

NO. 41916-5-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

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STATE OF WASHINGTON,

Respondent,

v.

JEFFREY RANDALL,

Appellant.

---

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

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APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT.

Jeffrey Randall, a resident of Tacoma, befriended a group of high school students during the spring of 2008. Although these teenagers agreed that they were all regular marijuana smokers long before meeting Mr. Randall, he was charged with two counts of involving a minor in a transaction to deliver marijuana, and unlawful delivery of marijuana to a person under the age of eighteen – as to two of the girls in this group.<sup>1</sup> As to the marijuana counts, the State alleged only that these acts occurred at some point between March and June of 2008, but did not specify any single act or transaction.

The evidence was such that it was impossible for the jury to distinguish among the alleged acts or to consider each act on its own. Although requested by the defense, no unanimity instruction was given by the trial court. Because the evidence was insufficient for the jury to agree unanimously that any particular and distinct act occurred, it was insufficient to sustain the convictions.

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<sup>1</sup>Mr. Randall was charged with two counts of RCW 69.50.401(1)(2)(b) and 69.50.406(2) with sexual motivation as defined in RCW 9.94A.030 and 9.94A.835. He was also acquitted of four counts of RCW 9A.44.079. CP 305-08.

B. ASSIGNMENTS OF ERROR.

1. The trial court violated Mr. Randall's right to a unanimous jury under Article I, Section 21.

2. Mr. Randall's right to a unanimous jury was violated when the State failed to elect a single act as the basis for either the delivery or the involving charge, and the trial court failed to give the required unanimity instruction.

3. The trial court erred in concluding that the State proved sexual motivation beyond a reasonable doubt.

4. The trial court erred in giving Instruction No. 31 regarding the special verdict, improperly instructing on the issue of unanimity.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. When evidence of multiple criminal acts is introduced to support a single conviction, either the State must elect one act, or the court must instruct the jury on unanimity. Here, the State introduced evidence of acts spanning almost four months, but the court failed to give the unanimity instruction as requested by the defense. Did the court's failure to instruct the jury on unanimity violate Mr. Randall's constitutional right to a unanimous verdict? (Assignments of Error 1-2).

2. To find a defendant acted with sexual motivation when committing a criminal offense, the State must present evidence of identifiable sexual conduct during the course of the offense that is not inherent to the underlying offense for which the defendant is convicted. Where the evidence that Mr. Randall engaged in any sexual conduct with the complaining witnesses was rejected by the jury, must the findings of sexual motivation be stricken?

(Assignment of Error 3).

3. A jury need not be unanimous in a special verdict finding when it determines that the State has not met its burden of proof. Jury instructions must be manifestly clear to the average juror. The trial court instructed the jury that it had to be unanimous in reaching the special verdict of sexual motivation, and that it should answer "no" if it had a reasonable doubt. Where the deliberative process requires accurate instructions on the requirement of unanimity, does the incorrect instruction undermine the jury's special verdict finding and require this Court to strike the special verdict?

D. STATEMENT OF THE CASE

Jeffrey Randall is a man in his early 40's, who was living at the Har-Mal Care Facility in Tacoma in the spring of 2008. RP 1704.<sup>2</sup>

In approximately March 2008, Mr. Randall befriended some teenagers who attended Woodrow Wilson High School. RP 631-33, 763-65, 1371-74. He became friendly with several of the boys, including Nathaniel Mitchell, and often drove them to play basketball after school. RP 1377-80. He confided to Mitchell that he wanted to get in shape, and he tried to keep up with the high school kids. RP 1377-80. The high school students, in turn, took advantage of having an older friend with a car, to pick them up from school and late-night parties. RP 641, 736-37, 763-65, 1375-76.

There were many such parties, as these teenagers were already daily marijuana and alcohol users when they met Mr. Randall. RP 635-37, 853-54. One of the teenagers, Holly T., recalled that she had been smoking marijuana since 7<sup>th</sup> grade, when her older brother began providing it, and that she regularly

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<sup>2</sup> Mr. Randall's disability was never discussed at trial, but a defense witness testified that Har-Mal is a residence for adults, providing medication management and meals, and at which trained staff members are always on duty. RP 1707-12. One teenaged witness recalled that the residence reminded her of "an old folks' home." RP 666.

got high and drank alcohol with her brother in the backyard of their mother's house. RP 702. The other complaining witness, Victoria N., testified that during her 9<sup>th</sup> grade year, she was smoking marijuana daily, and that her usage began well before meeting Mr. Randall. RP 759-60, 851-54. Both Victoria and Holly stated that it had been easy to obtain marijuana at school and in the area surrounding it, dating back to 2007. RP 635-37, 707, 759-60, 851-54.

Mr. Randall began to spend increasing amounts of time with Holly and Victoria, as well as with Nathaniel Mitchell, who even invited Mr. Randall to be an overnight guest in his home. RP 784-86, 649-51, 1381. Holly and Victoria began to regularly sneak out of their homes at night to spend time with Mr. Randall, driving around in his car. RP 659-61, 784-86. When this behavior was finally apprehended by the girls' respective parents, the girls suggested that Mr. Randall had been supplying them with marijuana and alcohol, as well as encouraging them to sell marijuana from his car. RP 689-91, 903-07, 1100-07. The girls also claimed that he had forced them to have sex with him at his residence. RP 689-91, 903-07, 1100-07.

Mr. Randall was charged with two counts of involving a minor in a transaction to deliver marijuana – one as to each of the girls -- and two counts of unlawful delivery of marijuana to a person under the age of eighteen -- one as to each of the girls. CP 223-26.<sup>3</sup>

The State did not specify any particular act or transaction during the charging period of March 1 to June 4, 2008. CP 223-26; 286-87. The defense requested a unanimity instruction for each count, as there was no evidence of a specific delivery to either girl, or a specific act to involve either girl in a delivery transaction. RP 1346, 1727, 1730-37; CP 231-34. The trial court denied the request for a unanimity instruction. RP 1736-37.

Following a jury trial, Mr. Randall was convicted of the delivery and involving counts. CP 309-12. The jury also returned a special verdict, finding Mr. Randall committed the crime of unlawful delivery with a sexual motivation. CP 313-14.

Mr. Randall timely appeals. CP 493-519.

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<sup>3</sup> Mr. Randall was also acquitted of four counts of RCW 9A.44.079 – two counts as to each of the girls. CP 223-26, 305-08.

E. ARGUMENT

1. THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN THE CONVICTIONS, AS NO JURY COULD UNANIMOUSLY AGREE THAT MR. RANDALL COMMITTED THE ALLEGED OFFENSES.

- a. Due process requires proof beyond a reasonable doubt of every element of the crime charged. Due process requires the prosecution prove, beyond a reasonable doubt, each element of a charged crime for a conviction to stand. U.S. Const. amend. XIV; Const. art. 1, § 22; Jackson v. Virginia, 443 U.S. 307, 311, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1960); In re Winship, 397 U.S. 358, 364-66, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); State v. Green, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980).

In Washington, a defendant may be convicted only when a unanimous jury concludes beyond a reasonable doubt that the criminal act charged in the information has been committed. State v. Petrich, 101 Wn.2d 566, 569, 683 P.2d 173 (1984) (citing State v. Stephens, 93 Wn.2d 186, 190, 607 P.2d 304 (1980)); Const. Art. 1, §§ 21,<sup>4</sup> 22.<sup>5</sup> In “multiple acts” cases, where the State alleges

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<sup>4</sup> “The right to trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts not of record, and for a verdict by nine or more jurors in civil cases in any court of record, and for waiving of the jury in civil cases where the consent of the parties interested is given thereto.” Const. art. 1, §21.

several acts and any one of them could constitute the crime charged, the jury must be unanimous as to which particular act or incident constitutes the crime. State v. Kitchen, 110 Wn.2d 403, 411, 756 P.2d 105 (1988). Thus, to ensure jury unanimity, the evidence must be sufficient for the jury to agree the State proved the elements of the charged crime on a particular occasion. Id.

The Supreme Court has recognized that in order to meet this requirement, the State must present evidence that allows the jurors to distinguish among the multiple incidents alleged. Originally, the court required the State to distinguish explicitly among the alleged incidents by electing which of the acts upon which it was relying for a conviction. Petrich, 101 Wn.2d at 570 (citing State v. Workman, 66 Wash. 292, 294-95, 119 P. 751 (1911)). In Petrich, however, the court recognized there would be occasions where it would be impractical for the State to elect a particular incident. Petrich, 101 Wn.2d at 572; Kitchen, 110 Wn.2d at 411. The Petrich court, therefore, announced a new rule: where the State chooses not to elect, unanimity must be assured by instructing the jury that all 12 jurors must agree the same underlying criminal act has been proved beyond a reasonable

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<sup>5</sup> Article 1, section 22 provides, "In criminal prosecutions the accused

doubt. Petrich, 101 Wn.2d at 572. In that situation, it is up to the jury to distinguish among the alleged incidents. Id. Here, the court did not give an instruction explaining the mandatory unanimity requirement; therefore, reversal is required unless the evidence was sufficient to assure the jury that a particular act occurred.

b. Where the State brings charges alleging a continuing course of conduct, specific incidents must still be alleged. Where a witness alleges a defendant repeated the same criminal act over a period of time, the evidence must be sufficient to support a series of *specific* incidents, *each* of which could support a separate criminal sanction. State v. Hayes, 81 Wn. App. 425, 437, 914 P.2d 788 (1996) (citing People v. Jones, 51 Cal.3d 294, 792 P.2d 643, 270 Cal.Rptr. 611, 622 (1990)). Such cases are therefore “multiple acts” cases that are subject to the rules set forth in Petrich. See 101 Wn.2d at 571 (distinguishing cases where “several distinct acts” are alleged from cases involving “one continuing offense”). Thus, to ensure jury unanimity, the evidence must be sufficient to enable the jury to agree unanimously that the particular act underlying the charge actually occurred. Id. at 572.

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shall have the right to . . . have a speedy public trial by an impartial jury. . . .”

The difficulty arises where the State brings multiple identical charges based on a witness's uncorroborated allegation that the same criminal act occurred more than once. If the complainant cannot describe any particular incident distinctly, as here, it is impossible for a jury to agree unanimously that any particular incident occurred. The jury must be able to isolate distinct incidents, distinguish among them, and agree as to which incidents occurred. Kitchen, 110 Wn.2d at 411; Petrich, 101 Wn.2d at 572-73.

Thus, to ensure the defendant's constitutional rights to a unanimous jury verdict and to proof beyond a reasonable doubt, the prosecutor must provide some factual details that serve to distinguish one incident from another. This Court reaffirmed that principle in State v. Hayes, where it held that the evidence in such cases must "clearly delineate specific and distinct incidents of sexual abuse." Hayes, 81 Wn. App. at 431 (quoting State v. Newman, 63 Wn. App. 841, 851, 822 P.2d 308 (1992)).

Washington courts universally require the jury be instructed on the unanimity requirement in multiple acts cases, even in sexual abuse cases indicating that the same act of abuse occurred more than once. Hayes, 81 Wn. App. at 431; State v. Holland, 77 Wn.

App. 420, 424-25, 891 P.2d 49 (1995) (reversing where victim could not recall any distinguishing characteristics of incidents).

Moreover, where the State brings multiple charges, double jeopardy principles also demand the State prosecute each charge separately. State v. Carter, 156 Wn. App. 561, 567-68, 234 P.3d 275 (2010), State v. Berg, 147 Wn. App. 923, 935, 198 P.3d 529 (2008), State v. Borsheim, 140 Wn. App. 357, 368, 165 P.3d 417 (2007). The evidence must show that one charged crime was completed before another began, and the State must present different evidence to prove each crime. Hayes, 81 Wn. App. at 439 (citing Noltie, 116 Wn.2d at 848); North Carolina v. Pearce, 395 U.S. 711, 717, 726, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), overruled on other grounds by Alabama v. Smith, 490 U.S. 794, 109 S.Ct. 2201, 104 L.Ed.2d 865 (1989). Due process requires that criminal charges be prosecuted in a manner that provides defendants with the ability to protect themselves from future double jeopardy. Valentine v. Konteh, 395 F.3d 626, 634 (6th Cir. 2005). Where there is insufficient specificity in the information or the trial record to enable a defendant to plead convictions or acquittals as a bar to future prosecutions, the constitutional right to protection from double jeopardy is implicated. Id.

Thus, in a continuing course of conduct case where the State brings multiple charges, the witness must be able to testify about the particular factual circumstances of the incidents that underlie each charge. The prosecutor need not be able to identify the particular dates on which the incidents occurred. See, e.g., Valentine, 395 F.3d at 632 (although prosecutor should be as specific as possible in delineating dates of alleged offenses, reality of cases involving young victims is that they often cannot identify particular dates). But the State must present some degree of factual detail to enable the jury to consider each count on its own. Id. at 633. This Court has recognized this principle. In Newman, for example, unanimity was assured because a reasonable trier of fact could single out specific incidents of sexual abuse as to each count charged. 63 Wn. App. at 851-52.

Thus, although the factual circumstances of the crime are not elements of the crime, see Hayes, 81 Wn. App. at 437, they are nonetheless an essential component of the State's burden of proof in this kind of case. Where the facts make it impossible for the jury to agree beyond a reasonable doubt the alleged criminal act occurred on a particular occasion, the evidence is insufficient to sustain the conviction.

c. The evidence was insufficient where the complaining witnesses described a generic scheme of marijuana transactions over a period of four months. In this case, Mr. Randall was convicted of two counts of involving a minor in a transaction to deliver marijuana, and two counts of unlawful delivery of marijuana to a person under the age of eighteen. CP 305-14. The statute governing involving a minor provides:

It is unlawful to compensate, threaten, solicit, or in any other manner involve a person under the age of eighteen years in a transaction unlawfully to manufacture, sell, or deliver a controlled substance.

RCW 69.50.4015.<sup>6</sup>

The statute governing unlawful delivery of a controlled substance provides:

Except as authorized by this chapter, it is unlawful for any person to manufacture, deliver, or possess with intent to manufacture or deliver, a controlled substance.

RCW 69.50.401(1).

Holly T. and Victoria N. testified that they would sneak out of their homes after their parents fell asleep and drive around with Mr. Randall in his car. RP 659-61, 784-86. They said that they would

smoke marijuana with Mr. Randall, and that he would also give them marijuana to sell. RP 659-61, 784-86. Both Holly and Victoria estimated that this type of behavior occurred on a regular basis, but neither was able to isolate a single act or transaction. RP 944-45, 1009-10, 1031, 1036. In response to the prosecutor's and defense questions, the complainants were unable to provide a day of the week or any other defining information regarding their accusations, stating that they were often stoned, drunk, or had even lied about incidents in prior statements. RP 1058, 1079.

Jury unanimity cannot be assured in a case that consists only of a witness's generic description of a criminal act and an estimate of the number of times the act occurred. This is even more troubling here, where the witnesses were not children, but streetwise teenagers who were competent to testify as to dates and times of events. The fact that the complaining witnesses failed to provide a single date or other clarifying characteristic to set a timeline for their allegations distinguishes this case from the line of child witness cases where multiple acts may form the basis of a charged crime.

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<sup>6</sup> Marijuana is defined as a controlled substance. RCW 69.50.204.

Washington has never wavered from the constitutional requirement of jury unanimity regarding the criminal act underlying each charge in a multiple acts case. To the contrary, the Supreme Court has consistently required jury unanimity in cases where the State alleges multiple acts, any one of which could form the basis of the charged crime. E.g., Nolfie, 116 Wn.2d at 846-47; Kitchen, 110 Wn.2d at 411; Petrich, 101 Wn.2d at 572-73. Thus, the evidence in such cases must be sufficient for the jury to distinguish among the charged incidents.

In this case, where the State failed to elect a single act, and where the trial court refused to give the unanimity instruction requested by the defense, the evidence was insufficient to support convictions on the unlawful delivery and involving counts. RP 1346, 1727, 1730-37; CP 231-34.

d. Lack of specificity in the verdict violates the right to appeal. This Court has recognized that where there are multiple counts and the information does not identify specific acts or segregate charging periods among the counts, and where the State does not elect which act it is relying upon for each count, there is no way to know which allegations the jury based its verdict upon. State v. Heaven, 127 Wn. App. 156, 162, 110 P.3d 835 (2005).

Here, as in Heaven, the record does not show which allegations the jury relied upon in convicting Mr. Randall of the four marijuana counts.

Under Article I, section 22, criminal defendants have a constitutional right to appeal. On appeal, the court must reach and decide each issue raised. State v. Jones, 148 Wn.2d 719, 722, 62 P.3d 887 (2003). Where it is impossible to discern the evidence upon which a jury relied in reaching a verdict, it is impossible for a defendant to challenge on appeal the sufficiency of the evidence supporting that verdict. See, e.g., Jackson, 443 U.S. at 313-14; Green, 94 Wn.2d at 220-21.

Moreover, here, the jury found the evidence was not sufficient to support convictions for the four counts of rape of a child. CP 305-08. Thus, this Court cannot conclude the jury simply must have accepted in full the complaining witnesses' allegations without question. The acquittals demonstrate that the jury did not find H.T. and V.N.'s testimony, as well as the testimony of Nathaniel Mitchell and the other State's witnesses, entirely credible. Because it is impossible to discern the evidence upon which the jury relied for the remaining counts, permitting the convictions to stand violates Mr. Randall's state constitutional right to challenge

on appeal the sufficiency of the evidence underlying those convictions.

e. Mr. Randall's convictions must be reversed and dismissed. The State did not elect a particular incident in order to meet its burden, and did not sufficiently prove specific acts upon which the jury could unanimously agree. Kitchen, 110 Wn.2d at 411; Petrich, 101 Wn.2d at 572. The unlawful delivery and involving a minor convictions must therefore be reversed. Jackson, 443 U.S. at 319; Green, 94 Wn.2d at 221.

The evidence was insufficient in this case for the jury to isolate four distinct incidents on which to base the involving and delivery convictions – one as to each complaining witness. In the context of jury unanimity, the question is not whether the State can prove how many times a criminal act occurred, but whether the jury could unanimously agree it occurred on a particular occasion. The State did not meet that burden of proof in this case.

2. THERE WAS INSUFFICIENT EVIDENCE OF SEXUAL MOTIVATION, WITH THE RAPE ACQUITTALS CREATING AN INCONSISTENT VERDICT ON THIS AGGRAVATING FACTOR.

a. To convict a defendant of acting with sexual motivation, the State must present evidence of identifiable sexual conduct during the course of the offense. In this case, the State alleged that Mr. Randall engaged in the crime of unlawful delivery of marijuana to a person under eighteen with a sexual motivation.

CP 225-26. Under the Sentencing Reform Act ("SRA"):

In a criminal case wherein there has been a special allegation the state shall prove beyond a reasonable doubt that the accused committed the crime with a sexual motivation. The court shall make a finding of fact of whether or not a sexual motivation was present at the time of the commission of the crime, or if a jury trial is had, the jury shall, if it finds the defendant guilty, also find a special verdict as to whether or not the defendant committed the crime with a sexual motivation.

RCW 9.94A.835(2). "Sexual motivation" means that one of the purposes for which the defendant committed the crime was for the purpose of his or her sexual gratification. RCW 9.94A.030(47). A finding of sexual motivation carries several consequences, including a potential exceptional sentence above the standard range. RCW 9.94A.535(2)(f).

“The statute requires evidence of identifiable conduct by the defendant while committing the offense which proves beyond a reasonable doubt the offense was committed for the purpose of sexual gratification.” State v. Halstein, 122 Wn.2d 109, 120, 857 P.2d 270 (1993) (emphasis added). In other words, “the State must present evidence of some conduct during the course of the offense as proof of the defendant’s sexual purpose.” Id. at 121. Only so construed does the statute survive a vagueness and overbreadth challenge. Id. at 121, 125.

“[A]n exceptional sentence may not be based on factors inherent to the offense for which a defendant is convicted.” State v. Thomas, 138 Wn.2d 630, 636, 980 P.2d 1275 (1999). “The purpose of ‘sexual motivation’ as an aggravating factor is to hold those offenders who commit sexually motivated crimes more culpable than those offenders who commit the same crimes without sexual motivation.” Id. (emphasis in original).

Finally, “the sexual nature of the current offense is the relevant inquiry.” State v. Halgren, 137 Wn.2d 340, 351, 971 P.2d 512 (1999). Neither prior treatment nor prior history is relevant to the sexual motivation determination. Id.

b. Here, the State presented insufficient evidence of sexual conduct as a motivation for unlawful delivery of marijuana, as shown by the four rape acquittals. In this case, the State failed to meet its burden to prove sexual motivation. The only evidence presented of sexual motivation were the claims of sexual contact described by Holly and Victoria – claims apparently found by the jury to be either incredible or insufficient. CP 305-08. The jury's decision to acquit Mr. Randall of all four counts of RCW 9A.44.079, while still finding that he acted with a sexual motivation as to the unlawful delivery counts, must be seen as an inconsistent verdict.

But even if these instances of sexual conduct were ultimately considered by the jury, they provide insufficient support for findings of sexual motivation. The prosecutor argued and the jury found that Mr. Randall's sexual interest in Holly and Victoria meant he must have committed the unlawful delivery of marijuana offenses with sexual motivation. However, because the jury was not instructed on unanimity, and because the State refused to elect any particular act within the four-month charging period, there are legitimate concerns that fewer than twelve jurors agreed on any specific act that constituted the offense of unlawful delivery. See supra. Considering the evidence produced at trial, the jury may

have concluded that Mr. Randall delivered marijuana to Holly and Victoria at various times throughout the charging period. The only way the special verdicts may be upheld, however, is if the jury found that at the time of a specific delivery, Mr. Randall was motivated by his own sexual purposes. That conclusion is untenable based upon the evidence produced at trial. See Halstein, 122 Wn.2d at 121, 125.

Halstein and Thomas shed light on the type of evidence that must be presented to prove sexual motivation. In Halstein, the defendant broke into a woman's house, took a vibrator and a box of condoms from a nightstand next to the bed where she was sleeping, examined photographs of her, but did not take any of her valuable personal property. Halstein, 122 Wn.2d at 129. An officer testified that he noticed a substance on one of the photographs that appeared to be semen. Id. at 128. In that case, the State presented sufficient evidence to prove that a burglary was sexually motivated. Id. at 129.

In Thomas, the defendant was convicted of felony murder based on three predicate felonies, one of which was first-degree rape and one of which was second-degree rape. Thomas, 138 Wn.2d at 631. The State proved sexual motivation beyond a

reasonable doubt by proving the elements of rape beyond a reasonable doubt. Id. at 631-32.

The evidence in this case differed from the above cases, as any evidence of sexual conduct occurring in the course of the alleged unlawful delivery offense was discounted by the jury as incredible or insufficient, as shown by the rape acquittals. CP 305-08. In addition, there was evidence that deliveries of marijuana were made likewise to male students, including Nathaniel Mitchell, Chris Gomez, Mike Phillips, and others. RP 1377-80. There was absolutely no evidence that Mr. Randall had any sexual interest in these male students, or that these acts were committed for the purpose of sexual gratification.

Without the ability to elect specific acts constituting the unlawful deliveries alleged in Counts 7 and 8, the special verdict findings are inherently insufficient. This Court should therefore strike the sexual motivation findings on both counts.

3. THE SPECIAL VERDICT MUST BE VACATED BECAUSE THE JURY WAS ERRONEOUSLY INSTRUCTED THAT UNANIMITY WAS REQUIRED TO ANSWER THE SPECIAL VERDICT FORM.

a. The trial court must properly instruct the jury on the unanimity required for an aggravating circumstance. When the jury is asked to make an additional finding beyond the substantive offense, the jury need not be unanimous to find the State has not sufficiently proven the aggravating factor. State v. Bashaw, 169 Wn.2d 133, 234 P.3d 195 (2010); State v. Goldberg, 149 Wn.2d 888, 72 P.3d 1083 (2003).<sup>7</sup> In Bashaw and Goldberg, the jurors were told that their answer in a special verdict form addressing an additional aggravating factor must be unanimous for either a “yes” or “no” answer. Bashaw, 169 Wn.2d at 139; Goldberg, 149 Wn.2d at 894. The Supreme Court found such an instruction erroneous, finding unanimity to be required only when the jury answers “yes.”

The rule from Goldberg then, is that a unanimous jury decision is not required to find that the State has failed to prove the presence of a special finding increasing the defendant’s maximum allowable sentence.

Bashaw, 169 Wn.2d at 146.

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<sup>7</sup>The Supreme Court has granted review on this precise issue in State v. Nunez, 160 Wn. App. 150, 248 P.3d 103 (2010), review granted, 172 Wn.2d 1004, 258 P.3d 676 (2011), which is set for argument on January 12, 2012.

The jury instruction given in Bashaw for the special verdict form told the jurors, “Since this is a criminal case, all twelve of you must agree on the answer to the special verdict.” Id. at 139. The Bashaw Court held that jurors need not be unanimous in a special finding. Rather, any jury’s less than unanimous verdict “is a final determination that the State has not proved that finding beyond a reasonable doubt.” Id. at 145. The Bashaw Court also noted that when the jury is improperly instructed on a special verdict, the deliberative process is so “flawed,” that it is not possible to “say with any confidence what might have occurred had the jury been properly instructed.” Id. at 147-48.

Bashaw and Goldberg are predicated on the right to trial by jury, an “inviolable” right guaranteed and strictly protected by the Washington Constitution, article I, sections 21 and 22. State v. Williams-Walker, 167 Wn.2d 889, 225 P.3d 913 (2010). The jury’s verdict must authorize the punishment imposed. Id. at 899.

Similarly to Bashaw, the trial court here instructed the jury as follows:

... If you find the defendant guilty, you will then use the corresponding special verdict form or forms and fill in the blank with the answer “yes” or “no” according to the decision you reach. In order to answer the special verdict forms “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 304 (Instruction 31).

Though the court’s instruction elaborated that “to answer the special verdict form ‘yes’, you must unanimously be satisfied beyond a reasonable doubt that ‘yes’ is the correct answer”, the instruction was not clear that a “no” finding need not be unanimous. See id. Instead, the trial court instructed the jury only that “If you have a reasonable doubt as to this question, you must answer ‘no’.” Id. Particularly because the instructions also contain the statement, “[b]ecause this is a criminal case, each of you must agree for you to return a verdict,” the instruction is far from clear that unanimity is not required to reach a “no” finding. CP 303 (Instruction 30). Because a jury lacks interpretive tools and training, jury instructions must be manifestly clear to the average juror. See, e.g., State v. Allery, 101 Wn.2d 591, 595, 682 P.2d 312 (1984); State v. LeFaber, 128 Wn.2d 896, 913 P.2d 369 (1996), abrogated on other grounds by State v. O’Hara, 167 Wn.2d 91, 217 P.3d 756 (2009). The court’s special verdict instruction did not make manifestly clear that a negative finding need not be unanimous.

Accordingly, the jury instruction in the case at bar consequently presents the identical error identified in Bashaw. The court erroneously, even if unintentionally, told the jury that they needed to be unanimous to vote “no” in the special verdict form.

b. The incorrect jury instruction requires vacation of the special verdict. The court in Bashaw characterized the problem as an error in “the procedure by which unanimity would be inappropriately achieved.” 169 Wn.2d at 147. This instructional error creates a “flawed deliberative process” and does not let the reviewing court simply surmise what the result would have been had it been given a correct instruction. Id.

The Bashaw Court looked to the example of the deliberative process in Goldberg, where several jurors had initially answered “no” to the special verdict, but after the trial judge told them they must be unanimous, they returned with a “yes” finding on the aggravating factor. Id. Thus in Bashaw, although “[t]here was no objection to the instruction” regarding the unanimity required for the special verdict form sentencing enhancement, the Supreme Court held the special finding must be reversed. State v. Bashaw, 144 Wn. App. 196, 199, 182 P.3d 451 (2009), reversed on review, 169

Wn.2d at 146.<sup>8</sup> In Bashaw, moreover, the trial court polled the jury and the jury said its verdict was unanimous, but the Supreme Court found the fundamental, structural nature of the incorrect explanation about the deliberative process denied Bashaw a fair trial. Id. at 147-48.

Where the trial court improperly insisted on a unanimous determination for a “no” finding, this Court “cannot say with any confidence what might have occurred had the jury been properly instructed,” and cannot conclude that the error was harmless beyond a reasonable doubt. Id. As in Bashaw, the jury was incorrectly informed that their special verdict finding must be unanimous. CP 304. The trial court’s polling of the jury after the instruction had been given and the special verdict returned does not resolve the error. Compare RP 1886-94 (polling jury) with Bashaw, 169 Wn.2d at 147-48. This Court may not guess the outcome of the case had the jury been correctly instructed, and thus the special findings imposing additional punishment because the incident allegedly involved a sexual motivation must be stricken. Bashaw, 169 Wn.2d at 147; CP 225-26, 304.

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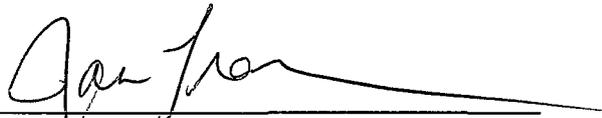
<sup>8</sup> Defense counsel here did not object to the trial court’s instruction, but filed a motion to vacate the special verdicts on Counts 7 and 8, based on Bashaw and Goldberg. CP 459-66.

F. CONCLUSION

For the foregoing reasons, Mr. Randall respectfully requests this Court reverse his convictions and remand the case for further proceedings. In the alternative, Mr. Randall requests that the special verdict be vacated and the case remanded for further proceedings.

DATED this 5<sup>th</sup> day of January, 2012.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Jan Trasen", written over a horizontal line.

JAN TRASEN (WSBA 41177)  
Washington Appellate Project (91052)  
Attorney for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO**

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STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	NO. 41916-5-II
v.	)	
	)	
JEFFREY RANDALL,	)	
	)	
APPELLANT.	)	

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