IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 28646-1-III**
	)	
Respondent,	)	
	)	
v.	)	**Division Three**
	)	
ROBBIE JOE MARCHER,	)	
	)	
Appellant.	)	**UNPUBLISHED OPINION**

Korsmo, J. — Robbie Joe Marcher shot a hunter and left him in a field. A jury convicted him of second degree assault, second degree unlawful hunting of big game, and failing to summon assistance. The jury also found egregious lack of remorse on the assault count and unanimously concluded that he was armed with a firearm in that offense. He challenges most of these determinations. We affirm.

FACTS

Earl Romig, an off-duty Grant County Sheriff's Deputy, went hunting on January 10, 2008, at Buell Orchards in Grant County. Unbeknownst to Mr. Romig, a special deer

hunting season was in effect; 20 people had the special license necessary for that season. Mr. Romig, who wore a white sweatshirt, arrived at Buell Orchards around 4:00 p.m. There was snow on the ground.

As he walked into the orchard, he saw recent marks in the snow indicating that a vehicle had hit a tree and then needed to use a tire chain to be freed. About 100 yards away, he saw a parked, white Ford-type truck with a chain on one tire. Romig then saw a man move from the driver's side of the truck to the back and "scope" him by looking at him through the scope of a hunting rifle. The man suddenly threw his elbow into a "shooter's pose." The man was "older," in his early 40s, and had dark facial hair and was wearing a greenish jacket and blue jeans. Romig was nervous so he turned and walked through some trees and over a fence to a nearby field.

Mr. Romig spent the next 20 to 25 minutes calling coyotes. None appeared, so he decided to leave and started walking back toward his car. After about 100 yards he realized he was walking near where the scoping took place, so turned and started to go another direction. He was then shot in the back and fell to the ground. Able to sit up, he turned in the direction from where the shot had been fired. Using his own gun scope, he saw a man walking away. It appeared to be the same man who had scoped him earlier. Romig then heard a vehicle drive away.

The injured man signaled for help by firing his rifle three times in quick succession. No one responded. When he later saw a truck driving down the road, Romig fired a shot over the cab of the truck. The driver, Donald Thill, investigated the shot and found the wounded deputy about 300 yards away. He called 911. Mr. Romig was eventually transported to a hospital where he was treated for extensive injuries.

Mr. Thill had seen an early 1990's white GMC pickup leave the orchard. While he did not see the driver, he knew from experience that it was Carl Marcher. Mr. Thill did see Carl's son, Robbie Joe Marcher, in the passenger seat.

Police contacted Carl Marcher that evening. He was one of the 20 permit holders for the special deer season and he owned a vehicle like that described by Romig and Thill. The investigating officers noted a white GMC pickup with recent damage and chains in the back when they approached the house. After talking to Carl Marcher, officers went next door to talk to Robbie Joe Marcher at his residence.

Robbie Joe Marcher told officers that he had accompanied Carl to the orchard in order to help the older man if he obtained a deer. He dropped his father off at his favorite location and then drove the truck to the northwest side of the orchard. Along the way he slid into a tree and had to obtain his father's help to remove it; they put a chain on one tire to help free it. Robbie Joe Marcher then waited with the truck while his father went

back to his hunting site. The younger Marcher took some walks without any weapon during the day. When it neared the 5:00 p.m. hunting deadline, he took a rifle with him on another walk. He initially told officers that he did not fire the rifle, but later told them that he did fire at a coyote in the adjoining field. He did not check to see if he hit the coyote. His father soon arrived with the pickup and they drove off. He did not see any other hunters that day.

Police seized Robbie Joe Marcher's rifle and boots. The boots matched the prints found at the fence line where Mr. Romig had seen the person who shot him. The next day Robbie Joe Marcher took officers to the same location and identified it as the place from where he had shot at the coyote.

Prosecutors eventually charged Robbie Joe Marcher with alternative counts of first or third degree assault as well as the unlawful big game hunting and failure to summon aid charges. The jury did not reach agreement on the first degree assault charge, but did find Mr. Marcher guilty of the inferior degree offense of second degree assault as well as the unlawful hunting and failure to summon aid counts. The jury also unanimously concluded that the aggravating factor of "egregious lack of remorse" was established.

The court imposed a standard range term of 48 months—12 months base sentence and 36 months of firearm enhancement—on the assault conviction.[1] The court also

ordered the two nonfelony counts to run consecutive to the felony assault conviction. Mr. Marcher then timely appealed to this court.

ANALYSIS

Mr. Marcher challenges the sufficiency of the evidence to support the assault and hunting convictions and questions whether his right to a unanimous verdict was protected, as well as the manner in which the jury was instructed on the two special verdict forms. We will address those arguments in that order.

Evidentiary Sufficiency. Mr. Marcher challenges the sufficiency of the evidence to support two of the convictions, arguing that he was not connected to the shooting and also that there was no indication that he engaged in "hunting."

The sufficiency of the evidence to support a verdict is reviewed according to long-settled principles. The reviewing court does not weigh evidence or sift through competing testimony. Instead, the question presented is whether there is sufficient evidence to support the determination that each element of the crime was proven beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979); *State v. Green*, 94 Wn.2d 216, 221-222, 616 P.2d 628 (1980). The

[1] However, the judgment and sentence is marked as an exceptional sentence in paragraph 2.4. Clerk's Papers at 113. This appears to be a scrivener's error in light of the fact that the sentence is standard range and the court's oral ruling. The parties likewise treat the matter as a standard range sentence.

reviewing court will consider the evidence in a light most favorable to the prosecution. *Id.*

On the assault count, the only element Mr. Marcher challenges is the sufficiency of the evidence to identify him as the assailant. He argues that Mr. Romig's testimony and identification of him was inconsistent with the evidence and that forensic evidence did not tie Mr. Marcher to the shooting. However, inconsistencies in testimony do not an evidentiary sufficiency challenge make. The *Green* test focuses on the evidence supporting the verdict, not the evidence contradicting it. This court does not reweigh evidence and is not in a position to find persuasive that which a jury found unpersuasive. *Quinn v. Cherry Lane Auto Plaza*, *Inc.*, 153 Wn. App. 710, 717, 225 P.3d 266 (2009), *review denied*, 168 Wn.2d 1041 (2010).

Mr. Romig described the assailant while he walked away from the scene carrying a rifle; Mr. Thill identified that man as Mr. Marcher. Mr. Romig and Mr. Marcher were both in agreement where the shooting occurred. While Mr. Marcher claimed to simply be shooting at a coyote, his own statement confirms that he was at the location where Mr. Romig saw him at roughly the same time the deputy was wounded. Any testimonial inconsistency or lack of supporting evidence were factors for the jury to weigh; they do not render the verdict inconsistent as a matter of law. The evidence was sufficient to

support the jury's determination that Mr. Marcher was the shooter.

The challenge to the hunting evidence is closer. To establish the crime of second degree unlawful hunting of big game, the State was required to prove that (1) in Washington (2) the defendant hunted big game (3) without appropriate licenses or regulatory permission. Clerk's Papers (CP) at 57 (instruction 27). "Hunt" was defined in instruction 26:

> "To hunt" and its derivatives means an effort to kill, injure, capture, or harass a wild animal. The act of hunting big game begins not when a hunter actually encounters big game, but rather when he or she makes an effort to kill or injure big game in an area where such animals may reasonably [be] expected.

CP at 56.

Only the "hunting" aspect of the crime is at issue here; Mr. Marcher does not contest the evidence showing that the events occurred in Grant County, Washington, and that he lacked permission to be hunting deer, which constitute "big game." Mr. Marcher argues that he simply was at the scene to protect his father from cougars and to assist in the event the older man bagged a deer. He contends that case law requires that he actually aim his gun at a big game animal, citing to *State v. Walsh*, 123 Wn.2d 741, 870 P.2d 974 (1994). *Walsh* does not aid his argument.

Walsh involved two "spotlighting" prosecutions—hunting with the aid of lights

that freeze an animal in place. Mr. Marcher seizes upon the court's discussion of when the defendants had completed the offense of spotlighting:

> We find, therefore, the State presented sufficient evidence 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.

Id. at 748. This discussion was focused on the third element of spotlighting—the use of artificial light to assist in big game hunting. More on point was the discussion one paragraph earlier analyzing the meaning of "hunting."

> This argument camouflages an incorrect assumption: that to hunt big game, defendants must actually encounter big game. Hunting, however, is an activity involving effort. From 1947 to the present, the Legislature has defined hunting as "an *effort* to kill [or] injure" a wild animal or wild bird. RCW 77.08.010(7). Every fall, thousands of Washington residents journey deep into the woods in search of game. To say that they do not hunt until they actually encounter game defines the activity far too narrowly. Like hunting, when we take rod and reel to a mountain lake and dip our line in its waters, we begin to fish. Effort defines these activities.

Id.

It is the hunting discussion that is the relevant aspect of *Walsh* to this case which does not involve spotlighting. It was the effort Mr. Marcher made to shoot deer that constituted hunting. He twice was seen walking around the orchard with a gun—first when he "scoped" Mr. Romig and later when he shot him. Even by his own admission

that he shot at a coyote, Mr. Marcher admitted hunting. The question was whether he was engaged in big game hunting. The evidence permitted the jury to conclude that he was. Mr. Marcher was not with his father, so his contention that he was standing guard against cougars makes no sense. Instead, viewed in a light most favorable to the verdict, the evidence suggested that Mr. Marcher hunted in Buell Orchards, an area known for its deer population. He was separated from his father and carrying a scoped rifle along with a range finder and binoculars. He was dressed in a hunter safety orange vest. He looked and acted like a hunter. The jury was free to conclude that he was hunting deer that day.

The evidence supports the jury's verdicts on the assault and hunting charges. It was sufficient.

Jury Unanimity. Mr. Marcher next contends that he was deprived of his right to a unanimous jury verdict on the assault conviction because either the act of "scoping" the deputy or of shooting him could have constituted second degree assault. The record shows that the State only relied upon the shooting as the basis for the conviction.

Only a unanimous jury can return a "guilty" verdict in a criminal case. *State v. Camarillo*, 115 Wn.2d 60, 64, 794 P.2d 850 (1990). Where the evidence shows multiple acts occurred that could constitute the charged offense, the State must either choose which act it relies upon or instruct the jury that it must unanimously agree upon which act

it found. *State v. Petrich*, 101 Wn.2d 566, 572, 683 P.2d 173 (1984). Constitutional error occurs if there is no election and no unanimity instruction is given. *State v. Bobenhouse*, 166 Wn.2d 881, 893, 214 P.3d 907 (2009); *State v. Kitchen*, 110 Wn.2d 403, 411, 756 P.2d 105 (1988). A constitutional error requires a new trial unless shown to be harmless beyond a reasonable doubt. *Camarillo*, 115 Wn.2d at 64.

The State elected which act it was relying upon to prove its case—the shooting of Mr. Romig by Mr. Marcher. It was the sole focus of closing argument for the very understandable reason that this case was tried as a *first* degree assault case. Therefore, the State had to prove that Mr. Marcher assaulted Mr. Romig with a firearm and with the intent to cause great bodily harm. CP at 44 (instruction 14). The only activity that could have caused great bodily harm was the shooting; "scoping" someone may constitute assault, but it does not show intent to cause *great bodily harm*. Thus, the State elected which act it was relying upon, and it chose the only activity that was consistent with its charging theory of the case.

The right to a unanimous jury verdict was preserved in this prosecution. The State elected the act upon which it was relying. There was no error.

Special Verdict Forms. Mr. Marcher also argues that the trial court erred in its instructions to the jury on the firearm enhancement and the lack of remorse aggravating

factor.[2] His effort to expand *State v. Bashaw*, 169 Wn.2d 133, 234 P.3d 195 (2010), is without merit and also was not preserved.

Bashaw involved a special interrogatory that instructed jurors that they needed to be unanimous to answer the interrogatory either "yes" or "no." *Id*. at 147. The Washington Supreme Court concluded that requiring unanimity for a "no" answer violated a common law right recognized in *State v. Goldberg*, 149 Wn.2d 888, 72 P.3d 1083 (2003). *Bashaw*, 169 Wn.2d at 147. *Goldberg*, in turn, had involved an instruction requiring unanimity to return a "yes" finding, and instructing the jury that if it had a reasonable doubt about the matter, it should answer "no." 149 Wn.2d at 893.

This case followed the *Goldberg* fact pattern. The jury was instructed that it should return a "yes" answer only if it was unanimous, and it should answer "no" if it had a reasonable doubt about the finding. CP at 65-66 (instruction 34). Mr. Marcher nonetheless argues that *Bashaw* should be applied because instruction 2 told jurors that they must be unanimous in order to return a verdict in a criminal case. CP at 32. This standard instruction is used in all criminal cases. 11 Washington Practice: Washington

[2] Even though the trial court did not impose an exceptional sentence, Mr. Marcher argues that the special interrogatory form used for the aggravating factor should still be addressed because of the possibility that an exceptional sentence could be imposed at a resentencing. In light of our conclusion that the special interrogatory form was not defective, this issue is technically moot as to the aggravating factor and we will not separately address it in our analysis.

Pattern Jury Instructions: Criminal 1.04, at 18 (3d ed. 2008).

This court recently has held that failure to object to a *Bashaw*-type of special verdict form prevents the issue from being considered for the first time on appeal because it does not involve constitutional error. *State v. Nunez*, 160 Wn. App. 150, 248 P.3d 103 (2011); RAP 2.5(a). Very recently, Division One of this court has disagreed with *Nunez*. *State v. Ryan*, No. 64726-1-I, 2011 WL 1239796 (Apr. 4, 2011). We adhere to *Nunez* and conclude that Mr. Marcher cannot now raise his belated challenge.

Alternatively, we also find the expanded *Bashaw* argument presented here is without merit because it conflicts with the instructions governing the special interrogatory forms used in this case. Instruction 34 expressly tells the jury how to answer the special interrogatory forms—it must answer "no" if it is not unanimous in finding "yes." CP at 65-66. In contrast, general instruction 2 and instruction 33 (concerning the order in which the greater and lesser offenses would be considered) deal with verdicts for the charged crimes. They expressly tell the jury that it must be unanimous to enter a "guilty" or a "not guilty" verdict. CP at 32, 63-64. There is no possibility that the jury could properly apply instruction 2 to instruction 34—the former instruction deals with general verdicts and the latter instruction deals with the special interrogatories. Only by ignoring instruction 34's commands could the jury misapply instruction 2 to the special

interrogatory form. The *Bashaw* interpretation of the *Goldberg* ruling simply is not implicated by the instructions used in this case.

For both reasons, we reject Mr. Marcher's challenges to the special verdict forms.

Affirmed.

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

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Korsmo, J.

WE CONCUR:

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Kulik, C.J.

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Sweeney, J.