

**FILED**  
**DEC. 13, 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. 30393-4-III
	)
Respondent,	)
	)
v.	) UNPUBLISHED OPINION
	)
DAVID GENE RICE,	)
	)
Appellant.	)
	)

Kulik, J. — A jury found David Rice guilty of first degree assault with a deadly weapon enhancement. Mr. Rice appeals his sentence. He contends that the deadly weapon enhancement should be vacated because the jury was incorrectly instructed that a unanimous decision was needed to answer “no” on the special verdict form. In light of the recent decision in *State v. Guzman Nunez*, 174 Wn.2d 707, 285 P.3d 21 (2012), we find no error in the jury instruction and affirm Mr. Rice’s sentence.

FACTS

A jury found Mr. Rice guilty of first degree assault and second degree assault in an incident where he stabbed the victim in the arm. The trial court later merged the second

degree assault with the first degree assault. As part of his assault convictions, the jury was asked to find by special verdict that Mr. Rice was armed with a deadly weapon when the crimes were committed. The jury was instructed that they must be unanimous in answering the special verdict form.

In order to answer the special verdict form “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 the question on the special verdict form, you must answer “no.”

**Unanimity.** In this criminal case, all twelve deliberating jurors must agree in order to return any verdict. When all of you have so agreed, fill in the proper form or forms of verdict to express your decision.

Clerk’s Papers at 91-92. The jury found that Mr. Rice was armed with a deadly weapon at the time of the commission of the crime. Based on the special verdict, the court added 24 months to Mr. Rice’s standard range sentence for first degree assault. Mr. Rice appeals the sentence.

#### ANALYSIS

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). Failure to timely object usually waives the issue on appeal, including issues regarding instructional errors. RAP 2.5(a); *State v. Williams*, 159 Wn. App. 298, 312, 244 P.3d 1018, *review denied*, 171 Wn.2d 1025 (2011). This court has held that a trial court’s failure to instruct a jury that it could be

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nonunanimous to acquit a defendant of an aggravating factor is not an issue of constitutional magnitude. *State v. Guzman Nunez*, 160 Wn. App. 150, 159, 162-63, 248 P.3d 103 (2011), *aff'd in part*, 174 Wn.2d 707.

Mr. Rice contends that the trial court improperly instructed the jury that a unanimous decision was needed to answer “no” on the special verdict form. Instead, he contends that the trial court was required to give a nonunanimity instruction as required in *State v. Bashaw*, 169 Wn.2d 133, 146-47, 234 P.3d 195 (2010), *overruled by Guzman Nunez*, 174 Wn.2d 707.

Mr. Rice did not object to the unanimity instruction and, therefore, waives the right to raise the issue on appeal. In any case, his challenge to the jury instruction fails.

Prior to the Washington Supreme Court’s recent decision in *Guzman Nunez*, the court in *Bashaw* recognized the nonunanimity rule developed in *State v. Goldberg*<sup>1</sup> that “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.” *Bashaw*, 169 Wn.2d at 146. However, in *Guzman Nunez*, our Supreme Court reconsidered and overruled the nonunanimity rule in *Bashaw*. *Guzman Nunez*, 174 Wn.2d at 709-10. The *Guzman Nunez* court concluded that such a rule “conflicts with

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<sup>1</sup> *State v. Goldberg*, 149 Wn.2d 888, 72 P.3d 1083 (2003), *overruled by Guzman Nunez*, 174 Wn.2d 707.

statutory authority, causes needless confusion, does not serve the policies that gave rise to it, and frustrates the purpose of jury unanimity.” *Id.* The court concluded that the challenged jury instructions, which required a unanimous “yes” or “no” decision on the special verdict form, were correct.

Here, based on *Guzman Nunez*, the trial court did not err in instructing the jury on the special verdict form. Accordingly, we affirm Mr. Rice’s sentence.

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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Kulik, J.

WE CONCUR:

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Brown, J.

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Korsmo, C.J.