

No. 66218-0-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

SAMUEL LIZARRAGA-GUTIERREZ,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Hollis Hill

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENT OF ERROR

The special verdict was obtained pursuant to a jury instruction in contravention of State v. Bashaw, 169 Wn.2d 133, 234 P.3d 195 (2010), and must be vacated.

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Must the special verdict upon which the jury was mis-instructed under Bashaw be vacated?
2. Is the instructional error identified in State v. Bashaw of constitutional magnitude, entitling an appellant to raise the error for the first time on review under RAP 2.5(a)(3)?

C. STATEMENT OF THE CASE

Samuel Lizarraga-Gutierrez was charged by an amended information with the crime of Attempting to Elude a pursuing officer pursuant to RCW 46.61.024, and with the special allegation that

during the commission of the crime, one or more persons other than the defendant or the pursuing law enforcement officer were threatened with physical injury or harm by the actions of the defendant, which is a special allegation of endangerment by eluding under the authority of Chapter 219, Laws of 2008.

CP 69. According to the affidavit of probable cause, Kent police officer Whitley observed vehicles engaged in illegal street racing,

which scattered when he arrived on the scene in his squad car. Officer Whitley pursued a Silver Honda which drove in a manner the officer judged reckless, but the officer gave up the pursuit along West Valley Highway due to safety concerns and notified the Tukwila Police Department. Tukwila officer Prasad detained a Silver Honda which had crashed on West Valley Highway, driven by the defendant and occupied by a female, Maria Romsez, an alleged runaway. CP 2-4.

The jury returned a verdict of guilty on the substantive crime of eluding, declining to find a lesser included offense. CP 141.

The jury also answered "yes" on the special verdict form, CP 140, having been instructed in contravention of State v. Bashaw that in order to answer the allegation either way, "all twelve of you must agree in order to answer the special verdict form [including that] [i]f you unanimously have a reasonable doubt as to this question, you must answer no." CP 136 (Instruction no. 13, at p.2).¹

¹Mr. Lizarraga-Gutierrez proposed Defense Proposed Jury instructions which offered instructions under a lesser included offense theory and other instructions; but he did not propose any instructions pertaining to the special allegation or to the requirements of jury agreement for answering the special verdict form, and thus the error was not invited. CP 6-17, 53-54, 104-116.

Mr. Lizarraga-Gutierrez was given a first-time offender waiver at sentencing. CP 175. The trial court imposed a sentence of 240 hours community restitution. CP 175-79.

D. ARGUMENT

THE BASHAW ERROR REQUIRES VACATION OF THE SPECIAL VERDICT AND THE ISSUE MAY BE RAISED FOR THE FIRST TIME ON APPEAL.

The Bashaw instructional error is constitutional in magnitude and thus can be raised initially on appeal. First, the special verdict instructions in Mr. Lizarraga-Gutierrez's case were faulty under State v. Bashaw, *supra*, 169 Wn.2d 133, 234 P.3d 195 (2010), and State v. Goldberg, 149 Wn.2d 888, 72 P.3d 1083 (2003). Juries must be instructed that a non-unanimous negative decision on a special finding is a final determination that the State has not proved that finding beyond a reasonable doubt, and verdicts obtained contrary to such instruction must be vacated. *Id.*

Importantly, this error is of constitutional magnitude and therefore can be raised for the first time on appeal under RAP 2.5(a)(3), despite Mr. Lizarraga-Gutierrez's absence of objection.

Indeed, the Washington Supreme Court decided, correctly,

in Bashaw, that such instructional error is of constitutional magnitude. State v. Bashaw, 169 Wn.2d at 134. And, as this Court of Appeals correctly stated in its recent decision on the matter:

The Bashaw court strongly suggests its decision is grounded in due process. The court identified the error as “the procedure by which unanimity would be inappropriately achieved,” and referred to “the flawed deliberative process” resulting from the erroneous instruction. The court then concluded the error could not be deemed harmless beyond a reasonable doubt, which is the constitutional harmless error standard. The court refused to find the error harmless even where the jury expressed no confusion and returned a unanimous verdict in the affirmative. We are constrained to conclude that under Bashaw, the error must be treated as one of constitutional magnitude and is not harmless.

(Footnotes omitted.) State v. Ryan, 160 Wn. App. 944, ___, 252 P.3d 895 (2011) (Slip Op. at * 2).

In the present appeal in Mr. Lizarraga-Gutierrez’s case, as it did in Ryan, the State of Washington will likely argue that the Bashaw error is not of constitutional magnitude, by noting a portion of the Bashaw opinion in which the Supreme Court stated that its holding in the case was “not compelled by constitutional protections against double jeopardy.” See Bashaw, 169 Wn.2d at 145-47; see

Ryan, 160 Wn. App. at ___ (Slip Op. at *2).

Mr. Lizarraga-Gutierrez argues that this contention, offered in support of the State's argument that the Bashaw holding did not have a constitutional basis, is not tenable. Review of the language of the Supreme Court's Bashaw opinion makes clear that the Court was referring by the quoted language to the *basis of the remedy* for the error, and was thus merely pointing out that the *source of the re-trial bar* is grounded in concerns for judicial economy, as opposed being based on double jeopardy principles. See Bashaw, 169 Wn.2d at 145-47.

This language in the Bashaw case does not contradict, much less override the Court's application of the "constitutional harmless error" analysis, which was further indicative of the constitutional nature of the instructional error.

Finally, it seems beyond cavil that the issue should be treated as constitutional. The gravamen of Bashaw error is that the jury instructions erroneously overstate the degree of jury agreement necessary for acquittal. For a special finding, each individual juror has the ability (by voting no) to unilaterally exercise the power of acquittal.

Bashaw error is just as plainly constitutional, as would be the opposite mistake -- erroneously *understating* the requirements for conviction. If the jury in Mr. Lizarraga-Gutierrez's case was instructed that only a *majority* of jurors needed to "vote" guilty in order to convict the defendant of the crime, such error would squarely violate due process and the right to a jury trial. Where unanimity is required for conviction, understating that requirement is clearly an error that is constitutional in nature. Johnson v. Louisiana, 406 U.S. 356, 92 S.Ct. 1620, 32 L.Ed.2d 152 (1972); Williams v. Florida, 399 U.S. 78, 90 S.Ct. 1893, 26 L.Ed.2d 446 (1970). Bashaw error is error of an analogous nature, but indeed a far greater extent of misstatement. Telling the jury that unanimity is required to answer "no" overstates by twelvefold the requirements of jury vote that is necessary.

Such error could certainly be raised for the first time on appeal. For further example, Petrich unanimity error may also be so raised.

[W]hen the State fails to make proper identification of the specific act charged and the trial court fails to instruct the jury on unanimity, there is constitutional error. "The error stems from the possibility that some jurors may have relied on one act or incident and

some another, resulting in a lack of unanimity on all of the elements necessary for a valid conviction.”

State v. Vander Houwen, 163 Wn.2d 25, 38, 177 P.3d 93 (2008).

This sort of error – not correctly telling the jury that all 12 need to agree -- is plainly a constitutional error:

The issue is constitutional[.] Here . . . , while the jury may have acted in unison, we do not have a verdict that shows that they did so.

(Emphasis added.) State v. Vander Houwen, 163 Wn.2d at 39

(addressing issue when raised for the first time on appeal and also reviewing the error under the constitutional requirement of harmlessness beyond a reasonable doubt).

Indeed, an error of telling the jury only a majority of jurors were required for guilt should be deemed *structural* – possessing that special combination of characteristics in which an error is so serious, and yet so difficult to quantify, that reversal is required without any specific showing of prejudice. All structural errors are, a fortiori, “constitutional.” Cf. United States v. Brown, 202 F.3d 691, 699 (4th Cir.2000).

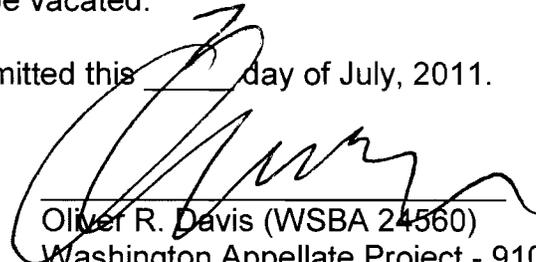
For the reasons carefully already elucidated by this Court of Appeals in Ryan, the instructional error in Mr. Lizarraga-Gutierrez’s

case was one of constitutional magnitude. It is properly raised initially on appeal and the special verdict must be vacated.

E. CONCLUSION

Mr. Lizarraga-Gutierrez respectfully requests this Court order that the special verdict be vacated.

Respectfully submitted this _____ day of July, 2011.



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Respondent,)	
)	NO. 66218-0-I
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SAMUEL LIZARRAGA-GUTIERREZ,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 7TH DAY OF JULY, 2011, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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<input checked="" type="checkbox"/> SAMUEL LIZARRAGA-GUTIERREZ 10591 SE 228 TH ST KENT, WA 98031	(X) () ()	U.S. MAIL HAND DELIVERY _____

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X _____ *gmk*

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