FILED
June 7, 2012
Court of Appeals
Division III
State of Washington

NO. 30393-4 III

COURT OF APPEALS, DIVISION THREE
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent

v.

DAVID RICE

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR GRANT COUNTY

BRIEF OF RESPONDENT

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I. INTRODUCTION

David Rice was convicted by a jury that found unanimously he had committed a first degree assault, and that he used a deadly weapon. The jury was instructed by the trial court that they must be unanimous on any verdict to convict or acquit.

II. ISSUES BEFORE THE COURT

1. Was the jury properly instructed that they must be unanimous on all verdicts, including special verdicts, to either convict or acquit?

III. STATEMENT OF THE CASE

David Rice was charged with assault in the first degree with a deadly weapon enhancement. CP 29. As it relates to the deadly weapon enchantment verdict, the jury was instructed that they must be unanimous to render a verdict.

> **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 you unanimously have a reasonable doubt as to the question on the special verdict form, you must answer "no."
>
> **Unanimity**. In this criminal case, all twelve deliberating jurors must agree in order to return any verdict. When all of you have so agreed, fill in the proper form or forms of verdict to express your decision.

Instruction Number 23. CP 91-92.

The jury found Rice was guilty of assault in the first degree and having been armed with a deadly weapon at the time of the commission of the crime. CP 96, 101.

Rice now appeals the special verdict alleging error in the unanimity instruction.

IV. ARGUMENT

Rice assigns error to Instruction Number 23, relying on *State v. Goldberg*, 149 Wn.2d 888, 72 P.3d 1083 (2003), and *State v. Bashaw*, 169 Wn.2d 133, 234 P.3d 195 (2010). This reliance is no longer well founded as the Washington Supreme Court has recently overruled these cases and the "nonunanimity rule adopted in *Bashaw*", writing "the nonunanimity rule adopted in *Bashaw* was based on an incorrect rule announced in *State v. Goldberg*... [and] the nonunanimity rule cannot stand". *State v. Nunez*, ___ Wn.2d ___ (2012), No. 85789-0.

Accordingly, the jury in this case was properly instructed according to the law and rendered a valid and unanimous verdict.

V. CONCLUSION

For the reasons set forth above, the State of Washington respectfully requests that this Court deny this appeal.

Dated Thursday, June 07, 2012

Respectfully submitted,

s/ D. Angus Lee

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COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON, Respondent, vs. DAVID RICE, Appellant.	))))))))))	No. 30393-4-III DECLARATION OF SERVICE

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

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

David N. Gasch
Gasch Law Office
gaschlaw@msn.com

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

David Gene Rice - #353778
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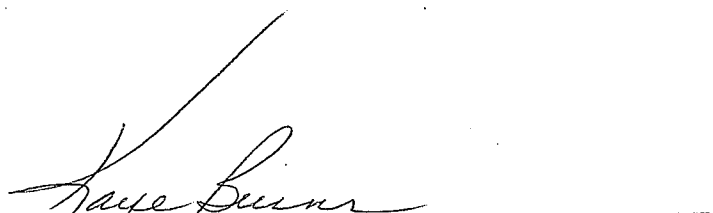
Dated: June 7, 2012.



Kaye Burns