

65575-2

65575-2

NO. 65575-2-1

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

STATE OF WASHINGTON,
Respondent,
v.
Mary Lakilado,
Appellant.

2011 JUN 27 PM 4:33
COURT OF APPEALS
CLERK OF COURT

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

APPELLANT'S REPLY BRIEF

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A. INTRODUCTION TO REPLY

As set forth below, the State's response brief fails to establish any basis for denying Ms. Lakilado's grounds for reversal of her second degree assault conviction, or in the alternative, the special finding that a deadly weapon was used. Accordingly, the conviction should be reversed because (1) instructional error impermissibly reduced the State's burden of proof in violation of Ms. Lakilado's right to due process; (2) the interpreter for two key defense witnesses was incompetent, which denied Ms. Lakilado her constitutional rights to a fair trial and to confront witnesses; and (3) Ms. Lakilado was denied effective assistance of counsel when trial counsel had knowledge of but failed to object to the incompetent interpretation. If the Court disagrees, then the Court should review the jury instruction on the special verdict and find that it violated State v. Bashaw, 169 Wn.2d 133, 234 P.3d 195 (2010).

B. ARGUMENT IN REPLY

1. INSTRUCTION 11 CREATED A MANDATORY PRESUMPTION BECAUSE IT DID NOT TIE THE RECKLESSNESS MENS REA TO THE ELEMENT OF SUBSTANTIAL BODILY HARM.

To prove assault in the second degree, the State must prove two mental states for two distinct elements beyond a reasonable

doubt. RCW 9A.36.021(1)(a). First, the State is required to prove that the defendant intentionally committed the act of assault on the alleged victim. Id. Second, the State must show beyond a reasonable doubt that the defendant also recklessly inflicted substantial bodily harm on the alleged victim. Id. The criminal defendant is “indisputably entitle[d]” to “a jury determination that he is guilty of every element of the crime beyond a reasonable doubt.” Apprendi v. New Jersey, 530 U.S. 466, 476-77, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); accord U.S. Const. amends. VI & XIV; State v. Green, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). Thus constitutional error occurs where jury instructions create a mandatory presumption that requires the jury to “to find a presumed fact from a proven fact.” State v. Hayward, 152 Wn. App. 632, 126 P.3d 354 (2009). The presumption relieves the State of its burden to prove every element beyond a reasonable doubt. E.g., Sandstrom v. Montana, 442 U.S. 510, 522, 99 S. Ct. 2450, 61 L. Ed. 2d 39 (1979).¹

To avoid creating a mandatory presumption, the model instruction on recklessness counsels use of qualifiers to specifically tailor the mens rea to the element at issue—here, the infliction of

¹ This Court reviews de novo alleged error of law in jury instructions. State v. Barnes, 153 Wn.2d 378, 382, 103 P.3d 1219 (2005).

substantial bodily harm. WPIC 10.03 (2010). The pattern jury instruction advises as follows:

WPIC 10.03 Recklessness—Definition

A person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that a [wrongful act] [] may occur and this disregard is a gross deviation from conduct that a reasonable person would exercise in the same situation.

[When recklessness [as to a particular [result] [fact]]] is required to establish an element of a crime, the element is also established if a person acts [intentionally] [or] [knowingly] [as to that [result] [fact]].]

WPIC 10.03.

The bracketed information was not included in Instruction 11 here. CP 31. In Ms. Lakilado's case, the jury was generically instructed:

A person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that a wrongful act may occur and that this disregard is a gross deviation from conduct that a reasonable person would exercise in the same situation.

When recklessness is required to establish an element of a crime, the element is also established if a person acts intentionally or knowingly.

Id. The instruction fails to tie the required mens rea, recklessness, to the result. In other words, the jury is not counseled as to *which*

element the mens rea attaches. Thus, contrary to the State's argument, insertion of the word "element" in Instruction 11 does not rectify the mandatory presumption.

Instead, the jury should have been instructed that "When recklessness *as to a particular result* is required to establish an element of a crime, the element is also established if a person acts intentionally or knowingly *as to that result*."^{2 3} See WPIC 10.03. Such an instruction avoids the possibility that the jury will presume recklessness as to the result from the fact that it found intentional behavior as to the act. It specifically advises the jury that the finding of recklessness can only relate to the result of substantial bodily harm, but that recklessness as to that result can be established through reckless, knowing or intentional mens rea.

Because the faulty instruction created a conclusive presumption that required the jury to find the second element was

² Similarly, the court might have instructed the jury that "When recklessness *as to substantial bodily harm* is required to establish an element of a crime, the element is also established if a person acts intentionally or knowingly *as to the substantial bodily harm element*."

³ The instruction provided in State v. McKague was not the same as that given here. 159 Wn. App. 489, 508, 246 P.3d 558 (2011) ("[w]hen recklessness *as to a particular fact* is required to establish an element of a crime, the element is also established if a person acts intentionally or knowingly" (emphasis added)). But see id. at 509-10 (relying on inclusion of "an element . . . the element"). The McKague instruction came closer to the pattern instruction in WPIC 10.03, and thus more specifically tailored the mens rea at issue. Accordingly, Division Two's decision in McKague does not dictate the result here.

established whenever the first was, the State was relieved of its obligation to prove all elements of assault in the second degree. Ms. Lakilado was accordingly denied due process. E.g., Hayward, 152 Wn. App. at 642; see State v. Deal, 128 Wn.2d 693, 699, 911 P.2d 996 (1996).

Finally, this error was not harmless. The State ignores key language from Yates v. Evatt, 500 U.S. 391, 111 S. Ct. 1884, 114 L. Ed. 2d 432 (1991), in arguing harmless error. An error in this context will only be found harmless if “the force of the evidence presumably considered by the jury . . . is so overwhelming as to leave it beyond a reasonable doubt that the verdict resting on that evidence would have been the same in the absence of the presumption.” Yates, 500 U.S. at 404-05. Put otherwise, the State must show that, beyond a reasonable doubt, the jury would have reached the same verdict if it had been properly instructed that recklessness must relate specifically to the substantial bodily harm inflicted.

The State cannot meet its burden. The jury could have concluded that Ms. Lakilado did not intend to inflict substantial bodily harm and neither knew of nor disregarded the risk that a glass would inflict substantial bodily harm. The State failed to

present evidence that Ms. Lakilado “knew of and disregarded the substantial risk” that the glass would create substantial bodily harm to Ms. Williams.⁴ The State did not even prove that Ms. Lakilado knew she had a glass in her hand at the time of the alleged assault. But because the instructions were flawed, the jury was required to presume this element from the finding that Ms. Lakilado intended to assault Ms. Williams. Moreover, the State conflated the issues even further in its closing argument by suggesting to the jury that it should follow the mandatory presumption. 2/3/09RP 8 (“these concepts [of intentionality and recklessness] overlap a little bit”); 2/3/09RP 8-9 (the recklessness element “is also established if a person acts intentionally” as defined in instruction number 9). The State has not demonstrated the error was harmless.

2. EXTENSIVE INTERPRETIVE ERRORS VIOLATED MS. LAKILADO’S CONSTITUTIONAL RIGHTS TO DUE PROCESS AND TO PRESENT A DEFENSE.

Though the State does not dispute that incompetent interpretation denies defendants, like Ms. Lakilado, their

⁴ Notably, each element is the State’s burden to prove beyond a reasonable doubt. Thus the absence of evidence on an element demonstrates the State’s failure to satisfy its obligation. Moreover, whether the defense emphasized the element in closing is irrelevant to whether the State actually proved recklessness beyond a reasonable doubt.

constitutional right to confront witnesses and to a fair trial,⁵ it argues that any errors here were insignificant. See Resp. Br. at 24-25 (“the State agrees that the right to an interpreter for a non-English-speaking defense witness is constitutionally guaranteed”; “constitutional right to an interpreter ensures a competent interpreter”). But case law interpreting a defendant’s constitutional right to competent interpretation holds that evidence of incorrectly translated words and nonsensical interpretation shows incompetency. Perez-Lastor v. I.N.S., 208 F.3d 773 (9th Cir. 2000); Teshome, 122 Wn. App. at 712; accord Joanne I. Moore, ed., Immigrants in Courts at 37, 39-40 (Univ. of Washington Press 1999). The record here reveals both problems persisted—incorrect and nonsensical interpretations. See Op. Br. at 22-36 (setting forth extensive errors in interpretation).⁶

The State suggests that testimony regarding alcohol consumption was insignificant because the “major issue in the case” was whether anger, not intoxication, was the alleged motive.

⁵ See, e.g., State v. Teshome, 122 Wn. App. 705, 711, 94 P.3d 1004 (2004) (recognizing constitutional right); Negron v. New York, 434 F.2d 386, 389 (2d Cir. 1970) (same); cf. RCW 2.43.010.

⁶ The State’s assertion that errors without “substantive effect” do not demonstrate incompetence is contrary to the case law and constitutional rights upon which the cases rely. See Resp. Br. at 35. Notably, the State does not dispute the standards set forth in the cases interpreting these constitutional rights. Resp. Br. at 25.

Resp. Br. at 20. However, it was the State, and not Ms. Lakilado, who first raised the issue of alcohol consumption. 1/27/09RP 11-12 (prosecutor questioning *first* witness regarding whether there were drinks at the party, what alcohol the witness and her friends brought with them, how much of it they consumed, when it was consumed, and whether intoxication resulted). Furthermore, even if the most significant issue actually was whether Ms. Lakilado was angry and thus had motive to assault Ms. Williams, the jury's belief as to motive likely would have been swayed by the presence or absence of alcohol. That is, it would be reasonable for a jury to assume alcohol consumption amplified the defendant's emotions. Thus, even if the jury would have otherwise not believed Ms. Lakilado capable of intentionally assaulting Ms. Williams, its position might reasonably have been altered if it believed her to have consumed more than a trivial amount of alcohol. Moreover, a jury that heard Ms. Lakilado drank significant amounts of alcohol might look less favorably upon her.⁷

⁷ The State's argument suffers from a further lack of logic. Relying on the trial court's reasoning below, the State asserts that one interpretational error claimed by Lakilado was not an error at all because, in interpreting Ms. Auko's testimony, the courtroom interpreter probably used context from Ms. Lakilado's testimony to make "the correct judgment." Resp. Br. at 27-28 (quoting trial court's oral ruling). But Ms. Auko testified *before* Ms. Lakilado. Compare 1/29/09RP 2 (index listing examination of Karamello Auko) with 2/2/09RP 2 (index listing examination of Mary Lakilado). Thus the interpreter could not have

The State's argument that motive was the key issue in the case, moreover, actually *supports* the conclusion that Ms. Lakilado's constitutional rights to confront witnesses and to a fair trial were violated. Because of the incompetent interpretation, defense counsel (and the jury) never heard Mr. Keny's testimony that at the time Ms. Williams was "assaulted," the dance floor was full of partygoers with their glasses and bottles raised above their heads in accompaniment to the reggae music Mr. Keny was playing. CP 200, 230-32.⁸ Whoever hit Ms. Williams with a bottle did not intend to; rather the dance floor was crowded with people who had their hands and glass receptacles raised in the air. An accidental collision between Ms. Williams and someone's drink ensued.

But the jury never heard this theory (or the testimony supporting it) because incompetent translation prevented defense counsel from learning of it.⁹ In fact, all the jury heard was the

used Ms. Lakilado's testimony as a basis for deciphering Ms. Auko's testimony. The trial court's conclusion, upon which the State relies, is manifestly unreasonable in light of the record.

⁸ This also explains why Mr. Keny called the events that transpired an "accident." CP 193 (first full row).

⁹ The State asserts that defense counsel "did not need to rely on trial testimony to learn what [Mr.] Keny claimed he saw" because she and the prosecutor had interviewed Mr. Keny before trial. Resp. Br. at 34. But the State

prosecutor's argument that "[T]here's no one who's testified that this was in any way accidental." 2/3/09RP 10. Of course, that is exactly what Mr. Keny said, but it was not interpreted at trial. If motive was the issue, interpretive error prevented the defense from presenting key evidence supporting absence of motive.

Significantly, the State does not dispute that interpretive errors affected Mr. Keny and Ms. Auko's credibility. See Op. Br. at 34-36. These witnesses were Ms. Lakilado's only fact witnesses. Their credibility was central to Ms. Lakilado's defense—the State's case came down to a credibility contest between the State and defense witnesses. Even absent the other errors, these blights on the credibility of two key witnesses prejudiced Ms. Lakilado.

The State cannot show beyond a reasonable doubt that any reasonable jury would have reached the same verdict absent the persistent interpretation errors. In the aggregate, even if not standing alone, these errors demonstrate incompetent interpretation that denied Ms. Lakilado her constitutional right to

does not establish that this information was covered during either interview. Witness testimony at trial does not always mirror what was said at pre-trial investigatory interviews. Furthermore, the State's assertion that the "defense was mistaken identity" is inapposite because (1) that defense might have changed had defense counsel learned of Mr. Keny's actual testimony and (2) mistaken identity comports with the notion that *someone else* accidentally hit Ms. Williams with a glass. See Resp. Br. at 34.

confront witnesses and to a fair trial at which she was present.

3. TRIAL COUNSEL'S FAILURE TO OBJECT TO THE INTERPRETIVE ERRORS CONSTITUTED INEFFECTIVE ASSISTANCE WHERE MS. LAKILADO INFORMED COUNSEL OF THE INCOMPETENCY AND MISCOMMUNICATIONS WERE APPARENT AT THE TIME OF TRIAL.

Contrary to the State's argument, Ms. Lakilado's trial counsel did have sufficient information to be concerned about the quality of the interpretations and object thereto at trial. First, trial counsel was informed by Ms. Lakilado that she believed the interpreter and the witnesses were not communicating in harmony. CP 285-86 (Lakilado Decl.); 2/2/09RP 25. Second, as set forth above and in the Opening Brief, the testimony on the record establishes that there were likely errors in interpretation and at least some misunderstandings between the interpreter and the key defense witnesses. Section B.2, supra; see also e.g., CP 189, 228, 230, 276 (setting forth interpretations that demonstrate confusion even as interpreted in court). Moreover, trial counsel failed to insist upon compliance with RCW 2.43.030.

Despite this evidence of at least potential erroneous interpretation, trial counsel was ineffective when she failed to object to use of the interpreter or make any additional inquiry. Strickland

v. Washington, 466 U.S. 668, 684-85, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) (counsel ineffective when performance falls below objective standards of reasonable representation and prejudice results); State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987) (same). Either because her client informed her or because the record at trial demonstrated at least miscommunication, and certainly for both reasons in the aggregate, trial counsel should have at least inquired further into the issue during the trial. See Strickland, 466 U.S. at 684-85. If counsel had investigated, the error likely would have been rectified during the course of the trial (or a new trial granted).¹⁰ See id. (prejudice demonstrated by reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different). Thus, trial counsel's performance fell below objective standards of reasonableness, and Ms. Lakilado was prejudiced as a result. See

¹⁰ In its response brief, the State argues that counsel was not ineffective because any interpretive errors were insignificant. For the reasons set forth in the prior section and in the Opening Brief, the errors actually were significant. Moreover, trial counsel could not have known without further inquiry the full extent of the interpretive errors, and thus could not have made her own determination of their significance absent further investigation. Based on the information before counsel, however, there was sufficient basis to at least conduct additional inquiry on the record. Such inquiry would have revealed the depth of the problem. Accordingly, failing to examine the issue was unreasonable.

also Op. Br. at 41-43 (arguing counsel's performance caused prejudice).

4. LIKE IN *BASHAW* AND *RYAN*, THE SPECIAL VERDICT MUST BE REVERSED BECAUSE IT WAS BASED ON A FATALLY FLAWED UNANIMITY INSTRUCTION.

The State fails to present any basis for denying Ms. Lakilado the alternative relief requested in her opening brief: the special verdict finding must be vacated because the jury was not properly instructed that a negative finding need not be unanimous.

As Ms. Lakilado previously set forth, the jury need not be unanimous to find the State *has not* sufficiently proven the aggravating factor. *State v. Bashaw*, 169 Wn.2d 133, 234 P.3d 195 (2010); *State v. Goldberg*, 149 Wn.2d 888, 72 P.3d 1083 (2003). *Bashaw* plainly holds that an instruction requiring unanimity for a negative answer constitutes error that requires reversal of the special finding. *Bashaw*, 169 Wn.2d at 147. In *State v. Ryan*, 160 Wn. App. 944, ___ P.3d ___, 2011 WL 1239796, *1-2 (April 4, 2011), this Division applied the Supreme Court's *Bashaw* holding and held that the error is of constitutional magnitude that is not harmless.

Here, the court's instructions stated, "Because this is a criminal case, all twelve of you must agree in order to answer the

special verdict form.” CP 32 (Instruction 12).¹¹ Under Goldberg, Bashaw, and Ryan, there can be no question that the instruction in this case was erroneous and the aggravator finding must be reversed.

The State recognizes this Court’s decision in Ryan. Resp. Br. at 46. Because it cannot prevail otherwise, the State posits that Division Three’s decision in State v. Nunez, 160 Wn. App. 150, 248 P.3d 103 (2011) provides the better rule. However, this Division explicitly considered and rejected Nunez when it decided Ryan. 2011 WL 1239796 at *2. Though the Nunez court found Bashaw was not based on constitutional grounds, the Ryan court points out that the Supreme Court opinion “strongly suggests” it is “grounded in due process,” recites the passages that support its reasoning, and finds persuasive that the Bashaw opinion uses the constitutional harmless error analysis. The State provides no basis other than Nunez, which was already considered by this Division

¹¹ Though the court eventually removed the word “unanimously” from the final sentence of the instruction, the jury was still instructed in that sentence, “If you have a reasonable doubt as to this question, you must answer ‘no’.” CP 32; 2/3/09RP 5-6, 58. Coupled with the prior sentence that “all twelve of you must agree in order to *answer* the special verdict,” the jury would have reasonably interpreted Instruction 30 to require them to be unanimous to *answer* the special verdict “yes” or “no.” CP 32. Thus removal of the word “unanimously” did not resolve the taint. At best, the instruction as a whole was ambiguous. See, e.g., State v. Allery, 101 Wn.2d 591, 595, 682 P.2d 312 (1984) (jury instructions must be “manifestly apparent to the average juror” (internal quotation marks and citation omitted)).

when it decided Ryan. Accordingly, the State's argument that Ms. Lakilado cannot demonstrate manifest constitutional error is foreclosed by Ryan and Bashaw.

Similarly, the State argues that Ms. Lakilado must demonstrate prejudice. Resp. Br. at 47. But Ryan plainly holds that the unanimity error "is not harmless." 2011 WL 1239796 at *2. The holding is well grounded in Bashaw. 169 Wn.2d at 147-48 (fundamental, structural nature of the incorrect explanation about the deliberative process denies defendant a fair trial).¹²

The State's argument that Ms. Lakilado invited any error is also wrong. Resp. Br. at 43-45. The invited error doctrine does not apply to the situation at bar. The instruction was proposed by the State. CP ___ (Sub # 96, p.3 (State's amended proposed jury instructions)).¹³ The trial court decided to change the last sentence of the instruction and both the prosecutor and defense counsel

¹² Even if Ms. Lakilado is required to show prejudice, reversal is warranted. The jury's two notes demonstrate that its deliberations were not one-sided. CP 36, 38. The prosecutor, moreover, acknowledged that a question existed as to whether the glass fragments introduced into evidence were what caused Ms. Williams' injury. 2/3/09RP 52. Additionally, though the jury was polled at the request of the prosecutor, the polling only inquired into the personal and jury verdict. 2/4/09RP 3-6. No poll of the special verdict finding was conducted. See generally id.; 2/4/09RP 2 (presiding juror reporting special verdict answer as "yes"). Finally, as demonstrated in Goldberg, a jury is likely to return different results when given different instructions on unanimity. See Bashaw, 169 Wn.2d at 147-48 (discussing Goldberg, 149 Wn.2d at 891-93).

¹³ A supplemental designation of clerk's papers has been filed in the Superior Court.

agreed with that change. 2/3/09RP 5-6, 58. However, there was no discussion on the record of any other part of the State-proposed instruction. Accordingly, defense counsel simply failed to raise any objection, but did not invite an error. As Bashaw and Ryan plainly hold, the failure to object to a flawed unanimity instruction does not prevent the defendant from raising the issue on appeal. Bashaw, 169 Wn.2d at 139 (objection only made on appeal); Ryan, 2011 WL 1239796, at *2. The State concedes the same. Resp. Br. at 43 (“A defendant who is merely silent in the face of manifest constitutional error does not fall within the invited error doctrine.”). Thus, this argument also fails.

Because Instruction 12 did not make manifestly clear to the jury that unanimity was not required to return a finding of “no”, this case is indistinguishable from Bashaw and Ryan. The special verdict must be reversed.

C. CONCLUSION

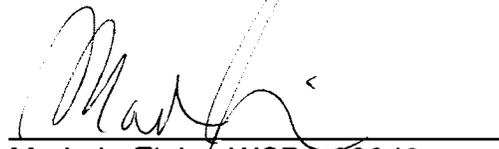
For the reasons set forth here and in the Opening Brief, Ms. Lakilado’s conviction should be reversed. First, flawed jury instructions relieved the State of proving an element of the crime of assault in the second degree. Second, Ms. Lakilado’s the use of an interpreter not competent in the dialect of two key defense violated

Ms. Lakilado's constitutional rights. Finally, defense counsel's failure to object to these interpretive errors constituted ineffective assistance of counsel.

Alternatively, the deadly weapon enhancement should be stricken because the jury was improperly instructed as to unanimity.

DATED this 27th day of June, 2011.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Marla L. Zink', is written over a horizontal line.

Marla L. Zink – WSBA 39042
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Attorney for Appellant

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 65575-2-I
v.)	
)	
MARY LAKILADO,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 27TH DAY OF JUNE, 2011, I CAUSED THE ORIGINAL **REPLY 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"/> MARY LAKILADO 1531 13 TH AVE S SEATTLE, WA 98144	(X) () ()	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 27TH DAY OF JUNE, 2011.

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