

NO. 41426-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

KAMARA KAM CHOUAP,

Appellant.

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STATE OF WASHINGTON
BY 
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COURT OF APPEALS
DIVISION TWO

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

The Honorable Frederick W. Fleming

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY¹

1. DOUBLE JEOPARDY REQUIRES REVERSAL AND DISMISSAL OF CHOUAP'S SECOND CONVICTION OF ATTEMPTING TO ELUDE A PURSUING POLICE VEHICLE AS CHARGED IN COUNT II BECAUSE HIS CONDUCT OF DRIVING A VEHICLE IN A RECKLESS MANNER WHILE ATTEMPTING TO ELUDE A POLICE VEHICLE CONSTITUTES ONLY ONE UNIT OF PROSECUTION.

The State argues that when a person drives recklessly to elude a pursuing police vehicle and ceases to drive recklessly then drives recklessly again to elude another pursuing police vehicle, he commits two acts of attempting to elude a pursuing police vehicle. Brief of Respondent at 11. The States cites State v. Adel, 136 Wn.2d 629, 965 P.2d 1072 (1998) and State v. Green, 156 Wn. App. 96, 230 P.3d 654 (2010) without any analysis as to how these cases support its conclusion that Chouap committed two separate acts of attempting to elude a pursuing police vehicle. Brief of Respondent at 8-14. In any event, Adel and Green compel a contrary conclusion.

In Adel, he argued that his two convictions for possession of marijuana for having marijuana in his convenience store and in his car parked outside the store violated double jeopardy. 136 Wn.2d at 631. The

¹ Pursuant to RAP 10.3(c), appellant's reply brief is limited to responding to the State's arguments that necessitate a reply beyond what appellant has argued in the opening brief.

relevant portion of the possession statute states, “any person found guilty of possession of forty grams or less of marihuana shall be guilty of a misdemeanor.” Id. at 635. In analyzing the statute to determine the unit of prosecution, the Court determined that the statute fails to indicate whether the Legislature intended to punish a person multiple times for simple possession based upon the drug being stashed in multiple places. The Court concluded that “[t]his lack of statutory clarity favors applying the rule of lenity and finding Adel guilty on only one count of simple possession.” Id. Upon further analysis, the Court determined that a person is “equally guilty” of possession whether that person has the drug hidden in one place or several places. Id. at 636-37. The Court concluded that the unit of prosecution is possessing forty grams of marijuana or less, regardless of where or in how many places the drug is kept. Holding that Adel’s conduct constitutes only one violation of the statute, the Court reversed one of his two convictions. Id. at 637.

In Green, the State charged Green with two counts of failure to register as a sex offender during two different time periods. 156 Wn. App. at 98. The duty to register statute states in relevant part:

All offenders who are required to register pursuant to this section who have a fixed residence and who are designated as a risk level II or III must report, in person, every ninety days to the sheriff of the county where he or she is registered.

156 Wn. App. at 99-100.

This Court determined that it was unclear from the statute's plain language whether the duty to register "in person, every ninety days" establishes the unit of prosecution as each 90-day period in which an offender with a fixed residence fails to register or treats the failure as an ongoing course of conduct. Id. at 100. Upon considering various provisions of the sex offender statute, and recognizing that any ambiguity must be construed in favor of Green, this Court held that the separate charges violated double jeopardy. Id. at 100-02.

Here, Chouap was convicted of two counts of attempting to elude a pursuing police vehicle under RCW 46.61.024(1) which provides in relevant part:

Any driver of a motor vehicle who willfully fails or refuses to immediately bring his vehicle to a stop and who drives his vehicle in a reckless manner while attempting to elude a pursuing police vehicle, after being given a visual or audible signal to bring the vehicle to a stop, shall be guilty of a class C felony.

It is evident that the unit of prosecution is driving a vehicle in a reckless manner while attempting to elude a police vehicle. See Brief of Appellant at 8-9. Under the statutory analysis in Adel, Chouap was "equally guilty" of driving in a reckless manner while attempting to elude a police vehicle whether there are one or several police vehicles and

regardless of whether he intermittently ceased driving recklessly throughout the pursuit. Adel, 136 Wn.2d at 636-37. As in Green, where the failure to register was an “ongoing course of conduct,” Choup’s attempt to elude the Tacoma police and then the Lakewood police over a period of approximately 15 minutes where he never stopped driving constitutes an ongoing course of conduct. Green, 156 Wn. App. at 100-02. “The unit of prosecution for a crime may be an act or a course of conduct.” State v. Tvedt, 153 Wn.2d 705, 710, 107 P.3d 728 (2005).

Furthermore, any ambiguity in the statute must be construed in favor of Chouap. Green, 156 Wn. App. at 100-02; Adel, 136 Wn.2d at 635 (citing Bell v. United States, 349 U.S. 81, 84, 75 S. Ct. 620, 99 L. Ed. 905 (1955)). Importantly, the Court in Adel emphasized that “[t]he United States Supreme Court has been especially vigilant of overzealous prosecutors seeking multiple convictions based upon spurious distinctions between the charges.” Id. See also In re Snow, 120 U.S. 274, 282, 7 S. Ct. 556, 30 L. Ed. 658 (1887)(if prosecutors were allowed arbitrarily to divide up ongoing criminal conduct into separate time periods to support separate charges, such division could be done ad infinitum).

“Double jeopardy principles protect a defendant from being convicted more than once under the same statute if the defendant commits only one unit of the crime.” Tvedt, 153 Wn.2d at 710. Chouap’s second

conviction of attempting to elude a pursuing police vehicle must be reversed and dismissed because the facts establish that he committed only one unit of the crime.

2. THE SENTENCING ENHANCEMENT FOR ATTEMPTING TO ELUDE A PURSUING POLICE VEHICLE WHILE ENDANGERING ONE OR MORE PERSONS OTHER THAN THE DEFENDANT OR A PURSUING POLICE OFFICER MUST BE REVERSED BECAUSE THE TRIAL COURT ERRED IN INSTRUCTING THE JURY THAT IT MUST UNANIMOUSLY AGREE ON AN ANSWER TO THE SPECIAL VERDICT AND THE ERROR WAS NOT HARMLESS BEYOND A REASONABLE DOUBT.

The State argues that this Court “should decline to address defendant’s challenge to the special verdict instruction as it is not of a constitutional nature and is raised for the first time on appeal.” Brief of Respondent at 17. The State overlooks the significant fact that Bashaw did not object to the jury instruction given in her case. State v. Bashaw, 144 Wn. App. 196, 199, 182 P.3d 451 (2008). Furthermore, although the Washington Supreme Court incidentally noted in a footnote that the nonunanimous jury rule is not compelled by constitutional protections against double jeopardy but by the common law, the Court’s analysis focuses on the fundamental right to due process. State v. Bashaw, 169 Wn.2d 133, 147, 234 P.3d 195 (2010). See Brief of Appellant at 12-15.

Importantly, the Court applied the constitutional harmless error test to determine whether the trial court's error was harmless. The Court determined that in order to hold that the jury instruction was harmless, "we must 'conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error.'" *Id.* at 147 (citing State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002), which quoted Neder v. United States, 527 U.S. 1, 19, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999)). The State argues that even if the trial court erred in giving the jury instruction, the error was harmless. Brief of Respondent at 17-20. In an attempt to bolster its argument, the State claims that the prosecutor explained during closing argument that "[r]egarding the [special] verdict form, all 12 of you have to agree it is yes. . . . If it is eleven yes and one no, then the answer you fill in here is no. All 12 of you have to agree. If all 12 of you don't agree, then you will have to answer no." Brief of Respondent at 19. The State's insertion of the word "special" in front of verdict form is misleading and a misstatement of the record. The record reflects that in that instance, the prosecutor was referring to the verdict form, not the special verdict form. 8RP 286.

The State argues further that the error was harmless because Chouap "provided no evidence in response to the State's testimony by Officer Sylar that defendant's reckless driving forced another driver to

take evasive action, pulling to the side of the road.” Brief of Respondent at 19. The State’s argument lacks merit where Chouap is not required to provide any evidence and the State bears the burden of proof. In light of the fact that seven officers testified and the only evidence of any endangerment to another person was Officer Syler’s limited testimony, it cannot be concluded beyond a reasonable doubt that the special verdict would have been the same absent the error especially when Bashaw has set a high bar for a finding of harmless error beyond a reasonable doubt. Bashaw, 169 Wn.2d at 147-48. As Division One of this Court emphasized in State v. Campbell, ___ Wn. App. ___, 260 P.3d 235 (2011), our Supreme Court “has taken a strict stance concerning harmless error in special verdict instructions.” 260 P.3d at 240-41 (citing State v. Recuenco, 154 Wn.2d 156, 159, 110 P.3d 188 (2005) and State v. Williams-Walker, 167 Wn.2d 889, 893-94, 225 P.3d 913 (2010)).

The sentence enhancement must be reversed because as our Supreme Court held in Bashaw, the jury instruction stating that all twelve jurors must agree on an answer to the special verdict was an incorrect

statement of the law and the error was not harmless beyond a reasonable doubt.²

3. CHOUAP'S EXCEPTIONAL SENTENCE MUST BE REVERSED BECAUSE THE TRIAL COURT'S REASONS DO NOT JUSTIFY AN EXCEPTIONAL SENTENCE.

The State argues that the trial court properly imposed an exceptional sentence ordering Chouap to serve his sentence for assault consecutive to his sentence for two convictions of attempting to elude a pursuing police vehicle because concurrent sentences would result in unpunished crimes due to his high offender score. Brief of Respondent at 27-28. The State's argument misses the point. The court's findings and conclusions clearly reflect that the court imposed consecutive sentences based on the jury's special verdict that Chouap's driving endangered another person other than himself or one of the pursuing officers and his three convictions. CP 42-45. As argued above, the enhancement must be reversed because the special verdict jury instruction was erroneous and the second conviction for attempting to elude a pursuing police vehicle must be reversed because it violates double jeopardy. Thus, the court's reasons for imposing the exceptional sentence are not legally justified.

² The erroneous jury instruction here additionally stated, "If you unanimously have reasonable doubt as to this question, you must answer "no." CP 75-76, Instruction 22.

Consequently, reviewed de novo as a matter of law, the exceptional sentence must be reversed and a remand for resentencing is required. State v. Law, 154 Wn.2d 85, 93, 110 P.3d 717 (2005); State v. Ha'mim, 132 Wn.2d 834, 840, 940 P.2d 633 (1997).

B. CONCLUSION

For the reasons stated here, and in appellant's opening brief, this Court should reverse and dismiss Mr. Chouap's second conviction of attempting to elude a pursuing police vehicle, reverse the sentence enhancement, reverse the exceptional sentence, and remand for resentencing.

DATED this 14th day of October, 2011.

Respectfully submitted,



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DECLARATION OF SERVICE

On this day, the undersigned sent by U.S. Mail, in a properly stamped and addressed envelope, a copy of the document to which this declaration is attached to Kathleen Proctor, Pierce County Prosecutor's Office, 930 Tacoma Avenue South, Tacoma, Washington 98402.

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

DATED this 14th day of October 2011, in Kent, Washington.



VALERIE MARUSHIGE

Attorney at Law

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