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Court of Appeals
Division III
State of Washington

No. 29979-1-III
IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

MATTHEW MARK NEDEAU,

Defendant/Appellant.

APPEAL FROM THE SPOKANE COUNTY SUPERIOR COURT
Honorable Kathleen M. O'Connor

BRIEF OF APPELLANT

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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 deadly weapon special verdicts.

2. Mr. Nedeau’s counsel was ineffective for failing to object to the special verdict unanimity instruction.

3. The trial court erred in imposing deadly weapon sentencing enhancements based on the answers to the special verdicts.

4. The evidence was insufficient to support the conviction for second degree murder.

5. The trial court erred in denying the motion for arrest of judgment and/or new trial on the basis of insufficient evidence.

6. The trial court erred in entering the following findings of fact in its order denying motion for arrest or judgment and/or new trial (CP 439–40):

¶14. The court finds that the two altercations between the defendant and the deceased [were] basically one continuous event, with an absolute nexus between the first and second altercations.

¶15. The two defendants acted in concert with each other and were in close proximity at the time of the fatal stabbing.

¶16. The first altercation in which the defendant inflicted a superficial chest wound was a criminal act that set in motion the subsequent chain of events.

¶17. The second altercation was a continuation of the first altercation with the situation becoming even more escalated.

...

¶22. The court finds that viewing these events using the totality of the circumstances approach, the defendant could be considered a principal actor or as an accomplice.

Issues pertaining to assignments of error.

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

2. Is a sentence enhancement illegal or erroneous when based upon an invalid special verdict? May illegal or erroneous sentences be challenged for the first time on appeal, regardless of whether defense counsel registered a proper objection before the trial court?

3. Was counsel ineffective for failure to object to the special verdict unanimity instruction?

4. Is the second degree murder conviction based on principal and/or accomplice liability unsupported by substantial evidence in violation of Mr. Nedeau’s right to due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment?

B. STATEMENT OF THE CASE

Matthew Mark Nedeau was charged with second degree murder as principal or accomplice in the death of Vitaliy Shevchuk (count 1), first

degree assault of Mr. Shevchuk (count 2), and as principal or accomplice in the second degree assault of Tomofei Dmitriev (count 3). CP 1–2. He, with co-defendant Maggie Mae Tyler, raised the affirmative defense of self-defense. At trial, the following evidence was presented.

On July 6, 2009, twenty-six year old Matthew Nedeau and a recent acquaintance, Savannah Frye, decided to spend the day together. Vol.5 RP 869–71. They smoked a little bit of methamphetamine. Vol.5 RP 872. That afternoon they went to visit and hang out with Ms. Tyler, a friend Mr. Nedeau had known for a few months. Vol.5 RP 871–73, 971–72. The three left in Ms. Frye’s car to run errands and purchase some alcohol. Vol.5 RP 973-74.

They drove back to Ms. Tyler’s home and were joined by another acquaintance, Nathan Gilstrap.¹ Vol.5 RP 873–74, 975. Mr. Nedeau, Ms. Tyler and Mr. Gilstrap drank some of the rum, and each took a tablet of ecstasy. Vol.5 RP 876–77, 977. As it was starting to get dark, the four of them left in the car to go somewhere else. Vol.2 438; Vol.5 RP 874, 877-78, 977. Mr. Nedeau drove, Ms. Frye and Ms. Tyler sat in the backseat, and Mr. Gilstrap was in the front passenger seat of the small car. Vol.2

¹ Mr. Gilstrap was deceased by the time of trial. Vol.4 RP 714.

438, 441–42; Vol.5 RP 874. Shortly before 10 p.m., they drove down Greene Street. Vol.1 71; Vol.5 RP 878–79, 978.

That evening, between 9 p.m. and 9:40 p.m., Vitaliy Shevchuk and Timofei Dmitriev arrived at their friend Peggy Hill’s home on Greene Street in Spokane. Vol.1 RP 70; Vol.2 RP 320-22. Mr. Shevchuk and Mr. Dmitriev shared two six packs of beer that day, and it was later determined that Mr. Shevchuk had a blood alcohol level of .22. Vol.1 RP 70; Vol.2 RP 373–74. Around 9:55 pm, Ms. Hill and Mr. Shevchuk left the home and walked along Greene Street toward the store to purchase some cigarettes. Vol.1 RP 71. Most of Ms. Hill’s neighbors were outside on this warm July night. Vol.1 RP 78.

As Mr. Nedeau and his friends drove by, Mr. Shevchuk yelled something at them. Vol.2 RP 444; Vol.5 RP 880, 978. Mr. Nedeau brought the car to a stop in the street and the man continued yelling. Vol.5 RP 881. When Mr. Nedeau got out of the car, he and Mr. Shevchuk had some words. Neighbors who came out into the street also got involved in the yelling. Vol.1 RP 131; Vol.2 RP 263, 282, 285, 325; Vol.5 RP 883, 978. Before she ran back to her house, Ms. Hill also yelled, and later said she was fearful “it would be another street fight...I thought some punches would be thrown...” Vol.1 RP 76.

Mr. Nedeau and Mr. Shevchuk argued face to face, as a male neighbor approached closer. Vol.5 RP 883–84. While Mr. Nedeau’s attention was focused on the two males coming at him, he was faintly aware that Mr. Gilstrap was out of the car and arguing with Mr. Dmitriev nearby. Vol.5 RP 884–85. Concerned for his safety Mr. Nedeau reached into his pocket and pulled out his knife hoping to keep the three males at bay. Vol.5 RP 882, 934, 940. The male neighbor dropped back, as Mr. Nedeau and Mr. Shevchuk continued to parry back and forth. Vol.5 RP 886–879. One male neighbor yelled at Mr. Nedeau to “fight fair.” Vol.2 RP 315.

Mr. Nedeau testified that at some point Mr. Shevchuk came at him to attack him, and to protect himself, he inflicted a superficial, nonlethal wound on Mr. Shevchuk’s chest. Vol.2 RP 368–69, 376–77; Vol.5 RP 942–43. Mr. Nedeau told a male neighbor that he should just take Mr. Shevchuk home. Vol.2 RP 315. Instead, Mr. Shevchuk ran to a neighbor’s yard and picked up a boulder. (Vol.1 RP 79).

Mr. Nedeau, Mr. Gilstrap and Ms. Tyler—who had apparently earlier gotten out of the car— got back into the car and began to drive away. Vol.5 RP 884, 978, 982. Mr. Shevchuk threw the 14-15 pound

rock at their car, smashing the rear window of the hatchback. Vol.1 RP 80, 133–35; Vol.2 RP 450; Vol.4 RP 704.

Mr. Nedeau drove down the street, and without discussion with his passengers made a U-turn in the road, and came back and stopped the car. Vol.2 RP 451; Vol.5 RP 898. By that time, Mr. Shevchuk had armed himself with a metal pole, preparing to strike Mr. Nedeau. Mr. Dmitriev had a chair as a weapon, and another neighbor, armed with a broom handle, later told police he intended to hit Mr. Nedeau with it Vol.1 RP 79, 87, Vol.2 RP 288, 335, 338; Vol.4 RP 779-780.

As Mr. Nedeau got out, Mr. Dmitriev was coming at him with the chair. Because Mr. Nedeau had dropped his knife in the earlier encounter, he threw a bottle at Mr. Shevchuk when he saw him running towards him with the pole in his hand. Vol.4 RP 740-41; Vol.5 RP 899–901. Mr. Nedeau backed away and ran around the car with his arm up, as the people came at him with a metal pole, a broom stick and a chair. Vol.5 RP 900, 903. He got in the passenger side of the car, and recalled telling Mr. Gilstrap to get in, “let’s go”. Vol.5 RP 904–05.

During this encounter that spanned mere seconds,² Ms. Tyler was very frightened that Mr. Nedeau was going to be beaten by the three men. Vol.4 RP 764, 797; Vol.5 RP 903–04. She saw a knife on the ground and picked it up. She testified she was terrified and swung the knife at Mr. Shevchuk to get him to back away. She stated she was not trying to kill him. Vol.5 RP 985-86. She struck Mr. Shevchuk in the neck, let go of the knife, and got back in the car with the others. Vol.1 RP 165; Vol.4 RP 767, 770. Mr. Nedeau reportedly asked Ms. Tyler, “Oh my god, you know, did that really just happen, did you do that?” Ms. Tyler said yes. Vol.3 RP 474-475. Officers from the Spokane Police Department were dispatched to the scene. Vol.1 RP 2. Mr. Shevchuk was transported to the hospital. (Vol.4 RP 642).

The friends drove in silence back to Ms. Frye’s home, saw police cars at the residence, and parked the car a block away. They walked to a store and got a ride with other friends to another house. Vol.3 RP 473–75; Vol.5 RP 913.

Ms. Frye contacted Crime Check a day or so later, after she learned from news reports that the police were looking for her. Vol.1 RP 169.

² Ms. Hill estimated the two encounters took place within a span of one and one half minutes. Vol.1 RP 85.

Ms. Tyler was not aware Mr. Shevchuk died until she saw a report on the news the next day. Vol.4 RP 769–70. She was arrested seventeen days later. Vol.1 RP 16. Mr. Nedeau learned of Mr. Shevchuk’s death from a news report. Vol.5 RP 915. He was subsequently arrested and charged in the matter. CP 1–2.

In her interview with Spokane police, Ms. Tyler said “[s]he guessed she stabbed him” and that Mr. Shevchuk was acting like he was about to hit Mr. Nedeau with a metal pipe. Vol.4 RP 791. Ms. Tyler stated she did not remember injuring Mr. Shevchuk, but remembered she “backed up afterwards” and “was shocked.” Vol.4 RP 813.

Spokane police officers found two knives in the street. Vol. 3 RP 549, 594. At trial, the Washington State Patrol crime lab technician testified both knives contained Mr. Shevchuk’s DNA. Vol.4 RP 666, 669. Mr. Nedeau was included as a possible DNA contributor regarding one knife and excluded as a DNA contributor regarding the other. Vol.4 RP 667, 670.

The Chief Medical Examiner testified that Mr. Shevchuk died as a result of the neck wound. Vol.2 RP 374–75. She stated the second wound to his chest was nonlethal, but may have contributed to death by way of any blood loss caused by the wound. Vol.2 RP 374–75. The examiner

also noted that Mr. Shevchuk had numerous bruises over his body, arms, and legs, caused by blunt force injuries sustained at least a few days before the encounter with Mr. Nedeau and Ms. Tyler. Vol.2 RP 363–64.

Mr. Nedeau and Ms. Tyler were each charged as principal and/or accomplice for the murder of Mr. Shevchuk and the alleged assault of Mr. Dimitriev. CP 1–2. Over objection by Mr. Nedeau’s defense counsel regarding his client, the court gave an accomplice liability instruction as to both defendants. Vol.6 RP 1050–51, 1055; Instruction No. 12 at CP 200.

In the concluding instruction, the jury was instructed in pertinent part regarding consideration of the special verdict forms:

Instruction No. 53: ... You will also be given special verdict forms for each crime. If you find the defendant not guilty of a crime do not use the special verdict form for that crime. If you find the defendant guilty of any of the crimes, you will then use the special verdict form for those crimes 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. [sic] If you unanimously have a reasonable doubt as to this question, you must answer “no”. ...

CP 245–46.

The jury convicted Mr. Nedeau of as charged of count 1 (second degree murder of Mr. Shevchuk) and found him guilty of the lesser

included offense of second degree assault on count 2 (assault against Mr. Shevchuk). CP 248, 256. The jury found Mr. Nedeau not guilty of count 3 (assault against Mr. Dmitriev). CP 260. The jury answered “yes” to the special verdict forms, finding that Mr. Nedeau was armed with a deadly weapon during the commission of the two crimes. CP 249, 257.

Post-verdict, Mr. Nedeau’s counsel moved for arrest of judgment or alternatively a new trial, on three bases. Counsel argued an accomplice instruction should not have been given as to Mr. Nedeau regarding the murder charge, the evidence did not support a conviction as principal or accomplice on either of the alternative theories of murder (intentional non-premeditated or felony murder with a predicate felony of assault), and Mr. Nedeau was prejudiced because the court erroneously sustained an objection during his closing argument. CP 308–17, 320–23, 347. The court denied the motion, and entered written findings of fact and conclusions of law. Vol.7 RP 1277–84; CP 438–40.

Post-verdict but pre-sentencing, Mr. Nedeau’s counsel moved the court to refrain from imposing the mandatory deadly weapon enhancements on Mr. Nedeau’s sentences. Counsel argued they resulted from flawed special verdicts based on erroneous instruction under State v. Bashaw and State v. Ryan, for which counsel was ineffective in failing to

make an objection during trial. CP 420–21. The court denied the motion.

Vol.7 RP 1277–84

The court sentenced Mr. Nedeau to concurrent low end standard range sentences of 216 months and 43 months, respectively, on the second degree murder and second degree assault convictions, and imposed mandatory consecutive weapon enhancement terms of 24 months and 12 months, respectively, on the two counts. The total term of confinement is 252 months. CP 447–48.

This appeal followed. CP 458.

C. ARGUMENT

1. The deadly weapon sentencing enhancements must be vacated because they were based on invalid special verdicts in which the jury was incorrectly instructed it had to be unanimous to answer “no” to the special verdicts.³

a. Unanimity is not required for the jury to answer “no” to the special verdict. 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. 6, 14; Wash. Const. art. I, §§ 21, 22; State v. Williams-Walker, 167 Wn.2d 887, 895–97, 225 P.3d 913

³ Assignment of Error 1, 2 and 3.

(2010); State v. Ortega-Martinez, 124 Wn.2d 702, 707, 881 P.2d 231 (1994); 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.” State v. Bashaw, 169 Wn.2d 133, 146-47, 234 P.3d 195 (2010); Goldberg, 149 Wn.2d at 893. 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. Unanimity is not required to answer “no” to whether the State proved a special finding capable of increasing the sentence. Id. at 895.

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. 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 41–42; Bashaw, 169 Wn.2d at 139. 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.

In the present case, the jurors were instructed even more specifically than in Bashaw, and were told they *must* be unanimous to return a “no” verdict:

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”. . . .*

CP 245–46 (emphasis added).

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;

Bashaw, 169 Wn.2d at 147.

b. The instructional error may be challenged for the first time on appeal, regardless of whether defense counsel registered a proper objection before the trial court.

i. The error is manifest constitutional error.

Recently, in State v. Nunez, 160 Wn. App. 150, 248 P.3d 103 (2011)⁴, the Court of Appeals found the trial court erred when it required the jury to be unanimous to find the State had not proven the special allegation. However, the Court ruled the error was not a manifest constitutional error and thus could not be raised for the first time on appeal. Nunez, 160 Wn. App. at 159–65. The decision in Nunez directly conflicts with other decisions from the Washington Supreme Court and Division One of the Court of Appeals. Those courts found such an error is manifest constitutional error and can be raised for the first time on appeal. Bashaw, 169 Wn.2d at 146-47; Goldberg, 149 Wn.2d at 892-94; *accord* State v. Ryan, 160 Wn. App. 944, 947, 252 P.3d 895 (2011). A decision by the Supreme Court is binding on all lower courts in the state. 1000

⁴ Review was accepted August 9, 2011 in State v. Nunez and State v. Ryan, 160 Wn. App. 944, 252 P.3d 895 (2011), and the cases are consolidated under State v. Nunez (85789-0). Oral argument took place on January 12, 2012, and a written decision is pending.

Virginia P'ship v. Vertecs, 158 Wn.2d 566, 578, 146 P.3d 423 (2006). In Bashaw, the defendant did not object to the flawed special verdict instruction⁵ but the Supreme Court still reversed after applying the harmless error test applicable to constitutional error. Bashaw, 169 Wn.2d at 147–48. This Court should follow Bashaw.

Both the Washington Constitution and United States Constitution guarantee the right to a fair and impartial jury trial. U.S. Const. amend. 5, 6; Wash. Const. art. 1, §§ 3, 22. Only a fair trial is a constitutional trial. State v. Charlton, 90 Wn.2d 657, 665, 585 P.2d 142 (1978). The failure to provide a fair trial violates minimal standards of due process. State v. Jackson, 75 Wn. App. 537, 543, 879 P.2d 307 (1994); U.S. Const. amend. 14; Wash. Const. art. 1, § 3.

“[M]anifest error affecting a constitutional right may be raised for the first time on appeal as a matter of right.” State v. Ford, 137 Wn.2d 472, 477, 973 P.2d 452 (1999). It is “well-settled that an alleged instructional error in a jury instruction is of sufficient constitutional magnitude to be raised for the first time on appeal.” State v. Davis, 141 Wn.2d 798, 866, 10 P.3d 977 (2000). To satisfy the constitutional demands of a fair trial, the jury instructions, when read as a whole, must

⁵ State v. Bashaw, 144 Wn. App. 196, 199, 182 P.3d 452 (2008), *reversed*, 169 Wn.2d 133, 234 P.3d 195 (2010).

correctly tell the jury of the applicable law. State v. O’Hara, 167 Wn.2d 91, 105, 217 P.3d 756 (2009). The applicable law here is that the jury need not be unanimous to return a special verdict of “no”.

The right to a jury trial embodies the right to have each juror reach his or her verdict by means of “the court’s proper instructions.” State v. Boogaard, 90 Wn.2d 733, 736, 585 P.2d 789 (1978) (reversal required where judge’s questioning suggested need for holdout jurors to come to an agreement on special verdict). Goldberg, which held the trial court erred by instructing a non-unanimous jury to reach unanimity on the special verdict, cited Boogaard and the right to a jury trial as authority for its decision. Goldberg, 149 Wn.2d at 892–93.

The incorrect instruction on unanimity results in a flawed deliberative process. Bashaw, 169 Wn.2d at 147. The Nunez Court does not explain how a jury instruction that causes a flawed deliberative process somehow avoids a due process violation. Division One in Ryan properly recognized the due process violation. Ryan, 160 Wn. App. at 948–49. The integrity of the fact-finding process is a basic component of due process. Parker v. United Airlines, Inc., 32 Wn. App. 722, 728, 649 P.2d 181 (1982). “To require the jury to be unanimous about the negative—to be unanimous that the State has not met its burden—is to leave the jury

without a way to express a reasonable doubt on the part of some jurors.” Ryan, 160 Wn. App. at 947. The instructional error here is constitutional in nature because it violates the constitutional right to a fair jury trial and due process. The error is properly raised on appeal under RAP 2.5(a)(3). Moreover, RAP 2.5(a) “never operates as an absolute bar to review.” Ford, 137 Wn.2d at 477. This Court may review an issue raised for the first time on appeal in the interest of justice. RAP 1.2(a); State v. Lee, 96 Wn. App. 336, 338 n.4, 979 P.2d 458 (1999).

ii. Illegal or erroneous sentences may be challenged for the first time on appeal.

“[I]llegal or erroneous sentences may be challenged for the first time on appeal,” regardless of whether defense counsel registered a proper objection before the trial court. State v. Ross, 152 Wn.2d 220, 229, 95 P.3d 1225 (2004), quoting State v. Ford, 137 Wn.2d at 477. A sentence enhancement must be authorized by a valid jury verdict. Williams-Walker, 167 Wn.2d at 900. Error occurs when a trial court imposes a sentence enhancement not authorized by a valid jury verdict. *See* State v. Recuenco, 163 Wn.2d 428, 440, 180 P.3d 1276 (2008) (the error in imposing a firearm enhancement where the jury found only a deadly weapon, occurred during sentencing, not in the jury’s determination of guilt).

Similarly, the error here occurred not just in the use of the invalid instruction, but more importantly when the trial court imposed the sentence enhancement based upon the invalid special verdict. Thus, contrary to Nunez, Mr. Nedeau could raise this issue for the first time on appeal because it involved the imposition of an illegal or erroneous sentence which was based upon an invalid special verdict -- itself the product of an improper jury instruction.

The instructions in the present case incorrectly required jury unanimity for the jury to answer “no” to the special verdict, contrary to Bashaw and Goldberg. The remedy for an improper special verdict is to strike the enhancement, not remand for a new trial. Williams-Walker, 167 Wn.2d at 899-900; Recuenco, 163 Wn.2d at 441-42.

iii. Alternatively, defense counsel rendered ineffective assistance by failing to object to the instruction on unanimity.

Both the federal and state constitutions guarantee the right to effective representation. U.S. Const. Amend. 6; Wash. Const. art. 1, § 22. An appellate court reviews claims for ineffective assistance of counsel de novo. State v. Shaver, 116 Wn. App. 375, 382, 65 P.3d 688 (2003). The appellate test for ineffective assistance of counsel is "whether, after examining the whole record, the court can conclude that appellant received

effective representation and a fair trial." State v. Ciskie, 110 Wn.2d 263, 284, 751 P.2d 1165 (1988). Washington has adopted the two-part *Strickland* test to determine whether a defendant had constitutionally sufficient representation. State v. Cienfuegos, 144 Wn.2d 222, 226, 25 P.3d 1011 (2001).

First, the "defendant must show that counsel's performance was deficient." Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). To establish deficient performance, a defendant must "demonstrate that the representation fell below an objective standard of reasonableness under professional norms ...". State v. Townsend, 142 Wn.2d 838, 843-44, 15 P.3d 145 (2001). Second, the "defendant must show that the deficient performance prejudiced the defense." Strickland, 466 U.S. at 687. This requires the defendant to prove that, but for counsel's deficient performance, there is a "reasonable probability" the outcome would have been different. Strickland, 466 U.S. at 694.

Here, defense counsel's representation was deficient because counsel failed to object to the misstatement of the law in Instruction No. 53: "Because this is a criminal case, all twelve of you must agree in order to answer the special verdict forms ... If you unanimously have a reasonable doubt as to this question, you must answer "no". CP 246. This

statement conflicts with binding Supreme Court precedent holding that unanimity is not required for a jury to answer "no" on a special verdict form (Goldberg, *supra*), and was specifically branded an incorrect statement of the law in Bashaw, *supra*.

Trial counsel's failure to raise the issue of jury unanimity is deficient performance, and counsel acknowledged his deficient performance. CP 420. The Committee's Notes on Use in Washington Practice immediately following the version of WPIC 160.00 in effect at the time of the trial in this case identifies jury unanimity as a potential issue, stating that the instruction will have to be modified in light of the Bashaw decision and that the committee is considering a revised pattern instruction. 11A Washington Practice: Washington Pattern Jury Instructions: Criminal 160.00, Notes on Use (3d ed. 2008, modified 2010).

Competent counsel conducts research and stays abreast of current happenings in the law. Bush v. O'Connor, 58 Wn. App. 138, 148, 791 P.2d 915 (1990) ("an attorney unquestionably has a duty to investigate the applicable law"); State v. Jury, 19 Wn. App. 256, 263, 576 P.2d 1302 (reasonable attorney conduct includes a duty to investigate the facts and law), *rev. denied*, 90 Wn.2d 1006 (1978); *see also* Strickland, 466 U.S. at 690-91 ("counsel has a duty to make reasonable investigations").

Defense counsel's failure to object to an instruction that misstated the law is deficient performance. State v. Ermert, 94 Wn.2d 839, 849-50, 621 P.2d 121 (1980). In Ermert, trial counsel "failed to object to an instruction on the grounds that it incorrectly set out the elements of the offense with which his client was charged." Ermert, 94 Wn.2d at 849-50. Additionally, defense counsel failed to cite applicable case law to the trial court and did not propose an alternate instruction that cured the defects in the original. Ermert, 94 Wn.2d at 851 n.1. The Supreme Court concluded that the errors made by trial counsel denied the defendant a fair and impartial trial. Ermert, 94 Wn.2d at 851.

Here, trial counsel's deficient performance prejudiced Mr. Nedean. As set forth in the next section, had it been given a proper special verdict instruction that did not require unanimity, the jury may have returned a different special verdict. Bashaw, 169 Wn.2d at 147.

c. The illegal or erroneous sentence based upon invalid special verdicts was not 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 (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. 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).

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 non-unanimous 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.

The situation in the present case is indistinguishable from Bashaw. It is impossible and improper to speculate about what the jury would have decided if it had been given the correct instruction. Therefore, the error was not harmless.

d. The special verdicts must be vacated. The instructions in the present case incorrectly required jury unanimity for the jury to answer “no” to the special verdict, contrary to Bashaw and Goldberg. The remedy for an improper special verdict is to strike the enhancement, not remand for a new trial. Williams-Walker, 167 Wn.2d at 899-900; Recuenco, 163 Wn.2d at 434, 441-42.

2. The second degree murder conviction based on principal and/or accomplice liability is unsupported by substantial evidence in violation of Mr. Nedeau's right to due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment.^{6, 7}

a. Due process requires proof of all elements of second degree murder beyond a reasonable doubt. As a part of the due process rights guaranteed under both the Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment the state must prove every element of a crime charged beyond a reasonable doubt. State v. Baeza, 100 Wn.2d 487, 488, 670 P.2d 646 (1983); In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970).

Mere possibility, suspicion, speculation, conjecture, or even a scintilla of evidence, is not substantial evidence, and does not meet the minimum requirements of due process. State v. Moore, 7 Wn. App. 1, 499 P.2d 16 (1972). As a result, any conviction not supported by substantial

⁶ Assignment of Error 4.

⁷ Assignment of Error 5, 6. The motion for new trial appears to argue both that there was insufficient evidence to support the conviction *and* there was insufficient evidence of accomplice liability as to Mr. Nedeau to support the giving of an accomplice instruction as to him. To the extent the court's findings (set forth in Assignment of Error 6) may be interpreted to address insufficiency of the evidence to support Mr. Nedeau's conviction of second degree murder as principal or accomplice, they are hereby challenged.

evidence may be attacked for the first time on appeal as a due process violation. Id. “Substantial evidence” in the context of a criminal case, means evidence sufficient to persuade “an unprejudiced thinking mind of the truth of the fact to which the evidence is directed.” State v. Taplin, 9 Wn. App. 545, 513 P.2d 549 (1973) (quoting State v. Collins, 2 Wn. App. 757, 759, 470 P.2d 227, 228 (1970)). The remedy for a conviction based on insufficient evidence is reversal and dismissal with prejudice. Smalis v. Pennsylvania, 476 U.S. 140, 144, 106 S. Ct. 1745, 90 L. Ed. 2d 116 (1986).

In determining the sufficiency of the evidence, the test is "whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (citing State v. Green, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980)). "When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." Salinas, 119 Wn.2d at 201, 829 P.2d 1068 (citing State v. Partin, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977)). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably

can be drawn therefrom." Salinas, 119 Wn.2d at 201, 829 P.2d 1068 (citing State v. Theroff, 25 Wn. App. 590, 593, 608 P.2d 1254, aff'd, 95 Wn.2d 385, 622 P.2d 1240 (1980)).

While circumstantial evidence is no less reliable than direct evidence, State v. Myers, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997), evidence is insufficient if the inferences drawn from it do not establish the requisite facts beyond a reasonable doubt. Baeza, 100 Wn.2d at 491. When an innocent explanation is as equally valid as one upon which the inference of guilty may be made, the interpretation consistent with innocence must prevail. United States v. Bautista-Avila, 6 F.3d 1360, 1363 (9th Cir. 1993).

b. There was no evidence Mr. Nedeau acted as principal in the death of Mr. Shevchuk. Ms. Frye testified that Ms. Tyler admitted to inflicting the fatal stab wound seconds after the incident. Vol.3 RP 543. The State presented the pretrial interviews of both defendants in which Mr. Nedeau stated Ms. Tyler had admitted committing the stabbing, and Ms. Tyler herself admitted committing the fatal stabbing. Vol.4 RP 736, 791. The State in its closing argument conceded that Ms. Tyler inflicted the fatal stab wound. Vol.6 RP 1129–31, 1203–04. No rational trier of fact

could find that Mr. Nedeau acting as principal inflicted the fatal stabbing beyond a reasonable doubt.

c. There was no substantial evidence Mr. Nedeau acted as accomplice to Ms. Tyler. To convict Ms. Tyler of murder in the second degree, the State was required to prove the elements of second degree murder (either an intentional unpremeditated homicide or second degree assault resulting in a homicide) beyond a reasonable doubt and that the homicide was not justifiable. RCW 9A.32.050.

A defendant is liable as an accomplice if, with knowledge that it will promote or facilitate the crime, he either: (1) solicits, commands, encourages, or requests another person to commit the crime or (2) aids or agrees to aid another person in the planning or committing the crime. RCW 9A.08.020(3)(a). “ ‘Aid’ means all assistance given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.” 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 10.51, at 217 (3d ed. 2008).

The defendant must act with knowledge that he is facilitating the specific crime charged, not simply “a crime.” State v. Cronin, 142 Wn.2d 568, 578-79, 14 P.3d 752 (2000). While an accomplice need not participate in the crime, have specific knowledge of every element of the crime, or share the same mental state as the principal (State v. Berube, 150 Wn.2d 498, 511, 79 P.3d 1144 (2003)), the accomplice must act with the knowledge that he is aiding a particular crime⁸. See State v. Whitaker, 133 Wn. App. 199, 230, 135 P.3d 923 (2006). It is not enough that some type of criminal activity might have been foreseeable. State v. Stein, 144 Wn.2d 236, 246, 248, 27 P.3d 184 (2001). A defendant must know that his acts will promote the crime committed by the principal. State v. Larue, 75 Wn. App. 757, 762, 875 P.2d 701 (1994).

In the present case, there was no evidence that Mr. Nedeau solicited, commanded, encouraged, or requested Ms. Tyler to do anything, much less to stab Mr. Shevchuk. There was no evidence Mr. Nedeau aided or agreed to aid Ms. Tyler in stabbing Mr. Shevchuk. The testimony

⁸ See State v. Langford, 67 Wn. App. 572, 580, 837 P.2d 1037 (1992), *rev. denied*, 121 Wn.2d 1007, 848 P.2d 1263, *cert. denied*, 510 U.S. 838, 114 S.Ct. 118, 126 L.Ed.2d 83 (1993) (A defendant can be liable as an accomplice to second degree felony murder based on assault even though he did not know the means by which the principal intended to accomplish the assault); see also State v. Cronin, 142 Wn.2d at 581–82 (In order to convict Cronin as an accomplice to premeditated murder, the State had to prove beyond a reasonable doubt that Cronin had general knowledge that he was aiding in the commission of the crime of murder).

from the State's witness, Ms. Frye, was clear that there was no discussion about what was going to happen when Mr. Nedeau turned the car around after having its back window smashed out by Mr. Shevchuk. There was no evidence of any agreement between the two, and certainly no agreement that Ms. Tyler should assault or murder Mr. Shevchuk.

Similarly, being present at the scene, and even knowing that one's presence would aid in the commission of a crime, does not establish liability unless it is proven that the defendant is present *because* he is waiting to assist in committing the crime. State v. Rotunno, 95 Wn.2d 931, 933, 631 P.2d 951 (1981) (emphasis added). Even though a defendant's presence at the scene of a crime may embolden or encourage another person to commit a crime that they may not have committed if that person were alone, the law requires that the "defendant/accomplice" want to cause that encouragement. See In re Wilson, 91 Wn.2d 487, 588 P.2d 1161 (1979).

After the rock shattered the back window of the car, Mr. Nedeau decided on his own to immediately go back to the scene, to find out where Mr. Shevchuk had gone so that Ms. Frye could later pursue him for the damage he caused. Vol.5 RP 896-98. Mr. Nedeau got out of the car first, and there was no evidence he even knew anyone else had gotten out of the

car. From this evidence one cannot infer that Mr. Nedeau knew that by getting out of the car, he was assisting Ms. Tyler in getting out of the car, assisted her in arming herself, or assisted her in stabbing Mr. Shevchuk. To the contrary, the only rational inference that can be drawn is that Mr. Nedeau had no idea Ms. Tyler was going to get out of the car, arm herself, and stab Mr. Shevchuk simply because he turned the car around and stopped to confront Mr. Shevchuk.

For Mr. Nedeau to be considered an accomplice to Ms. Tyler's act of stabbing Mr. Shevchuk, the evidence must establish beyond a reasonable doubt that he at a minimum knew of her crime or intent to commit the crime *beforehand*. In State v. Luna, the defendant was driving a car when a passenger asked him to stop. The passenger got out of Luna's car and stole another vehicle nearby. The defendant witnessed this crime, drove his car and followed the thief away from the scene, and even raced the thief in the stolen car. The court held that because Luna did not know of the passenger's intent to steal the car beforehand, his acts could not have been done with the desire to see the crime committed and thus did not satisfy the *mens rea* for accomplice liability. State v. Luna, 71 Wn. App. 755, 759–60, 862 P.2d 620 (1993).

In State v. Robinson, a defendant was driving a car with several passengers inside. At some point one of the passengers jumped out of the car and stole a woman's purse. The defendant pulled his car off to the side, watched the crime, waited for the passenger to get back into his car, and then drove the thief away from the scene. The defendant was convicted as an accomplice to the robbery. The appellate court reversed the conviction because being at the scene and knowing a crime was being committed did not establish accomplice liability. State v. Robinson, 73 Wn. App. 851, 857, 872 P.2d 43 (1984). The court further stated that even driving the thief away from the scene did not make the driver an accomplice because the crime had already been committed at that point, and while assistance given after a crime has been committed may be rendering criminal assistance, it does not implicate accomplice liability. Id. at 857–58.

Here, the evidence proved that Mr. Nedeau was driving the car, made the U-turn after his window was smashed out, and stopped the car near Mr. Shevchuk. As in Luna and Robinson, this does not make Mr. Nedeau an accomplice to anything his passengers did without knowledge that they planned to do something. The evidence does not even suggest that Mr. Nedeau knew what his passengers intended to do, if anything.

And, as in Robinson, no accomplice liability can attach where Mr. Gilstrap—not Mr. Nedeau—drove away from the scene of the stabbing.

The only timeframe in which Mr. Nedeau could have done anything to make himself an accomplice to Ms. Tyler was during the time he was out of the car during the second encounter. During cross-examination, the State repeatedly pressed Ms. Tyler to say that she got out of the car during both encounters to act as Mr. Nedeau’s “back”. Vol.5 RP 1001–09. While this evidence might show that during this time Ms. Tyler could have been acting as an accomplice to Mr. Nedeau if he chose to commit a crime against Mr. Shevchuk,⁹ the opposite is not true. For accomplice liability to attach to him, there must be substantial evidence that during this time Mr. Nedeau knew Ms. Tyler was going to commit the crime of assault or murder, that he knew his acts would encourage or promote Ms. Tyler committing an assault or murder, and that he participated in her acts as something he wished to bring about and make succeed. See Cronin, 142 Wn.2d at 579; Larue, 74 Wn. App. at 762.

The evidence, even when viewed most favorably to the State, shows that Mr. Nedeau did not aid Ms. Tyler in the crime of murder

⁹ Cf. One of the court’s findings on the motion for new trial regarding whether an accomplice instruction should have been given as to defendant Nedeau was: “[20. The court is satisfied that [Ms.] Tyler was there to aid the defendant based on her testimony that she got out of the car the second time to ‘have Matt’s back’.” CP 439.

because he had no prior knowledge that she planned to commit that crime, and did nothing to join in her act of murder as something he wished to see succeed.

Because the evidence is insufficient to support the conviction on either basis—principal or accomplice liability—the conviction must be dismissed.

D. CONCLUSION

For the reasons stated, the conviction for second degree murder should be reversed and dismissed. Alternatively, the deadly weapon sentencing enhancements should be vacated and the matter remanded for resentencing.

Respectfully submitted April 4, 2012.

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PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on April 4, 2012, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of brief of appellant:

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