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COURT OF APPEALS
STATE OF WASHINGTON
BY _____

No. 28613-4-III

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

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

SHAWN M. TAYLOR,

Defendant/Appellant.

Appellant's Reply Brief

DAVID N. GASCH
WSBA No. 18270
P.O. Box 30339
Spokane, WA 99223-3005
(509) 443-9149
Attorney for Appellant

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A. ARGUMENT—ISSUE No. 1.

The State contends first that Taylor failed to preserve this issue for appeal. Response Brief P. 3. However, an error may be raised for the first time on appeal if it is a manifest error involving 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))).

Extensive authority supports the proposition that instructional error of the nature alleged here is of sufficient constitutional magnitude to be raised for the first time on appeal. Id. (citing State v. Peterson, 73 Wn.2d 303, 306, 438 P.2d 183 (1968)); State v. Scott, 110 Wn.2d 682, 688 n. 5, 757 P.2d 492 (1988); Martinez v. Borg, 937 F.2d 422, 423 (9th Cir.1991). This is not a case where a jury instruction merely failed to define a term, or where a trial court did not instruct on a lesser included offense that was never requested. See Scott, 110 Wn.2d at 688 n. 5, 757 P.2d 492. Instead, the instruction herein misstates the requirement of unanimity for the jury to answer "no" to the special verdict.

The State correctly states that the court in State v. Bashaw, 169 Wn.2d 133, 234 P.3d 195 (2010), did not engage in a manifest constitutional error analysis for the instructional error. Response Brief p. 4. However, since the Bashaw court did engage in a constitutional harmless error analysis, as the State points out, it must have deemed the instructional error to be one of manifest constitutional error. Bashaw, 169 Wn.2d at 147-48, 234 P.3d 195. As such, it may be considered for the first time on appeal. RAP 2.5(a)(3)

Next, the State argues the error was harmless under a constitutional harmless error analysis. This assertion is incorrect. The Bashaw court found the erroneous 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)). Moreover, 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 Goldberg¹, the error reversed by this court was the

¹ State v. Goldberg, 149 Wn.2d 888, 72 P.3d 1083 (2003)

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 were given the correct instruction. Therefore, the error is not harmless.

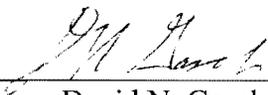
Finally, the State asserts, without citation to any legal authority, that even if the instruction was not harmless, the proper remedy is to remand for a new trial. This assertion is also incorrect. In Goldberg, the Court found it was error for the trial court to order continued deliberations after the jury failed to reach a unanimous decision on the special verdict.

Goldberg, 149 Wn.2d at 894, 72 P.3d 1083. The Court then vacated the finding on the aggravating factor. Id. Similarly, the Court in Bashaw vacated the sentencing enhancements after the jury was given an incorrect special verdict instruction identical to the one in the present case. Bashaw, 169 Wn.2d at 147, 234 P.3d 195. The same remedy should be applied here.

B. CONCLUSION

For the reasons stated herein, and in appellant's initial brief, the special verdict should be vacated.

Respectfully submitted November 12, 2010.



David N. Gasch #18270
Attorney for Appellant