FILED
Dec. 18, 2012
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON,	)	No. 26495-5-III
Respondent,	)	
v.	)	
JUSTIN TYE CLIFTON,	)	UNPUBLISHED OPINION
Petitioner.	)	

Brown, J. • The jury found Justin T. Clifton guilty of first degree robbery. This court affirmed in *State v. Van Antwerp*, noted at 147 Wn. App. 1042 (2008) and consolidated with *State v. Clifton*, noted at 170 Wn.2d 1021 (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. Clifton'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, our Supreme Court decided *Nuñez*. Because *Nuñez* resolves Mr. Clifton's unanimity challenge against him by approving the instruction at issue, we affirm.

FACTS

After being released from jail, Russell Hawkinson arranged a ride for fellow inmate, Carl Stränge, to go to the bank to cash a check. After the bank, the two went to Mr. Hawkinson's friend's apartment. Mr. Stränge became concerned about the security of the cash he was carrying. He decided to leave the residence. Once he exited the apartment, Mr. Stränge was assaulted by several men; one of the men displayed a knife. Mr. Stränge threw cash at the men and ran to call the police. When they arrived, Mr. Stränge identified Mr. Clifton as one of the assailants. The State charged Mr. Clifton with first degree robbery with a special deadly weapon allegation.

Without objection, the court instructed the jury regarding the deadly weapon special verdict:

> [F]ill in the blank with the answer "yes" or "no" according to the decision you reach. In order to answer the special verdict form[s] "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."

Clerk's Papers at 55 (emphasis added).

The jury found Mr. Clifton guilty as charged. He appealed.

ANALYSIS

The issue is whether the court erred in its deadly weapon enhancement instruction. Relying on *Bashaw*, Mr. Clifton argues the court erred in instructing the jury that in order to answer the special verdict form the jury must be unanimous. 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. Clifton 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 Nuñez*, 174 Wn.2d 707, Division Two of this court addressed this identical argument. There, the court held that the issue is of constitutional magnitude and can be raised for the first time on appeal. *Id.* at 948. This division, however, has held that 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, then the issue is waived and cannot be raised for the first time on appeal.

Nevertheless, Mr. Clifton 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 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 that 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* to this case, the court properly instructed the jury that it had to be unanimous to either answer "yes" or "no." The trial court did not err in giving 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.

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Kulik, J.