

No. 27306-7-III

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,
Plaintiff/Respondent,

vs.

JOHN JOSEPH COOK
Defendant/Appellant.

FILED
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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

APPEAL FROM THE BENTON COUNTY SUPERIOR COURT
HONORABLE CARRIE L. RUNGE

SUPPLEMENTAL BRIEF OF APPELLANT

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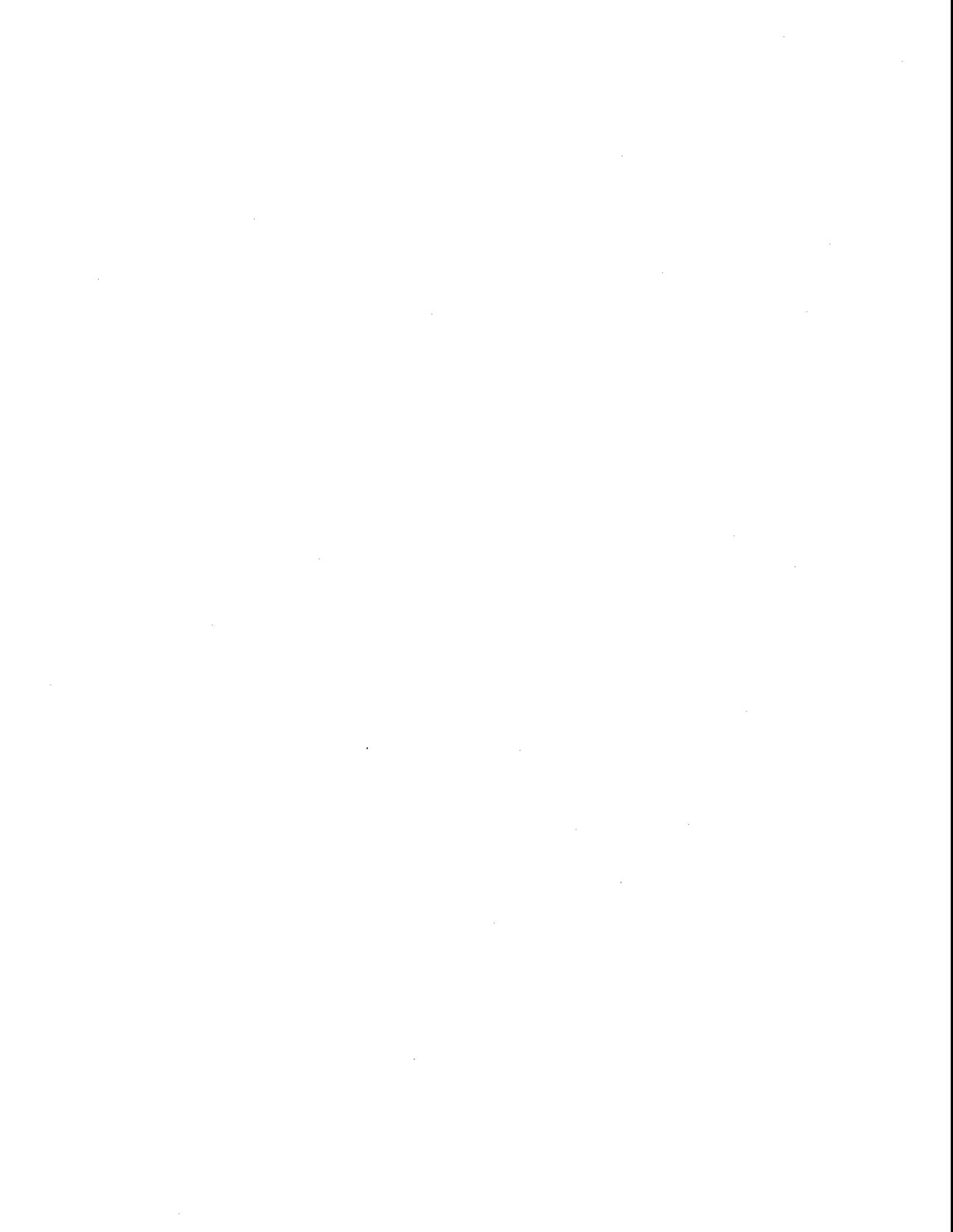


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A. SUPPLEMENTAL ASSIGNMENT OF ERROR

The trial court erred in imposing an illegal or erroneous sentence enhancement that was based upon an invalid special verdict.

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Should the exceptional sentence be vacated because the jury was incorrectly instructed it had to be unanimous to answer “no” to the special verdicts?

2. Is a sentence enhancement illegal or erroneous when based upon an invalid special verdict? May illegal or erroneous sentences be challenged for the first time on appeal, regardless of whether defense counsel registered a proper objection before the trial court?

3. Was the illegal or erroneous sentence based upon the invalid special verdict harmless error?

C. SUPPLEMENTAL STATEMENT OF THE CASE

The facts are set forth in Appellant’s initial brief and are incorporated herein. The following additional facts pertain to the supplemental issues raised herein:

The jury was asked to find by special verdicts whether the crimes of residential burglary and protection order violation took place in front of

a minor child. CP 22. The jury was instructed in pertinent part regarding the special verdicts:

You will also be given two special verdict forms for the crimes of Burglary in the First Degree or Residential Burglary as charged in Count I, and violation of a No Contact Order as charged in Count II. If you find the defendant not guilty of either of these crimes, do not use the corresponding special verdict form(s). If you find the defendant guilty of either crime, you will then use the corresponding special verdict form(s) and fill in the blank with the answer “yes” or “no” according to the decision you reach. In order to answer the special verdict form(s) “yes”, you must unanimously be satisfied beyond a reasonable doubt that “yes” is the correct answer. If you unanimously have a reasonable doubt as to this question, you must answer “no”.

Instruction No. 24, CP 57.

The jury found Mr. Cook guilty of four crimes, including residential burglary and protection order violation, and answered “yes” to the special verdicts as to these two crimes. CP 22. The standard range for residential burglary was 6–12 months. CP 13. Based on the jury finding of the aggravating factors, the trial court imposed an exceptional sentence of 12 months plus 1 day of incarceration on the burglary and concurrent sentences within the standard ranges on the other three counts. CP 13, 15;

7/17/08 RP 5–6.

D. ARGUMENT

1. The exceptional sentence should be vacated because the aggravating factors were based on an invalid special verdict in which the jury was incorrectly instructed it had to be unanimous to answer “no” to the special verdicts.

A criminal defendant may not be convicted unless a twelve-person jury unanimously finds every element of the crime beyond a reasonable doubt. U.S. Const. amends. VI, XIV; Const. art. I, §§ 21, 22; *State v. Williams-Walker*, 167 Wn.2d 889, 895-97, 225 P.3d 913 (2010); *State v. Ortega-Martinez*, 124 Wn.2d 702, 707, 881 P.2d 213 (1994); *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.” *State v. Bashaw*, 169 Wn.2d 133, 146-47, 234 P.3d 195 (2010); *Goldberg*, 149 Wn.2d at 893, 72 P.3d 1083. Where the jury is deadlocked or cannot decide, the answer to the special verdict is “no.” *Id.*

In *Goldberg*, the jury was given the following special verdict instruction:

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".

Id. Although the Supreme Court vacated the special verdict for other reasons, it did not find fault with this instruction. *Goldberg*, 149 Wn.2d at 894, 72 P.3d 1083.

In *Bashaw*, the Supreme Court vacated sentencing enhancements where the jury was given an instruction requiring jury unanimity for special verdicts. *Bashaw*, 169 Wn.2d at 147-48, 234 P.3d 195. In *Bashaw*, the jury was incorrectly instructed, "Since this is a criminal case, all twelve of you must agree on the answer to the special verdict." *Bashaw*, 169 Wn.2d at 139, 234 P.3d 195. Citing *Goldberg*, the *Bashaw* court held:

Applying the *Goldberg* rule to the present case, the jury instruction stating that all 12 jurors must agree on an answer to the special verdict was an incorrect statement of the law. Though unanimity is required to find the presence of a special finding increasing the maximum penalty, see *Goldberg*, 149 Wn.2d at 893, it is not required to find the absence of such a special finding. The jury instruction here stated that unanimity was required for either determination. That was error.

Bashaw, 169 Wn.2d at 147, 234 P.3d 195.

In the present case, the jurors were instructed even more specifically than in Bashaw, and were told they *must* be unanimous to return a “no” verdict:

You will also be given two special verdict forms for the crimes of Burglary in the First Degree or Residential Burglary as charged in Count I, and violation of a No Contact Order as charged in Count II. ... If you find the defendant guilty of either crime, you will then use the corresponding special verdict form(s) and fill in the blank with the answer “yes” or “no” according to the decision you reach. In order to answer the special verdict form(s) “yes”, you must unanimously be satisfied beyond a reasonable doubt that “yes” is the correct answer. *If you unanimously have a reasonable doubt as to this question, you must answer “no”.*

Instruction No. 24, CP 57 (emphasis added).

This instruction, like the one given in *Bashaw*, incorrectly requires jury unanimity to answer “no” to the special verdicts, contrary to *Bashaw* and *Goldberg*. Therefore, the special verdicts were invalid.

2. A sentence enhancement is illegal or erroneous when based upon an invalid special verdict. Illegal or erroneous sentences may be challenged for the first time on appeal, regardless of whether defense counsel registered a proper objection before the trial court.

Recently, in *State v. Nunez*, ___ Wn. App. ___, 2011 WL 505335 (No. 28259-7-III, February 24, 2011), the Court of Appeals found the trial court erred when it required the jury to be unanimous to find the State had not proven the special allegation. However, the Court ruled the error was not a manifest constitutional error and thus could not be raised for the first time on appeal. Decision at 13-16. The decision in *Nunez* directly conflicts with other decisions from the Washington Supreme Court which found such an error can be raised for the first time on appeal. *Bashaw*, 169 Wn.2d at 146-47; *Goldberg*, 149 Wn.2d at 892-94.

“[I]llegal or erroneous sentences may be challenged for the first time on appeal,” regardless of whether defense counsel registered a proper objection before the trial court. *State v. Ross*, 152 Wn.2d 220, 229, 95 P.3d 1225 (2004), quoting *State v. Ford*, 137 Wn.2d 472, 477, 973 P.2d 452 (1999). A sentence enhancement must be authorized by a valid jury verdict. *Williams-Walker*, 167 Wn.2d at 900. Error occurs when a trial court imposes a sentence enhancement not authorized by a valid jury

verdict. See *State v. Recuenco*, 163 Wn.2d 428, 440, 180 P.3d 1276 (2008) (the error in imposing a firearm enhancement where the jury found only a deadly weapon, occurred during sentencing, not in the jury's determination of guilt).

Similarly, the error here occurred not just in the use of the invalid instruction, but more importantly when the trial court imposed the exceptional sentence based upon the invalid special verdicts. Thus, contrary to the Court of Appeals ruling in *Nunez*, Mr. Cook *could* raise this issue for the first time on appeal because it involved the imposition of an illegal or erroneous sentence which was based upon an invalid special verdict -- itself the product of an improper jury instruction.

The instructions in the present case incorrectly required jury unanimity for the jury to answer "no" to the special verdicts, contrary to *Bashaw* and *Goldberg*. The remedy for an improper special verdict is to strike the enhancement, not remand for a new trial. *Williams-Walker*, 167 Wn.2d at 899-900; *Recuenco*, 163 Wn.2d at 441-42.

3. The illegal or erroneous sentence based upon an invalid special verdict was not harmless error.

In order to hold that a jury instruction error was harmless, "we must conclude beyond a reasonable doubt that the jury verdict would have

been the same absent the error.' " *Bashaw*, 169 Wn.2d at 147, 234 P.3d 195 (citing *State v. Brown*, 147 Wash.2d 330, 341, 58 P.3d 889 (2002) (quoting *Neder v. United States*, 527 U.S. 1, 19, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999))). The *Bashaw* court found the erroneous special verdict instruction was an incorrect statement of the law. *Bashaw*, 169 Wn.2d at 147, 234 P.3d 195. A clear misstatement of the law is presumed to be prejudicial. *Keller v. City of Spokane*, 146 Wn.2d 237, 249, 44 P.3d 845 (2002) (citing *State v. Wanrow*, 88 Wn.2d 221, 239, 559 P.2d 548 (1977)).

In finding the instructional error not harmless the *Bashaw* court stated the following:

The State argues, and the Court of Appeals agreed, that any error in the instruction was harmless because the trial court polled the jury and the jurors affirmed the verdict, demonstrating it was unanimous. This argument misses the point. The error here was the procedure by which unanimity would be inappropriately achieved. In *Goldberg*, the error reversed by this court was the trial court's instruction to a nonunanimous jury to reach unanimity. 149 Wn.2d at 893, 72 P.3d 1083. The error here is identical except for the fact that that direction to reach unanimity was given preemptively.

The result of the flawed deliberative process tells us little about what result the jury would have reached had it been given a correct instruction. *Goldberg* is illustrative. There, the jury initially answered "no" to the special verdict, based on a lack of unanimity, until told it must reach a unanimous verdict, at which point it answered "yes." *Id.* at 891-93, 72 P.3d 1083. Given different instructions, the jury returned different verdicts. We can only speculate as to why this might be so. For instance, when unanimity is required, jurors with reservations might not hold to their

positions or may not raise additional questions that would lead to a different result. We cannot say with any confidence what might have occurred had the jury been properly instructed. We therefore cannot conclude beyond a reasonable doubt that the jury instruction error was harmless. As such, we vacate the remaining sentence enhancements and remand for further proceedings consistent with this opinion.

Bashaw, 169 Wn.2d at 147-48, 234 P.3d 195.

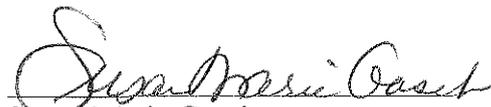
The situation in the present case is indistinguishable from *Bashaw*.

It is impossible to speculate about what the jury would have decided if it had been given the correct instruction. Therefore, the error was not harmless.

E. CONCLUSION

For the reasons stated, this Court should reverse its decision in *Nunez*, follow the precedent set forth in *Bashaw*, and vacate the exceptional sentence.

Respectfully submitted March 31, 2011.



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