

No. 40968-2-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

ADELE E. EWING,

Appellant.

Appeal from the Superior Court of Washington for Lewis County

Respondent's Supplemental Brief

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF THE CASE 1

ARGUMENT 1

A. EWING FAILED TO OBJECT TO THE SPECIAL VERDICT
JURY INSTRUCTION GIVEN BY THE TRIAL COURT AND
IS THEREFORE BARRED FROM RAISING IT FOR THE
FIRST TIME ON APPEAL. 1

B. EWING RECEIVED EFFECTIVE ASSISTANCE OF
COUNSEL THROUGHOUT THE TRIAL..... 5

CONCLUSION 6

TABLE OF AUTHORITIES

Washington Cases

<i>State v. Bashaw</i> , 169 Wn.2d 133, 234 P.3d 195 (2010).....	2, 3
<i>State v. Horton</i> , 116 Wn. App. 909, 68 P.3d 1145 (2003)	5
<i>State v. McFarland</i> , 127 Wn.2d 322, 899 P.2d 1251 (1995)....	1, 2, 5
<i>State v. Nunez</i> , Court of Appeals, Div. 3 Case No. 28259-7-III, decided February 15, 2011 (published in part)	4
<i>State v. O'Hara</i> , 167 Wn.2d 91, 217 P.3d 756 (2009)	1, 2
<i>State v. Reichenbach</i> , 153 Wn.2d 126, 101 P.3d 80 (2004).....	5

Federal Cases

<i>Strickland v. Washington</i> , 466 U.S. 688, 104 S. Ct. 2052, 80 L. Ed. 674 (1984).....	5
---	---

Other Rules or Authorities

RAP 2.5(a).....	1, 3
WPIC 160.00	6

I. ISSUES

- A. Did the trial court error by instructing the jury that they must be unanimous in order to answer the special verdict?
- B. Was Ewing's trial counsel ineffective for failing to object to the special verdict jury instruction?

II. STATEMENT OF THE CASE

Ewing's version of the procedural facts is adequate for purposes of this supplemental response. The State will supplement as necessary in the argument portion of this brief.

ARGUMENT

A. EWING FAILED TO OBJECT TO THE SPECIAL VERDICT JURY INSTRUCTION GIVEN BY THE TRIAL COURT AND IS THEREFORE BARRED FROM RAISING IT FOR THE FIRST TIME ON APPEAL.

An appellate court generally will not consider an issue that a party raises for the first time on appeal. RAP 2.5(a); *State v. O'Hara*, 167 Wn.2d 91, 97-98, 217 P.3d 756 (2009); *State v. McFarland*, 127 Wn.2d 322, 333-34, 899 P.2d 1251 (1995). The origins of this rule come from the principle that it is the obligation of trial counsel to seek a remedy for errors as they arise. *State v. O'Hara*, 167 Wn.2d at 98. The exception to this rule is "when the claimed error is a manifest error affecting a constitutional right." *Id.*, citing RAP 2.5(a). There is a two part test in determining whether

the assigned error may be raised for the first time on appeal, “an appellant must demonstrate (1) the error is manifest, and (2) the error is truly of constitutional dimension.” *Id.* (*citations omitted*).

The reviewing court analyzes the alleged error and does not assume it is of constitutional magnitude. *Id.* The alleged error must be assessed to make a determination of whether a constitutional interest is implicated. *Id.* If an alleged error is found to be of constitutional magnitude the reviewing court must then determine whether the alleged error is manifest. *Id.* at 99; *State v. McFarland*, 127 Wn.2d at 333. An error is manifest if the appellant can show actual prejudice. *State v. O’Hara* 167 Wn.2d at 99. The appellant must show that the alleged error had an identifiable and practical consequence in the trial. *Id.* There must be a sufficient record for the reviewing court to determine the merits of the alleged error. *Id.* (*citations omitted*). No prejudice is shown if the necessary facts to adjudicate the alleged error are not part of the record on appeal. *State v. McFarland*, 127 Wn.2d at 333. Without prejudice the error is not manifest. *Id.*

Ewing asserts in her supplemental brief that her case is analogous to *State v. Bashaw*¹ because the procedural history in

¹ *State v. Bashaw*, 169 Wn.2d 133, 234 P.3d 195 (2010).

Bashaw is similar to the procedural history in Ewing's case, therefore, the sentence enhancement imposed for the school bus stop must be vacated. Brief of Appellant 3-5. The court in *Bashaw* held that the trial court erred in giving a special verdict jury instruction that required the jury to be unanimous. *State v. Bashaw*, 169 Wn.2d 133, 147, 234 P.3d 195 (2010). In *Bashaw* the jury was given a special verdict form regarding whether Bashaw had delivered a controlled substance within 1,000 feet of a school bus route stop. Similarly, the jury in Ewing's case was instructed that if they found Ewing guilty of delivery of a controlled substance they were to answer the special verdict form and their decision must be unanimous. CP 31. Ewing did not object to the jury instruction when it was given by the trial court. 4RP 197-198². Ewing does not identify a constitutional interest that the trial court has violated. Brief of Appellant 3-5. Ewing fails to justify how she can assign error to the jury instruction for the first time on appeal. There is no analysis by Ewing of RAP 2.5(a) or the manifest constitutional error doctrine.

² There are numerous volumes of proceedings in Ewing's case. They will be referred to as follows in the State's response brief: 1RP – March 2, 2007, 2RP – June 21, 2007, 3RP – July 25, 2007, 4RP – Volume I and II of the trial transcript, 5RP - April 30, 2010 and June 24, 2010 Hearing, 6 RP – June 28, 2010 and July 1, 2010 hearings.

In *State v. Nunez* the court held that Nunez could not for the first time on appeal assign error to trial court's jury instruction requiring unanimity to acquit him of the aggravating factor. *State v. Nunez*, Court of Appeals, Div. 3 Case No. 28259-7-III, decided February 15, 2011 (published in part). Nunez was convicted of delivery of a controlled substance. *Id.* The jury also found that Nunez had delivered the controlled substance within 1,000 feet of a school bus zone or school. *Id.* Nunez did not object to the jury instruction that required jury unanimity in regards to the special verdict for the aggravating factor. *Id.* The court stated:

[T]he aggravating factors in Mr. Nunez's case were imposed following a deliberative procedure to which he did not object; which no court, state or federal, has found to be unconstitutional or unfair; which has been acknowledged to have procedural advantages; and which, in the lesser included crime context, is preferred by a number of jurist and courts. This is not constitutional error.

Id. It further held that if such an error in instruction was of constitutional magnitude, any such error was harmless. *Id.*

In Ewing's case, like *Nunez*, there is no showing by Ewing that the alleged error is a manifest constitutional error. Therefore, she is precluded from raising it for the first time on appeal. The court should affirm the jury's special verdict and the sentence enhancement.

B. EWING RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL THROUGHOUT THE TRIAL.

To prevail on an ineffective assistance of counsel claim Ewing must show that (1) the attorney's performance was deficient and (2) the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 688, 687, 104 S. Ct. 2052, 80 L. Ed. 674 (1984); *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). The presumption is that the attorney's conduct was not deficient. *State v. Reichenbach*, 153 Wn.2d at 130, *citing State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). Deficient performance exists only if counsel's actions were "outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690. The court must evaluate whether given all the facts and circumstances the assistance given was reasonable. *Id.* at 688. If counsel's performance is found to be deficient, than the only remaining question for the reviewing court is whether the defendant was prejudiced. *State v. Horton*, 116 Wn. App. 909, 921, 68 P.3d 1145 (2003). Prejudice "requires 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *State v. Horton*, 116 Wn. App. at 921-22, *citing Strickland v. Washington*, 466 U.S. at 694.

The trial in this case was in 2007, three years before the decision in *Bashaw*. While the State is not conceding any error in the jury instructions given by the trial court, failure to object to the alleged improper instruction does not constitute ineffective assistance of counsel. The jury instruction given was the pattern instruction for special verdicts. WPIC 160.00; CP 34. There is no way that trial counsel could have predicted the Washington State Supreme Court's decision in *Bashaw*. Therefore, Ewing has not shown that her trial counsel's performance was deficient and her claim of ineffective assistance of counsel fails.

CONCLUSION

For the foregoing reasons, this court should affirm Ewing's conviction for VUCSA – delivery of methamphetamine, including the sentencing enhancement found by the jury for delivery within 1,000 feet of a school bus stop.

RESPECTFULLY submitted this 5th day of April, 2011.

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