

No. 30075-7-III
IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

FILED

DECEMBER 27, 2011

Court of Appeals
Division III
State of Washington

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

RANDAL LEE RAPH,

Defendant/Appellant.

APPEAL FROM THE FERRY COUNTY SUPERIOR COURT
Honorable Allen C. Nielson

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in instructing the jury inconsistently as to unanimity requirements on the special verdicts.

2. Trial counsel rendered ineffective assistance of counsel by failing to object to a jury instruction that misstated the law regarding jury unanimity on the special verdicts.

3. The trial court erred in imposing an exceptional sentence based on the special verdict.

Issues pertaining to assignments of error.

1. Should the special verdicts be vacated because the jury was inconsistently instructed regarding unanimity requirements on answering “no” to the special verdicts?

2. The jury received special verdict forms asking them to decide whether certain crimes had been committed with aggravating factors. The court instructed the jury that all twelve of them had to agree in order to answer the special verdict forms, but also that their decision need not be unanimous to answer “no”. Did defense counsel err in failing to object where the court's instruction is inconsistent and misstates the law, thereby making it more difficult for a jury to answer "no" on the special verdict forms?

B. STATEMENT OF THE CASE

The defendant, Randal Lee Raph, was charged with five crimes: attempted second degree rape-domestic violence, unlawful imprisonment-domestic violence, theft of a motor vehicle, interfering with reporting domestic violence, and felony harassment-domestic violence. CP 50–53. The jury at Trial No. 1 convicted Mr. Raph of unlawful imprisonment and theft of a motor vehicle. RP 442–43. By special verdicts, the jury found a domestic relationship component and presence of both alternative elements as to the unlawful imprisonment. CP 116–19; RP 443–44. The jury was hung on the remaining three counts, and a mistrial was declared. RP 436–42.

At Trial No. 2, the jury convicted Mr. Raph of the remaining three counts as charged. CP 136–38, 223–25; RP 816. By special verdicts, the jury found a domestic relationship component and the presence of two aggravating factors as to the crime of attempted rape, and a domestic relationship component to the crime of harassment. CP 226–28; RP 816–17.

Prior to and during Trial No. 1, there was discussion about how to properly instruct the jury regarding unanimity in answering the special verdict forms regarding aggravating factors. RP 176, 282, 289. The court

noted that the most recent case on this issue—State v. Bertha Bashaw¹ (decided July 1, 2010)—had originated there in Ferry County. RP 289. The court believed the concluding instruction submitted by the State was consistent with the current law. CP RP 289, 368. Defense counsel did not except or object to the proposed instruction. RP 372–73. For Trial No.2, the State submitted essentially the same concluding instruction adjusted for the crimes being considered, which the court read carefully. CP 171–73; RP 729. Defense counsel did not object to it. RP 724–33.

In both trials, the jury was told that “The order of these instructions has no significance as to their relative importance. They are all important[.]” and “As jurors, you have a duty to discuss the case with one another and to deliberate in an effort to reach a unanimous verdict.”

Instruction No. 1 at CP 59, 188; Instruction No. 2 at CP 60, 189.

In both trials, the jury was given functionally identical concluding instructions, which differed only in the particular crimes to be considered. Instruction No. 28 (Trial No. 1) at CP 88–91; Instruction No. 27 (Trial No. 2) at CP 214–16. The jurors were told in the concluding instruction how to consider the verdict forms and how to use the special verdict forms. Below is the relevant portion of the instruction from Trial No. 2.

¹ 169 Wn.2d 133, 234 P.3d 195 (2010).

You will be given the exhibits admitted in evidence, these instructions, five (5) verdict forms for recording your verdict. Some exhibits and visual aids may have been used in court but will not go with you to the jury room. The exhibits that have been admitted into evidence will be available to you in the jury room.

You must fill in the blank provided in each verdict form the words "not guilty" or the word "guilty", according to the decision you reach.

You will also be given special verdict form I for the crime of Attempted Rape in the Second Degree, as charged in Count I. If you find the defendant not guilty of this crime, do not use the special verdict form 1. If you find the defendant guilty, you will then use the special verdict form 1 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 form.** 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 any one of you ha[s] a reasonable doubt as to this question, you must answer "no". Your decision need not be unanimous to answer "no".**

You will also be given a special verdict form 2 for the crime of Attempted Rape in the Second Degree and Harassment, as charged in Counts I and III. If you find the defendant not guilty of all of these crimes, do not use special verdict form 2. If you find the defendant guilty of any one of these crimes, you will then use the special verdict form 2 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 form.** 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 any one of you ha[s] a reasonable doubt as to this question, you must answer "no". Your decision need not be unanimous to answer "no".**

Because this is a criminal case, each of you must agree for you to return a verdict. When all of you have so agreed, fill in the verdict forms to express your decision. The presiding juror must sign the verdict forms and notify the bailiff. The bailiff will bring you into court to declare your verdict.

Instruction No. 27 (Trial No. 2) at CP 214–16 (emphasis added); *accord*

Instruction No. 28 (Trial No. 1) at CP 89–91.

The jury returned special verdicts of “yes” to the questions whether the crimes of unlawful imprisonment, attempted rape in the second degree and harassment were committed against a member of the same family or household. CP 119, 227–28. The jury also answered “yes” on special verdict form 1, concluding that in committing attempted rape Mr. Raph had used his position of trust to facilitate its commission and knew or should have known that the victim was particularly vulnerable or incapable of resistance. CP 226.

The court imposed an exceptional sentence on the attempted rape conviction of a minimum term of 120 months, based on the two aggravating factors.² CP 255. The standard range sentences on the other four convictions run concurrent to it. CP 123, 255. The court entered written findings of fact and conclusions of law for the exceptional sentence. CP 264. This appeal followed. CP 274.

² Based on an offender score of 3, the standard range is 76.5 to 102 months. CP 254.

C. ARGUMENT

1. The special verdicts should be vacated because the jury was inconsistently instructed it had to be unanimous to answer “no” to the special verdict.

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 (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, 72 P.3d 1083. Where the jury is deadlocked or cannot decide, the answer to the special verdict is “no.” Id.

In Goldberg, the jury was given the following special verdict instruction:

In order to answer the special verdict form "yes", you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you have a reasonable doubt as to the question, you must answer "no".

Id. Although the Supreme Court vacated the special verdict for other reasons, it did not find fault with this instruction. Goldberg, 149 Wn.2d at 894, 72 P.3d 1083. 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, 234 P.3d 195. In this case as well as in Bashaw, the jury was incorrectly instructed, “Since this is a criminal case, all twelve of you must agree on the answer to the special verdict.” CP 41–42; Bashaw, 169 Wn.2d at 139, 234 P.3d 195. Citing Goldberg, the Bashaw court held:

Applying the Goldberg rule to the present case, the jury instruction stating that all 12 jurors must agree on an answer to the special verdict was an incorrect statement of the law. Though unanimity is required to find the presence of a special finding increasing the maximum penalty, see Goldberg, 149 Wn.2d at 893, it is not required to find the absence of such a special finding. The jury instruction here stated that unanimity was required for either determination. That was error.

Bashaw, 169 Wn.2d at 147, 234 P.3d 195.

b. The jury was inconsistently instructed that unanimity was both required and not required for the jury to answer “no” to the special verdict. “When instructions are inconsistent, it is the duty of the reviewing court to determine whether ‘the jury was misled as to its function and responsibilities under the law’ by that inconsistency.” State v. Wanrow, 88 Wn.2d 221, 239, 559 P.2d 548, 558 (1977) (quoting State v. Hayes, 73 Wn.2d 568, 572, 439 P.2d 978, 980 (1968)); State v. Carter, 127 Wn. App. 713, 112 P.3d 561 (2005). Because jurors lack the legal interpretative skills possessed by those trained in the profession, instructions as to the law must be “manifestly clear.” State v. LeFaber, 128 Wn.2d 896, 902, 913 P.2d 369 (1996).

Here, although the jurors were instructed that they need not be unanimous to answer “no” they were also *twice* instructed that they instead had to agree in order to answer the special verdict form.

You will also be given special verdict form I for the crime of Attempted Rape in the Second Degree, as charged in Count I. If you find the defendant not guilty of this crime, do not use the special verdict form 1. If you find the defendant guilty, you will then use the special verdict form 1 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 form.** 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 any one of you ha[s] a reasonable doubt as to this question, you must**

answer "no". Your decision need not be unanimous to answer "no".

Instruction No. 27 (Trial No. 2) at CP 215 (emphasis added).

You will also be given a special verdict form 2 for the crime of Attempted Rape in the Second Degree and Harassment, as charged in Counts I and III. If you find the defendant not guilty of all of these crimes, do not use special verdict form 2. If you find the defendant guilty of any one of these crimes, you will then use the special verdict form 2 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 form.** 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 any one of you ha[s] a reasonable doubt as to this question, you must answer "no". Your decision need not be unanimous to answer "no".**

Instruction No. 27 (Trial No. 2) at CP 215–16 (emphasis added).

Under the controlling law of Goldberg and Bashaw, the instruction that all twelve jurors must agree in order to answer the special verdict form is a clear misstatement of the law.

c. The inconsistent instructions resulted in a misstatement of the law and permitted the jury to enter the special findings of knowledge of particular vulnerability³ and abuse of position of trust⁴ without being satisfied beyond a reasonable doubt. This constitutes manifest constitutional error that may be raised for the first time on appeal.

³ RCW 9.94A.535(3)(b).

⁴ RCW 9.94A.535(3)(n).

Because aggravating circumstances permit the imposition of a sentence beyond the standard range, they are constitutionally required to be proved to a jury beyond a reasonable doubt. Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004); RCW 9.94A.537(3). The jury's verdict on the aggravating factor must be unanimous. RCW 9.94A.537(3). Where the State is relieved of its burden to prove the existence of an aggravating factor beyond a reasonable doubt, the issue is one of manifest constitutional error and may be raised for the first time on appeal. State v. Ryan, 160 Wn. App. 944, 947, 252 P.3d 895 (2011).

When instructions can be interpreted two ways— one which supports the correct legal standard and one which does not—the instruction cannot be said to be manifestly clear. LeFaber, 128 Wn.2d at 902. “[T]he fact that one instruction may correctly state the law as applicable to one theory of the case does not necessarily cure the error caused by an inconsistent and erroneous statement of the law.” Dunn v. Puget Sound Traction, Light & Power Co., 89 Wash. 36, 38–39, 153 P. 1059 (1915)(citations omitted).

The instruction in question here did not make it manifestly clear to the jury that before they could enter a special finding of knowledge of particular vulnerability and/or misuse of a position of trust they had to be

satisfied beyond a reasonable doubt. While the last two sentences of the two applicable paragraphs cited above from Instruction 27 correctly instructed the just as to the proper legal standard, the language closely preceding those two sentences, “Because this is a criminal case, all twelve of you must agree in order to answer the special verdict form”, directly contradicted it. Instruction No. 27 (Trial No. 2) at CP 215–16. This language was found to be clearly erroneous in Bashaw. 169 Wn.2d at 147. The instruction misstated the law and explicitly misled the jury as to its functions and responsibilities.

Further language in Instruction 27 did not clarify the standard of unanimity required for a finding of guilt versus that standard of unanimity required for a finding of an aggravating factor. The jury was told at the beginning they would be given “five (5) verdict forms for recording [your] verdict”⁵; and then they were [2] told to fill in the blanks provided in each verdict form⁶; and at the end of the instruction were [3] told *for yet a third time* “Because this is a criminal case, each of you must agree for your to return a verdict”⁷, and [4] “When all of you have so agreed, fill in the verdict forms to express your decision. The presiding juror must sign the verdict forms and notify the bailiff. The bailiff will bring you into court to

⁵ Instruction No. 27 (Trial No. 2) at CP 214–15.

⁶ Instruction No. 27 (Trial No. 2) at CP 215.

declare your verdict.” Instruction No. 27 (Trial No. 2) at CP 2156. The jury was in fact given only five verdict forms – three concerning the elements of the crimes (CP 217–19), one regarding the aggravating factors (CP 220) and one regarding the finding of a domestic relationship (CP 220–21). The instructions as a whole did not make it “manifestly clear” what legal standard should be applied in answering the special verdict forms. Faber, *supra*.

d. 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. Recently, in State v. Nunez, 160 Wn. App. 150, 248 P.3d 103 (2011)⁸, 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.

⁷ Instruction No. 27 (Trial No. 2) at CP 216.

⁸ Review was accepted August 9, 2011 in State v. Nunez and State v. Ryan, 160 Wn. App. 944, 947, 252 P.3d 895 (2011), and the cases are consolidated under State v. Nunez (85789-0). The cases are set for oral argument on January 12, 2012.

Bashaw, 169 Wn.2d at 146-47; Goldberg, 149 Wn.2d at 892-94; *accord* State v. Ryan, No. 64726-1-I, 2011 WL 1239796 at *2 (Apr. 4, 2011). A decision by the Supreme Court is binding on all lower courts in the state. 1000 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 instruction⁹ 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

⁹ State v. Bashaw, 144 Wn. App. 196, 199, 182 P.3d 452 (2008), *reversed*, 169 Wn.2d 133, 234 P.3d 195 (2010).

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 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 015093.

The incorrect instruction on unanimity results in a flawed deliberative process. Bashaw, 169 Wn.2d at 147. This Court in Nunez 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, 2011 WL 1239796 at *2. 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, 2011 WL 1239796 at *2. 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).

e. Alternatively, defense counsel rendered ineffective assistance by failing to object to the inconsistent instructions 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 Strickland¹⁰ 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.

¹⁰ Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

Here, defense counsel's representation was deficient because counsel failed to object to the misstatement of the law in Instruction No. 27 (Trial No. 2): "Because this is a criminal case, all twelve of you must agree in order to answer the special verdict form." CP 215. 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. The Committee's Notes on Use in Washington Practice immediately following the version of WPIC 160.00 in effect at the time of the trials 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. Raph. 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.

f. The error in giving inconsistent unanimity instructions was prejudicial to Mr. Raph's right to have aggravating factors determined beyond a reasonable doubt. In order to hold that a jury instruction error

was harmless, "we must 'conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error.'" Bashaw, 169 Wn.2d at 147, 234 P.3d 195 (citing State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002) (quoting Neder v. United States, 527 U.S. 1, 19, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999))). The Bashaw court found the erroneous special verdict instruction was an incorrect statement of the law. Bashaw, 169 Wn.2d at 147, 234 P.3d 195. A clear misstatement of the law is presumed to be prejudicial. Keller v. City of Spokane, 146 Wn.2d 237, 249, 44 P.3d 845 (2002) (citing State v. Wanrow, 88 Wn.2d at 239). So, too, when assessing the impact of instructional error due to defense counsel's deficient performance, reversal is automatic unless the error is "trivial, or formal, or merely academic, and was not prejudicial to the substantial rights of the party assigning it, and in no way affected the final outcome of the case. Wanrow, 88 Wn.2d at 237, 559 P.2d 548 (quoting State v. Golladay, 78 Wn.2d 121, 139, 470 P.2d 191 (1970)).

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, 234 P.3d 195.

The situation in the present case is indistinguishable from Bashaw.

It is impossible to speculate about what the jury would have decided if it had been given an instruction without the inconsistent language that was a misstatement of the law. Because appellate courts cannot determine how the jury is affected by instructional misstatements, conflicting instructions are presumed to mislead the jury in a manner prejudicial to the defendant.

Carter, 127 Wn. App. at 718.

When the erroneous instruction results in undermining the reasonable-doubt standard, a harmless error analysis is not appropriate because at that point it has become essentially an illogical analysis. As the Washington Supreme Court recently explained:

There being no jury verdict of guilty-beyond-a-reasonable-doubt, the question whether the *same* verdict of guilty-beyond-a-reasonable-doubt would have been rendered absent the constitutional error is utterly meaningless. There is no *object*, so to speak, upon which harmless-error scrutiny can operate. The most an appellate court can conclude is that a jury *would surely have found* petitioner guilty beyond a reasonable doubt—not that the jury's actual finding of guilty beyond a reasonable doubt *would surely not have been different* absent the constitutional error. That is not enough. The Sixth Amendment requires more than appellate speculation about a hypothetical jury's action, or else directed verdicts for the State would be sustainable on appeal; it requires an actual jury finding of guilty.

State v. Hughes 154 Wn.2d 118, 144, 110 P.3d 192 (2005) (some emphasis added) (quoting Sullivan v. Louisiana, 508 U.S. 275, 279–80, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993)). Given the presumption of prejudice from instructions that do not clearly articulate the burden of proof, the special verdicts in this case should be reversed.

The inconsistent instructions allowed the jury to find the two aggravating factors without first being satisfied beyond a reasonable doubt. And the special verdict forms in this case did not ask the jury to determine whether the State had proven the factors beyond a reasonable doubt. CP

226–28. This Court is obliged to presume that the inconsistent instructions misled the jury in a manner prejudicial to the defendant—that is, the jury did not find presence of both aggravating factors beyond a reasonable doubt as required by RCW 9.94A.537(3).

g. The special verdicts must be vacated. The inconsistent instructions in the present case distorted the fact-finding process and allowed the finding of aggravating factors based on less than proof beyond a reasonable doubt, contrary to Bashaw, Blakely and RCW 9.94A.537(3). 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; State v. Recuenco, 163 Wn.2d 428, 434, 441-42, 180 P.3d 1276 (2008).

D. CONCLUSION

For the reasons stated, the special verdicts should be vacated and the matter remanded for entry of a standard range sentence.

Respectfully submitted December 23, 2011.

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PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on December 27, 2011, 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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