FILED

JAN 22, 2013

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. 29232-1-III
Respondent,	)	
v.	)	
	)	UNPUBLISHED OPINION
PHILIP J. STRONG,	)	
Appellant.	)	

Sweeney, J. — The defendant appeals the imposition of a 60-month sentencing enhancement, contending that the trial court erred by requiring jury unanimity to answer "no" on a firearm enhancement special verdict form. He relies on *State v. Bashaw*, which held that jury unanimity is not required to reject an aggravating circumstance on a special verdict. 169 Wn.2d 133, 234 P.3d 195 (2010), *overruled in part by State v. Guzman Nuñez*, 174 Wn.2d 707, 285 P.3d 21 (2012). The Supreme Court recently changed its mind and overruled the so-called nonunanimity rule. *Guzman Nuñez*, 174 Wn.2d at 719. We then affirm the imposition of the sentence enhancement.

FACTS

This is the second time this case comes before us. In 2007, the State charged Mr. Strong with first degree murder while armed with a firearm for shooting and killing Trent Irby. A jury found Mr. Strong guilty of second degree murder and found by special verdict that he committed the murder while armed with a firearm. We concluded that the jury should have been given a first degree manslaughter instruction, reversed the conviction, and remanded for a new trial.

On remand, the State charged Mr. Strong with second degree murder with a firearm sentencing enhancement. The State showed that Mr. Strong shot Mr. Irby twice. Mr. Strong testified and admitted that he shot Mr. Irby with a rifle, but claimed self-defense.

On the firearm enhancement, the court instructed the jury:

> Because this is a criminal case, in order to answer any special verdict form "yes," you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer.

Clerk's Papers at 124 (Instruction 23).

The court asked Mr. Strong about the instruction and he responded that he had no objection. In fact, Mr. Strong did not object to any of the proposed jury instructions or proposed alternative instructions.

A jury found Mr. Strong guilty of the lesser degree crime of first degree

manslaughter. And the jury answered "yes" to the special verdict form, finding that Mr. Strong was armed with a firearm during the commission of the crime. The court imposed a standard range sentence that included the mandatory 60-month firearm enhancement.

DISCUSSION

Mr. Strong contends that the court's special verdict form on the firearm enhancement was flawed. Specifically, he argues that because instruction 23 was silent as to whether unanimity was required to answer "no" to the special verdict, the jury, reading the instructions as a whole, necessarily believed unanimity was required to acquit him of the aggravating factor. Relying on *Bashaw*, he contends that this was an error of constitutional magnitude and that the matter must be remanded for resentencing without the firearm enhancement.

We review alleged errors of law in jury instructions de novo. *Boeing Co. v. Key*, 101 Wn. App. 629, 632, 5 P.3d 16 (2000). But generally a defendant must object to preserve any error for appeal. RAP 2.5(a); *State v. Guzman Nuñez*, 160 Wn. App. 150, 159, 162-63, 248 P.3d 103 (2011), *aff'd*, 174 Wn.2d 707. We have recently held that the court's failure to instruct a jury that it must be unanimous to acquit a defendant of an aggravating factor is not an issue of constitutional magnitude. *Guzman Nuñez*, 160 Wn. App. at 159, 162-63 ("The trial court's failure to instruct the jury that it could acquit Mr.

Nunez of the aggravating factor nonunanimously is . . . not an error of constitutional dimension."); *see also State v. Rodriguez*, 163 Wn. App. 215, 234, 259 P.3d 1145 (2011), *review denied*, 173 Wn.2d 1009 (2012). Under *Guzman Nuñez*, Mr. Strong waived his right to appeal this issue. But his assignment of error has no merit, in any event.

The Supreme Court accepted review of *Guzman Nuñez*, reconsidered its holding in *Bashaw*, and concluded that permitting nonunanimity for a negative answer in this special verdict "conflicts with statutory authority, causes needless confusion, does not serve the policies that gave rise to it, and frustrates the purpose of jury unanimity." *Guzman Nuñez*, 174 Wn.2d at 709-10. The court noted that for Sentencing Reform Act of 1981[1] aggravating circumstances, the legislature "intended complete unanimity to impose *or reject* an aggravator." *Id.* at 715 (emphasis added) (citing RCW 9.94A.537). Under *Guzman Nuñez*, the jury was then properly instructed.

Statement of Additional Grounds for Review

In his statement of additional grounds for review (SAG), Mr. Strong first asserts the victim's handgun should have been tested for fingerprints or blood. We rejected the same argument in Mr. Strong's first SAG, noting there had been no handgun. Mr. Strong makes no showing that should lead to a different conclusion now.

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[1] Ch. 9.94A RCW.

Next, Mr. Strong contends that the trial court should have allowed him to impeach Kelly Stout, a State's witness, with evidence of a prior felony conviction. Again, we addressed and rejected this argument in Mr. Strong's first appeal, explaining that Ms. Stout's prior convictions were not admissible because they were more than 10 years old or were not crimes of dishonesty.

Before the second trial, Mr. Strong asked the court to reconsider its previous ruling and admit evidence of one of Ms. Stout's prior felony drug convictions for impeachment purposes. The trial court excluded this evidence, noting that drug convictions are not admissible to show dishonesty.

We review a trial court's evidentiary rulings for abuse of discretion. *State v. Finch*, 137 Wn.2d 792, 810, 975 P.2d 967 (1999). Generally, "prior drug convictions . . . are not probative of a witness's veracity." *State v. Hardy*, 133 Wn.2d 701, 709-10, 946 P.2d 1175 (1997). Mr. Strong does not explain how the trial court abused its discretion by disallowing evidence of Ms. Stout's prior drug conviction. Without more, we cannot conclude that the court abused its discretion.

We again affirm the conviction and the enhancement.

A majority of the panel has determined that 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.

Sweeney, J.

WE CONCUR:

Brown, J.

Kulik, J.