IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. ERIC LAMONT SMITH, Appellant.	No. 41922-0-II UNPUBLISHED OPINION

Worswick, J. — Eric Smith appeals his special verdict jury finding that his crime of second degree assault was an aggravated domestic violence offense. Holding that Smith is precluded from raising this issue and the special verdict jury instruction was not error, we affirm.[1]

FACTS

Smith and his former girl friend, Tisha Renner, have an infant son together. On the morning of August 21, 2010, while Renner was home alone with her then three-month-old son, Smith entered Renner's home and assaulted her. Smith choked Renner in close proximity to their young son. Although Renner fought back, she briefly lost consciousness. When she regained consciousness, Smith was gone. Renner then grabbed her son and ran out of her home for help.

Although she later recanted her statement, Renner initially reported to neighbors and police that Smith assaulted her. The State charged Smith with second degree assault and alleged that the crime was an aggravated domestic violence offense.[2] An aggravated domestic violence

[1] A commissioner of this court initially considered Smith's appeal as a motion on the merits under RAP 18.14 and then transferred it to a panel of judges.

[2] The State also charged Smith with unlawful imprisonment. The jury found Smith not guilty of

finding subjected Smith to an exceptional sentence above the standard range. RCW 9.94A.535(3)(h).

At trial, the court instructed the jury:

> To find that this crime is an aggravated domestic violence offense, each of the following two elements must be proved beyond a reasonable doubt:
>
> (1) That the victim and the defendant were family or household members; and
>
> (2) That the offense was committed within the sight or sound of the victim's child or children who were under the age of 18 years;
>
> If you find from the evidence that elements (1) and (2) have been proved beyond a reasonable doubt, then it will be your duty to answer "yes" on the special verdict form. On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to element (1) or (2), then it will be your duty to answer "no" on the special verdict form.

Clerk's Papers at 85. Smith did not object to this instruction below. The jury found Smith guilty of second degree assault and answered "yes" to both aggravated domestic violence sentence enhancement elements.

Smith's standard sentencing range was 63 to 84 months. The sentencing court imposed a sentence of 64 months, plus a two-month sentence enhancement based on the jury finding an aggravated domestic violence offense. Thus, the court sentenced Smith to 66 months of confinement total.

ANALYSIS

Citing *Bashaw*,[3] Smith argues that the trial court erred because the court did not instruct the jury that it was required to answer "no" to the aggravated domestic violence sentence enhancement question if *any* juror had a reasonable doubt about either of the elements. We

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that charge.

[3] *State v. Bashaw*, 169 Wn.2d 133, 145-47, 234 P.3d 195 (2010).

disagree for two reasons. First, Smith may not challenge the special verdict instruction because he did not challenge the instruction defining aggravated domestic violence offense at trial. *State v. Grimes*, 165 Wn. App. 172, 182-84, 267 P.3d 454 (2011); *State v. Bertrand*, 165 Wn. App. 393, 399, 267 P.3d 511 (2011). We only review an issue raised for the first time on appeal if the error is manifest and affects a constitutional right. *Grimes*, 165 Wn. App. at 179; RAP 2.5(a)(3). Where a special verdict jury instruction incorrectly states that the jurors must unanimously answer "no" on the special verdict, that error is not one of constitutional magnitude. *Grimes*, 165 Wn. App. at 182-84; *Bertrand*, 165 Wn. App. at 402.

Further, even if Smith could meet his burden of showing that the alleged special verdict instruction was manifest constitutional error such that he could raise it for the first time on appeal, any error was harmless. Constitutional errors do not require reversal if they are harmless beyond a reasonable doubt. *See Grimes*, 165 Wn. App. at 187-88. An error is harmless beyond a reasonable doubt if it did not influence the verdict. *Grimes*, 165 Wn. App. at 187-88. Here, any error in the special verdict jury instruction was harmless because there is no evidence that the instruction affected the jury's decision in any way. Thus, Smith's arguments fail.

Second, instructions requiring juror unanimity to return a "no" answer to a special verdict are erroneous. *State v. Bashaw*, 169 Wn.2d 133, 147, 234 P.3d 195 (2010). For example, in *Bashaw*, the trial court erred by instructing the jury that "all 12 jurors must agree on an answer to the special verdict" because juror unanimity is not required for the jury to return a "no" answer to a special verdict. 169 Wn.2d at 147. However, the special verdict instruction here did not erroneously state that juror unanimity was required for a "no" answer. CP at 85. Instead, the

trial court stated:

> If you find from the evidence that elements (1) and (2) have been proved beyond a reasonable doubt, then it will be your duty to answer 'yes' on the special verdict form. On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to element (1) or (2), then it will be your duty to answer 'no' on the special verdict form.

CP at 85. This instruction did not run afoul of *Bashaw* because it does not require juror unanimity for a "no" answer to the special verdict. Thus, the trial court did not err in giving this instruction.[4] Accordingly, Smith's argument fails.

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 in accordance with RCW 2.06.040, it is so ordered.

Worswick, J.

We concur:

Penoyar, C.J.

Hunt, J.

[4] In a divided opinion, Division One has held that the instruction given by the trial court here was erroneous. *State v. Campbell*, 163 Wn. App. 394, 401, 260 P.3d 235 (2011), *petition for review pending*. We decline to follow *Campbell*. See also *State v. Berlin*, No. 41307-8-II, 2012 WL 716594, at *6 (Wash. Ct. App. March 6, 2012).