

COURT OF APPEALS
DIVISION TWO
OF THE STATE OF WASHINGTON

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DIVISION TWO

11 MAR 24 11:07 AM '07

STATE OF WASHINGTON)

Respondent,)

No. 40179-7-II)

v.)

Robert S. Wilson)

(your name))

STATEMENT OF ADDITIONAL
GROUNDS FOR REVIEW)

Appellant.)

I, Robert S. Wilson, have received and reviewed the opening brief prepared by my attorney. Summarized below are the additional grounds for review that are not addressed in that brief. I understand the Court will review this Statement of Additional Grounds for Review when my appeal is considered on the merits.

Additional Ground 1

Please see Attached Brief, #1), Regarding Jury
INSTRUCTIONAL error

Additional Ground 2

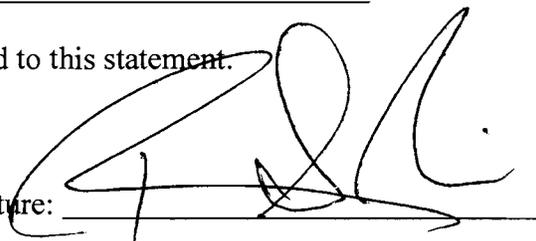
Please see Attached Brief, #2), Regarding
INEFFECTIVE ASST. of Counsel

If there are additional grounds, a brief summary is attached to this statement.

Date:

3/20/11

Signature:



ORIGINAL

1) The Trial Court Errored when incorrectly Instructing the Jury on Their Unanimity for the Special Verdict on the Firearm Enhancement.

Washington requires unanimous jury verdicts in criminal cases. Wa. Const. Art. I, sec. 21; State v. Stephens, 93 Wn. 2d 186, 190, 607 P. 2d 304 (1980). As for aggravating factors, jurors must be unanimous to find the State has proved the existence of the special verdict beyond a reasonable doubt. State v. Goldberg, 149 Wn. 2d 888, 892-93, 72 P. 3d 1083 (2003). However, jury unanimity is not required to answer "no". Goldberg, id at 893. "(A) unanimous jury decision is not required to find that the State has failed to prove the presence of a special finding increasing the defendants maximum allowable sentence" such as a special verdict. State v. Bashaw, 169 Wn. 2d 133, 146, 234 P. 3d 195 (2010). It is an "incorrect statement of the law" to instruct jurors in a way which indicates they must agree in order to answer a special verdict. Bashaw, id at 147. Unanimity is only required to find the "presence of a special finding increasing the maximum penalty...(but) it is not required to find the absence of such a special finding." Bashaw, Id.

In this case, the jury was instructed as so:

"Because this is a criminal case, each of you must agree to return a verdict."

CP 191, Instruction No. 32 (in pertinent part); and

"In order to answer the special verdict form 'yes', you must unanimously be satisfied beyond a reasonable doubt 'yes' is the correct answer. If you have a reasonable doubt as to the question, you must answer 'no'."

CP 192, Instruction No. 33 (in pertinent part).

These instructions incorrectly infer to the jury it had to be unanimous in the special verdict finding of "no", as well as having to be unanimous in the special verdict finding of "yes". To put it another way, the Bashaw Court held "(a) non unanimous jury decision on a...special verdict is a final determination that the State has not proved that finding beyond a reasonable doubt." Bashaw, id at 145. Thus, jurors do not need to be unanimous to answer a special verdict form "no" under the law of the State of Washington. Bashaw, Id; accord Goldberg, supra at 890.

These instructions improperly suggest that unanimity is required for a finding of "no" on the special verdict form. After repeatedly instructing the jury they had to agree to reach a verdict

and that they had a duty to do so, the instructions did not make it clear that unanimity was not required to answer the special verdict form "no". CP 192. The court first instructed the jurors: "Because this is a criminal case, each of you must agree for you to return a verdict." (CP 191, in pertinent part), then instructed: "In order to answer the special verdict form 'yes', you must unanimously be satisfied beyond a reasonable doubt that 'yes' is the correct answer. If you have a reasonable doubt as to the question, you must answer 'no'." (CP 192, in pertinent part).

Thus, taken as a whole, the jury instructions in this case failed to inform the jurors that they had to be unanimous to answer "yes" but not "no" on the special verdict firearm enhancement.

Further, in Bashaw, supra, the court rejected the idea that the idea of polling the jury to affirm the verdict somehow rendered the error "harmless". Bashaw, supra at 147-48. In order to render the error "harmless", the court said, it would have to be able to find beyond a reasonable doubt that the jury would have reached the same verdict without the error. Bashaw, supra at 147.

This it could not do because the error in the procedure so tainted the conclusion. Bashaw, Id. The error was "the procedure by which unanimity would be inappropriately achieved", the court said, so that it would not be possible to deem the error "harmless". Bashaw, id at 147-48.

Further still, this error can be raised for the first time on appeal as it is a manifest error affecting a constitutional right. "An error is 'manifest' if it had 'practical and identifiable consequences in the trial case.'" "It is well settled that an alleged instructional error in a jury instruction is of sufficient constitutional magnitude to be raised for the first time on appeal." State v Davis, 141 Wn. 2d 798, 856-57, 10 P. 3d 977 (2000)(citing State v. Deal, 128 Wn. 2d 693, 698, 911 P. 2d 996 (1996)).

In Bashaw, supra, as here, no one objected to the erroneous jury instruction at trial. As the jury instruction regarding the special verdict in this case is procedurally identical to that in Bashaw, supra, Bashaw, supra, controls this court on this issue.

Because the trial courts instructional error

had constitutional dimensions and practical and identifiable consequences - the jurys special verdict added an additional 60 months to WILSON's sentence - this error can be raised for the first time on appeal. Davis, supra at 866.

Because this error is not harmless, and because here, as in Bashaw, supra, the error in the jury instructions tainted the deliberation process and misled the jury into thinking it had to be unanimous in the finding of "no" on the special verdict firearm enhancement, the special verdict firearm enhancement must be vacated. WILSON requests so.

2) Counsel's Ineffective Assistance Was Direct Deficiency in the Effectiveness of the Representation of WILSON.

To establish ineffective assistance of counsel, the defendant must establish that his attorney's performance was deficient and that the deficiency prejudiced the defendant. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed 2d 674(1984); State v. Hendrickson, 129 Wn. 2d 61, 77-78, 917 P. 2d 563(1996). Deficient performance is performance falling "below an objective standard of reasonableness based on consideration of all

the circumstances." State v. McFarland, 127 Wn. 2d 322, 334-35, 899 P. 2d 1251(1995). A criminal defendant receives constitutionally inadequate representation only if (1) the defense attorney's performance was deficient, i.e., fell below an objective standard of reasonableness based on a consideration of all the circumstances, and (2) such deficient performance prejudiced the defendant, i.e., there is a reasonableness that the outcome would have been different had the representation been adequate. State v. Brett, 126 Wn. 2d 136, 198-99, 892 P. 2d 29(1995), cert. denied, 516 U.S. 1121, 133 L. Ed. 2d 858, 116 S. Ct. 931(1996); Strickland, supra; State v. King, 130 Wn. 2d 517, 531, 925 P. 2d 606(1996). Reasonable conduct of an attorney includes carrying out the duty to research the relevant law. Strickland, supra at 690-91. A counsel is ineffective when he fails to adequately acquaint himself with the facts of the case by interviewing witnesses, failure to subpoena witnesses, and failing to inform the court of the substance of witnesses testimony. State v. Jury, 19 Wn. App. 256, 263-64, 576 P. 2d 1302(1978).

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A) WILSON Was Denied Effective Assistance Of Counsel by His Trial Counsels Failure To Subpoena Appropriate Witnesses To Establish His Alibi.

Counsel was informed and knew before trial that WILSON was not the account holder of the cell phone that was in WILSON's possession on December 15, 2008. WILSON's alibi was based in pertinent part on the testimony of SHANNON DIAZ, account holder of Verizon Wireless cell phone #(253) 355-6074. VRP 11/04/09, pg. 131 @23-24. This testimony would have confirmed WILSON's exclusive possession of the cell phone when coupled with WILSON Sr.'s testimony that the same phone # was used by him to reach his son. VRP 11/05/09, pg. 206 @ 10-13.

The calls made on this cell phone were made minutes before and after the established time of the robbery, placing whoever was in possession and use thereof 11-12 miles away from the location of the robbery at pertinent times of the robbery. DIAZ's testimony was needed to establish the fact, by way of Google Maps and Verizon Wireless account Statements and expert witness testimony (VRP 11/12/09, pg. 292-315) that the user of this cell phone made the calls 11-12 miles away from the robbery at the times of the robbery. This shows, inter alia, that

counsel failed to conduct appropriate investigation, either factual or legal, to determine what matters of defense were available, or failed to allow himself enough time for reflection and preparation for trial. State v. White, 5 Wash. App. 283, 286-87, 487 P. 2d 243(1971), rev'd. on other grounds, 81 Wn. 2d 223, 500 P. 2d 1242(1972).

Counsel was long before trial informed of this alibi, and should have known the preparation necessary therefore. VRP 11/12/09, pg. 252, 253. Counsel knew that WILSON was not the account holder and that WILSON needed DIAZ's testimony together with WILSON Sr.'s to place exclusive possession and use of the phone with WILSON on 12/15/2008. Counsel, in requesting a continuance at trial, states:

"THE COURT: Someone is going to testify Mr. WILSON was using a particular phone at issue here?

Mr. LANDRY: Yes, your Honor."

VRP 11/03/09, pg. 34 @ 22-24. Counsel knew from at least August of 2009 that he needed the account holders testimony in order to establish WILSONs alibi. VRP 11/12/09, pg 252 @ 25. However, it was brought to the courts attention that counsel requested the account holder information only

at the states request. VRP 11/12/09, pg.254 @ 8-25, and at the last posible time at that. Id.

"The failure of counsel to adequately acquaint himself with the facts of the case by interviewing witnesses, failure to subpoena them, and failure to inform the court of the substance of their testimony, both at the time of trial argument on the motion for continuance and for a new trial, were omissions which no reasonable competent counsel would not have committed." State v. Jury, 19 Wn.App. 256, 264, 576 P.2d 1302 (1978).

By failing to interview SHANNAN DIAZ, and by failing to subpoena her for trial, counsel's performance was ineffective. Jury, Id. This is because her testimony, as the known account holder of the phone, coupled with WILSON Sr.'s testimony, put possession of the phone exclusively with WILSON Jr. on 12/15/2008; at pertinent times regarding the robbery.

The omission of establishing exclusive possession of the cell phone prejudiced WILSON because this phone was used minutes before and after the established time of the robbery WILSON

was charged with, approximately 11-12 miles away from the location of the robbery. See VRP 11/12/09, pg. 300 @20-22. Had WILSON been able to establish that he was the exclusive possessor of this cell phone, he would have then presented an established alibi placing him 11-12 miles away from the scene of the robbery at the time of the robbery and there is great reasonability that the jury would have found WILSON not guilty of the robbery charge based upon this alibi.

Because counsel failed to adequately prepare and present WILSON's alibi through SHANNON DIAZ, the jury returned a verdict of guilty regarding the robbery. VRP 11/12/09, pg.'s 254-55. (State commenting on the account holder of the phone).

Because counsel failed to interview DIAZ or subpoena her, his performance was ineffective. Jury, supra. Because WILSON did not present a sufficient alibi, the jury returned a guilty verdict; thus he was prejudiced. Because there is a strong reasonability that the jury would have found WILSON not guilty if this alibi was established through DIAZ's testimony, both prongs of the Strickland, supra, requirements have been

met in this case for this issue.

Based upon the foregoing, WILSON received ineffective assistance of counsel, his convictions must be reversed, and this matter must be remanded to the trial court for a new trial with effective assistance of counsel. WILSON respectfully requests so.

B) WILSON Was Prejudiced by His Counsel's Failure to Object To The Court's Jury Instruction No. 33, That It Must Be Unanimous Before Returning A Verdict On The Firearm Enhancement And By Failing To Propose an Accurate Instruction and Special Verdict Form.

Should the Court find that trial counsel failed to object to the Courts instruction No. 33 as set forth sufficiently in SAG Assignment of Error/Additional Ground No. 1 hereinabove, then both elements of the Strickland, supra, requirements have been met for ineffective assistance of counsel. For the sole purpose of avoiding needless duplication, the prior discussion relating to the Bashaw issue set forth hereinabove is hereby incorporated by reference as if set forth in full herein.

Counsel's performance was deficient because he failed to object to jury instruction No. 33 regarding the firearm enhancement special verdict

form. Counsel had a duty to research the relevant law as to the special verdict instruction. Strickland, supra at 690-91. State v. Goldberg, supra, was already a holding since 2003. Counsel should have objected to instruction No. 33 based on Goldberg.

Further, the record does not, and could not, reveal any tactical or strategic reason why trial counsel would have failed to object to jury instruction No. 33 and accompanying special verdict form relating to the firearm enhancement.

Additionally, the prejudice to WILSON is self-evident. Had counsel properly objected and proposed an accurate instruction and special verdict form there is every likelihood under the facts of the case that the court would have upheld the objection and the jury would have been properly instructed and could have issued a verdict of "non-unanimous" or "no" as to the firearm enhancement, with the result that the firearm enhancement would not have been imposed.

Based upon the above, this Court should reverse the convictions and remand back to the trial court for a new trial to be held with effective

assistance of counsel. WILSON respectfully request so.

CONCLUSION.

Based upon the foregoing, this court should vacate the firearm enhancement and remand for resentencing. In the alternative, this court should find that WILSON received ineffective assistance of counsel, reverse his convictions and remand to the trial court for a new trial to be held with effective assistance of counsel. WILSON respectfully request so.

Dated: 3.22-11

Respectfully submitted,



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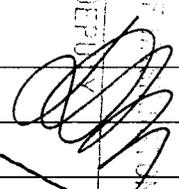
DECLARATION OF SERVICE BY MAIL
GR 3.1

I, Robert Wilson, declare and say:

That on the 22 day of MARCH, 2011, I deposited the following documents in the Stafford Creek Correction Center Legal Mail system, with First Class U.S. Mail, pre-paid postage affixed, under cause No. 40179-7-II:
* SAG, 10.10 Brief
* Declaration of service by Mail & GR.3.1

addressed to the following:

* Court of Appeals * Pierce County
Division II Prosecutor office
950 Broadway Suite 930 Tacoma Ave
300 Tac, WA 98402 S. Room #946
 Tac WA 98402

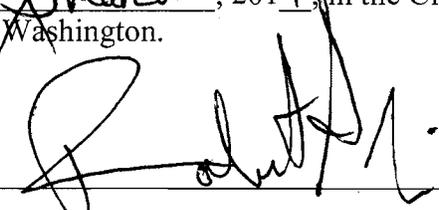
11 MAR 26 PM 1:07
STATE OF WASHINGTON
BY _____ DEPOSITED


COURT OF APPEALS
ABERDEEN

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my belief.

DATED THIS 22 day of ^{RSW} March, 2011, in the City of Aberdeen, County of Grays Harbor, State of Washington.

WITH ALL RIGHTS RESERVED.



Robert Wilson

c/o [DOC 061542 UNIT 412
STAFFORD CREEK CORRECTIONS CENTER
191 CONSTANTINE WAY
ABERDEEN WA (98520)]

ORIGINAL