

No. 41322-1-II

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

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STATE OF WASHINGTON,

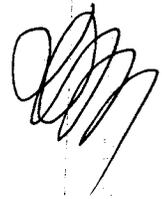
Respondent,

v.

CAMERON M. A. BEASLEY,

Appellant.

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

The Honorable Carol Murphy, Judge  
Cause No. 10-1-00809-1

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BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether the court's incorrect instruction to the jury was reversible error.

2. Whether defense counsel's failure to object to the jury instruction constituted a denial of Stacy's right to effective assistance of counsel.

B. STATEMENT OF THE CASE

The State accepts the appellant's statement of the substantive and procedural facts. Any additional facts relevant to the State's argument will be included in the argument portion of this brief.

C. ARGUMENT.

1. The court's instruction was, under the circumstances of this particular trial, a harmless error. Persons other than Beasley and pursuing law enforcement were clearly threatened with physical injury or harm by Beasley's attempt to unlawfully elude police vehicles. The special verdict should therefore be upheld and the exceptional sentence affirmed.

The superior court incorrectly instructed the jury that it had to unanimously answer the special verdict. [CP 49] The question which the jury subsequently answered in the affirmative was:

Was any person, other than Cameron Michael Anthony Beasley or a pursuing law enforcement officer, threatened with physical injury or harm by the actions of Cameron Michael Anthony Beasley during his commission of the crime of attempting to elude a police vehicle?

[Id.]

Beasely, who did not object to the court's instruction at trial, now argues that his sentence must be vacated and his case remanded for resentencing. Appellant's Opening Brief at 4. The basis for his argument is State v. Bashaw, 169 Wn.2d 133, 234 P.3d 195 (2010).

Bashaw concerned a special verdict where the jury was instructed to unanimously agree on whether the specific site of a drug transaction was within 1000 feet of a school bus stop. The State's witnesses estimated that the transaction occurred anywhere between 528 feet to 1,320 feet from a school bus stop. Id. at 139. The State succeeded on appeal by arguing that any error in the instruction was harmless because the trial court polled the jury and they affirmed the verdict. Id. at 147. But the Washington Supreme Court reversed, concluding that this unanimity had been inappropriately formed. Id. The Supreme Court went on to say that the error was reversible because "[w]e cannot say with any confidence what might have occurred had the jury been properly instructed. We therefore cannot conclude beyond a reasonable doubt that the error was harmless." Id. at 148.

By contrast, this court can conclude beyond a reasonable doubt that the error in Beasley's case was harmless because there was no alternative conclusion that a reasonable juror, acting on the evidence, could have reached. The question is not whether Beasley actually hurt anyone in his attempt to elude law enforcement, but whether anyone other than Beasley and his pursuers were "threatened" with harm or injury because of Beasley's actions. On review, courts apply the same standard for the sufficiency of the evidence of an aggravating factor as they do to the sufficiency of the evidence of the elements of a crime. State v. Yarbrough, 151 Wn.App. 66, 96, 210 P.3d 1029, 1044 (2009). If a statute is clear on its face, its meaning is to be derived from the plain language of the statute alone. Legislative definitions included in the statute are controlling, but in the absence of a statutory definition, courts give a term its plain and ordinary meaning. State v. Watson, 146 Wn.2d 947, 954-55, 51 P.3d 66 (2002).

The State's evidence, which included the testimony of pursuing Tumwater police officers along with both photographic and video recordings from the chase, demonstrated to all but an absolute certainty that multiple known and unknown "innocent" third-parties were "threatened" with harm or injury because of

Beasley's extremely dangerous and unlawful conduct. From this evidence, the following details of the chase emerged.

a. The Chase

The chase began in a long residential driveway off of Dennis Street in Tumwater, sometime after 1:00 a.m. on May 28, 2010. [Vol. 1 RP at 30-32 & 77] After refusing an order to shut off his motor, Beasley charged down the drive way, cutting between houses and backyards in an attempt to outmaneuver his pursuers. [Id. at 39-42] Successfully avoiding initial efforts to contain him, Beasley emerged from the driveway and making a right on to 65<sup>th</sup> Way, sped through the cul-de-sac in between two duplexes, where his vehicle struck some lawn furniture. [Vol. 2 RP at 130] The car then cut through a large field onto Capitol Boulevard. [Vol.1 at 45] Although the speed limit on Capitol Boulevard is 35 miles per hour, Officer Russell Mize, then the primary officer in pursuit, testified that the defendant was going "anywhere from 50 to 60." [Id. at 47]

Beasley then headed south, turning right onto Tumwater Boulevard, where he slowed but did not stop, to allow his unwilling passenger, Whitney Cox, to exit the vehicle. [Id at 46] Beasley would later say that Cox was screaming and kicking the dashboard, demanding to be let out. [Vol. 2 RP at 142] Cox screamed "you're

going to get me shot,” to which Beasley replied “they’re not going to effing shoot you. I’ve been in plenty of high-speed chases.” [Id.] Officer Mize then attempted a Pursuit Intervention Technique (PIT), which failed, and soon thereafter Beasley turned onto New Market Street. [Id. at 50]

At that point, appellant turned into the employee parking lot of a United Parcel Service (UPS) distribution center. [Id. at 51]. The chase continued through the parking lot at speeds ranging from 25 to 35 miles-per-hour, around the building towards a school, then back onto New Market Street and south towards other pursuing vehicles. [Id. at 51 & 72]

Beasley then fled south, back to Tumwater Boulevard, before turning west over the freeway as far as Littlerock Road, nearly striking several police vehicles in the process. [Id. at 52] The speed limit on Littlerock Road is 35 miles per hour. Officer Mize testified that the defendant was traveling at 90 miles per hour as he approached the Littlerock intersection. [Id. at 54] Despite slowing to speeds ranging from 40 to 60 miles per hour while on the Littlerock Road, Officer Mize testified that Beasley narrowly missed a civilian in a silver vehicle. [Id at 58-59] Officer Tyler Boling, supporting the pursuit, testified that upon reaching the intersection

of Littlerock Road and Tumwater Boulevard, the defendant's car went the wrong way through the intersection's roundabout at speeds that forced him onto the sidewalk and into a residential yard. [Id. at 90] Beasley then entered the oncoming lane of travel, and proceeded to drive through several residential yards, smashing through a fence and narrowly missing a home. [Id. at 55-56 & 91] He then continued to Israel Road, almost striking a westbound vehicle whilst negotiating roundabouts at speeds ranging from 40 to 60 miles per hour. [Id. at 57 & 93] Later, Beasley said that he thought he went somewhere between 80 to 85 miles per hour through this roundabout. [Vol. 2 RP at 141] The appellant then fled past Kingswood up to Trosper Road. [Vol. 1 RP at 57]

At the intersection of Littlerock and Trosper roads, Beasley was traveling north at between 40 to 50 miles per hour when he approached a red light. [Id. at 95] The traffic moving east and west at this intersection had the right of way. [Id. at 95] Seeing that Beasley had no intention of slowing down, Officer Boling activated his Opticom to change the traffic signal, thereby preventing a collision with east-west traffic. [Id. at 95-96] The defendant then blew through a stop sign on Second Avenue at somewhere between 40 to 50 miles per hour. [Vol. 2 RP at 104]

Faced with a blocking police unit at the intersection of Custer and Second Avenue, Beasley turned east onto Custer. [Id. at 105] He then made a right-hand turn onto Boston where he drifted onto Officer Boling's bumper. [Id.] The two vehicles, now stuck together, swerved to a stop. [Id.] Officer Boling then exited the vehicle and ordered Beasley out, but instead, Beasley threw his transmission into reverse and began driving backwards, downhill, on Boston towards Deschutes. [Id. at 105-106]

At this point, both vehicles had sustained significant damage and were difficult to steer or keep straight. [Id. at 106] Nevertheless, Beasley attempted to drive his battered vehicle backwards onto the 101 freeway. [Id.] Officer Boling was able to ram Beasley off the road and pin his vehicle against a fence, where the chase finally ended. [Id. at 106-107]

b. Threatened Victims

The State's evidence proved beyond a reasonable doubt that Whitney Cox was unwillingly exposed to the obvious risk of trying to elude police officers in a motor vehicle. The threat of injury to Ms. Cox during the escape from the driveway and subsequent neighborhoods was very real, as Beasley's chase ultimately revealed. No reasonable juror could have concluded otherwise and

therefore, even with the proper instruction, the verdict would have been unanimous.

The State also showed that the safety of a number of law abiding motorists was threatened by Beasley's crime. One in particular was the Trospen Road traveler who, had Officer Boling not activated the Opticom, might have collided with Beasley. Another was the driver Beasley narrowly missed before entering the opposing lane of traffic at the roundabout on Israel Road.

Defense counsel simply was unable to credibly raise reasonable doubts from these incidents. Instead, defense counsel dismissed the incident at Trospen Road, arguing that the State's failure to provide an accident reconstructionist, testimony concerning estimates of feet and distance, width of the intersection, or how far a car skids if the driver slams on its brakes at 40 or 50 mile per hour while travelling north, meant that any conclusions concerning a threat of injury was pure speculation. [Id. at 193] As to the video of Beasley driving the wrong way up the Israel Road roundabout and subsequently almost striking an innocent motorist, defense counsel argued that the video was purposefully misleading. [Id. at 191] Simultaneously, defense counsel cited the

video as evidence that his client was not a threat to innocent motorists, arguing:

If you look closely at that part, what you see is ... my client's car going onto the median of the roundabout. Now I proffer to you it is possible that Mr. Beasley did that to avoid that car? Is that heedless and rash if he did? Or is that actually conscientiousness and trying to avoid harm to that car [?]

[Id.]

No reasonable juror would have been swayed by either argument, and therefore no reasonable jury would have been divided on the special verdict had the proper instruction been given.

Additionally, the State showed that an unknown number of people, whose driveways or yards briefly hosted a scene in the chase, were similarly threatened by Beasley's desperate attempt at escape. There were also UPS employees who, had they not been inside at work, would certainly have been threatened by Beasley's escapade.

Defense counsel argued that the State had failed to meet its burden on these points, because it neither provided evidence that anyone was inside the many homes whose yards and sidewalks briefly hosted a scene in Beasley's car chase, nor any evidence that a UPS employee might have entered the UPS employee

parking lot at the hour when Beasley drove in at somewhere between 25 and 35 miles per hour. [Id. at 189-190]

Although a stretch, a proper jury instruction might have enabled a reasonable juror to conclude that the actual threat of harm or injury to these innocent third parties was less real than what the prosecuting attorney had argued at trial. Even so, the aforementioned incidents with Ms. Cox and with the aforementioned unidentified motorists proved beyond a reasonable doubt that innocent persons were threatened by Beasley's conduct. All that must be shown is that one innocent third party was threatened beyond a reasonable doubt, and the State produced at least three between Ms. Cox, the driver at Trospen Road and the driver at the roundabout on Israel Road.

Furthermore, it is worth noting that the issue of the improper instruction was not raised at trial and as Justice Rosellini once observed:

We have, with almost monotonous continuity, recognized ... and adhered to the proposition that, absent obvious and manifest injustice, we will not review assignments of error based upon the giving or refusal of instructions to which no timely exceptions were taken.

State v. McHenry, 88 Wn. 2d 211, 217, 558 P.2d 188, 192 (1977).

An appellant may raise an issue for the first time on appeal only if the error is both manifest and of a constitutional dimension. There is no express constitutional rationale cited in the Bashaw decision, and therefore no reason for this court to review the issue.

Beasley had his trial, and it was fair under any reasonable definition. The possibilities for differences of opinion on the crucial questions which inspired the ruling in Bashaw were not present in Beasley's case. There was no possibility, based on the evidence and the jurors' common sense and experience, that anyone would have found that innocent lives were not threatened. Beasley used his vehicle to flee across residential lawns and to plow through backyard fences. He attempted to outmaneuver his pursuers by turning his vehicle into oncoming traffic and charging through residential neighborhoods and parking lots at speeds reaching 90 miles per hour. Ignoring all stop signs, red lights, speed limits and police sirens, Beasley exposed his unwilling passenger to the very real possibility of being severely injured in a car accident, and despite her objections, never stopped to let her safely out of his crime. In a final act of reckless self-centered desperation, Beasley attempted to enter the freeway while driving his crippled car backwards.

No reasonable jury, having just returned a guilty general verdict, would then have reached a divided conclusion on the issue of the enhanced sentence.

2. Considering the facts of Beasley's case, his attorney's failure to object to the court's instruction did not constitute a denial of effective counsel such that his special verdict should be reversed and remanded. While the instruction was admittedly in error, it was harmless and did not ultimately affect the verdict.

Beasley claims that, were it not for his attorney's failure to object to the court's instruction, individual jurors with reservations on the special verdict might have prevented the enhanced sentence. Appellant's Opening Brief, at 7. He therefore claims that he was denied effective assistance of counsel.

For an appellant to prevail on a claim of ineffective assistance of counsel, it must first be shown that there was error, and that the outcome would have been different had the alleged error not occurred. State v. We, 138 Wn. App. 716, 722, 158 P.3d 1238, 1241 (2007). Here there was an instructional error, but as has already been argued, the error was harmless and could not possibly have affected the special verdict in any meaningful way.

However, once an error is identified, two prongs are considered to assess the performance of defense counsel. The

appellant must demonstrate (1) counsel's performance was deficient and (2) the deficient performance prejudiced him. State v. Thomas, 109 Wn.2d 222, 225-226, 743 P.2d 816 (1987).

Beasley therefore has the burden of first showing that his counsel at trial was deficient, meaning that his performance "fell below an objective standard of reasonableness based on consideration of all the circumstances." State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251, 1256 (1995). Beasley argues that there is no tactical or strategic reason for his counsel not to have objected to the instruction, and that his counsel was therefore deficient. Appellant's Brief at 6. While there may have been no strategic reason for defense counsel to not object to the error, the competency of counsel must be judged from the record as a whole, and not from an isolated segment. State v. Piche, 71 Wn.2d 583, 591, 430 P.2d 522, 527 (1967).

There is little evidence from the record as a whole to confirm that defense counsel was deficient. On the contrary, defense counsel proved to be a zealous advocate for his client, raising no less than nine objections during the State's direct examination of just two witnesses. [Vol. 1&2 RP at 36, 107, 128, 139, 140 & 143] Defense counsel also successfully prevented the admission of

damaging evidence on multiple occasions, [Vol. 1 RP at 25-26] During cross examination, defense counsel was able to soften some of the details of the chase to the benefit of his client, most notably those details related to the scene outside the UPS distribution center. [Vol. 1 RP at 71-72] He even had the jury polled, in what was perhaps a last effort to save his client from the special verdict. [Vol. 2 RP at 212-214]

Despite these efforts, defense counsel failed to save his client from an enhanced sentence. That fact is, however, irrelevant with regard to defense counsel's competency. See State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816, 819 (1987)(competency is not measured by the result); State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242, 1243 (1972)("effective assistance of counsel" does not mean "successful assistance of counsel").

If, however, Beasley could show that his counsel was deficient, he still has the burden of showing prejudice, meaning that "there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." McFarland, 127 Wn.2d at 335. Beasley argues that the prejudice is self-evident, quoting Bashaw in arguing that "when

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.” Appellant’s Opening Brief at 6-7.

Nevertheless, this argument ultimately fails because as has already been noted, appellant does not point to a plausible alternative outcome to his trial. If defense counsel had objected, the court would have provided the correct instruction and the outcome would ultimately have been the same. No reasonable juror, having heard the officers’ testimony and then seen the video and photographic recordings of the chase, would have voted that no person, other than Beasley or a pursuing officer, was threatened with physical injury or harm during Beasley’s commission of the crime of attempting to elude a police vehicle.

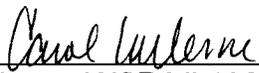
#### D. CONCLUSION.

The court’s instruction was, under the circumstances of this particular trial, a harmless error, distinguishable from that in Bashaw. The State’s evidence, which included the testimony of pursuing Tumwater police officers along with both photographic and video recordings from the chase, demonstrated to all but an absolute certainty that multiple known and unknown innocent third-parties were “threatened” with harm or injury because of Beasley’s

extremely dangerous and unlawful conduct. Had the proper instruction been given, the result would have been the same. The special verdict should therefore be upheld and the exceptional sentence affirmed.

Subsequently, considering the facts of Beasley's case and the weight of the State's evidence, his attorney's failure to object to the court's instruction did not constitute a denial of effective counsel such that his special verdict should be reversed and remanded. If defense counsel had objected, the court would have provided the correct instruction and the outcome would ultimately have been the same. Therefore, while the instruction was admittedly in error, it was harmless and did not ultimately affect the verdict.

Respectfully submitted this 28<sup>th</sup> day of June, 2011.

  
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CERTIFICATE OF SERVICE

I certify that I served a copy of the Brief of Respondent, on all parties or their counsel of record on the date below as follows:

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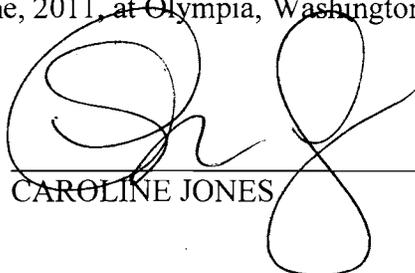


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I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 28 day of June, 2011, at Olympia, Washington.

  
CAROLINE JONES