

**FILED**

DECEMBER 6, 2011

Court of Appeals  
Division III  
State of Washington

No. 29716-1-III

---

**COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON**

---

**STATE OF WASHINGTON,**

**RESPONDENT,**

**v.**

**LORENZO RENTERIA RAMOS,**

**APPELLANT.**

---

**BRIEF OF RESPONDENT**

---

**D. ANGUS LEE  
PROSECUTING ATTORNEY**

**By: Douglas R. Mitchell, WSBA #22877  
Deputy Prosecuting Attorney  
Attorney for Respondent**

**PO BOX 37  
EPHRATA WA 98823  
(509)754-2011**

TABLE OF CONTENTS

	<u>Page</u>
Table of Contents.....	i
Table of Authorities .....	ii-v
A. IDENTITY OF RESPONDENT .....	1
B. RELIEF SOUGHT .....	1
C. STATEMENT OF FACTS .....	1-9
D. RESPONSE TO APPELLANT’S ISSUES PRESENTED .....	9-25
1. The Court did not err by denying Appellant’s Motion to Sever.....	9-11
2. The Court did not err by using the qualified, but not certified, interpreter for the testimony of witness Jose Orozco.....	11-16
3. The Court did not err in its instructions to the jury as to the Special Verdict form referenced in Instruction 13. ...	16-22
4. The evidence at trial was sufficient to sustain the Charges of Assault in the Second Degree and Robbery In the First Degree.....	22-25
E. CONCLUSION .....	26

TABLE OF AUTHORITIES

	<u>Page</u>
<u>State Cases:</u>	
<i>City of Seattle v. Rainwater</i> , 86 Wn.2d 567, 546 P.2d 450 (1976) ...	17
<i>State v. Bashaw</i> , 169 Wn.2d 133, 234 P.3d 195 (2010) .....	16, 18, 20, 21
<i>State v. Beasley</i> , 126 Wn. App. 670, 109 P.3d 849 (2005).....	24
<i>State v. Bryant</i> , 89 Wn. App. 857, 950 P.2d 1004 (1998) .....	9, 10
<i>State v. Camarillo</i> , 115 Wn.2d 60, 794 P.2d 850 (1990).....	22
<i>State v. Denby</i> , 143 Wash. 288, 255 P. 141 (1927).....	25
<i>State v. Depaz</i> , 165 Wn.2d 842, 204 P.3d 217 (2009).....	17
<i>State v. DeVries</i> , 149 Wn.2d 842, 72 P.3d 748 (2003).....	22
<i>State v. Drum</i> , 168 Wn.2d 23, 225 P.3d 237 (2010).....	22
<i>State v. Engel</i> , 166 Wn.2d 572, 210 P.3d 1007 (2009).....	22
<i>State v. Goldberg</i> , 149 Wn.2d 888, 72 P.3d 1083 (2003).....	18, 20, 21
<i>State v. Gonzales-Morales</i> , 138 Wn.2d 374, 979 P.2d 826 (1999) ...	13, 14
<i>State v. Green</i> , 94 Wn.2d 216, 616 P.2d 628 (1980).....	22
<i>State v. Johnson</i> , 155 Wn.2d 609, 121 P.3d 91 (2005).....	25
<i>State v. Kalakosky</i> , 121 Wn.2d 525, 852 P.2d 1064 (1993).....	9
<i>State v. Markle</i> , 118 Wn.2d 424, 823 P.2d 1101 (1992).....	10, 11
<i>State v. Mitchell</i> , 169 Wn.2d 437, 237 P.3d 282 (2010).....	22

TABLE OF AUTHORITIES (continued)

	<u>Page</u>
<i>State v. Nunez</i> , 160 Wn. App. 150, 248 P.3d 103, rev. granted, 172 Wn.2d 1004 (2011).....	17
<i>State v. O'Hara</i> , 167 Wn.2d 91, 217 P.3d 756 (2009) .....	13, 17
<i>State v. Ortega-Martinez</i> , 124 Wn.2d 702, 881 P.2d 231 (1994).....	17
<i>State v. Parsons</i> , 44 Wash. 299, 87 P. 349 (1906) .....	25
<i>State v. Pavelich</i> , 150 Wash. 411, 273 P. 182 (1928).....	15
<i>State v. Pham</i> , 75 Wn. App. 626, 879 P.2d 321 (1994).....	13, 14, 15
<i>State v. Russell</i> , 125 Wn.2d 24, 882 P.2d 747 (1994) .....	11
<i>State v. Scott</i> , 110 Wn.2d 682, 757 P.2d 492 (1988).....	16, 17
<i>State v. Smith</i> , 84 Wn.2d 498, 527 P.2d 674 (1974).....	16
<i>State v. Smith</i> , 159 Wn.2d 778, 154 P.3d 873 (2007).....	24
<i>State v. Stephens</i> , 93 Wn.2d 186, 607 P.2d 304 (1980).....	17
<i>State v. Teshome</i> , 122 Wn. App. 705, 94 P.3d 1004 (2004) .....	14
<i>State v. Wade</i> , 133 Wn. App. 855, 138 P.3d 168 (2006) .....	24
<i>State v. Weber</i> , 137 Wn. App. 852, 155 P.3d 947 (2007).....	24
<i>State v. Wentz</i> , 149 Wn.2d 342, 68 P.3d 282 (2003) .....	22
<i>State v. Woods</i> , 143 Wn.2d 561, 23 P.3d 1046 (2001).....	19

TABLE OF AUTHORITIES (continued)

	<u>Page</u>
 <i><u>Federal Cases:</u></i>	
<i>United States v. Mayans</i> , 17 F.3d 1174 (9 <sup>th</sup> Cir. 1994) .....	14
 <i><u>Statutes and Other Authorities:</u></i>	
Const. art. I, §21 and 22 .....	17
CrR 6.15 (c) .....	17
CrR 6.16 .....	20, 21
GR 11.2 .....	15
RAP 2.5(a) .....	13, 16, 17
RCW 2.04.200 .....	15
RCW 2.43.010 .....	12, 13
RCW 2.43.030 .....	14, 15
RCW 2.43.080 .....	15
RCW 9A.04.110(6) .....	24
RCW 9A.36.021(1) .....	24
Sentencing Reform Act .....	18, 19
WPIC 3.01 .....	10

TABLE OF AUTHORITIES (continued)

Page

Statutes and Other Authorities (continued):

WPIC 151.00 .....	19
WPIC 160.00 .....	21

A. IDENTITY OF RESPONDENT

The State of Washington was the Plaintiff in the Superior Court, and is Respondent herein. The State is represented by the Grant County Prosecutor's Office.

B. RELIEF SOUGHT

The State is asking this Court to affirm the decisions of the Superior Court and uphold the convictions and sentence of the Appellant.

C. STATEMENT OF FACTS

Jose Orozco and his children live in a house at 13252 Road "D" in rural Grant County. RP trial, 60–62.<sup>1</sup> An additional person, not a member of the family, lived with them for one or two months in 2009. RP trial, 61–62, 74. That person was Lorenzo Ramos Renteria, the Defendant below and Appellant herein. Appellant was identified on the record by Mr. Orozco. The presence of Appellant in that home ended in late December, 2009<sup>2</sup>. RP Trial, 62. Mr. Orozco testified that he was asleep in his room when Appellant knocked on the door and entered and told Mr. Orozco that he (Appellant) was

---

<sup>1</sup> There are several sets of transcripts, but the primary and longest is the three volumes totaling 397 pages, which will be cited to as "RP Trial".

<sup>2</sup> At trial, the date testified to varied among the witnesses, apparently due to the passage of time. The events occurring before Appellant's arrest in Idaho occurred consecutively within approximately two

going to kill Mr. Orozco, based on hearing that Mr. Orozco wanted to kill Appellant. Mr. Orozco denied any desire to harm Appellant. RP Trial, 62–63.

After that threat, Appellant grabbed a rifle, and the two men struggled over it. Mr. Orozco was struck in the forehead and was knocked down. He called for his son to help him. Appellant put his foot on Mr. Orozco's throat, and he still had pain there and in his shoulders at the time of trial in January 2011. RP Trial, 65–66. Christopher Orozco responded to his father's cries for help, removed Appellant from Mr. Orozco, and then kicked Appellant out of the house. Appellant had also pointed the rifle at Mr. Orozco and tried to chamber a cartridge, but the rifle malfunctioned and the round did not feed into the chamber. RP Trial, 66–69. Photographs of Mr. Orozco taken the morning of the incident and showing the injuries to his face were admitted and published to the jury. Ex. 21–26; RP Trial 70-73.

Christopher Orozco testified to similar facts. He was awakened a little before 6AM because his name was being yelled by his father. He went to his father's room, and found Appellant on top of Mr. Orozco, choking Mr. Orozco with the rifle. Appellant was identified on the record by Christopher Orozco. RP Trial 88–91. Christopher said it sounded as though his father was struggling to talk. Christopher struck Appellant on the head with no apparent

---

hours that morning.

effect, then grabbed Appellant around the neck and removed him from Mr. Orozco. RP Trial, 92. After a few minutes, during which he got a drink of water, Appellant left the house through the front door, taking the rifle with him. Christopher heard a shot, and told the others in the house to get away from the windows. RP Trial, 93–94. Christopher saw Appellant get into a tan Ford Explorer and attempt to leave the property. He was not successful, as the vehicle became stuck in the snow. Christopher did not see where Appellant went afterward, but the vehicle was still in the same location when the deputies arrived. RP Trial, 95–96. Christopher described bloody injuries to his father's face, and that a law enforcement officer took photographs of his (Christopher's) father while in the house that morning. Christopher testified he gave an alien registration card bearing Appellant's likeness to Sergeant Hyer. RP Trial, 96, 99–100.

Officer Michelle Peters of the Parma, Idaho Police Department testified about her encounter with Appellant on the night of December 19<sup>th</sup>, 2009. She contacted Appellant about 9PM that night, speaking with him at a close distance for about ten minutes. Communication was limited, as she has limited Spanish language skills. He was with a silver Chevrolet pickup. The area was well lit by her patrol car lights, and she identified him on the record. RP Trial, 123–125. In the course of that contact, Officer Peters learned that

the pickup was a reported stolen vehicle from Washington State. Appellant was eventually taken into custody with assistance of several other officers, one of whom was Sergeant Jared George. The vehicle was impounded and the scene processed by Sergeant George. RP Trial, 126. During re-direct, Officer Peters testified that Appellant claimed to have ID in the pickup, walked to the passenger side, and reached toward the center console. RP Trial, 129.

Sergeant George testified next. He is an officer of the Wilder, Idaho Police Department and one of the officers who responded to assist Officer Peters on December 19<sup>th</sup>, 2009. He observed Officer Peters' patrol car parked behind a silver Chevrolet pickup. He took care of the tow and impound process for that vehicle, including an inventory of the contents of the vehicle. RP Trial, 132 – 134. He took a collection of photographs of the vehicle and its contents, including a Jennings .22 caliber pistol. The photographs were introduced and described during his testimony. Ex. 4-20; RP Trial 135-140. Sergeant George also seized the Jennings pistol. Although it did not have a magazine in it, there was a cartridge in the chamber. There were also loose .22 caliber rounds in the pickup of the same type as the one in the chamber. He identified the pistol in court as being the same one, and it was admitted without objection. The pistol was brought to Washington by Officer Peters

and turned over to Sergeant Hyer of the Grant County Sheriff's Office. RP Trial, 142–147, 153-155.

Michael Levi Meseberg (who goes by and will be referred to as Levi to differentiate him from his father) testified that his family owns a resort and related businesses about fifteen miles south of Moses Lake. Included in those business operations are a guiding business for hunters during the waterfowl hunting season. Levi testified about events that occurred early on a day in mid – late December 2009 just off of Roads “E” and “12”. He was in a group of seven people involved in a goose hunt, including his father and a man who guides for them, Nick Anderson. RP Trial, 160–162.

That morning, Levi ran an errand in a Chevrolet pickup belonging to his father and used for the family business. He returned to the location of the hunt about 0915. As he pulled into the field, Levi noticed a truck stuck in the ditch. He was about twenty yards from the truck, and did not recognize it at that time. Levi tried to assist the person driving the truck in getting it unstuck. As he did so, he realized that the truck belonged to Mr. Anderson, but that Appellant was the person with the vehicle. Levi indentified Appellant on the record. He knew that Mr. Anderson had employees who might be authorized to use the truck. RP Trial, 163–165. Levi called Mr. Anderson to ascertain whether an employee might be using the pickup. Because he does not speak

Spanish and Mr. Anderson does, Levi handed the phone to Appellant. It seemed to Levi that there was a conversation, but Levi did not know what was being said. Levi got the phone back after the conversation, and attempted to call Mr. Anderson back to find out what was going on. Levi turned his back, and when he turned back around found that the Appellant had pulled a small caliber pistol. Levi was at arm's length from Appellant. Appellant gestured for Levi to step back, and Appellant took the pickup Levi had been driving. At the time, Levi did not own any handguns. RP Trial, 165–169.

Levi retrieved his own pickup truck, and attempted to pursue Appellant and the stolen pickup. Due to the fog and the fact that his pickup still had a trailer attached to it, the effort was not successful. During the pursuit effort, he called 911. Grant County Sheriff's deputies eventually contacted him at the field. Levi described the Appellant to them. In response, the deputies showed Levi a document bearing a photograph, and asked Levi if he recognized the person shown. Levi testified that the person shown was the Appellant. RP Trial, 169–171. Levi subsequently identified the pistol in evidence as the one that had been pointed at him. He also testified about the process of a photographic lineup, and identifying the Appellant. He also identified the pickup and its contents shown in the previously admitted photographs taken by Sergeant George. Levi did testify that the pistol shown

in the pickup was not his and that he had not seen it before the events at the field. RP Trial, 172–179.

Nicholas Anderson testified about the events at the field. He described the telephone conversations, and his pickup truck being stuck at the edge of the field much as Levi Meseberg did. Mr. Anderson did not see the Appellant at the field as he was about three-quarters of a mile from the events described by Levi. RP Trial, 194–201.

The following witness was Michael A. Meseberg, Levi's father. (He will be referred to as Mr. Meseberg.) He owns Mardon Resort, and has additional businesses, as was described by Levi. He testified that Levi is one of the employees of the hunting service, and that he owns one Chevrolet pickup, the one previously testified about. He listed the persons who have permission to use that vehicle, none of whom was the Appellant. He specifically denied that Appellant had permission to use the pickup. He then testified that he was notified on a following day that the pickup had been recovered in Idaho. Mr. Meseberg also identified the pickup from photographs. Ex. 4–5, RP Trial 203–209.

Sergeant Collin Hyer of the Grant County Sheriff's Office was the next witness. He testified that on the morning of December 19, 2009, he was dispatched to 13252 Road "D" Southeast in Grant County for an assault

report. It took him a long time to get there due to the weather and the distance from which he was traveling. He arrived about 0730. Upon arrival, the officers looked at the vehicle stuck at the end of the driveway. The vehicle was empty, and the deputies did not find the person they believed to be associated with the vehicle after searching the property and buildings. RP Trial, 210–213.

Sergeant Hyer spoke with Jose Orozco, using Christopher Orozco as an interpreter. Sergeant Hyer described seeing Mr. Orozco with significant injuries. He identified photographs of Mr. Orozco showing those injuries. Mr. Orozco named Appellant as the person who had inflicted the injuries on him. Sergeant Hyer also obtained information from Christopher Orozco about the events. In the course of the investigation, Sergeant Hyer was provided an identification card displaying the Appellant's photograph. At a later time, Sergeant Hyer presented the card to Levi Meseberg, who identified the Appellant from the card as the person who had held a gun to his head. RP Trial, 213–218.

Sergeant Hyer then had to respond to the location on rural Road "E", Southeast at about 0851. This was with regard to the incident involving Levi Meseberg. This location was about one to one and a half miles from the Orozco residence. Sergeant Hyer described the process of taking the stolen

vehicle report from Michael Meseberg. Sergeant Hyer also identified photographs of the red Ford pickup belonging to Mr. Anderson as it was seen that morning, stuck in the ditch. He also described the process of obtaining and testing the Jennings .22 caliber pistol from Officer Peters and his credentials for conducting the testing. RP Trial, 218–234.

Deputy Ricardo Char of the Grant County Sheriff's Office testified that he too went to the Orozco home on December 19, 2009. While there, he saw and took photographs of the injuries to Jose Orozco. He identified the photographs and ID card; the card was then admitted. Deputy Char also identified the Appellant as the person depicted on the card, which he provided to Sergeant Hyer after obtaining it. RP Trial, 253–257.

D. RESPONSE TO APPELLANT'S ISSUES PRESENTED

1. The Court did not err by denying Appellant's Motion to Sever.

A trial court's refusal to sever is reviewed for manifest abuse of discretion. *State v. Kalakosky*, 121 Wn.2d 525, 537-539, 852 P.2d 1064 (1993). There was no such abuse of discretion here; the Court carefully considered the motion and argument in making its decision. RP Trial, 15-23.

The defendant is to receive a fair trial untainted by prejudice. *State v. Bryant*, 89 Wn. App. 857, 865, 950 P.2d 1004 (1998). To the extent that

there may be prejudice in any given case, of which there is no evidence here, there are several factors which may offset any prejudice resulting from refusal to sever. *Id.*, at 867-868. Among them are whether the court properly instructed the jury to consider the evidence of each crime, as was done here. Instruction # 3, incorporating WPIC 3.01, does exactly that, and is given for that reason. CP, 66.

Another factor discussed in *Bryant* is the admissibility of the evidence of the crime(s) pursuant to the relevant rules. As noted above, the trial court conducted a detailed and careful analysis of the issue. The facts are so interwoven that substantial overlap in the trials would have occurred had severance been granted. A trial court's rulings regarding the admission of evidence may only be reversed if there is a manifest abuse of discretion. *State v. Markle*, 118 Wn.2d 424, 438, 823 P.2d 1101 (1992) (citation omitted). Severance would thus have made little, if any, difference in the facts submitted to the jury.

Appellant has failed to meet his burden of proof, a burden which has been well established without change for years. Even if evidence related to the separate counts would not be cross admissible, this is not sufficient to show that undue prejudice would result from a joint trial. *State v. Markle*, 118 Wn.2d 424, 439, 823 P.2d 1101 (1992) (citation omitted). Concluding that

the failure to sever was error would require finding that the trial court engaged in a manifest abuse of discretion, and requires that the Appellant had shown that the risk of prejudice would outweigh the concern for judicial economy. *Id.*

In determining whether the potential for prejudice requires severance, a trial court must consider (1) the strength of the State's evidence on each count; (2) the clarity of defenses as to each count; (3) court instructions to the jury to consider each count separately; and (4) the admissibility of evidence of the other charges even if not joined for trial. In addition, any residual prejudice must be weighed against the need for judicial economy. On review, a trial court's refusal to sever charges is reversible only where it constitutes a manifest abuse of discretion. The defendant bears the burden of demonstrating such abuse.

*State v. Russell*, 125 Wn.2d 24, 63, 882 P.2d 747 (1994) (citations omitted).

Here, although he moved for and argued in support of severance, Appellant did not provide a significant, let alone sufficient, basis to sever. The Court further ruled that there would not have been a reasonable probability that the motion to sever would have been granted had it been brought before trial. RP Trial, 24. There was no error.

2. The Court did not err by using the qualified, but not certified, interpreter for the testimony of witness Jose Orozco.

Although it is not clear from Appellant's brief, it appears to the State that the impression created is that Appellant was assisted by the interpreter in question, Mr. Rojas. Br. of Appellant, 10. To be clear, Appellant was at all times assisted by Mr. Chambers, who is a certified interpreter with his oath on file. RP Trial, 38. The services of Mr. Rojas were utilized solely to interpret when Mr. Orozco testified. RP Trial, 59. This is consistent with the legislative expression of intent in the relevant statutory scheme, which is to ensure that the rights of a person in the position such as that in which Appellant found himself are protected.

It is hereby declared to be the policy of this state to secure the rights, constitutional or otherwise, of persons who, because of a non-English-speaking cultural background, are unable to readily understand or communicate in the English language, and who consequently cannot be fully protected in legal proceedings unless qualified interpreters are available to assist them.

RCW 2.43.010. The Court's decision to use Mr. Rojas for the limited purpose of interpreting when Mr. Orozco testified is consistent with the applicable standards.

The Court inquired of Mr. Rojas on the record, but outside the presence of the jury, as to his credentials. Mr. Rojas stated that he had taken and passed the written and oral tests, and had his oath on file with the Administrative Office of the Courts. Based on this inquiry and the answers,

the Court accepted him as “certified”. This was probably a misstatement, as Mr. Rojas stated that he did not yet have his certification. RP Trial, at 53–54. Appellant did not in fact object, but counsel stated that she was “... not entirely comfortable with his acceptance by the court.” RP Trial, 54–55. It is the State’s position that there was no error, but even if there were, it was not preserved due to the failure to object, as use of a qualified but not certified interpreter is not an issue of constitutional magnitude. *State v. Pham*, 75 Wn. App. 626, 633, 879 P.2d 321 (1994). Under RAP 2.5(a), the court may consider an issue raised for the first time on appeal when it involves a “manifest error affecting a constitutional right.” RAP 2.5(a)(3). In order to raise an error for the first time on appeal under this rule, the appellant must demonstrate that (1) the error is manifest, and (2) the error is truly of constitutional dimension. *State v. O’Hara*, 167 Wn.2d 91, 98, 217 P.3d 756 (2009). Having noted that, the State will proceed to the merits in an abundance of caution.

Under Washington law, the right *of a defendant* in a criminal case to have an interpreter is derived from the Sixth Amendment right to confront witnesses, have a fair trial, and be present at one’s own trial. *State v. Gonzales-Morales*, 138 Wn.2d 374, 379, 979 P.2d 826 (1999) (emphasis added). This right is also codified in statute. RCW 2.43.010. However, our

Supreme Court has stated that “[t]he appointment of an interpreter [is] a matter within the discretion of the trial court to be disturbed only upon a showing of abuse.” *State v. Gonzales-Morales*, *supra*, at 381 (internal quotations omitted). “The use of interpreters in the courtroom is a matter within the trial court’s discretion, and that a trial court’s ruling on such a matter will be reversed only for clear error ... even the more fundamental question of whether an interpreter is necessary has been consigned to the “wide discretion” of the trial court.” *United States v. Mayans*, 17 F.3d 1174, 1179 (9<sup>th</sup> Cir. 1994). Under this standard of review, appellate courts typically uphold a trial court’s decision concerning the use of interpreters. *State v. Gonzales-Morales*, *supra*, at 381 (citations omitted).

A defendant is entitled to a competent interpreter. *State v. Teshome*, 122 Wn. App. 705, 711, 94 P.3d 1004 (2004) (citing *State v. Pham*, 75 Wn. App. 626, 633, 879 P.2d 321 (1994)). This is also presumptively true with regard to the interpreters used for the testimony of witnesses. Under RCW 2.43.030, only certified interpreters may be used unless good cause is shown. RCW 2.43.030(1)(b). “Good cause” includes situations in which the current list of certified interpreters does not include an interpreter certified in the language spoken by the non-English-speaking person. RCW 2.43.030(1)(b)(ii). When good cause is found for using a non-certified

interpreter, the court is to make a preliminary determination. Particularly, the statute requires that the court determine on the record that the interpreter (a) is capable of communicating effectively with the court and defendant and (b) has read, understands, and will abide by the code of ethics for language interpreters. RCW 2.43.030(2). “The statute’s determination of what constitutes good cause, however, is not exclusive.” *State v. Pham*, 75 Wn. App. 626, 633, 879 P.2d 321 (1994).

The Court may have made an imperfect inquiry as to the statutory obligation to follow the “code of ethics”, but that is not reversible error, as the statute properly delegates this procedural issue to the judiciary. All interpreters, whether certified *or qualified*, are required to follow the “code of ethics” to be established by Supreme Court rule. RCW 2.43.080 (emphasis added). There is no doubt on this record that Mr. Rojas is qualified, and it is admittedly difficult to believe that anyone would seriously assert that an unqualified interpreter should be used, regardless of the language of the statute. The rule in question, which is referred to by the Court as a “Code of Conduct”, requires that language interpreters serving in a legal proceeding abide by the Code of Conduct, not that they have read and understood it. GR 11.2. Court rules prevail over statutes in this context. RCW 2.04.200, *State v. Pavelich*, 150 Wash. 411, 273 P. 182 (1928). Rule 11.2 is a procedural rule,

that is, a rule that relates to the *manner* in which an alleged offense will be heard by the court. *State v. Smith*, 84 Wn.2d 498, 502, 527 P.2d 674 (1974) (emphasis in original). Promulgation of procedural rules is an inherent attribute of the Supreme Court and an integral part of the judicial process, so those rules cannot be modified or abrogated by statute. *Id.* The Court did not err in the appointment of Mr. Rojas to interpret for the testimony of Mr. Orozco.

3. The Court did not err in its instructions to the jury as to the Special Verdict form referenced in Instruction 13. If the Court did err, any purported error was not of Constitutional magnitude and was not preserved.

Appellant complains, based upon *State v. Bashaw*, 169 Wn.2d 133, 234 P.3d 195 (2010), that the instruction told the jury that it must be unanimous to answer "no" to the allegations of the enhancement in the special verdict form. Br. of Appellant, 12. Assuming without conceding that *Bashaw* was correctly decided, as the rule applied in *Bashaw* has no support in any constitutional provision, Washington statute, or caselaw, the issue was not preserved for appeal. RAP 2.5(a) states the general rule for appellate disposition of issues not raised in the trial court: appellate courts will not entertain them. *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988). As

pointed out in *Scott*, the general rule has specific applicability with respect to claimed errors in jury instructions in criminal cases through CrR 6.15(c), requiring that timely and well stated objections be made to instructions given or refused “ ‘in order that the trial court may have the opportunity to correct any error.’ ” *Id.* at 686 (quoting *City of Seattle v. Rainwater*, 86 Wn.2d 567, 571, 546 P.2d 450 (1976)). *State v. Nunez*, 160 Wn. App. 150, 157, 248 P.3d 103, *rev. granted*, 172 Wn.2d 1004 (2011). No such objection was made at trial. As noted in the State’s response to Appellant’s argument regarding the qualifications of the interpreter for Mr. Orozco, an error which is not a “manifest error affecting a constitutional right” is not preserved for appeal if not objected to. RAP 2.5(a)(3), *State v. O’Hara*, 167 Wn.2d 91, 98, 217 P.3d 756 (2009). Again, the State will proceed to the merits in an abundance of caution.

A criminal defendant cannot compel a deadlocked jury to answer “no” on a special verdict. “Washington requires unanimous jury verdicts in criminal cases.” *State v. Stephens*, 93 Wn.2d 186, 190, 607 P.2d 304 (1980). The requirement for jury unanimity derives from the state constitutional right to jury trial in criminal matters set forth in Const. art. I, § 21 and 22. *State v. Depaz*, 165 Wn.2d 842, 853, 204 P.3d 217 (2009); *State v. Ortega-Martinez*, 124 Wn.2d 702, 707, 881 P.2d 231 (1994). Other

than *Bashaw* and *State v. Goldberg*, 149 Wn.2d 888, 72 P.3d 1083 (2003), the State is unaware of any authority, nationwide, supporting a rule that the court can require a deadlocked jury to answer "no" on a special verdict for a sentence enhancement. Sentence enhancements and aggravating circumstances were created by the legislature, and there is no suggestion anywhere in the Sentencing Reform Act ("SRA") that anything other than a unanimous verdict is required. Given that the fixing of legal punishments for criminal offenses is a legislative function,<sup>3</sup> it is for the legislature, not the court, to allow for acquittal based upon a non-unanimous jury. While the court may recommend or identify needed changes, it must wait for the legislature to act.<sup>4</sup>

The lack of any authority supporting the *Bashaw* rule of unanimity for special verdicts is striking, given that special verdicts have been presented to jurors in criminal cases for nearly a century. Well before the enactment of the SRA, juries rendered special verdicts in criminal cases.<sup>5</sup> Since the SRA was

---

<sup>3</sup> *State v. Ammons*, 105 Wn.2d 175, 180, 713 P.2d 719, 718 P.2d 796 (1986).

<sup>4</sup> See, e.g., *State v. Pillatos*, 159 Wn.2d 459, 469-70, 150 P.3d 1130 (2007) (absent statutory authority, courts could not empanel juries to determine the existence of aggravating circumstances); *State v. Martin*, 94 Wn.2d 1, 7, 614 P.2d 164 (1980) (absent statutory authority, courts could not empanel juries to decide whether a defendant who pled guilty should receive the death sentence).

<sup>5</sup> See *State v. Burnett*, 144 Wash. 598, 599, 258 P. 484 (1927) (special finding that defendant had been previously convicted of the crime of unlawful possession of intoxicating liquor); *State v. Redden*, 71 Wn.2d 147, 151, 426 P.2d 854 (1967) (special verdict on whether defendant was armed with a deadly weapon); *State v. Bradley*, 20 Wn. App. 340, 346, 581 P.2d 1053 (1978) (special verdict on whether defendant was armed with a firearm).

enacted, the legislature has created numerous sentencing enhancements, all requiring special verdicts by the jury.<sup>6</sup> The pattern jury instructions used for the past several decades did not instruct the jury to answer "no" if they were deadlocked on a special verdict. At best, the instructions were silent as to whether the jury had to be unanimous to answer "no."<sup>7</sup> Given that the standard concluding instruction given in every criminal case, WPIC 151.00, states that "[b]ecause this is a criminal case, each of you must agree for you to render a verdict," a reasonable juror could, reading the instructions together, believe that unanimity was required for any answer to a special verdict.

For several decades, the pattern instruction for aggravated first-degree murder simply instructed the jury to answer "yes" if the jurors unanimously agreed that a specific aggravating circumstance had been proved and said nothing about when to answer "no."<sup>8</sup> In *State v. Woods*, 143 Wn.2d 561, 593, 23 P.3d 1046 (2001), the Supreme Court rejected a claim that additional language was necessary in order to instruct the jury as to when it should answer "no" on the special verdict. It is difficult to reconcile *Woods* with the

---

6 See, e.g., RCW 9.94A.533(3) (firearm enhancement); RCW 9.94A.533(4) (deadly weapon enhancement); RCW 9.94A.533(8) (sexual motivation enhancement).

7 See, e.g., 11A Washington Practice: Washington Pattern Jury Instructions: Criminal 300.07 (3d ed. 2008) (exceptional sentence aggravating circumstances); 11A Washington Practice: Washington Pattern Jury Instructions: Criminal 160.00 (2d ed. 1994) (general special verdict instruction).

8 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 30.03 (3d ed. 2008); 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 30.03 (2d ed. 1994).

holding in *Bashaw*. Thus, the only authorities cited in *Goldberg* for the proposition that jury unanimity was not required for a "no" answer were (i) a court rule, and (ii) the jury instruction given in that case. However, neither provides support for the notion that a defendant has a right to a non-unanimous "no" decision on a special verdict.

With respect to the court rule, CrR 6.16(a)(3), the Court in *Goldberg* placed significance on the fact that "[w]hen a jury is deadlocked on a general verdict, the trial court has the authority, within limits, to instruct the jury to continue deliberations," but "[t]hat authority does not exist with respect to a jury's answer to a special finding...." 149 Wn.2d at 894. In fact, that interpretation of the rule is inconsistent with the plain language of the rule. CrR 6.16(a)(3) allows the trial court to poll the jury and then direct continued deliberations on a special finding. That rule provides:

*(3) Poll of Jurors.* When a verdict *or special finding* is returned and before it is recorded, the jury shall be polled at the request of any party or upon the court's own motion. If at the conclusion of the poll, all of the jurors do not concur, the jury may be directed to retire for further deliberations or may be discharged by the court.

CrR 6.16(a)(3) (emphasis added).<sup>9</sup> Indeed, elsewhere, the rule authorizes the court to order further deliberations "[w]hen a special finding is inconsistent with another special finding or with the general verdict." CrR 6.16(b). Accordingly, CrR 6.16 cannot be read as establishing a rule that a jury must answer a special verdict "no" when they are deadlocked.

Similarly, the jury instruction used in *Goldberg* is not authority that a defendant is entitled to a non-unanimous "no" on a special verdict. The instruction did not tell the jury that they must answer "no" if they are not unanimous. Instead, it simply stated, "If you have a reasonable doubt as to the question, you must answer 'no'." 149 Wn.2d at 893. This language comes from WPIC 160.00, the pattern concluding instruction used for special verdicts.

In sum, *Goldberg* cited no authority for the proposition that the jury must be instructed to answer "no" when the jurors are deadlocked on a special verdict for a sentence enhancement. Subsequently, in *Bashaw*, this Court cited no additional authority supporting the rule, but simply cited to *Goldberg*.

---

<sup>9</sup> CrR 6.16 has been amended twice after *Goldberg* was decided. However, the amendments did not change the language cited above, which has been in the rule since it was enacted. 4A Karl B. Tegland, *Washington Practice: Rules Practice CrR 6.16*, at 484-85 (2008) and at 63-65 (2010 Pocket Part).

There is no legal basis to treat the unanimity requirement for special verdicts any differently than general verdicts. There was no error.

4. The evidence at trial was sufficient to sustain the charges of Assault in the Second Degree and Robbery in the First Degree.

In order to determine whether there was sufficient evidence to support Appellant's conviction, this Court will "view the evidence in the light most favorable to the prosecution and determine whether any rational fact finder could have found the essential elements of the crime beyond a reasonable doubt. *State v. Mitchell*, 169 Wn.2d 437, 443-44, 237 P.3d 282 (2010) (citing *State v. Engel*, 166 Wn.2d 572, 576, 210 P.3d 1007 (2009) (citing *State v. Wentz*, 149 Wn.2d 342, 347, 68 P.3d 282 (2003))). A claim of insufficiency of the evidence not only requires that the Appellant admit the truth of the State's evidence, but also grants the State the benefit of all inferences that can reasonably be drawn from it. *State v. DeVries*, 149 Wn.2d 842, 849, 72 P.3d 748 (2003) (citing *State v. Green*, 94 Wn.2d 216, 222, 616 P.2d 628 (1980)). Additionally, appellate courts defer to the finder of fact (in this case, the jury) on issues of witness credibility. *State v. Drum*, 168 Wn.2d 23, 35, 225 P.3d 237 (2010) (citing *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990)).

At the close of evidence, Appellant moved to dismiss the count of Assault in the Second Degree based on insufficiency of the evidence. RP Trial, 262–263. The Court properly denied the motion, finding there was sufficient evidence. RP, Trial, 269. In the course of the jury instruction conference, Appellant also renewed a previous motion to dismiss the Count alleging Robbery in the First Degree, on the same basis. RP Trial, 290–292. This too was denied. RP Trial, 293. This Court should likewise reject the attack upon the sufficiency of the evidence. Considering all evidence, including all reasonable inferences drawn from it, is reviewed in the light most favorable to the State, there is more than sufficient evidence to support the convictions for Assault in the Second Degree and Robbery in the First Degree.

Appellant claims that there is “no evidence that Mr. Orozco suffered a substantial loss or impairment of function of the body or any fracture.” Br. of Appellant, 15. The State is confused by this claim, as there is not only considerable evidence of such injury, but it is uncontradicted. During his testimony, Mr. Orozco described having residual pain in his throat, and pointed to the area of this pain. He also described and pointed to an area of his forehead which still hurts. RP Trial, 65. Mr. Orozco also testified that he lacks strength in his shoulders as a result of the attack, and continues to have pain at the top of his shoulders. RP Trial, 66. Mr. Orozco suffered substantial

swelling and bruising on his forehead as a result of the assault. Ex. 21–26; RP Trial 70–73. The injuries and photographs were also testified to by Christopher Orozco, Sergeant Hyer, and Deputy Char, as described above. The pain and continued weakness in his throat, forehead, arms and shoulders over a year after the assault are also legally sufficient to prove the assault alleged in violation of RCW 9A.36.021(1)(a), and apparently the jury agreed that the facts submitted for their consideration were sufficient. In this sense, the facts in this case are similar enough to those in *State v. Weber*, 137 Wn. App. 852, 155 P.3d 947 (2007) that this matter should receive similarly cursory treatment from this court.

Further, Appellant completely ignores the other prong of Assault in the Second Degree under which he was charged, Assault with a Deadly Weapon in violation of RCW 9A.36.021(1)(c). CP, 1. Appellant struck Mr. Orozco in the forehead with the rifle, knocking him down. RP Trial, 63–64. This is what caused the continuing pain there referred to above. A firearm, loaded or unloaded, is *per se* a deadly weapon. RCW 9A.04.110(6). One need not use a firearm to fire a projectile to commit an assault with it. *State v. Smith*, 159 Wn.2d 778, 154 P.3d 873 (2007); *State v. Wade*, 133 Wn. App. 855, 873, 138 P.3d 168 (2006); *State v. Beasley*, 126 Wn. App. 670, 689–690, 109 P.3d 849 (2005).

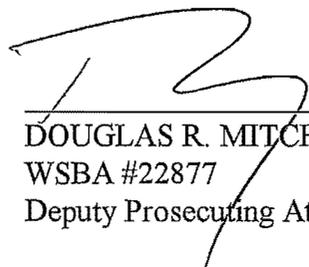
Appellant's argument as to the count of Robbery in the First Degree is nearly as ill-considered. During his testimony, Levi Meseberg testified that after his telephone conversation with Mr. Anderson about the use of Anderson's pickup and handing the phone to Appellant to speak to Anderson, Appellant had hung up the phone. Before Levi could call Mr. Anderson back, he turned and found Appellant holding a pistol. RP Trial, 167--168. The pistol was at arm's length, and Appellant gestured for Levi to step back, then took off in the Chevrolet pickup. RP Trial, 168. On cross-examination, Levi was asked if anyone had previously pointed a gun at him and taken his vehicle, and Levi answered "No, that was the first time." RP Trial, 181. He also answered in the affirmative with regard to having a gun in his face while his identification of the Appellant was being attacked. RP Trial, 185. This testimony is sufficient to support the elements relating to defendant's (Appellant's) use or threatened use of force, violence or fear of injury to the victim. CP, 73. It has been the law in Washington for over a century that the actual level of force used or threatened is not at issue; it need only be sufficient to overcome resistance to the taking and be the cause of the victim parting with the property against his will. *State v. Parsons*, 44 Wash. 299, 301-302, 87 P. 349 (1906); *State v. Denby*, 143 Wash. 288, 255 P. 141 (1927); *State v. Johnson*, 155 Wn.2d 609, 610-611, 121 P.3d 91 (2005).

E. CONCLUSION

The Appellant has not raised any supportable claims of error. The trial court did not err when it denied the motion to sever the offenses; the appointment of the interpreter for Mr. Orozco's testimony was not erroneously conducted and any objection was not properly made and preserved; the instruction for the special verdict was legally accurate and any purported error was also not preserved, and the evidence was more than sufficient.

Accordingly, this Court should uphold the decisions of the trial court and the conviction of the Appellant. The trial may not have been perfect, as there are no perfect trials. It was, however, fair, and that is what the Appellant was entitled to receive – a fair trial.

Respectfully submitted this 5<sup>th</sup> day of December, 2011.



---

DOUGLAS R. MITCHELL  
WSBA #22877  
Deputy Prosecuting Attorney

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION III

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	No. 29716-1-III
	)	
vs.	)	
	)	
LORENZO RENTERIA RAMOS,	)	DECLARATION OF SERVICE
	)	
Appellant.	)	
<hr/>		

Under penalty of perjury of the laws of the State of Washington, the undersigned declares:

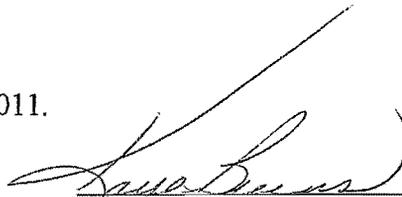
That on this day I served a copy of the *Brief of Respondent* in this matter by e-mail on the following party, receipt confirmed, pursuant to the parties' agreement:

Kenneth H. Kato  
khkato@comcast.net

That on this day I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to Appellant containing a copy of the *Brief of Respondent* in the above-entitled matter.

Lorenzo Renteria Ramos - #346865  
Washington Corrections Center  
PO Box 900  
Shelton WA 98584

Dated: December 6, 2011.

  
\_\_\_\_\_  
Kaye Burns