

No. 28646-1-III
IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

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DIVISION III
SPokane, WA

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

ROBBIE JOE MARCHER,

Defendant/Appellant.

APPEAL FROM THE GRANT COUNTY SUPERIOR COURT
HONORABLE JOHN M. ANTOSZ

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in sustaining the conviction for second degree assault.

2. The trial court erred in failing to give a jury unanimity instruction.

3. The trial court erred in sustaining the conviction for unlawful hunting of big game.

4. The trial court erred in instructing the jury it had to be unanimous on the answer to the special verdict.

Issues pertaining to assignments of error.

1. Was the evidence insufficient to prove beyond a reasonable doubt that Mr. Marcher was guilty of second degree assault?

2. Is a Petrich instruction required where the evidence discloses more criminal acts than those actually charged, and proof of any of the alleged acts would satisfy what must be proved under the charging statute?

3. Was the evidence insufficient to prove beyond a reasonable doubt that Mr. Marcher was guilty of unlawful hunting of big game?

4. Did the trial court err in instructing the jury it must be unanimous on the answer to the special verdict?

B. STATEMENT OF THE CASE

In the afternoon of January 10, 2008, 26-year-old off-duty Grant County Sheriff's Deputy Earl Romig decided to hunt coyotes at a favorite place in Grant County. 4 RP 214, 218–19, 242.¹

This Buell Orchards area encompasses a wide area including the Buell farm/orchard and nearby Sheep Canyon. It is considered a prime hunting spot for deer and coyote; it suffers a lot of deer damage and during the special deer hunt “orchard preservation” sessions gets quite crowded. Romig was unaware that a special month long deer hunt session by permit was in effect. 4 RP 219, 228–29, 261–62; 5 RP 460, 490, 495–96, 499–500, 575, 585–91, 648–49, 657; Instruction No. 28 at CP 58.

There was at least seven inches of snow on the ground, and Romig wore a white sweatshirt over his other clothing. 4 RP 226–27, 233.

As Romig arrived and began walking, he noticed damage to an orchard tree and fresh marks in the snow suggesting two people had gotten stuck and put a tire chain on. He then saw the passenger side back bed of a parked, white Ford/F-50 type pickup about 100 yards away, with a chain on one of the tires. 4 RP 230, 232–36, 238–39, 241, 309–12.

¹ The trial transcripts are found in 12 volumes with sequentially numbered pages, and will be referred to by volume number and page, e.g. “4 RP 214”. Voir dire and opening statements are found in 3 volumes with sequentially numbered pages, and will be referred

Romig saw a man move behind the car from the driver's side to the back of the pickup and look through the eyepiece of the gun scope at him for a few seconds. 4 RP 240–41, 244–46, 310, 313. Romig described the person as an older man with a hat and some facial hair or a beard, wearing blue jeans and a greenish jacket. 4 RP 242–44. Romig turned right, walked through the trees, crossed a fence and walked out into the adjacent open sage brush field. 4 RP 247–49. He could barely make out the pickup when looking back through the trees. 4 RP 250. Romig sat down in the snow on the side of a sage brush bush that faced away from the orchard, and spent 20 to 25 minutes unsuccessfully using his “coyote calls” to hunt. 4 RP 250, 252–53. . Although constantly looking around for coyote, Romig did not see the person again. 4 RP 251, 259.

Romig left and headed back to the orchard. RP 261–63. After walking about 100 yards, Romig turned to go back to his car another way and was shot in the back. 4 RP 264–66, 320.

Romig was able to turn and sit up. 4 RP 267–69. He looked through his gun scope in the direction he thought the shot came from and for a split second saw the outline of a male walking away who looked like the same person he earlier saw step behind the truck. 4 RP 269, 271, 273,

to as “Voir Dire RP ____”. The remaining transcripts will be referred to by date, e.g. “10/23/09 RP ____”.

275. He heard the sound of a car in the orchard but did not see a white pickup. 4 RP 273, 277.

Romig crawled back to the bottom of the knoll and fired his gun three times in quick succession (the universal sign of “need help”). 4 RP 279–81. At one point he could see a different truck on the roadway 350 to 400 yards away, and fired a shot over the driver’s head. 4 RP 284, 287.

The driver was Donald Thill, who was scouting the area for his son who held one of the 20 permits issued for this special deer hunt session. 4 RP 343–46, 370; 5 RP 575. Thill heard some shots. 4 RP 351–52, 356, 358, 370. He parked his truck and began to look for deer. He saw an early ‘90’s GMC or Chevy pickup come out of the orchard. 4 RP 346, 351–54, 358–60. Thill didn’t see the occupants, but he was a hunter and recognized the pickup as one he’d seen quite often in the area during the prior fall’s regular deer hunting season. At that time, the driver was an older man (late 50’s) with a full face and gray hair and there was always a passenger. 4 RP 228, 343, 352–55. Thill later identified a photo of Robbie Joe Marcher as that passenger. 4 RP 355–56, 374.

Tim McNamara lived nearby and was driving home in his older white Ford possibly F-150 pickup. He had been a hunter for years and

shot hundreds of coyotes and deer. McNamara stopped for a few minutes to see what Thill was doing there and then left. 5 RP 455–59, 464.

As Thill began to leave, he heard a single shot outside his window. 4 RP 360, 385. He found Romig about 300 yards away and called 911. 4 RP 360–62, 365, 385. Romig was eventually taken to the hospital. 4 RP 293–94, 402, 448, 478.

The night of the incident, police contacted Carl Marcher, the defendant's father. Carl was one of 20 permit holders for the current special hunt session, and his physical description and make of truck apparently matched that given by Romig and Thill. 5 RP 554–59, 575–76, 617; 6 RP 841–52; 7 RP 917–43, 1087; 9 RP 1535–36. At least one other special hunt permit holder drove a vehicle matching Romig's description of a white Ford pickup. 6 RP 712.

Police also talked to the defendant, Robbie Joe Marcher, who lived next door to his father. 6 RP 854–68; 7 RP 903–06, 943–58, 1087, 1091–1100; 9 RP 1537–50.

On the day of the incident Carl Marcher asked his son to accompany him to the orchard area to help Carl if he got a deer. They drove Carl's GMC pickup, taking two .30-06 rifles and Marcher's binoculars and range finder. 5 RP 616–19; 6 RP 713, 10 RP 1680, 1688.

Marcher dropped off Carl to hunt, and headed to park the pickup at the far northwest corner of the orchard. 5 RP 629–40; 10 RP 1689.

On the way, Marcher slid sideways into a tree. 10 RP 1689. He walked back and got his father, and the two of them got the truck unstuck. They parked at the northwest corner, and Carl went back to his hunting spot. 5 RP 640–43; 10 RP 1690–91. Marcher waited in the parked pickup, taking several walks nearby without a rifle. 10 RP 1696–99, 1703–07.

Shooting hours ended at 5:00 p.m. Shortly before then, Marcher took a rifle and went on one last walk. 10 RP 1708. He wandered through the apple trees. Hearing sheep and possibly a howling coyote, Marcher headed to a large gap in an adjacent row of poplar trees that separated the orchard from the sage brush field. 10 RP 1708–12.

Using his rangefinder, Marcher couldn't see what was making the noise. He glimpsed something moving out of the corner of his eye and as he moved closer saw that it was a coyote. Just as Marcher located the coyote in his gun scope, his father fired up the pickup causing him to pull the trigger. Marcher shot at the coyote, in a direction which was to the north and west of his position. 10 RP 1712–14, 1716–18. Marcher estimated he was about 110 feet away from the pickup when he shot. 10

RP 1792. He ejected the shell and walked back towards the pickup along the road. 10 RP 1722.

Carl had stopped hunting about 4:45 p.m. and walked back to the empty pickup. He began driving out along the road next to the poplar trees and encountered Marcher about 20² yards down the road. 5 RP 652–53, 658; 6 RP 741, 759; 10 RP 1723–24. They saw several vehicles stopped along the road as they drove out, and the owners of the Buell orchard were seen earlier driving in the orchard area. 5 RP 645; 6 RP 759–60; 10 RP 1724–28.

Marcher was arrested after the police interview early the next morning. 6 RP 868. The following day, Marcher was consensually brought to the scene. According to police, the place where Marcher indicated he stood when he shot at the coyote was the same place that police had City of Ephrata Corporal Erik Koch stand in the “re-creation” of the scene.³ 7 RP 1105; 9 RP 1561, 1565, 1570. Police said Marcher indicated he shot directly north of the position. 7 RP 964–978.

Marcher testified that he had been standing in a different spot further down the row of trees and instead shot in a northwesterly direction,

² Carl Marcher denied telling police that night that he picked up Marcher about 50, 100 or 150 yards down the road. 5 RP 652; 6 RP 847; 7 RP 925.

and had pointed it out to police when taken to the scene and in a diagram made during his earlier interview. 7 RP 903–05; 10 RP 1711, 1713–14, 1745–46.

Even a slight change in a shooter’s position would change the field of view, distance of the shot and make a significantly bigger change at the destination. 7 RP 1035–37; 8 RP 1221. Romig estimated the shooter was 150 yards away. 8 RP 1182–83. In the “re-creation”, police placed the shooter only 80 yards away from Romig’s position. 8 RP 1239–42; 9 RP 1439.

Emergency room surgeon Dr. Allen Rolfs testified Romig’s wound was consistent with being shot through the back by a hi-powered hunting rifle with a hollow point cartridge. 3 RP 162–64, 197. In his opinion, the injuries created a high probability of death and resulted in permanent disfigurement. 3 RP 201–02.

Police did not find the bullet that wounded Romig, and presented no testimony at trial by a ballistics expert. 4 RP 185–86.

Romig and Marcher had never met each other. 4 RP 335–36; 10 RP 1679.

³ The day following the incident, police videotaped a “re-creation”, the purpose of which was to show the view through the gun scope when looking at the place Romig fell from the spot where Marcher was allegedly standing when he fired his shot. CP 67.

By fifth amended information, Marcher was charged with a number of crimes, and “to convict” instructions were given for the crimes of first-degree assault with a firearm or in the alternative, third degree assault; second degree assault – deadly weapon or intentional assault with reckless infliction of substantial bodily harm, third degree assault, second degree hunting of big game and failing to summon assistance. CP 23, 44, 48, 54, 57, 60.

In the “to convict instruction” regarding second degree assault, the jury was instructed the State must prove beyond a reasonable doubt that the defendant:

- (a) intentionally assaulted Earl Romig and thereby recklessly inflicted substantial bodily harm; or
- (b) assaulted Earl Romig with a firearm.

Instruction No. 18 at CP 48. The jury was instructed that:

A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result which constitutes a crime.

Instruction No. 6 at CP 36. The jury was further instructed that:

An assault is an intentional touching or striking or cutting or shooting of another person that is harmful or offensive regardless of whether any physical injury is done to the person. A touching or striking or cutting or shooting is offensive, if the touching or striking or cutting or shooting would offend an ordinary person who is not unduly sensitive.

An assault is also an act, with unlawful force, done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury.

Inatruccion No. 12 at CP 42.

In part, the State argued during closing:

... Let's look at the difference on assault two, then. Assault two is [Instruction] No. 18. The elements there [are] that on January 10th—the State has proved that. That the defendant intentionally ... assaulted Earl Romig, and there by recklessly inflicted substantial bodily harm, or —and that means either one of those, it doesn't have to be both, because it doesn't say and, it says or, just either one—or assaulted Earl Romig with a firearm.

Now assault is what? We looked at that definition of assault, which is an intentional touching, striking or shooting. An intent is acting with an objective or purpose.

Ladies and gentlemen, when we discuss a little bit further down the road, the state argues it's going to prove that the defendant intentionally assaulted Earl Romig. ...

Now, did he inflict the substantial bodily harm? Yes. Because substantial bodily harm if you look at it is less injury than great bodily harm. And we saw what a great bodily harm is, and substantial. And did he do that? The state would argue yes. Or that he just assault Earl Romig with a firearm, an assault again, did he intend to do it, did he assault him with a firearm? ...

11 RP 1890–92.

... But the state believes it has proved and it's by circumstantial evidence of why there was a shooting that day and why the defendant shot. And he was angry. Because somebody came into his prime location to scare one of his deer, after him sitting there for three hours. And he was ticked. And how do we know that? Because we have testimony from Earl Romig, who says when he was walking up the orchard lane road, that he sees this guy, and this guy throws his rifle up and points it at him and cocks his arm.

Now, for those of you who do hunt, most of the time you're in more of a shot there and you're getting set there, to show that they're going to shoot. The state argues that [stance] is a threat right there ... from the defendant to Earl Romig to get out of here. I'm hunting here, this is my spot. So [defendant] scares him off.

Was Earl Romig scared? Yeah. What did you hear?
Testimony: I'm not going up there. So he, Earl Romig, cuts off over here to the left, goes out to the [open field area]. ...

11 RP 1897–98.

With respect to the special verdicts, the jury was instructed in pertinent part:

Instruction No. 2: As jurors, you have a duty to discuss the case with one another and to deliberate in an effort to reach a unanimous verdict. ...

CP 32.

Instruction No. 11: For purposes of a special verdict, the state must prove beyond a reasonable doubt that the defendant was armed with a firearm at the time of the commission of the ... lesser included crime of Assault in the Second Degree ...

CP 41.

Instruction No.31: If you find the defendant guilty ... of the crime of Assault in the Second Degree ..., then you must determine if the following aggravating circumstance exists: Whether the defendant demonstrated or displayed an egregious lack of remorse.

CP 61.

Instruction No. 33: ... Because this is a criminal case, each of you must agree for you to return a verdict.

CP 64. The jurors were told to consider the alleged crimes in a particular sequence and instructed that as to each crime, “If you unanimously agree on a verdict, you must fill in the blank ... [but if] you cannot agree on a verdict, do not fill in the blank” CP 63–64.

Instruction No. 34: ... You’ll also be furnished with a special verdict form ... G [armed with a firearm at the time of commission of the crime]⁴ and a special verdict form J [demonstrated an egregious lack of remorse at the time of commission of the crime]⁵... If you find the defendant guilty of the lesser included crime of Assault in the Second Degree ..., you will then use the special verdict form G and special verdict form J and fill in the blank with the answer “yes” or “no” according to the decision you reach. In order to answer the special verdict form “yes,” you must be unanimously satisfied beyond a reasonable doubt that “yes” is the correct answer. If you have a reasonable doubt as to the question, you must answer “no”.

CP 65–66.

The jury convicted Mr. Marcher of second degree assault, second degree unlawful hunting of big game, and failing to summon assistance. 12 RP 2003–04; CP 84, 86–87. The jury also answered “yes” to the special verdict forms G and J. CP 89, 92. In addition to community custody and restitution, the court imposed confinement of 12 months plus 36 months (firearm enhancement) on the assault conviction, 365 days on the gross misdemeanor unlawful hunting conviction, and 90 days on the misdemeanor failing to summon assistance conviction, to be served

consecutively to each other. Sentencing RP 2085–86; 12/23/09 RP 31; CP 114–15, 119, 212–13.

This appeal followed. CP 132.

C. ARGUMENT

1. Marcher’s right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment, was violated where the state failed to prove all of the elements of the crime of second degree assault.

As a part of the due process rights guaranteed under both the Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment the state must prove every element of a crime charged beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 488, 670 P.2d 646 (1983); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970). As the United States Supreme Court explained in *Winship*: “[T]he use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law.” *In re Winship*, 397 U.S. at 364.

Mere possibility, suspicion, speculation, conjecture, or even a scintilla of evidence, is not substantial evidence, and does not meet the

⁴ “Special Verdict Form G – Firearm” at CP 89.

⁵ “Special Verdict Form J – Aggravating Circumstance” at CP 92.

minimum requirements of due process. State v. Moore, 7 Wn. App. 1, 499 P.2d 16 (1972). As a result, any conviction not supported by substantial evidence may be attacked for the first time on appeal as a due process violation. Id. “Substantial evidence” in the context of a criminal case, means evidence sufficient to persuade “an unprejudiced thinking mind of the truth of the fact to which the evidence is directed.” State v. Taplin, 9 Wn. App. 545, 513 P.2d 549 (1973) (quoting State v. Collins, 2 Wn. App. 757, 759, 470 P.2d 227, 228 (1970)).

The conviction here was for second degree assault⁶. The jury was instructed there were two alternative means of committing the crime: if Marcher (1) intentionally assaulted Earl Romig and recklessly inflicted substantial bodily harm, or (2) assaulted Romig with a deadly weapon. Instruction No. 18 at CP 48; RCW 9A.36.021(1)(a), (c). The potential act that could form the basis of an assault under the first means was shooting the gun at Romig. There are two potential acts that could form the basis of an assault under the second means—either aiming the scope of the gun at Romig or shooting the gun at Romig. The evidence presented at trial was insufficient to prove either alleged assault beyond a reasonable doubt.

⁶ Over defense objection, the court granted the State’s request that the jury be instructed on second degree assault under the authority of RCW 10.61.010 (“lesser included”) and/or RCW 10.61.003 (“inferior degree”). 10 RP 1631–60.

No one identified Marcher as the person who scoped or shot at Romig. Romig said the person who scoped him was an older man with facial hair. 4 RP 242–44. Marcher was only 39 years old at the time.⁷ As a police officer, Romig would be trained to give accurate estimates of age, height weight, etc. His description here of an “older man” does not match Marcher. It does however match Marcher’s father, Carl. In fact, the police first interviewed Carl because he matched Romig’s description.

Second, Romig didn’t see the actual shooting or the shooter. When he was able to look back towards the general direction of the shot, Romig thought he saw the same person he’d seen earlier. And, no one else saw the scoping or the shooting.

Third, the State placed the shooter at only 80 yards (a position much disputed by Marcher), while Romig, who as a policeman would have expertise in estimating distances, said the shooter was 150 yards away from him. Although Romig was in a much better position to know, the essential fact is that Romig never saw the person who shot him.

Finally, the discrepancies in the vehicle and “person who did the scoping” descriptions also do not establish that Marcher was the shooter. Romig saw a white Ford F-150 pickup. Several people at the scene or

⁷ Marcher was born 2/28/69 and the incident took place 1/10/08. CP 1.

who held the special hunting permits drove white Ford pickups, while the Marcher vehicle was a GMC pickup. Thill recognized a white pickup but not the men. He described the father from his encounters during the prior hunting season as an older gent, kind of a full face, gray hair and in his late 50's (4 RP 353–56, 374). Moreover, as stated previously, police interviewed Carl because he matched the description they were given: 60's, gray hair, white pickup. 6 RP 840.

Based on these facts, it is conceivable that Carl was the person who scoped or shot at Romig. It is also conceivable that one or more of the other people in the orchard area at the time—including Thill, McNamara, the Buells, or possibly one of the other 19 special permit holders, or even a poacher—was responsible. Without more, there is insufficient evidence to identify Marcher beyond a reasonable doubt as the person who scoped or shot at Romig.

Lack of any ballistics or reliable evidence connecting Marcher to the crime. The wound was consistent with being shot by a high powered rifle. High powered guns are commonly used to hunt deer, and this popular orchards area was open for hunting. All the people known to be at the scene hunted the area, including Carl and people living nearby. Carl was carrying a high powered rifle at the time of the incident. Presumably,

other permit holders and anyone else hunting in the area also had similar weapons.

As such, an errant shot could have been fired by anyone. Police did not find the bullet or spent cartridge that wounded Romig, and presented no testimony at trial by a ballistics expert that would connect Marcher's gun to the shooting. There was no indication that the police eliminated Carl's rifle as the possible assault weapon by checking to see if it had been fired. The same holds true for weapons that may have been carried by other people or were in vehicles at the scene. Without more, there is insufficient evidence to tie Marcher's gun to Romig's injury.

Red herring motive. To get beyond the extremely circumstantial nature of the evidence in this case, the State during closing argument fabricated a theory that Marcher was ticked off because Romig came to disturb his deer hunting session, and then became angry enough to shoot because Romig was keeping the deer away with the noise of his coyote calls. 11 RP 1890–96. This is pure speculation. Romig and Marcher had never met each other, and there was no evidence to support the State's theory. Even if the State could prove that Marcher's bullet was the cause of Romig's injuries, they did not prove that the shooting was anything other than an unfortunate accident.

In summary, the State's evidence was something less than circumstantial. If Marcher were the only person in the orchard area and the only person with a white truck, perhaps the indirect evidence would be enough to implicate Marcher. But the additional facts—that other hunters and other white trucks were present, that Marcher was never identified as the “scoper” or the shooter, and that no ballistics evidence existed to connect Marcher's gun to the bullet that injured Romig—dilute any circumstantial evidence to the point of being meaningless. Therefore, the State failed to prove all elements of the crime of second degree assault beyond a reasonable doubt, and the conviction must be reversed.

2. Marcher was denied his constitutional right to a unanimous jury verdict because the State relied on numerous criminal acts as a basis for conviction and a Petrich instruction on jury unanimity was not given.

"When the evidence indicates that several distinct criminal acts have been committed, but defendant is charged with only one count of criminal conduct, jury unanimity must be protected." State v. Petrich, 101 Wn.2d 566, 572, 683 P.2d 173 (1984). The State may, in its discretion, elect the act upon which it will rely for conviction. Id. Alternatively, if the jury is instructed that all 12 jurors must agree that the same underlying

criminal act has been proved beyond a reasonable doubt, a unanimous verdict on one criminal act will be assured. Id. When the State chooses not to elect, this jury instruction must be given to ensure the jury's understanding of the unanimity requirement. Id. The failure to follow one of the above options violates the defendant's State constitutional right to a unanimous jury verdict and his United States constitutional right to a jury trial. State v. Beasley, 126 Wn. App. 670, 682, 109 P.3d 849 (2005), *citing* State v. Badda, 63 Wn.2d 176, 182, 385 P.2d 859 (1963); U.S. Const. amend. 6; Wash. Const. art. 1, § 22.

An alleged Petrich error may be raised for the first time on appeal. State v. Holland, 77 Wn. App. 420, 424, 891 P.2d 49, *rev. denied*, 127 Wn.2d 1008, 898 P.2d 308 (1995). When determining whether a unanimity instruction is required, the court must answer three inquiries: (1) what must be proved under the statute? (2) what does the evidence disclose? and (3) does the evidence disclose more than one violation? State v. Russell, 69 Wn. App. 237, 249, 848 P.2d 743 (1993).

In State v. Williams, 136 Wn. App. 486, 150 P.3d 111 (2007), the defendant was charged with one count of first degree burglary. The state was required to prove that he or an accomplice was armed with a deadly weapon or assaulted any person. Two distinct criminal acts were alleged,

an assault against Johnson and an assault against Otis. No unanimity instruction was given. 136 Wn. App. at 496–97. In reversing and remanding the case, the Court of Appeals rejected the State’s argument that the two assaults were merely alternative means of committing a single crime, rather than distinct criminal acts:

Under the statute, burglary in the first degree may be committed in two different ways, either by being armed with a deadly weapon, or by assaulting any person. Accordingly, these two modes of commission constitute alternative means by which the crime of burglary may be proved. In contrast, the two assaults alleged in this case constitute only one mode of commission under the statute, i.e., assault. Even if the State offered evidence proving beyond a reasonable doubt that both alleged assaults occurred, Williams would nonetheless have committed burglary in the first degree by only one of the two alternative means outlined in RCW 9A.52.020. Accord State v. Stephens, 93 Wn.2d 186, 190, 607 P.2d 304 (1980)(holding that assaults alleged against two different individuals were not alternative means because they constituted "one mode of commission" under second degree assault statute). Thus, the two alleged acts constitute distinct criminal acts, not alternative means by which first degree burglary may be committed. A unanimity instruction was required.

Williams, 136 Wn. App. at 498. The Court held that “[t]he trial court erred by not providing an instruction requiring the jury to unanimously find that Williams assaulted Otis or to unanimously find that Williams assaulted Johnson in order to find Williams guilty of burglary in the first degree.” Id. at 499.

The circumstances in the present case are indistinguishable from Williams. Here, the jury was instructed there were two alternative means of committing the crime: if Marcher (1) intentionally assaulted Earl Romig and recklessly inflicted substantial bodily harm, or (2) assaulted Romig with a deadly weapon. Instruction No. 18 at CP 48; RCW 9A.36.021(1)(a), (c). The potential act that could form the basis of an assault under the first means was shooting the gun at Romig. There are two potential acts that could form the basis of an assault under the second means—either aiming the scope of the gun at Romig or shooting the gun at Romig. It is the latter two acts that required a jury unanimity instruction.

As in Williams, the State did not expressly elect to rely only on the “scoping” incident or the “shooting incident” in seeking a conviction under the second means, both of which involved a deadly weapon. The State offered evidence of the “scoping”, and also referred to it in its closing argument. Williams, 136 Wn. App. at 497.

The “scoping” and “shooting” incidents were two distinct criminal acts for purposes of assault based on use of a deadly weapon. Instruction No. 18 required only unanimity in finding that one of the alternative means had been proven beyond a reasonable doubt. While it is conceivable that

no members of the jury even considered the second means, it is equally conceivable that some or all of them did. As in Williams, the trial court erred by not providing an instruction requiring the jury to unanimously agree on the distinct criminal act serving as the basis for the alternative means of committing second degree assault by use of a deadly weapon. Williams, 136 Wn. App. at 499.

As in Williams, there is no way to assure that all the members of the jury were relying on the same act when voting to convict Mr. Smith. Therefore, there was no assurance that the jury verdict was unanimous.

Failure to give a Petrich instruction under these circumstances is harmless only if a rational trier of fact could have found each incident proved beyond a reasonable doubt. Petrich, 101 Wn.2d at 573, 683 P.2d 173. As set forth in the preceding argument, there was insufficient evidence of both means of committing second degree assault, as well as the two distinct acts involved in the second means of assault by a deadly weapon.

Since these acts do not satisfy the “to convict” instruction for the second means of committing second degree assault, a rational trier of fact could not have found each alleged act proved beyond a reasonable doubt. Since there was no Petrich instruction given regarding the second means,

there is no way of knowing whether all the members of the jury were relying on the same distinct act for the second alternative means when considering the single count of second-degree assault. Therefore, the failure to give a unanimity instruction was not harmless and the conviction must be reversed.

3. Marcher's right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment, was violated where the state failed to prove all of the elements of the crime of unlawful hunting of big game.

The general law on sufficiency of evidence is set forth in the preceding argument.

In order to convict him of the crime of unlawful hunting big game, the State had to prove beyond a reasonable doubt that on January 10, 2018 Marcher hunted a big game animal, in Grant County, State of Washington, without required licenses or permits. Instruction No. 27 at CP 57; RCW 77.15.410(1)(a). Here, there was no evidence that Marcher was hunting a big game animal.

RCW 77.08.030 defines "big game" as elk or wapiti, blacktail deer or mule deer, whitetail deer, moose, mountain goat, caribou, mountain sheep, pronghorn antelope, cougar or mountain lion, black bear, or grizzly

bear, and the jury here was so instructed. Instruction No. 25 at CP 55.

Marcher testified he shot at a coyote, which is not defined as “big game”.

The State presented no evidence that he was shooting at any type of “big game”.

Nor was there any evidence that Marcher was “hunting” big game. RCW 77.08.010(53) defines “[t]o hunt”, as “an effort to kill, injure, capture, or harass a wild animal or wild bird.” “Hunters begin to ‘hunt big game’, not when they actually encounter big game, but rather when they make an effort to kill or injure big game in an area where such animals may reasonably be expected. State v. Walsh, 123 Wn.2d 741, 748, 870 P.2d 974 (1994). There being no Washington Pattern Jury Instruction (WPIC), the jury here was instructed with the statutory definition and the noted language from the Walsh case. Instruction No. 26 at CP 56.

Walsh involved a regulation⁸ prohibiting the use of artificial light after sunset to hunt deer and other big game, commonly known as “spotlighting”. The Walsh Court noted that the Department of Wildlife often attempts to enforce the spotlighting statute by planting a Styrofoam deer at sunset in a field by the side of a rural road. When cars drive by the decoy at night, their headlights illuminate the decoy's reflective eyes.

⁸ Former RCW 77.16.050, now recodified at RCW 77.15.450. Laws of 2005 c 406 § 6, eff. July 24, 2005; Laws of 1998 c 190 § 27.

Walsh, 123 Wn.2d at 744. The defendants in the two consolidated appeals allegedly illuminated the decoy with their car headlights, and one defendant only aimed his gun at it, while the other defendant actually shot at the decoy. Appealing the superior courts reversal of district court dismissals, the defendants claimed that because it was impossible to hunt a decoy deer, the charges against them for spotlighting big game should be dismissed. Id.

In rejecting the defense of impossibility, the Court discussed the minimum facts necessary to prove the element of “hunting”:

[T]he plain words of the spotlighting statute ... are straightforward--the statute requires proof of three elements: (1) hunting, (2) big game, and (3) artificial light.

... Hunters begin to "hunt big game", not when they actually encounter big game, but rather when they make an effort to kill or injure big game in an area where such animals may reasonably be expected. The spotlighting statute outlaws making this effort with the aid of artificial light. We find, therefore, the State presented evidence sufficient to show defendants completed the crime of spotlighting. *When defendants allegedly took aim at the decoy in their headlights, believing it to be a deer, they hunted big game with artificial light.* Whether a defendant fires a shot may be evidence of intent, but it is not essential to prosecuting the charge.

Walsh, 123 Wn.2d at 748 (emphasis added). For purposes of the crime of spotlighting, “hunting” therefore requires (1) belief that a particular animal that falls within the definition of “big game” is present, (2) artificially

illuminating the animal, and (3) aiming at or targeting that animal in your gun sight.

Here, unlike in Walsh, there was no evidence that Marcher aimed his gun at a deer or other big game. The evidence showed only that Marcher had no special permit to hunt deer, was in an orchard frequented by deer, had his binoculars and rangefinder along, and had ready access to a gun. In closing, the State argued these facts proved beyond a reasonable doubt that Marcher was hunting big game. 11 RP 1883–86. Instead, under Walsh these facts are insufficient to establish the “effort to kill” that is required in order to complete the crime of unlawful hunting of big game. The State failed to prove all elements of this crime, and the conviction must be reversed.

4. The special verdicts must be vacated because the jury was improperly instructed in a way which indicated that they had to be unanimous not only to answer the special verdicts “yes” but also to answer “no”.

Washington requires unanimous jury verdicts in criminal cases. Wash. Const. art. I, § 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, 892–93, 72 P.3d 1083 (2003). However, jury unanimity is not required to answer “no.” State v. Bashaw, ___ P.3d ___, 2010 WL 2615794 *6 ¶21 (Wash) (“The rule from Goldberg, then is that a unanimous jury determination 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.”).

Jury instructions are constitutionally sufficient if they are supported by substantial evidence, allow the parties to argue their theories of the case, do not mislead the jury and, when taken as a whole, properly inform the jury of the applicable law. *See State v. Clausing*, 147 Wn.2d 620, 626, 56 P.3d 550 (2002). This Court applies *de novo* review to determine whether instructions met those standards. *See State v. Pirtle*, 127 Wn.2d 628, 656, 904 P.2d 245 (1995), *cert. denied*, 518 U.S. 1026, 116 S.Ct. 2568, 135 L.Ed.2d 1084 (1996).

In this case, the instructions did not meet those standards.

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, you must answer "no".

Id.

Although the Supreme Court vacated the special verdict for other reasons, it did not find fault with this instruction. Goldberg, 149 Wn.2d at 894, 72 P.3d 1083. The Goldberg jurors originally rendered a “no” verdict and, when polled, indicated that the “no” verdict was not unanimous. 149 Wn.2d at 891–93. The Supreme Court held that the trial court erred in refusing to accept that original “no” verdict and in ordering the jurors to continue deliberation until they were “unanimous”, because there is no requirement for such unanimity in order to answer “no”. Id.

In the present case, the jury was instructed similarly to Goldberg:

Instruction No. 34: ... In order to answer the special verdict form “yes,” you must be unanimously satisfied beyond a reasonable doubt that “yes” is the correct answer. If you have a reasonable doubt as to the question, you must answer “no”.

CP 65–66.

However the jury was also instructed they must deliberate in an effort to reach a unanimous verdict⁹, they must unanimously agree in order to return a verdict¹⁰, and if they can’t agree on a verdict they must not fill in the blank on the form¹¹.

⁹ Instruction No. 2, CP 32.

¹⁰ Instruction No. 33, CP 64.

¹¹ Instruction No. 33, CP 63–64.

Jury instructions must be read as a whole. State v. Pirtle, 127 Wn.2d at 656.¹² Together, instructions 2, 33 and 34 were misleading because they gave the improper impression that jury unanimity was required for the jury to answer “no” to the special verdicts, which is contrary to Goldberg and Bashaw.

The offending jury instruction in Bashaw similarly required unanimity: “Since this is a criminal case, all twelve of you must agree on the answer to the special verdict.” State v. Bashaw, 2010 WL 2615794 *2 ¶5. The Bashaw Court rejected the argument that the error was harmless because the jury affirmed the verdict when polled. 2010 WL 2615794 *7 ¶24.

This argument misses the point. The error here was the procedure by which unanimity would be inappropriately achieved. In Goldberg, the error reversed by this court was the trial court’s instruction to a non-unanimous jury to reach unanimity. 149 Wn.2d at 893, 72 P.3d 1083. The error here is identical except for the fact that direction to reach unanimity was given preemptively.

Id. Because it could not “say with any confidence what might have occurred had the jury been properly instructed,” the Bashaw Court declined to find the instructional error harmless. Bashaw, 2010 WL 2615794 *7 ¶25.

¹² Here, Instruction No. 1 properly required the jury to read all the instructions together:

Unlike the facts in Goldberg, because this jury answered affirmatively when polled, there is no way to determine whether the jurors understood that they did not have to be unanimous in order to answer the special verdicts “no”. As in Bashaw, the direction to reach unanimity was given preemptively and was therefore instructional error.

Here, similarly to Bashaw, the jury instructions required unanimity to find the presence or the absence of a special finding increasing the maximum penalty. The closing directive of Instruction No. 33, “Because this is a criminal case, each of you must agree for you to return a verdict[,]” needed an additional proviso such as, “except in the case of a special verdict where the answer is “no.” Without the proviso, and in view of the emphasis in the noted instructions that they must not answer if they could not agree, the jury could only conclude that unanimity was required for either answer to the special verdict. That was error. Bashaw, 2010 WL 2615794 *7 ¶23.

The instructions in this case incorrectly required jury unanimity for the jury to answer “no” to the special verdict. A unanimity instruction that does not adequately inform the jury of the applicable law violates a defendant’s right to a unanimous jury verdict. State v. Watkins, 136 Wn.

“During your deliberations, you must consider the instructions as a whole.” CP 31.

App. 240, 244, 148 P.3d 1112 (2006). Since the instructions given in this case misstate the law, the special verdicts must be stricken. The matter must be remanded for resentencing without the firearm and aggravating circumstance¹³ special verdicts. Bashaw, 2010 WL 2615794 *7 ¶26.

D. CONCLUSION

For the reasons stated, the conviction must be reversed and dismissed. In the alternative, the special verdicts should be vacated and the matter remanded for resentencing.

Respectfully submitted August 18, 2010.



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¹³ Although the jury was instructed to consider whether the aggravating circumstance of an egregious lack of remorse was present and answered the special verdict “yes”, the sentencing court declined to impose an exceptional sentence based upon it. CP 92; 10/23/09 RP 2070–2083. However, the aggravating circumstance special verdict is included in this argument regarding instructional error so that upon remand the re-sentencing court may not use the finding to impose an exceptional sentence.