

No. 28835-8-III
IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

ANTHONY D. SINGH,

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 verdicts.

2. The trial court erred in imposing firearm enhancement based on the answers to the special verdicts.

3. The trial court erred in imposing an exceptional sentence

Issues Pertaining to Assignments of Error

1. Should the firearm enhancements based on special verdicts be vacated because the jury was incorrectly instructed it had to be unanimous to answer “no” to the special verdicts?

2. Should the exceptional sentence be vacated because the court’s stated reason for imposing the exceptional sentence—that the firearm enhancements used up all but 12 months of the 120-month statutory maximum on the underlying charges—no longer exists?

B. STATEMENT OF THE CASE

Anthony Singh was convicted by a jury of second degree assault while armed with a firearm, drive by shooting, first degree unlawful possession of a firearm, conspiracy to commit second degree assault while armed with a firearm, and tampering with a witness. CP 649-56. On Counts I and IV the jury was asked to find by special verdict that the

defendant was armed with a firearm. CP 650, 654. The jury was instructed in pertinent part regarding the special verdict:

You will also be given special verdict forms for the crimes charged in counts 1 and 4. If you find the defendant not guilty of these crimes do not use the special verdict forms. If you find the defendant guilty of these crimes you will then use the special verdict forms and fill in the blank with the answer "yes" or "no" according to the decision you reach. Because this is a criminal case, all twelve of you must agree in order to answer the special verdict forms "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".

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 verdict forms to express your decision.

CP 648.

The jury answered "yes" to the special verdicts. CP 650, 654.

Based on the jury's answer, and the doubling of the enhancements due to Mr. Singh's prior convictions, the court imposed an additional 108 months of firearm enhancements on Counts I and IV. CP 855-56; 2/10/10 RP 30-35. The court then imposed an exceptional sentence, based on the fact that the firearm enhancements used up all but 12 months of the 120-month statutory maximum on the underlying charges. *Id.*

This appeal followed. CP 875-98.

C. ARGUMENT

1. The firearm enhancements based on the special verdicts should be vacated because the jury was incorrectly instructed it had to be unanimous to answer “no” to the special verdicts.¹

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))).

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

¹ Assignments of error 1 & 2.

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 effectively alters the burden of proof because it 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 Supreme Court case addressing this issue regarding the special verdict instruction, no exception to the instruction was made at the trial court. *State v. Bashaw*, 144 Wn. App. 196, 199, 182 P.3d 451 (2008). The Supreme 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 the Supreme Court did engage in a constitutional harmless error analysis, 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).

Invited Error Doctrine. The State may argue under the invited error doctrine that Mr. Singh is precluded from challenging the special verdict instruction in this case because he failed to take exception to that instruction. The invited error doctrine does not go that far. The doctrine

of invited error "prohibits a party from setting up an error at trial and then complaining of it on appeal." *In re Call*, 144 Wn.2d 315, 328, 28 P.3d 709 (2001) (citing *In re Thompson*, 141 Wn.2d 712, 723, 10 P.3d 380 (2000)). The invited error doctrine "appears to require affirmative actions by the defendant ... [in which] the defendant took knowing and voluntary actions to set up the error; where the defendant's actions were not voluntary, courts do not apply the doctrine. *Id.* (citing *Thompson*, 141 Wn.2d at 724, 10 P.3d 380)).

In *Call*, the Supreme Court found the defendant did not invite the error where his attorney wrote the wrong offender score and standard range on the guilty plea statement that the defendant signed. Neither the defendant, the prosecuting attorney, or the sentencing court was aware of the error in calculating the offender score and standard range. *Call*, 144 Wn.2d at 324-28, 28 P.3d 709.

Similarly, in the present case, Mr. Singh did not invite the error where his attorney failed to take exception to an erroneous instruction that neither his attorney, the prosecutor, nor the court was aware. Exceptions to the jury instructions were taken prior to December 15, 2009. Since *Bashaw* was not decided until July 1, 2010, this was not a situation where there were affirmative actions by the defendant in which he took knowing

and voluntary actions to set up the error. Therefore, he did not invite the error.

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.

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 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.” CP 648; *Bashaw*, 169 Wn.2d at 139, 234 P.3d 195. The jury herein was also specifically instructed, “If you *unanimously* have a reasonable doubt as to this question, you must answer no.” CP 648 (emphasis added).

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. *Goldberg*, 149 Wn.2d at 894, 72 P.3d 1083; *Bashaw*, 169 Wn.2d at 147, 234 P.3d 195.

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 Wn.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.

2. The exceptional sentence should be vacated because the court's stated reason for imposing the exceptional sentence—that the firearm enhancements used up all but 12 months of the 120-month statutory maximum on the underlying charges—no longer exists.²

An appellate court analyzes the appropriateness of an exceptional sentence by asking: (1) Are the reasons given by the sentencing judge supported by the record under the clearly erroneous standard? (2) Do the

² Assignment of Error No. 3.

reasons justify a departure from the standard range under the de novo review standard? and (3) Is the sentence clearly too excessive or too lenient under the abuse of discretion standard? *State v. Law*, 154 Wn.2d 85, 93, 110 P.3d 717 (2005) (quoting *State v. Ha'mim*, 132 Wn.2d 834, 840, 940 P.2d 633 (1997)); RCW 9.94A.585(4).

The trial court may impose a sentence outside the standard range only if there are "substantial and compelling reasons justifying an exceptional sentence." RCW 9.94A.535. The legislature created a nonexclusive list of illustrative factors that support an exceptional sentence. *Id.* One such aggravating circumstance exists if "[t]he operation of the multiple offense policy of RCW 9.94A.589 results in a presumptive sentence that is clearly too lenient in light of the purpose of this chapter, as expressed in RCW 9.94A.010." RCW 9.94A.535(2)(i).

Given the purpose of the multiple offense policy, a standard range sentence is not "clearly too lenient" simply because the defendant has an offender score greater than nine. *State v. Stephens*, 116 Wn.2d 238, 246, 803 P.2d 319(1991). Instead, the trial court may impose an exceptional sentence when "some extraordinarily serious harm or culpability resulting from multiple offenses ... would not otherwise be accounted for in determining the presumptive sentencing range." *State v. Brundage*, 126

Wn.App. 55, 66, 107 P.3d 742 (2005) (quoting *State v. Fisher*, 108 Wn.2d 419, 428, 739 P.2d 683 (1987)).

Here, the court imposed an exceptional sentence, based on the fact that the firearm enhancements used up all but 12 months of the 120-month statutory maximum on the underlying charges. CP 855-56. As shown in the preceding issue, those firearm enhancements should be vacated because of the improper special verdict instruction. Accordingly, the court's only stated reason to impose the exceptional sentence no longer exists. Therefore, there are no longer any "substantial and compelling reasons justifying an exceptional sentence." RCW 9.94A.535.

D. CONCLUSION

For the reasons stated, the special verdict firearm enhancements and the exceptional sentence should be vacated and the case remanded for resentencing within the standard range.

Respectfully submitted February 15, 2011.



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PROOF OF SERVICE
(RAP 18.5(b))

I, David N. Gasch, do hereby certify under penalty of perjury that on February 15, 2011, 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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April 11, 2011

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APPELLANT'S
BRIEF
COURT OF APPEALS
STATE OF WASHINGTON
SH

RE: State v. Anthony Singh, No. 28835-8-III.

Dear Ms. Townsley:

As permitted by RAP 10.8, Appellant cites as additional authority pertaining to Appellant's ~~Supplemental~~ Brief: *State v. Ryan*, No. 64726-1 (Apr. 04, 2011). I am enclosing 5 copies of this letter.

Sincerely,


David N. Gasch

Enclosures as stated

cc: Mark Lindsey