

FILED

APR 06 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

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

STATE OF WASHINGTON

Plaintiff/Respondent,

vs.

RANDALL LEE RAPH

Defendant/Appellant.

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

BRIEF OF RESPONDENT

L. Michael Golden, WSBA# 26128
Ferry County Prosecuting Attorney's Office
350 E. Delaware Avenue, #11
Republic, WA 99166

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A. STATEMENT OF THE CASE

The defendant was brought to trial twice below. During the first trial, the issue of the special verdict instruction was addressed on the record on three separate occasions. RP 176, 282, 289. Each time, defense counsel was present and raised no objection. At the close of evidence, the trial court convened an instruction conference, during which defense counsel urged that proposed instruction 10 (elements of Rape 2) not be given the jury. RP 365-66. Defense counsel also raised a question as to instruction 26 (regarding Interfering with Reporting Domestic Violence), but ultimately did not challenge the instruction. Defense counsel also challenged a typographical error in the charging document. RP 369-70. After taking a break so counsel could further review the instructions, the following exchange occurred:

THE COURT: Please be seated.
All right counsel, counsel, we have the instructions now. And Mr. Golden, have you had a chance to look them over?

MR. GOLDEN: Just briefly, your Honor --

THE COURT: Okay.

MR. GOLDEN -- that's all.
I haven't noted anything that is different than what was previously provided, other than what we discussed.

THE COURT: Okay. And so you at this point would take no exceptions to the instructions.

MR. GOLDEN: Exactly right, your Honor.

THE COURT: Okay. And Mr. Irwin, have you had a chance to look them over?

MR. IRWIN: I -- I have, your Honor. Not much more time than the State. But I don't see anything out of order.

THE COURT: Okay.
And you pointed out, fortunately, that we need a 5(a) [nontestifying Defendant] instruction --

MR. IRWIN: That's correct.

THE COURT: -- if you will, and --

MR. IRWIN: And that was --

THE COURT: And that was added. Okay.

MR. IRWIN: And that's -- they're now in all the set, the --

THE COURT: Okay.

MR. IRWIN: -- 5(a)

THE COURT: And now, Madam Bailiff, we won't had those out until after we complete the trial --

BAILIFF: (Inaudible)

THE COURT: Okay.
Now, counsel, anything more that we need to talk about before we have the jury come in. Mr. Golden?

THE COURT: And Mr. Irwin:

MR. IRWIN: I don't believe so, your Honor.

THE COURT: Okay. All right.
Then we will have the jury come back in.

RP 373. The instructions were then read to the jury, instructing them that in this criminal case, they must deliberate to reach a unanimous verdict. Instruction No. 1 at CP 59; Instruction No. 2 at CP 60. The jury was instructed that a "yes" answer on a special verdict form must be unanimous but need not be unanimous to answer "no". Instruction No. 28, CP 89-91. At the point where the trial court reached the special verdict forms, the court stated:

Then you come to the special verdict forms, and there are four -- special verdict forms. The first two verdict forms have to do with the alleged aggravating factors, here. And so Verdict Form -- Special Verdict Form 1, there, as you can see only applies to attempted rape in the second degree. If you find the defendant not guilty on that particular charge, then you don't even look at this. If you find him guilty, however, of that particular crime, then you look at Special Verdict Form 1, and you consider those two questions, there.

And if you -- if you find that an aggravating factor has been committed, you have to be unanimous, all twelve of you agree on that. On the other hand, if one of you doesn't agree that it was committed, then it's not committed. So you all have to be unanimous.

On these -- to back up on the five verdict forms here you have to be unanimous guilty or unanimous not guilty. On the special verdict forms you have to unanimous as to guilt, but if one of you doesn't agree to guilt then you -- you cannot find that has a yes answer on that special verdict form.

And this will make more sense, I think, when you go back and -- look at them.

RP 396-97 (emphasis added).

The jury returned verdicts of guilty for Unlawful Imprisonment and Theft of a Motor Vehicle, and returned special findings that there was a domestic relationship between victim and defendant, and finding the presence of both alternative elements for the charge Unlawful Imprisonment. RP 442-444.

At the second trial, functionally identical concluding instructions were given. As in the first trial, the jury was instructed that they must deliberate to reach a unanimous verdict. Instruction No. 1 at CP 188; Instruction No. 2 at CP 189. The jury was instructed that a "yes" answer on a special verdict form must be unanimous, but a "no" answer need not be unanimous. Instruction No. 27, CP 214-16. During the Jury Instruction Conference, defense counsel raised a sufficiency of the evidence exception to instructions 15 and 16, relating to Interfering with Reporting Domestic Violence. RP 727-28. The defense raise no other exceptions. The jury

returned with guilty verdicts on all counts and with special findings regarding abuse of position of trust, particularly vulnerable victim and domestic relationship. RP 816-17. The jury was polled at the request of defense, and each juror answer "yes" to the question whether the verdict was their verdict and "yes" to the question whether it was the verdict of the jury. RP 817-19.

B. ARGUMENT

1. The Defendant's Failure to Object to Instructions 27 and 28 at the Trial Level Constitutes a Waiver of the Issue on Appeal.

The Defendant failed to object at any point in either trial regarding the issue of which he now complains. The issue was raised three times during the first trial. RP 176, 282, 289. The case of State v. Bashaw, 106 Wn.2d 133, 146-47, 234 P.2d 195 (2010), was specifically mentioned by the trial court, as was the court's decision that the instructions were in compliance with the ruling in that case. RP 289. A Bashaw error in instructions on special verdicts is not of constitutional magnitude and cannot be raised for the first time on appeal. State v. Morgan, 163 Wn.App. 341, 351-53, 261 P.3d 167 (2011) (the error is not of constitutional magnitude and cannot be raised for the first time on appeal); State v. Guzman Nunez, 160 Wn.App. 150, 153-54, 165, 248 P.3d 103 (the error is not of constitutional magnitude and cannot be raised for the first time on appeal), review granted, 172 Wn.2d 1004, 258 P.3d 676 (2011), but see, State v. Ryan, 160 Wn.App. 944, 948-49, 252 P.3d 895 (the error is of constitutional magnitude, not harmless, and can be raised for the first time on appeal), review granted. 172 Wn.2d 1004, 258 P.3d 676 (2011). As stated in State v. Morgan, supra:

As noted in the Supreme Court's decision in Bashaw, the rule set forth therein is not compelled by constitutional protections against double jeopardy. Thus, the constitutional grounding for that rule, if any, must be found elsewhere. Relying upon our Supreme Court's articulation of the basis for the Bashaw rule, Division

Three has determined that no such constitutional grounding exists. State v. Guzman Nunez, 160 Wn.App. 150, 248 P.3d 103 (2011), review granted, 172 Wash.2d 1004, 258 P.3d 676 (2011).

163 Wn.App. at 349-50. State v. Nunez controls; the issue is not of constitutional magnitude, was waived below and should not be heard for the first time on appeal.

2. **The Jury Instructions Properly Instructed the Jury that it had to be Unanimous to Answer "Yes" but Did Not Have to be Unanimous to Answer "No".**

A jury must be unanimous to return a valid affirmative answer to request for special finding, but need not be nonunanimous to answer "no". State v. Bashaw, 106 Wn.2d 133, 146-47, 234 P.2d 195 (2010), State v. Goldberg, 149 Wn.2d 888, 895, 72 P.2d 1083 (2003). Functionally identical instructions were given in both trials. The challenged instructions stated in pertinent part that:

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 that "yes" is the correct answer, you must answer "no". Your decision need not be unanimous to answer "no".

Instruction No. 27 (Trial No. 2) at CP 215-16. The defendant is entitled to instructions that are "readily understood and not misleading to the ordinary mind." State v. Dana, 73 Wn.2d 533, 537, 439 P.2d 403 (1968). The question here is whether the first sentence in the above-quoted portion of the instruction would be misleading to the ordinary mind.

A challenged jury is reviewed not in isolation, but in the context of the instructions as a whole. See, State v. Jackman, 156 Wash.2d 736, 743, 132 P.3d 136 (2006). The instructions must make the relevant legal standard manifestly apparent to the average juror. State v. Borsheim, 140 Wn.App. 357, 366, 165 P.3d 417 (2007) (quoting, State v. Watkins, 136 Wn.App.

240, 241, 148 P.3d 1112 (2006)). The juries here were instructed that they must deliberate in an effort to reach a unanimous verdict. Instruction No. 1 at CP 59; Instruction No. 2 at CP 60. As part of the overall set of instructions, they were then instructed that they must be unanimous to answer "yes" on a special verdict, but that if any one juror disagrees, the answer must be "no". Instruction No. 28 (Trial No. 1) at CP 89-91; Instruction No. 27 (Trial No. 2) at CP 215-16. The instructions make it manifestly apparent that during the course of deliberations, if any one juror disagreed with a "yes" answer on a special verdict, the jury answer must be "no". This complies with the ruling in State v. Bashaw, *supra*.

3. If There Was Error in the Challenged Instructions, any Error Was Harmless

There is no evidence of jury confusion here. Each juries was instructed in the process of asking questions, and no question was raised regarding the special verdict forms or the unanimity issue. Instruction No. 28 (Trial No. 1) at CP 88-91; Instruction No. 27 (Trial No. 2) at CP 214-16. At the first trial, the trial court verbally reinforced the rule that a "yes" answer on a special verdict must be unanimous and that if any juror disagreed, the answer must be "no". RP 396-97. The jury did not submit any questions about this issue and there is no evidence of jury confusion.

At the second trial, after the verdicts had been read, the jury was polled. RP 817-19. Each juror was asked whether the verdict was the verdict of the jury and whether it was the verdict of that juror. *Id.* Every juror answered in the affirmative. *Id.* Again, no question was presented by the jury on this issue and there is no evidence of jury confusion. The polling establishes that there is no question whether the jurors did unanimously agree to the verdicts.

4. Defense Counsel Did Not Render Ineffective Assistance of Counsel

A criminal defendant is entitled to effective representation. U.S.Const. Amend. 6; Wash.

Const. Art. 1 § 22. The representation here was not ineffective because the jury instructions adequately stated the law. The defense attorney here challenged several instructions at both the first trial and the second trial. RP 365-66, 369-70, 727-28. The issue of unanimity was raised on several occasions and defense counsel did not object, but there is no indication that the lack of objection was because of a lack of perception. RP 176, 282, 289. The trial court specifically referenced State v. Bashaw during the first trial and specifically mentioned the issue of jury unanimity. CP 289. The State submits that the defense did not object because the jury instructions were not, and are not, confusing to the ordinary mind. Jury instructions must be read as a whole. State v. Jackman, supra. The jury was instructed they were to deliberate in an effort to reach a unanimous decision. Instruction No. 1 at CP 59; Instruction No. 2 at CP 60, RP 396-97. They were instructed that they must be unanimous to return a "yes" answer on any special verdict form. Instruction No. 28 (Trial No. 1) at CP 88-91; Instruction No. 27 (Trial No. 2) at CP 214-16, RP 396-97. Most importantly for this appeal, they were instructed that if any juror disagreed, they must answer "no" on the special verdict forms. Id. The deliberative process was not tainted -- the juries were properly instructed. Defense counsel's lack of objection is not ineffective assistance of counsel; it is evidence that the instructions were not confusing.

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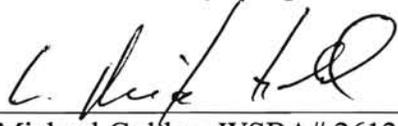
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C. CONCLUSION

For the reasons stated above, and pursuant to the points and authorities cited herein, the State of Washington respectfully requests that the Court affirm challenged decision.

Respectfully submitted this 5th day of April, 2012.

A handwritten signature in black ink, appearing to read "L. Michael Golden", written over a horizontal line.

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

STATE OF WASHINGTON,

Respondent,

No. 30075-7-III
Ferry County #10-1-00036-4

v.

RANDAL LEE RAPH

SWORN STATEMENT OF
SERVICE BY MAIL

Appellant.

1. I, Terri Bell, state that I am and was at the time of the service, a citizen of the United States, residing in Republic, Ferry County, Washington; that I am over the age of twenty-one years and am not a party to the within entitled action.

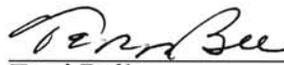
2. That on April 5, 2012, I mailed to the Court of Appeals, Division III, 500 N Cedar Street, Spokane, WA 99201-1905; and mailed to Susan Marie Gasch, Gasch Law Office, P.O. Box 30339, Spokane, WA 99223-3005 and Randal Lee Raph, #348894, Coyote Ridge Corrections Center, P.O. Box 769, Connell, WA 99326-0769, copies of the following documents:

Respondent's Brief AND Sworn Statement of Service by Mail

3. That such service was made by mailing said documents first class mail, postage prepaid, to the person(s) named at the address(es) of service.

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 5th day of April, 2012, in Republic, Ferry County, Washington.



Terri Bell