IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	NO. 63929-3-I
	)	
Respondent,	)	DIVISION ONE
	)	
v.	)	
	)	
DAVID E. LANGE,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	FILED: May 2, 2011

Lau, J. — A jury convicted David Lange of second degree assault and found the victim's "injuries substantially exceed[ed] the level of bodily harm necessary to satisfy the elements of the offense." The trial court imposed an exceptional sentence. Lange appeals, arguing the instructions misinformed the jury that unanimity is required to answer "no" on the aggravating factor special verdict form. Because the instructions misinformed the jury on the unanimity question, we vacate the exceptional sentence and remand.

FACTS

Lange and Donna Oakley began dating in the summer of 2008. Oakley moved in with Lange, who lived in an abandoned trailer, but the two broke up sometime after the trailer was towed away.

On January 16, 2009, Lange, Oakley, and Oakley's friend, Cher Martin, went to Lange's makeshift tarp shelter. Lange and Martin began to "go at it" while Oakley watched. Martin eventually told Lange she did not want to have sex, and Oakley told Lange to get off Martin. Lange dragged Oakley outside the tarp and struck her in the face with his fist multiple times.

Martin's account differed. According to her, the three went to sleep when they reached Lange's tarp. When she woke up, Lange and Oakley were arguing and she saw him pull Oakley outside.

Oakley eventually went to the hospital where she was treated for multiple facial fractures. She also sustained a broken nose and collapsed cheekbone and eye socket. To avoid a permanent facial deformity and double vision, the treating physician inserted a metal plate and seven screws into her face.

The State charged Lange with second degree assault and alleged an aggravating circumstance—"Oakley's injuries substantially exceed[ed] the level of bodily harm necessary to satisfy the elements of the offense"—pursuant to RCW 9.94A.535(3)(y).

The trial court instructed the jury on the aggravating factor.

> If you find the defendant guilty of Assault in the Second Degree, you will then use the special verdict form C 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 form C. In order to answer the special verdict form C "yes," you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. <u>If you unanimously have a reasonable doubt as to this question, you must answer "no</u>."

(Emphasis added.) The jury convicted Lange of second degree assault and answered

"yes" to the following special verdict question—"Did the injuries of Donna Oakley sustained during the commission of the crime of Assault in the Second Degree as charged substantially exceed the level of bodily harm necessary to satisfy the elements of the crime of Assault in the Second Degree?"

ANALYSIS

Unanimity Instruction

Lange argues, "The court erred in instructing the jury it must be unanimous to answer 'no' to the special verdict form." Supp. Br. of Appellant at 3 (capitalization omitted). Lange relies on State v. Bashaw, 169 Wn.2d 133, 234 P.3d 195 (2010). There, the State charged Bashaw with delivery of a controlled substance and sought a sentence enhancement under RCW 69.50.435(1)(c) because the delivery occurred within 1,000 feet of a school. Bashaw, 169 Wn.2d at 137. The jury was instructed to determine by special verdict form if Bashaw's delivery took place within 1,000 feet of a school. An instruction explaining the special verdict form stated, " '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.

Our Supreme Court held this instruction was erroneous.

> Though unanimity is required to find the presence of a special finding increasing the maximum penalty, see [State v.] Goldberg, 149 Wn.2d [888,] 893, 72 P.3d 1083 [2003], 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. The court so held even though the trial court had polled the jurors and found the verdict to be unanimous. "The error here was the procedure

by which unanimity would be inappropriately achieved. . . . The result of the flawed deliberative process tells us little about what result the jury would have reached had it been given a correct instruction." Bashaw, 169 Wn.2d at 147.

The State maintains that Bashaw is unavailing here for two reasons. It first argues that Lange waived any objection to the unanimity instruction by not raising it below. But we rejected an identical argument in our recent decision in State v. Ryan, No. 64726-1-I, 2011 WL 1239796 (Apr. 4, 2011). There, because the Bashaw court premised its decision on due process and because it applied a constitutional harmless error analysis, we concluded, "[T]he error must be treated as one of constitutional magnitude and is not harmless." Ryan, 2011 WL 1239796 at *2. Accordingly, the error can be raised for the first time on appeal. RAP 2.5(a).

The State next argues that Bashaw is distinguishable because it involved a sentence enhancement pursuant to RCW 69.50.435(1)(c), a provision that does not mention unanimity. By contrast, here, RCW 9.94A.537(3) addresses unanimity: "The facts supporting aggravating circumstances shall be proved to a jury beyond a reasonable doubt. The jury's verdict on the aggravating factor must be unanimous, and by special interrogatory." But in Ryan, we concluded, "Reading the quoted section together with other provisions of the statute, as we must, convinces us that unanimity is required only for an affirmative finding." Ryan, 2011 WL 1239796, at 3.

We adhere to our reasoning in Ryan. Accordingly, we vacate Lange's exceptional sentence and remand for further p

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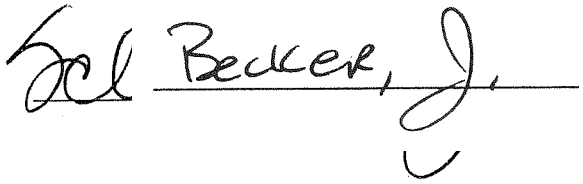
roceedings consistent with this opinion.[1]

WE CONCUR:



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