

65345-8

65345-8

NO. 65345-8-I

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

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STATE OF WASHINGTON,  
Respondent,

v.

BOBBY LITTLE, III,  
Appellant.

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

The Honorable Vickie I. Churchill Judge  
Superior Court Cause No. 09-1-00138-4

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BRIEF OF RESPONDENT

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**I. STATEMENT OF THE ISSUES.**

1. Whether the prosecutor committed reversible error by stating “[q]uite a bit of blood” after a police witness identified a substance in a photograph as blood.

**Short Answer:** No. The prosecutor’s comment was a *de minimis* interjection that did not express an opinion regarding a contested issue of fact, nor did it express an opinion about the defendant’s guilt. Though improper during witness examination, it is not misconduct. The defendant did not make a timely objection, nor did he request a curative instruction when the matter was brought to the court’s attention at a subsequent recess in the trial. Even if the remark were error, and even if the error had been preserved, it would be harmless.

2. Whether this Court should consider a claim that the trial court erred by instructing the jury in violation of *State v. Bashaw*, when the claimed error is raised for the first time on appeal.

**Short Answer:** The Court should not consider this claim. Here, the instructional error under *State v. Bashaw*, is based on common law and the Supreme Court’s concerns for judicial economy, and is not an error of constitutional magnitude that may be raised for the first time on appeal. Even if it were an error of constitutional magnitude, it would have to be manifest – that is, it must have practical and identifiable consequences. Here it is not manifest because the jury rendered a unanimous affirmative

verdict, and there was no indication that the jury had reached an impasse that could be considered a negative “decision.”

3. Whether instructing the jury that it must be unanimous to render a special verdict on the use of a deadly weapon, in violation of *State v. Bashaw*, is harmless error under the facts of this case.

**Short Answer:** The error, if any, was harmless. Here, the defendant asserted he acted in self-defense, and testified that the 1.75 liter bottle of Jack Daniel’s whiskey was a deadly weapon. Moreover, his attorney on closing argument referred to the bottle repeatedly as a “deadly weapon.” The jury’s special verdict merely affirmed a fact that was not contested.

## **II. STATEMENT OF THE CASE**

### **A. Facts of the Case**

On June 24, 2009 the defendant/appellant Bobby L. Little, III (hereinafter “Little”) viciously, and without warning or provocation, attacked Timothy Kester (“Kester”) in Kester’s home with an empty 1.75 liter Jack Daniel’s whiskey bottle. At the time, Kester was sitting at his kitchen table, and leaning over to turn on his computer. Little was standing, and held the bottle with two hands, swinging it like a baseball bat. Little shattered the thick-glassed bottle on Kester’s face, knocking Kester to the floor and splitting a gash into the side of his face. Little

continued to beat Kester, who was on his back on the floor in the hallway. Kester tried to slide backwards away from Little, while Little bludgeoned him with an unidentified blunt object. RP 139-143<sup>1</sup>. During the beating, Little was demanding Kester tell him where his “bags” (of marijuana) and money were. RP 145. Kester screamed for help, and Little grabbed a small bag of Kester’s marijuana and fled the house. RP 146-47.

Shortly before the attack, Kester had invited Little into his house for the purpose of smoking some of Kester’s marijuana. RP 118-119. The men shared the marijuana and then Little attacked Kester from behind with the bottle and stole his marijuana. RP 139.

At trial, Little testified that he had met Kester once prior to the date of the assault, when he had bought some marijuana from Kester. RP 180. Little asserted Kester ripped him off, and gave him only about two-thirds of the amount of marijuana to which he was entitled for \$20. RP 189-192. Little admitted on direct examination that he went to Kester’s house to confront him about the marijuana deal. RP 181-82.

Little asserted that Kester attacked him with the empty Jack Daniel’s bottle, but that Little disarmed him and defended himself with the bottle. RP 183-84. Little testified on direct examination that the bottle,

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<sup>1</sup> The trial record consists of two volumes from the trial that took place from April 7 through April 10, 2010. The report of proceedings is numbered continuously across the two volumes, and is referred to only as “RP” in the State’s brief. Volume 1 includes pages 1 – 133, and Volume 2 includes pages 134-338.

due to its size, would “do something to [his] face” if he were hit with it. RP 184. He conceded on cross examination that the broken Jack Daniel’s bottle could kill someone. RP 231-32.

The physical evidence at the house was entirely consistent with Kester’s version of events. Especially notable was that the glass was confined to an area near Kester’s computer in one corner of his kitchen, where Kester said he was sitting when Little blindsided him. RP 49-57, 67, 138-141; EX 16, 17, 19

. The back of Kester’s T-shirt was drenched in blood, consistent with Kester’s description of trying to slide away from Little while lying on his back. RP 37; EX. 23. The blood on Kesters face ran towards the back of his head, consistent with someone lying down after having his cheek split open. EX 2. Kester’s arms and wrists were bruised and swollen from defending himself. RP 96.

Kester called the police immediately after Little fled, and Little was arrested at his home about an hour later. RP 62-63, RP 149.

#### **B. Procedural History of the Case**

The State charged Little by Second Amended Information with robbery in the first degree, and assault in the second degree. Each count included a special allegation that the crimes were committed while the defendant was armed with a deadly weapon. CP 43.

Little asserted he assaulted Kester in self-defense. CP 66. The trial instructed the jury on self-defense, including giving a “no duty to retreat” instruction. CP 36, 37. (Instructions 17-18).

During direct examination of Oak Harbor Police Sergeant Bill Wilke, the prosecutor asked him about a discoloration on the image of Kester’s T-shirt clad back. The exchange was as follows:

Q: I'm going to go here to [Exhibit] No. 23. And can you remind us what it is we're looking at here?

A: That's the back of Mr. Kester, sir. The back of his shirt and his back.

Q: Okay. Now, the colors are difficult, I think, on the projector; but it looks like his shirt, there's-- It's darker in the middle. It looks wet. Was it wet?

A: Yes, sir.

Q: What was it wet with?

A: It appeared to be blood, sir.

Q: Okay. Quite a bit of blood.

RP 37.

Counsel for Little did not timely object or request a curative instruction. Later that day, after the jury was excused for a 15 minute recess, defense counsel advised the court he was “a little bit concerned” about the prosecutor’s comment, and advised the court he would ask for an “admonishment” if the prosecutor made “any further comments like that.” RP 64. He did not ask for a curative instruction, or to have the comment stricken. The judge indicated the prosecutor had violated her *Guidelines for Jury Trials*, prohibiting “wisecracking and comments on

the evidence.” RP 64. The prosecutor acknowledged he should not have made the remark about the quantity of blood, and pointed out that defense counsel had the right and ability to object to such remarks. RP 65.

At the close of the evidentiary portion of the trial, the jury was instructed as follows:

It is important, however, for you to remember that the lawyers' statements are not evidence.

The evidence is the testimony and the exhibits. The law is contained in my instructions to you. You must disregard any remark, statement or argument that is not supported by the evidence or the law in my instructions.

CP 17. (Instruction No. 1).

The trial court also instructed the jury that it had to be unanimous to render a special verdict regarding the presence of a deadly weapon. CP 38-39. (Instruction 19). The pertinent section of the instruction comes from pattern jury instruction WPIC 160:

You will also be given two special verdict forms for the crimes charged in Counts I and II. If you find the defendant not guilty of Count I do not use the corresponding special verdict form. If you find the defendant guilty of Count I you will use the corresponding special verdict form and fill in the blank with the answer “yes” or “no” according to the decision you reach. If you find the defendant not guilty of Count II do not use the corresponding special verdict form. If you find the defendant guilty of Count II you will use the corresponding 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 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 39.

The jury found Little “not guilty” of robbery, and “guilty” of second degree assault. CP 13, 14. Further, the jury unanimously found that Little was armed with a deadly weapon when he assaulted Kester. CP 15.<sup>2</sup> The jury necessarily found that the State proved beyond a reasonable doubt that Little did not act in self defense.

On April 23, 2010, Little was sentenced to serve 24 months in prison, which included a 12-month deadly weapon sentencing enhancement, pursuant to RCW 9.94A.533(4). CP 3-6. Little filed a timely appeal. CP 1-2.

On July 1, 2010 the Supreme Court issued its opinion in *State v. Bashaw*, 169 Wn.2d 133, 234 P.3d 195 (2010), holding that it is error to instruct a jury that it must be unanimous to render a negative verdict on a school bus zone sentencing enhancement. The State has filed a motion to reconsider *Bashaw*, which is still pending.

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<sup>2</sup> The Index to Appellant’s Clerk’s Papers designates two different documents as CP 53: “Defendant’s Proposed Jury Instructions” and “Special Verdict Form for Count II.” It appears that “Special Verdict Form II” should be CP 15.

### III. ARGUMENT

#### A. The Prosecutor's Insignificant Remark – “Quite a bit of blood” - Does Not Constitute Prosecutorial Misconduct.

Little's claim of prosecutorial misconduct based on the five words, “[q]uite a bit of blood,” could be characterized as a frivolous appeal. Nevertheless, the State is obligated to respond.

To prevail on a prosecutorial misconduct allegation, a defendant must show both improper conduct and prejudicial effect. *State v. Pirtle*, 127 Wn.2d 628, 672, 904 P.2d 245 (1995) (citing *State v. Furman*, 122 Wn.2d 440, 455, 858 P.2d 1092 (1993)). Prejudice is established by showing a substantial likelihood that the improper conduct affected the jury's verdict. *Pirtle*, 127 Wn.2d at 672. The defendant bears the burden of establishing both the impropriety of the prosecutor's conduct and its prejudicial effect. *State v. Ish*, \_\_\_ Wn.2d \_\_\_, 241 P.3d 389, 392 (2010). Moreover, where a timely objection is not made, and there is no request for a curative instruction, the defendant bears the burden of proving that the misconduct is so flagrant and ill-intentioned that no instruction could have cured it. *State v. Warren*, 165 Wn.2d 17, 29-30, 195 P.3d 940 (2008); *State v. Munguia*, 107 Wn.App. 328, 336, 26 P.3d 1017 (2001). “The courts of this state have consistently stated that any objection to prosecutorial misconduct is waived by failure to make a timely objection and request a curative instruction.” *State v. Jones*, 71 Wn.App. 798, 807,

863 P.2d 85 (1993)(citing *State v. Swan*, 114 Wn.2d 613, 790 P.2d 610 (1990), *cert. denied*, 498 U.S. 1046, 111 S.Ct. 752, 112 L.Ed.2d 772 (1991)).

Here, Little asserts that his attorney noted his objection, suggesting that the error was properly preserved for review. App. Br. at 4. However, trial counsel's expression of concern outside the presence of the jury at a later point in the trial, and his failure to request a curative instruction, does not adequately preserve the error. For example, trial counsel in *Jones* moved for a new trial based on improper argument after a verdict was rendered. On appeal, Jones argued he had sufficiently preserved the error. This Court rejected that argument, noting that the objection must be made at the time of the improper argument, so that the court has an opportunity to issue a curative instruction. *State v. Jones*, 71 Wn.App at 807, n. 2. See also, *State v. Swan*, 114 Wn.2d 613, 661, 790 P.2d 610 (1990), *cert. denied*, 498 U.S. 1046, 111 S.Ct. 752, 112 L.Ed.2d 772 (1991)(noting the absence of an objection at the time of the improper statement strongly suggests the event did not appear prejudicial in the context of the trial).

Thus, the inquiry is whether the prosecutor's remark was so flagrant and ill-intentioned that no instruction could cure the problem. Since, had the remark been made by the prosecutor in closing argument, it would have been entirely proper, and supported by the evidence, it is

difficult to see how it was prejudicial in the least. In effect, this innocuous remark was untimely, at its worst.

Little offers this Court little explanation of how the remark is prejudicial. He asserts the remark expressed a personal opinion as to the nature and degree of injury. App. Br. at 4. In truth, the remark merely stated what every juror could already see in Exhibit 23. The prosecutor's theory about the level of injury constituting "substantial bodily harm" was that it was either the permanent scarring on the victim's face, or his loss of consciousness. RP 268-69. The volume of blood spilled was not a significant component of the proof of any element.

Little argues the remark about the blood diminished Little's claim of self-defense. There is no logical support for that argument. Self-defense imposes no limit on the degree and nature of the injury inflicted upon an assailant, so long as the force used is reasonable. Self defense is even available in homicide prosecutions.

Little has waived his appeal of this issue because he failed to preserve the error for review, failed to request a curative instruction, and can show no prejudice from the prosecutor's remark, let alone a flagrant and ill-intentioned motive. His appeal on this ground should be rejected.

**B. Little Failed To Preserve His Non-Constitutional Claim of Instructional Error, and Has Therefore Waived His *Bashaw* Appeal.**

Little claims the trial court's instruction regarding the deadly weapon special verdict violates the Supreme Court's ruling in *State v. Bashaw*, 169 Wn.2d 133, 234 P.3d 195 (2010) because it required the jury to be unanimous before rendering any decision. However, Little not only failed to object to this instruction below, his counsel affirmatively told the court he had no objection to any of the State's proposed instructions. RP 235. Because the claimed error is not of constitutional magnitude, he has waived the issue on appeal. RAP 2.5(a)(3).

RAP 2.5(a)(3) permits the Court to consider an issue raised for the first time on appeal only when it involves a "manifest error affecting a constitutional right." In order to raise an error for the first time on appeal under this rule, the appellant must demonstrate that (1) the error is manifest, and (2) the error is truly of constitutional dimension. *State v. O'Hara*, 167 Wn.2d 91, 98, 217 P.3d 756 (2009). " 'Manifest' in RAP 2.5(a)(3) requires a showing of actual prejudice." *State v. Kirkman*, 159 Wn.2d 918, 935, 155 P.3d 125 (2007). A showing of actual prejudice means Little must make a plausible showing that the asserted error had practical and identifiable consequences in the trial of the case. *Id.*; *See*

also *State v. Israel*, 113 Wn.App. 243, 264-265, 54 P.3d 1218, 1232 (2002).

An unpreserved instructional error must be analyzed on a case by case basis to determine whether it was a manifest error affecting a constitutional right. See, *State v. O'Hara*, 167 Wn.2d 91, 100, 217 P.3d 756 (2009). The Supreme Court in *Bashaw* noted that its decision was not compelled by constitutional protections against double jeopardy, but rather by the Court's common law precedent and policy considerations focused on preserving judicial resources. *Bashaw*, 169 Wn.2d at 146-47.

The non-constitutional dimension of jury unanimity questions is also noted in the Supreme Court's decision in *State v. Labanowski*, 117 Wn.2d 405, 422, 816 P.2d 26 (1991). There, the Court addressed the issue of whether a jury must unanimously acquit a defendant of a greater charge, before considering a lesser included offense. The Court ruled that the *policy preference* in this state is that juries be instructed to consider lesser offenses when they are "unable to agree" instruction on greater offenses. *Labanowski*, 117 Wn.2d at 422. The Court cited with approval federal cases holding that the issue was not one of constitutional magnitude. *Id.* (citing *Catches v. United States*, 582 F.2d 453, 459 (8th Cir.1978); *United States v. Jackson*, 726 F.2d 1466 (9th Cir.1984); *United States v. Harvey*, 701 F.2d 800, 806 (9th Cir.1983)).

Since the error is not of constitutional dimension, and since Little approved of the instruction as given, he did not preserve the error. This Court should decline to review it.

It is also true that the instruction does not rise to the level of a manifest error. As noted above, the appellant has the burden to make a plausible showing that the error had an identifiable and practical consequence in his case. Here, Little has presented neither evidence nor argument identifying a practical consequence to his trial. The jury never indicated it was deadlocked on the enhancement. There was no suggestion that it ever reached any decision other than a unanimous finding that Little was armed with a deadly weapon. The jurors were polled, and each indicated that the verdicts were both the collective and individual verdicts of the jurors.

Since Little has not met his burden of showing the instructional error was manifest, this court should not review the matter.

**C. The Instructional Error was Harmless.**

Even if the court determines the claim raises a manifest constitutional error, it may still be subject to a harmless error analysis. *State v. O'Hara*, 167 Wn.2d 91, 98, 217 P.3d 756 (2009) (citing *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995); *State v. Lynn*, 67 Wn.App. 339, 345, 835 P.2d 251 (1992)). A jury instruction is harmless if

the Court concludes beyond a reasonable doubt that the verdict would be the same absent the error. *Bashaw*, 169 Wn.2d at 147 (quoting *State v. Brown*, 147 Wn.2d 330, 341, 58 P.3d 889 (2002) (quoting *Neder v. United States*, 527 U.S. 1, 19, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999))). Here, the error was indeed harmless.

Little agreed the 1.75 liter bottle was dangerous, and, after he broke it, capable of killing someone.<sup>3</sup> RP 184, 231-32. On closing, his attorney also repeatedly characterized the bottle as a deadly weapon. RP 279-280, 294-95.

The bottle was used like a club, and wielded in a two-handed baseball bat swing with sufficient force to shatter the bottle, cut a gash in Kester's face and knock Kester off his chair. After being hit, Kester complained that his vision "went in and out" and that "[e]verything was extremely blurry." RP 140. He said for a time he was unable to see, and his head was "ringing." RP 141. His face needed stitches in the muscles underneath his eye, and five or six stitches to close the wound. RP 154-55.

No challenge was made to the characterization of the bottle as a deadly weapon. The jury was polled, and each juror individually affirmed

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<sup>3</sup> An identical empty 1.75 liter bottle was admitted for illustrative purposes Ex 36. CP 130. The bottle was not transmitted to this Court, as it is a cumbersome exhibit (and in this case, a weapon) RAP 9.8(b). The bottle is more than twice the size of a standard 750 ml bottle of whiskey.

his or her verdicts. The jury's unanimous finding that the 1.75 liter bottle was a deadly weapon would have been no different, had a *Bashaw*-compliant instruction been given.

**D. *Bashaw* Was Wrongly Decided and Contrary to Legislative Intent.**

While this Court is bound by *Bashaw*, the State respectfully submits that the holding in that case is incorrect and offers the following argument in order to preserve the issue.

The state constitutional right to jury trial in criminal matters stems from Const. art. I, § § 21 and 22. Const. art. I, § 21 which provides that "[t]he right of trial by jury shall remain inviolate" preserves the right to a jury trial as that right existed at common law in the territory when section 21 was adopted. *Sofie v. Fiberboard Corp.*, 112 Wn.2d 636, 645, 771 P.2d 711, 780 P.2d 260 (1989). This right, in criminal cases, included a right to a twelve person jury, and a right to a unanimous verdict. *State v. Stegall*, 124 Wn.2d 719, 723-24, 881 P.2d 979 (1994); *State v. Stephens*, 93 Wn.2d 186, 190, 607 P.2d 304 (1980).

The Washington Supreme Court has rejected the notion that a defendant can waive the unanimity requirement. In *State v. Noyes*, 69 Wn.2d 441, 446, 418 P.2d 471 (1966), the defendant's first trial resulted in a hung jury which stood 11 to 1 for acquittal. On appeal, the court

characterized as "without merit" the notion that the defendant could waive his right to a unanimous verdict and accept the vote of 11 jurors as a valid verdict of acquittal. *Id.* at 446.

When enacting sentencing enhancement statutes, the legislature is presumed to be familiar with the court's rulings on jury unanimity. The legislature gave force or meaning to a non-unanimous verdict in only one sentencing statute concerning aggravated first-degree murder. *See* RCW 10.95.080(2). For all other sentencing statutes, consistent with the dictates of Const. art. I, § 21, the legislature's procedure requires unanimity before a sentencing verdict can be rendered for conviction or acquittal.

The fixing of legal punishments for criminal offenses is a legislative function. *State v. Ammons*, 105 Wn.2d 175, 180, 713 P.2d 719, 718 P.2d 796 (1986). The judiciary may only alter the sentencing process when necessary to protect an individual from excessive fines or cruel and inhuman punishment. *Id.* Otherwise, the court may recommend or identify needed changes, but must then wait for the legislature to act. *See, e.g., State v. Pillatos*, 159 Wn.2d 459, 469-70, 150 P.3d 1130 (2007) (absent statutory authority, courts could not empanel juries to determine the existence of aggravating circumstances); *State v. Martin*, 94 Wn.2d 1, 7, 614 P.2d 164 (1980) (absent statutory authority, courts could not empanel juries to decide whether a defendant who pled guilty should

receive the death sentence). Accordingly, it is for the legislature, not the court, to allow for acquittal based upon a non-unanimous jury.

It also bears pointing out that *State v. Goldberg*, upon which *Bashaw* is based, had a much more narrow holding than *Bashaw*. *State v. Goldberg*, 149 Wn.2d 888, 894, 72 P.3d 1083 (2003). In *Goldberg*, the jury rendered a decision that a special allegation had not been proved, even though the jury was not unanimous.<sup>4</sup> What differentiates *Goldberg* from *Bashaw* is that no decision was rendered in *Bashaw*.

The trial court “evidently concluded the jury was deadlocked on the special verdict instruction and ordered continued deliberations.” *Goldberg*, 149 Wn.2d at 893. The Supreme Court’s reasoning in *Goldberg* was that the jury was not deadlocked. To the contrary it had rendered a decision and it was improper to require unanimity. The Supreme Court in *Goldberg* also points out that the trial court did not have the authority to “order continued deliberations with respect to a jury’s answer to special finding as given in this case.” *Id.* at 894 (emphasis added).

Regrettably, the Supreme Court stretched the narrow holding of *Goldberg* way beyond its initial intent.

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<sup>4</sup> The *Goldberg* jury’s decision was not rendered contrary to the instructions in that case. The special verdict instruction did not require unanimity for a verdict of “no.” *State v. Goldberg*, 149 Wn.2d at 894.

**E. The Remedy Upon Reversal Due to Instructional Error Permit the State to Submit The Question of a Deadly Weapon Enhancement to a Jury That Is Instructed Consistent With *Bashaw*.**

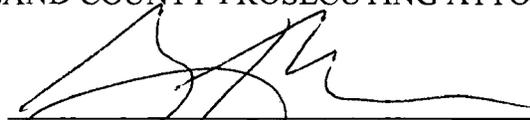
If the Court finds there was reversible instructional error, the matter should be remanded, and the State should be permitted to empanel a jury to determine whether he was armed with a deadly weapon. *State v. Woolfolk*, 95 Wn.App. 541, 542-43, 977 P.2d 1 (1999). Ironically, the *Bashaw* decision will result in the retrial of this issue, in derogation of one of its stated goals to conserve judicial resources.

**IV. CONCLUSION**

For the foregoing reasons, the State requests the Court to reject all aspects of Little's appeal, and uphold his conviction and sentence.

Respectfully submitted December 13, 2010.

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