No. 66732-7-I, State v. Kenneth Ozell Campbell

Appelwick, J. (dissenting) — I respectfully dissent from the majority's analysis. The instructions in this case did not constitute reversible error. But if any error did occur, I would hold that it was harmless. Therefore, I would affirm.

I. The Trial Court Did Not Err in Instructing the Jury

The majority holds that the jury instructions in this case were erroneous because they could have misled the jury into believing that it was required to be unanimous in order to answer "no" on the special verdict. Majority at 5-9. I disagree.

The standard for clarity in jury instructions is higher than that for a statute because although courts may use statutory construction, juries lack these same interpretive tools. State v. LeFaber, 128 Wn.2d 896, 902, 913 P.2d 369 (1996), overruled on other grounds by State v. O'Hara, 167 Wn.2d 91, 217 P.3d 756 (2009). Accordingly, in order to be valid, the instructions must be manifestly apparent to the average juror. Id.; State v. Irons, 101 Wn. App. 544, 550, 4 P.3d 174 (2000).

Instructions 26 and 27 discussed the general verdict. Instruction number 26 informed the jurors of their "duty to discuss the case with one another and to deliberate in an effort to reach a unanimous verdict." Instruction 27 required that "each of you must agree for you to return a verdict." Instruction 28 discussed the special verdict. It stated:

> You will also be furnished with special verdict forms. If you find the defendant not guilty do not use the special verdict forms. If you find the defendant guilty, you will then use the special verdict

> forms and fill in the blank with the answer "yes" or "no" according to the decision you reach. 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 have a reasonable doubt as to the question you must answer "no."

The majority states without citation that the jury should have been affirmatively instructed that it need not be unanimous to answer "no" to the special verdict. Majority at 6. The majority holds that the instructions as a whole implied to the jury that it was required to be unanimous in order to answer in the negative on the special verdict. Majority at 6-7. I disagree.

First, instruction 28 correctly stated the law. The instruction is identical to that given in State v. Goldberg, 149 Wn. 2d 888, 893, 72 P.3d 1083 (2003). It requires unanimity to answer "yes." By contrast, it does not state a requirement to be unanimous to answer "no." Id. at 893-94. Goldberg did not find this instruction erroneous. Id. Nor did State v. Bashaw, 169 Wn.2d 133, 147, 234 P.3d 195 (2010). No case has.

Second, the instruction clearly indicated to the jury that it applied to the special verdict only: it stated the phrase "special verdict" no less than four times. It never used the word "verdict" alone. If the special verdict was required to be answered unanimously in the negative, instructions 26 and 27 would be sufficient to so instruct the jury as to both general and special verdicts. The portion of instruction 28 relating to unanimity would have been redundant. The inclusion of the distinct language in instruction 28 would cause an average juror reasonably to infer that the rules relating to the special verdict were different.

Third, the fact that the jury asked the question demonstrates that they

perceived the difference. The court's response did not disabuse the jury of the distinction it questioned.

Read as a whole, the jury instructions imply that to answer "no" to the special verdict the jury need not be unanimous. This would have been manifestly apparent to an average juror. It was manifest to the jury in Goldberg when the jury answered "no," and it was manifest to this jury when it answered "no." This instruction was not erroneous. And, since there was not error in the instruction, it was not error for the trial court not to further instruct the jury in response to the question.

II. Any Error in the Jury Instructions was Harmless

The majority may be correct that an express statement is preferable that unanimity is not required to answer "no" to the special verdict. But, even if the majority is correct that the instruction is erroneous for failure to make that express statement, I would affirm on the ground that the error was harmless.

In order to hold that a jury instruction error was harmless, "we must 'conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error.'" 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)). The State bears the burden of proving beyond a reasonable doubt that the error was harmless. State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985).

The majority relies on State v. Recuenco, 154 Wn.2d 156, 110 P.3d 188 (2005), rev'd and remanded by Washington v. Recuenco, 548 U.S. 212, 126 S.

Ct. 2546, 165 L. Ed. 2d 466 (2006), aff'd, 163 Wn.2d 428, 180 P.3d 1276 (2008), State v. Williams-Walker, 167 Wn.2d 889, 225 P.3d 913 (2010), and Bashaw, 169 Wn.2d 133, to hold that this court cannot apply a harmless error analysis to the type of error alleged. Majority at 10-12. Those cases are distinguishable and not binding on the facts of this case.

In Recuenco, the sentencing court imposed a firearm enhancement despite the fact that the State had only charged, and the jury had only been instructed, as to the lesser deadly weapon enhancement. 163 Wn.2d at 432. The firearm was a deadly weapon and the only weapon in evidence. Id. at 431. Nonetheless, our Supreme Court held that the trial court did not have the authority to impose a firearm enhancement where the State had failed to allege that enhancement, and that the lack of notice to the defendant on the firearm enhancement was not subject to a harmless error analysis. Id. at 434, 439, 442. Because the trial court exceeded its authority in imposing a sentence that was neither charged nor authorized by the jury, the trial court erred. Id. at 442.

But, this is not a remarkable proposition. The law is crystal clear after Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), and Blakely v. Washington, 542 U.S. 296, 301, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), that the jury must make findings of fact, not a judge. The rule from Recuenco is simply that a trial court may not attribute to the jury the answer to a question that it was never asked.

Williams-Walker is similarly distinguishable. In that case, several defendants were charged and convicted of crimes for which the possession or

use of a firearm was included as an element of the underlying offenses. 167 Wn.2d at 898-99. The jury returned special verdicts finding use of a deadly weapon. Id. at 898. The sentencing court imposed firearm enhancements instead. Id. at 893-94, 898-99. Our Supreme Court held that because the trial court exceeded its authority by imposing an enhancement not based on a jury finding, the trial court erred. Id. at 899-900. The court then held that the harmless error doctrine does not apply where the trial court acts without the authority of the jury's factual findings. Id. at 900-01.

The result in Williams-Walker is the same as in Recuenco. Those cases merely stand for the proposition that a sentencing court does not have the authority to impose a sentence for an enhancement that was not charged by the State and found by a jury. Findings of fact in a jury trial are the province of the jury only. Any error on these grounds is not subject to a harmless error analysis. Again, this is not a remarkable proposition. This is settled law.

Reliance on Recuenco and Williams-Walker here is simply misplaced. The question in those cases was whether the court had the authority to enter its verdict, without a jury finding. That is not at issue here. The trial court did not impose a firearm enhancement without authority to do so. Therefore, those cases do not preclude the application of the constitutional harmless error standard here.

Bashaw involved a jury instruction that affirmatively stated the need for a unanimous special verdict, either "yes" or "no." 169 Wn.2d at 139. The unanimity requirement for a "no" verdict was contrary to Goldberg. Id. at 147.

Because juries are presumed to follow the instructions, the court had to conclude that the deliberative process was necessarily flawed. The same flaw is not present here. The jury instruction did not affirmatively misstate a unanimity requirement for a "no" on the special verdict. At most, it allowed a possibility for the jury to misinterpret the jury instruction to infer that unanimity requirement. But, the facts do not support a reasonable doubt that they did so.

We have only three facts to look to: instruction 28 itself, the jury's question about that instruction, and the trial court's response. As noted above, instruction 28 was distinct in its language from the unanimity requirement of the general verdict instructions. It expressly required unanimity for "yes" and did not expressly require unanimity for "no." It told the jury if it had a reasonable doubt it should return a "no" verdict. Unlike Bashaw, it did not prescribe an erroneous deliberative process.

The jury asked the trial court during deliberations:

> In regards to the special verdict forms if we are not in unanimous agreement can we render the answer "no" or must we all agree unanimously "yes" or "no"?

The majority concludes that the fact that the jury asked that question indicates that the instructions were deficient. Majority at 8. The premise is that the language so confused the jury that it believed it had to be unanimous to render a "no" on the special verdict, and therefore it was coerced to rendered a unanimous "yes."

To the contrary, this question specifically confirms that the jury recognized that the language of Instruction 28, applicable only to the special

verdict, was different from instructions 26 and 27 for the general verdict. Otherwise, the jury would have merely repeated the process it had followed for the general verdict without inquiry.

The trial court did nothing to disabuse them of the distinction they observed. It merely directed them to follow the instructions already given.

The underlying crime as charged included the element of the use of a firearm. The jury returned a unanimous verdict. The jury instructions required that the jury only address the special verdict if it had previously reached a unanimous verdict on the general question of guilt. We presume a jury follows the trial court's instruction. State v. Swan, 114 Wn.2d 613, 661–62, 790 P.2d 610 (1990). Therefore, we properly conclude that the jury unanimously agreed on the general verdict of guilty before it considered the special verdict question of whether a firearm had been used in the commission of the crime. The special verdict was unanimous "yes" as was the general verdict. Neither the instruction, which the jury perceived as different from the general verdict instructions, nor the court's response suggests a flawed deliberative process. Nothing establishes a basis for reasonable doubt. The Majority's assertion that the jury might have misunderstood this instruction and reached the opposite conclusion had it been properly instructed is mere conjecture. The State has met its burden to show any error was harmless beyond a reasonable doubt.

I would affirm.