

22336-1-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JASON ALLEN GRAHAM, APPELLANT

---

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

---

SUPPLEMENTAL BRIEF OF RESPONDENT

---

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I.

ISSUES PRESENTED

1. Whether the decision of *State v. Bashaw*, 169 Wn.2d 133, 234 P.3d 195 (2010) mandates vacation of the special verdicts despite defendant's failure to object to the challenged jury instruction?
2. Whether the decision of *State v. Williams-Walker*, 167 Wn.2d 889, 225 P.3d 913 (2010) precludes the trial court from imposing firearm enhancements upon a defendant's sentence when the jury only found that the defendant was armed with a deadly weapon?

II.

STATEMENT OF THE CASE

The facts are set forth in the initial briefs by the Appellant and Respondent and are incorporated herein by this reference. Any additional pertinent facts will be addressed in the Argument section as appropriate.

### III.

#### ARGUMENT

A. DEFENDANT HAS NOT SHOWN THAT THE TRIAL COURT COMMITTED A MANIFEST ERROR WHICH QUALIFIES FOR REVIEW PURSUANT TO RAP 2.5(a)(3).

Generally, the failure to object to a trial court's jury instruction precludes appellate review. *State v. Scott*, 110 Wn.2d 682, 685-6, 757 P.2d 492 (1988). Neither the defendant nor his counsel objected to the jury instruction that he now contends was erroneous. Generally, an issue cannot be raised for the first time on appeal unless it is a manifest error affecting a constitutional right. *See* RAP 2.5(a)(3). The applicability of RAP 2.5(a)(3) is determined by a test: (1) whether the alleged error is truly constitutional and (2) whether the alleged error is manifest. *State v. Kronich*, 160 Wn. 2d 893, 899, 161 P.3d 982 (2007). An error is manifest when it has practical *and* identifiable consequences in the trial of the case. *State v. Stein*, 144 Wn. 2d 236, 241, 27 P.3d 184 (2001). (Emphasis added). Here, defendant has identified no practical and identifiable consequences in the *trial of this case* that are directly attributable to the alleged error. The defendant has not satisfied the threshold burden that the trial court committed a manifest error which

affected a constitutional right, and hence, is not entitled to appellate review thereof at this point.

B. THE DEFENDANT'S FAILURE TO OBJECT TO THE TRIAL COURT'S ERRONEOUS INSTRUCTION PRECLUDES REVIEW OF THE ERROR ON APPEAL PURSUANT TO RAP 2.5(a).

Defendant claims that the special verdicts should be vacated based upon the trial court incorrectly instructing the jury that it had to unanimously answer "no" before the special verdicts could be rejected. The defendant cites the Supreme Court's decision in *Bashaw*, in support of his claim. Defendant relies upon the reasoning in *Bashaw* while not heeding the ruling by the Supreme Court in *State v. O'Hara*, 167 Wn.2d 91, 217 P.3d 756 (2009), that appellate courts do not assume that an error is of constitutional magnitude. *Id.*

In *State v. Nunez*, No. 28259-7-III, 2011 WL 505335 (Div. III. Feb. 15, 2011), this Court analyzed the requisites for review of the issue defendant has raised herein. Citing the Supreme Court's *O'Hara* decision, this Court analyzed whether the defendant in *Nunez* had qualified for review of the trial court instructional error. Specifically, this Court inquired whether Mr. Nunez had established that the trial court's instructional error was constitutionally "manifest." This Court sought proof that the instructional error was constitutionally "manifest" in the

only source available, the record before the trial court. In *Nunez*, this Court found the record devoid of the facts required to demonstrate that the defendant had suffered actual prejudice. Accordingly, this Court found that Mr. Nunez had failed to carry his burden to prove that he had suffered actual prejudice as a result of the instructional error. Hence, Mr. Nunez had not proved that the trial court's instructional error had manifestly affected an identified constitutional provision, and thus had not qualified for the exception to the provisions of RAP 2.5(a). Here, the record lacks proof of any practical and identifiable consequences to the trial of Mr. Graham's case to support the claim that the asserted instructional error was "manifest."

C. ASSUMING, ARGUENDO, THAT THE INSTRUCTIONAL ERROR IS "MANIFEST" AND THAT SUFFICIENT EVIDENCE SUPPORTED THE CLAIM TO MAKE IT OF CONSTITUTIONAL MAGNITUDE, THE ERROR WAS HARMLESS.

Defendant claims the trial court committed manifest constitutional error by instructing the jury that it had to unanimously answer the special verdict form "no" to avoid finding the sentencing enhancement factor. Defendant cites *State v. Bashaw* in support of his position; however, this position does not cure the fact that instructional error does not automatically constitute constitutional error.

The Supreme Court based its *Bashaw* decision on *State v. Goldberg*, 149 Wn.2d 888, 72 P.3d 1083 (2003). In *Goldberg*, the trial court instructed the jury: “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’.” *Id.*, at 893. The Supreme Court held that this instruction did not mandate unanimity before a “no” answer could be rendered. *Id.*, at 893. The Supreme Court further ruled that the jury therein had completed their assigned task as instructed when it rendered a “no” verdict despite a lack of unanimity. *Id.*, at 893. It is important to note that the Supreme Court found that the error in *Goldberg* was precipitated by the trial court’s order that the jury continue to deliberate despite its having indicated that it was deadlocked and unable to reach a verdict regarding the special interrogatory.

Here, the trial court’s instruction regarding the special verdict form was the same as that given in *Goldberg*. The instruction herein did not specifically direct the jury that it needed to be unanimous to render a “no” answer to the interrogatory. Both instructions focused the jury’s attention on the need to be unanimous beyond a reasonable doubt to answer the special interrogatory “yes.” Accordingly, it is logical to infer from the

instructions given in *Goldberg* and herein that unanimity was not required to render a “no” answer to the special interrogatory.

The defendant’s reliance upon *Bashaw* is understandable, yet misplaced. The special verdict form in *Bashaw* directed the jury as follows: “Since this is a criminal case, all twelve of you must agree on the answer to the special verdict.” As noted, the special verdict forms herein, like that given in *Goldberg*, provided that the jury need only be unanimous beyond a reasonable doubt to render an affirmative answer. CP 86. Accordingly, the trial court’s instructional error was harmless in light of the presumption that the jury follows the law as instructed by the trial court. *State v. Johnson*, 124 Wn.2d 57, 77, 873 P.2d 514 (1994).

D. THE TRIAL COURT’S INSTRUCTIONAL ERROR WAS HARMLESS.

Defendant argues that the error created by the trial court’s special verdict form instruction was not harmless based upon the Supreme Court’s reasoning in *Bashaw* that there was no way to discern how the jury would have answered the interrogatory had it been properly instructed. Here, the essential elements instructions for the attempted first degree murder/first degree assault charges required the jury find that those crimes were committed with a firearm in order to convict. Again, assuming that the jury followed the trial court’s instruction, the jury had to unanimously find

beyond a reasonable doubt that the defendant committed the charged crimes with a firearm before it could render a guilty verdict on any of those charged crimes. Moreover, the trial court's instructions mandated that the jury find that the defendant had committed the charged crimes by the use of a firearm before the jury could even consider the special verdict interrogatory.

The standard of review requires that the appellate court inquire whether it can conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error with regard to each charged crime. Here, there should be no reasonable doubt that the jury, having already agreed that defendant had used a firearm to commit the attempted murders/first degree assaults for purposes of the general verdict forms, would render the same answers to the interrogatory posed by the special verdicts. Accordingly, assuming that the instructional error was manifestly unconstitutional pursuant to *State v. Bashaw*, it was harmless beyond a reasonable doubt.

**E. THE TRIAL COURT WAS PRECLUDED FROM IMPOSING FIREARM ENHANCEMENTS PURSUANT TO THE JURY'S ANSWERS TO THE SPECIAL VERDICT INTERROGATORIES.**

Defendant contends that the wording of the special verdict forms precluded the trial court from imposing firearm sentencing enhancements

on the underlying convictions. Specifically, that the trial court was restricted to imposing deadly weapon, rather than, firearm enhancements because the special verdict forms failed to ask the jury whether defendant committed the charged crimes while armed with a firearm. Defendant correctly cites *Williams-Walker*, as controlling the resolution of this issue herein.

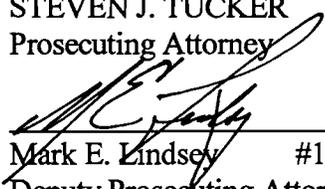
V.

#### CONCLUSION

For the reason stated, the special verdicts rendered and the corresponding sentencing enhancements imposed therefrom should be affirmed.

Respectfully submitted this 16<sup>th</sup> day of March, 2011.

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