

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

**DIVISION II**

STATE OF WASHINGTON,  
Respondent,

v.

ROBERT R. KENNEDY,  
Appellant.

No. 40657-8-II

UNPUBLISHED OPINION

Armstrong, J. — A jury found Robert R. Kennedy guilty of attempted robbery in the first degree. On appeal, Kennedy challenges the jury instructions and the validity of his sentence. The State concedes the jury instruction error and we agree. Accordingly, we remand for further proceedings consistent with this opinion.

**FACTS**

A jury found Kennedy guilty of attempted robbery in the first degree with a firearm enhancement. As part of the jury instructions, the trial court required the jury to be unanimous on the special verdict form, which asked, “Was the defendant Robert R. Kennedy armed with a firearm at the time of the commission of the crime in Count II?” Clerk’s Papers at 35. The jury returned an affirmative unanimous special verdict.

The trial court sentenced Kennedy to 106.5 months of confinement and 18 months of

community custody. Kennedy appeals.

#### ANALYSIS

Kennedy argues that jury instruction number 25, which required the jury to be unanimous on the special verdict form, is inconsistent with current Washington law. The State concedes this error and we agree. Because the error was not harmless, we remand for further proceedings and do not reach Kennedy's other arguments.

We review challenged jury instructions de novo. *State v. Bennett*, 161 Wn.2d 303, 307, 165 P.3d 1241 (2007); *State v. Miller*, 156 Wn.2d 23, 27, 123 P.3d 827 (2005).

When a jury has unanimously found a defendant guilty of a substantive crime, and proceeds to making an additional finding that increases the defendant's sentence beyond the maximum penalty, the jury's answer does not need to be unanimous. *State v. Bashaw*, 169 Wn.2d 133, 145, 234 P.3d 195 (2010) (citing *State v. Goldberg*, 149 Wn.2d 888, 72 P.3d 1083 (2003)). The jury must answer unanimously "to find the *presence* of a special finding increasing the maximum penalty. . . [but unanimity] is not required to find the *absence* of such a special finding." *Bashaw*, 169 Wn.2d at 147 (citing *Goldberg*, 149 Wn.2d at 893). A trial judge does not have the authority to instruct a jury otherwise. *Goldberg*, 149 Wn.2d at 894.

The State charged Kennedy with attempted first degree robbery. The special verdict form asked the jury to decide if Kennedy's conviction should include a firearm sentencing enhancement. The jury instructions told the jury that they must unanimously find "yes" or "no." Under *Bashaw* and *Goldberg*, the court incorrectly instructed the jury to return a unanimous special verdict. Accordingly, we hold that the jury instruction was in error.

In order to find that this 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)). A jury verdict that requires unanimity when unanimity is not necessary cannot be harmless error because “[w]e cannot say with any confidence what might have occurred had the jury been properly instructed.” *Bashaw*, 169 Wn.2d at 148. Therefore, we must vacate the sentence enhancements.

We remand for further proceedings consistent with this opinion.

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 pursuant to RCW 2.06.040, it is so ordered.

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Armstrong, J.

We concur:

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Quinn-Brintnall, J.

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Worswick, A.C.J.