

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Appellant,

v.

CAMERON MICHAEL ANTHONY
BEASLEY,

Respondent.

No. 41322-1-II

UNPUBLISHED OPINION

Johanson, J. – Cameron Michael Anthony Beasley appeals a special verdict sentencing enhancement based on a jury finding that his actions while attempting to elude the police threatened another person other than himself or a pursuing law enforcement officer with physical injury or harm.¹ Citing *State v. Bashaw*, 169 Wn.2d 133, 234 P.3d 195 (2010), he argues that the jury instruction erroneously required that the jury be unanimous in order to reject the special verdict. He also argues that defense counsel provided ineffective assistance in failing to object to this erroneous instruction. Because Beasley failed to preserve the jury instruction error for review and any potential error was clearly harmless, we affirm.

FACTS

I. Attempted Eluding

On May 28, 2010, at about 1:00 am, Tumwater Police Officer Russell Mize was on patrol in his marked patrol car when he noticed a car turn without signaling. Officer Mize turned on the patrol car's overhead lights, followed the car, and stopped it in a driveway. As Officer Mize

¹ See RCW 9.94A.834.

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approached the stopped vehicle, he saw a woman, Whitney Cox, in the front passenger seat. Beasley was in the driver's seat.

When Officer Mize asked Beasley for his driver's license, proof of insurance, and registration, Beasley responded that he did not have any of these documents. Beasley told Officer Mize that his name was "William M. Hash" and gave the officer a birth date. 1 Verbatim Report of Proceedings (VRP) at 35. About that time, Officer Tyler Boling arrived to assist Officer Mize.

Officer Mize returned to his patrol car to run a record check on the name Beasley had given him. When the report came back that there was no one matching this name and birth date, Officer Mize returned to Beasley's car and, through a closed window, told Beasley that there is no such "William M. Hash." 1 VRP at 37-38. Beasley, however, continued to assert that he was Hash. During this conversation, Officer Mize told Beasley to unroll the car window, to put out his cigarette, and to turn off the car. Beasley said he was going to take "a couple more drags" of his cigarette, but when Officer Boling joined Officer Mize at the car, Beasley put the car in drive and "took off" down the long, gravel driveway. 1 VRP at 39, 65, 81.

Officer Mize returned to his patrol car and reported that the officers were now pursuing a fleeing vehicle. Officer Boling chased Beasley's car on foot as Beasley drove toward the two houses at the end of the driveway.

Passing very near Officer Boling, Beasley drove down the driveway, through one of the houses' backyards, between the two houses, back onto the driveway, and then out into the street at a "pretty good clip." 1 VRP at 40-41. He then drove "through [a] cul de sac in between two duplexes," and "through [a] large field onto" Capitol Boulevard. 1 VRP at 45. Beasley then

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turned south and continued at about 50 to 60 mph to Tumwater Boulevard, where he turned right. The speed limit in this area was 35 mph. Officer Mize pursued Beasley with his emergency lights and siren on.

After turning onto Tumwater Boulevard, Beasley “slowed down to a minimal speed to where [Cox] basically jumped out” of the car. 1 VRP at 46. Officer Mize continued to pursue Beasley and attempted to perform a Pursuit Intervention Technique (PIT maneuver) to force Beasley off of the road, but Beasley defeated this maneuver by ramming Officer Mize’s vehicle.

Beasley next turned onto New Market Street and drove at a “[v]ery high rate of speed” into the United Parcel Services employee parking lot. Although not open to the public at that time, the facility was in operation 24 hours a day. Beasley drove through the parking lot, around the building, through a wooded area, and toward a school, then back onto New Market Street, narrowly missing other “[p]ursing vehicles.” 1 VRP at 51-52. Officer Mize estimated that as Beasley crossed over the interstate and drove through a traffic circle, he was going about 90 mph.

At one point, Beasley drove through a traffic circle in the wrong direction, narrowly missing another car that was also in the traffic circle. Beasley continued to flee with Officer Mize still following him. After going through a residential yard, Beasley “took out a fence and also collided with a building.” 1 VRP at 55. He then drove northbound in the southbound lanes of a divided roadway. While Beasley was driving on the wrong side of the road, at least two oncoming vehicles had to pull over.

Eventually, Officer Boling was immediately behind Beasley. When Beasley approached a red light at an intersection and it was clear that Beasley was not going to stop, Officer Boling

used an “Opticom” to change the traffic light so the vehicle that was approaching the intersection on the cross street would not enter the intersection the same time as Beasley. The officers eventually stopped and apprehended Beasley.²

II. Procedure

The State charged Beasley with (1) attempting to elude a pursuing police vehicle,³ with a special allegation that he committed the offense while endangering one or more persons other than himself or the pursuing law enforcement officer,⁴ and (2) making false or misleading statements to a law enforcement officer.⁵ The case went to trial on September 8, 2010. The officers testified as described above⁶; Beasley did not present any evidence.

Jury instruction 16 stated in part,

You will also be given a special verdict form. If you find the defendant not guilty of the crime in Count I, do not use the special verdict form. If you find the defendant guilty of the crime in Count I, you will then use the 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 form.* 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 unanimously have a reasonable doubt as to this question, you must answer “no”.*

² After the arrest, Beasley told Officer Mize that when Cox was in his car, she was screaming at him and kicking the dashboard and that she told him she was afraid he was going to get her shot, despite his assurances to her that he knew what he was doing.

³ RCW 46.61.024(1).

⁴ RCW 9.94A.834.

⁵ RCW 9A.76.175.

⁶ The jury also viewed a video of the pursuit. Although there is some testimony describing the video’s contents, the video is not in the appellate record.

Clerk's Papers at 46-47 (emphasis added). Defense counsel did not object to this instruction.

The jury found Beasley guilty of attempting to elude a pursuing police vehicle and, by special verdict, that during the commission of this crime, his actions threatened another person other than himself or a pursuing law enforcement officer with physical injury or harm. The jury also found him guilty of making false or misleading statements to a public servant. At sentencing, the trial court imposed an endangerment sentencing enhancement of 12 months and one day.

Beasley appeals the sentencing enhancement.

ANALYSIS

I. Special Verdict Instruction Issue

Beasley first argues that the trial court improperly instructed the jury that its "yes" or "no" findings on the special verdict had to be unanimous. Although we agree, and the State concedes, that this instruction misstated the law under *Bashaw*, 169 Wn.2d 133,⁷ because Beasley failed to object to this instruction, he failed to preserve this issue for review.

We may refuse to review a claim of error that the appellant failed to raise in the trial court unless the appellant establishes that the error is manifest and constitutional. RAP 2.5(a)(3). We recently held in *State v. Grimes*, 165 Wn. App. 172, 188-89, 267 P.3d 454 (2011) (citing *State v. Nunez*, 160 Wn. App. 150, 248 P.3d 103, *review granted*, 172 Wn.2d 1004 (2011); *State v. Morgan*, 163 Wn. App. 341, 261 P.3d 167 (2011)), *petition for review filed* Dec. 30, 2011; and *State v. Bertrand*, 165 Wn. App. 393, 402, 267 P.3d 511 (2011), *petition for review filed* Jan. 3,

⁷ See also *State v. Goldberg*, 149 Wn.2d 888, 892-94, 72 P.3d 1083 (2003), and our recent opinions in *State v. Grimes*, 165 Wn. App. 172, 188-89, 267 P.3d 454 (2011), *petition for review filed* Dec. 30, 2011; and *State v. Bertrand*, 165 Wn. App. 393, 402, 267 P.3d 511 (2011), *petition for review filed* Jan 3, 2012.

2012, that this type of special verdict instructional error is not an error of constitutional magnitude. Thus, under *Grimes*, Beasley cannot show that he is entitled to review under the RAP 2.5(a)(3) exception to the usual preservation of error requirement, and we need not further consider this argument.

We note, however, that even if Beasley had preserved this error, it would be harmless beyond a reasonable doubt. The evidence established that during his attempt to elude the police, (1) Beasley drove considerable distances on the wrong side of the roadway, travelling at excessive speeds, when other vehicles not involved in the pursuit were present; (2) non-law enforcement vehicles encountering the chase had to pull over; (3) Beasley confronted one of these vehicles while driving the wrong way around a traffic circle; (4) one of the officers had to use specialized equipment to change a traffic light that Beasley showed every intention of running to avoid a possible collision; (5) there was a passenger in Beasley's car when the eluding incident started; and (6) the passenger exited Beasley's car during the pursuit. Given this overwhelming evidence that Beasley's actions created a threat to drivers of other vehicles on the road and a threat of possible harm to his passenger, both as a passenger and when she exited his vehicle, we hold that beyond a reasonable doubt the jury would not have come to a different decision on the special verdict had it been properly instructed.

II. Ineffective Assistance of Counsel Claim

Beasley next argues that defense counsel rendered ineffective assistance in failing to object to the special verdict portion of jury instruction 16. This argument also fails.

The state and federal constitutions guarantee a defendant the right to effective assistance

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of counsel. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). We begin with a strong presumption that counsel provided adequate and effective representation. *McFarland*, 127 Wn.2d at 335. To prevail in an ineffective assistance of counsel claim, Beasley must show that (1) his trial counsel's performance was deficient and (2) this deficiency prejudiced him. *Strickland*, 466 U.S. at 687. Deficient performance is that which falls below an objective standard of reasonableness. *State v. Horton*, 116 Wn. App. 909, 912, 68 P.3d 1145 (2003). Prejudice occurs when trial counsel's performance was so inadequate that there is a reasonable probability that the trial result would have differed, undermining our confidence in the outcome. *Strickland*, 466 U.S. at 694. If Beasley fails to establish either element, we need not address the other element because an ineffective assistance of counsel claim fails without proof of both elements. *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996), *overruled on other grounds by Carey v. Musladin*, 549 U.S. 70, 127 S. Ct. 649, 166 L. Ed. 2d 482 (2006).

The State argues, and we agree, that Beasley cannot show that his counsel's failure to object to the jury instruction was prejudicial. The evidence described in the previous section was overwhelming evidence that Beasley's actions during the pursuit endangered other drivers and his passenger. Given these facts, we hold that there was no reasonable probability that the jury would have come to a different decision on the special verdict had the trial court given the proper jury instruction. Because Beasley does not establish prejudice, his ineffective assistance of counsel claim also fails.

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We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Johanson, J.

We concur:

Van Deren, J.

Worswick, A.C.J.