

65243-5

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NO. 65243-5-I

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

STATE OF WASHINGTON,

Respondent,

v.

PENNY GREEN,

Appellant.

REC'D
JAN 27 2011
King County Prosecutor
Appellate Unit

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

The Honorable Michael C. Hayden, Judge

BRIEF OF APPELLANT

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TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENT OF ERROR</u>	1
Issue Pertaining to Assignment of Error	1
B. <u>STATEMENT OF THE CASE</u>	1
1. <u>Trial and sentencing</u>	1
2. <u>Firearm enhancement instructions</u>	7
C. <u>ARGUMENT</u>	7
THE FLAWED UNANIMITY INSTRUCTION FOR THE SPECIAL VERDICT REQUIRES VACATION OF THE FIREARM SENTENCING ENHANCEMENT.....	7
D. <u>CONCLUSION</u>	13

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

State v. Bashaw,
144 Wn. App. 196, 182 P.3d 451 (2008)..... 8

State v. Bashaw,
169 Wn.2d 133, 234 P.3d 195 (2010)..... 8, 9, 12

State v. Brown,
147 Wn.2d 330, 58 P.3d 889 (2002)..... 9

State v. Clausing,
147 Wn.2d 620, 56 P.3d 550 (2002)..... 8

State v. Goins,
151 Wn.2d 728, 92 P.3d 181 (2004)..... 11

State v. Goldberg,
149 Wn.2d 888, 72 P.3d 1083 (2003)..... 8

State v. Hauck,
33 Wn. App. 75, 651 P.2d 1092 (1982),
review denied, 99 Wn.2d 1001 (1983)..... 11

State v. Holmes,
106 Wn. App. 775, 24 P.3d 1118 (2001)..... 11

State v. Roggenkamp,
153 Wn.2d 614, 106 P.3d 196 (2005)..... 11

State v. Williams-Walker,
167 Wn.2d 889, 225 P.3d 913 (2010)..... 10

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>RULES, STATUTES AND OTHER</u>	
<u>Former RCW 9.94A.602</u>	10
RAP 2.5(a)(3).....	8
WPIC 2.06.....	9
WPIC 166.00.....	7
WPIC 2.10.....	9

A. ASSIGNMENT OF ERROR

The trial court incorrectly instructed the jury it must be unanimous to find Penny Green or an accomplice was not armed with a firearm during the commission of the attempted first degree robbery.

Issue Pertaining to Assignment of Error

A non-unanimous special finding by a jury is a final decision by the jury that the State has not proved its case beyond a reasonable doubt. Did the court err in instructing the jury it must be unanimous to answer “was not” to the special verdict?

B. STATEMENT OF THE CASE

1. Trial and sentencing

Paul Bauer was cleaning the kitchen of his Seattle home for a dinner party when two unknown women opened his screen door and walked in. 5RP 6, 28-29, 30-33, 59.¹ The women approached him and announced they were there to collect the money he owed. 5RP 35-36. Bauer said he owed no one money and commanded the women to leave.

¹ Green refers to the 6-volume verbatim report of proceedings as follows: 1RP – 12/8/09, 12/9/09, 2/17/10; 2RP – 2/9/10; 3RP – 2/11/10; 4RP – 2/16/10; 5RP – 2/18/10; 6RP – 2/22/10, 3/19/10, 4/9/10.

One of the woman began searching for something in a bag and the second said, "[H]e said you do." 5RP 36.

Bauer began pushing the women back outside when he saw one woman retrieve a handgun from the bag and begin "waving it around." 5RP 36, 39-41, 75-77. This did not deter Bauer, who continued pushing the women toward the front screen door. 5RP 40-42, 86-87. During his advance, Bauer grabbed a steak knife to defend himself, but the women knocked it out of his hand. RP5 42-44. He then pulled out his cell phone, but it, too, was knocked away. So he continued to push the women back until they arrived at the front door. 5RP 44-46.

At that point a struggle ensued, someone "conked" Bauer on his head with the gun, and the weapon fired. 5RP 46-47, 78-79. A single .45-caliber bullet hit the front door and landed on the floor. 1RP 148-49; 4RP 39-40; 5RP 55. Bauer fell into a plant and the women fled. 5RP 47-48. As blood rushed down his face, Bauer yelled for his neighbor, who was outside working on his house, for help. 5RP 48-49. The neighbor called police, who arrived in a few minutes. 5RP 48-51.

Bauer recalled telling officers the women were shorter and heavy-set. One had brown hair and the other was a bleached-blond. 5RP 72-73. He later picked one photo from each of two six-person photo montages,

but was not sure either depicted his assailant. 1RP 130-37; 5RP 62-65. At trial, Bauer identified Penny Green as one of the women. 5RP 67-68. He explained he recognized her as she walked down the hallway toward the courtroom the morning of his testimony. 5RP 68-69, 71, 88-89.

The bleached-blond woman was Yakima resident Carla Smith. 6RP 42-45, 74-75. Smith had a job that included mowing the lawn at Green's Yakima residence. Smith met Shane Rochester at Green's home within a month before the attempted robbery of Bauer. 6RP 48-51. One morning Smith's boyfriend drove her to Green's house to mow the lawn. When they arrived, Rochester was there. 6RP 57-59. From there, everyone went to Green's niece's house, where Green borrowed a car. 6RP 64-68.

A short time later, Rochester picked up Smith and her boyfriend, as well as a woman called "B," in Green's niece's car. Rochester said he wanted to collect a debt from someone in Seattle, so the four got onto the freeway. 6RP 68-72, 83. When they arrived in Seattle, Rochester pointed out Bauer's home while Smith's boyfriend drove the car. 6RP 85.

Rochester and Bauer had been lovers for 12 or 13 years, but had no contact for nearly two years. 5RP 10, 58. While they were together, Rochester remodeled several parts of Bauer's home. 5RP 10-17. Bauer

paid Rochester regular rates for the work. 5RP 14-15. After finishing an extensive kitchen project, however, Rochester told Bauer he "ended up with too good a kitchen" and should pay more for the job. 5RP 57. The issue was never resolved. 5RP 57.

Smith's boyfriend drove to a nearby park, where it was decided Smith and B would walk to Bauer's home to collect the debt. 6RP 84-86. Smith said she did not want her boyfriend and Rochester to collect because they could get violent. 6RP 106-07.

Smith and B walked to Bauer's home. Smith carried a purse with a gun inside. 6RP 84-86, 109. When they arrived they opened the screen door, entered the house, and walked to the kitchen where Bauer was at the sink. Either B or Smith told Bauer he owed someone some money, and Smith displayed the gun. Bauer told them to get out of the house, so they turned and headed for the screen door. 6RP 86-88, 108. But Bauer intercepted them before they reached the door. A struggle ensued, during which Smith's hand was hit and the gun fired. 6RP 88-90, 116. Smith did not remember hitting Bauer with the gun, but she admitted it was possible. 6RP 91, 110-11.

She and B left the house and split up. Smith returned to the park but no one was there. She hitchhiked to Issaquah, from where her friend

Debbie picked her up and took her back to Yakima. 6RP 92, 112-14. A day or two later, Smith was traveling in a friend's car when police stopped the car. 4RP 26, 6RP 79, 125-26, 136. At that point, Smith attempted suicide by taking a "handful" of what she believed were morphine pills. 6RP 73, 79-80. Smith was arrested and later interviewed by Yakima Police detective Ajo. 4RP 23; 6RP 77, 122-23.

The state played the videotape of Smith's interview with Ajo to the jury. 6RP 76-78, 122-26; Ex. 40. Smith testified she remembered little if anything from the interview because she was "fading in and out." 6RP 73, 93-94, 117-18. She told Ajo that when they arrived at a park in Seattle, she decided to accompany Green to the house. Green walked into the house and she followed. Green displayed the gun and hit Bauer on the head with it during a struggle. Ex. 41 at 6-7.² The gun fired, after which she and Green ran out of Bauer's house. 6RP 124, 150; Ex. 41 at 7.

Explaining her discrepant testimony, Smith said she implicated Green to deflect heat from herself. She thought a story involving Green -- rather than B -- would be more credible because the car they used to get to Seattle belonged to Green's niece. 6RP 94-95. Smith told jurors Green

² Exhibit 41, a transcript of Smith's recorded interview, was marked but not admitted or sent back with the jury. 6RP 122-23.

was not with her in Seattle. 6RP 95. She admitted she lied to police in her earlier statements. 6RP 118, 120.

Meanwhile, Yakima police arrested Green at her home a day after the incident at Bauer's home. 1RP 119-20; 4RP 26-27. A Seattle police detective interviewed Green in Yakima and drove her to Seattle. 1RP 122-25. Green acknowledged knowing Rochester, Smith, and Smith's boyfriend. 1RP 127-28. She said she had permission to use her niece's car, which she allowed Rochester use to run errands. She did not go to Seattle. 1RP 122-25; 2RP 35, 49; 4RP 19-20; Ex. 15.

Seattle police detained Rochester near Bauer's home shortly after the incident. During a frisk, an officer retrieved seven unspent .45 caliber rounds from Rochester's pocket. 1RP 191-95, 6RP 146-47.

Rochester, Smith, and Green were charged with attempted first degree robbery, during the commission of which Green was armed with a handgun. CP 28-29. Smith pleaded guilty as charged and was sentenced before testifying in Green's case. 6RP 75-76, 80-81. Jurors in Green's trial apparently were unimpressed with Smith's testimony, because they found Green guilty as charged. CP 85-86, 89. The trial court sentenced Green to the 120-month statutory maximum, which included a mandatory 36-month firearm enhancement. CP 91-100; 6RP 212-15.

2. Firearm enhancement instructions

The trial court instructed jurors that with respect to the special verdict, the state bore the burden of proving beyond a reasonable doubt Green was armed with a firearm during the attempted robbery. CP 84 (instruction 23). Pertinent to Green's appeal is the second paragraph of instruction 22, which is a variation of WPIC 166.00:

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 "was," you must unanimously be satisfied beyond a reasonable doubt that "was" is the correct answer. If you unanimously have a reasonable doubt as to this question, you must answer "was not".

CP 83 (attached as appendix).

The jury answered "was" – it found Green or an accomplice "was" armed with a firearm during the commission of the crime. CP 89.

C. ARGUMENT

THE FLAWED UNANIMITY INSTRUCTION FOR THE SPECIAL VERDICT REQUIRES VACATION OF THE FIREARM SENTENCING ENHANCEMENT.

Instruction 22 incorrectly required unanimity for the jury's special verdict on whether Green was armed with a firearm at the time of the offense. CP 83. The sentencing enhancement should be vacated.

Instruction 22, which stated all 12 jurors must agree on an answer to the special verdict, was an incorrect statement of the law. State v. Bashaw, 169 Wn.2d 133, 147, 234 P.3d 195 (2010). An instruction containing the same improper requirement was given in Bashaw. Bashaw, 169 Wn.2d at 139 ("Since this is a criminal case, all twelve of you must agree on the answer to the special verdict."). A unanimous jury decision is not required to find the state has failed to prove the presence of a special finding increasing the defendant's maximum allowable sentence. Bashaw, 169 Wn.2d at 146 (citing State v. Goldberg, 149 Wn.2d 888, 72 P.3d 1083 (2003)).

The State proposed the erroneous instruction. Supp. CP __ (sub no. 46, State's Instructions to the Jury, 2/17/10). Defense counsel did not object to this instruction. 6RP 166. But neither did counsel in Bashaw. State v. Bashaw, 144 Wn. App. 196, 199, 182 P.3d 451 (2008). The Supreme Court nevertheless reversed after applying the harmless error test applicable to constitutional error. Bashaw, 169 Wn.2d at 147-48.

An error of constitutional magnitude may be raised for the first time on appeal. RAP 2.5(a)(3). Instructional error is presumed prejudicial unless it affirmatively appears to be harmless. State v. Clausung, 147 Wn.2d 620, 628, 56 P.3d 550 (2002). The presumption is rebutted only if

a reviewing court can conclude beyond a reasonable doubt that the verdict would have been the same absent the error. Bashaw, 169 Wn.2d at 147 (citing State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002)).

As in Bashaw, "[t]he error here was the procedure by which unanimity would be inappropriately achieved." Bashaw, 169 Wn.2d at 147. And as in Bashaw, "[t]he result of the flawed deliberative process tells us little about what result the jury would have reached had it been given a correct instruction." Id. Consequently, Green's 36-month sentencing enhancement must be vacated.

The State may argue the error was harmless beyond a reasonable doubt because the jury unanimously found Green "displayed what appeared to be a firearm or other deadly weapon" as part of the general verdict for attempted first degree robbery. CP 67-69, 85-86.³ As required by law, the jury was instructed it had to be unanimous in order to return a general verdict. CP 62, 81-82; see Bashaw, 169 Wn.2d at 145 n.5 (general verdicts in criminal cases must be unanimous to convict or acquit).

³ The court instructed jurors that "[a] firearm, whether loaded or unloaded is a deadly weapon." CP 71 (instruction 11); WPIC 2.06. The court defined "firearm" as "a weapon or device from which a projectile may be fired by an explosive such as gunpowder." CP 72 (instruction 12); WPIC 2.10.

Our Supreme Court rejected a similar argument in State v. Williams-Walker, 167 Wn.2d 889, 898-99, 225 P.3d 913 (2010). Two of the three defendants in that consolidated case – Ruth and Graham -- were charged with first degree assault with a firearm, a conviction that required the jury to find a firearm was used. Williams-Walker, 167 Wn.2d at 899. But the court submitted special verdict forms for a deadly weapon enhancement, not for a firearm enhancement, and the jury returned positive answers to those deadly weapon special verdict forms. Williams-Walker, 167 Wn.2d at 898.

The trial court nevertheless imposed firearm sentencing enhancements. Williams-Walker, 167 Wn.2d at 894. The state argued the firearm enhancements were authorized because the juries implicitly found, by their guilty verdicts, that the defendants committed the crimes using a firearm. Williams-Walker, 167 Wn.2d at 898-99. The Court disagreed:

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 firearm by special verdict. Such a result violates both the statutory requirements and the defendant's constitutional right to a jury trial.

Williams-Walker, 167 Wn.2d at 898-99.

The same reasoning applies to Green's case. Former RCW 9.94A.602 required the jury to find use of a deadly weapon, including a

firearm, by special verdict. Relying solely on the general guilty verdict would render meaningless the statutory special verdict requirement. Courts must interpret and construe statutes so all the language is given effect, with no part rendered meaningless or superfluous. State v. Roggenkamp, 153 Wn.2d 614, 624, 106 P.3d 196 (2005). Under these principles, this Court cannot ignore the special verdict and the process by which the jury answered that verdict.

Furthermore, sometimes jurors return seemingly inconsistent special verdicts. See e.g., State v. Goins, 151 Wn.2d 728, 731, 92 P.3d 181 (2004) (jury found defendant guilty of second degree assault with intent to commit indecent liberties but, by special verdict, found he did not act with sexual motivation); State v. Holmes, 106 Wn. App. 775, 778-79, 24 P.3d 1118 (2001) (jury found defendant guilty of first degree robbery (armed with a deadly weapon) but rejected by special verdict sentencing enhancement for being armed with deadly weapon); State v. Hauck, 33 Wn. App. 75, 76, 651 P.2d 1092 (1982) (jury found defendant guilty of first degree robbery (displayed what appeared to be firearm or other deadly weapon) but, in answer to special interrogatory, found he was not armed with deadly weapon), review denied, 99 Wn.2d 1001 (1983); "Juries return inconsistent verdicts for various reasons, including mistake, compromise,

and lenity." Goins, 151 Wn.2d at 733. For this reason as well, this Court should not rely solely on the general verdict in Green's case.

With a proper special verdict instruction that did not require unanimity, the jury may have returned a different special verdict in Green's case. Bashaw, 169 Wn.2d at 147. As articulated by the Bashaw Court,

We can only speculate as to why this might be so. For instance, when unanimity is required, jurors with reservations might not hold to their positions or may not raise additional questions that would lead to a different result. 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.

Bashaw, 169 Wn.2d at 147-48.

The same is true in Green's case. This Court cannot confidently say the jury would have reached the same result had it been instructed that unanimity was not required before answering the special verdict form "was not." This Court should vacate the 36-month firearm sentencing enhancement. Bashaw, 169 Wn.2d at 148.

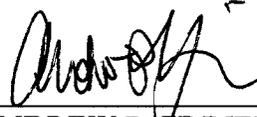
D. CONCLUSION

Green requests this Court vacate her sentence enhancement because the jury was incorrectly instructed it must be unanimous to answer “was not.”

DATED this 26 day of January, 2011.

Respectfully submitted,

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APPENDIX

No. 22

You will also be given a special verdict form for the crime of Attempted Robbery in the First Degree. If you find the defendant not guilty of the crime of Attempted Robbery in the First Degree, do not use the special verdict form. If you find the defendant guilty of this crime, you will then use the special verdict form and fill in the blank with the answer "was" or "was not" 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 "was," you must unanimously be satisfied beyond a reasonable doubt that "was" is the correct answer. If you unanimously have a reasonable doubt as to this question, you must answer "was not".