

41783-9-II
No. 84248-5

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JD KIENITZ,

Appellant.

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

APPELLANT'S REPLY BRIEF

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A. ARGUMENT IN REPLY

1. MR. KIENITZ WAS DENIED HIS
CONSTITUTIONAL RIGHT TO THE
EFFECTIVE ASSISTANCE OF COUNSEL
DURING PLEA NEGOTIATIONS

a. Mr. Kienitz may raise an ineffective assistance of counsel claim even though he rejected the State's plea offer. The State contends Mr. Kienitz cannot argue he received ineffective assistance of counsel during plea negotiations, because he rejected the State's plea offer and was convicted after a jury trial. SRB at 7-10. The State's position is contrary to the great weight of authority from Washington State and other jurisdictions.

As argued in the opening brief, it is well-settled that the right to counsel attaches during plea negotiations. It is axiomatic that the advice of counsel is vitally important to a criminal defendant's understanding of a guilty plea agreement. "[A]n intelligent assessment of the relative advantages of pleading guilty is frequently impossible without the assistance of an attorney." Brady v. United States, 397 U.S. 742, 748 n.6, 90 S. Ct. 1463, 25 L. Ed. 2d 747 (1970). The need for the effective assistance of counsel is just as great when a defendant decides to reject a plea offer as when he decides to accept one. State v. James, 48 Wn. App. 353, 361 n.2, 739 P.2d 1161 (1987) ("the result of an error by counsel at

this critical stage of the proceedings can have as serious an effect on the defendant who pleads not guilty as on the defendant who pleads guilty"). Thus, a defendant's Sixth Amendment right to the assistance of counsel may be violated during plea negotiations, even if the defendant ultimately rejects the State's plea offer and proceeds to trial.

The State relies on Hill v. Lockhart, 474 U.S. 52, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985), in which the United States Supreme Court held the test for determining whether the defendant was prejudiced by counsel's deficient performance during plea bargaining was whether there was "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Id. at 59. But the Supreme Court has not addressed a claim of ineffective assistance of counsel in a case where counsel's deficient performance led the defendant to *reject* a plea offer. Logically, if counsel's ineffective assistance resulted in the defendant rejecting a plea offer, the prejudice question should be whether the defendant would have accepted the offer absent the ineffective assistance.

Contrary to the State's position, the Court of Appeals has held that a defendant may raise a claim of ineffective assistance of

counsel even if he rejected the State's plea offer and received a fair trial. James, 48 Wn. App. 353. In James, defendants claimed their attorney failed to inform them of a favorable plea offer by the State. Id. at 358. Acknowledging Hill, the court explained, "[w]hile the validity of a guilty plea is different from the validity of the plea process where an accused pleads not guilty, the test for ineffective assistance of counsel should be the same." Id. at 361 n.2. The standard for determining prejudice is "whether there is a reasonable probability that but for an attorney's error, a defendant would have accepted a plea agreement." Id. at 363-64 (citing Hill, 474 U.S. 52). Although it is often uncertain "whether plea bargain negotiations would have resulted in a consummated bargain, uncertainty should not prevent reversal where 'confidence in the outcome' is undermined." Id. at 363 (citations omitted).

The overwhelming weight of authority from other jurisdictions is in accord with James. See AOB at 9. As noted in Commonwealth v. Mahar, 442 Mass. 11, 15, 809 N.E.2d 989, 993 (2004), the prevailing if not unanimous view is "that if the offer is rejected because of the ineffective assistance of counsel, the fact that the defendant subsequently receives a fair trial does not ameliorate the constitutional harm that occurred in the plea

consideration process." (citing cases). For cases concluding that a fair trial cannot cure the constitutional harm caused by ineffective assistance of counsel during plea bargaining, see, e.g., Julian v. Bartley, 495 F.3d 487 (7th Cir. 2007); United States v. Grammas, 376 F.3d 433 (5th Cir. 2004); United States v. Rashad, 331 F.3d 908, 912 (D.C. Cir. 2003); Pham v. United States, 317 F.3d 178 (2nd Cir. 2003); Tse v. United States, 290 F.3d 462 (1st Cir. 2002); Magana v. Hofbauer, 263 F.3d 542 (6th Cir. 2001); United States v. Carter, 130 F.3d 1432, 1442 (10th Cir. 1997); Engelen v. United States, 68 F.3d 238, 241 (8th Cir. 1995); Coulter v. Herring, 60 F.3d 1499, 1504 (11th Cir. 1995); United States v. Blaylock, 20 F.3d 1458 (9th Cir. 1994); United States v. Day, 969 F.2d 39, 42-43 (3rd Cir. 1992); State v. Donald, 198 Ariz. 406, 411-12, 10 P.3d 1193, 1198-99 (Ct. App. 2000); In re Alvernaz, 2 Cal.4th 924, 934-35, 830 P.2d 747, 754 (1992); Cottle v. State, 733 So.2d 963, 967 (Fla. 1999); Lloyd v. State, 258 Ga. 645, 646, 373 S.E.2d 1, 2 (1988); People v. Curry, 178 Ill.2d 509, 517-18, 687 N.E.2d 877, 882 (1997); Lyles v. State, 178 Ind. App. 398, 402, 382 N.E.2d 991, 994 (1978); Stone v. Commonwealth, 217 S.W.3d 233, 240 (Ky. 2007); Williams v. State, 326 Md. 367, 382, 605 A.2d 103, 110 (1992); Leake v. State, 737 N.W.2d 531, 541 (Minn. 2007); State v.

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b. Mr. Kienitz received ineffective assistance of counsel, because his attorney was precluded from adequately evaluating the merits of the State's plea offer. The State acknowledges that defense counsel was precluded from identifying and interviewing Mr. Kienitz's principal accusers prior to advising his client whether to accept the State's plea offer. But, citing State v. Moen, 150 Wn.2d 221, 76 P.3d 721 (2003), the State argues no constitutional harm occurred, because Mr. Kienitz was not entitled to receive a plea offer from the State in the first place. SRB at 4-7.

But as argued in the opening brief, although defendants have no constitutional right to plea bargain, once they receive a plea offer, they have a well-established constitutional right to have an attorney assist them in deciding whether to accept the offer. As stated, the constitutional right to counsel unequivocally includes the right to effective assistance of counsel during plea bargaining. Hill, 474 U.S. at 59; State v. A.N.J., 168 Wn.2d 91, 109-11, 225 P.3d 956 (2010); State v. Swindell, 93 Wn.2d 192, 198, 607 P.2d 852 (1980). At a minimum, counsel must reasonably evaluate the evidence against the accused and the likelihood of a conviction if the case proceeds to trial. A.N.J., 168 Wn.2d at 111-12. It is difficult to imagine how a defendant and his counsel can adequately evaluate the strength of the State's evidence and the chances of prevailing at trial without knowing the identities of the witnesses who participated in the crime and provided the source and basis for the State's evidence of guilt.

The State also relies on United States v. Ruiz, 536 U.S. 622, 122 S. Ct. 2450, 153 L. Ed.2d 586 (2002), to argue the Due Process Clause does not require prosecutors to make impeachment evidence available to defendants during plea negotiations. SRB at 5-7. But Ruiz does not apply here, because

the State failed to disclose more than simply impeachment evidence. The State failed to disclose the *identities* of Mr. Kienitz's principal accusers. In doing so, the State kept hidden the source and basis for its allegations of guilt. The State also precluded defense counsel from conducting an independent investigation into the strengths and weaknesses of the State's case. Mr. Kienitz's constitutional right to receive the effective assistance of counsel during plea bargaining was therefore violated.

In Ruiz, the Supreme Court held the Due Process Clause does not require prosecutors to disclose material impeachment evidence during plea negotiations, even if prosecutors must disclose such information when a case goes to trial. Ruiz, 536 U.S. at 629. The right to receive from prosecutors potentially exculpatory impeachment material is part of the Constitution's fair trial guarantee. Id. at 628 (citing U.S. Const. amends. 5, 6; Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963)). When a defendant pleads guilty, she foregoes not only the right to a fair trial, but also accompanying constitutional guarantees. Ruiz, 536 U.S. at 629. Applying a balancing test, the Court concluded (1) the need for material impeachment information is "more closely related to the *fairness* of a trial than to the *voluntariness* of the

plea," (2) the value of such information "in terms of the defendant's added awareness of relevant circumstances is ordinarily limited" during the plea process, and (3) the burden imposed on government of requiring the provision of such information well in advance of trial is substantial. Id. at 633. Therefore, on balance, the Due Process Clause does not require the government to disclose such information prior to entering a plea agreement with the defendant. Id.

Applying the Court's analysis in Ruiz to the kind of information at issue here—the identities of the defendant's accusers—leads to the conclusion that prosecutors *do* have a constitutional obligation to disclose such information prior to entering a plea agreement with a defendant. Unlike impeachment information, which may or may not help a particular defendant depending on the case, the identity of one's accusers is essential information for any defendant contemplating a guilty plea.

Case law recognizes that the State's obligation to disclose the identity of a confidential informant depends upon the role the informant played in the case. Disclosure is relevant and helpful to the defense, and therefore necessary, "in cases when the informant set up the commission of the crime, participated in the crime, or

was present at its occurrence." State v. Atchley, 142 Wn. App. 147, 156, 173 P.3d 323 (2007). Here, the informants did all three. Knowing the identity of an informant who played such a central role in the case would be just as relevant and helpful to a defendant contemplating a guilty plea offer as to a defendant facing trial on the charges.

In addition, the due process balancing test the Court applied in Ruiz does not apply where the constitutional right at issue is the Sixth Amendment right to counsel. The right to counsel is not merely "a more detailed version of the Due Process Clause." United States v. Gonzalez-Lopez, 548 U.S. 140, 145-46, 126 S. Ct. 2557, 165 L. Ed. 2d 409 (2006). Like the constitutional right to confrontation, the right to counsel is separate and distinct from the right to due process. Id. The right to counsel commands not that the accused receive a fair trial, but that the fairness of the trial be achieved in a particular manner—through the effective assistance of counsel. Id.

Unlike the right to a fair trial and the associated constitutional rights addressed in Ruiz, the right to counsel is not waived when a person pleads guilty. If anything, a defendant is in even greater need of the effective assistance of counsel during

plea negotiations than at trial. Generally, only competent counsel can discern from the facts whether a plea of guilty would be appropriate. Swindell, 93 Wn.2d at 198. But "a defendant's counsel cannot properly evaluate the merits of a plea offer without evaluating the State's evidence." A.N.J., 168 Wn.2d at 109. Here, where the confidential informants set up the commission of the crime, participated in the crime, *and* were present at its occurrence, it was essential for defense counsel to know their identities in order to evaluate the State's evidence. Hiding the informants' identities precluded counsel from conducting an adequate independent investigation and violated Mr. Kienitz's constitutional right to counsel.

Finally, even if the prosecutor had no affirmative duty to disclose impeachment information during plea negotiations, the prosecutor *did* have an ethical obligation not to interfere with defense counsel's ability to contact the State's witnesses and conduct his own independent investigation. It is well established that neither the prosecutor nor the defense attorney may obstruct an attempt by opposing counsel or his or her agent to communicate with a prospective witness. RPC 3.4(a) (a lawyer shall not "unlawfully obstruct another party's access to evidence

or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value"); RPC 8.4(a) (a lawyer shall not violate the Rules of Professional Conduct or knowingly assist or induce another to do so). The American Bar Association's "Standards for Criminal Justice" provide that "[a] prosecutor should not discourage or obstruct communication between prospective witnesses and defense counsel. A prosecutor should not advise any person or cause any person to be advised to decline to give to the defense information which such person has the right to give." ABA, Standards for Criminal Justice: Prosecution Function, 3-3.1(d) (3rd ed. 1993). The Washington State Bar Association has determined that "a prosecutor who discourages or otherwise obstructs witnesses from consenting to defense interviews would violate RPC 3.4." WSBA, Informal Op. 1020 (1986).

In sum, Mr. Kienitz was denied his constitutional right to counsel because his attorney was precluded from adequately assessing the State's evidence and conducting a reasonable investigation before advising his client whether to accept the State's plea offer.

c. Mr. Kienitz is not required to show that counsel's ineffective assistance prejudiced him or, in the alternative, he has shown prejudice, because there is a strong possibility that had he received the information sought, he would have accepted the State's plea offer. As argued in the opening brief, Mr. Kienitz is entitled to a remedy without a showing of prejudice, because defense counsel was prevented from participating fully and fairly in the adversarial factfinding process through State action. AOB at 22-24. In the alternative, Mr. Kienitz has shown prejudice, because there is a strong possibility that, had the State disclosed the informants' identities, Mr. Kienitz would have accepted the State's plea offer.

The State argues Mr. Kienitz cannot show prejudice because he was not deprived of any substantial right but instead was merely deprived of a "windfall." SRB at 14-18. But as argued above and in the opening brief, Mr. Kienitz was deprived of a well-established, substantial constitutional right—his right to the assistance of counsel during plea negotiations. Again, the decision to reject a plea offer due to counsel's ineffective assistance can be just as harmful to a defendant as a poorly counseled decision to plead guilty. James, 48 Wn. App. at 361 n.2.

Under Strickland v. Washington, in order to show prejudice, the defendant must show there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland v. Washington, 466 U.S. 668, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Where counsel's deficient performance causes the defendant to reject a guilty plea offer, the question is "whether there is a reasonable probability that but for [the] attorney's error, [the] defendant would have accepted [the] plea agreement." James, 48 Wn. App. at 363-64 (citing Hill, 474 U.S. 52). The defendant need not show with certainty that plea bargain negotiations would have resulted in a consummated bargain; instead, the issue on appeal is whether "'confidence in the outcome' is undermined." James, 48 Wn. App. at 363 (citations omitted). In James, the court concluded confidence in the outcome is undermined when defendant asserts he would have accepted the plea offer if not for the ineffective assistance, and there is a significant disparity between the sentence received and the potential outcome if the defendant had accepted the plea offer. Id. at 361, 363-64.

State courts generally agree that a defendant who rejects a plea offer due to counsel's ineffectiveness may show prejudice by

establishing a reasonable probability he would have accepted the plea offer if not for counsel's ineffectiveness, and there is a significant disparity between the terms of the plea offer and the consequences of proceeding to trial. See, e.g., Donald, 10 P.3d at 1201 (prejudice established where defendant asserted he would have accepted plea agreement if adequately advised by counsel, and 10-year sentence received following trial was significantly longer than two-to-four-year sentence in plea offer); Alvernaz, 830 P.2d at 756 (court should examine "the disparity between the terms of the proposed plea bargain and the probable consequences of proceeding to trial"); Cottle, 733 So.2d at 969 (appellant must prove that had he been correctly advised he would have accepted plea offer, and that acceptance of plea offer would have resulted in lesser sentence); Curry, 687 N.E.2d at 889 (prejudice established where defense counsel asserted defendant rejected plea offer because of counsel's erroneous advice, and disparity between 12-year, mandatory minimum sentence defendant faced following trial and four-and-one-half sentence in plea offer was significant); Williams, 605 A.2d at 110 (significant disparity between 10-year sentence in plea offer and 25-year sentence without possibility of parole following trial); Simmons, 309 S.E.2d at 498 (disparity

between two-year sentence in plea offer and five-year sentence received); Hanzelka, 682 S.W.2d at 387 (zero time in jail versus one year in jail); Becton, 516 S.E.2d at 768 (10-year versus 40-year sentence).

Here, the record shows Mr. Kienitz rejected the State's plea offer due to the prosecutor's refusal to disclose the identities of the confidential informants and defense counsel's resulting inability to evaluate the merits of the offer or conduct an independent investigation. CP 15-16; 8/05/09RP 528-36. In addition, the disparity between the sentence Mr. Kienitz received and the terms of the plea offer was significant. Following trial, Mr. Kienitz received a standard-range sentence of 12 months for the three delivery charges, plus 72 months for the three 24-month school bus zone enhancements, for a total sentence of 84 months. CP 119. In the plea offer, the State was to drop the school bus zone enhancement allegations. CP 39.

Thus, the record shows there is a reasonable probability that, but for the terms of the plea offer that prevented counsel from conducting an adequate investigation, Mr. Kienitz would have accepted the plea offer and received a substantially lower sentence. Confidence in the outcome is undermined and Mr.

Kienitz is therefore entitled to a remedy. See James, 48 Wn. App. at 363.

2. THE SPECIAL VERDICT JURY INSTRUCTIONS ARE ERRONEOUS AND MR. KIENITZ MAY CHALLENGE THEM FOR THE FIRST TIME ON APPEAL

a. Mr. Kienitz did not waive his right to challenge the jury instructions. The State contends Mr. Kienitz waived his right to challenge the special verdict jury instructions, because he did not object at trial and because the claimed error is not one of constitutional magnitude. SRB at 19-23. To the contrary, Mr. Kienitz had a constitutional right to have the jury correctly instructed on the unanimity requirement for the special verdict forms and he may challenge the instructions for the first time on appeal.

Criminal defendants have both a federal and state constitutional right to have a jury determine, beyond a reasonable doubt, the facts required to impose a sentence enhancement. State v. Williams-Walker, 167 Wn.2d 889, 896, 225 P.3d 913 (2010); U.S. Const. amend. 6; Const. art. 1, §§ 21, 22. Article 1, section 21 of the Washington Constitution requires that jury verdicts in criminal cases be unanimous. Const. art. 1, § 21; State v. Stephens, 93 Wn.2d 186, 190, 607 P.2d 304 (1980). Where a sentencing factor is submitted to the jury via special verdict, the jury

must be unanimous to find the State has proven the special finding beyond a reasonable doubt. State v. Goldberg, 149 Wn.2d 888, 892-93, 72 P.3d 1083 (2003). But the jury need not be unanimous to find the State *failed* to prove the special allegation. State v. Bashaw, 169 Wn.2d 133, 146, 234 P.3d 195 (2010).

In Bashaw, this Court concluded the defendant was entitled to have the jury correctly instructed it need not be unanimous in order to answer "no" on the special verdict form. Id. at 147. The jury instructions were erroneous because they informed the jury they must be unanimous in order to answer the special verdict form. Id. Thus, the error "was the procedure by which unanimity would be inappropriately achieved." Id. The result was a "flawed deliberative process" that "tells us little about what result the jury would have reached had it been given a correct instruction." Id. By implication, the error affected Bashaw's constitutional right to have a jury determine the special allegation beyond a reasonable doubt.

Generally, an error may be raised for the first time on appeal if it is a manifest error affecting a constitutional right. RAP 2.5(a)(3); State v. Roberts, 142 Wn.2d 471, 500, 14 P.3d 713 (2000). An error is "manifest" if it had "practical and identifiable consequences in the trial of the case." Id. (citing State v. WWJ

Corp., 138 Wn.2d 595, 603, 980 P.2d 1257 (1999) (quoting State v. Lynn, 67 Wn. App. 339, 345, 835 P.2d 251 (1992)).

"To satisfy the constitutional demands of a fair trial, the jury instructions, when read as a whole, must correctly tell the jury of the applicable law, not be misleading, and permit the defendant to present his theory of the case." State v. O'Hara, 167 Wn.2d 91, 105, 217 P.3d 756 (2009) (citing State v. Mills, 154 Wn.2d 1, 7, 109 P.3d 415 (2005)); U.S. Const. amend. 14; Const. art. 1, § 3. This Court has held the following jury instruction errors are manifest constitutional errors that may be challenged for the first time on appeal: directing a verdict, State v. Peterson, 73 Wn.2d 303, 306, 438 P.2d 183 (1968); shifting the burden of proof to the defendant, State v. McCullum, 98 Wn.2d 484, 487-88, 656 P.2d 1064 (1983); failing to define the "beyond a reasonable doubt" standard, State v. McHenry, 88 Wn.2d 211, 214, 558 P.2d 188 (1977); failing to require a unanimous verdict, State v. Carothers, 84 Wn.2d 256, 262, 525 P.2d 731 (1974); and omitting an element of the crime charged, State v. Johnson, 100 Wn.2d 607, 623, 674 P.2d 145 (1983), overruled on other grounds by State v. Bergeron, 105 Wn.2d 1, 711 P.2d 1000 (1985). O'Hara, 167 Wn.2d at 100. In contrast, instructional errors not falling within the scope of RAP

2.5(a), that is, not constituting manifest constitutional error, include the failure to instruct on a lesser included offense, State v. Mak, 105 Wn.2d 692, 745-49, 718 P.2d 407 (1986), and the failure to define individual terms, State v. Scott, 110 Wn.2d 682, 690-91, 757 P.2d 492 (1988). O'Hara, 167 Wn.2d at 100.

In this case, the jury instructions misstated the law regarding the unanimity requirement for the special verdict forms. The error is similar to the instructional errors this Court has held may be challenged for the first time on appeal. The jury instructions did not merely fail to define a term or fail to inform the jury of a lesser included offense. Because the instructions misstated the law regarding jury unanimity, they deprived Mr. Kienitz of his constitutional right to a fair trial. O'Hara, 167 Wn.2d at 105. The error is therefore a manifest constitutional error that may be raised for the first time on appeal. RAP 2.5(a); O'Hara, 167 Wn.2d at 100, 105.

Consistent with this reasoning, this Court addressed an identical error in Bashaw, even though the error was never raised at the trial court level. See State v. Bashaw, 144 Wn. App. 196, 198-99, 182 P.2d 451 (2009), rev'd, 169 Wn.2d 133 (2010) (defense counsel did not object to challenged jury instruction). In

addition, in determining whether the error was harmless, the Court applied the constitutional harmless error standard. Bashaw, 169 Wn.2d at 147 (citing State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002); Neder v. United States, 527 U.S. 1, 19, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999)).

b. The State's argument that *Bashaw* should be overruled is not persuasive. The State contends the holding in Bashaw is incorrect, SRB at 19-21, 23-25, but the State's argument is not persuasive. The holding of Bashaw is within this Court's authority to interpret our constitution's jury trial requirements and is consistent with this Court's case law and with public policy.

Bashaw drew a sharp distinction between special verdicts and general verdicts in terms of the jury unanimity requirement. Bashaw held that for special verdicts, "a nonunanimous special finding by a jury is a final decision by the jury that the State has not proved its case beyond a reasonable doubt." Bashaw, 169 Wn.2d at 148. But "[g]eneral verdicts in criminal cases, of course, must still be unanimous to convict or acquit." Id. at 145 n.5. Thus, the decision is consistent with State v. Noyes, 69 Wn.2d 441, 446, 418 P.2d 471 (1966), which held that for a *general* verdict, a defendant

could not waive a unanimous verdict and accept the vote of 11 jurors as a valid verdict of acquittal.

Bashaw is also consistent with State v. Labanowski, 117 Wn.2d 405, 816 P.2d 26 (1981), another case cited by the State. Labanowski held that when a jury is instructed on a lesser included or lesser degree offense, "it should also be instructed that it is to first consider the crime charged and if after full and careful consideration of the evidence it cannot agree on a verdict as to that crime, it may then proceed to arrive at a verdict on a lesser crime." Id. at 414. The policy considerations underlying the decision in Labanowski are similar to the policy considerations cited in Bashaw—that allowing a jury to render a verdict on a lesser crime if it is unable to agree on the charged crime promotes the efficient use of judicial resources by avoiding retrials in cases where the jury would have been unanimous on a lesser offense. Id. at 419; see Bashaw, 169 Wn.2d at 146-47 (allowing a jury to answer "no" on a special verdict form by a less-than-unanimous vote avoids "[t]he costs and burdens of a new trial," which are "substantial"). Although Labanowski held an "acquittal first" type of instruction was not reversible error, "the *proper* instruction to the jury will allow it to

render a verdict on a lesser crime if it is unable to agree on the charged crime." Id. at 414-15 (emphasis added).

The State also contends Bashaw is contrary to legislative intent. The State asserts the Legislature gave force or meaning to a non-unanimous verdict in only one sentencing statute— concerning aggravated first-degree murder, RCW 10.95.080(2)— but for all other sentencing statutes, the Legislature's procedure requires unanimity before a sentencing verdict can be rendered for conviction or acquittal. SRB at 14. The State cites no authority for this proposition.

In this case, the State alleged the deliveries occurred within 1,000 feet of a school bus route stop, justifying an additional 24-month sentence enhancement for each count under RCW 69.50.435(1)(b) and RCW 9.94A.533(6). CP 1-2. But neither of those statutes sets forth any requirement regarding jury unanimity for the jury's special verdict finding.

The Sentencing Reform Act (SRA) contains specific provisions authorizing juries to make findings for several different types of special sentencing enhancement allegations. RCW 9.94A.825-.839. The school bus zone enhancement is not covered by any of those provisions. Moreover, none of those provisions

addresses whether the jury's finding, whether affirmative or negative, must be unanimous. For deadly weapon enhancements, for example, the statute requires only that the jury shall "find a special verdict as to whether or not the defendant or an accomplice was armed with a deadly weapon at the time of the commission of the offense." RCW 9.94A.825.

In State v. Barnes, 153 Wn.2d 378, 383, 103 P.3d 1219 (2005), this Court held the deadly weapon enhancement statute "requires the State to prove that the defendant, or an accomplice, was armed with a deadly weapon at the time of the commission of the crime." The Court noted "[a]n affirmative finding on the special verdict results in an increase of the defendant's sentence." Id. The Court did not state the jury must be unanimous in order to make a negative finding on the special verdict form.

In sum, the rule in Bashaw and Goldberg is consistent with this Court's prior decisions and with the SRA. It is justified by substantial policy considerations of judicial economy. In this case, the State does not dispute that the jury instructions misstated the law regarding jury unanimity as set forth in Bashaw. The special verdicts must therefore be reversed.

B. CONCLUSION

For the reasons above and in the opening brief, Mr. Kienitz received ineffective assistance of counsel during plea negotiations, requiring that the prosecutor either reinstate the plea offer, or that Mr. Kienitz be resentenced in accordance with the plea offer. Alternatively, the school bus zone enhancements must be vacated, as the jury was improperly instructed they must be unanimous in order to answer "no" on the special verdict forms.

Respectfully submitted this 14th day of December 2010.


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