IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JASON BRADLEY MORRIS, Appellant.	No. 41553-4-II UNPUBLISHED OPINION

Quinn-Brintnall, J. — A jury found Jason B. Morris guilty of one count of violating a post-conviction no-contact order—domestic violence. RCW 26.50.110(5); RCW 10.99.020, .050. On appeal, Morris argues for the first time that (1) the trial court erroneously instructed the jury regarding the unanimity requirement for a special verdict, and (2) he received ineffective assistance of counsel when his defense attorney failed to object to the special verdict instruction. The State concedes the instructional error, but argues that because the trial court did not enhance Morris's sentence, the error is harmless. We note that the trial court's special verdict instruction does not suffer the infirmity identified in *State v. Bashaw*, 169 Wn.2d 133, 234 P.3d 195 (2010). Moreover, because the trial court did not enhance Morris's sentence, any error in the enhancement instruction did not prejudice Morris. Accordingly, we affirm.

Facts

On September 22, 2009, a trial court entered a no-contact order prohibiting Morris from having any contact with his child's mother, Leah Fae Moreno, for two years. On August 16, 2010, Lacey Police Department officers responded to a disturbance in a park where a man was reported to be verbally threatening a woman, later determined to be Moreno. When the police arrived, the man provided a false name and then ran. The police eventually arrested the man and, with Moreno's assistance, identified him as Morris.

On September 3, the State charged Morris with one count of violating a post-conviction no-contact order—domestic violence. RCW 26.50.110(5); RCW 10.99.020, .050. On November 15, the case proceeded to a jury trial where the jury instructions included a special verdict instruction on the question of whether Morris and Moreno were family or household members. That instruction stated in relevant part,

> 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". *If you cannot reach a unanimous decision to answer "yes" or "no" as to the special verdict form, you must answer "not unanimous".*

Clerk's Papers (CP) at 28 (emphasis added). Morris did not object to or propose any jury instructions.[1]

The jury found Morris guilty as charged and returned a special verdict finding that Morris and Moreno were family or household members. The trial court did not enter a finding that Morris's offense was a crime involving domestic violence. It also did not impose a domestic

[1] The State does not assert that Morris failed to preserve his challenge to the instruction for appeal. *See* CrR 6.15.

violence financial penalty or order domestic violence treatment as a condition of community custody. Instead, the trial court sentenced Morris to a standard range sentence unenhanced by the jury's special verdict finding that Morris and Leah Fae Moreno were family or household members. The trial court sentenced Morris to 35 months confinement and 9 to 18 months of community custody. Morris acknowledges that he was "sentenced within his standard range." Br. of Appellant at 2. Nevertheless, Morris appeals, arguing that the trial court gave the jury an improper special verdict unanimity instruction.

Discussion

Morris argues that the trial court erred in instructing the jury that it must unanimously have reasonable doubt as to whether Morris and Moreno were household or family members to answer "no" on the special verdict form. Citing *Bashaw*, the State concedes that the trial court erroneously instructed the jury on the unanimity requirement, but argues that the error was harmless because the jury's special verdict did not affect Morris's sentence. We note the jury instruction here differs from that identified in *Bashaw* and we hold that even if error, the trial court's sentence rendered it harmless.

In *Bashaw*, our Supreme Court stated, "[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." 169 Wn.2d at 146; *see also State v. Goldberg*, 149 Wn.2d 888, 895, 72 P.3d 1083 (2003). And "[a] nonunanimous jury decision is a final determination that the State has not proved the special finding beyond a reasonable doubt." *Bashaw*, 169 Wn.2d at 146. The *Bashaw* court explained,

> [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, 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.

169 Wn.2d at 147 (emphasis added). But unlike the instruction in *Bashaw*, the trial court's instruction here expressly provided for nonunanimity:

> 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". *If you cannot reach a unanimous decision to answer "yes" or "no" as to the special verdict form, you must answer "not unanimous".*

CP at 28 (emphasis added).

Likewise the special verdict form provided as follows,

> ANSWER: _____ ("Yes" or "No" or Not Unanimous")

CP at 30.

Morris's special verdict jury instructions did not have the defect identified in *Bashaw*[2] and the jury's special verdict finding that he and Moreno were family or household members was not improper on this ground. Moreover, because the trial court did not enter a finding that Morris's offense was a crime involving domestic violence or enhance his sentence accordingly,

[2] Morris's claim that his defense counsel's representation was ineffective necessarily fails and we do not address it further. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) (to prevail on a claim of ineffective assistance of counsel, the appellant must show that counsel's performance was deficient and that the deficient performance prejudiced the defense).

any error in the special verdict instruction had no effect on his sentence and was harmless. Accordingly, 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.

QUINN-BRINTNALL, J.

I concur:

HUNT, J.

I concur in the result,

ARMSTRONG, P.J.