

FILED

SEP 15 2016

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

No. 286274-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

ROBERT DANIEL WEBB,

Appellant.

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

SUPPLEMENTAL BRIEF OF APPELLANT

ELAINE L. WINTERS
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

FILED

SEP 15 2016

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

No. 286274-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

ROBERT DANIEL WEBB,

Appellant.

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

SUPPLEMENTAL BRIEF OF APPELLANT

ELAINE L. WINTERS
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

A. SUPPLEMENTAL ASSIGNMENT OF ERROR..... 1

B. ISSUE PERTAINING TO SUPPLEMENTAL ASSIGNMENT
OF ERROR 1

C. STATEMENT OF THE CASE2

D. ARGUMENT2

THE AGGRAVATING FACTOR AND EXCEPTIONAL
SENTENCE MUST BE VACATED BECAUSE THE JURY
WAS INCORRECTLY INSTRUCTED THAT UNANIMITY
WAS REQUIRED TO ANSWER “NO” ON THE SPECIAL
VERDICT FORM2

E. CONCLUSION7

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

State v. Bashaw, 169 Wn.2d 133, 234 P.3d 195 (2010)..... 3, 4, 5

State v. Goldberg, 149 Wn.2d 888, 72 P.3d 1083 (2003)..... 3, 5

State v. Hagar, 158 Wn.2d 369, 144 P.3d 298 (2006)..... 3

State v. Ortega-Martinez, 124 Wn.2d 702, 881 P.2d 213 (1994)..... 3

State v. Williams-Walker, 167 Wn.2d 889, 225 P.3d 913 (2010)..... 3

United States Supreme Court Decision

Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531,
159 L.Ed.2d 403 (2005) 3

United States Constitution

U.S. Const. amend. VI..... 2

U.S. Const. amend. XIV 2

Washington Constitution

Const. art. I, § 21..... 2

Const. art. I, § 22..... 2

Washington Statutes

RCW 9.94A.5056
RCW 9.94A.5106
RCW 9.94A.5156
RCW 9.94A.5273
RCW 9.94A.5352, 6
RCW 9.94A.5376
RCW 9A.20.0216
RCW 9A.56.2006
RCW 69.50.435.....5

A. SUPPLEMENTAL ASSIGNMENT OF ERROR

6. The trial court erred by instructing the jury it had to be unanimous to answer “no” to the special verdict form. CP 58-59 (Instruction 21).

B. ISSUE PERTAINING TO SUPPLEMENTAL ASSIGNMENT OF ERROR

6. To find an aggravating factor applies to a defendant’s crime, the jury must unanimously agree the aggravator is proved beyond a reasonable doubt, but the jury need not be unanimous to conclude the aggravator was not found. Const. art. I, §§ 21, 22. The jury found Mr. Webb committed first degree robbery and also found the crime “involved a destructive and foreseeable impact on persons other than the victim.” The jury finding authorized the court to sentenced Mr. Webb to a sentence above the standard sentence range, and the court imposed an exceptional sentence. Where the jury was incorrectly instructed it had to be unanimous to find the enhancement was not proven, must the aggravating factor be vacated because this Court cannot conclude beyond a reasonable doubt how the jury would have answered the special verdict form if correctly instructed?

C. STATEMENT OF THE CASE

After a jury trial, Robert Dennis Webb was convicted of first degree robbery, which the jury found involved a destructive and foreseeable impact on persons other than the victim, and reckless endangerment. CP 61-63; RCW 9.94A.535(3)(r).

Mr. Webb's standard sentence range for first degree robbery was 31 to 41 months. CP 66. The court imposed an exceptional sentence of 82 months based upon the jury's finding of the aggravating factor. CP 66-67, 77; 11/23/09RP 12. The court also ordered Mr. Webb serve 12 months in confinement for the crime of reckless endangerment, and ordered the sentences run consecutively, for a total of 94 months confinement. CP 67; 11/23/09RP 12.

D. ARGUMENT

THE AGGRAVATING FACTOR AND EXCEPTIONAL SENTENCE MUST BE VACATED BECAUSE THE JURY WAS INCORRECTLY INSTRUCTED THAT UNANIMITY WAS REQUIRED TO ANSWER "NO" ON THE SPECIAL VERDICT FORM

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). The jury was thus required to unanimously find the State had proved Mr. Webb's robbery involved a destructive and foreseeable impact on persons other than the victim beyond a reasonable doubt. Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2005); State v. Hagar, 158 Wn.2d 369, 373-74, 144 P.3d 298 (2006); RCW 9.94A.527(3); CP 52.

The jury was thus required to unanimously find beyond a reasonable doubt that Mr. Webb's offense involved a destructive and foreseeable impact on someone other than the victim in order to answer "yes" to the special verdict form. Unanimity, however, is not required for a "no" answer. State v. Bashaw, 169 Wn.2d 133, 146-47, 234 P.3d 195 (2010); State v. Goldberg, 149 Wn.2d 888, 893-94, 72 P.3d 1083 (2003). Because the jury was incorrectly instructed it had to be unanimous in order to answer "no" on the special verdict form, the aggravating factor must be vacated. Bashaw, 169 Wn.2d at 148.

The jury in Mr. Webb's case was provided with special verdict form that required a "yes" or "no" answer to the question, "Did the crime involve a destructive and foreseeable impact on persons other than the victim?" CP 62. In its concluding

instruction, the trial court informed the jury that its decision had to be unanimous in order to answer either “yes” or “no” to answer the question in the special verdict form. CP 58-59 (Instruction 21). The court’s concluding instruction concerning the special verdict form read:

You will also be given a special verdict form for the crimes of Robbery in the First Degree and/or Robbery in the Second Degree. If you find the defendant not guilty of both of these crimes, do not use the special verdict form. If you find the defendant guilty of Robbery in either the First or Second Degree, you will then use the special verdict form and fill in the blank with the answer “yes” or “no” according to the decision you reach. Because it is a criminal case, all twelve of you must agree in order to answer the special verdict form. 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 unanimously have a reasonable doubt as to this question, you must answer “no.”

CP 58-59 (emphasis added).

A similar instruction was found to be incorrect in Bashaw, supra. The defendant in that case was charged with three counts of delivery of a controlled substance, and the State also alleged each offense was committed within 1,000 feet of a school bus route stop. Bashaw, 169 Wn.2d at 137. The relevant enhancement statute required the court to double the defendant’s maximum sentence if the jury found an enhancement. Id.; RCW

69.50.435(1). Like the jury in Mr. Webb's case, the court told the jury, "Since this is a criminal case, all twelve of you must agree on the answer to the special verdict." Id. at 139.

Relying upon its prior opinion in Goldberg, supra, the Bashaw Court found the jury had been improperly instructed because "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 145 (citing Goldberg, 149 Wn.2d at 895). The court concluded it could not determine how the jury would have answered the special verdict forms if it had been properly instructed and thus the error was not harmless beyond a reasonable doubt. Id. at 147-48. The court therefore vacated the sentencing enhancements and remanded for the imposition of a sentence without the enhancements. Id. at 148; Goldberg, 149 Wn.2d at 895.

The jury instruction in Mr. Webb's case also informed the jury that it had to be unanimous to answer the special verdict form question in the negative. CP 58-59. This was even more clear than in Bashaw, as the jury was not only told its answer to the verdict form had to be unanimous, it was specifically instructed "If

you unanimously have a reasonable doubt as to this question, you must answer 'no.'" CP 59. Thus, the instruction was improper.

As result of the jury's finding on the special verdict form, the court was authorized by the Sentencing Reform Act of 1985 to sentence Mr. Webb to a term of confinement up to the maximum allowed under RCW 9A.20.021, in this case life in prison. RCW 9.94A.535; RCW 9.94A.537(6); RCW 9A.20.021(1)(a) (maximum term for class A felony is life); RCW 9A.56.200(2) (first degree robbery is class A felony). The court therefore sentenced Mr. Webb to 82 months in prison, twice the high end of the applicable standard sentence range. CP 66-67; RCW 9.94A.505(2)(a)(9); RCW 9.94A.510 (Table 1); RCW 9.94A.515 (Table 2).

As in Bashaw, the State cannot demonstrate that the improper instruction was harmless because we do not know what the jury would have done if properly instructed. This Court thus cannot conclude the error was harmless beyond a reasonable doubt. The special verdict and Mr. Webb's exceptional sentence must be vacated and his case remanded to the superior court for a sentence within the statutory standard sentence range.

E. CONCLUSION

The jury finding that Mr. Webb's robbery involved a foreseeable, destructive impact upon persons other than the victim must be vacated because the jury was incorrectly instructed that is had to be unanimous to answer the special verdict form in the negative.

DATED this 13th day of September 2010.

Respectfully submitted,



Elaine L. Winters – WSBA #7780
Washington Appellate Project
Attorneys for Appellant

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 28627-4-III
v.)	
)	
ROBERT WEBB,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 13TH DAY OF SEPTEMBER, 2010, I CAUSED THE ORIGINAL **SUPPLEMENTAL BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

<input checked="" type="checkbox"/> LAURA HOOPER, DPA KITTITAS COUNTY PROSECUTOR'S OFFICE 205 W 5 TH AVE, STE 213 ELLENSBURG, WA 98926	(X) () ()	U.S. MAIL HAND DELIVERY _____
<input checked="" type="checkbox"/> ROBERT WEBB 334662 COYOTE RIDGE CC PO BOX 769 CONNELL, WA 99326-0769	(X) () ()	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 13TH DAY OF SEPTEMBER, 2010.

X _____ 

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710