

FILED

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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

28646-1-III

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OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ROBBIE JOE MARCHER,

Appellant.

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

The Honorable John Antosz

RESPONDENT'S BRIEF

D. ANGUS LEE
Prosecuting Attorney

by: Tyson R. Hill—40685
Deputy Prosecuting Attorney

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I. IDENTITY OF RESPONDENT

The State of Washington, represented by the Grant County Prosecutor, is the Respondent herein.

II. RELIEF REQUESTED

The State asserts no error worthy of reversal occurred in the trial and conviction of the Appellant.

III. ISSUES

- A. Whether there was sufficient evidence supporting Marcher's conviction for Assault in the Second Degree.

- B. Whether the court erred by not including a *Petrich* instruction regarding the charge of Assault in the Second Degree.

- C. Whether there was sufficient evidence supporting Marcher's conviction for Unlawful Hunting of Big Game in the Second Degree.

- D. Whether the jury was properly instructed on the special verdicts and, if not, whether the error was harmless.

IV. STATEMENT OF THE CASE

On January 10, 2008, Earl Romig, a deputy with the Grant County Sheriff's Office, was shot by the Appellant, Robbie Joe Marcher. See Verbatim Report of Proceedings (RP) (September 16, 2009) at 214-15. Deputy Romig was not working on the day he was shot. *Id.* Instead, after spending the morning with his fiancé, he had decided to hunt coyote. *Id.* at 218. Deputy Romig arrived at a location referred to as "the Buell orchard" in Soap Lake, Washington, around 4 p.m. *Id.* at 221, 230. He was wearing brown pants and a white sweatshirt with a large blue lifeguard symbol on the front. *Id.* at 227. He was carrying his rifle, as well as other hunting gear. *Id.* at 226-27. As it was winter, there was snow on the ground, there were no leaves on the trees, and it was freezing cold. *Id.* at 220, 232.

As Deputy Romig walked through the orchard, he noticed fresh tire tracks. *Id.* at 233. It appeared to Deputy Romig that a vehicle had run into one of the trees in the orchard, and then had continued toward the far side of the orchard with a chain on one tire. *Id.* at 234-35. He continued on the same path, following the tire tracks, until he sighted a white truck approximately 100 yards away (at the far corner of the orchard). *Id.* at 238. Deputy Romig then saw an individual walk around from the other

side of the truck. *Id.* at 241. The individual was a male, with some facial hair, a “trucker’s type hat”, blue jeans, a “greenish” jacket, and a rifle. *Id.* at 242, 244. Deputy Romig, who was 26 years old at the time, testified at trial that the individual looked like an “older man”. *Id.* at 242. However, Deputy Romig clarified that, if he had to estimate, he would guess the individual was in his early 40s. *Id.* at 243. Deputy Romig also testified that the individual’s beard was dark, not grey. *Id.*

As Deputy Romig watched the individual, he saw him suddenly lift his rifle to his shoulder, point it at him, and look at him through the scope of the rifle. *Id.* at 244-5. After about 3 seconds, the individual “throws out his elbow” in a shooter’s pose. *Id.* Deputy Romig immediately took a quick step to his right and headed out of the orchard, and into a neighboring area that was covered only with sage brush. *Id.* at 250. Despite the eerie feeling this encounter caused him, he walked a few hundred yards and found what he believed to be a good spot to hunt coyotes, and used coyote calls for approximately 20 minutes.¹ *Id.* at 250-53. During the time Deputy Romig was hunting, he never saw another person, or a coyote, nor did he ever hear any coyotes. *Id.* at 251.

Finally, around 4:30 p.m., he decided to return to his vehicle. *Id.* at 253. Initially, he went back the way he came, following his own tracks

¹ A “coyote call” does not make a sound like a coyote. Instead, it sounds like an animal is dying in order to attract coyotes. RP (Sept. 16, 2009) at 252.

through the snow. *Id.* at 253. While walking, he was constantly scanning the tree line, looking for the individual who had pointed the rifle at him. *Id.* at 254. Realizing it would probably not be a good idea to go back to the orchard, he changed directions, and began walking through the open field to his vehicle. *Id.* at 264.

Then, suddenly, Deputy Romig was shot in the back with the bullet going through his stomach, knocking him to the ground. *Id.* at 269. He began screaming, as loud as he could. *Id.* at 270. Deputy Romig could “feel [his] guts pushing through [his] stomach. *Id.* at 271. He looked towards the direction of where the shot came from. *Id.* at 270. He then saw the same person who had aimed the rifle at him earlier standing in the tree line, beginning to walk away. *Id.* at 270. The individual looked back at him for just a split second and then continued walking despite Deputy Romig’s screams for help. *Id.* at 271.

A short time later, Deputy Romig heard a vehicle in the orchard. *Id.* at 277. Deputy Romig never saw the shooter again, or anyone else, until a dark colored truck stopped on the road approximately 400 yards away. *Id.* at 284. Deputy Romig fired a shot from his rifle over the truck and was able to get the attention of the driver (Donald Thill). *Id.* Mr. Thill was able to summon assistance after finding Deputy Romig lying in

the snow, bleeding to death.² *Id.* at 284-287.³ Mr. Thill testified that he saw a white truck leaving the area when he arrived. *Id.* at 353. He had seen that vehicle in the area in the past and he was later (via photo) able to identify Robbie Marcher as the passenger of the white truck. *Id.* at 355.

As officers began to investigate what happened, they learned that there was a special deer hunt session for the area where these events took place. RP (September 17, 2009) at 555-56. Only 20 individuals held permits for this special hunt. *Id.* Police began to visit the homes of the individuals who held these permits, including the home of Carl Marcher.⁴ RP (September 18, 2009) at 711-713.

Upon arriving at Carl's residence, officers immediately noticed a white GMC pickup parked in between Carl's residence and the residence of his son, Robbie.⁵ Officers took pictures of the tread pattern of the tires, noted fresh damage to the left side of the vehicle, and also found tire chains in the bed of the truck. *Id.* at 716-18. Then, officers knocked on Carl's door and spoke with him about his whereabouts that day. See, e.g. *Id.* at 743.

² One of the treating doctors was surprised that Deputy Romig was able to survive long enough to reach the hospital. RP (Sept. 16, 2009) at 202.

³ The injury was very grave. A treating doctor testified that he did not know how Deputy Romig survived. *Id.* at 201.

⁴ Throughout this brief, Carl Marcher will be referred to as "Carl" while Robbie Marcher will be referred to as "Marcher." The same format is used by the Appellant in his brief.

⁵ Carl and Robbie Marcher's residence are only separated by approximately 200 feet. *Id.* at 713.

Carl confirmed that he and his son Robbie Marcher went to the Buell orchard that day to hunt. RP (September 17, 2009) at 616-17. Carl told the officers about driving into the orchard, the truck getting stuck on a tree, putting a chain on the truck tire, and Marcher parking the truck in the corner of the orchard. *Id.* at 642-43. Carl went to a different portion of the orchard (in the opposite direction of where the shooting took place) while his son remained in/by the truck. *Id.* at 649-50.

When Carl returned to his truck around 4:45 p.m., Marcher was not there. *Id.* at 651. Carl also noticed Marcher's gun was not there as well. *Id.* Carl started up the truck and began driving out the way he had come. After driving a short distance he saw Marcher walking towards him, gun in hand. *Id.* at 654. Marcher put the gun in the truck, got in, and they left the orchard. Carl asked Marcher if he had seen anything to shoot at. *Id.* at 755. Marcher responded that he had not.⁶ *Id.* After exiting the orchard, Carl stopped the truck to take off the tire chain. *Id.* at 759-60. Marcher exited the vehicle and did it himself. *Id.* They then drove home.

Carl testified he saw no other hunters that day. *Id.* at 643-48. He had not seen any other white trucks. *Id.* at 644. Nor did he see any game (coyotes or otherwise). *Id.* at 650-51. Perhaps most importantly, he

⁶ However, while being questioned by police, Carl Marcher stated that Robbie had told him he had "seen a couple of deer down in the orchard."

testified he did not fire a single shot that day. RP (September 18, 2009) at 764.

After speaking with Carl, officers went to Marcher's home. *Id.* at 853. It was approximately 2:30 a.m. *Id.* During the course of the initial 30 to 45 minutes police were speaking with Marcher, he never asked why they were there. RP (Sept. 21, 2009) at 1093.

Marcher confirmed most of the details shared by his father including going to the orchard, the white truck getting stuck, parking in the corner of the orchard, etc. RP (Sept. 18, 2009) at 856. He told police that near the end of hunting hours he heard what sounded like a coyote and went to investigate. *Id.* at 857. He admitted he went to the fence line (looking out to where Deputy Romig was using his coyote call). *Id.* at 858. However, at that point in the interview, he denied that he took a shot. *Id.* at 859. Marcher also claimed he never saw any other person in the orchard that day. *Id.* at 855.

After approximately 30 to 45 minutes of speaking with the officers one of them confronted Marcher with the evidence they had. *Id.* at 867; 860. One of the officers explained the evidence at the scene and told Marcher they knew he had fired a round, that someone had been shot, and the only question they had was whether he had done it on purpose or whether it was an accident. *Id.* at 866. Marcher did not immediately

respond. RP (Sept. 21, 2009) at 1093-94. He sat there, saying nothing, for 10 to 15 seconds. *Id.* Finally he responded that it was “an accident.” *Id.*

Marcher then told the officers a new story. RP (Sept. 18, 2009) at 860. He stated that, as the time for hunting was coming to a close, he saw some deer in the orchard. *Id.* at 860. He followed the deer, taking his rifle with him. *Id.* at 861; RP (Sept. 21, 2009) at 949. He went to the fence line in the same area where Deputy Romig had gone into the field to hunt.⁷ He claimed he saw a coyote in the field. *Id.* at 861. He claimed he scoped the animal and fired a shot at it. *Id.* at 864; 871. However, he did not go check to see if he had hit it. *Id.* at 864.

After the officers finished questioning Marcher, they seized the gun he had shot as well as the boots he was wearing. *Id.* at 947. The boots matched the prints found at the fence line where Deputy Romig saw the person who had shot him. RP (Sept. 21, 2009) at 1103-07. It was the same place Marcher took police the next day to show the spot he had fired from. *Id.*; RP (Sept. 23, 2009) at 1400; 1412; 1420.

Marcher’s testimony at trial followed the second story he told police. He denied that he shot anyone. He maintained that he had shot a coyote even though he also admitted at trial that he never hunted coyote. RP (Sept 24, 2009) at 1717. Despite contrary testimony, he claimed the

⁷ This was clarified at trial to be the same location. RP (Sept. 24, 2009) at 1775-76.

fog was so thick that one would be lucky to see 8 feet in front of the hood of a vehicle. *Id.* at 1716. However, he estimated the coyote was 60 to 80 feet away when he shot at it. *Id.* at 1738. Despite testifying earlier the he normally keeps “trophies” of things he kills, *Id.* at 1751, Marcher did not even walk the 60 to 80 feet to see if he has hit the coyote.

Marcher denied ever hearing any screaming after he fired his rifle. He also admitted that he never called the police or tried to summon assistance. RP (Sept. 23, 2009) at 1549. The evidence, however, showed that Marcher shot Deputy Romig and left him to die in the snow.

After hearing all the evidence the jury found Marcher guilty of Assault in the Second Degree (with a firearm enhancement), Unlawful Hunting of Big Game in the Second Degree, and Failing to Summon Assistance. RP (Sept. 28, 2009) at 2003-06. The jury also found that Marcher had shown an egregious lack of remorse and was armed with a firearm in the commission of the Assault. *Id.* Marcher now appeals his convictions and sentence. His arguments, however, are without merit.

V. ARGUMENT

- A. THERE WAS SUFFICIENT EVIDENCE PRESENTED AT TRIAL SUPPORTING THE JURY’S UNANIMOUS VERDICT FINDING MARCHER GUILTY OF ASSAULT IN THE SECOND DEGREE.

Marcher challenges his conviction for Assault in the Second Degree arguing the evidence was insufficient to prove beyond a reasonable doubt that he committed the crime. Pet'r's Brief at 14. However, Marcher does not cite to the standard of review ordinarily associated with sufficiency claims.

In order to determine whether there was sufficient evidence to support Marcher's conviction, this Court will "view the evidence in the light most favorable to the prosecution and determine whether any rational fact finder could have found the essential elements of the crime beyond a reasonable doubt. *State v. Mitchell*, 169 Wn.2d 437, 443-44, 237 P.3d 282 (2010) (citing *State v. Engel*, 166 Wn.2d 572, 576, 210 P.3d 1007 (2009) (citing *State v. Wentz*, 149 Wn.2d 342, 347, 68 P.3d 282 (2003))). A claim of insufficiency of the evidence not only requires that the Appellant admit the truth of the State's evidence, but also grants the State the benefit of all inferences that can reasonably be drawn from it. *State v. DeVries*, 149 Wn.2d 842, 849, 72 P.3d 748 (2003) (citing *State v. Green*, 94 Wn.2d 216, 222, 616 P.2d 628 (1980)). Additionally, appellate courts defer to the finder of fact (in this case, the jury) on issues of witness credibility. *State v. Drum*, 168 Wn.2d 23, 35, 225 P.3d 237 (2010) (citing *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990)).

At sentencing, defense counsel argued for a new trial based on a lack of sufficiency of the evidence. The trial court properly denied counsel's request. RP (October 23, 2009) at 2032-34. This Court should do the same. Considering all evidence, including all reasonable inferences drawn from it, is reviewed in the light most favorable to the state, there is more than sufficient evidence to support a conviction for Assault in the Second Degree.

All the evidence at trial pointed to there being only 3 people in the Buell orchard and neighboring field during the time period Deputy Romig was shot. These people were Deputy Romig, Carl Marcher, and Robbie Marcher. There was no evidence of footprints or tire tracks belonging to anyone other than the Marchers and Deputy Romig.

While in the orchard Deputy Romig saw a man, in his early forties, wearing the same clothes that Marcher was wearing, point his gun at him, look at him through his scope, and raise his arm in a shooter's pose. The person Deputy Romig saw was standing by a white truck in the corner of the orchard and was alone.

Deputy Romig left the orchard, crossed a fence, and went into the neighboring field. When he was shot, approximately 20 minutes later, he saw the same individual he had seen earlier at the white truck. The individual had gone to the same spot in the fence line where Deputy

Romig had gone (and should, therefore, have seen his footprints). Deputy Romig was screaming after he was shot. He saw the individual who shot him look back for a moment and then walk away and leave.

Carl and Robbie Marcher confirmed there were no other hunters in the orchard that day. They confirmed that Marcher had parked the white truck in the corner of the Buell orchard and was alone. He had a gun with him, even though he claimed he wasn't hunting. When Carl returned from hunting, Marcher was not at the truck. Marcher's footprint was found at the spot at the fence line where the Deputy Romig saw the person who shot him. Marcher's clothing, age, and appearance matched what Deputy Romig saw. When Carl picked up Marcher and they headed home, Marcher told Carl he had not seen anything to shoot at. Marcher initially told the police the same story. Eventually, he confessed that he had fired his rifle, but claimed he was shooting at a coyote, though he did not check to see if he had hit it and admitted he did not hunt coyote.

Deputy Romig was shot by a rifle consistent with the one fired by Marcher. Marcher had been sitting in the corner of the orchard, in a prime hunting spot, for some time, with alcohol in the vehicle. Evidence showed that Marcher, after scoping Deputy Romig, followed him to the fence line where he entered the field, and then shot him as he was walking back.

This and other evidence, when taken in the light most favorable to the State, is more than sufficient to uphold a conviction for Assault in the Second Degree. Therefore, this Court should not reverse Marcher's conviction for Assault in the Second Degree due to insufficient evidence.

B. ANY ERROR THE TRIAL COURT COMMITTED WHEN IT DID NOT GIVE A PETRICH INSTRUCTION--WHERE ONLY ONE ACT WAS ARGUED AS CONSTITUTING ASSAULT IN THE SECOND DEGREE--WAS HARMLESS.

Marcher argues he was denied his constitutional right to a unanimous jury verdict because the jury was not given a *Petrich*⁸ instruction and the State relied on numerous criminal acts as basis for conviction. Appellant's Brief at 18-23. However, although a *Petrich* instruction was not given, any error was harmless. Contrary to what the Appellant is claiming, the State only relied on one act to support the Assault charge.

Whether the failure to give a unanimity instruction constitutes error hinges on whether the charge at issue was an *alternative means* case or a *multiple acts* case. *State v. Bobenhouse*, 166 Wn.2d 881, 892, 214 P.3d 907 (2009) (citing *State v. Arndt*, 87 Wn.2d 374, 377, 553 P.2d 1328 (1976)). Marcher is arguing that this is a multiple acts case, contending

⁸ *State v. Petrich*, 101 Wn.2d 566, 683 P.2d 173 (1984).

that there were two separate acts articulated at trial, which could have constituted assault in the second degree. Appellant's Brief at 18-23.

A jury must unanimously agree as to which incident constituted the crime charged. *Bobenhouse*, 166 Wn.2d at 893. Where there are multiple acts that relate to one charge, the State must elect the act on which it relies or the jury must be provided with a unanimity instruction. *Id.* (citing *State v. Petrich*, 101 Wn.2d at 572). If neither of these courses are taken it will be deemed constitutional error. *Id.* (citing *State v. Kitchen*, 110 Wn.2d 403, 411, 756 P.2d 105 (1988)). However, when this error occurs, a constitutional harmless error analysis is applied. *State v. Bobenhouse*, 166 Wn.2d at 893.

There was no confusion in the record as to which act the State was relying on to support the Assault in the Second Degree charge. As has already been stated, a Petrich instruction is not required if the State makes an election of a particular act. *Petrich*, 101 Wn.2d at 572. The State will have elected a particular act if the State's closing argument, when considered with the jury instructions and charging documents, makes it clear which act or acts the State is relying on for each charge and there is no possibility that the jury could have been confused as to which act related to which charge. *State v. Bland*, 71 Wn. App. 345, 352, 860 P.2d

1046 (1993), overruled in part on other grounds by *State v. Smith*, 159 Wn.2d 778, 154 P.3d 873 (2007).

There was never any question that the ONLY act the State was arguing constituted assault was Marcher's act of shooting Deputy Romig. The only issue was whether Marcher shot Deputy Romig intentionally, or whether he was trying to shoot near him in an attempt to scare him, or whether he was shooting recklessly in the fog. This was made clear to the jury. The incident involving the earlier contact between Marcher and Deputy Romig, where Marcher scoped Deputy Romig and lifted his arm in a shooters pose, was only used to show (1) identification of Marcher; and (2) that Marcher (a) was trying to send a warning to Deputy Romig to leave the area and/or (b) had two opportunities to identify Deputy Romig as a person and not a coyote and/or (c) to help explain a motive (anger at remaining in his hunting area). There was never ANY argument, at ANY stage of the trial, where the State argued (or the defense defended against) the idea that the initial contact between Marcher and Deputy Romig constituted Assault in the Second Degree.

In its closing statement, the State spent very little time discussing Assault in the Second Degree and instead focused the majority of its time on Assault in the First Degree. In referring to Assault in the Second Degree the State only went through the jury instructions and discussed

how the elements were met when Marcher shot Deputy Romig. RP (September 25, 2009) at 1890-92.

Although Marcher cites to a portion of the record where the State was referring to the earlier contact between Marcher and Deputy Romig, it was obvious the earlier contact was not being used as an alternative act constituting Assault in the Second Degree. See Appellant's Brief at 10. Instead, as already noted, it was meant merely to show intent regarding the later shooting as well as identification.

Regardless, any error regarding a unanimity instruction was harmless. This conclusion is supported by case law. For example, in *State v. Bobenhouse*, 166 Wn.2d 881, 214 P.3d 907 (2009), the State Supreme Court found the failure to give a unanimity instruction in a rape case to be harmless error. In that case, the victim detailed two separate incidents that each independently were capable of constituting rape of a child in the first degree "(i.e., Bobenhouse forced [the victim] to perform fellatio on Bobenhouse, and Bobenhouse inserted his finger in [the victim's] anus). *Id.* at 894-95. The court noted that "Bobenhouse offered only a general denial to these allegations, and, consequently, the jury had no evidence on which it could rationally discriminate between the two incidents." *Id.* at 895. The court clarified and stated "[p]ut otherwise, if the jury in Bobenhouse's case reasonably believed that one incident happened, it

must have believed each of the incidents happened.” *Id.* The court therefore concluded that the trial court’s failure to instruct the jury on unanimity was harmless error. *Id.* (citing *State v. Camarillo*, 115 Wn.2d 60, 794 P.2d 850 (1990)).

Likewise, any error in this case was harmless. Marcher denied ever aiming his rifle at Deputy Romig, either in the orchard, or in the field when he shot him. Regardless, at no point during opening statements or closing arguments did the State argue that the initial “scoping” constituted Assault. Additionally, defense counsel never made any arguments regarding whether the “scoping” would or would not have constituted Assault. The entire focus of the case was on the shooting. The initial “scoping” was not contemplated by either party as a standalone assault and it was not argued as such to the jury. Instead, as was obvious throughout the trial, it was meant merely to show identity and intent regarding the shooting. Therefore, any error regarding unanimity was harmless.

C. THERE WAS SUFFICIENT EVIDENCE PRESENTED AT TRIAL SUPPORTING THE JURY’S UNANIMOUS VERDICT FINDING MARCHER GUILTY OF UNLAWFUL HUNTING OF BIG GAME.

The standard of review for a sufficiency of the evidence claim has already been outlined. Under this review standard, Marcher's claim that there was insufficient evidence to convict him of Unlawful Hunting of Big Game in the Second Degree also fails.

Jury Instruction No. 27 outlined what the State needed to prove to convict Marcher of Unlawful Hunting of Big Game in the Second Degree: (1) that on or about January 10th, 2008, the defendant hunted a big game animal; (2) that the defendant at the time of hunting the animal did not have and possess all licenses, tags, or permits required under Title 77 RCW; and, (3) that the acts occurred in the State of Washington, County of Grant. RP (Sept. 25, 2009) at 1866-67. The jury was also instructed that a special deer permit was required for the area in question where the Marchers were hunting. *Id.*

There was more than sufficient evidence presented at trial supporting the jury's unanimous decision that Marcher was guilty of Unlawful Hunting of Big Game. On the day in question, Marcher had taken the day off from work. RP (Sept. 24, 2009) at 1769. Marcher claimed, at trial, that he was only going with his father to help him bring home any deer he shot and to protect his father from cougars. *Id.* at 1767. However, Marcher did not wait with his father during the hunt (and could not, therefore, protect him from cougars). *Id.* at 1764. Marcher testified

he was a regular deer hunter and that he gets a deer every year. *Id.* at 1750. Marcher brought with him his rifle, a range finder, suitable hunting clothing (camouflage/hunter's orange), a scope, and binoculars. *Id.* at 1764. Carl had testified that the area Marcher was located in the orchard was the best spot to hunt. RP (Sept. 18, 2009) at 648, 740. It was Marcher who decided to go to that spot. *Id.* at 649. When Carl picked up Marcher at the end of the day, one of the only things he asked him was whether he had seen anything to shoot at. *Id.* at 755. Marcher had also testified he had seen some deer in the orchard and went to look for them, and took his rifle with him. *Id.* at 861. As the police investigation showed, Marcher was not one of the people holding the special permit to hunt deer in that area at that time.

Considering the State reaps the benefit on review of all inferences that can reasonably be drawn from the evidence, this Court should uphold Marcher's conviction for Unlawful Hunting of Big Game in the Second Degree. Despite his claim that he was only there to help his father, the evidence shows otherwise. Therefore, this claim of error should be denied.

D. THE JURY WAS PROPERLY INSTRUCTED REGARDING THE SPECIAL VERDICTS AND ANY ERROR WOULD HAVE BEEN HARMLESS.

Finally, Marcher claims the jury was not properly instructed regarding the special verdicts. It is now unquestioned that while “unanimity is required to find the presence of a special finding increasing the maximum penalty...it is not required to find the absence of such a special finding.” *State v. Bashaw*, 169 Wn.2d 133, 147, 234 P.3d 195 (2010) (citing *State v. Goldberg*, 149 Wn.2d 888, 893, 72 P.3d 1083 (2003)). However, the jury was properly instructed in this case and returned a unanimous finding that Marcher acted with an egregious lack of remorse and was armed with a firearm. Therefore, there was no error.

Marcher cites *State v. Bashaw* in an attempt to support his conclusion that the jury was improperly instructed on the special verdicts. However, the instruction in *Bashaw* was not the same as the instruction used here. The *Bashaw* court noted that “[i]n the jury instruction explaining the special verdict forms, jurors were instructed, ‘Since this is a criminal case, all twelve of you must agree on the answer to the special verdict.’” *Bashaw*, 169 Wn.2d at 139.

In the present case, however, the jury was instructed as follows:

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 the 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.”

RP (September 25, 2009) at 1875. This instruction is taken directly from WPIC 160.00. It appropriately instructs the jury that it must be unanimous for a “yes” finding but does not require unanimity for a “no” finding. Conversely, the language in the jury instructions in *Bashaw* required that “all twelve of [the jurors] must agree on the answer on the special verdict.” *Bashaw*, 169 Wn.2d at 139. This language instructed the jury it must be unanimous to make either a “yes” or “no” finding. The *Bashaw* court noted:

[T]he jury instruction stating that all 12 jurors must agree on an answer to the special verdict was an incorrect statement of the law. Though unanimity is required to find the presence of a special finding increasing the maximum penalty, see *Goldberg*, 149 Wn.2d at 893, it is not required to find the absence of such a special finding. *The jury instruction here stated that unanimity was required for either determination.* That was error.

Bashaw, 169 Wn.2d at 147 (emphasis added).

Conversely, in *State v. Goldberg*, which was the leading case relied upon by the Supreme Court in *Bashaw*, the jury was given the same

jury instruction as was given in the present case. In *Goldberg*, the special jury instruction read “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’”. *Goldberg*, 149 Wn.2d at 893.

In *Goldberg*, after the jury deliberated, it returned a guilty verdict on the underlying crime and responded with an answer of “no” to the special verdict. *Goldberg* at 894. A poll of the jury revealed the jury had not reached a unanimous decision and therefore responded “no” on the special verdict. *Id.* However, instead of accepting the “no” finding due to lack of unanimity, the judge required the jury to continue to deliberate. *Id.*

Based on these facts, the Washington Supreme Court concluded:

Here, the jury performed as it was instructed. It returned a verdict of guilty as to the crime, for which unanimity was required, and it answered “no” to the special verdict form, where under instruction 16, unanimity is not required in order for the verdict to be final. We find no error in the jury’s initial verdict in this case which would require continued deliberations. As instructed in this case, when the verdict was returned, the jury’s responsibilities were completed and the jury’s judgment should have been accepted. We hold that it was error for the trial court to order continued deliberations and we vacate the finding on the aggravating factor.

Goldberg at 894. Again, it is important to remember that unlike *Bashaw*, where the jury was instructed in the special verdict instruction that they must be unanimous regardless of whether their answer was “yes” or “no” to the special verdict, the instruction in *Goldberg* was exactly the same as the instruction in the present case (as to unanimity). This instruction was taken directly from the WPIC’s. The *Goldberg* court found no error with this jury instruction, and even commented that the jury had initially followed the instruction by answering “no” despite not being unanimous on that decision. The error in *Goldberg* was the trial court’s insistence that the jury continue to deliberate on the special verdict, not the instruction. No such error is alleged to have occurred here.

Based on this reading of *Bashaw* and *Goldberg* it is clear that the jury was properly instructed and there was no error in the jury’s instructions regarding the special verdicts in the present case.

Harmless Error

The *Bashaw* court also noted, however, that a jury instruction error may be harmless if the reviewing court can “conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error.” *Bashaw*, 169 Wn.2d at 147 (quoting *State v. Brown*, 147 Wn.2d 330, 341, 58 P.3d 889 (2002)). Since no error occurred regarding the

special verdict instructions to the jury, this Court need not conduct a harmless error analysis.

However, should the court disagree and find that the jury was instructed in error, this Court should none-the-less uphold the firearm enhancement. There is no question that if the jury found Marcher guilty of Assault in the Second Degree they would also necessarily have found him to have committed the crime with a firearm. There was no dispute at trial that Deputy Romig was shot with a firearm. The only issue was who shot Deputy Romig and whether the shot was intentional. As the jury unanimously found Robbie Marcher guilty of Assault in the Second Degree, this Court should be able to conclude beyond a reasonable doubt that the jury would have answered “yes” to the finding that he was armed with a firearm regardless of how the jury instruction was worded regarding unanimity. However, the Court need not address this issue as the jury was properly instructed and returned answers of “yes” to both the firearm enhancement and the aggravating factor of Egregious Lack of Remorse.

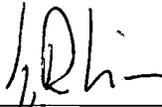
VI. CONCLUSION

After a lengthy trial, a jury unanimously convicted Marcher of Assault in the Second Degree with a Firearm Enhancement as well as

finding him guilty of Failing to Summon Assistance and Unlawful Hunting of Big Game. The jury also unanimously found that Marcher showed an Egregious Lack of Remorse. This Court should uphold these convictions and enhancements as Marcher has failed to show a lack of sufficient evidence or that the jury was improperly instructed.

Dated this 12th day of November 2010.

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