

FILED

OCT 06 2010

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

No. 28259-7-III

85789-0

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

ENRIQUE NUNEZ,

Appellant.

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

SUPPLEMENTAL BRIEF OF APPELLANT

JAN TRASEN
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

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A. SUPPLEMENTAL ASSIGNMENT OF ERROR

2. The trial court erred by instructing the jury it had to be unanimous to answer "no" to the special verdict forms. CP 30 (Instruction 15).

B. ISSUE PERTAINING TO SUPPLEMENTAL ASSIGNMENT OF ERROR

2. To find a sentence enhancement applies to a defendant, the jury must unanimously agree the enhancement is proven beyond a reasonable doubt, but the jury need not be unanimous to conclude the enhancement was not found. Const. art. I, §§ 21, 22. The jury found Mr. Nunez sold and delivered a controlled substance with intent to deliver, both within 1000 feet of a school bus route stop, and each enhancement increased his maximum sentence. Where the jury was incorrectly instructed it had to be unanimous to find the enhancements were not proven, must the enhancements be vacated because this Court cannot conclude beyond a reasonable doubt how the jury would have answered the special verdict forms if correctly instructed?

C. STATEMENT OF THE CASE

After a jury trial, Enrique Nunez was convicted of delivery of a controlled substance (Count 1) and possession of a controlled

substance with intent to deliver (Count 2). 7/1/09 RP 282-83. On each count, the jury returned a special verdict. CP 35-36; 7/1/09 RP 283-84. CP 21-23, 53; 3RP 122.

Mr. Nunez's standard range sentence for delivery was 12 to 20 months. CP 42; 7/13/09 RP 297-98. Mr. Nunez's standard range sentence for possession with intent was also 12 to 20 months. CP 42; 7/13/09 RP 297-98. The court added an additional 24-months for the sentence enhancement. CP 42; 7/13/09 RP 297-98.

D. ARGUMENT

THE SPECIAL VERDICTS MUST BE VACATED
BECAUSE THE JURY WAS INCORRECTLY
INSTRUCTED THAT UNANIMITY WAS REQUIRED TO
ANSWER "NO" ON THE SPECIAL VERDICT FORMS

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. VI, XIV; Const. art. I, §§ 21, 22; State v. Williams-Walker, 167 Wn.2d 889, 895-97, 225 P.3d 913 (2010); State v. Ortega-Martinez, 124 Wn.2d 702, 707, 881 P.2d 213 (1994). The jury was thus required to unanimously find the State had proved Mr. Nunez had delivered and/or possessed a controlled substance with intent to deliver within 1000 feet of a

school bus route stop in order to answer “yes” to either of the special verdict forms. Unanimity, however, is not required for a “no” answer. State v. Bashaw, 169 Wn.2d 133, 146-47, 234 P.3d 195 (2010). Because the jury was incorrectly instructed it had to be unanimous in order to answer “no” on the special verdict forms for Counts 1 and 2, the deadly weapon enhancements must be vacated. Id. at 148.

The jury in Mr. Nunez’s case was provided with special verdict forms for Counts 1 and 2 that required the jury to answer “yes” or “no” to the question, “Did the defendant possess (or deliver) a controlled substance with the intent to manufacture or deliver within one thousand feet of a school bus route stop designated by a school district?” alleged in the appropriate count. CP 35-36. The trial court informed the jury that its decision had to be unanimous in order to answer either “yes” or “no” to the question. CP 30; 7/1/09 RP 256. The court’s concluding instruction concerning the special verdict forms read:

You will also be given special verdict forms for the crimes charged in Count I and Count II. If you find the defendant not guilty of these crimes, do not use the special verdict forms. If you find the defendant guilty of these crimes, you will then use the special verdict forms 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 forms. In order to answer the special verdict forms "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 this question, you must answer "no."

CP 30 (emphasis added); 7/1/09 RP 256.

A similar instruction was found to be incorrect on similar facts in Bashaw, supra. The defendant in that case was charged with three counts of delivery of a controlled substance, and the State also alleged each offense was committed within 1,000 feet of a school bus route stop. Bashaw, 169 Wn.2d at 137. The school zone enhancement statute required the court to double the defendant's maximum sentence if the jury found an enhancement. Id.; RCW 69.50.435(1). Like the jury in Mr. Nunez's case, the court told the jury, "Since this is a criminal case, all twelve of you must agree on the answer to the special verdict." Id. at 139.

Relying upon its prior opinion in State v. Goldberg, 149 Wn.2d 888, 7 P.2d 1083 (2003), the Bashaw Court found the jury had been improperly instructed because "a unanimous jury decision is not required to find that the State has failed to prove the presence of a special finding increasing the defendant's maximum allowable sentence." Bashaw, 169 Wn.2d at 145 (citing Goldberg,

149 Wn.2d at 895). The court concluded it could not determine how the jury would have answered the special verdict forms if it had been properly instructed and thus the error was not harmless beyond a reasonable doubt. Id. at 147-48. The court therefore vacated the sentencing enhancements and remanded for the imposition of a sentence without the enhancements. Id. at 148; Goldberg, 149 Wn.2d at 895.

The jury instruction in Mr. Nunez's case also informed the jury that it had to be unanimous to answer the special verdict form questions in the negative. CP 30; 7/1/09 RP 256. This was even more clear than in Bashaw, as the jury was not only told its answer to the verdict form had to be unanimous, it was specifically instructed "If you unanimously have a reasonable doubt as to this question, you must answer 'no.'" CP 30; 7/1/09 RP 256. Thus, the instruction was improper. In addition, the sentence enhancement increased the maximum term to which Mr. Nunez could be sentenced. The enhancement for Count 2 increased Mr. Nunez's sentence by 24 months. CP 42; 7/13/09 RP 296-97.

As in Bashaw, the State cannot demonstrate that the improper instruction was harmless because we do not know what the jury would have done if properly instructed. This Court thus

cannot conclude the error was harmless beyond a reasonable doubt. Mr. Nunez's sentence enhancement must be vacated and his case remanded to the superior court for a sentence without the enhancement.

E. CONCLUSION

Mr. Nunez's sentencing enhancement must be vacated because the jury was incorrectly instructed that is had to be unanimous to answer the special verdict form in the negative.

DATED this 4th day of October, 2010.

Respectfully submitted,



Jan Trasen – WSBA #41177
Washington Appellate Project
Attorneys for Appellant

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DIVISION THREE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 28259-7-III
v.)	
)	
ENRIQUE NUNEZ,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 4TH DAY OF OCTOBER, 2010, I CAUSED THE ORIGINAL **SUPPLEMENTAL BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] ERIC BIGGAR, DPA	(X)	U.S. MAIL
DOUGLAS COUNTY PROSECUTOR'S OFFICE	()	HAND DELIVERY
PO BOX 360	()	_____
WATERVILLE WA 98858-0360		

SIGNED IN SEATTLE, WASHINGTON THIS 4TH DAY OF OCTOBER, 2010.

X _____ 

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710