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I. PROCEDURAL HISTORY

The appellant's initial appellate counsel, Anne Cruser, was allowed to withdraw. The appellant's new counsel then filed a supplemental brief asserting error in the jury instructions pursuant to State v. Bashaw, 169 Wn.2d 13, 234 P.3d 195 (2010). The Court ordered further briefing from the State on this new issue.

II. STATEMENT OF THE CASE

The State relies upon the statement of facts containing in its initial response brief. Where appropriate, this brief cites to additional facts in the record.

III. ISSUES PRESENTED

1. May the appellant complain that the trial court incorrectly instructed the jury when there was no objection at trial?
2. If the jury instructions were in error, was the error harmless?

IV. SHORT ANSWER

1. No.
2. Yes.

V. ARGUMENT

I. The Appellant's Claim Regarding the Unanimity Instruction For the Special Verdicts Was Not Preserved for Appeal.

The appellant argues that the trial court erred by instructing the jury that it must be unanimous to return a special verdict of “no.” However, the appellant did not object to the instructions as given at trial. As such, this claim was not preserved for appeal.

At trial, the jury was instructed to complete six special verdict forms (A-F) related to firearm enhancements and one special verdict form (G) regarding various aggravating factors. Instruction 30 indicated that the jury must be unanimous to return a special verdict. CP 45-46. This instruction was based on the current pattern instruction, former 11A WPIC 160.00. Five months after the trial in this matter, the Washington Supreme Court issued its opinion in State v. Bashaw, 169 Wn.2d 133, 234 P.3d 195 (2010), holding requiring unanimity for a special verdict of “no” was error.

The appellant did not object to the trial court's jury instructions regarding the special verdict forms. RP 403, 410. As he failed to object at trial, the appellant must now show the alleged instructional error was “manifest” as defined by RAP 2.5(a)(3). A manifest error must have

practical and identifiable consequences apparent on the record that would have been reasonably obvious to the trial court. State v. Kirkman, 159 Wn.2d 918, 935, 155 P.3d 125 (2007). The courts will not assume an error is manifest. Kirkman, 159 Wn.2d at 926-927. This rule applies to jury instructions as well. State v. Scott, 110 Wn.2d 682, 685, 757 P.2d 492 (1988). Scott held that a criminal defendant must make timely objections to instructions “in order that the trial court may have the opportunity to correct any error.” 110 Wn.2d at 686, quoting City of Seattle v. Rainwater, 86 Wn.2d 567, 571, 546 P.2d 450 (1976).

Applying this standard, the court in State v. Nunez, No. 28259-7-III, 2011 WL 536431 (no further citation information available), found that failure to comply with the Bashaw rule was not manifest error that could be asserted for the first time on appeal. The Nunez court observed that the rule announced in Bashaw was not based on any constitutional provision, but instead on a common law rule predicated upon judicial economy. 2011 WL 536431 at paragraph 22, Bashaw, 169 Wn.2d at 146 n. 7. The Nunez court correctly noted that this error was not of constitutional magnitude, and falls outside the provisions of RAP 2.5(a)(3). 2011 WL 536437 at paragraph 25. Based on this analysis, the Nunez court refused to consider a Bashaw claim not preserved at trial. Id. at paragraph 30.

The State asks that this Court follow Nunez and find that a Bashaw claim may not be asserted on appeal unless there was a timely objection at trial. The error identified in Bashaw is not of constitutional magnitude, thus the appellant must object at trial for the claim to be preserved. Here, the appellant did not object to the instruction at issue, and this Court should decline to address his tardy claim.

II. The Instructional Error Was Harmless.

As argued above, this Court should decline to reach the issue asserted in the appellant's supplemental brief. However, should the Court reach the merits of this claim, the error was harmless under the facts of this case. Accordingly, the Court should reject the claimed error.

Even if there is error, reversal is not required if the error did not prejudice the appellant. Instructional error may be harmless if it shown "beyond a reasonable doubt that the jury verdict would have been the same without the error." Bashaw, 169 Wn.2d at 147. If the instructional error could not have affected the special verdicts, then reversal is not necessary or appropriate.

The special verdicts at issue here required the jury to decide two distinct issues: (1) whether a firearm was used in the commission of the crimes (Special Verdicts A-F); and (2) whether certain aggravating factors were present (Special Verdict G). Regarding issue (1), the jury had already

unanimously decided the appellant used a firearm by convicting him of assault in the second degree in count III. This conviction required the jury to be unanimously convinced the appellant assaulted Ms. Barrett with a firearm. See RP 420-421. Thus, by deciding count III the jury had necessarily unanimously decided the very issue presented in Special Verdicts A-F. In order for the error at issue to have prejudiced the appellant, there must have been some remaining question for the jury to decide. As there was not, the instructional error cannot be said to have prejudiced the appellant in any meaning way related to this issue.

Regarding issue (2), the jury was asked to decide whether certain aggravating factors had been proven. Special Verdict Form G asked four questions:

Did the defendant know, or should have known, that the victims of the current offense were particularly vulnerable or incapable of resistance?

Was the victims' vulnerability a substantial factor in the commission of the crime?

Did the offenses involve an invasion of the victim's privacy?

Was one of the current offenses a burglary were the victim was present in the building when the crime was committed?

CP 59-60. Considering the facts of the case, none of these questions were in any real dispute. The sole issue presented to the jury at trial was whether the appellant was the person that committed these heinous crimes.

See RP 447 (trial counsel for appellant arguing the case was a “who done it.”). The testimony established beyond any reasonable doubt that the victims were vulnerable persons, as the Barretts were elderly and Mr. Barrett was paralyzed and confined to a hospital bed. The testimony similarly proved beyond any reasonable doubt that the Barretts’ privacy was invaded and that they were present in the residence when the burglary occurred. It strains credulity to see how any jury could not have found the presence of these aggravating factors, regardless of the unanimity instruction given.

Based on the record in the case, the Court should find that the instructional error was harmless beyond any reasonable doubt. The firearm question was resolved by the jury’s verdict on count III, and the aggravating factors were not subject to reasonable dispute. The Court should affirm the jury’s special verdicts.

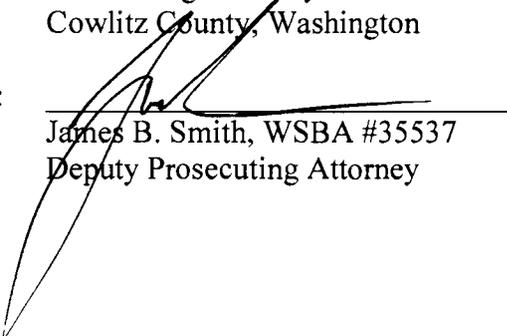
VI. CONCLUSION

Based on the preceding argument, the State respectfully requests the Court to uphold the special verdicts. The judgment and sentence of the trial court should be affirmed.

Respectfully submitted this 17th day of March, 2011.

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COURT OF APPEALS, STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,)
)
 Respondent,)
)
 vs.)
)
 JOSEPH LEE MOORE,)
)
 Appellant.)
 _____)

NO. 40376-5-II
Cowlitz County No.
09-1-01047-9

CERTIFICATE OF
MAILING

I, Michelle Sasser, certify and declare:

That on the 17th day of March, 2011, I deposited in the mails of the United States Postal Service, first class mail, a properly stamped and address envelope, containing Respondent's Response to Supplemental Brief addressed to the following parties:

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Tacoma, WA 98402-4454

Mr. David B. Koch
Nielson, Broman & Koch, PLLC
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Seattle, WA 98122

I certify under penalty of perjury pursuant to the laws of the State of Washington that the foregoing is true and correct.

Dated this 17th day of March, 2011.


Michelle Sasser