

65744-5

65744-5

NO. 65744-5-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

DANIEL CRANE,

Appellant.

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COURT OF APPEALS
DIVISION I
CLERK OF COURT

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE DOUGLASS NORTH

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

| | Page |
|---|------|
| A. <u>ISSUE PRESENTED</u> | 1 |
| B. <u>STATEMENT OF THE CASE</u> | 1 |
| C. <u>THE COURT SHOULD REJECT CRANE'S CHALLENGE TO THE SPECIAL VERDICT INSTRUCTIONS</u> | 6 |
| 1. CRANE HAS WAIVED ANY CHALLENGE TO THE SPECIAL VERDICT INSTRUCTION | 7 |
| 2. THE SPECIAL VERDICT INSTRUCTION WAS A CORRECT STATEMENT OF THE LAW FOR THE CHARGED SPECIAL ALLEGATIONS | 9 |
| 3. THE RULE IN <u>BASHAW</u> IS CONTRARY TO LEGISLATIVE INTENT | 12 |
| D. <u>CONCLUSION</u> | 15 |

TABLE OF AUTHORITIES

Page

Table of Cases

Washington State:

Sofie v. Fiberboard Corp., 112 Wn.2d 636,
771 P.2d 711, 780 P.2d 260 (1989)..... 13

State v. Ammons, 105 Wn.2d 175,
713 P.2d 719, 718 P.2d 796 (1986)..... 14

State v. Bashaw, 169 Wn.2d 133,
234 P.3d 195 (2010)..... 6, 7, 9, 10, 11, 12

State v. Davis, 163 Wn.2d 606,
184 P.3d 639 (2008)..... 11

State v. Eggleston, 164 Wn.2d 61,
187 P.3d 233, cert. denied,
___ U.S. ___, 129 S. Ct. 735,
172 L. Ed. 2d 736 (2008)..... 8

State v. Goldberg, 149 Wn.2d 888,
72 P.3d 1083 (2003)..... 8, 9, 10

State v. Kirkman, 159 Wn.2d 918,
155 P.3d 125 (2007)..... 7

State v. Martin, 94 Wn.2d 1,
614 P.2d 164 (1980)..... 14

State v. Noyes, 69 Wn.2d 441,
418 P.2d 471 (1966)..... 13

State v. Nunez, ___ Wn. App. ___,
___ P.3d ___ (No. 28259-7-III,
decided February 15, 2011) 9

State v. O'Hara, 167 Wn.2d 91,
217 P.3d 756 (2009)..... 7

| | |
|--|----|
| <u>State v. Pillatos</u> , 159 Wn.2d 459, 150 P.3d 1130 (2007)..... | 14 |
| <u>State v. Stegall</u> , 124 Wn.2d 719, 881 P.2d 979 (1994)..... | 13 |
| <u>State v. Stephens</u> , 93 Wn.2d 186, 607 P.2d 304 (1980)..... | 13 |

Constitutional Provisions

Washington State:

| | |
|--------------------------|------------|
| Const. art. I, § 21..... | 12, 13, 14 |
| Const. art. I, § 22..... | 12 |

Statutes

Washington State:

| | |
|---------------------|--------|
| RCW 9.94A.535 | 4, 10 |
| RCW 9.94A.537 | 10, 11 |
| RCW 10.95.020..... | 10 |
| RCW 10.95.080..... | 13 |
| RCW 69.50.435..... | 10 |

Rules and Regulations

Washington State:

| | |
|--------------|---|
| RAP 2.5..... | 7 |
|--------------|---|

Other Authorities

WPIC 160.00..... 1, 5

A. ISSUE PRESENTED

The defendant did not object to the trial court giving WPIC 160.00 (governing unanimity in special verdict forms) as a jury instruction. Has the defendant shown that WPIC 160.00 is an inaccurate statement of the law, and that using it to instruct the jury was manifest constitutional error?

B. STATEMENT OF THE CASE

On February 18, 2010, at approximately one o'clock in the morning, Officer Timothy Carpenter of the Kirkland Police Department initiated a traffic stop on a poorly driven vehicle. 4RP 7-12. Upon stopping the vehicle, the officer approached from the driver's side, immediately smelling the odor of stale beer. 4RP 12. Officer Carpenter asked the driver for his license, registration, and insurance. 4RP 13.

After indicating that he didn't have a license, the driver stated, "but I do have this," reaching toward the center of the front seat of his vehicle. 4RP 13. Officer Carpenter ordered the driver to place his hands on the steering wheel, for the officer's safety. 4RP 13. Officer Jonathan Ishmael would later respond to the scene, and discover that there was a large knife lodged in the

location toward which the defendant had reached. 3RP 20-21.

Officer Ishmael would inform Officer Carpenter of this fact. 4RP 13.

Upon being asked again for identification, the defendant reached into his back pocket and removed his wallet, providing a Washington State identification card, identifying him as the defendant, Daniel Crane. 4RP 14. During the beginning of this contact, Crane appeared fixated on Officer Carpenter, which was a stark contrast to the normal reaction that civilians have to police. 4RP 14. Upon the arrival of Officer Ishmael as cover, Officer Carpenter returned to his patrol car to run a records check of Crane. 4RP 14. This check revealed that the defendant was a convicted felon and violent offender, and was the respondent in multiple no-contact orders. 4RP 15.

Throughout the DUI investigation process, while the defendant was out of the vehicle with Officer Carpenter, he was asking Carpenter personal questions, such as where he lived, if he was married, and if he had kids. 4RP 24. The defendant remained remarkably calm, and fixated on Officer Carpenter, which was unnerving to the officer. 4RP 25.

Officer Carpenter arrested the defendant for DUI and other driving offenses. 4RP 25. During the search incident to that arrest,

the defendant asked Officer Carpenter if he had ever been shot in the head. 4RP 26. When asked to clarify, the defendant stated, "I was shot in the head. You and I are not communicating; you need to respect me." 4RP 27.

When the defendant had been placed in the patrol car and Officer Carpenter had climbed into the driver's seat, the defendant asked the officer, "Have you ever been shot in the face in front of your wife and kids and had them killed too?" 4RP 28. When asked again to clarify, the defendant stated, "You can read the writing on the wall. You know God? I'll make you go see him." 4RP 28. When asked if he was making threats, the defendant calmly responded, "When I get out I'm going to come and find where you live. I'm going to kill you in front of your family, and then I'm going to kill them, too." 4RP 29. Later, during the DUI processing, the defendant would further reference the officer's family, and being shot in the head. 4RP 35.

These comments, the demeanor with which they were delivered, and the fact that the defendant was known to be a violent offender made Officer Carpenter sick to his stomach. 4RP 29. He would later find out that Crane had been convicted of both manslaughter and unlawful possession of a firearm. 4RP 30.

Officer Carpenter took numerous steps to protect himself during the DUI processing that evening. 4RP 31. While he had received threats before on the job, these threats were different, due to their specificity and detail. 4RP 38-39.

Because the threats were against his family, Officer Carpenter made the difficult decision to tell his wife. 4RP 38. During the weeks after the incident, Officer Carpenter took action to protect his family, including arming their security system more frequently, and teaching his wife how to use a shotgun. 4RP 40-41. The entire scenario upset the officer's wife to the point of weeping, and such that she sometimes had trouble sleeping. 4RP 40-42.

By way of an amended information prior to trial, the State charged Daniel Crane with two counts of harassment (threats to kill, one count for each officer), one count of driving while under the influence, one count of driving while license suspended, and one count of violation of ignition interlock. CP 9-12. For each harassment charge, the State also made special allegations that the victim was a law enforcement officer, and that the crimes had a destructive and foreseeable impact on persons other than the victim, both aggravating factors under RCW 9.94A.535. CP 9-10. Prior to trial, the defendant pled guilty to the ignition interlock and

suspended license violations, proceeding to trial on only the harassment and DUI charges. CP 13-21.

After a three-day jury trial, in which the above substantive facts were put forth, the jury was instructed on the applicable law. 4RP 111-22. As required by statute, the jury was provided with special interrogatories in regard to the alleged aggravating factors. CP 48-50. The jury was also instructed on how to use those "special verdict forms." Instruction No. 22 read, in pertinent part:

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 47; 4RP 122. This instruction is identical to WPIC 160.00. The trial court had previously asked whether the parties had any objections to the instructions; while other instructions were discussed, Crane did not object to Instruction No. 22. 4RP 110-11.

After hearing the closing arguments of counsel, the jury was released to deliberate. 4RP 156. The following morning, the jury returned its verdict, convicting the defendant of DUI and of the harassment against Officer Carpenter, while finding him not guilty of the harassment against Officer Ishmael. 5RP 2; CP 51-53. The

jury answered "yes" to all relevant special interrogatories, thus finding that aggravating circumstances existed. 5RP 2-3; CP 48-50.

At sentencing, the defendant's standard range was 22 to 29 months, and the State requested that he be given an exceptional sentence of 44 months of incarceration in the department of corrections. 6RP 6. The defendant requested that a standard range sentence be imposed. 6RP 8. The Court sentenced the defendant to the low end of the standard range (22 months), with an additional seven months for each of the two aggravating factors found by the jury, for a total of 36 months. 6RP 9. It is this exceptional sentence that is the subject of the defendant's appeal.

C. THE COURT SHOULD REJECT CRANE'S CHALLENGE TO THE SPECIAL VERDICT INSTRUCTIONS.

Citing the recent case of State v. Bashaw, 169 Wn.2d 133, 234 P.3d 195 (2010), Crane challenges the instructions for the law enforcement victim and destructive and foreseeable impact special allegations, arguing that the jury should not have been told that it had to be unanimous in order to answer "no." However, Crane did not object to this instruction below, and because the claimed error

is not of constitutional magnitude, he has waived this issue on appeal. Even if the issue is not waived, the rule in Bashaw does not apply to these two special allegations because, unlike the school bus stop enhancement at issue in that case, the relevant statute expressly requires jury unanimity for a "no" finding.

1. CRANE HAS WAIVED ANY CHALLENGE TO THE SPECIAL VERDICT INSTRUCTION.

Under RAP 2.5(a), the court may consider an issue raised for the first time on appeal when it involves a "manifest error affecting a constitutional right." RAP 2.5(a)(3). In order to raise an error for the first time on appeal under this rule, the appellant must demonstrate that (1) the error is manifest, and (2) the error is truly of constitutional dimension. State v. O'Hara, 167 Wn.2d 91, 98, 217 P.3d 756 (2009). "'Manifest' in RAP 2.5(a)(3) requires a showing of actual prejudice." State v. Kirkman, 159 Wn.2d 918, 935, 155 P.3d 125 (2007). Crane must make a plausible showing that the asserted error had practical and identifiable consequences in the trial of the case. Id.

The case cited by Crane, Bashaw, makes clear that the claimed error is not of constitutional dimension. Bashaw was

charged with three counts of delivery of a controlled substance and a school bus stop sentencing enhancement. The special verdict form for the sentencing enhancement stated: "Since this is a criminal case, all twelve of you must agree on the answer to the special verdict." 169 Wn.2d at 139. The Supreme Court held that the instruction was incorrect because it told the jury that they had to be unanimous to answer "no." Id. at 145-47. Citing State v. Goldberg, 149 Wn.2d 888, 72 P.3d 1083 (2003), the court held that "a unanimous jury decision is not required to find that the State has failed to prove the presence of a special finding increasing the defendant's maximum allowable sentence." 169 Wn.2d at 146.

In so holding, the court acknowledged that this rule was not of constitutional dimension. "This rule is not compelled by constitutional protections against double jeopardy, cf. State v. Eggleston, 164 Wn.2d 61, 70-71, 187 P.3d 233 (stating that double jeopardy protections do not extend to retrial of noncapital sentencing aggravators), cert. denied, ___ U.S. ___, 129 S. Ct. 735, 172 L. Ed. 2d 736 (2008), but rather by the common law precedent of this court, as articulated in Goldberg." 169 Wn.2d at 146 n.7. Instead, the court cited policy justifications for this common law rule:

The rule we adopted in Goldberg and reaffirm today serves several important policies.... The costs and burdens of a new trial, even if limited to the determination of a special finding, are substantial. We have also recognized a defendant's "valued right" to have the charges resolved by a particular tribunal." [Citation omitted]. Retrial of a defendant implicates core concerns of judicial economy and finality. Where, as here, a defendant is already subject to a penalty for the underlying substantive offense, the prospect of an additional penalty is strongly outweighed by the countervailing policies of judicial economy and finality.

Id. at 146-47.

Crane fails to explain how the issue raised is of constitutional magnitude, other than to simply cite to the fact that the Court in Bashaw used a harmless error analysis that would typically apply to constitutional cases. Brief of Appellant at 9. He waived his challenge to this instruction by not objecting to it in the trial court. See, e.g., State v. Nunez, ___ Wn. App. ___, ___ P.3d ___ (No. 28259-7-III, decided February 15, 2011).

2. THE SPECIAL VERDICT INSTRUCTION WAS A CORRECT STATEMENT OF THE LAW FOR THE CHARGED SPECIAL ALLEGATIONS.

Even if the issue was not waived, Crane cannot show that the special verdict instruction was erroneous with respect to the special allegations because the relevant statute requires jury

unanimity for any kind of verdict. Bashaw involved a school bus stop sentencing enhancement,¹ and the relevant statute is silent as to whether the jury must be unanimous before they may answer "no" to the special verdict. See RCW 69.50.435. In contrast, the statute governing the two special allegations charged in this case requires jury unanimity for any verdict.

The special allegation of knowingly victimizing an officer acting in accordance with official duties is an exceptional sentence aggravating circumstance. RCW 9.94A.535(3)(v). Similarly, the special allegation of foreseeable destructive impact on persons other than the victim falls under the same statute. RCW 9.94A.535(3)(r). RCW 9.94A.537(3) states in pertinent part: "The facts supporting aggravating circumstances shall be proved to a jury beyond a reasonable doubt. The jury's verdict on the aggravating factor must be unanimous, and by special interrogatory." By its plain language, RCW 9.94A.537(3) requires jury unanimity to return either a "no" or a "yes" special verdict on an aggravating factor.

¹ Goldberg, the case cited in Bashaw, also did not involve an exceptional sentence aggravating circumstance; rather, it was an aggravated first-degree murder case and involved aggravating circumstances under RCW 10.95.020. 149 Wn.2d at 894-95.

Moreover, the Supreme Court defers to the legislature's policy judgment with respect to exceptional sentence procedures, State v. Davis, 163 Wn.2d 606, 614, 184 P.3d 639 (2008), and the legislature has made it clear that the policy justification for the common law rule discussed in Bashaw does not apply to aggravating circumstances. As discussed above, the Bashaw court held that the reason that unanimity was not required for a "no" finding was because, in the court's opinion, the costs and burdens of conducting a second trial on a sentencing enhancement outweighed the interest in imposing the additional penalty on a defendant. However, with respect to aggravating circumstances, the legislature has indicated that the imposition of an appropriate exceptional sentence outweighs any concern about judicial economy or costs. When an exceptional sentence is imposed but is subsequently reversed, the legislature has expressly authorized the superior court to conduct a new jury trial on the aggravating circumstances alone. RCW 9.94A.537(2).² This policy judgment is

² In this case, if this Court were to reverse Crane's exceptional sentence based upon Bashaw, the State would be entitled to again seek an exceptional sentence at a new trial on the aggravating circumstance.

not surprising, because exceptional sentences are reserved for the worst offenders. When the jury finds an aggravating circumstance, the trial court has the discretion to impose a sentence up to the statutory maximum. In contrast, the Supreme Court characterized the school bus zone sentencing enhancement as simply "an additional penalty" imposed upon a defendant "already subject to a penalty on the underlying offense." Bashaw, 169 Wn.2d at 146-47.

Bashaw does not apply to aggravating circumstances, such as the law enforcement victim and foreseeable destructive impact special allegations, and the instruction as to the jury's use of the special verdict forms was an accurate statement of the law.

3. THE RULE IN BASHAW IS CONTRARY TO LEGISLATIVE INTENT.

While this Court is bound by Bashaw, the State respectfully submits that the holding in that case is incorrect and offers the following argument in order to preserve the issue.

The state constitutional right to jury trial in criminal matters stems from Const. art. I, § § 21 and 22. Const. art. I, § 21 which provides that "[t]he right of trial by jury shall remain inviolate"

preserves the right to a jury trial as that right existed at common law in the territory when section 21 was adopted. Sofie v. Fiberboard Corp., 112 Wn.2d 636, 645, 771 P.2d 711, 780 P.2d 260 (1989). This right, in criminal cases, included a right to a twelve person jury, and a right to a unanimous verdict. State v. Stegall, 124 Wn.2d 719, 723-24, 881 P.2d 979 (1994); State v. Stephens, 93 Wn.2d 186, 190, 607 P.2d 304 (1980).

The Washington Supreme Court has rejected the notion that a defendant can waive the unanimity requirement. In State v. Noyes, 69 Wn.2d 441, 446, 418 P.2d 471 (1966), the defendant's first trial resulted in a hung jury which stood 11 to 1 for acquittal. On appeal, the court characterized as "without merit" the notion that the defendant could waive his right to a unanimous verdict and accept the vote of 11 jurors as a valid verdict of acquittal. Id. at 446.

When enacting sentencing enhancement statutes, the legislature is presumed to be familiar with the court's rulings on jury unanimity. The legislature gave force or meaning to a non-unanimous verdict in only one sentencing statute concerning aggravated first-degree murder. See RCW 10.95.080(2). For all

other sentencing statutes, consistent with the dictates of Const. art. I, § 21, the legislature's procedure requires unanimity before a sentencing verdict can be rendered for conviction or acquittal.

The fixing of legal punishments for criminal offenses is a legislative function. State v. Ammons, 105 Wn.2d 175, 180, 713 P.2d 719, 718 P.2d 796 (1986). The judiciary may only alter the sentencing process when necessary to protect an individual from excessive fines or cruel and inhuman punishment. Id. Otherwise, the court may recommend or identify needed changes, but must then wait for the legislature to act. See, e.g., State v. Pillatos, 159 Wn.2d 459, 469-70, 150 P.3d 1130 (2007) (absent statutory authority, courts could not empanel juries to determine the existence of aggravating circumstances); State v. Martin, 94 Wn.2d 1, 7, 614 P.2d 164 (1980) (absent statutory authority, courts could not empanel juries to decide whether a defendant who pled guilty should receive the death sentence). Accordingly, it is for the legislature, not the court, to allow for acquittal based upon a non-unanimous jury.

D. CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court affirm the exceptional sentence imposed by the trial court.

DATED this 9th day of March, 2011.

Respectfully submitted,

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