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WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,	)	No. 26741-5-III
Respondent,	)	
v.	)	
MAURICE T. BROWN,	)	UNPUBLISHED OPINION
Petitioner.	)	

Brown, J. • A jury specially found Maurice T. Brown guilty of delivery of a controlled substance within 1,000 feet of a school bus route stop. This court affirmed in *State v. Brown*, noted at 149 Wn. App. 1027 (2009), *review granted*, 170 Wn.2d 1025 (2011). After we filed our opinion, the Supreme Court decided *State v. Bashaw*, 169 Wn.2d 133, 234 P.3d 195 (2010), *overruled by State v. Guzman Nuñez*, 174 Wn.2d 707, 285 P.3d 21 (2012) (approving unanimity instruction form). The Supreme Court granted Mr. Brown's petition for review and remanded the matter to this court in light of *Bashaw*. Before the matter was reset on this court's docket, however, our Supreme Court decided *Nuñez*. The question on remand is whether, based on recent legal authority, Mr. Brown's

conviction should be reversed due to instructional error. Following *Nuñez*, we affirm.

FACTS

In April 2007, a cooperative individual (CI) purchased methamphetamine from Mr. Brown near a Kennewick residence and near a school bus stop. The State charged him with delivering methamphetamine within 1,000 feet of a school bus stop. Without objection from Mr. Brown, the court instructed the jury, "Since this is a criminal case, all twelve of you must agree on the answer to the special verdict." Clerk's Papers (CP) at 81. The jury found Mr. Brown guilty as charged, including a special finding that he committed the crime within 1,000 feet of a school bus stop. His sentence included a 24-month enhancement based on the special finding. Mr. Brown appealed.

ANALYSIS

The issue is whether the court improperly instructed the jury regarding unanimity in the special verdict. Mr. Brown contends the jury was not required to be unanimous in answering "no" to the special verdict finding of whether he delivered a controlled substance within 1,000 feet of a school bus stop. We review this claimed error of law de novo. *State v. Willis*, 153 Wn.2d 366, 370, 103 P.3d 1213 (2005).

The State responds that Mr. Brown waived the issue by failing to object to the instruction below. A claim of error may be raised for the first time on appeal if it is a

manifest error affecting a constitutional right. RAP 2.5(a)(3). In *State v. Ryan*, 160 Wn. App. 944, 252 P.3d 895 (2011), *overruled by Guzman Nuñez*, 174 Wn.2d 707, Division Two of this court addressed this argument. There, the court held the issue was of constitutional magnitude and could be raised for the first time on appeal. *Id.* at 948. This division, however, has held this claim of error may not be raised for the first time on appeal. *State v. Guzman Nuñez*, 160 Wn. App. 150, 153-54, 165, 248 P.3d 103, *rev'd*, 174 Wn.2d 707, 285 P.3d 21 (2012)). Our Supreme Court accepted review and consolidated *Ryan* and *Nuñez*, and recently filed its opinion, without specifically addressing the waiver issue.

Since this division has held in the past that this issue is not an error of constitutional magnitude and our Supreme Court has not explicitly held otherwise, the issue is waived and cannot be raised for the first time on appeal.

Nevertheless, Mr. Brown relies on the unanimity rule discussed in *Bashaw* and rejected in *Nuñez.* In *Bashaw*, the Supreme Court held that for purposes of a special verdict, "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. The court reasoned, "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." *Id.* at 147 (citation omitted).

In *Nuñez,* our Supreme Court overruled the nonunanimity rule set forth in *Bashaw,* concluding that it "conflicts with statutory authority, causes needless confusion, does not serve the policies that gave rise to it, and frustrates the purpose of jury unanimity." *Nuñez*, 174 Wn.2d at 709-10. In reaching this decision, the Court noted for aggravating circumstances, under the Sentencing Reform Act of 1981, chapter 9.94A RCW, the legislature "intended complete unanimity to impose *or reject* an aggravator." *Id.* at 715 (citing RCW 9.94A.537(3) (emphasis added)). Applying *Nuñez*, the court properly instructed the jury that it had to be unanimous to either answer "yes" or "no." There was no error in the special verdict instruction.

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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Brown, J.

WE CONCUR:

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Korsmo, C.J. Kulik, J.