FILED
March 11, 2013
Court of Appeals
Division III
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 31053-1-III

STATE OF WASHINGTON, Respondent,

v.

MELINDA ROSE BARRERA, Appellant.

APPELLANT'S BRIEF

Andrea Burkhart, WSBA #38519
Burkhart & Burkhart, PLLC
6 ½ N. 2nd Avenue, Suite 200
PO Box 946
Walla Walla, WA 99362
Tel: (509) 529-0630
Fax: (509) 525-0630
Attorney for Appellant

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I. INTRODUCTION

Melinda Barrera was convicted of second degree felony murder in the shooting of Robert Nelson based on the predicate offense of second degree assault. The evidence at trial was conflicted as to how the assault occurred. Some witnesses testified that Barrera took a gun to Nelson's house and shot him during a physical confrontation in which Nelson struck Barrera in the head with a telephone, after which she struck him in the head with the gun. Other evidence indicated that an alleged accomplice, David McLaughlin (who was acquitted), struck Nelson with a bat. Barrera testified that she brought a hammer to the house and shot Nelson with a pistol she found there after Nelson assaulted her and she struck him with the hammer. But the jury was not instructed that it had to agree unanimously upon the act that constituted the predicate assault for the felony murder.

The jury was given special verdicts for both a firearm enhancement and a deadly weapon enhancement, and found "Yes" as to both. However, the jury was never instructed that it had to agree unanimously as to whether the firearm, the hammer, or the bat comprised the deadly weapon for purposes of the jury verdict. The jury was also not instructed to find whether the deadly weapon was something other than a firearm as required by RCW 9.94A.533(4).

Juror unanimity as to the basis for the verdict and the special allegation was not assured in this case because reasonable doubt existed as to the various acts alleged that could have constituted the predicate assault. In addition, the jury was not given instructions consistent with the charging document and the statutory basis for the special allegation because it was not instructed or required to find that the deadly weapon had to be a deadly weapon other than the firearm. The instructional error is not harmless because there is a substantial risk that the jury based the deadly weapon verdict on the use of the firearm, which would violate double jeopardy. Lastly, the sentence imposed exceeded the trial court's authority because the jury did not return the findings necessary to authorize a consecutive sentence enhancement under RCW 9.94A.533(4).

Accordingly, the jury's verdict should be vacated and the case remanded for retrial or resentencing without the deadly weapon enhancement.

II. ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR 1: The jury instructions failed to ensure a unanimous verdict on the primary charge and the deadly weapon enhancement.

ASSIGNMENT OF ERROR 2: The trial court erred in failing to give a *Petrich* instruction to ensure unanimity on the felony murder charge and the deadly weapon enhancement.

ASSIGNMENT OF ERROR 3: The trial court erred in imposing separate consecutive sentences for the deadly weapon and firearm enhancements when the verdict was unclear whether both enhancements penalized the same criminal act.

ASSIGNMENT OF ERROR 4: The consecutive two year sentence imposed based on 9.94A.533(4) for use of a deadly weapon exceeded the trial court's authority because the jury did not find that Barrera used a deadly weapon other than a firearm.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

ISSUE 1: When the disputed evidence provided at trial established multiple acts upon which the jury could have found the predicate second degree assault occurred as well as the deadly weapon enhancement true, does it deprive the accused of the right to a unanimous verdict if the jury is not instructed that it must unanimously agree as to which act formed the basis for its verdict? YES.

ISSUE 2: Did the instructions fail to accurately advise the jury of the requirements of RCW 9.94A.533(4) as well as the allegation in the charging document that Barrera used a deadly weapon other than a firearm in the commission of the crime? YES.

ISSUE 3: Was the instructional error harmless beyond a reasonable doubt when the evidence was conflicting as to how the death occurred and the jury could have returned both special verdicts based upon Barrera's use of the firearm? NO.

ISSUE 4: Does the trial court have authority to impose an enhanced sentence under RCW 9.94A.533(4) when the jury did not find that the deadly weapon used was something other than a firearm? NO.

IV. STATEMENT OF THE CASE

Barrera and her co-defendant McLaughlin were charged with second degree murder after Robert Nelson was found in his apartment, dead of a gunshot wound. CP 1-6, 24-25. There were numerous witnesses to the incident, who presented conflicting versions of events before and at trial.

A juvenile witness, A.B., testified that Nelson was shouting at her and calling her a bitch when Barrera came into the apartment and

confronted Nelson. 2 RP 258. A.B. testified that Barrera had nothing in her hands when she first came into the apartment. 2 RP 260. McLaughlin then came and hit Nelson with a bat, after which she heard a gunshot and saw the gun in McLaughlin's hands. 2 RP 261-62. During a prior interview with police, A.B. said that Barrera pistol whipped Nelson with the gun; but at trial, she disavowed her prior statements to police. CP 5; 2 RP 285-87.

Misty Warden, who sometimes stayed with Nelson at his apartment, did not see Barrera bring anything into the apartment. 3 RP 468, 473. She did, however, see a bat and she saw McLaughlin with the gun. 3 RP 473. She did not initially realize that Nelson had been shot. 3 RP 484, 495.

Another juvenile, M.C., testified that Nelson and A.B. were yelling at each other in the kitchen when Barrera walked in with a gun. 4 RP 545-47. Barrera told Nelson to shut up and Nelson came up to her with a phone and struck her in the head. 4 RP 547-48. Barrera then struck Nelson in the face with the gun. 4 RP 550. A.B. told M.C. to "go get David," so he went to McLaughlin's apartment and woke him up. 4 RP 550-51. McLaughlin grabbed a bat and ran to Nelson's apartment. 4 RP 551. According to M.C., McLaughlin hit Nelson with the bat through an

opening in the bedroom door. 4 RP 552-53. The door closed and McLaughlin grabbed the gun from Barrera. 4 RP 553. M.C. turned around and heard a boom. 4 RP 553-54. On redirect, he stated that he saw McLaughlin holding the gun when it went off. 4 RP 597.

McLaughlin claimed to be elsewhere that night and denied knowledge of Nelson's shooting. 6 RP 969-70. In further questioning, he stated that he heard Nelson shouting, grabbed a T-ball bat and went to Nelson's apartment. 6 RP 973. He admitted hitting Nelson in the chest with the bat. 6 RP 974. He claimed that he then left and went back to his apartment. 6 RP 975. He denied that he had a gun. 6 RP 976.

Barrera initially told police that she had been working that evening and did not know what had happened in Nelson's apartment. 3 RP 323-24. However, she later confessed to police that she shot Nelson. 6 RP 968. In a written statement, she described hearing yelling and seeing Nelson push A.B. down. Barrera stated that she jumped in the middle and Nelson hit her on the head with the phone. She grabbed a gun on the table and loaded it, telling Nelson to stop or she would shoot him. He continued to throw things at her and she shut the door when the gun went off. 6 RP 1038. She described hiding the gun at a neighbor's apartment where it was later retrieved with a baggie of ammunition. 6 RP 1051-52; 3 RP 383,

390-91, 401. She also stated that she had carried a hammer into the apartment. 6 RP 1052. Police recovered two hammers, one in the living room of Nelson's apartment. 3 RP 342. They also recovered a baseball bat. 3 RP 408, 410, 6 RP 1061.

Barrera testified at trial. 8 RP 1200. She said McLaughlin heard Nelson yelling next door, so she took a hammer for protection and went over. 8 RP 1203. She saw Nelson standing over A.B. yelling at her and she intervened. 8 RP 1206-07. Nelson began to yell at her and when she told him to calm down or she would call for help, he grabbed the phone and struck her in the head with it several times. 8 RP 1210-11. She swung the hammer and hit him in the face. 8 RP 1211. Nelson continued to throw things at her. She saw the gun in a chair, grabbed it and loaded a bullet into it. 8 RP 1215-17. She told Nelson to stop and calm down. 8 RP 1217. McLaughlin came in and struck Nelson in the chest with the bat. 8 RP 1220. Barrera pulled the door closed and as she turned around the gun went off in her hand. 8 RP 1222-23. Neither she nor Warden realized he had been shot. 8 RP 1223-24. She admitted taking the gun to the neighbor's house and hiding it in the bathroom floor. 8 RP 1227.

The trial court instructed the jury on both the firearm and the deadly weapon enhancements. 8 RP 1347-49; CP 110-11. The deadly enhancement instruction read:

> For purposes of a special verdict the State must prove beyond a reasonable doubt that the defendant was armed with a deadly weapon at the time of the commission of the crime.
>
> A person is armed with a deadly weapon if, at the time of the commission of the crime, the weapon is easily accessible and readily available for offensive or defensive use. The State must prove beyond a reasonable doubt that there was a connection between the weapon and the defendant. The State must also prove beyond a reasonable doubt that there was a connection between the weapon and the crime. In determining whether these connections existed, you should consider, among other factors, the nature of the crime and the circumstances surrounding the commission of the crime, including the location of the weapon at the time of the crime and the type of weapon.
>
> If one person is armed with a deadly weapon, all accomplices are deemed to be so armed, even if only one deadly weapon is involved.
>
> A deadly weapon is an implement or instrument that has the capacity to inflict death and from the manner in which it is used, is likely to produce or may easily and readily produce death. The following instruments are examples of deadly weapons: blackjack, sling shot, billy, sand club, sandbag, metal knuckles, any dirk, dagger, pistol, revolver or any other firearm, any knife having a blade longer than three inches, any razor with an unguarded blade, and any metal pipe or bar used or intended to be used as a club, any explosive, and any weapon containing poisonous or injurious gas.

CP 110.

Defense counsel did not request and the trial court did not give a *Petrich* instruction on unanimity, notwithstanding that the State presented

evidence of numerous separate acts that could have constituted the felonious assault on Nelson and the use of a deadly weapon.

The jury acquitted McLaughlin of all charges. 9 RP 1475. Barrera was convicted of second degree felony murder and the jury answered "yes" to both the deadly weapon and firearm special allegations. CP 113-18. The trial court sentenced her to 140 months with an additional 84 months consecutive for the two enhancements. CP 314. Barrera appeals. CP 322.

V. ARGUMENT

Barrera alleges constitutional error on the grounds that the instructions failed to ensure unanimity as to the criminal act. Read as a whole, the instructions in this case permitted the jury to convict Barrera of felony murder without unanimous agreement as to which act constituted the predicate assault – striking Nelson with a hammer, striking Nelson with a firearm and/or brandishing a firearm at him, shooting Nelson through the door without intent to kill him, or as an accomplice to McLaughlin's use of the bat to hit Nelson through the door. The instructions also permitted the jury to enter a "yes" verdict to the deadly weapon enhancement without unanimous agreement whether the deadly weapon consisted of the firearm, the hammer, or the baseball bat.

Further, as given, the instructions permitted the jury to return two verdicts compelling two sentences for the same activity – the use of the firearm – because the instructions defined a "deadly weapon" as including a firearm and nothing in the instructions advised the jury that the deadly weapon had to be a different weapon than the firearm that was the basis for the special verdict on the firearm enhancement. This instructional error is a manifest error affecting a constitutional right that can be raised for the first time on appeal because the result of the verdict is that Barrera was likely sentenced twice for the same use of a firearm, in violation of double jeopardy principles.

Lastly, the trial court erred in imposing the deadly weapon enhancement at sentencing because the jury's verdict did not reflect a finding that Barrera used a deadly weapon *other than a firearm*, as required by the statutory authorization.

For all of these reasons, the conviction should be vacated and the cause remanded for a new trial on the felony murder charge. In the alternative, the judgment and sentence should be vacated and the case remanded for resentencing without consecutive time added for the deadly weapon enhancement.

A. The absence of a unanimity instruction when the State presented evidence of multiple acts requires reversal of the felony murder conviction as well as vacation of the deadly weapon enhancement.

The failure to instruct the jury that it must unanimously agree which act comprised the basis for the felony murder charge and the deadly weapon special allegation implicates Barrera's right to a unanimous jury verdict. *See Apprendi v. New Jersey,* 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); *Blakely v. Washington*, 542 U.S. 296, 313–14, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004) (right to unanimous jury verdict on sentencing aggravator); *State v. Petrich*, 101 Wn.2d 566, 572, 683 P.2d 173 (1984).

In *State v. Petrich*, the Washington Supreme Court held that in cases where the State presents evidence of multiple acts that could constitute the crime charged and does not elect which act it is relying upon for conviction, the jury must be instructed that it must agree unanimously which underlying criminal act was proven beyond a reasonable doubt. 101 Wn.2d at 572. "The error is harmless only if a rational trier of fact could have found each incident proved beyond a reasonable doubt." *Id.* at 573.

In *Petrich*, the State charged the defendant with one count each of indecent liberties and statutory rape, but presented evidence at trial about multiple instances of sexual contact. *Id.* at 568. *Petrich* relied on *State v. Workman*, 66 Wash. 202, 119 P. 751 (1911), which also involved a charge of rape supported by evidence of three different acts. Here, the State presented evidence of multiple acts that could have constituted the predicate assault – Barrera pointing the firearm at Nelson, Barrera striking Nelson with the hammer, Barrera striking Nelson with the firearm, McLaughlin striking Nelson with the bat as an accomplice, McLaughlin shooting Nelson through the door as an accomplice, or Barrera shooting Nelson through the door without intent to kill him. Thus, as in *Petrich* and *Workman*, the State here presented evidence of multiple acts in support of a single charge, as well as in support of a single sentence enhancement. According to those authorities, a special instruction was required to ensure juror unanimity as to which act Barrera committed that constituted the predicate assault, and which item – the hammer, the bat, or the firearm – constituted the deadly weapon.

Because *Petrich* error is constitutional error, it is not subject to harmless error analysis. Instead, the standard is whether a reasonable juror could have had a reasonable doubt as to any of the incidents. *State v. Kitchen*, 110 Wn.2d 403, 411, 756 P.2d 105 (1988). This standard

presumes that the error is prejudicial and overcomes the presumption only if no rational juror could have had reasonable doubt as to any of the incidents. *Id.*

In the present case, the jurors certainly could have had reasonable doubt as to any of the incidents because the evidence was greatly conflicting. Although Barrera testified that she brought a hammer to the apartment and struck Nelson with it, other witnesses testified that she brought the gun with her or that she brought nothing. No other witness testified that a hammer was involved besides Barrera. Depending upon which version of events the jury believed, it could have found (1) She came to the apartment unarmed; (2) She came to the apartment with a gun but did not use it; (3) She came to the apartment with a hammer with which she struck Nelson after he hit her in the head with a telephone; (4) She came to the apartment armed and struck Nelson with the gun; or (5) She deliberately shot Nelson through the door but did not intend to kill him. A reasonable jury could have rejected Barrera's testimony that she brought a hammer to the apartment – as it clearly rejected her testimony that the shooting was accidental – based on the testimony of the other eye witnesses that Barrera either brought nothing to the apartment, or the gun. Without appropriate instructions, the jury was not required to return a unanimous finding as to what actually occurred to constitute the second

degree assault or the use of a deadly weapon, creating a risk that the jury was divided in its decision. This risk is particularly heightened in light of the fact that the jury acquitted McLaughlin of all charges despite general agreement as to his role in the shooting, and acquitted Barrera of intentional second degree murder.

Under the demanding "harmless beyond a reasonable doubt" standard for *Petrich* error, the result is that jury's unanimity as to the events constituting the criminal acts cannot be assured. Had the jury been correctly instructed that it must agree unanimously as to which act constituted the second degree assault and which act formed the basis for the special verdict, there is a substantial likelihood that the jury would have returned a different special verdict. Accordingly, the verdict should be reversed and the case remanded.

B. <u>The jury instructions incorrectly allowed the jury to return a special verdict finding that Barrera used a deadly weapon in the commission of the crime without specifying that for sentencing purposes, the deadly weapon had to be something other than a firearm.</u>

Despite the language in the charging document and in the judgment and sentence stating that the deadly weapon used was "a deadly

weapon other than a firearm," the jury was not so instructed. CP 24-25, 311. To the contrary, the jury was specifically instructed that a deadly weapon could include a firearm. CP 110. These instructions permitted the jury to return two special verdicts based on the use of the firearm even if it rejected the evidence about the use of the bat and the hammer.

In the present case, defense counsel did not object to the instructions given. Ordinarily, failure to raise an issue below precludes its consideration on appeal. RAP 2.5(a). But manifest errors of constitutional magnitude may be raised at any time. *Id.*

To demonstrate a manifest constitutional error, an appellant must "identify a constitutional error and show how the alleged error actually affected the [appellant's] rights at trial." *State v. Guzman Nunez*, 160 Wn. App. 150, 157-58, 248 P.3d 103, 107 (2011), affirmed, *State v. Nunez*, 174 Wn.2d 707, 285 P.3d 21 (2012) (*quoting State v. O'Hara*, 167 Wn.2d 91, 98, 217 P.3d 756 (2009)). Once an error implicating a constitutional interest is shown, the court then considers whether the error is "manifest" by determining whether the error had practical and identifiable consequences in the trial. *Guzman Nunez*, 160 Wn. App. at 158. "[T]o determine whether an error is practical and identifiable, the appellate court must place itself in the shoes of the trial court to ascertain whether, given

what the trial court knew at the time, the court could have corrected the error." *State v. O'Hara*, 167 Wn.2d 91, 99-100, 217 P.3d 756 (2009).

The instructional error alleged by Barrera is of constitutional magnitude. The failure to instruct the jury that the firearm could not be the basis for both the firearm and the deadly weapon enhancements implicates the Fifth Amendment to the U.S. Constitution and Article 1, Section 9 of the Washington constitution prohibiting multiple punishments for the same offense. The instructions also failed to accurately reflect what the special allegation accused her of doing.

Because the jury was not correctly instructed, there is a considerable likelihood that Barrera's use of the firearm formed the basis for both special verdicts. But imposing separate sentence enhancements for the same criminal act violates state and federal prohibitions against double jeopardy. In *State v. Kelley*, 168 Wn.2d 72, 226 P.3d 773 (2010), the Washington Supreme Court considered the application of double jeopardy analysis to sentence enhancements. The *Kelley* court recognized that cumulative punishments may be imposed if the legislature so intends. 168 Wn.2d at 77 (citing *Missouri v. Hunter*, 459 U.S. 359, 366, 103 S. Ct. 673, 74 L. Ed. 2d 535 (1983)). However, if such intent cannot be ascertained from the statute, then the court applies the test set forth in

Blockburger v. U.S., 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932), to determine whether each offense requires proof of an element the other does not.

In the present case, the legislature clearly did not intend to impose multiple punishments for the use of a single firearm because it expressly distinguished between sentence enhancements for use of a firearm and use of a deadly weapon other than a firearm. RCW 9.94A.533(3), (4). And under the "same evidence" test set forth in *Blockburger*, if the deadly weapon relied upon by the jury is in fact a firearm, then proof of both enhancements requires proof of the same fact – use of a firearm in the commission of the crime. Double jeopardy would, accordingly, prohibit the stacking of consecutive sentences against a defendant for the same use of a firearm.

Moreover, the erroneous instruction was a manifest error because it plainly resulted in confusion as to what the jury actually found and affected the sentencing process. This confusion is manifest in the State's own sentencing memorandum, in which it asserted that the deadly weapon enhancement concerned "presumably the hammer." CP 147. The State further relied on *State v. DeSantiago*, 149 Wn.2d 402, 68 P.3d 1065 (2003) in support of its sentence recommendation, arguing that use of

multiple weapons during the commission of a single crime requires separate consecutive sentences on the enhancements. CP 147-48. But the State's argument failed to acknowledge that nothing in the jury instructions required the jury's finding on the deadly weapon enhancement to be based on something other than the use of the firearm that also supported the firearm enhancement.

In sum, the State alleged in the information that Barrera possessed a deadly weapon other than a firearm. It did not, however, ask the jury to make that finding. To the extent the State intended to rely upon the finding for sentencing purposes, the instructions were erroneous and permitted a verdict that was violative of double jeopardy prohibitions. This error was manifest and affected Barrera's constitutional rights. For these reasons, the jury's verdict on the deadly weapon enhancement should be vacated and the matter reversed for resentencing without additional time for the enhancement.

C. <u>The trial court erred in imposing a consecutive twenty-four month sentence enhancement based on the deadly weapon special verdict when the jury did not find that Barrera used a deadly weapon other than a firearm.</u>

The trial court's application of RCW 9.94A.533(4) at sentencing to impose an additional twenty-four consecutive months was unsupported by the jury's finding. RCW 9.94A.533(4) authorizes the imposition of additional consecutive time for use of a deadly weapon "other than a firearm" in the commission of the crime.

Despite the language in the charging document and in the judgment and sentence stating that the deadly weapon used was "a deadly weapon other than a firearm," the jury was not so instructed. CP 24-25, 311. To the contrary, the jury was specifically instructed that a deadly weapon could include a firearm. CP 110. Consequently, in returning the special verdict on the deadly weapon enhancement, the jury did not necessarily find that the deadly weapon was something other than the firearm.

"Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi*, 530 U.S. at 490; *see also State v. Frazier*, 81 Wn.2d 628, 633, 503 P.2d 1073 (1972) ("Where a factor aggravates an offense and causes the defendant to be subject to a greater punishment than would otherwise be imposed, due process requires that the issue of whether that factor is

present, must be presented to the jury upon proper allegations and a verdict thereon rendered before the court can impose the harsher penalty.")

Here, the jury did not return a verdict that Barrera was armed with a deadly weapon *other than a firearm* as set forth in RCW 9.94A.533(4). Because the jury's verdict did not support the sentence enhancement imposed by the trial court, the sentence exceeded the trial court's authority. *See State v. Recuenco*, 163 Wn.2d 438, 442, 180 P.3d 1276 (2008) ("The error in this case occurred when the trial judge imposed a sentence enhancement for something the State did not ask for and the jury did not find. The trial court simply exceeded its authority in imposing a sentence not authorized by the charges.") This error is never harmless. *State v. Williams-Walker*, 167 Wn.2d 889, 901-02, 225 P.3d 913, 917 (2010).

Because the trial court's imposition of twenty-four consecutive months under RCW 9.94A.533(4) exceeded its authority in light of the jury's special verdict, the sentence should be vacated and the case remanded for resentencing in accordance with the jury's findings.

VI. CONCLUSION

The jury was not correctly instructed as to its duty to agree unanimously as to the facts comprising the crime when the State presented evidence of multiple acts that could have constituted the predicate assault to the single felony murder charge, as well as multiple acts that could have constituted the use of a deadly weapon for purposes of the single special allegation. Because the instructions deprived Barrera of a unanimous verdict on the felony murder charge and the deadly weapon enhancement, the conviction should be reversed and the case remanded for retrial.

Even if the court does not agree that the *Petrich* error requires reversal, nevertheless, the deadly weapon enhancement must be vacated and the case remanded for resentencing. Because the jury was not correctly instructed in the terms of the deadly weapon sentencing enhancement, requiring that the deadly weapon be something other than the firearm, the error creates a substantial risk that both sentence enhancements imposed were based on the same criminal act – the use of the firearm – in violation of the double jeopardy prohibition. Lastly, because the jury's special verdict did not reflect the statutory requirements to impose a separate sentence enhancement for use of a deadly weapon by specifically finding that the deadly weapon was something other than a

firearm, the sentence imposed exceeded the trial court's authority. The judgment and sentence should be vacated and the cause reversed for resentencing.

RESPECTFULLY SUBMITTED this 14th day of March 2013.

ANDREA BURKHART, WSBA #38519
Attorney for Appellant

DECLARATION OF SERVICE

I, the undersigned, hereby declare that on this date, I caused to be served a true and correct copy of Appellant's Brief upon the following parties in interest by depositing them in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

Mark Lindsey
Spokane County Prosecutor's Office
1100 W. Mallon Ave.
Spokane, WA 99260-0270

Melinda Barrera, DOC #359882
Washington Corrections Center for Women
9601 Bujacich Road NW
Gig Harbor, WA 98332

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

Signed this 11th day of March, 2013 in Walla Walla, Washington.

Andrea Burkhart