

29979-1-III

FILED

COURT OF APPEALS

JUN 04 2012

DIVISION III

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STATE OF WASHINGTON
By _____

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

MATTHEW M. NEDEAU, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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Prosecuting Attorney

Mark E. Lindsey
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I.

APPELLANT'S ASSIGNMENTS OF ERROR

1. The trial court erroneously instructed jury that it had to be unanimous to answer "no" to the Special Verdict interrogatory.
2. Defendant received ineffective assistance when counsel failed to object to the trial court's special verdict instruction.
3. The trial court erroneously imposed deadly weapon enhancements to defendant's sentence based upon jury's answers to Special Verdict interrogatory.
4. Insufficient evidence supported conviction of defendant for second degree murder conviction.
5. The trial court erroneously denied defendant's motion for arrest of judgment and/or a new trial.
6. The trial court erred in the factual findings and legal conclusions entered in support of the denial of defendant's motion for arrest of judgment and/or a new trial.

II.

ISSUES PRESENTED

1. Should the deadly weapon enhancements of defendant's sentence be vacated because jury was incorrectly instructed it had to be unanimous to answer "no" to the special verdict?
2. Is a sentencing enhancement illegal or erroneous when it is based upon an invalid special verdict?
3. May illegal or erroneous sentences be challenged for the first time on appeal where defendant did not object to the sentence before the trial court?
4. Was counsel ineffective for failing to object to the special verdict unanimity instruction?
5. Does a conviction based upon principal and/or accomplice liability that is unsupported by substantial evidence violate defendant's due process rights?

III.

STATEMENT OF THE CASE

The respondent accepts the appellant's statement of the case for purposes of this appeal only.

IV.

ARGUMENT

A. THE DEFENDANT'S FAILURE TO OBJECT TO THE TRIAL COURT'S ALLEGEDLY ERRONEOUS INSTRUCTION PRECLUDES REVIEW OF THE ERROR ON APPEAL PURSUANT TO RAP 2.5(a).

Generally, the failure to object to a trial court's jury instruction precludes appellate review. Rules of Appellate Procedure ("RAP") 2.5(a)(3); *State v. Scott*, 110 Wn.2d 682, 685-6, 757 P.2d 492 (1988). Neither the defendant nor his counsel objected to the jury instruction that he now contends was erroneous. Generally, an issue cannot be raised for the first time on appeal unless it is a manifest error affecting a constitutional right. *See* RAP 2.5(a)(3). The applicability of RAP 2.5(a)(3) is determined by a test: (1) whether the alleged error is truly constitutional and (2) whether the alleged error is manifest. *State v. Kronich*, 160 Wn.2d 893, 899, 161 P.3d 982 (2007). An error is manifest when it has practical *and* identifiable consequences in the trial of the case. *State v. Stein*, 144 Wn.2d 236, 241, 27 P.3d 184 (2001). (Emphasis added). Here, defendant has identified no practical and identifiable consequences in the *trial of this case* that are directly attributable to the alleged error. The defendant has not satisfied the threshold burden that the trial court committed a manifest error which affected a constitutional right, and hence, is not entitled to appellate review thereof at this point.

B. THE SENTENCING ENHANCEMENTS WERE PROPERLY IMPOSED BY THE TRIAL COURT BASED UPON THE EVIDENCE PRESENTED AT TRIAL.

Defendant claims that the special verdicts should be vacated based upon the trial court incorrectly instructing the jury that it had to unanimously answer “no” before the special verdicts could be rejected. The defendant cites the Supreme Court’s decision in *State v. Bashaw*, 169 Wn.2d 133, 234 P.3d 195 (2010), in support of his claim. Defendant relies upon the reasoning in *Bashaw* while not heeding the ruling by the Supreme Court in *State v. O’Hara*, 167 Wn.2d 91, 217 P.3d 756 (2009), that appellate courts do not assume that an error is of constitutional magnitude. *Id.*

In *State v. Nunez*, 160 Wn. App. 150, 248 P.3d 103 (2011), *rev. granted*, 172 Wn.2d 1004, 258 P.3d 676 (2011), this Court analyzed the requisites for review of the issue defendant has presented herein. Citing the Supreme Court’s *O’Hara* decision, this Court analyzed whether the defendant in *Nunez* had qualified for review of the trial court instructional error. Specifically, this Court inquired whether Mr. Nunez had established that the trial court’s instructional error was constitutionally “manifest.” This Court sought proof that the instructional error was constitutionally “manifest” in the only source available, the record before the trial court. In *Nunez*, this Court found the record devoid of the facts required to demonstrate that the defendant had suffered actual prejudice. Finding no actual prejudice, this Court found that Mr. Nunez had failed to carry

his burden to prove that he had suffered actual prejudice as a result of the instructional error. Mr. Nunez had not proved that the trial court's instructional error had manifestly affected an identified constitutional provision, and thus had not qualified for the exception to the provisions of RAP 2.5(a).

Here, the record lacks proof of any practical and identifiable consequences *to the trial* of Mr. Nedeau's case to support the claim that the asserted instructional error was "manifest." Quite the contrary is the circumstance because defendant proffered the affirmative defense of self-defense in response to the charged crime. Defendant claimed that his stabbing of Mr. Shevchuk with the knife was in response to Mr. Shevchuk coming at defendant with a metal pole. Defendant never challenged the fact that he was armed and used that weapon to defend himself against what defendant believed was an assault by Mr. Shevchuk. There was never any real question that defendant was armed with a deadly weapon. Once the jury returned the general verdicts finding defendant guilty despite the self-defense claim, the answer to the special interrogatory was not truly an issue any longer and the sentencing enhancements were legally mandated to be imposed.

C. ASSUMING, ARGUENDO, THAT THE INSTRUCTIONAL ERROR IS “MANIFEST” AND THAT SUFFICIENT EVIDENCE SUPPORTED THE CLAIM TO MAKE IT OF CONSTITUTIONAL MAGNITUDE, THE ERROR WAS HARMLESS.

Defendant claims the trial court committed manifest constitutional error by instructing the jury that it had to unanimously answer the special verdict form “no” to avoid finding the sentencing enhancement factor. Defendant cites *Bashaw* in support of his position; however, this position does not cure the fact that instructional error does not automatically constitute constitutional error.

The Supreme Court based its *Bashaw* decision on *State v. Goldberg*, 149 Wn.2d 888, 72 P.3d 1083 (2003). In *Goldberg*, the trial court instructed the jury: “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.*, at 893. The Supreme Court held that this instruction did not mandate unanimity before a “no” answer could be rendered. *Id.*, at 893. The Supreme Court further ruled that the jury therein had completed their assigned task as instructed when it rendered a “no” verdict despite a lack of unanimity. *Id.*, at 893. It is important to note that the Supreme Court found that the error in *Goldberg* was precipitated by the trial court’s order that the jury continue to deliberate despite its having indicated that it was deadlocked and unable to reach a verdict regarding the special interrogatory.

Here, the defendant did not bring the claimed instructional error to the trial court's attention until he brought a post-conviction motion. The instruction herein did specifically direct the jury that it needed to be unanimous to render a "yes" or "no" answer to the interrogatory. The instruction focused the jury's attention on the need to be unanimous beyond a reasonable doubt to answer the special interrogatory. Accordingly, it is logical that the defendant cite to the *Bashaw* decision in support of his position on appeal.

The defendant's reliance upon *Bashaw* is understandable, yet misplaced. In *Bashaw*, the Supreme Court was simply reiterating what is evident from a plain reading of the challenged instruction. First, no sentencing enhancement can be imposed without a unanimous jury finding that the answer to the special verdict is "yes" beyond a reasonable doubt. Obviously, when one juror votes "no" there can be no unanimous jury special finding, so no enhancement imposed. One juror voting "no" results in a deadlocked jury, so no special verdict is rendered and no enhancement can be imposed. If the jury is actually, "legally", going to answer – to fill in the blank – "yes" or "no", then it must be *unanimous because it is a criminal case*. It is the requirement that the jury render an answer to the special interrogatory that causes the confusion. If it is irrelevant that the jury actually answers "no" to the special interrogatory, then a unanimous "no" special verdict need not be rendered. Nevertheless, defendant faces no jeopardy of an enhanced

penalty unless the jury finds beyond a reasonable doubt that the State has proved the special verdict.

Here, the trial court accepted the premise that the special verdict instruction was erroneous, then provided a detailed analysis of why the instructional error was harmless. RP 1246-1249; 1277-1284. Specifically, that:

[t]he issues with regard to the deadly weapon enhancements have to do with whether...the defendant is armed...my response is there is no question that the defendant was armed...no question that the weapon was used, and that wasn't even an issue in the case in terms of the testimony...The fact situation...was [there] a weapon...the weapon was used.

RP 1283.

Finally, the instructional error was harmless in light of the presumption that the jury follows the law as instructed by the trial court. *State v. Johnson*, 124 Wn.2d 57, 77, 873 P.2d 514 (1994). No sentencing enhancement could be imposed absent the jury finding beyond a reasonable doubt that the answer to the special interrogatory was "yes." Accordingly, even if the trial court's special verdict instruction was erroneous, the error was harmless.

D. DEFENDANT HAS NOT SHOWN THAT THE TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE BY NOT OBJECTING TO THE SPECIAL VERDICT INSTRUCTIONS.

Defendant neatly bypasses the procedural bar raised by RAP 2.3(a)(3) for his failure to object to the trial court's special verdict instruction by proffering the

constitutional claim of ineffective assistance of counsel. Defendant claims he received ineffective assistance of counsel for the failure to object to the trial court's special verdict form instruction.

A defendant must establish that the attorney's performance was deficient *and* that the defendant was prejudiced by that deficiency to establish ineffective assistance of counsel. *State v. Nichols*, 161 Wn.2d 1, 8, 162 P.3d 1122 (2007). The defendant must prove that the trial counsel's performance fell below an objective standard of reasonableness based on all the circumstances to show deficient performance. *Id.* Prejudice is established where the defendant shows that, but for counsel's errors, there is a reasonable probability that the outcome of the trial would have been different. *Id.* The failure to establish either prong of the test is fatal to the claim of ineffective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 697, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987).

There is a strong presumption that a trial counsel's performance was reasonable and effective. *State v. Thomas*, 109 Wn.2d at 226. A claim of ineffective assistance of counsel will not stand where the trial counsel's conduct can be characterized as legitimate trial strategy or tactics. *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Here, the inquiry focuses upon whether the trial counsel's failure to object to the trial court's special verdict instruction can be characterized as legitimate trial strategy or tactics.

Defense counsel did object to the trial court's special verdict instructions because it was not necessary in light of the defense theory of the case. Specifically, that defendant was acting in self-defense when Mr. Shevchuk was stabbed to death. The defense theory of the case depended upon the jury finding the defendant's and Ms. Tyler's testimony more credible than that of the other witnesses that they were acting in self-defense. The defense took great pains to extract every detail available through the witnesses with regard to their observations of the incident. Specifically, that during the incident both the defendant and Mr. Nedeau acted only in self-defense in response to the perceived violence intended against them by the victim and the neighbors.

It is reasonable to infer that the jury did what the defense asked; it weighed the evidence and rendered its verdict. There is no evidence in, or reasonable inferences to be drawn from a review of, the record to support that defendant's trial counsel was ineffective. Quite the contrary is evident from the record since the jury acquitted defendant of the charged crime of first degree assault in favor of the lesser-included offense of second degree assault. The fact that the jury weighed the evidence and did not find Mr. Tyler's theory of the case credible does not establish that his trial counsel was ineffective. Appellant has not shown that counsel's representation was objectively deficient *and* that the outcome would have been different. As noted previously, the failure to establish either prong of the *Strickland* test is fatal to a claim of ineffective assistance of

counsel. *Strickland v. Washington*, 466 U.S. at 697; *State v. Thomas*, 109 Wn.2d 226. Here, appellant has failed to satisfy his burden that his counsel was ineffective.

E. SUFFICIENT EVIDENCE SUPPORTED THE SECOND DEGREE MURDER CONVICTION OF DEFENDANT.

Defendant contends that insufficient evidence supported the jury verdict finding defendant guilty of second degree murder as either a principal or an accomplice. The standard for adjudging the sufficiency of the evidence to support a verdict is well established. The test is whether, after viewing the evidence in a light most favorable to the State, any rational trier of fact could find that each element of the offense has been proved beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 221-222, 616 P.2d 628 (1980). In reviewing the sufficiency of the evidence in a criminal case, the reviewing court must draw all reasonable inferences from the evidence in favor of the State and interpret those inferences most strongly against the defendant. *State v. Lopez*, 79 Wn. App. 755, 768, 904 P.2d 1179 (1995); *State v. Hagler*, 74 Wn. App. 232, 235, 872 P.2d 85 (1994). The reviewing court will defer to the trier of fact regarding issues of conflicting testimony, witness credibility, and the persuasiveness of the evidence. *State v. Thomas*, 150 Wn.2d 821, 83 P.3d 970 (2004). Application of these standards requires affirming of the murder conviction.

The Information charged the defendant with Murder in the Second Degree, committed, as follows:

That the defendants, MAGGIE M. TYLER and MATTHEW MARK NEDEAU, as actors and/or accomplices, in the State of Washington, on or about July 6, 2009, with intent to cause the death of another person, did cause the death of VITALIY SHEVCHUK, a human being, said death occurring on or about July 6, 2009, OR while committing and attempting to commit the crime of Second Degree Assault, and in the course of and furtherance of said crime and in immediate flight therefrom, did cause the death of VITALIY SHEVCHUK, a human being, not a participant in such crime, said death occurring on or about Jul6 2009, and the defendants, as actors and /or accomplices, being at said time armed with a deadly weapon other than a firearm under the provisions of RCW 9.94A.602 and 9.94A.533(4).

CP 1-2.

In response thereto, defendant claimed to have acted in self-defense. A claim of self-defense in a murder prosecution requires the defendant to provide some evidence that: (1) the killing occurred in circumstances amounting to defense of life, *and* (2) defendant had a reasonable apprehension of great bodily harm and imminent danger. RCW 9A.16.050; *State v. Read*, 147 Wn.2d 238, 242, 53 P.3d 26 (2002). One of the elements of self-defense is that the person relying on the self-defense claim must have had a *reasonable* apprehension of great bodily harm. *State v. Janes*, 121 Wn.2d 220, 237, 850 P.2d 495 (1993) (*citing* RCW 9A.16.050). The significance of the objective portion of the defense must be acknowledged because absent the reference point of a reasonably prudent person, a defendant's subjective beliefs would always justify the homicide. *Janes*, 121 Wn.2d at 239. The objective

portion of the standard “keeps self-defense firmly rooted in the narrow concept of necessity.” *Janes*, 121 Wn.2d at 240.

Here, the *reasonable prudent person* initially would not have stopped the car and exited in response to some unintelligible comment yelled as defendants drove by. The *reasonable prudent person* would not have turned the car around while fleeing from the first confrontation that resulted in an unarmed Mr. Shevchuk being stabbed in the chest. The *reasonable prudent person* would not have returned for a second confrontation with Mr. Shevchuk and used deadly force in response to a broken car window.

The defendants admitted that Mr. Shevchuk was not armed during the initial confrontation. RP 885, 931, 934, 1004, 1005. Moreover, the defendants admitted that they stopped to confront Mr. Shevchuk merely because he had yelled something unintelligible at their car as they drove down Greene Street. RP 730-731, 755, 878-880, 929-931, 978. But for defendant deciding to take offense from Mr. Shevchuk’s unintelligible comments, Mr. Shevchuk would still be alive today. The evidence before the jury was that Mr. Shevchuk, and the others who came to his aid, were fleeing back to their homes when defendant turned the car around to come back down Greene Street. RP 287-288, 333-335. The damage to Ms. Frye’s car did not justify the stabbing and murder of Mr. Shevchuk. Especially since the defendants were in the car, away from the danger before defendant decided to stop to confront Mr. Shevchuk about the damage.

The evidence before the Jury established that not once, but twice, the defendants took the initiative to place themselves in the position of using deadly force despite not facing deadly force. The evidence before the jury was that the defendants, at best, faced a chair that was held in a defensive posture, a broom handle, and a hollow flimsy metal pole that was never once swung at either of the defendants. RP 315, 335, 343, 762, 766, 950. The evidence before the jury included the defendant, Mr. Nedeau, stating that co-defendant, Ms. Tyler, committed the killing act when defendant attracted Mr. Shevchuk's attention. RP 726, 736, 738, 746; CP-854-857. But for defendant's confrontation of Mr. Shevchuk, co-defendant Tyler would not have needed to act. But for defendant introducing the knife into the confrontation, co-defendant Tyler would not have had access to the deadly weapon that delivered the homicidal stroke. The evidence before the jury included the defendants claiming that neither had a knife (RP 758), yet defendant's DNA profile is found on one of the knives that also has Mr. Shevchuk's blood and DNA on the blade. RP 664-667. Moreover, numerous witnesses testified to having observed both the defendants armed with a knife. RP 264, 284, 276, 289, 315, 329, 330, 424, 447, 488, 489, 490. The jury weighed the credibility of the evidence presented and decided that the defendant was not acting in self-defense when Mr. Shevchuk died as a result of being stabbed by the defendants with two different knives. Accordingly, the evidence presented at trial established the elements of murder in the second degree beyond a reasonable doubt when viewed most favorably to the

State. The uncontroverted evidence before the jury also supported the finding that each of the knives involved in the murder had blades of three inches or more. RP 668, 670. The evidence amply supported the jury's general and special verdicts.

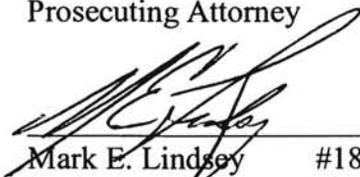
V.

CONCLUSION

For the reasons stated above the defendant's conviction and sentence should be affirmed.

Dated this 7th day of June, 2012.

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