

NO. 66057-8-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

CLINTON ROBINSON,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE LAURA GENE MIDDAUGH

BRIEF OF RESPONDENT

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A. ISSUES

1. Whether an aggravating circumstance that gives a trial court the *discretion* to impose an exceptional sentence above the standard range is subject to a challenge that it is unconstitutionally vague.

2. Whether the rapid recidivism aggravating factor that supports Robinson's exceptional sentence is unconstitutionally vague as applied, where he committed residential burglary a little more than two months after being released from custody on burglary in the second degree.

3. Whether State v. Bashaw¹ applies where the special verdict relates to a statutory aggravating factor.

4. Whether Robinson waived any claim under Bashaw by failing to object to the special verdict instruction in the trial court.

5. Whether the decision in Bashaw is contrary to legislative intent.

¹ 169 Wn.2d 133, 234 P.3d 195 (2010).

B. STATEMENT OF THE CASE²

Defendant Clinton Robinson was charged by information with: Count I -- Residential Burglary (8-11-09); Count II -- Residential Burglary (8-18-09); Count III -- Residential Burglary (8-23-09); Count IV -- Possessing Stolen Property in the Third Degree (8-11-09); Count V -- Making a False or Misleading Statement to a Public Servant (8-18-09). CP 1-8, 35-37, 39-42, 58-61.

The charges of burglary on August 11 and August 18 included an additional allegation under RCW 9.94A.535(3)(u), that the victim was "present in the building or residence" at the time of the burglary. CP 58-59. All three burglary charges included an allegation under RCW 9.94A.535(3)(t), that Robinson committed the current offense "shortly after being released from incarceration." CP 58-60.

At the request of the defense, the trial court severed the crimes committed on August 11th (Counts I and IV). RP³ 10-19;

² Because the substantive facts of the counts on which Robinson was found guilty are not at issue in this appeal, the State will not repeat them here.

³ The verbatim report of proceedings consists of three consecutively-numbered volumes, and will be referred to in this brief as "RP."

CP 38. The jury found Robinson not guilty on Count II (Residential Burglary on August 18, 2009), but guilty of the lesser included offense of Criminal Trespass in the Second Degree. CP 97-98. The jury found Robinson guilty on Count III (Residential Burglary on August 23, 2009) and Count V (Making a False or Misleading Statement to a Public Servant on August 18, 2009). CP 100, 102.

The "rapid recidivism" aggravating factor was put before the jury in a bifurcated proceeding. The court instructed the jury as follows:

You must fill in the blank provided in the special verdict form the word "yes" or "no," according to the decision you reach.

Because this is a criminal case, each of you must agree for you to return a verdict. When all of you have so agreed, fill in the special verdict form[s] to express your decision.

CP 115. The jury found that Robinson committed the August 23, 2009 burglary shortly after being released from incarceration.⁴

CP 105.

In a separate trial, a jury found Robinson not guilty on Count I (Residential Burglary on August 11, 2009). RP 545-47; CP 213, 230. Robinson chose to have Count IV (Possessing

⁴ Robinson was released from incarceration on his 2008 conviction for Burglary in the Second Degree on June 14, 2009. RP 324; CP 96, 288-94.

Stolen Property in the Third Degree on August 11, 2009) tried to the court, which found Robinson guilty as charged. RP 406-07; CP 236-38.

Based on his offender score of 5, Robinson's standard range for his burglary conviction was 22-29 months. RP 559; CP 370-71. Relying on the jury's finding on the aggravating factor of rapid recidivism, the State asked the trial court to impose an exceptional sentence of 100 months of confinement. RP 560-63; CP 241-49. The court instead imposed an exceptional sentence of 39 months based on the jury's finding of rapid recidivism. RP 572-74; CP 373.

C. ARGUMENT

1. ROBINSON HAS FAILED TO ESTABLISH THAT THE AGGRAVATING FACTOR OF RAPID RECIDIVISM IS UNCONSTITUTIONALLY VAGUE.

Robinson claims that the "rapid recidivism" aggravating circumstance under RCW 9.94A.535(3)(t), that he committed his current burglary "shortly after being released from incarceration," is unconstitutionally vague under the Due Process Clause. This claim fails for several reasons.

First, the Washington Supreme Court has held that aggravating circumstances are not subject to due process

vagueness challenges because they do not define conduct or allow for arbitrary arrest and criminal prosecution by the State. Second, even if a vagueness challenge could be brought here, it would fail under these circumstances. Because his vagueness challenge does not implicate the First Amendment, Robinson must demonstrate that the aggravating circumstance is unconstitutionally vague as applied to him. Robinson was on notice that the aggravating circumstance that he "committed the current offense shortly after being released from incarceration" could apply when he burglarized a home barely more than two months after being released from incarceration for a previous burglary.

a. The Aggravating Circumstance Is Not Subject To A Due Process Vagueness Challenge.

Under the Due Process Clause, a statute is void for vagueness if (1) it fails to define the offense with sufficient precision that a person of ordinary intelligence can understand it, or (2) it does not provide standards sufficiently specific to prevent arbitrary enforcement. State v. Eckblad, 152 Wn.2d 515, 518, 98 P.3d 1184 (2004). Both prongs of the vagueness doctrine focus on laws that

prohibit or require conduct. State v. Baldwin, 150 Wn.2d 448, 458, 78 P.3d 1005 (2003).

The Washington Supreme Court has held that aggravating circumstances are not subject to vagueness challenges under the Due Process Clause because they "do not define conduct nor do they allow for arbitrary arrest and criminal prosecution by the State." Baldwin, 150 Wn.2d at 459. "A citizen reading the guideline statutes will not be forced to guess at the potential consequences that might befall one who engages in prohibited conduct because the guidelines do not set penalties." Id. The court further observed that "[t]he guidelines are intended only to structure discretionary decisions affecting sentences; they do not specify that a particular sentence must be imposed. Since nothing in these guideline statutes requires a certain outcome, the statutes create no constitutionally protectable liberty interest." Id. at 461.

In his attempt to circumvent Baldwin, Robinson relies on Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed.2d 403 (2004). But the fact that a jury, rather than a judge, now makes the finding of whether an aggravating circumstance accompanied the commission of the crime does not establish that the reasoning in Baldwin is no longer valid. The aggravating circumstances in

RCW 9.94A.535 list accompanying circumstances that *may* justify a trial court's imposition of a higher sentence. A jury's finding of an aggravating circumstance does not *mandate* an exceptional sentence. State v. Williams, 159 Wn. App. 298, 314, 244 P.3d 1018 (2011) (trial court is not required to impose an exceptional sentence merely because a jury finds an aggravating circumstance proved). Thus, even when a jury finds an aggravating circumstance, the trial court has considerable discretion in deciding whether the aggravating circumstance is a substantial and compelling reason to impose an exceptional sentence. Id.; RCW 9.94A.535. Under Baldwin, the aggravating circumstance is not subject to Robinson's vagueness challenge.

b. The Aggravating Circumstance Is Not Unconstitutionally Vague As Applied.

The aggravating circumstance at issue is the jury's finding that Robinson committed his current burglary "shortly after being released from incarceration." RCW 9.94A.535(3)(t). This finding was based on Robinson's 2008 conviction for Burglary in the Second Degree, for which he was released from incarceration on June 14, 2009. RP 324; CP 96, 288-95. His current conviction for

Residential Burglary was based on a crime he committed on August 23, 2009. CP 105. Even if Robinson could challenge this aggravating circumstance for vagueness, his claim should fail under these facts.

The party challenging a statute under the "void for vagueness" doctrine bears the burden of overcoming a presumption of constitutionality, i.e., "a statute is presumed to be constitutional unless it appears unconstitutional beyond a reasonable doubt." State v. Halstien, 122 Wn.2d 109, 118, 857 P.2d 270 (1993). A statute is vague if it either fails to define the offense with sufficient precision that a person of ordinary intelligence can understand it, or it does not provide standards sufficiently specific to prevent arbitrary enforcement. Eckblad, 152 Wn.2d at 518.

A statute is not unconstitutionally vague merely because a person cannot predict with complete certainty the exact point at which his actions would be classified as prohibited conduct. State v. Watson, 160 Wn.2d 1, 7, 154 P.3d 909 (2007). The Supreme Court has recognized that some measure of vagueness is inherent in the use of language. Id.

Because Robinson's vagueness challenge does not implicate the First Amendment, he must demonstrate that the aggravating circumstance is unconstitutionally vague *as applied to him*. City of Spokane v. Douglass, 115 Wn.2d 171, 182, 795 P.2d 693 (1990). The challenged statute "is tested for unconstitutional vagueness by inspecting the actual conduct of the party who challenges the ordinance and not by examining hypothetical situations at the periphery of the ordinance's scope." Id. at 182-83.

Robinson claims that the term "shortly after" is unconstitutionally vague. But the term is not so vague that persons of ordinary intelligence must guess at its meaning or differ widely as to its application. Nor is it necessary that the amount of time encompassed by "shortly" be delineated with certainty; the length of time that qualifies as "shortly" may vary with the circumstances. State v. Combs, 156 Wn. App. 502, 506, 232 P.3d 1179 (2010).

It is readily apparent that the aggravating circumstance is not unconstitutionally vague when considered in the context of Robinson's conduct. Robinson committed residential burglary barely more than two months after being released from jail for burglary. A person of ordinary intelligence would understand that committing the same crime roughly two months after being

released from jail would place his conduct within the scope of this aggravating circumstance. Robinson's vagueness challenge must fail.

2. THIS COURT SHOULD REJECT ROBINSON'S CHALLENGE TO THE SPECIAL VERDICT INSTRUCTION.

Citing State v. Bashaw, 169 Wn.2d 133, 234 P.3d 195

(2010), Robinson challenges the instruction for the "rapid recidivism" aggravating circumstance, arguing that jurors should not have been told that they had to be unanimous to answer "no." The Court should reject this challenge.

First, the rule announced in Bashaw does not apply to this aggravating circumstance because, unlike the school bus stop enhancement at issue in Bashaw, the relevant statute here expressly requires jury unanimity for a finding of "no." And even if the Bashaw rule applied, Robinson waived his challenge to the instruction by not objecting below. Finally, the rule in Bashaw is contrary to legislative intent.

a. Bashaw Does Not Apply To The Statutory Aggravating Circumstance.⁵

The jury found that Robinson committed the August 23, 2009 residential burglary "shortly after being released from incarceration." CP 105. This aggravating factor is set out in RCW 9.94A.535(3)(t). That statute specifies that the jury should determine the necessary facts using the procedures set out in RCW 9.94A.537. Those procedures are, 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."⁶ RCW 9.94A.537(3) (italics added).

The supreme court will defer to the legislature's policy judgment with respect to the exceptional sentence procedures. State v. Davis, 163 Wn.2d 606, 614-15, 184 P.3d 639 (2008). The legislature has made it clear that the policy justification for the

⁵ The State recognizes that this Court rejected this argument in State v. Ryan, 160 Wn. App. 944, 252 P.3d 895 (2011), but nevertheless makes the argument here to preserve it for further review.

⁶ By contrast, the statute establishing the school bus stop sentencing enhancement at issue in Bashaw, RCW 69.50.435, is silent as to whether the jury must be unanimous to answer "no" to the special verdict.

common-law rule discussed in Bashaw does not apply to statutory aggravating circumstances imposed under RCW 9.94A.535.

The Bashaw court believed that the costs and burdens of conducting a second trial on a sentencing enhancement outweigh the State's interest in imposing an additional penalty on a criminal defendant. 169 Wn.2d at 146-47. But the legislature has indicated that, with respect to the statutory aggravating circumstances, imposition of an appropriate exceptional sentence is more important than any concern for judicial economy or costs. When such an exceptional sentence is reversed, the legislature has expressly authorized the superior court to conduct a new jury trial on the aggravating circumstance alone. RCW 9.94A.537(2).

This policy judgment is not surprising, because exceptional sentences are reserved for the worst offenders. While the Bashaw court characterized the school bus zone enhancement imposed in that case as simply "an additional penalty" upon a defendant "already subject to a penalty on the underlying substantive offense," 169 Wn.2d at 146-47, a trial court has the discretion to impose a sentence up to the statutory maximum when the jury has found a statutory aggravating circumstance. The common-law rule applied in Bashaw does not apply to statutory aggravating

circumstances such as the one found by the jury in Robinson's case.

b. Robinson Waived This Challenge.⁷

Robinson waived the right to challenge the special verdict instruction by failing to object at trial. To claim error on appeal, an appellant challenging a jury instruction must first show that he took exception to that instruction in the trial court. State v. Salas, 127 Wn.2d 173, 181, 897 P.2d 1246 (1995). The purpose of requiring objections or exceptions is "to afford the trial court an opportunity to know and clearly understand the nature of the objection" so that "the trial court may have the opportunity to correct any error." City of Seattle v. Rainwater, 86 Wn.2d 567, 571, 546 P.2d 450 (1976).

The objecting party must indicate the instruction objected to and the reasons for the objection. CrR 6.15(c). By failing to object to the special verdict instruction at trial, Robinson deprived the trial court of the opportunity to correct any alleged error and waived his right to challenge the instruction on appeal. Indeed, Robinson's attorney explicitly told the court that he had no objection to the

⁷ The State recognizes that this Court rejected this argument in State v. Ryan, 160 Wn. App. 944, 252 P.3d 895 (2011), but nevertheless makes the argument here to preserve it for further review.

special verdict instruction, thus leading the court to believe that the instruction was adequate. RP 186, 315.

An instructional error may nevertheless be raised for the first time on appeal if it is a "manifest error affecting a constitutional right." RAP 2.5(a)(3); State v. Scott, 110 Wn.2d 682, 686-87, 757 P.2d 492 (1988) (failure to instruct on "knowledge" was not manifest error). To obtain review, a defendant must show that the claimed error is of constitutional magnitude and that it resulted in actual prejudice. State v. O'Hara, 167 Wn.2d 91, 98-99, 217 P.3d 756 (2009). Actual prejudice requires the defendant to make a plausible showing that the alleged error had "practical and identifiable consequences in the trial of the case." Id.

Instructional errors are not automatically deemed manifest constitutional errors. Id. at 103. Division Three of the Court of Appeals recently held that a trial court's erroneous, pre-Bashaw instruction that a jury must be unanimous to acquit on a special verdict, was neither a constitutional error, nor was it manifest. State v. Nunez, 160 Wn. App. 150, 159-64, 248 P.3d 103 (2011).⁸ Like the defendant in Nunez, Robinson has failed to identify a

⁸ But see Ryan, supra.

constitutional provision that the special verdict instruction violated beyond the general provision in the state constitution protecting a criminal defendant's right to a unanimous jury verdict for purposes of conviction. See Nunez, 160 Wn. App. at 159-60.

Robinson rests his claim on Bashaw, despite its lack of constitutional underpinnings. In Bashaw, the court explicitly based its holding on common-law and policy considerations. 169 Wn.2d at 146-47, 146 n.7. The Bashaw court explicitly stated that its holding was "not compelled by constitutional protections against double jeopardy . . . but rather by the common law precedent of this court." Id. at 146 n.7. The court further noted that "several important policies" justified the common-law rule, including judicial economy and finality. Id. at 146-47. Robinson cannot rely on Bashaw to demonstrate an error of constitutional magnitude.⁹

⁹ The fact that the court in Bashaw, and the earlier decision on which it relied, State v. Goldberg, 149 Wn.2d 888, 72 P.3d 1083 (2003), considered the jury unanimity issue for the first time on appeal, does not absolve Robinson of his duty to make the required showing in this case under RAP 2.5(a)(3). Neither Bashaw nor Goldberg discussed RAP 2.5(a)(3), and it is unclear whether the issue was ever raised in those cases.

Robinson does not even attempt to show that the claimed error resulted in actual prejudice, the second element required to obtain review under RAP 2.5(a)(3). Unlike other instructions deemed to have resulted in manifest constitutional error, this instruction did not direct the verdict, shift the burden of proof, fail to require jury unanimity to convict, or omit an element of the crime charged. O'Hara, 167 Wn.2d at 103.

Under these circumstances, Robinson waived any challenge to the special verdict instruction by failing to object to it below and by failing on appeal to make an affirmative showing that the alleged error was of constitutional magnitude and resulted in actual prejudice.

c. 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 this issue.

The state constitutional right to jury trial in criminal matters stems from Const. art. I, §§ 21 and 22. Article I, section 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. Fibreboard 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), cert. denied, 386 U.S. 968 (1967), 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 article I, section 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 alter the sentencing process only 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 all of the foregoing reasons, the State respectfully asks this Court to affirm Robinson's exceptional sentence.

DATED this 22 day of July, 2011.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to **Gregory C. Link**, the attorney for the appellant, at **Washington Appellate Project**, 1511 Third Avenue, Suite 701, Seattle, WA 98101, containing a copy of the **Brief of Respondent**, in **STATE V. CLINTON ROBINSON**, Cause No. **66057-8-I**, in the Court of Appeals for the State of Washington, Division I.

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



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