

Similarly, Wash. Const. Art. 1 sec(s) 3, 21 and 22, guarantee Mr. Carter the right to a fair trial and due process of law. This right was violated when the State did not prove the essential elements of the crime charged. This was not due to a lack of pleading or faulty indictment; the State just did not prove the essential elements beyond a reasonable doubt. In *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970), the United States Supreme Court said that the State must prove the essential elements of the crime charged.

In the present case, the defendant was charged with attempt to elude, but the elements were not proven. In the “To Convict” instructions, it says: To convict the defendant of *Attempt to Elude a Pursuing Police Vehicle as charged in Count IV*, each of the following elements of the crime must be proved beyond a reasonable doubt;

- (1) That on or about the 25th day of March, 2010, the defendant drove a motor vehicle;
- (2) That the defendant was signaled to stop by a uniformed police officer by hand, voice, emergency light, or siren;
- (3) That the signaling police officer’s vehicle was equipped with lights and siren;

- (4) That the defendant willfully failed or refused to immediately bring the vehicle to a stop after being signaled to stop;
- (5) That while attempting to elude a pursuing police vehicle, the defendant drove his vehicle in a reckless manner; and
- (6) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

In element (2) of the “to convict” instructions, which says that the defendant was signaled to stop by a uniformed police officer by hand, voice, emergency light, or siren. Officer Martin and Officer Johnson stated that the lights were activated, but the camry was always one or two blocks ahead of them and when they turned a corner the camry was turning another block. Officer Martin further stated that when he lost sight of the vehicle, he turned off his emergency lights and started conducting an area check to where the vehicle may have turned off or gone to. (*RP Vol. Pg 28, 68*) (*Vol. VI. Pg 556*).

There is no way for the State to prove beyond a reasonable doubt that the camry saw the lights of the police vehicle with the officers stating in open court that he was always one or two blocks ahead of us, and he was turning.

In element (4) of the “to convict” instructions, which says that the defendant willfully failed or refused to immediately bring the vehicle to a stop after being signaled to stop. Officer Martin and Officer Johnson who were in the same car, stated in open court that they activated the lights on the police car, that the camry was one or two blocks ahead.

The officers further testified when they turned a corner the camry was turning and that they temporarily lost sight of the camry. Officer Martin then further stated that “not having view of the vehicle anymore, I shut down my emergency lights and siren to conduct a check of the area.” (*RP Vol. VI. Pg 556*). During this time, neither Officer Martin nor Officer Johnson, got on the radio, and called dispatch to say they were chasing an eluding vehicle. (*RP Vol. VI. Pg 598*). Officer Martin testified in open court that when he activated his lights it was less than two minutes from that time for the camry to stop. (*RP Vol. VI. Pg 632*), but they had lost sight of the camry and turned their lights on the police car and siren off and conducted an area check. If all this was done in less than two minutes

and when they found the camry, it had already stopped. With the camry stopped when they conducted an area search with the lights and sirens off, there is no way for the State to prove beyond a reasonable doubt that the defendant willfully failed or refused to immediately bring the vehicle to a stop after being signaled to stop. The officers previously stated in open court that when he turned his lights on the camry was on another block and always approximately one block ahead, so it is doubtful that the defendant saw the lights. (*RP Vol. I Pg (s) 28, 68*).

In the “to convict” instructions, element (5), that while attempting to elude a pursuing police vehicle, the defendant drove his/her vehicle in a reckless manner. According to Officer Martin, who testified in open court: “as the camry made its turn, I seen that vehicle that was westbound slow, almost come to a stop to avoid this camry, which is going westbound.”

This westbound vehicle that was already on South 35th street, traveling westbound would have had the right of way. It’s an unmarked intersection not posted with any stop sign, but it’s westbound traffic would have had the right of way to the vehicle traveling southbound or correction, northbound on Ainsworth. At that point I believe now the vehicle is operating in a definite reckless manner. (*See RP Vol. VI, Pg 552*)

Officer Johnson, who was riding with Officer Martin, on redirect, testified in open court that they attempted radio contact with dispatch but it did not work out. There was a lot of radio traffic, and I was not able to get out. (See *RP Vol. VI, Pg 683*). The State cannot make a *prima facie* showing of guilt in this case, due to the facts the officer's testified that they lost sight of the vehicle temporarily, turned the lights and siren off on the police car to conduct an area search. (See *RP Vol. VI. Pg 556*). The defendant testified in open court that he made a right turn on to 36th, drove straight up 36th all the way to the end (Alaska), stopped at a stop sign, proceeded forward and then made a right turn into the alley. (See *RP Vol. VI. Pg 875*). Being that Officer Martin and Officer Johnson lost sight of the camry temporarily, how can it be proven beyond a reasonable doubt that they were in pursuit of the defendant's vehicle, when they never called in, the defendant testified he was on another street, and only after arresting the defendant, did they have the pertinent information to put down as what happened during their pursuit. This charge cannot be based on innuendos and inconsistencies. The Officers did not follow Tacoma Police Procedures and Policies for a pursuit, which Officer Johnson testified to in open court, (See *RP Vol. VI. Pg 683*), and therefore there is no way to prove beyond a reasonable doubt that the elements in this crime

charged were proven beyond a reasonable doubt, and no prima facie case was shown or proven under the corpus delecti rule.

Generally, all of the elements of the crime must appear in the to-convict instruction because it is the yardstick the jury uses to measure the evidence and determine guilt. State v. Mills, 154 Wn.2d 1, 7, 109 P.3d 415 (2005); State v. Lorenz, 152 Wn.2d 22, 31, 93 P.3d 133 (2004). Our Supreme Court defines "'elements of crime' as '[t]he constituent part of a crime—usu[ally] consisting of the actus reus, mens rea, and causation—that the prosecution must prove to sustain a conviction.'" *Fisher*, 165 Wn.2d at 754 (alteration in original) (quoting BLACK'S LAW DICTIONARY 559 (8TH ed. 2004)). Furthermore, Washington "cases also identify the statutory elements of a crime as the essential elements." *Fisher*, 165 Wn.2d at 754.

"[A]s a general legal principle all the pertinent law need not to be incorporated in one instruction." State v. Emmanuel, 42 Wn.2d 799, 819, 259, P.2d 845 (1953). And it is well settled that jury instructions "must be read together and viewed as a whole." State v. Teal, 117 Wn. App. 831, 837, 73 P.3d 402 (2003), *aff'd*, 152 Wn.2d 333, 96 P.3d 974 (2004); *see State v. Foster*, 91 Wn.2d 466, 480, 589 P.2d 789 (1979). We also presume the jury followed the court's instructions.

State v. Grisby, 97 Wn.2d 493, 499, 647 P.2d 6 (1982). But we do not expect a jury “to search the other instructions to see if another element alleged in the information should have been added to those specified in [the to-convict] instruction.” *Emmanuel*, 42 Wn.2d at 819.

GROUND TWO

MR. CARTER’S RIGHT TO A FAIR TRIAL AND DUE PROCESS OF LAW PURSUANT TO THE SIXTH AND FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND WASH. CONST. ART. 1 § 21 AND 22 AND 1 § 3, WAS VIOLATED WHEN THE JURY WAS GIVEN AN ERRONEOUS JURY INSTRUCTION DURING TRIAL, INSTRUCTING THE JURY THAT THEY HAD TO BE UNANIMOUS TO ANSWER “NO.”

The Sixth and Fourteenth Amendments to the United States Constitution guarantee Mr. Carter the right to a fair trial and due process of law.

Similarly, Wash. Const. Art 1 § 21 and 22, and 1 § 3, guarantee Mr. Carter the right to a fair trial and due process of law. Mr. Carter contends that he was given an erroneous jury instructions during trial, instructing the jury that they had to be unanimous to answer “no” on the special verdict form.

This instruction has to do with the “Special Verdict” sentencing enhancement portion of this trial, which intimately enhanced the normal sentencing amount by 108 months in total confinement. Mr. Carter contends that this error was not harmless and that the sentence

enhancement portion of his sentence should be vacated. He relies on the recent decision that the Supreme Court ruled on in State v. Bashaw, 169 Wn.2d 133, 234 P.3d 195 (2010), a decision on jury unanimity on special verdicts. This decision was available and ruled upon at the time of trial, but the State still presented an erroneous jury instruction to the deliberating jury. This same instruction is still being used even in light of the recent decision in Bashaw, supra.

Washington requires unanimous jury verdicts in criminal cases. Const. Art. 1 § 21; State v. Stephens, 93 Wn.2d 186, 190, 607 P.2d 304 (1980). As for aggravating factors, jurors must be unanimous to find the State has proved the existence of the special verdict beyond a reasonable doubt. State v. Goldberg, 149 Wn.2d 888, 72 P.3d 1083 (2003). However jury unanimity is not required to answer “no”. Id at 893.

In Goldberg the jury was given the following special verdict instruction:

“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 have a reasonable doubt as to the question, then you must answer “no”. Id.

Although the Supreme Court vacated the special verdict for other reasons, it did not find fault with this instruction. By contrast, in the present case, the jury was instructed:

“In order to answer the interrogatories on a Special Verdict form “yes”, all twelve of you must unanimously be satisfied beyond a reasonable doubt that “yes” is the correct answer. If you do not unanimously agree that is “yes” then the presiding juror should sign the section indicating that the answer has been intentionally left blank.”

Jury instructions are reviewed de novo. State v. Haywood, 152 Wn.App. 632, 641 217 P.3d 354 (2009). Instructions must be manifestly clear because juries lack tools of statutory construction. See eg. State v. Killo, 166 Wn.2d 856, 864, 215 P.3d 177 (2009); State v. Berg, 147 Wn. App. 931, 198 P.3d 529 (2008); State v. Harris, 122 Wn. App. 547, 544, 90 P.3d 1133 (2004). In the present case, the jury instructions is very unclear and for the average juror this makes it seem that for one to answer “no”, you must be unanimous on the answer of “no.”

In Goldberg, the jury convicted the defendant on First Degree Murder, but answered “no” on the special verdict form regarding an aggravated factor. Goldberg at 891. Yet, when the trial court polled the jury, only one person indicated voting “no” on the aggravating factor, Id. at 891. The trial court concluded the jury was deadlocked and ordered the continued deliberation, after which the jury returned with a “yes” verdict. Id. at 893. On appeal, our Supreme Court held that this was error because a trial court has no authority to request a jury to continue deliberations on a special verdict, unlike when the jury is deadlocked on a general verdict.

Id. at 894. Mr. Carter argues that Goldberg stands for the proposition that unanimity is required only for a jury to answer “yes” on a special verdict form, not to answer “no”. However, in *State v. Bashaw*, 144 Wn. App. 196, 182, P.3d 451, review granted, 165 Wn.2d 1002, 198 P.3d 512 (2008), Division Three of the Appellate Court interpreted Goldberg more narrowly. It concluded that Goldberg’s holding was based on specific instruction involved and that unanimity is required to answer “no” on a special verdict form. Bashaw, 144 Wn. App. 196.

The Supreme Court of Washington State reviewed this instruction and held that it is not harmless error and that unanimity on the answer of “no” is not required. See State v. Bashaw, 196 Wn.2d 133, 234, P.3d 195 (2010). Our Supreme Court did to cite, a constitutional basis for its decision in *Bashaw*. To the contrary, both *Bashaw* and the court’s earlier decision in State v. Labanowski, 177 Wn.2d 405, 816 P.2d 26 (1991), recognized that it is common law rule, not the Constitution, that permits Washington juries to reject sentence enhancements or higher offenses less than unanimously. Labanowski, involved a choice as the procedure to be followed by juries considering lesser included or lesser degrees of charged crimes: How should a trial judge instruct a jury regarding its ability to

render a verdict on a lesser offense when it is unable, after due deliberation to agree on a verdict for a greater offense? Id at 418. The court considered two predominant forms of instruction given in other jurisdiction: the “acquittal first” instruction, by which a jury is required to reach a unanimous agreement on the charged crime before considering a lesser crime as an alternative; and the “unable to agree” instruction, by which a jury, after full and careful consideration, is allowed to quit deliberating toward unanimity on the charged crime and proceed to agreement on a lesser offense. Id at 418-20.

However, in 2011 the Division One Court of Appeals held, that the error is of Constitutional magnitude and that the Bashaw court strongly suggests its decision is “grounded in Due Process.” State v. Ryan, No. 64726-1-I (2011). The Bashaw Court identified the errors as “the procedure by which unanimity would be inappropriately achieved,” and referred to “the flawed deliberative process” resulting from the erroneous instruction. Bashaw, 169 Wn.2d at 147. The Bashaw court then concluded the error could not be deemed harmless beyond a reasonable doubt, which is the constitutional harmless error standard. The Bashaw court refused to find the error harmless, even where the jury expressed no confusion and

returned a unanimous verdict in the affirmative. Id at 147-48; See also State v. Brown, 147 Wn.2d 330, 58 P.3d 889 (2002). As Ryan, supra, the error must be treated as one of Constitutional magnitude and is not harmless.

The Washington State Supreme Court has held that the decision in Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), was one of the criminal “procedure” not of “substance”. In State v. Evans, 154 Wn.2d 438, 114 P.3d 627 (2005), the petitioners argued that the Blakely decision was substantive because it changed the notion of what factors must be treated as elements of the crime in Washington. The petitioners also argued that Blakely had elevated exceptional sentencing factors to elements of the crime. The Supreme Court rejected their argument but stated:

“We Find Petitioner’s arguments unavailing at this time. We do not of Course; reach whether sentencing factors may be elements in other contexts.” Evans, at 447.

Weapon enhancements are precisely the “context” where the concepts in Blakely and Recuenco are “substantive” rather than “procedural” and must be applied retroactively.

Unlike other sentencing enhancements, the Washington statutes have always required a jury determination of fact. Thus, this particular enhancement has always been more akin to an element of the offense than exceptional sentence factors at issue in *Evans*. Questions relating to “elements” are substantive, not procedural issues.

The error concerning Mr. Carter was the procedure which unanimity would be inappropriately achieved. The result of the flawed deliberative process tells us little about what result the jury would have reached had it been given the correct instruction. Therefore it cannot be determined beyond a reasonable doubt that the jury instruction was harmless. See *Bashaw*, *supra*. The remedy is to vacate the sentence enhancement and remand for proceedings consistent with the ruling in *State v. Bashaw*, 169 Wn.2d 133, 234 P.3d 195 (2010).

According to Washington Practice Criminal Jury Handbook (“WPIC” 2010-2011 Edition), the instruction in Mr. Carter’s trial incorrectly requires jury unanimity for the jury to answer “no” to the special verdict, contrary to *Goldberg*. Thus if the jury was deadlocked, instead of just answering “no” it would feel compelled by this instruction to continue deliberations to reach unanimity. Since this instruction mis-

states the law, it greatly prejudice Mr. Carter, and the special verdict must be stricken. See ("WPIC" 2010-2011 Edition).

CONCLUSION

For the reason stated herein, these counts should be vacated, the weapon enhancements should be vacated, and the charges dismissed with prejudice, or in the alternative an evidentiary hearing should be given on the attempt to elude with the special verdict being dismissed with prejudice.

Dated this 17th day of October, 2011

Respectfully submitted,


Joseph D. Carter

A copy of this SAG was sent to the prosecutor for the State and to my appellate counsel (Sheri L. Arnold).

Subscribed and Sworn to before me 
A Notary Public for the State of Washington
Who resides in Connell
My Commission expires: 10-10-2012

