

No. 28673-8-III
IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

CHANCEY D. HOWARD,

Defendant/Appellant.

Appellant's Brief

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in instructing the jury it had to be unanimous to answer “no” to the special verdict.

2. The trial court erred in imposing the firearm enhancement on Count I.

Issue Pertaining to Assignments of Error

Should the firearm enhancement and special verdict be vacated because the jury was incorrectly instructed it had to be unanimous to answer “no” to the special verdict?

B. STATEMENT OF THE CASE

Chancey Howard was convicted by a jury of first degree robbery and unlawful possession of a firearm. CP 49-52. On Count I the jury was asked to find by special verdict that Mr. Howard was armed with a firearm when the offense was committed. CP 50. The jury was instructed in pertinent part regarding the verdicts and special verdict:

Because this is a criminal case, each of you must agree for you to return a verdict. When all of you have so agreed, fill in the proper form of verdict or verdicts to express your decision.

If you find the defendant guilty of the crime of robbery in the first degree, you must then make a decision with respect to the firearm and indicate that decision on form A-1 [special verdict] and whatever decision you place on form A-1 must be unanimous.

RP 284, 286.¹

The jury answered “yes” to the special verdict. CP 47. Based on this answer, the court imposed an additional 60-month firearm enhancement on Count I. RP 335.

This appeal followed. CP 56.

C. ARGUMENT

1. The firearm enhancement and special verdict should be vacated because the jury was incorrectly instructed it had to be unanimous to answer “no” to the special verdict.²

Manifest Constitutional Error. As a threshold matter, it should be noted that this issue was not raised at the court below by excepting to the special verdict instruction. 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))).

¹ All citations designated “RP” are to the trial held 11/12-11/13/09 and the sentencing held 4/1/10.

² Assignments of error 1 & 2.

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.

In State v. Bashaw, 169 Wn.2d 133, 234 P.3d 195 (2010), the most recent case addressing this issue regarding the special verdict instruction, the Court did not engage in a manifest constitutional error analysis for the instructional error. Bashaw, 169 Wn.2d at 145-48, 234 P.3d 195. However, since no exception to the instruction was made at the trial court, and since the Bashaw Court *did* engage in a constitutional harmless error analysis, the Court 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).

Improper Special Verdict Instruction. Washington requires unanimous jury verdicts in criminal cases. Const. art. I, § 21; 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.” 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.

More recently, in Bashaw, the Supreme Court vacated sentencing enhancements where the jury was given an instruction requiring jury unanimity for special verdicts similar to the one given in this case. Bashaw, 169 Wn.2d at 147-48, 234 P.3d 195. In this case as well as 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..

The instruction in the present case incorrectly requires jury unanimity for the jury to answer “no” to the special verdict, contrary to Bashaw and Goldberg. Since this instruction misstates the law, the special verdict enhancement must be vacated.

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. Moreover, there was conflicting testimony about whether the alleged weapon was actually a firearm or a

pepper spray dispenser that looked like a gun. See RP 37, 91, 124, 240.

Therefore, the error was not harmless.

D. CONCLUSION

For the reasons stated, the special verdict firearm enhancement should be vacated.

Respectfully submitted November 12, 2010.



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_____)	

I, David N. Gasch, do hereby certify under penalty of perjury that on November 12, 2010, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, a true and correct copy of Appellant's Brief:

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