IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	No. 66006-3-I
	)	
Respondent,	)	DIVISION ONE
	)	
v.	)	
	)	
MILORD GELIN,	)	UNPUBLISHED
	)	
Appellant.	)	FILED: September 17, 2012
	)	
	)	

Cox, J. — Milord Gelin appeals the exceptional sentence and deadly weapon enhancements to his sentence, following his convictions of first degree burglary, first degree assault, and theft of a motor vehicle. Based on State v. Bashaw[1] and State v. Goldberg,[2] he contends that the special verdict forms for the aggravators failed to make manifestly clear that "unanimity was not required to *reject* an aggravating circumstance" (the "nonunanimity rule").[3] In his Statement of Additional Grounds for Review, he makes additional claims.

In State v. Nunez,[4] the supreme court held that jury unanimity is required

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[1] 169 Wn.2d 133, 234 P.3d 195 (2010).

[2] 149 Wn.2d 888, 72 P.3d 1083 (2003).

[3] State v. Nunez, 174 Wn.2d 707, 712, ___ P.3d ___ (2012) (citing Bashaw, 169 Wn.2d at 146) (emphasis in original).

[4] Id. at 709-10.

to *reject* aggravating circumstances on a special verdict form, thus expressly overruling the nonunanimity rule of Bashaw[5] and Goldberg.[6] Assuming without deciding, that the special verdict forms and jury instructions in this case did not make manifestly clear the nonunanimity rule, there was no error. That rule is no longer of any force or effect. The Statement of Additional Grounds for Review has no merit. Accordingly, we affirm.

Milord Gelin and Laurie Williams had a romantic relationship and lived together for a period of time. They eventually separated. In 2009, Williams woke up to find Gelin in her bedroom. Williams testified that Gelin hit her several times with what she believed to be a hammer. Williams's teenage daughter testified that she heard her mother screaming and saw Gelin run out of her mother's bedroom. Gelin then drove away from Williams's home in Williams's car.

The State charged Gelin with first degree burglary, attempted first degree murder, first degree assault, and theft of a motor vehicle. The jury convicted Gelin of all of the crimes except attempted first degree murder. By special verdicts, the jury also found that Gelin was armed with a deadly weapon at the time of the commission of the burglary and assault. The jury also found that the burglary and assault were aggravated domestic violence offenses.

Gelin appeals.

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[5] 169 Wn.2d 133, 234 P.3d 195 (2010).

[6] 149 Wn.2d 888, 72 P.3d 1083 (2003).

JURY INSTRUCTIONS

For the first time on appeal, Gelin argues that the jury instructions for the special verdict forms failed to make the nonunanimity rule manifestly clear. Because that rule no longer has any force or effect, we disagree.

We review alleged errors of law in jury instructions de novo.[7] Failure to timely object usually waives the issue on appeal, including issues regarding instructional errors.[8] But an appellant may raise an issue for the first time on appeal if the error is both manifest and constitutional.[9] In State v. Ryan, we concluded that under Bashaw the nonunanimity rule was grounded in due process.[1] We determined that jury instructions that did not include the nonunanimity rule were of constitutional magnitude and manifest.[11]

Here, Gelin did not object to the jury instructions below. For the first time

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[7] Boeing Co. v. Key, 101 Wn. App. 629, 632, 5 P.3d 16 (2000).

[8] RAP 2.5(a); State v. Williams, 159 Wn. App. 298, 312-13, 244 P.3d 1018, review denied, 171 Wn.2d 1025 (2011).

[9] State v. O'Hara, 167 Wn.2d 91, 98, 217 P.3d 756 (2009).

[1] 160 Wn. App. 944, 948, 252 P.3d 895, review granted, 172 Wn.2d 1004 (2011), *rev'd on other grounds*, Nunez, 174 Wn.2d at 713 (explaining that Bashaw was based on common law rather than constitutional grounds).

[11] Id.

on appeal, he argues that the jury instructions failed to make the nonunanimity rule "manifestly clear." Under Ryan, this error was both manifest and constitutional, so it can be raised for the first time on appeal.

The State argues that Gelin waived any challenge to the special verdict instructions by failing to object below. But the State acknowledges that this court rejected this argument in Ryan.

As to the nonunanimity rule, since Gelin filed his brief, the supreme court overruled Goldberg[12] and the portions of Bashaw[13] that adopted the nonunanimity rule.[14] The nonunanimity rule stated that the jury need not be unanimous to reject an aggravating circumstance on a special verdict form.[15] But, in Nunez, the supreme court rejected this rule, 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."[16] In reaching this decision, the Nunez court noted that the Legislature "intended complete unanimity to impose or reject an aggravator" under the Sentencing Reform Act.[17]

Relying on Bashaw[18] and Goldberg,[19] Gelin argues that the special verdict

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[12] 149 Wn.2d 888.

[13] 169 Wn.2d 133.

[14] Nunez, 174 Wn.2d at 717-18.

[15] Bashaw, 169 Wn.2d at 146.

[16] Nunez, 174 Wn.2d at 709.

[17] Id. at 715.

instructions conflicted with the general jury instructions and thus did not make the nonunanimity rule "manifestly clear" to the average juror. But Nuñez rejected the nonunanimity rule.[2] Thus, even if we assume that Gelin's argument is correct, it is not persuasive because it is premised on law that has since been overruled. The law requires unanimity both as to the presence or absence of aggravating factors. In sum, there was no prejudicial error.

Because of our resolution of this issue, we need not address the State's argument that the rule of Bashaw does not apply to the statutory domestic violence aggravator.

STATEMENT OF ADDITIONAL GROUNDS

Gelin raises two additional issues in his statement of additional grounds. Neither is persuasive.

First, Gelin argues that improper special verdict instructions deprived him of a fair trial. We need not address this argument as it is adequately addressed in his appellate counsel's brief.[21]

Second, Gelin argues that ineffective assistance of counsel deprived him of a fair trial. Gelin makes a handful of unpersuasive assertions to support this

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[18] 169 Wn.2d 133.

[19] 149 Wn.2d 888.

[2] Nuñez, 174 Wn.2d at 709.

[21] See, e.g., State v. Gomez, 152 Wn. App. 751, 754, 217 P.3d 391 (2009) (refusing to review a defendant's statement of additional grounds because he raised no new issues).

claim.

To prevail on a claim of ineffective assistance of counsel, a defendant must show that his counsel's performance fell below an objective standard of reasonableness and that the deficient performance prejudiced his trial.[22] The reasonableness inquiry presumes effective representation and requires the defendant to show the absence of legitimate strategic or tactical reasons for the challenged conduct.[23] To show prejudice, the defendant must show that but for the deficient performance, there is a reasonable probability that the verdict would have been different.[24] A reasonable probability is one sufficient to undermine confidence in the outcome.[25] Failure on either prong defeats a claim of ineffective assistance of counsel.[26]

Gelin asserts four different bases for his counsel's alleged ineffectiveness. First, Gelin asserts that his counsel should have provided a "Haitian" or "Hispanol" interpreter at trial. But at trial, Gelin had a French interpreter. There is nothing in the record to indicate that Gelin objected to this

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[22] Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

[23] McFarland, 127 Wn.2d at 336.

[24] Matter of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1998).

[25] Id.

[26] Strickland, 466 U.S. at 697; State v. Foster, 140 Wn. App. 266, 273, 166 P.3d 726 (2007).

choice of language, or that the interpreter inadequately addressed his needs. Thus, Gelin fails to establish that his counsel's performance was deficient.

Second, Gelin argues that his counsel was ineffective as he failed to consult a "doctor" or "forensic expert" regarding Williams's alleged bruises. It is unclear how Gelin believes an expert could have supported his defense. But whether counsel could have found an expert willing to testify as Gelin desired will not be considered on direct appeal because it is "speculative and beyond the record."[27] Thus, there is no showing that counsel's alleged failure was deficient.

Third, Gelin contends that his counsel failed to prepare him for his testimony and failed to provide "copies of redacted discovery." Because this assertion is not supported by credible evidence in the record, we cannot review it.[28] Again, there is no showing of deficient performance.

Finally, Gelin argues his counsel was ineffective as he failed to investigate bank records, phone records, and medical records. We disagree.

At a minimum, a defendant seeking relief under a "failure to investigate" theory must show a reasonable likelihood that the investigation would have

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[27] State v. Fraser, __ Wn. App. __, 282 P.3d 152 (2012) (choosing not to review an additional ground asserting that counsel should have called an expert to testify about crime scene reconstruction and ballistics to support his defense of an accidental shooting).

[28] See RAP 10.10(c) ("Reference to the record and citation to authorities are not necessary or required, but the appellate court will not consider a defendant/appellant's statement of additional grounds for review if it does not inform the court of the nature and occurrence of alleged errors."); State v. Alvarado, 164 Wn.2d 556, 569, 192 P.3d 345 (2008).

produced useful information not already known to the defendant's counsel.[29] There is no such showing here. Thus, there is no showing of deficient performance by counsel.

To summarize, Gelin has not demonstrated how his counsel's performance was deficient in any respect. Without this showing, it is unnecessary to address the prejudice prong of ineffective assistance of counsel.

We affirm the judgment and sentence.

Cox, J.

WE CONCUR:

Appelwick, J.

Ellington, J.

[29] See, e.g., Bragg v. Galaza, 242 F.3d 1082, 1088 (9th Cir. 2001), amended by 253 F.3d 1150 (2001) (explaining that an ineffective assistance claim fails when the record clearly shows that the lawyer was well-informed, and the defendant fails to state what additional information would be gained by discovery she or he now claims was necessary).