IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JOHN LEE BURNS, Appellant.	No. 41059-1-II
STATE OF WASHINGTON. Respondent, v. JESSUP BERNARD TILLMON, Appellant.	(consolidated with No. 41143-1-II) UNPUBLISHED OPINION

Quinn-Brintnall, J. — At a consolidated trial on April 13, 2010, a jury found John Lee Burns and Jessup Bernard Tillmon guilty of one count of first degree burglary, three counts of first degree kidnapping, and four counts of first degree robbery for their role in a December 2009 home invasion. The jury also found by special verdict that both Burns and Tillmon committed all eight offenses while armed with firearms. RCW 9.94A.533(3).

Burns and Tillmon appeal three of the four robbery convictions, arguing that an incomplete jury instruction shifted the State's burden such that insufficient evidence supports the convictions. Burns and Tillmon further contend that this court must vacate the firearm enhancements associated with all of the verdicts because the trial court misstated the law on acquittal in relation to special verdicts. Finally, Burns and Tillmon argue that they received ineffective assistance of counsel because their counsel did not object to unanimity language in the special verdict jury instructions.

Because insufficient evidence supports three of the four robbery verdicts in light of the State's proposed incomplete jury instructions given at trial, we reverse those convictions. We also hold that Burns and Tillmon may not challenge the special verdict jury instructions for the first time on appeal and their ineffective assistance claims lack merit. Accordingly, we reverse counts VI, VII, and VIII and their attendant firearm sentence enhancements but remand for resentencing on the remaining counts with their firearm enhancements, which the appellants do not challenge on appeal.

FACTS

Background

At approximately four in the morning on December 27, 2009, Tillmon and Burns forcibly entered and then burglarized the Thurston County home of Zachary Dodge, Nicholas Oatfield, and Nick and Aaron Ormrod. All four young men were home at the time of the incident as well as Dodge's girlfriend, Brittany Burgess, and two close friends, Casey Jones and Malcolm Moore, who were spending the night before going to paintball practice with the housemates early the next day. In the course of the break-in, the armed intruders forced everyone present to gather in the

dining room on their stomachs while they ransacked other parts of the home for valuables.

Although the robbers stole property from many of the rooms in the home, only Dodge was robbed prior to being forced into the dining room. One of the intruders took Dodge's laptop and the money in his wallet before escorting him and Burgess to the dining room at gunpoint. Oatfield and both Ormrods were unaware of what the intruders stole until after the suspects fled the scene: roughly $150 was stolen from Oatfield's wallet, as well as $50 from Aaron Ormrod's wallet. The television from Nick Ormrod's bedroom was also stolen.

Thurston County Deputy Sheriff Rod Ditrich arrived on the scene just as the suspects were fleeing and eventually arrested Tillmon after Tillmon called to turn himself in. Olympia Police Officer Duane Hinrichs successfully apprehended a second suspect near the scene, later identified as Burns.[1]

Procedural History

On December 29, the State charged Burns and Tillmon by information with burglary, multiple counts of kidnapping, and robbery—all while armed with firearms. On February 23, 2010, the State submitted a third amended information with the charges it eventually brought to trial. These charges were: (1) first degree burglary, (2) first degree kidnapping of Moore, (3) first degree kidnapping of Jones, (4) first degree kidnapping of Burgess, (5) first degree robbery of Dodge, (6) first degree robbery of Oatfield, (7) first degree robbery of Aaron Ormrod, and (8) first degree robbery of Nick Ormrod. RCW 9A.52.020(1); RCW 9A.40.020; RCW 9A.56.200(1). The State sought deadly weapon firearm enhancements for all eight counts. RCW

[1] Thurston County sheriffs later arrested a third suspect, Deshone Herbin. Thurston County Superior Court consolidated Burns's, Tillmon's, and Herbin's trials, but the jury was unable to reach a unanimous verdict in regards to Herbin and the trial court declared a mistrial.

9.94A.533(3).

Trial began on April 1, 2010, and closing arguments concluded on April 9. In its instructions to the jury, the court gave the following "to convict" robbery instructions for both Tillmon and Burns for all four robbery counts:

> To convict the defendant . . . of the crime of robbery in the first degree, . . . each of the following six elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about December 27, 2009, the defendant or an accomplice unlawfully took personal property *from the person of another*, [victim's name],
>
> (2) That the defendant or an accomplice intended to commit theft of the property;
>
> (3) That the taking was against the person's will by the defendant's or accomplice's use or threatened use of immediate force, violence, or fear of injury to that person or to that person's property or to the person or property of another;
>
> (4) That force or fear was used by the defendant or an accomplice to obtain or retain possession of the property;
>
> (5)(a) That in the commission of these acts or in immediate flight therefrom the defendant or an accomplice was armed with a deadly weapon; or
>
> (b) That in the commission of these acts or in the immediate flight therefrom the defendant or an accomplice displayed what appeared to be a firearm or other deadly weapon; and
>
> (6) That any of these acts occurred in the State of Washington.

Clerk's Papers (CP) (Burns) at 203-14 (emphasis added).

In explaining the special verdict firearm enhancement forms, the court gave the jury the following instruction (instruction 50):

> 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 at 217 (Burns). Burns and Tillmon did not object to this instruction.

The jury returned its verdicts on April 13, 2010, finding Burns and Tillmon guilty of all

eight counts with firearm enhancements attached to each count. On August 10, the trial

court sentenced Tillmon to 311 months confinement and Burns to 431 months confinement.[2] Burns and Tillmon timely appeal.

DISCUSSION

Robbery Instruction

Burns and Tillmon both contend that, under the "law of the case" doctrine,[3] the trial court's jury instructions for the first degree robbery charges created an additional burden on the State—the necessity to prove that Tillmon and Burns took property "from the person of another"—a burden it failed to meet. We agree. Accordingly, we reverse Burns's and Tillmon's convictions related to the robberies of Oatfield and both Ormrods.

We review jury instructions de novo, "within the context of the jury instructions as a whole." *State v. Jackman*, 156 Wn.2d 736, 743, 132 P.3d 136 (2006). Jury instructions, "taken in their entirety, must inform the jury that the State bears the burden of proving every essential element of a criminal offense beyond a reasonable doubt." *State v. Pirtle*, 127 Wn.2d 628, 656, 904 P.2d 245 (1995), *cert. denied*, 518 U.S. 1026 (1996).

"In criminal cases, the State assumes the burden of proving otherwise unnecessary elements of the offense when such added elements are included without objection in the 'to convict' instruction." *State v. Hickman*, 135 Wn.2d 97, 102, 954 P.2d 900 (1998). On appeal, "a

---

[2] Both sentences were well below the standard range—the State noted that the top end of the range would have been "67.10 years in prison" (Report of Proceedings (Aug. 10, 2010) at 6)—as the trial court only added one firearm enhancement (of eight possible) to Tillmon's sentence and three (of eight) firearm enhancements to Burns's sentence. The trial court explained the discrepancy between Tillmon's and Burns's sentences as resulting from Tillmon turning himself in and possible mental health issues resulting from Tillmon's recent war zone deployment.

[3] Under the "law of the case" doctrine, jury instructions not objected to become the law of the case. *State v. Hames*, 74 Wn.2d 721, 725, 446 P.2d 344 (1968).

defendant may assign error to elements added under the law of the case doctrine." *Hickman*, 135 Wn.2d at 102. When a defendant challenges the sufficiency of the evidence in light of an incomplete or incorrect jury instruction, we determine whether sufficient evidence exists to sustain the conviction based on the given instruction. *See, e.g., Tonkovich v. Dep't of Labor & Indus.*, 31 Wn.2d 220, 225, 195 P.2d 638 (1948) ("It is the approved rule in this state that the parties are bound by the law laid down by the court in its instructions. . . . In such case, the sufficiency of the evidence to sustain the verdict is to be determined by the application of the instructions and rules of law laid down in the charge.").

Here, the State proposed "to convict" robbery instructions based on 11 *Washington Practice: Washington Pattern Jury Instructions: Criminal* 37.02, at 667 (3d ed. 2008) (WPIC), which reads, in relevant part,

> To convict the defendant of the crime of robbery in the first degree, each of the following six elements of the crime must be proved beyond a reasonable doubt:
> (1) That on or about (date) , the defendant unlawfully took personal property from the person [or in the presence] of another.

But the State's proposed jury instructions, which the trial court gave, *omitted* the "or in the presence of another" language from WPIC 37.02. Because the trial court did not include the optional "or in the presence of another" language from WPIC 37.02 in its defendant-specific "to convict" robbery instructions,[4] the State was required to prove that either appellant (or an accomplice) took property "from the person" rather than "in the presence" of the named robbery victim. At trial, the State presented no evidence that Oatfield, Aaron Ormrod, or Nick Ormrod had property stolen from their person.

[4] These instructions were numbers 36, 39, 42, and 45 for Tillmon and 37, 40, 43, and 46 for Burns.

Because the State failed to prove the elements as stated in its proposed instruction—that each victim had property taken from his person—insufficient evidence supports the three robbery convictions related to Oatfield and the Ormrods. Accordingly, we reverse these convictions and remand with instructions that the trial court dismiss them and their attendant firearm sentence enhancements with prejudice. *Hickman*, 135 Wn.2d at 103 ("Retrial following reversal for insufficient evidence is 'unequivocally prohibited' and dismissal is the remedy.").

Special Verdict Unanimity Instruction

Burns and Tillmon next contend that the trial court committed reversible error by instructing the jury that unanimity was required to answer "no" on the special verdict firearm enhancements and that their sentence enhancements should be vacated for purposes of resentencing.[5] Burns and Tillmon failed to challenge this instruction at trial. But both contend that the Supreme Court's recent decision in *State v. Bashaw*, 169 Wn.2d 133, 234 P.3d 195 (2010), allows them to challenge the instruction for the first time on appeal. The State concedes that giving a unanimity instruction was error but contends that proper remedy is "to vacate the sentence enhancements and remand for re-impanelling of a new jury to determine the sentence enhancements." Brief of Resp't at 11.

We have held, in both *State v. Grimes*, 165 Wn. App. 172, 267 P.3d 454 (2011), and *State v. Bertrand*, 165 Wn. App. 393, 267 P.3d 511 (2011), that an appellant may not challenge a *Bashaw* error for the first time on appeal. Thus, we do not accept the State's concession or address the merits of Burns's and Tillmon's unpreserved challenges to the special verdict

[5] Because we are reversing three of the four robbery counts, those attendant firearm enhancements must also be dismissed. Accordingly, only five firearm enhancements are implicated by this assignment of error.

unanimity instructions. RAP 2.5(a).

Ineffective Assistance

Last, Burns and Tillmon both argue that in failing to object to the unanimity language in the trial court's special verdict jury instructions, they received ineffective assistance of counsel. However, as the State points out, the jury here received its instructions from the trial court on April 9, 2010—almost three months before the Supreme Court filed its *Bashaw* decision. Burns and Tillmon do not argue that *Bashaw* applies retroactively. Instead, they simply ignore the temporal discrepancy. Prior to *Bashaw*, the pattern jury instruction (11A WPIC 160.00, at 630 (3d ed. 2008)) used at Tillmon and Burns's trial was routinely given. We find no fault in defense counsel's failure to foresee that, *after* their clients' trial, the Supreme Court would take issue with the unanimity language in WPIC 160.00.

Accordingly, we reverse Tillmon's and Burns's three robbery convictions related to Oatfield and Nick and Aaron Ormrod and remand to the trial court with directions to dismiss the three convictions, and the three firearm sentence enhancements attendant to those counts, with prejudice and for resentencing on the remaining counts and enhancements.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

QUINN-BRINTNALL, J.

We concur:

ARMSTRONG, J.

PENOYAR, C.J.