

No. 65002-5-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

JUSTIN MATTHEW BACANI,

Appellant.

10-11-13 10:02 AM

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

The Honorable Douglass A. North

BRIEF OF APPELLANT

THOMAS M. KUMMEROW
Attorney for Appellant

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

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in imposing the 12 month sentence for the deadly weapon enhancement.

2. Court's Instruction 16 misstated the law on jury unanimity as it applied to the special verdict.

B. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

A trial court may impose only that sentence authorized by the jury verdict. Where the verdict is without legal support, the verdict is infirm and the court lacks authority to impose a sentence. The unanimity instruction on the deadly weapon enhancement used here by the trial court was erroneous, thus the special verdict was inform. Was the court without authority to impose the sentence on the special verdict entitling Mr. Bacani to reversal of the sentence enhancement and remand for resentencing without the enhancement?

C. STATEMENT OF THE CASE

Justin Bacani was charged with second degree assault and also with being armed with a deadly weapon. CP 1-6. The trial court instructed the jury in Instruction 16 regarding the deadly weapon special verdict:

You will also be given a special verdict form. If you find the defendant not guilty of these crimes, do not use the special verdict form. If you find the defendant guilty of a crime, you will then use the special verdict form 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 you unanimously have a reasonable doubt as to this question, you must answer “no”.*

CP 44 (emphasis added).

The jury subsequently found Mr. Bacani guilty of the offense of second degree assault and answered “yes” to the deadly weapon special verdict. CP 45, 47. The court imposed a 12-month sentence for the deadly weapon enhancement based upon the jury’s finding. CP 56.

D. ARGUMENT

THE TRIAL COURT'S ERROR IN IMPOSING THE 12 MONTH SENTENCE FOR THE DEADLY WEAPON ENHANCEMENT WITHOUT A *VALID* SPECIAL VERDICT MUST RESULT IN THIS COURT STRIKING THE SENTENCE ENHANCEMENT

1. The jury need not be unanimous to find the State had failed to prove the enhancement. The Washington Constitution requires unanimous jury verdicts in criminal cases. Art. I, § 21; *State v. Stephens*, 93 Wn.2d 186, 190, 607 P.2d 304 (1980).

Regarding special verdicts, the jury must be unanimous to find the State has proven the special finding beyond a reasonable doubt. *State v. Goldberg*, 149 Wn.2d 888, 892-93, 72 P.3d 1083 (2003). But, the jury does not have to be unanimous to find that the State had not proven the special finding beyond a reasonable doubt. *State v. Bashaw*, 169 Wn.2d 133, 146, 234 P.3d 195 (2010).

The Supreme Court has held that jury unanimity is not required to answer “no” to a special verdict question. *Goldberg*, 149 Wn.2d at 894. In *Goldberg*, upon discovering that jurors were not unanimous in answering “no” to a special verdict question, the trial court ordered the jurors to resume deliberations until they reached unanimity. *Id.* at 891. The Supreme Court concluded that the trial court erred in doing so, holding that jury unanimity is not required to answer “no” to a special verdict. *Id.* at 894.

Subsequently, in *Bashaw*, the trial court instructed the jury in precisely the same manner regarding the special verdict: “Since this is a criminal case, all twelve of you must agree on the answer to the special verdict.” 169 Wn.2d at 139. The Court in *Bashaw* found the instruction an incorrect statement of the law and ordered the special verdict stricken:

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 the special finding increasing the maximum penalty, [citation omitted], it is not required to find the *absence* of such a finding. The jury instruction here stated that unanimity was required for either determination. That was error.

Bashaw, 169 Wn.2d at 147 (emphasis added).

The same instruction at issue in *Bashaw* was used in Mr. Bacani's trial. CP 44. Nevertheless, as in *Bashaw*, the simple use of this improper instruction resulted in an invalid special verdict which could not authorize the sentence imposed by the court.

2. Under *Bashaw*, the error can never be harmless. In

Bashaw, the same instruction at issue here was used. The Supreme Court refused to apply harmless error:

This argument misses the point. The error here was the *procedure* by which unanimity would be inappropriately achieved.

...
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 . . . 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.

Id. at 147-48 (emphasis added).

The same analysis applies here. The same instruction was used here as was utilized in *Bashaw*, thus this Court is foreclosed from applying a harmless error analysis.

More to the point though, this Court cannot infer that the jury's verdict on the underlying offense renders the matter harmless where the jury found Mr. Bacani had committed a second degree assault with a deadly weapon. That would run afoul of the Supreme Court's decision in *State v. Williams-Walker*.

We decline to hold that guilty verdicts alone are sufficient to authorize sentence enhancements. If we adopted this logic, a sentencing court could disregard altogether the statutory requirement that the jury find the defendant's use of a deadly weapon or deadly weapon by special verdict. Such a result violates both the statutory requirements and the defendant's constitutional right to a jury trial.

167 Wn.2d 889, 899, 225 P.3d 913 (2010). As a consequence, the Supreme Court has already stated this procedure would be improper. The error is not susceptible to a harmless error analysis.

3. The remedy is reversal of the deadly weapon enhancement and remand for dismissal of the enhancement. A deadly weapon enhancement is not an element of the offense but a sentencing factor, and the remedy for an improper deadly weapon enhancement finding by the jury is to reverse the sentence imposed

and strike the enhancement. *Williams-Walker*, 167 Wn.2d at 889-902.

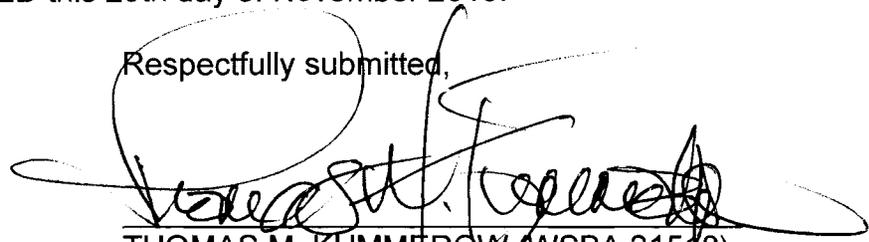
Here, the trial court's error in imposing a sentence for the deadly weapon enhancement without a *valid* special verdict to support it occurred when the trial court imposed the sentence for the enhancement. See *State v. Recuenco*, 163 Wn.2d 428, 440, 180 P.3d 1276 (2008) (the error in imposing a deadly weapon enhancement where the jury found only a deadly weapon occurred during sentencing, not in the jury's determination of guilt). Thus, 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; *Recuenco*, 163 Wn.2d at 441-42.

E. CONCLUSION

For the reason stated, Mr. Bacani submits this Court must strike the deadly weapon enhancement and remand for resentencing.

DATED this 29th day of November 2010.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Thomas M. Kummerow', is written over a horizontal line. The signature is stylized and cursive.

THOMAS M. KUMMEROW (WSBA 21518)
tom@washapp.org
Washington Appellate Project – 91052
Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 65002-5-I
v.)	
)	
JUSTIN BACANI,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 29TH DAY OF NOVEMBER, 2010, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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<input checked="" type="checkbox"/> JUSTIN BACANI 804802 WASHINGTON STATE PENITENTIARY 1313 N 13 TH AVE WALLA WALLA, WA 99362	(X) () ()	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 29TH DAY OF NOVEMBER, 2010.

X _____ 

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