

65847-6

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NO. 65847-6-I

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

STATE OF WASHINGTON,

Respondent,

v.

TERR MACMILLAN

Appellant.

2011 MAY -3 PM 4:05
FILED
CLERK OF COURT

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

The Honorable John Meyer, Judge

REPLY BRIEF OF APPELLANT

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A. ISSUES IN REPLY

1. Does this Court's recent opinion in State v. Ryan¹ require vacation of appellant's deadly weapon sentence enhancement under State v. Bashaw²?

2. Should the illegal alcohol-related community conditions be vacated?

B. ARGUMENT IN REPLY

1. THIS COURT'S OPINION IN *STATE V. RYAN* REQUIRES VACATION OF THE DEADLY WEAPON SENTENCE ENHANCEMENT.

In its response brief, the State appears to argue that instructional error as to the deadly weapon enhancement was harmless beyond a reasonable doubt and, in any case, vacation is not the appropriate remedy.

This Court recently rejected both arguments in State v. Ryan, ___ Wn. App. ___, __ P.3d ___, 2011 WL 1239796 (April 4, 2011). This Court found the facts there to be as follows: Ryan, who had been drinking, was talking with his girlfriend as he toyed with a knife. When the girlfriend said she wished to end their relationship, Ryan pointed the knife to within a few inches of her face and threatened to cut and to kill her. Ryan, however,

¹ State v. Ryan, ___ Wn. App. ___, __ P.3d ___, 2011 WL 1239796 (April 4, 2011).

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

accidentally cut his leg and left the house. The girlfriend called the police, who arrived shortly thereafter. Officers found Ryan laying under a tarp in a nearby vacant lot with a cut on his leg. Ryan denied he was involved in the incident and said he had not been to the house in three days. Officers found the knife on Ryan's person. The State charged Ryan with second degree assault, based on the deadly weapon provision of the statute, as well as felony harassment. 2011 WL 1239796 at *1; Brief of Appellant, case no. 64726-1-I.

As in MacMillan's case, the State alleged as a sentencing enhancement that Ryan committed an offense while armed with a deadly weapon. As in MacMillan's case, jurors were told they had to be unanimous in rejecting these circumstances. Citing State v. Bashaw, 169 Wn.2d 133, 234 P.2d 195 (2010), however, this Court concluded that this instructional error could be raised for the first time on appeal, the error was not harmless, and that vacation was the appropriate remedy.³ Ryan, 2011 WL 1239796 at *2-3.

Here, as in Ryan, the jury reached a general verdict on second degree assault with a deadly weapon. Id. at *1; CP 75-76. But instructional error is presumed prejudicial unless it affirmatively appears to be harmless. State v.

³ This Court disagreed with Division Three's recent opinion in State v. Nunez, 160 Wn. App. 150, 248 P.3d 103 (2011).

Clausing, 147 Wn.2d 620, 628, 56 P.3d 550 (2002). To find an instructional error harmless, the reviewing court must conclude beyond a reasonable doubt that the verdict would have been the same without the error. Bashaw, 169 Wn.2d at 147 (citing State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002)). In Bashaw, as here, "[t]he error . . . was the procedure by which unanimity would be inappropriately achieved." Bashaw, 169 Wn.2d at 147. Moreover, "[t]he result of the flawed deliberative process tells [a reviewing court] little about what result the jury would have reached had it been given a correct instruction." Id. "[W]hen 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." Id. at 147-48.

Here as in Bashaw⁴ and Ryan, but for the "flawed deliberative process," jurors may not have reached unanimity on MacMillan's firearm special verdict. Bashaw, 169 Wn.2d at 147; see also Brief of Appellant at

⁴ The facts in Bashaw likewise demonstrate that, as in that case, the error here cannot be considered harmless. The Bashaw Court addressed two distinct claims each relating to three school bus route enhancement special verdicts. 169 Wn.2d 133. As to the first claim, the Bashaw court found the trial court abused its discretion in admitting testimony relating to a measuring wheel that was not shown to be reliable. Id. at 143. As to two of three counts, however, the Court considered the error harmless because there was sufficient evidence to show the drug sales well under the 1,000-foot range triggering the enhancement (100 to 150 feet). Id. at 138, 144. Despite finding the error harmless as to the first claim, the Court was compelled to reverse the enhancements as to the other two counts based on the erroneous instructions. Id. at 147-48.

11-12 (describing varying testimony regarding alleged deadly weapon). The sentencing enhancement should, therefore, be vacated. Bashaw, 169 Wn.2d at 148.

2. THE ILLEGAL COMMUNITY CUSTODY CONDITIONS SHOULD BE VACATED.

The State's brief next defends the trial court's imposition of a substance abuse evaluation. However, MacMillan did not raise that issue on appeal. He challenged only certain alcohol-related conditions. The State's brief does not address those claims. The challenged alcohol-related conditions should be vacated.

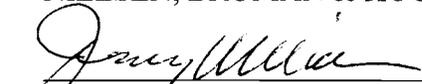
C. CONCLUSION

For the reasons set forth above and in MacMillan's opening brief, this Court should vacate the deadly weapon enhancement and remand for correction of the challenged alcohol-related community custody conditions.

DATED this ^{3rd} day of May, 2011.

Respectfully submitted,

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DIVISION ONE

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 65847-6-1
)	
TERR MacMILLAN,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 3RD DAY OF MAY 2011, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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SIGNED IN SEATTLE WASHINGTON, THIS 3RD DAY OF MAY 2011.

x *Patrick Mayovsky*

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