NO. 29048-4-III
Consolidated with
29075-1-III

IN THE COURT OF APPEALS

OF THE STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON

RESPONDENT

V.

TANSY FAY-ARWEN MATHIS &

DAVID EUGENE RICHARDS

APPELLANTS

SUPPLEMENTAL BRIEF OF RESPONDENT

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A. ISSUES

1. Failure to object to claimed instructional error prohibits raising the issue for the first time on appeal.

2. Neither the State Constitution, nor the Legislature authorized non-unanimous acquittals as to sentencing factors in non-capital cases. Accordingly, instructing a jury that they must be unanimous to convict *or* acquit on aggravating factors does not raise constitutional error, and is a correct statement of law.

B. ARGUMENT

1. THE DEFENDANT MAY NOT RAISE A CHALLENGE TO THE SPECIAL VERDICT JURY INSTRUCTION FOR THE FIRST TIME ON APPEAL.

Only those exceptions to instructions that are sufficiently particular to call the court's attention to the claimed error will be considered on appeal. *State v. Harris*, 62 Wn.2d 858, 872-3, 385 P.2d 18 (1963). The Court of Appeals will not consider an issue raised for the first time on appeal unless it involves a manifest error affecting a constitutional right. RAP 2.5(a); *See State v. Brewer*, 148 Wn. App. 666, 673, 205 P.3d 900 (2009). A defendant may not object to an instructional error where it was not objected to below unless the error invades a fundamental right of the accused. *State v. Watkin,* 136 Wn. App. 240, 244, 148 P.3d 1112 (2006).

In the present case, there is no exception to RAP 2.5(a) that warrants raising the form of special verdicts in his case for the first time on appeal. An instruction that requires a jury to deliberate to unanimity in order to acquit a defendant of an aggravating factor does not constitute manifest constitutional error.

To demonstrate that an error qualifies as manifest constitutional error an appellant must identify a constitutional error and show how the alleged error actually affected the appellant's rights at trial. *State v. Guzman Nunez*, 160 Wash.App. 150, 157-159, 248 P.3d 103, 106 - 107 (2011) (citing *State v. O'Hara*, 167 Wash.2d 91, 98, 217 P.3d 756 (2009)). Courts do not assume that an error is of constitutional magnitude. The Court looks to the asserted claim and assess whether it implicates a constitutional interest as compared to another form of trial error. *Id.*

Even if a claimed error is of constitutional magnitude, the Court determines whether the error is manifest; which under RAP 2.5(a)(3) requires a showing of actual prejudice. *See id.* To demonstrate actual prejudice there must be a plausible showing by the appellant that the asserted error had practical and identifiable consequences in the trial of the case. *Id.* The

determination whether the error is manifest and actual prejudice has been shown is a different question from whether the error was harmless; harmless error analysis takes place only after it has been determined that the trial court committed manifest constitutional error. *Id.*

The trial court's failure to instruct the jury that it could acquit the defendant of aggravating factors non-unanimously is not an error of constitutional dimension. *Guzman Nunez*, 160 Wash.App. at 159. In fact it is not error at all. See *State v. Nunez*, 174 Wash.2d 707, 285 P.3d 21, 22 (2012).

In the instant case, no objection to the jury instructions was raised. There was no ruling from the trial court to be considered on appeal. The Court should decline to address Appellant's challenges to the special verdict instruction that were not raised at the trial court level.

2. INSTRUCTING A JURY THAT THEY MUST BE UNANIMOUS TO CONVICT OR ACQUIT ON AGGAVATING CIRCUMSTANCES IS A CORRECT STATEMENT OF THE LAW

Appellants relied upon *State v. Goldberg*, 149 Wash.2d 888, 894, 72 P.3d 1083 (2003) and *State v. Bashaw*, 169 Wash.2d 133, 234 P.3d 195 (2010), for the claim that error of constitutional magnitude occurred when the jury was instructed

that they must be unanimous to reject the aggravating circumstances in the special verdict forms. *Goldberg* and *Bashaw* were overruled by *State v. Nunez*, 174 Wash.2d 707, 285 P.3d 21, 22 (2012).

The instruction at issue in *State v. Nunez Guzman* contained the same concluding language as Instruction #51 in the present case:

> Because this is a criminal case, all twelve of you must agree in order to answer the special verdict forms. In order to answer the special verdict forms "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."

Nunez, 174 Wash.2d at 710. In *Nunez*, the Court held that the adoption of the non-unanimity rule for special verdicts in aggravated murder cases adopted in *State v. Goldberg*, 149 Wash.2d 888, 894, 72 P.3d 1083 (2003) was incorrect. *Nunez*, 174 Wash.2d at 714. Additionally, the decision in *State v. Bashaw*, 169 Wash.2d 133, 234 P.3d 195 (2010), that relied solely on *Goldberg* for the non-unanimity rule for special verdicts on aggravating circumstances, was also overruled by *Nunez*. *Nunez* 174 Wash.2d at 715. The non-unanimity rule cannot apply to aggravating circumstances found in the SRA, or those found

under the Uniform Controlled Substances Act, chapter 69.50 RCW. *Id.*

The instruction given in the present case was proper and the Appellant's unanimity argument must be rejected.

C. CONCLUSION

Appellant did not preserve their assignments of error pertaining to the special verdict instructions when they did not raise objection to the specific instructions at trial.

Moreover, Appellant's claim that it was error to instruct the jury it must be unanimous to reject the aggravating circumstances in the special verdict forms, was clearly rejected by *State v. Nunez*, 174 Wash.2d 707, 285 P.3d 21, 22 (2012).

Dated this 27 day of Oct 20 12

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NAME OF CASE: State of Washington v. Tansy Mathis & David Richards
Okanogan County Cause No. 09-1-00109-8 & 09-1-00104-7

I hereby certify under penalty and perjury of the laws of the State of Washington that on the **22nd day of October, 2012,** I mailed the original and one copy of **Certificate of Mailing and Supplemental Brief of Respondent's** to the following court and one copy to counsel of record and/or other interested parties by depositing in the mails of the United States of America an addressed envelope with prepaid postage to the following:

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