

65744-5

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NO. 65744-5-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,  
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

DANIEL CRANE,

Appellant.

REC'D  
JAN 10 2011  
King County Prosecutor  
Appellate Unit

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

The Honorable Douglass North, Judge

BRIEF OF APPELLANT

DAVID B. KOCH  
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC  
1908 East Madison  
Seattle, WA 98122  
(206)623-2373

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A. ASSIGNMENT OF ERROR

The trial court erred in instructing the jury that it must be unanimous to answer the special verdict forms.

Issue Pertaining to Assignment of Error

It is reversible error to instruct jurors they must be unanimous in order to find that the State has failed to satisfy the requirements of a sentencing enhancement. Appellant's jury received such an instruction. Must the special verdict, and the resulting exceptional sentence, be vacated?

B. STATEMENT OF THE CASE

The King County Prosecutor's Office charged Daniel Crane with five criminal offenses: (count one) Felony Harassment for threatening to kill Kirkland Police Officer Tim Carpenter; (count two) Felony Harassment for threatening to kill Kirkland Police Officer John Ishmael; (count three) Driving While Under the Influence; (count four) Driving While License Suspended/Revoked; and (count five) Violation of Ignition Interlock. CP 9-12.

For the harassment charges contained in counts one and two, the State charged two aggravating factors in support of an exceptional sentence: (1) that the victim was a law enforcement

officer performing his official duties and the defendant knew he was a law enforcement officer, and (2) that the offense involved “a destructive and foreseeable impact on persons other than the victim.” CP 9-10 (citing RCW 9.94A.535(3)(v) and 9.94A.535(3)(r)).

Crane pled guilty to the charges in counts four and five and not guilty to the Felony Harassment and DUI charges. 1RP<sup>1</sup> 2-10; CP 13-21.

Evidence at trial revealed that shortly before 1:00 a.m. on the morning of February 18, 2010, Kirkland Police Officer Tim Carpenter watched as a pickup truck exited the parking lot of the Lucky Seven Saloon, drifted into another lane of travel, jerked back into the original lane, and hit the curb. 4RP 7-9, 11. Officer Carpenter activated his overhead lights and initiated a stop. The driver of the pickup – later identified as Daniel Crane – pulled back into the parking lot, spun his wheels, and fishtailed a bit before regaining control of the truck and pulling into a parking spot. 4RP 9, 11-12.

Officer Carpenter approached the driver’s side window of the truck and smelled stale beer. 4RP 12. He asked for Crane’s license

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<sup>1</sup> This brief refers to the verbatim report of proceedings as follows: 1RP – June 22, 2010; 2RP – June 23, 2010; 3RP – June 24, 2010; 4RP – June 28, 2010; 5RP – June 29, 2010; 6RP – July 9, 2010.

and Crane informed him he did not have one. 4RP 13. Instead, Crane provided a Washington State ID. He lifted a patch he was wearing over one eye, revealed that the eye was missing, and explained that he was in town to get a new eye. 4RP 14, 47, 53. Crane denied drinking alcohol. 4RP 15.

A second officer – Officer John Ishmael – arrived on scene and watched Crane as Officer Carpenter returned to his patrol car and ran Crane's criminal history. 4RP 16. Crane was staring at Ishmael and asking him personal questions. He repeatedly asked whether Ishmael wore a wedding ring, whether he was married, and whether he had any children. Ishmael did not answer him. Crane was studying Ishmael up and down and appeared to be fixated on Ishmael's nametag. 3RP 15-18.

Officer Carpenter returned and informed Ishmael that Crane was a convicted felon and had been designated a "violent offender." 3RP 19-20. Carpenter also learned that Crane was the respondent in two no contact orders. 4RP 18. After patting down Crane to ensure he was not armed, Carpenter had him do field sobriety tests. 4RP 18-19. During these tests, Crane stared at Officer Carpenter and repeatedly asked him about his family and

where he lived. 4RP 19-25. Crane was intoxicated and “obviously impaired.” 4RP 83-86.

Officer Carpenter arrested Crane for multiple driving offenses, including DUI, and placed him in handcuffs. 4RP 25. During a search incident to arrest, Crane asked Carpenter if he had ever been shot in the head. When Carpenter asked him to clarify, Crane said he had been shot, said he and Carpenter were not communicating, and that Carpenter should respect him. 4RP 26-27. Officer Ishmael heard this comment. Crane continued to ask about Ishmael’s family and, while looking directly at Ishmael, asked if he knew what it felt like to get shot in the back of the head. He then made an additional comment regarding someone getting shot in the head. 3RP 27-32, 53, 55.

Carpenter read Crane his rights and placed him in the patrol car. 4RP 28. On the way to the police station, Crane said he had been shot in the head by an individual now serving a life sentence. He then asked, “have you ever been shot in the face in front of your wife and kids and had them killed too?” 4RP 28. Officer Carpenter again asked for clarification and Crane said, “you can read the writing on the wall, you know God, I’ll make you go see him.” 4RP 28. Carpenter asked if Crane was threatening him and Crane

replied that when he got out of jail he was going to find where Carpenter lived and kill him and his entire family. 4RP 28-29.

Once at the jail, Officer Carpenter ran a more thorough criminal history on Crane and discovered he had been convicted of manslaughter in the second degree and arrested for possession of a firearm. 4RP 30. Crane refused to provide a sample of his breath. 4RP 32-34. He also repeatedly asked about Officer Ishmael's whereabouts and continued referencing the officers' families and where they lived. 4RP 34-35. Officer Carpenter shared this information with Officer Ishmael. 4RP 36.

Officer Carpenter feared for his safety and that of his family. 4RP 36. He informed his wife of the threats and took security measures at home. His wife broke down crying when she heard what Crane had said, had difficulty sleeping, and became emotional whenever Carpenter raised the subject. Moreover, Carpenter's son saw both his parents crying while discussing the matter. 4RP 37-43.

Officer Ishmael testified that he had a similar experience. After his interactions with Crane at the scene, and in light of what he subsequently heard about Crane from Officer Carpenter, he was

frightened. 3RP 34-39. He also informed his family and took extra security measures. 3RP 39-42.

Crane testified in his own defense. He lives in Yakima and was in the Seattle area on February 18 to get a prosthetic eye. He was shot in the face in 2003 and lost his eye as a result. 4RP 97-98. He admitted drinking the night of his arrest and asking the officers personal questions. But he testified the questions were simply designed to build some rapport with the officers. He denied threatening them or their families. 4RP 99-103.

The jury convicted Crane of Felony Harassment in count one (Officer Carpenter), acquitted him of that charge in count two (Officer Ishmael), and convicted him of DUI in count three. CP 51-53.

Jurors were given special verdict forms pertaining to counts one, two, and three. Instruction 22 informed jurors how to decide the special verdict questions:

You will also be given special verdict forms for the crime(s) charged in Count(s) One, Two, and Three. If you find the defendant not guilty of these crimes do not use the corresponding special verdict form. If you find the defendant guilty [of] these crimes, you will then use the corresponding special verdict form and fill in the blank with the answer "yes" or "no" according to the decision you reach. Because this is a criminal case, all twelve of you must agree in order

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

CP 47 (emphasis added).

The special verdict form for count one asked three questions: whether the offense was committed against a law enforcement officer who was performing his official duties, whether Crane knew that Officer Carpenter was a law enforcement officer, and whether the offense involved “a destructive and foreseeable impact on persons other than” Officer Carpenter. Jurors answered “yes” to each question.<sup>2</sup> CP 50.

The special verdict form for count three asked whether Crane refused to submit to a test of his breath after being requested to provide a sample. Jurors also answered “yes” to this question. CP 48.

Crane’s standard range for count one was 22 to 29 months. CP 56. Based on the jury’s special verdict, however, the court imposed an exceptional sentence of 36 months (22 months plus 7

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<sup>2</sup> The form for count two, on which jurors acquitted, asked identical questions regarding Officer Ishmael. CP 49.

additional months for each of the two aggravating factors). CP 58; 6RP 9. The court also imposed a total of 12 months for the convictions on counts three, four, and five, and ran that time concurrently with the 36-month sentence on count one. CP 63-64. Crane timely filed his Notice of Appeal. CP 65-85.

C. ARGUMENT

THE FLAWED UNANIMITY INSTRUCTION FOR THE SPECIAL VERDICTS REQUIRES THAT CRANE'S EXCEPTIONAL SENTENCE ON COUNT ONE BE VACATED.

Instruction 22, which stated all 12 jurors must agree on an answer to the special verdicts, was an incorrect statement of the law. State v. Bashaw, 169 Wn.2d 133, 147, 234 P.3d 195 (2010). An instruction containing the same improper requirement was given in Bashaw. Bashaw, 169 Wn.2d at 139 ("Since this is a criminal case, all twelve of you must agree on the answer to the special verdict."). A unanimous jury decision is not required to find that the State has failed to prove the presence of a special finding increasing the defendant's maximum allowable sentence. Id. at 146-147 (citing State v. Goldberg, 149 Wn.2d 888, 72 P.3d 1083 (2003)).

The State proposed this erroneous instruction. Supp CP \_\_\_ (sub no. 28, State's Instructions to the Jury, 6/23/10). Defense

counsel did not object, but the error can be raised for the first time on appeal as an error of constitutional magnitude. RAP 2.5(a)(3). The defendant in Bashaw did not object to this instruction, either,<sup>3</sup> but the Supreme Court still reversed after applying the harmless error test applicable to constitutional violations. Bashaw, 169 Wn.2d at 147-48.

Instructional error is presumed to be prejudicial unless it affirmatively appears to be harmless. State v. Clausing, 147 Wn.2d 620, 628, 56 P.3d 550 (2002). In order to find an instructional error harmless, the reviewing court must conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error. Bashaw, 169 Wn.2d at 147 (citing State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002)).

As in Bashaw, "[t]he error here was the procedure by which unanimity would be inappropriately achieved." Bashaw, 169 Wn.2d at 147. The deliberative process is different when the jury is properly given the option of not returning a unanimous verdict. "The result of the flawed deliberative process tells us little about

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<sup>3</sup> State v. Bashaw, 144 Wn. App. 196, 199, 182 P.3d 451 (2008), reversed, 169 Wn.2d 133, 234 P.3d 195 (2010).

what result the jury would have reached had it been given a correct instruction." Id.

In Bashaw, the defendant was convicted of three counts of delivering a controlled substance. The jury entered special verdicts finding all three crimes occurred within 1,000 feet of a school bus route stop, increasing Bashaw's maximum sentence. Id. at 137-139. The verdict on one count was vacated based on the erroneous admission of certain evidence. Id. at 140-144. For the remaining counts, however, although *all* of the trial evidence indicated the sentencing enhancement had been proved, in light of the "flawed deliberative process," the court refused to find the error harmless. Id. at 138-139, 143-148.

The Bashaw court explained that given a proper special verdict instruction that did not require unanimity, the jury may have returned a different special verdict. Bashaw, 169 Wn.2d at 147. "For instance, when unanimity is required, jurors with reservations might not hold to their positions or may not raise additional questions that would lead to a different result. We cannot say with any confidence what might have occurred had the jury been properly instructed. We therefore cannot conclude beyond a

reasonable doubt that the jury instruction error was harmless." Id.  
at 147-48.

The same holds true here. On the special verdict for Felony Harassment in count one, one or more jurors may have entertained doubts whether the prosecution had proved beyond a reasonable doubt the three questions posed, but – given the unanimity requirement for answering “no” – they may have abandoned their positions or failed to raise their concerns. Jurors may not have reached unanimity had they not been required to do so. Because the instructional error impacted the procedure jurors used, it is impossible to determine the “flawed deliberative process” had no impact whatsoever.

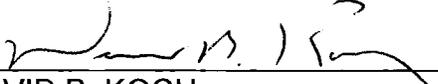
D. CONCLUSION

For the reasons stated, Crane respectfully requests that this Court vacate his exceptional sentence and remand for resentencing without consideration of the special verdicts on count one.

DATED this 10<sup>th</sup> day of January, 2011.

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC

  
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DAVID B. KOCH  
WSBA No. 23789  
Office ID No. 91051  
Attorneys for Appellant