FILED
APR 28 2011
COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By_____

No. 292380

IN THE COURT OF APPEALS OF THE
STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent/ Cross Appellant,

vs.

ARMONDO HERNANDEZ GONZALEZ,

Appellant.

APPEAL FROM THE SUPERIOR COURT
OF YAKIMA COUNTY, WASHINGTON

THE HONORABLE C. JAMES LUST, JUDGE

BRIEF OF RESPONDENT/CROSS APPELLANT

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Prosecuting Attorney

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I. ASSIGNMENTS OF ERROR

A. ISSUES PRESENTED BY ASSIGNMENTS OF ERROR.

1. Whether the trial court abused its discretion by declining to remove Juror Number 4?

2. Whether Instruction Number 39, the special verdict instruction, constituted instructional error in light of State v. Goldberg, 149 Wn.2d 888, 72 P.3d 1083 (2003), and State v. Bashaw, 169 Wn.2d 133, 234 P.3d 195 (2010)?

B. ANSWERS TO ASSIGNMENTS OF ERROR.

1. As Juror Number 4 did not express any preconceived ideas about Mr. Gonzalez' guilt, or identify any specific threats from individuals associated with the participants in the trial, the court was well within its discretion in declining to remove him from the jury.

2. Gonzalez is precluded from raising his second assignment of error, as he did not take exception to Instruction 39 at trial, and the instruction does not constitute manifest constitutional error. In the alternative, the instruction constituted harmless error.

II. ASSIGNMENTS OF ERROR ON CROSS REVIEW.

A. ASSIGNMENTS OF ERROR.

1. The trial court erred in instructing the jury that it could find Gonzalez guilty of first or second degree manslaughter as lesser included offenses of second degree murder. **(CP 135-141)**

2. The trial court erred in instructing the jury that it could find Gonzalez guilty of second degree assault as a lesser included offense of first degree assault. **(CP 152-154)**

B. ISSUE PRESENTED BY ASSIGNMENT OF ERROR.

1. Whether the evidence supported an inference that the lesser included offenses were committed to the exclusion of the charged offenses, or in other words, whether the factual prong of the *Workman* test is met in light of Gonzalez' actions, and the number of shots fired toward the victims?

III. STATEMENT OF THE CASE

The Statement of Facts contained in Gonzalez' opening brief is generally accurate, and is adopted pursuant to RAP 10.3(b), though the State submits the following supplement of that narrative.

Juror Number 4 expressed general concerns about the anonymity of the jury process, but was not more specific:

> THE COURT: -- could talk into the mike.
> Mr. -------, I'm advised by the bailiff that you have expressed some concern about retaliation; is that right?

> JUROR NUMBER 4: Well, just concerned for, you know, why my name is said out loud and, you know.
> THE COURT: Well, let me –
> JUROR NUMBER 4: Safety issues –
> THE COURT: Yeah.
> JUROR NUMBER 4: -- that kind of thing.
>
> . . .
>
> THE COURT: I'm advised that no one else has been here. There are members of the Defendant's family that have been subpoenaed as witnesses and may testify, but they're not in the courtroom and they can't come in the courtroom. Does that help in any way with respect to your concerns?
> JUROR NUMBER 4: To be honest, no.
> THE COURT: Okay. You want --
> JUROR NUMBER 4: What bothers me is – is, you know, not much – not necessarily what's happening here, but it could be anywhere. You know what I'm saying? I thought it was gonna be more anonymous than –
> THE COURT: There's nothing –
> JUROR NUMBER 4: -- it is.
> THE COURT: -- anonymous about a criminal trial.
> JUROR NUMBER 4: Well –
>
> . . .
>
> **(RP 596-98)**

During counsel's conference with the court on jury instructions, the deputy prosecutor identified his concern with the unanimity language in the special verdict instruction:

> MR. RAMM: . . . And there is an issue about whether or not they have to agree – unanimously agree as to no. And so I think that we need to tweak that instruction to –
> THE COURT: Yeah.
> MR. RAMM: -- to take that out so that –
> THE COURT: I know what you're talking about.

> MR. RAMM: --yeah, so that they don't have to be unanimous as to no.
>
> **(RP 1117)**

In relevant part, Instruction Number 39 provided that:

> You will also be given special verdict forms for the crimes charged in counts 1 and 2. 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 or any lesser crime or degree, 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. 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". **If you cannot agree on a verdict, do not fill in the blank provided in the special verdict form.**
>
> **(CP 163-64, emphasis added)**

The emphasized language above is not included in the pattern instruction, WPIC 160.00.

IV. ARGUMENT.

1. **The court did not abuse its discretion when it did not remove Juror Number 4.**

It is well-settled that a court has a continuous obligation to excuse unfit jurors:

> It shall be the duty of a judge to excuse from further jury service any juror, who in the opinion of the judge, has manifested unfitness as a juror by reason of bias, prejudice,

> indifference, inattention or any physical or mental defect or by reason of conduct or practices incompatible with proper and efficient jury service.
>
> RCW 2.36.110

Also, CrR 6.5 provides that in the event a juror is found unable to perform his or her duties, "the court shall order the juror discharged."

The decision whether to excuse a juror is reviewed for abuse of discretion. State v. Hughes, 106 Wn.2d 176, 204, 721 P.2d 902 (1986), *cited in* State v. Jorden, 103 Wn. App. 221, 226, 11 P.3d 866 (2000). At issue in Jorden was a juror who was removed after she was observed by the court to be dozing off and otherwise inattentive. The defendant assigned error to the court's failure to make formal findings that she had missed important testimony or prejudiced either party. Significantly, the Court of Appeals held that the test was whether the juror committed misconduct, and was "unwilling to impose on the trial court a mandatory format for establishing such a record. Instead the trial judge has discretion to hear and resolve the misconduct issue in a way that avoids tainting the juror and, thus, avoids creating prejudice against either party." Jorden, 103 Wn. App. at 229.

In the other case relied upon by Gonzalez, the Washington Supreme Court held that a trial court did not manifestly abuse its discretion in denying a defendant's challenge of jurors for cause. State v.

Rupe, 108 Wn.2d 734, 749, 743 P.2d 210 (1987). In that case, the defendant argued that the court denied his right to a fair and impartial jury by refusing to excuse three jurors who he maintained were disposed to impose the death penalty. Id., at 748.

The Court observed that the responses of the three jurors were, in fact, equivocal, and that while a defendant is guaranteed the right to a fair and impartial jury under both the Sixth Amendment and article 1, section 22, a trial court need not disqualify a juror with preconceived ideas if the juror can "put these notions aside and decide the case on the basis of the evidence given at the trial and the law as given him by the court." Id., at 748, *quoting* State v. Mak, 105 Wn.2d 692, 707, 718 P.2d 407, *cert. denied*, 479 U.S. 995, 93 L. Ed. 2d 599, 107 S. Ct. 599 (1986), *overruled on other grounds,* State v. Hill, 123 Wn.2d 641, 645, 870 P.2d 313 (1994).

The Rupe decision reiterated that "[g]ranting or denying a challenge for cause is within the discretion of the trial court, and will be reversed only for manifest abuse of discretion." Rupe, 108 Wn.2d at 748, *citing* State v. Gilcrist, 91 Wn.2d 603, 611, 590 P.2d 809 (1979). Indeed, "[t]he trial judge is best situated to determine a juror's competency to serve impartially." Rupe, 108 Wn.2d at 749, (citations omitted).

Here, there was no indication that Juror Number 4 was inattentive, had committed any misconduct, had preconceived ideas as to Gonzalez'

guilt, or was otherwise unable to perform his duties. Instead, the record reflects that he had a general anxiety about his lack anonymity during the jury selection process, and did not relate that he had received any threats. The court's decision to deny Gonzalez' request to excuse this juror was well within its discretion.

2. Gonzalez is precluded from raising the instructional error issue for the first time on appeal, and in the alternative, any error was harmless.

The Washington Supreme Court has held that a unanimous jury decision is not required to find that the State has failed to prove the presence of a special finding increasing a defendant's maximum allowable sentence, and instead, a "nonunanimous jury decision is a final determination that the State had not proved the special finding beyond a reasonable doubt." State v. Bashaw, 169 Wn.2d 133, 145-46, 234 P.3d 195 (2010), *citing* State v. Goldberg, 149 Wn.2d 888, 72 P.3d 1083 (2003). As reflected in the record, Bashaw was handed down after the verdicts were received in this case.

At issue in Bashaw was the concluding instruction as to a sentencing enhancement, which stated that all twelve jurors had to agree as to the special verdict. Indeed, WPIC 160.00 provides that:

> Because this is a criminal case, all twelve of you must agree in order to answer the special verdict forms. 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".

This court has since had an opportunity to apply Bashaw, and has held that while review may have been granted in Bashaw as a matter of public interest, even in the absence of preserved error below, claimed instructional error on this issue is not manifest constitutional error, and review for the first time on appeal may be denied. State v. Nunez, 160 Wn. App. 150, 165, 248 P.3d 103 (2011).

Again in Nunez, the court gave the pattern concluding instruction, requiring unanimity for either response, "yes" or "no". Nunez did not object to the instruction. Id., at 156.

As a general rule, appellate courts will not consider issues raised for the first time on appeal. An exception is applied, however, for claims of "manifest error affecting a constitutional right." RAP 2.5(a)(3); State v. Scott, 110 Wn.2d 682, 686-87, 757 P.2d 492 (1988); *cited in* State v. McFarland, 127 Wn.2d 322, 332-33, 899 P.2d 1251 (1995).

However, an appellant must show actual prejudice in order to establish that the error is "manifest". State v. Lynn, 67 Wn. App. 339, 346, 835 P.2d 251 (1992). In meeting this burden, the appellant must identify a constitutional error, and show how the error actually affected his or her rights at trial. Scott, 110 Wn.2d at 688. Further, allowing every

possible constitutional error to be raised for the first time on appeal, "undermines the trial process, generates unnecessary appeals, creates undesirable retrial sand is wasteful of the limited resources of prosecutors, public defenders and courts". Lynn, 67 Wn. App at 344.

Further, CrR 6.15(c) requires that timely and well stated objections be made to instructions given or refused, so that the trial court may correct any error. Scott, 110 Wn.2d at 686, *cited in* Nunez, 160 Wn. App. at 157.

In deciding Nunez, this court observed that the Bashaw opinion did not cite a constitutional basis for its decision but rather the "common law precedent of this court, as articulated in Goldberg." Bashaw, 169 Wn.2d at 146 n. 7, *cited by* Nunez, 160 Wn. App. at 161-62. Without a "constitutional mooring", as well, for the rule announced in Goldberg:

> In short, the aggravating factors in Mr. Nunez's case were imposed following a deliberative procedure to which he did not object; which no court, state or federal, has found to be unconstitutional or unfair; which has been acknowledged to have procedural advantages; and which, in the lesser included crime context, is preferred by a number of jurists and courts. This is not constitutional error.
>
> Nunez, 160 Wn. App. at 162-63.

Here, as well, Mr. Gonzalez did not object to the instruction at issue. Further, he cannot demonstrate any prejudice on this record, since the court added additional language to the pattern instruction to give the

jury what was essentially a third option, and that was to leave the verdict form blank if the jury could not agree. This instruction is quite different from the stock instruction at issue in Bashaw and even Nunez.

Also, the instruction given here, if in error, was harmless since this court can conclude beyond a reasonable doubt that the jury's special verdict would have been the same absent the error. Bashaw, 169 Wn.2d at 147, *citing* State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002). The jury was told that it had to be unanimous to answer "yes", unanimous to answer "no", but that if there was no agreement, the form would be left blank. It is clear that the verdict was unanimous.

3. The court erred in giving the lesser included instructions.

Under the so-called *Workman* test, a defendant is entitled to a lesser included offense instruction if each of the elements of the lesser offense is a necessary element of the greater offense (legal prong), and the evidence supports an inference that only the lesser offense was committed (the factual prong). State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978); State v. Fernandez-Medina, 141 Wn.2d 448, 455, 6 P.3d 1150 (2000) (clarifying that to satisfy the fact-based prong "the evidence must raise an inference that only the lesser included . . . offense was committed to the exclusion of the charged offense").

Here, there is no inference that only the lesser included offenses were committed, to the exclusion of the charged offense, and the court erred in instructing on the lesser offenses.

As related in Gonzalez' Statement of the Case, Mr. Gonzalez exited the van in which he was riding, then pulled out a gun and began shooting. He fired seventeen times, causing the death of Mr. Vargas, and wounding Mr. Carrasco. The State would allow that first and second degree manslaughter meet the legal prong as to second degree murder, and second degree assault meets the legal prong as to first degree assault, but as it is clear that Mr. Gonzalez intended both to kill and cause great bodily harm, the factual prong under Workman is not met.

V. CONCLUSION

Based upon the foregoing arguments, this Court should affirm the convictions and the firearm enhancements, but in the event this matter is remanded for trial, the trial court should be directed not to give lesser included instructions.

Respectfully submitted this 27th day of April, 2011.

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