

NO. 66218-0-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

SAMUEL LIZARRAGA-GUTIERREZ,

Appellant.

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2011 OCT 26 PM 1:04

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE HOLLIS HILL

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

BRIDGETTE E. MARYMAN
Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 296-9650

TABLE OF CONTENTS

	Page
A. <u>ISSUES PRESENTED</u>	1
B. <u>STATEMENT OF THE CASE</u>	2
1. PROCEDURAL FACTS	2
2. SUBSTANTIVE FACTS	2
C. <u>ARGUMENT</u>	4
1. LIZARRAGA'S CHALLENGE TO HIS SENTENCING ENHANCEMENT SHOULD BE DISMISSED AS MOOT	4
2. THE COURT SHOULD REJECT LIZARRAGA'S BELATED CHALLENGE TO THE SPECIAL VERDICT INSTRUCTION.....	7
a. Relevant Facts	8
b. Lizarraga Did Not Reserve His Challenge To The Special Verdict Instruction	8
c. Any Error Caused By The Jury Instruction Was Harmless.....	14
D. <u>CONCLUSION</u>	16

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Catches v. United States, 582 F.2d 453
(8th Cir.1978) 14

United States v. Pineda-Doval, 614 F.3d 1019
(9th Cir. 2010) 14

Washington State:

In re Detention of Cross, 99 Wn.2d 373,
662 P.2d 828 (1983)..... 5

In re Personal Restraint Petition of Silas,
135 Wn. App. 564, 145 P.3d 1219 (2006) 6

Monohan v. Burdman, 84 Wn.2d 922,
530 P.2d 334 (1975)..... 5

State v. Bashaw, 169 Wn.2d 133,
234 P.3d 195 (2010)..... 1, 4, 7, 10-15

State v. Bergeron, 105 Wn.2d 1,
711 P.2d 1000 (1985)..... 10

State v. Eggleston, 164 Wn.2d 61,
187 P.3d 233, cert. denied,
___ U.S. ___, 129 S. Ct. 735,
172 L. Ed. 2d 736 (2008)..... 11

State v. Goldberg, 149 Wn.2d 888,
72 P.3d 1083 (2003)..... 10, 11

State v. Johnson, 100 Wn.2d 607,
674 P.2d 145 (1983)..... 10

State v. Kirkman, 159 Wn.2d 918,
155 P.3d 125 (2007)..... 9

<u>State v. Labanowski</u> , 117 Wn.2d 405, 816 P.2d 26 (1991).....	12, 13, 14
<u>State v. Mak</u> , 105 Wn.2d 692, 718 P.2d 407, <u>cert. denied</u> , 479 U.S. 995 (1986)	10
<u>State v. McCullum</u> , 98 Wn.2d 484, 656 P.2d 1064 (1983).....	10
<u>State v. McFarland</u> , 127 Wn.2d 322, 899 P.2d 1251 (1995).....	9
<u>State v. McHenry</u> , 88 Wn.2d 211, 558 P.2d 188 (1977).....	10
<u>State v. Morgan</u> , 2011 WL 3802782 (No. 67130-8-I, filed August 29, 2011).....	12
<u>State v. Nunez</u> , 160 Wn. App. 150, 248 P.3d 103, <u>rev. granted</u> , 172 Wn.2d 1004 (2011).....	7, 12
<u>State v. O'Hara</u> , 167 Wn.2d 91, 217 P.3d 756 (2009).....	9
<u>State v. Ryan</u> , 160 Wn. App. 944, 252 P.3d 895, <u>rev. granted</u> , 172 Wn.2d 1004 (2011).....	7, 12
<u>State v. Salas</u> , 127 Wn.2d 173, 897 P.2d 1246 (1995).....	9
<u>State v. Scott</u> , 110 Wn.2d 682, 757 P.2d 492 (1988).....	9, 10
<u>State v. Turner</u> , 98 Wn.2d 731, 658 P.2d 658 (1983).....	5

Other Jurisdictions:

State v. Davis, 266 S.W.3d 896
(Tenn. 2008)..... 14

State v. Goodwin, 278 Neb. 945,
774 N.W.2d 733 (2009) 14

State v. LeBlanc, 186 Ariz. 437,
924 P.2d 441 (1996)..... 14

Statutes

Washington State:

RCW 9.94A.533 5

RCW 9.94A.650 6

RCW 9.94A.834 2, 5

Rules and Regulations

Washington State:

CrR 6.15..... 8

RAP 2.5..... 9

Other Authorities

WPIC 160.00..... 8

A. ISSUES PRESENTED

1. An issue is moot if a court cannot provide effective relief. Courts generally will not consider a moot issue unless the issue is one of continuing and substantial public interest. Lizarraga¹ challenges his special verdict jury instruction, despite the fact that trial court did not impose an enhanced sentence. Should this Court dismiss Lizarraga's appeal as moot where this Court cannot provide effective relief and where the public interest exception does not apply?

2. An issue may not be raised for the first time on appeal unless the error involves manifest constitutional error. Relying on State v. Bashaw,² Lizarraga challenges a jury instruction for the first time on appeal and cannot show that the assigned error implicates a constitutional right. Has Lizarraga waived his challenge to the jury instruction?

¹ Although the appellant's full name is Samuel Lizarraga-Gutierrez, he insisted that the trial court refer to him as Samuel Lizarraga. 1RP 23; 5RP 32. In order to be consistent with the trial proceedings, the State refers to the appellant as Samuel Lizarraga.

² 169 Wn.2d 133, 234 P.3d 195 (2010).

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

Defendant Samuel Lizarraga was charged by information with attempting to elude a pursuing police vehicle. CP 79. The State further alleged that during the commission of the crime, one or more persons other than Lizarraga or the pursuing police officer was threatened with physical injury or harm, pursuant to RCW 9.94A.834. CP 79.

Trial occurred in September of 2010. A jury found Lizarraga guilty as charged. CP 141. The court granted Lizarraga's motion for a first-time offender waiver, imposing 240 hours of community service in lieu of any confinement. CP 175-81. The State is withdrawing its cross-appeal of Lizarraga's sentence.

2. SUBSTANTIVE FACTS.

Shortly after 2:30 a.m. on January 10, 2010, Kent Police Officer Doug Whitley was dispatched to a report of street racing in the area of 190th Street and West Valley Highway. 6RP 73.³ When

³ The verbatim report of proceedings will be referred to as follows: 1RP (8/10/2010); 2RP (8/11/2010); 3RP (8/12/2010); 4RP (9/8/2010); 5RP (9/13/2010); 6RP (9/14/2010); 7RP (Revised Transcript, 9/15/2010); 8RP (9/16/2010); 9RP (9/17/2010); 10RP (10/29/2010); and 11RP (11/5/2010).

Whitley arrived in his marked patrol car, many of the suspect cars quickly dispersed. 6RP 79. Whitley noticed that Lizarraga, who was headed eastbound, appeared to be driving faster than the rest of traffic. 6RP 80. Whitley turned on his overhead lights and followed Lizarraga. 6RP 82. As Whitley followed, Lizarraga used the lane of oncoming traffic to pass another car. 6RP 82. Lizarraga returned to the correct lane and accelerated, heading towards West Valley Highway. 6RP 85. As he was speeding away, Lizarraga briefly drove onto the curb. 6RP 85. Lizarraga then turned onto West Valley Highway, where he continued to exceed the 50-miles-per-hour speed limit. 6RP 87, 89. By this time, Whitley had both his lights and sirens activated. 6RP 94. Although Lizarraga was driving too fast for Whitley to see his license plate, Whitley could tell that the car was a silver Honda, with distinctive, after-market taillights. 6RP 90, 92. Whitley provided that description to dispatch. 6RP 94. Because of safety concerns, Whitley stopped his pursuit after Lizarraga drove through a red light at a high speed. 6RP 112, 114-15.

Just after Whitley stopped his pursuit, Tukwila Police Officer Sajay Prasad responded to the dispatch report regarding Lizarraga's car. 6RP 36. Prasad passed Lizarraga walking

northbound along West Valley Highway, and then saw Lizarraga's car, which had noticeable front-end damage, parked in the driveway of a retail parking lot. 6RP 43, 49. Prasad contacted Lizarraga and his female passenger, Maria Rangel. 6RP 50. Lizarraga told Prasad that his car had been damaged when he hit a nearby jersey barrier. 6RP 51.

Whitley arrived on the scene shortly after Prasad. 6RP 118. After being advised of his constitutional rights, Lizarraga acknowledged that he had seen Whitley's emergency lights. 6RP 125. Lizarraga claimed that at first he did not realize that Whitley was trying to pull him over. 6RP 125. Lizarraga admitted that, after he realized that Whitley was signaling him, he did not stop because he was afraid of going to jail. 6RP 125. Lizarraga also admitted to driving about 80 miles per hour. 6RP 125.

C. ARGUMENT

1. LIZARRAGA'S CHALLENGE TO HIS SENTENCING ENHANCEMENT SHOULD BE DISMISSED AS MOOT.

Lizarraga argues that his special verdict should be vacated because, contrary to Bashaw,⁴ the trial court instructed the jury that

⁴ 169 Wn.2d 133.

they had to be unanimous in order to answer "no" to the special verdict instruction. However, despite the jury's affirmative answer to the special verdict, the trial court did not impose an enhanced sentence. Because this Court cannot provide any effective relief, Lizarraga's appeal should be dismissed as moot.

"A case is moot if a court can no longer provide effective relief." In re Detention of Cross, 99 Wn.2d 373, 376-77, 662 P.2d 828 (1983) (citing State v. Turner, 98 Wn.2d 731, 733, 658 P.2d 658 (1983)). Where the subject of an appeal is a term of confinement that has already been served, the appellate court cannot provide the relief that is sought and, thus, the case is moot. Cross, 99 Wn.2d at 377 ("Since the detention which is the subject of this appeal has already ended, we cannot provide the most basic relief ... sought.").⁵

Lizarraga's standard range for attempting to elude a pursuing police vehicle was 0 to 60 days, plus an additional 12 months and 1 day for the enhancement.⁶ CP 176. The trial

⁵ An appeal may not be moot where there are collateral consequences to that sentence. Monohan v. Burdman, 84 Wn.2d 922, 925, 530 P.2d 334 (1975). No such collateral consequences exist here.

⁶ Under RCW 9.94A.533(11), an additional twelve months and one day shall be added to the standard sentence range for a conviction of attempting to elude a police vehicle if the conviction included a finding by special allegation of endangering one or more persons under RCW 9.94A.834.

court granted Lizarraga's request for a first-time offender waiver, imposing no confinement, 240 hours of community service, and 12 months of community custody.⁷

Here, Lizarraga asks this Court to vacate the special verdict. Appellant's Brief at 8. The sole purpose served by such a remedy would be to obtain a non-enhanced sentence, as there are no other consequences associated with the special verdict in this case. Because the trial court granted a first-time offender waiver, Lizarraga will never serve an enhanced sentence.⁸ This Court cannot provide effective relief. Therefore, Lizarraga's appeal is moot.

Generally courts will not consider a moot issue, unless it involves a continuing and substantial public interest. In re Personal Restraint Petition of Silas, 135 Wn. App. 564, 568, 145 P.3d 1219 (2006). To determine whether the public interest exception applies, courts consider the following factors: (1) the public or private

⁷ For qualifying defendants, a court may waive the imposition of a standard-range sentence and instead impose community custody and a term of confinement of up to 90 days. Unlike some other sentencing alternatives, such as a Drug Offender Sentencing Alternative ("DOSA"), a first-time offender waiver cannot be "revoked." See RCW 9.94A.650.

⁸ In addition to the fact that Lizarraga did not receive an enhanced sentence, undersigned counsel has confirmed that Lizarraga was released from community custody on July 12, 2011.

nature of the issue, (2) the need for a judicial decision to provide future guidance to public officers, and (3) the likelihood that the issue will recur. Id.

The public interest exception does not apply in Lizarraga's case. The special verdict instruction used in Lizarraga's case mirrors that used in Bashaw. See Bashaw, 169 Wn.2d at 139. Although the State maintains that the instruction was proper, this Court is bound by Bashaw. Therefore, the only issue before this Court is whether Lizarraga may raise the issue for the first time on appeal. The Washington Supreme Court has accepted review of State v. Ryan⁹ and State v. Nunez,¹⁰ and will presumably resolve this issue. This Court need not consider Lizarraga's moot appeal in order to provide future guidance.

2. THE COURT SHOULD REJECT LIZARRAGA'S BELATED CHALLENGE TO THE SPECIAL VERDICT INSTRUCTION.

Relying on Bashaw,¹¹ Lizarraga argues that the special verdict should be vacated because the special verdict instruction

⁹ 160 Wn. App. 944, 252 P.3d 895, rev. granted, 172 Wn.2d 1004 (2011).

¹⁰ 160 Wn. App. 150, 248 P.3d 103, rev. granted, 172 Wn.2d 1004 (2011).

¹¹ 169 Wn.2d 133.

told the jury that it must be unanimous in order to answer "no."
Lizarraga failed to object to the instruction at the time it was offered.
Because any error in the jury instruction is not a manifest error
affecting a constitutional right, Lizarraga waived this argument by
failing to preserve the objection.

a. Relevant Facts.

The court provided the jury with a special verdict form for the
endangerment enhancement. CP 140. In regards to the special
verdict forms, the court instructed the jury:

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 136. This instruction is nearly identical to WPIC 160.00.

Lizarraga did not take exception to the instruction at issue.

7RP 127-48; 8RP 2-22.

b. Lizarraga Did Not Reserve His Challenge To
The Special Verdict Instruction.

Under CrR 6.15(c), objections to proposed jury instructions
must be made before the court instructs the jury, to allow the trial

court the opportunity to correct any error. State v. Scott, 110 Wn.2d 682, 685-86, 757 P.2d 492 (1988). Before error can be claimed on the basis of a jury instruction given by the trial court, the appellant must show that a timely objection was made in the trial court. State v. Salas, 127 Wn.2d 173, 181, 897 P.2d 1246 (1995).

Similarly, under RAP 2.5(a)(3), appellate courts generally do not consider an issue raised for the first time on appeal unless it involves a "manifest error affecting a constitutional right." To raise an issue not previously preserved, an appellant must show 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). Lizarraga must first identify a constitutional error and then must show how the asserted error actually affected his rights at trial. State v. Kirkman, 159 Wn.2d 918, 926-27, 155 P.3d 125 (2007). Only after the court determines that the claim does in fact raise a manifest constitutional error should the court move on to a harmless error analysis. State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995).

Not all instructional error rises to the level of manifest constitutional error. Examples of manifest constitutional errors in jury instructions include: shifting the burden of proof to the

defendant, State v. McCullum, 98 Wn.2d 484, 487-88, 656 P.2d 1064 (1983); failing to define the “beyond a reasonable doubt” standard, State v. McHenry, 88 Wn.2d 211, 214, 558 P.2d 188 (1977); and omitting an element of the crime charged, State v. Johnson, 100 Wn.2d 607, 623, 674 P.2d 145 (1983), overruled on other grounds by State v. Bergeron, 105 Wn.2d 1, 711 P.2d 1000 (1985). On the other hand, failure to instruct on a lesser included offense, State v. Mak, 105 Wn.2d 692, 745-49, 718 P.2d 407, cert. denied, 479 U.S. 995 (1986); and failure to define individual terms, Scott, 110 Wn.2d at 688, are examples of instructional errors that do not fall within the scope of manifest constitutional error.

Lizarraga relies on Bashaw and its interpretation of State v. Goldberg, 149 Wn.2d 888, 72 P.3d 1083 (2003). Bashaw was charged with three counts of delivering a controlled substance. Bashaw, 169 Wn.2d at 137. The State further alleged that the deliveries occurred within 1000 feet of a school bus stop. Id. The trial court instructed the jury that “since this is a criminal case, all twelve of you must agree on the answer to the special verdict.” Id. at 139. The Supreme Court held that the instruction was incorrect because it told the jury that they had to be unanimous to answer “no.” Id. at 145-47. Citing Goldberg, supra, the court held that

"a unanimous jury decision is not required to find that 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.

In explaining its ruling, the Bashaw court explicitly acknowledged that the claimed error was not of constitutional magnitude: "This rule is not compelled by constitutional protections against double jeopardy, cf. State v. Eggleston, 164 Wn.2d 61, 70-71, 187 P.3d 233 (stating that double jeopardy protections do not extend to retrial of noncapital sentencing aggravators), cert. denied, ___ U.S. ___, 129 S. Ct. 735, 172 L. Ed. 2d 736 (2008), but rather by the common law precedent of this court, as articulated in Goldberg." Bashaw 169 Wn.2d at 146 n.7. Instead, the common law rule adopted in Goldberg and reaffirmed in Bashaw is based on policy considerations. Noting that the costs and burdens of a new trial are substantial, the court reasoned that, where a defendant is already subject to a penalty for the underlying offense, "the prospect of an additional penalty is strongly outweighed by the countervailing policies of judicial economy and finality." Bashaw, at 146-47.

A panel of this Court has held that a claim based upon Bashaw is not of constitutional magnitude and, thus, may not be raised for the first time on appeal. State v. Morgan, 2011 WL 3802782 (No. 67130-8-I, filed August 29, 2011). Finding that "the Supreme Court made clear in Bashaw that the right at issue is based in Washington common law," this Court concluded that neither state nor federal due process rights dictated the result in Bashaw. Morgan, at *5.¹²

Similarly, in State v. Nunez, Division Three thoroughly reviewed the possible constitutional sources for Bashaw and found none. 160 Wn. App. 150, 159-60, 248 P.3d 103, rev. granted, 172 Wn.2d 1004. As Division Three recognized, the rule applied in Bashaw is similar to that at issue in State v. Labanowski, 117 Wn.2d 405, 816 P.2d 26 (1991). Labanowski, which also addressed a jury unanimity issue, was cited in Bashaw in that portion of the opinion discussing the policy behind the rule.

¹² Another panel of this Court has held that a defendant's challenge to a jury instruction under Bashaw presents an issue of constitutional magnitude that can be raised for the first time on appeal. State v. Ryan, 160 Wn. App. 944, 252 P.3d 895, rev. granted, 172 Wn.2d 1004 (2011). As stated supra, the Washington Supreme Court recently granted review of Ryan and Nunez and will likely resolve this conflict.

Bashaw, 169 Wn.2d at 146. An examination of Labanowski leaves no doubt that the rule in Bashaw is not of constitutional dimension.

In Labanowski, the Court addressed the issue of how to instruct the jury about a lesser-included offense. 117 Wn.2d at 417. In some jurisdictions, courts gave an "acquittal first" instruction, which told the jury that it could proceed to the lesser included offense only if it unanimously acquitted on the greater offense. Id. at 418. Alternatively, other jurisdictions used an "unable to agree" instruction, which instructed the jury that it could proceed to the lesser offense if it was deadlocked on the greater offense. Id. at 419.

The Court was persuaded by the rationale underlying the "unable to agree" instruction and held that it should be given in the future. Id. at 420-23. This rationale is the same as that cited by the Court in Bashaw: that it promoted the efficient use of resources by avoiding retrials. Id. at 420. However, the Court held that the giving of the "acquittal first" instruction was not reversible error and concluded that "[t]he defendants' arguments that the 'acquittal first' instruction violates a constitutional right does not withstand

scrutiny." Id. The Court held that reversal was not warranted where an "acquittal first" instruction was given.¹³ Id. at 425.

Given the similarity in the rules and the policy interests underlying them, it is difficult to reconcile Labanowski's holding with Lizarraga's argument that Bashaw was based on a constitutional interest. This Court should hold that a challenge to a jury instruction under Bashaw does not raise an issue of constitutional magnitude that can be raised for the first time on appeal.

c. Any Error Caused By The Jury Instruction Was Harmless.

Even if this issue could be raised for the first time on appeal, any alleged error was harmless. A jury instruction is harmless if the court can conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error. Bashaw, 169 Wn.2d at 147. In Bashaw, the court held that it could not find the error harmless because of a "flawed deliberative process." Id. However,

¹³ The Court's holding in Labanowski that there was no constitutional issue right to an "unable to agree" instruction is consistent with holdings in other jurisdictions. Catches v. United States, 582 F.2d 453, 458-59 (8th Cir.1978); State v. LeBlanc, 186 Ariz. 437, 924 P.2d 441 (1996); State v. Goodwin, 278 Neb. 945, 774 N.W.2d 733, 749 (2009); State v. Davis, 266 S.W.3d 896, 901-08 (Tenn. 2008); see also United States v. Pineda-Doval, 614 F.3d 1019, 1030-31 (9th Cir. 2010) (holding that a defendant may not challenge an "acquittal first" instruction if he did not object to it at trial).

in Bashaw the distance from the school bus stop was a disputed issue, with the defense objecting to the State's measurements. Id. at 138.

Lizarraga's defense focused on whether he drove recklessly and whether he knew that a police officer was pursuing him; he never disputed that there was a passenger in his vehicle at the time of Officer Whitley's pursuit. 8RP 62-96. Before considering the special verdict, the jury unanimously found that Lizarraga drove his vehicle in a reckless manner.¹⁴ CP 129. Accordingly, while the Bashaw court speculated that the error in the instruction might have some impact on the jurors' verdict, here, the jurors resolved the contested issues before deliberating on the special verdict. Once the jurors determined that Lizarraga had driven his car in a rash or heedless manner, there could be no doubt that his passenger was endangered. Unlike in Bashaw, this Court can conclude beyond a reasonable doubt that the jury verdict would have been the same absent any error in the instructions.

¹⁴ Operating a vehicle in a reckless manner means to drive in a rash or heedless manner. CP 132.

D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm Lizarraga's sentence.

DATED this 26 day of October, 2011.

Respectfully submitted,

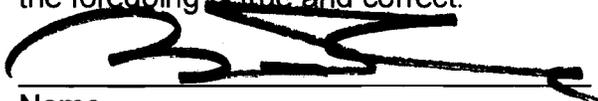
DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: Bridgette E Maryman
BRIDGETTE E MARYMAN, WSBA #38720
Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Oliver Davis, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. SAMUEL LIZARRAGA-GUTIERREZ, Cause No. 66218-0-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Name
Done in Seattle, Washington

10-26-11
Date