

No. 40012-0-II

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

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STATE OF WASHINGTON,

Respondent,

v.

KENNETH CAMPBELL,

Appellant.

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ON APPEAL FROM THE  
SUPERIOR COURT OF THE STATE OF WASHINGTON,  
PIERCE COUNTY

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The Honorables Lisa Worswick (trial and sentencing),  
Ronald E. Culpepper (motions) and Susan K. Serko (motion), Judges

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A. ASSIGNMENTS OF ERROR

1. The firearm special verdicts and the resulting sentencing enhancements must be stricken because the jury was improperly instructed in a way which indicated that the jurors had to be unanimous to answer the special verdict forms “no.”

2. Jury instructions 26, 27, 28 and 29 improperly misled the jury about the law by implying that the jury need to be unanimous in order to answer the special verdicts “no” and thus those instructions deprived appellant Kenneth Campbell of his rights to the benefit of any reasonable doubt and the presumption of innocence for the special verdicts. Copies of the relevant instructions are attached as Appendix C.

3. The trial court abused its discretion in failing to correctly inform the jury that they did not have to be unanimous to find that the state had failed to prove the special verdicts, despite the jurors’ specific question indicating that they did not understand the relevant law.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Campbell was accused of committing two assaults and unlawful possession of a firearm. The assaults and possession were all charged with being committed for the purposes of furthering or obtaining gang membership, and the assaults were also alleged to have been committed while armed with a firearm.

Under State v. Goldberg, 149 Wn.2d 888, 72 P.3d 1083 (2003), and consistent with the principle that the defendant is entitled to the benefit of any reasonable doubt under the presumption of innocence, a jury need not be unanimous in answering a special verdict “no.” During

deliberations, the jurors sent out a question asking whether they had to be unanimous in order to answer the special verdict forms “no.” The parties and court then concluded that the relevant jury instructions were inconsistent and unclear about the answer. The court nevertheless refused to give further instructions to clarify that jurors were not required to be unanimous to answer the special verdicts “no,” instead only telling the jurors to rely on the instructions they had been given.

1. Were the jury instructions improper and misleading where some of the instructions indicated that the jury had to be unanimous in order to perform its duties while the special verdict instruction did not clearly tell the jurors that they need not be unanimous to answer that special verdict “no?”

2. Was the court’s additional instruction an abuse of discretion where it failed to clarify the proper legal standard the jurors should apply and instead simply referred them back to the improper, confusing instructions which had led to the question in the first place?

3. Must the sentencing enhancements based upon the special verdicts be dismissed where those verdicts were the result of instructions which tainted the deliberative process so that it is not possible to deem the error harmless?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant Kenneth Campbell was charged by second amended information with two counts of second-degree assault, both alleged to

have been committed while armed with a firearm and also for the purposes of furthering or obtaining gang position, and one count of unlawful possession of a firearm in the first-degree, alleged to have been committed for the purposes of furthering or obtaining gang position. CP 129-30; RCW 9.41.010(12), RCW 9.41.040, RCW 9A.36.021(1)(c), RCW 9.94A.310, RCW 9.94A.370, RCW 9.94A.510, RCW 9.94A.530, RCW 9.94A.535(3)(s).

After pretrial motions on May 20, 2009, before the Honorable Judge Susan K. Serko and on August 27, September 10, 17, 22 and 29, 2009, before the Honorable Judge Ronald Culpepper, motions and trial were held before the Honorable Judge Lisa Worswick on September 30, 2009, October 1, 5, 6, 7, 8, 12 and 13, 2009. 1RP 1, 2RP 1, RP 1, 84, 207, 366, 463, 578.<sup>1</sup> The jury found Campbell guilty of the assaults and the unlawful possession, and of committing the assaults with a firearm, but did not find that any of the crimes were committed for the purposes of furthering or obtaining gang position. CP 253-60.

On November 13, 2009, Judge Worswick ordered Campbell to serve standard-range sentences for each of the three offenses, to run concurrently, and two 36-month firearm enhancements, for a total sentence of 108 months in custody. RP 721; CP 263-76.

Campbell appealed and this pleading follows. See CP 292-306.

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<sup>1</sup>The verbatim report of proceedings in this case consists of 9 volumes of transcript, which will be referred to as follows:  
the motion hearing of May 20, 2009, as "1RP;"  
the motion hearings of August 27, September 10, 17, 22 and 29, 2009, as "2RP;"  
the 7 chronologically paginated volumes containing the trial and sentencing on September 30, October 1, 5, 7 (a.m. and p.m. separate), 8, 12 and 13, 2009, and November 13, 2009, as "RP."

2. Testimony at trial

On December 3, 2008, at about 10 at night, someone fired several shots at Dale Dyer's house. RP 358–59. Dyer, who was not home at the time, had gone with his wife to the corner store just a few moments before. RP 359. When they returned from the store and were about a block and a half away from the house, they heard what Dyer described as “probably about eight or nine gunshots.” RP 360, 371.

Dyer did not see anyone with a gun or any cars at the time, but the sounds made him walk a little faster getting home. RP 360, 374.

Lakewood Police Department (LPD) officer Brian Wurts happened to live nearby. RP 220. He was sitting in his outdoor hot tub at the time and heard the sound of “rapid gunfire.” RP 220. He jumped out of the hot tub, grabbed his gun and got on his portable radio to call “dispatch” to report what he had heard. RP 221. LPD officer Aaron Grant responded to the call and found a man, later identified as Dyer, walking in the street. RP 232. Dyer said it was his house that had been involved and Grant then followed Dyer back there. RP 234.

After holding Dyer at gunpoint and in a police car for awhile, officers realized Dyer was not involved in the shooting. RP 361.

Nine gunshot shell casings were found on the ground in the street in front of the house, and a blue truck in front of the house had two bullet holes and sported a bullet inside its engine block. RP 234-36. There was damage to the front screen door which Grant opined indicated a round had “hit the screen door, ricocheted or glanced off the screen door, hit the side of the house near the front door,” and then come to rest in the front

walkway area. RP 238. Dyer said his truck had not previously had gunshots, nor had the door had a bullet hole. RP 362. A month later, when he was moving some stuff out he noticed a bullet hole in a window that he had not seen before. RP 362.

Mark<sup>2</sup> Dyer, who was 17 at the time of trial, was at the house in the living room with some friends, his little sister and two brothers and a man named Alton Young at the time of the incident. RP 319. They were playing video games when they heard some gunshots and Mark's brother said, "[h]it the ground. Hit the ground," at the same time turning off the lights. RP 319-20. Mark went outside after the shots and did not see anyone. RP 321, 327. No one in the house got hurt and nothing inside the house was damaged. RP 321, 374.

Several people in the home were associated with gangs. RP 316, 324-27, 335-38, 363, 380-81. None of them saw anyone shooting or identified any cars they thought were associated with what happened. RP 334, 380-81.

LPD Officer Brent Prante was on his way to the area in an unmarked car when two black teenage males walking towards him stopped and looked at him. RP 294. One of the men then turned around and ran while the other put his head down and started walking away. RP 294. The officer notified "dispatch" of where the runner was headed while Prante ordered the walker to stop. RP 297-98.

A K-9 officer was put on track where Prante had seen the runner

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<sup>2</sup>Because Mark Dyer shares the same last name as his father, another witness, he will be referred to as "Mark" herein for clarity. No disrespect is intended.

and the dog led officers over a fence and to a jacket, some gloves and a handgun. RP 255, 263, 282. The dog tracked some more and indicated on a hat lying in a nearby driveway. RP 265. At that point, the scent was lost. RP 275. The gun was later found to be the one from which the nine casings and two bullets had been ejected or fired. RP 523-29.

The walker, Steven Kelly, later pled guilty to two counts of assault and one firearm enhancement for his part in the incident. RP 445-48. He denied being the shooter, instead claiming it was someone named Kenneth Campbell who had fired the gun. RP 469-72. According to Kelly, Campbell had said something about wanting to “go put in some work,” which Kelly said meant to go shoot at someone’s house. RP 469-72. Kelly said that he and Campbell were in a car which dropped off near the incident and Campbell tried to hand Kelly the gun, saying, “[h]ere, cuz.” RP 482. Kelly said he told Campbell not to do anything but Campbell walked to a specific house and started shooting. RP 484-87.

Kelly claimed he did not know whose house was involved. RP 375. It was Kelly, however, that Dyer knew and Kelly who had previously been involved in a confrontation with Dyer and his family members. RP 375. In fact, Dyer had never met Campbell. RP 375.

Dyer explained that he had been involved in a “hostile encounter” caused by Kelly at the Lakewood mall a few months earlier, in July, when Kelly was confronting Dyer’s son and Kelly pulled out a gun. RP 375.

Monica Johnston, who had been seeing Campbell romantically for about four months at the time of the incident, said she had been driving with Kelly and Campbell in the car and they had told her to pull over and

let them out. RP 384-94. She did so and went home where, about 15 minutes later, Campbell showed up. RP 393-94. She dropped him off at a friend's house a little later but he then called and asked her to drive down the street to see if she saw Kelly. RP 394. When she did as Campbell requested, she saw Kelly on the side of the road, being arrested. RP 394. Later on, about 12:30 or 1 a.m., Campbell called Johnston again and she picked him up and stayed the night with him at Campbell's father's house. RP 395. At 6 a.m. the next morning, police came and ordered everyone out of the house and arrested Johnston, among others. RP 395-96. Johnston had been in custody ever since. RP 396.

Johnston identified the jacket which was found as looking like one Campbell owned. RP 413. Campbell did not, however, have gloves on that night, and Johnston said she never saw a gun. RP 414.

Johnston was not at the incident when it occurred. RP 433. She nevertheless entered a plea to some charges in order to avoid charges which would have led to 111-147 months in custody, away from her child. RP 410-20. At trial, Johnston opined that "they" - meaning Kelly and Campbell - had committed a crime after she let them out of the car. RP 410-33. She admitted, however, that what she was saying she thought the two men "did" was based on what she was told by police or read in police reports only. RP 433.

Kelly was originally charged with offenses which would have resulted in a sentence of between 138 and 184 months in prison and another "60 months for the gun on top of that." RP 499. As a result of his "deal," he agreed to testify against Campbell and was facing at most 56

months in custody. RP 500.

Erinn Dyer, the wife of Mr. Dyer, said that, when police arrived after the incident, she told them about someone making threats against Alton Young, who had been staying at the Dyer home for about a week. RP 618-22. Dyer said Tauna Johnson had been threatening Young, saying “she would not come through fighting with her fists; that she would come through with a gun, shooting.” RP 621-22. Johnson had left this threat in a voice mail message which Mrs. Dyer not only told police about but played for them. RP 621.

That threat was made about a day before the shooting. RP 623-26.

D. ARGUMENT

THE JURY INSTRUCTIONS ON THE SPECIAL VERDICTS  
WERE IMPROPER AND THE RESULTING VERDICTS MUST  
BE STRICKEN

At sentencing, Campbell was ordered to serve two consecutive 36-month terms of flat time for the firearm enhancements. Those two terms must be stricken under the controlling precedent of State v. Bashaw, \_\_\_ Wn.2d \_\_\_, \_\_\_ P.3d \_\_\_ (2010 WL 2615794) (July 1, 2010)<sup>3</sup>, because the jurors were improperly instructed in a way which indicated that they had to be unanimous not only to answer the special verdicts “yes” but also “no.”

a. Relevant facts

At trial, the jury was given several instructions regarding whether it had to be unanimous in deciding all aspects of the case. See CP 245-52

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<sup>3</sup>A copy of the decision is attached as Appendix A for the Court’s convenience.

Instruction 26 told jurors, in relevant part, that jurors had a “duty” to deliberate “in an effort to reach a unanimous verdict.” CP 248-49.

Instruction 27 also told jurors, “[b]ecause this is a criminal case, each of you must agree for you to return a verdict. When all of you have so agreed, fill in the verdict forms to express your decision.” CP 249-50.

Instruction 28, the instruction on special verdicts, told the jury:

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 have a reasonable doubt as to the question, you must answer “no.”

CP 251.

After closing argument on October 12, 2009, the jury started deliberating at 2:59 p.m. and were dismissed at 4:05, returning the next day to start deliberations at 9:16. See Supp. CP \_\_\_ (clerk’s minutes at 11).

After lunch that next day, when they had deliberated for a short time, they sent out a question at 1:24 p.m., in which they asked:

In regards to the special verdict forms, if we are not in unanimous agreement can we render the answer “no” or must we all agree unanimously “yes” or “no.”

CP 217-18.<sup>4</sup>

When the parties appeared before the court to argue about how to respond to the question, the court said that the “legal answer” to the jury’s question was that “they don’t have to unanimously agree to no” and “[t]hey would only have to unanimously agree to yes.” RP 697. The court admitted that the special verdict instruction, instruction 28, did not “exactly direct them in that fashion.” RP 697. The prosecutor disagreed,

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<sup>4</sup> A copy of the question is attached as Appendix B.

arguing that the jury had to be unanimous to answer either yes or no on a special verdict. RP 698-99. For her part, defense counsel thought it was “very, very clear” that the jurors were not required to be unanimous to answer no, asking that the jurors be so informed. RP 699.

At that point, confusingly, the court then said that the “rule isn’t that they can answer no, if they’re not unanimous” but that it was deemed as a “hung” jury. RP 700. Counsel responded that she thought it would be misleading to suggest to the jury that it had to be unanimous to answer “no.” RP 700. The prosecutor again advanced the theory that the jury should be instructed, “[y]ou must be unanimous as to your decision in regard to the special verdict forms.” RP 702. When counsel objected, the court said “[h]ung isn’t a no answer legally” but only “for the purposes of this case.” RP 702. The court then examined Goldberg and other caselaw and concluded that the answer was to “tell them to follow the instruction that’s given to them.” RP 703. The prosecutor then said:

They followed the instruction. I agree with that, but the instruction did not clearly state the law. That’s the issue. . .the instruction is not clear. And it’s not accurate.

Even though we agreed to it, and we presented it to the Court and asked you to give it to the jury, this issue has come up for the first time that I’ve ever seen it, but it’s clear to the State what the jury is asking, and the bottom line is that that instruction is misleading.

The law is you must be unanimous, yes or no.

RP 704. The prosecutor said “it’s not too late yet” to give the jury that information. RP 705.

The court then said that it was in that gray area where we have a question indicating that potentially

they're deadlocked. They want further instruction from us. I'm not comfortable giving them any additional information with regard to the instructions because it leads to treading on what they're doing.

RP 705. The court declared, 'I'm just going to tell them to refer to their jury instructions, and we'll see where it leads us.' RP 705. The court then gave the jurors that instruction. CP 217-18.

That instruction was read to the jurors at 2:39 in the afternoon on October 13, 2009. Supp. CP \_\_\_\_ (clerk's minutes at 11-12). One minute later, the jurors took their afternoon recess for an unspecified time. Id. At 3:00, the jurors came back with its verdicts, including special verdicts finding that Campbell was armed with a firearm for both assault offenses but that he did not commit the offenses for the purposes of furthering, maintaining or establishing gang position. RP 707-708; CP 256-60.

The sentence later imposed on Campbell included two 36-month firearm enhancements, ordered as "flat time" and to run consecutively to each other and to the time on the underlying offenses. RP 721; CP 265-76.

- b. The instructions were misleading and deprived Campbell of his right to the benefit of the doubt and to be cloaked with the presumption of innocence for the special verdicts and the resulting "yes" verdicts must be stricken

The two firearm enhancements must be stricken, because the jury instructions on those verdicts were misleading and deprived Campbell of his right to the benefit of any doubt, as well as depriving him of the presumption of innocence for the special verdicts. Further, the trial court erred in refusing to correct the improper instructions.

First, the jury instructions were improper and misleading, as the parties themselves realized once the jurors sent out their question. Jury instructions are sufficient if they are supported by substantial evidence, allow the parties to argue their theories of the case, do not mislead the jury and, when taken as a whole, they properly inform the jury of the applicable law. See State v. Clausing, 147 Wn.2d 620, 626, 56 P.3d 550 (2002). Instructions are review de novo, to determine whether they met those standards. See State v. Pirtle, 127 Wn.2d 628, 656, 904 P.2d 245 (1995), cert. denied, 518 U.S. 1026, 116 S. Ct. 2568, 135 L. Ed. 2d 1084 (1996).

The instructions in this case did not meet those standards. First, Instruction 26, the instruction on deliberation told the jurors their duty was “to deliberate in an effort to reach a unanimous verdict.” CP 247. Instruction 27 also told the jurors, “[b]ecause this is a criminal case, each of you must agree for you to return a verdict.” CP 248-49. But the special verdict instruction, Instruction 28, then told the jurors:

You will also be furnished with special verdict forms. If you find the defendant not guilty do not use the special verdict forms. If you find the defendant guilty, you will then use the special verdict forms and fill in the blank with the answer “yes” or “no” according to the decision you reach. **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 have a reasonable doubt as to the question, you must answer “no.”**

CP 250 (emphasis added).

Taken together, these instructions were misleading and incorrect, because they gave the improper impression that unanimity was required not only in order to conclude that the state had met its burden of proving

the special verdict but also to find that it had *not*. Under Goldberg, *supra*, however, while unanimity is required to *convict* on a special verdict, however, it is *not* required for the jury to conclude that the state has not satisfied its burden of proving the special verdict. See Goldberg, 149 Wn.2d at 890. Instead, the Supreme Court held, for special verdicts on such things as aggravating factors or enhancements, “the jury **must be unanimous** to find the State has proven the existence of the aggravating factor beyond a reasonable doubt” but is not required to be unanimous in order to answer the special verdict “no.” 149 Wn.2d at 892-93 (emphasis in original).

Thus, not all jurors have to agree that the prosecution has not proven an enhancement in order to answer “no” on a special verdict. See id. This has the practical effect of ensuring that the defendant receives the benefit of any reasonable doubt - a benefit to which he is clearly entitled as part of the presumption of innocence. See State v. Warren, 165 Wn.2d 17, 26-27, 195 P.3d 940 (2008), cert. denied, \_\_\_ U.S. \_\_\_, 129 S. Ct. 2007, 173 L. Ed. 2d 1102 (2009). If some jurors have such doubts whether the state has met its burden of proving a special verdict, the special verdict is answered “no” and the defendant is given the benefit of those doubts.

Thus, in Goldberg, where the jury was given the same special verdict instruction as that which was given here, the defendant was entitled to the “no” verdict originally rendered by the jurors, even though the jury poll showed that “no” was not unanimous. 149 Wn.2d at 891-93. The trial court erred in refusing to accept that “no” and in ordering the jurors to continue deliberation until they were “unanimous,” the Supreme

Court held, because there was no requirement for such unanimity in order to answer “no.” Id.

If there were doubts about whether the Goldberg decision meant what it said, those doubts were laid to rest by a near-unanimous Court recently in Bashaw, supra. In that case, the Supreme Court adhered to Goldberg and declared, plainly, 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,” such as a special verdict. \_\_\_ Wn.2d at \_\_\_ (slip op. at 14-15). This was the “rule from Goldberg,” the Bashaw Court held, and it is an “incorrect statement of the law” to instruct the jurors that in a way indicating that they have to agree in order to answer a special verdict. Bashaw, \_\_\_ Wn.2d at \_\_\_ (slip op. at 16). Instead, the Supreme Court held, unanimity is only required to find the “*presence* of a special finding increasing the maximum penalty. . . [but] it is not required to find the *absence* of such a special finding. \_\_\_ Wn.2d at \_\_\_ (slip op. at 16) (emphasis in original).

Put another way, the Bashaw Court held, “[a] nonunanimous jury decision on . . . a special finding is a final determination that the State has not proved that finding beyond a reasonable doubt.” \_\_\_ Wn.2d at \_\_\_ (slip op. at 13, 15). Thus, jurors need not be unanimous to answer a special verdict form “no” under the law of this state. Id.; see Goldberg, 149 Wn.2d at 890.

Here, the instructions did not make this standard clear, as evidenced by the jury’s question. The instructions, first informing the jurors that they had to agree to render a verdict and that their duty was to

do so and then not making it clear that such agreement or unanimity was not required to answer the special verdicts “no” clearly misstated the proper standard and misled the jury. Even if the instructions themselves did not reveal this error, the jury’s question did, informing the court that the jurors were not clear about whether such unanimity was required.

Instead of remedying the problem, however, the trial court compounded it by failing to instruct the jury properly when the issue arose as a result of the jurors’ question. While a court has discretion to decide whether to give clarifying instructions when a juror question has been asked, it is an abuse of that discretion to fail to correct an erroneous understanding of the law. See, State v. Davenport, 100 Wn.2d 757, 764, 675 P.2d 1213 (1984). In addition, to simply give an instruction telling jurors to rely on the instructions already given “could not fairly be called a curative instruction” where, as here, the instructions the jurors were given were the problem in the first place. See, e.g., Davenport, 100 Wn.2d at 764-65.

Dismissal of the enhancements and remand for resentencing without those enhancements is required. Bashaw, supra, controls. In Bashaw, after concluding that it was error to instruct the jury that it had to be unanimous in order to answer the special verdict, the Supreme Court then turned to the question of whether the error could be deemed harmless and concluded it could not. \_\_\_ Wn.2d at \_\_\_ (slip op. at 15-16). The Court reached this conclusion after looking at the “several important policies” behind prohibiting retrial on an enhancement alone. A second trial “exact[s] a heavy toll on both society and defendants,” crowds court

dockets, delays other cases and helps “drain state treasuries,” the Court noted, so that the “costs and burdens of a new trial, even if limited to the determination of a special finding, are substantial.” \_\_\_ Wn.2d at \_\_\_ (slip op. at 15). Further, the Court declared:

Retrial of a defendant implicates core concerns of judicial economy and finality. Where, as here, a defendant is already subject to a penalty for the underlying substantive offense, the prospect of an additional penalty is strongly outweighed by the countervailing policies of judicial economy and finality.

\_\_\_ Wn.2d at \_\_\_ (slip op. at 15-16).

Considering those policies, the Court next rejected the idea that the polling of the jury to have them affirm the verdict somehow rendered the error “harmless.” \_\_\_ Wn.2d at \_\_\_ (slip op. at 16). To find the error “harmless,” the Court said, it would have to be able to conclude beyond a reasonable doubt that the jury would have reached the same verdict, absent the error. \_\_\_ Wn.2d at \_\_\_ (slip op. at 16). This it could not do because the error in the procedure so tainted the conclusion:

The result of the flawed deliberative process tells us little about what result the jury would have reached had it been given a correct instruction. *Goldberg* is illustrative. There, the jury initially answered “no” to the special verdict, based on a lack of unanimity, until told it must reach a unanimous verdict, at which point it answered “yes.” Given different instructions, the jury returned different verdicts. We can only speculate why this might be so. **For instance, when unanimity is required, jurors with reservations might not hold to their positions or may not raise additional questions that would lead to a different result.**

\_\_\_ Wn.2d at \_\_\_ (slip op. at 16-17) (citations omitted; emphasis added).

As a result, the Supreme Court held, it was not possible to “say with any confidence what might have occurred had the jury been properly instructed” and “[w]e therefore cannot conclude beyond a reasonable

doubt that the jury instruction error was harmless.” \_\_\_ Wn.2d \_\_\_ (slip op. at 17).

Notably, the Bashaw Court reached this conclusion even though it had already found that evidentiary error in relation to two of the three special verdicts and sentencing enhancements was harmless in light of the evidence in the case. \_\_\_ Wn.2d at \_\_\_ (slip op. at 2-17). In Bashaw, the three enhancements were for three counts of delivery of a controlled substance, alleged to have each occurred within 1,000 feet of a school bus route stop and thus subject to a “school bus route stop” sentencing enhancement. \_\_\_ Wn.2d at \_\_\_ (slip op. at 2-3). The prosecution relied on evidence from a measuring device which was not properly shown to be reliable. Id. The measuring device indicated that the three deliveries occurred 1) within 924 feet of a school bus route stop, 2) within 100 feet of a school bus route stop and 3) within 150 feet of a school bus route stop. \_\_\_ Wn.2d at \_\_\_ (slip op. at 3). Officers also testified that the first delivery was approximately 1/10 mile (528 feet) or 1/4 mile (1,320 feet) from the stop. \_\_\_ Wn.2d at \_\_\_ (slip op. at 4).

After first finding that the measuring device evidence should have been excluded, the Court concluded that admission of that evidence was harmless error as to the second and third deliveries, because the evidence was such that there was “no reasonable probability” that the jury would have concluded that those deliveries had not taken place within 1,000 feet of the stop if the measuring device evidence had been excluded. \_\_\_ Wn.2d at \_\_\_ (slip op. at 4-12).

Despite that evidence, however, the Court reversed the

enhancements for the second and third deliveries based upon the error in the instructions for the special verdicts. \_\_\_ Wn.2d at \_\_\_ (slip op. at 13-17). The Court was not concerned with whether there was sufficient evidence to support the enhancements despite the improper instruction, because the issue was that the procedure in gaining the verdict rendered it fundamentally flawed. \_\_\_ Wn.2d at \_\_\_ (slip op. at 16-17). Indeed, the Court did not examine the issue in the light of the strength or weaknesses of the evidence on the enhancements, instead focusing on how the “flawed deliberative process” was such that the Court could not determine what result the jury would have reached, had it been properly instructed. \_\_\_ Wn.2d at \_\_\_ (slip op. at 16-18).

As a result, under Bashaw, reversal and dismissal of the sentencing enhancements did not depend upon whether there was evidence which the jury *could have* relied on in saying “yes” to the special verdicts, nor did the Court substitute its own belief about whether the evidence would have supported verdicts of “yes.” Id. Instead, the near-unanimous Court refused to engage in such speculation in light of the jury instruction error, finding that the error compelled reversal. Id.

Here, just as in Bashaw, there is no way to be sure that the jury instruction error was harmless beyond a reasonable doubt, despite the verdicts of “yes” for the firearm enhancements. As in Bashaw, the misleading, confusing and improper jury instructions tainted the entire process. And as in Bashaw, the question is not whether there was evidence from which the jurors could have entered “yes” to the special verdicts, nor is it the Court’s role to substitute its own belief about the

strength or weakness of that evidence in order to uphold the defective special verdicts. Because the instructional error tainted the deliberative process and misled the jury into thinking that it had to be unanimous in order to answer “no” to the special verdicts, reversal and dismissal of the firearm special verdicts and remand for resentencing without those verdicts is required.

Finally, although the Court in Bashaw did not address this issue, the improper instructions also deprived Campbell of his constitutional right to the “benefit of the doubt” under the presumption of innocence. That presumption is the “bedrock upon which the criminal justice system stands.” State v. Bennett, 161 Wn.2d 303, 315-16, 165 P.3d 1241 (2007). A defendant is constitutionally entitled to the benefit of the doubt when it comes to determining whether the state has proven its case. Warren, 165 Wn.2d at 26-27. In the context of a special verdict, indicating to jurors that they have to be unanimous not only to answer “yes” but also to answer “no” deprives the defendant of the benefit of the doubts some jurors may have had. As the Bashaw Court noted, where, as here, the jury is under the mistaken belief that unanimity is required, “jurors with reservations might not hold to their positions or may not raise additional questions that would lead to a different result.” \_\_\_ Wn.2d at \_\_\_ (slip op. at 17).

Because the jury was improperly instructed and misled about whether it had to be unanimous in order to answer the special verdict forms “no,” the special verdicts on the firearm enhancements must be stricken under Bashaw. Reversal and remand for resentencing without

those enhancements is required.

E. CONCLUSION

For the reasons stated herein, reversal and remand for resentencing without the firearm enhancements is required.

DATED this 6th day of July, 2010.

Respectfully submitted,



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CERTIFICATE OF SERVICE BY MAIL

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Appellant's Opening Brief to opposing counsel and to appellant by depositing the same in the United States Mail, first class postage pre-paid, as follows:

to Ms. Kathleen Proctor, Esq., Pierce County Prosecutor's Office,  
946 County City Building, 930 Tacoma Ave. S., Tacoma, WA. 98402;

to Mr. Kenneth Campbell, DOC 335947, Coyote Ridge CC, P. O.  
Box 769, Connell, WA. 99326-0769.

DATED this 07 day of July, 2010.



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# APPENDIX A

--- P.3d ---, 2010 WL 2615794 (Wash.)  
(Cite as: 2010 WL 2615794 (Wash.))

Only the Westlaw citation is currently available.

Supreme Court of Washington,  
En Banc.  
STATE of Washington, Respondent,  
v.  
Bertha Iola BASHAW, Petitioner.  
No. 81633-6.

July 1, 2010.

**Background:** Defendant was convicted in a jury trial in the Superior Court, Ferry County, Rebecca M. Baker, J., of three counts of delivery of a controlled substance, and was found to have committed each offense within 1,000 feet of a school-bus stop, as a sentence enhancement. Defendant appealed. The Court of Appeals, 144 Wash.App. 196, 182 P.3d 451, affirmed. Defendant appealed.

**Holdings:** The Supreme Court, en banc, Susan Owens, J., held that:

- (1) court improperly admitted evidence from distance measuring device;
- (2) admission was harmless error with respect to two of three counts;
- (3) admission was not harmless error with respect to remaining charge;
- (4) instruction as to unanimity requirement for special sentencing finding was erroneous; and
- (5) error was not harmless error.

Reversed and remanded.

Barbara A. Madsen, C.J., dissented and filed opinion in which Gerry L. Alexander and James M. Johnson, JJ., joined.

#### West Headnotes

#### [1] Criminal Law 110 ⚡1139

110 Criminal Law  
110XXIV Review  
110XXIV(L) Scope of Review in General

#### 110XXIV(L)13 Review De Novo

110k1139 k. In General. Most Cited

#### Cases

The Supreme Court reviews challenged jury instructions de novo.

#### [2] Criminal Law 110 ⚡1153.1

110 Criminal Law  
110XXIV Review

110XXIV(N) Discretion of Lower Court

110k1153 Reception and Admissibility of

#### Evidence

110k1153.1 k. In General. Most Cited

#### Cases

The Supreme Court reviews the admission of evidence for abuse of discretion.

#### [3] Criminal Law 110 ⚡1147

110 Criminal Law  
110XXIV Review

110XXIV(N) Discretion of Lower Court

110k1147 k. In General. Most Cited Cases

Abuse of discretion exists when a trial court's exercise of its discretion is manifestly unreasonable or based upon untenable grounds or reasons.

#### [4] Criminal Law 110 ⚡444.4

110 Criminal Law  
110XVII Evidence

110XVII(P) Documentary Evidence

110k444 Authentication and Foundation

110k444.4 k. Sufficiency of Evidence;

Standard of Proof in General. Most Cited Cases

Authentication of evidence requires that the proponent produce proof sufficient to support a finding that the matter in question is what its proponent claims. ER 901(a).

#### [5] Criminal Law 110 ⚡444.4

110 Criminal Law  
110XVII Evidence

110XVII(P) Documentary Evidence

110k444 Authentication and Foundation

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110k444.4 k. Sufficiency of Evidence; Standard of Proof in General. Most Cited Cases  
The party offering evidence must make a prima facie showing consisting of proof that is sufficient to permit a reasonable juror to find in favor of authenticity or identification. ER 901(a).

**[6] Criminal Law 110 ↪388.4(3)**

110 Criminal Law  
110XVII Evidence  
110XVII(I) Competency in General  
110k388 Experiments and Tests; Scientific and Survey Evidence  
110k388.4 Speed; Radar  
110k388.4(3) k. Reliability of Particular Testing Devices. Most Cited Cases  
Authentication of speed measuring devices requires a showing that the particular unit was functioning properly and produced accurate results at the time it was employed. ER 901.

**[7] Sentencing and Punishment 350H ↪964**

350H Sentencing and Punishment  
350HIV Sentencing Guidelines  
350HIV(H) Proceedings  
350HIV(H)2 Evidence  
350Hk964 k. Admissibility in General. Most Cited Cases  
Before the State introduces evidence that will result in a mandatory penalty enhancement, the State must show that the evidence it relies upon is accurate. ER 901(a).

**[8] Criminal Law 110 ↪388.3**

110 Criminal Law  
110XVII Evidence  
110XVII(I) Competency in General  
110k388 Experiments and Tests; Scientific and Survey Evidence  
110k388.3 k. Foundation or Authentication in General. Most Cited Cases  
Results of a mechanical device are not relevant, and therefore are inadmissible, until the party offering the results makes a prima facie showing that the device was functioning properly and produced accurate results. ER 901(a).

**[9] Criminal Law 110 ↪388.3**

110 Criminal Law  
110XVII Evidence  
110XVII(I) Competency in General  
110k388 Experiments and Tests; Scientific and Survey Evidence  
110k388.3 k. Foundation or Authentication in General. Most Cited Cases  
A showing that a distance measuring device is functioning properly and producing accurate results is a prerequisite to admission of the results. ER 901(a).

**[10] Criminal Law 110 ↪388.4(3)**

110 Criminal Law  
110XVII Evidence  
110XVII(I) Competency in General  
110k388 Experiments and Tests; Scientific and Survey Evidence  
110k388.4 Speed; Radar  
110k388.4(3) k. Reliability of Particular Testing Devices. Most Cited Cases  
For speed measuring devices relying on complex scientific principles, authentication is a compound determination, first involving the qualifications of a witness and then whether the mechanical device operated reliably. ER 702, 901(a).

**[11] Criminal Law 110 ↪388.3**

110 Criminal Law  
110XVII Evidence  
110XVII(I) Competency in General  
110k388 Experiments and Tests; Scientific and Survey Evidence  
110k388.3 k. Foundation or Authentication in General. Most Cited Cases  
State failed to make a prima facie showing that rolling wheel measuring device produced accurate results, and therefore results were improperly admitted in drug prosecution in which sentence was enhanced due to distance from school bus stop; no comparison of results generated by the device to a known distance was made nor was there any evidence that it had ever been inspected or calibrated. ER 901(a).

**[12] Criminal Law 110 ↪388.3**

110 Criminal Law

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110XVII Evidence

110XVII(Q) Competency in General

110k388 Experiments and Tests; Scientific and Survey Evidence

110k388.3 k. Foundation or Authentication in General. Most Cited Cases  
Some devices operate in a manner such that any failure by the device to produce accurate results would be immediately obvious to the user; in such cases, it may be inferred from testimony by the user about measurements with the device that the results are accurate for purposes of authentication. ER 901(a).

**[13] Criminal Law 110 ↪1169.1(1)**

110 Criminal Law

110XXIV Review

110XXIV(Q) Harmless and Reversible Error

110k1169 Admission of Evidence

110k1169.1 In General

110k1169.1(1) k. Evidence in General. Most Cited Cases

The improper admission of evidence to support a criminal conviction may be harmless error.

**[14] Criminal Law 110 ↪1168(1)**

110 Criminal Law

110XXIV Review

110XXIV(Q) Harmless and Reversible Error

110k1168 Rulings as to Evidence in General

110k1168(1) k. Prejudice to Rights of

Accused in General. Most Cited Cases

An evidentiary error is not harmless if, within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected.

**[15] Criminal Law 110 ↪1177.3(2)**

110 Criminal Law

110XXIV Review

110XXIV(Q) Harmless and Reversible Error

110k1177.3 Sentencing and Punishment

110k1177.3(2) k. Sentencing Proceedings in General. Most Cited Cases

Improper admission of results of distance test using unauthenticated distance measuring device was harmless error with respect to two of three drug charges in drug prosecution in which sentences were

enhanced due to proximity of alleged drug sales to school bus route stop, where, apart from the measurement results with respect to two of the counts, testimony at trial addressed the relevant locations and distances between the drug transactions and the school bus stop route. ER 901(a).

**[16] Criminal Law 110 ↪1177.3(2)**

110 Criminal Law

110XXIV Review

110XXIV(Q) Harmless and Reversible Error

110k1177.3 Sentencing and Punishment

110k1177.3(2) k. Sentencing Proceedings in General. Most Cited Cases

Improper admission of results of distance test using unauthenticated distance measuring device was not harmless error with respect to one of three drug charges in prosecution in which sentences were enhanced due to proximity of alleged drug sales to school bus route stop, where there was conflicting testimony as to whether sale occurred within 1,000 feet of the bus stop, and an aerial photograph of the area contained no scale or other method of accurately determining distance. ER 901(a).

**[17] Criminal Law 110 ↪872.5**

110 Criminal Law

110XX Trial

110XX(K) Verdict

110k872.5 k. Assent of Required Number of Jurors. Most Cited Cases

General verdicts in criminal cases must be unanimous to convict or acquit. Wash. Const. art. I, § 21.

**[18] Criminal Law 110 ↪872.5**

110 Criminal Law

110XX Trial

110XX(K) Verdict

110k872.5 k. Assent of Required Number of Jurors. Most Cited Cases

A nonunanimous jury decision after a jury has unanimously found a defendant guilty of a substantive crime and proceeds to make an additional finding that would increase the defendant's sentence beyond the maximum penalty allowed by the guidelines is a final determination that the State has not proved that finding beyond a reasonable doubt.

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**[19] Criminal Law 110 ↪872.5**

110 Criminal Law

110XX Trial

110XX(K) Verdict

110k872.5 k. Assent of Required Number of

Jurors. Most Cited Cases

Though unanimity is required to find the presence of a special finding increasing a maximum penalty, it is not required to find the absence of such a special finding.

**[20] Criminal Law 110 ↪798(.5)**

110 Criminal Law

110XX Trial

110XX(G) Instructions: Necessity, Requisites, and Sufficiency

110k798 Manner of Arriving at Verdict

110k798(.5) k. In General; Unanimity.

Most Cited Cases

**Criminal Law 110 ↪1172.1(2)**

110 Criminal Law

110XXIV Review

110XXIV(Q) Harmless and Reversible Error

110k1172 Instructions

110k1172.1 In General

110k1172.1(2) k. Particular Instruc-

tions. Most Cited Cases

Erroneous jury instruction regarding unanimity requirement for special sentencing finding was not harmless error in drug prosecution; Supreme Court could not say with any confidence what might have occurred in the deliberation process had the jury been properly instructed.

**[21] Criminal Law 110 ↪1172.1(1)**

110 Criminal Law

110XXIV Review

110XXIV(Q) Harmless and Reversible Error

110k1172 Instructions

110k1172.1 In General

110k1172.1(1) k. Instructions in

General. Most Cited Cases

In order to hold that a jury instruction error was harmless, the Supreme Court must conclude beyond a reasonable doubt that the jury verdict would have been

the same absent the error.

Appeal from Ferry County Superior Court; 06-1-00028-5, Honorable Rebecca M. Baker, Judge. Shadan Kapri, Stevens County Prosecuting Attorney, Colville, WA, for Respondent.

David N. Gasch, Gasch Law Office, Spokane, WA, for Petitioner.

OWENS, J.

\*1 ¶ 1 Bertha **Bashaw** was convicted of three counts of delivery of a controlled substance. Because the jury determined that each offense occurred within 1,000 feet of a school bus route stop, her maximum sentence was doubled by statute. **Bashaw** argues that distance measurements of a mechanical device were improperly admitted because the State failed to demonstrate that the device functioned reliably. **Bashaw** further contends that the jury instructions incorrectly required unanimity for a finding that her actions did not take place within 1,000 feet of the school bus route stop. We agree with both of **Bashaw's** arguments, though we find the improper admission of the results harmless with respect to two of the sentence enhancements. Because the instructional error was not harmless, however, we reverse all three sentence enhancements and remand the case to the trial court for further proceedings consistent with this opinion.

Facts

¶ 2 In July 2007, the State charged **Bashaw** with three counts of delivery of a controlled substance based on three separate sales to a police informant. The State also sought a sentence enhancement, pursuant to RCW 69.50.435(1)(c), based on its allegation that each sale took place within 1,000 feet of a school bus route stop. That enhancement allows for imprisonment of up to twice the period otherwise authorized. Count I was alleged to have occurred on May 11, 2006, some distance south of the former Vaagen Mill's parking lot. Counts II and III were alleged to have occurred on May 23 and May 31, 2006, respectively, in the parking lot of the former mill.

¶ 3 At trial, witness testimony established the locations of the school bus route stops and the drug transactions. Dan Chaplik, superintendent of the Re-

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public School District, testified to the locations of two school bus route stops in the area. One was in the “main driveway” of the old mill site, which was located in the parking lot, while the other was across the street and slightly to the south of the parking lot. 1 Transcript of Trial (TR) at 53, 56. Detective Jan Lewis testified that he returned to the locations of the transactions and measured the distance from each location to the nearest school bus route stop. All three drug transactions took place in the vicinity of the same two school bus route stops. To measure the distances, Detective Lewis used what he described as “[o]ne of those rolling wheel measurers you can zero out and roll along ahead of you and it counts out feet.” 2 TR at 176. Detective Lewis further testified that he borrowed the particular device from the Republic Police Department and that he had not used it before, though he had used similar devices. Such devices, according to Detective Lewis, are commonly used by law enforcement. After Detective Lewis pressed a button to zero out the numbers, he measured the distance from each transaction location to the school bus route stop.<sup>ENL</sup> At trial, **Bashaw** objected to the admission of the results of the measuring device based on a lack of foundation. The trial judge overruled the objection, and Detective Lewis testified that, based on his measurements, the distance from the location of the first sale to the school bus route stop was 924 feet and the distances from the locations of the second and third transactions to the school bus route stop were each 100 to 150 feet. This was the only testimony directly addressing the distance between the transactions and the school bus route stop.

\*2 ¶ 4 The transcript also reveals additional testimony about the relevant locations from which distance might be inferred. Detective Lewis estimated that the distance from the parking lot entrance to the end of the former mill's parking lot was no more than 150 feet. Additionally, four other witnesses, including the confidential informant and three other law enforcement personnel, testified to the locations of the drug transactions and the distance from the parking lot to the location of the transaction alleged in count I. As to this distance, Detective Donald Redfield estimated the distance to be one-tenth of a mile (528 feet) while Detectives Steve Brown and Armondo Moralez, as well as the confidential informant, estimated the distance to be one-quarter of a mile (1,320 feet).

¶ 5 Because the State sought a sentence enhancement,

the jury was given a special verdict form for each charge. The form asked the jury to make a special finding of whether each charged delivery took place within 1,000 feet of a school bus route stop. In the jury instruction explaining the special verdict forms, jurors were instructed: “Since this is a criminal case, all twelve of you must agree on the answer to the special verdict.” Clerk's Papers at 95. On appeal, **Bashaw** challenges this instruction as contrary to precedent from this court.

¶ 6 The jury found **Bashaw** guilty of all three counts of delivery of a controlled substance and found that each had taken place within 1,000 feet of a school bus route stop. The latter finding increased **Bashaw's** maximum sentence from 24 months to 48 months. The trial judge sentenced **Bashaw** to 36 months' imprisonment. **Bashaw** appealed the sentence but not the underlying conviction. The Court of Appeals affirmed the sentence, and **Bashaw** filed a petition for review with this court, which we granted. *State v. Bashaw*, 144 Wash.App. 196, 182 P.3d 451, review granted, 165 Wash.2d 1002, 198 P.3d 512 (2008).

#### IssueS

¶ 7 1. Did the trial court abuse its discretion by admitting testimony about the results of a measuring device without any showing of reliability?

¶ 8 2. Did the trial court correctly instruct the jury that its special finding had to be unanimous?

#### STANDARD OF REVIEW

[1][2][3] ¶ 9 This court reviews challenged jury instructions de novo. *State v. Bennett*, 161 Wash.2d 303, 307, 165 P.3d 1241 (2007). We review the admission of evidence for abuse of discretion. *City of Auburn v. Hedlund*, 165 Wash.2d 645, 654, 201 P.3d 315 (2009). “Abuse of discretion exists ‘[w]hen a trial court's exercise of its discretion is manifestly unreasonable or based upon untenable grounds or reasons.’ “ *State v. Magers*, 164 Wash.2d 174, 181, 189 P.3d 126 (2008) (alteration in original) (quoting *State v. Powell*, 126 Wash.2d 244, 258, 893 P.2d 615 (1995)).

#### Analysis

I. The Trial Court Abused Its Discretion by Admitting

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### Testimony about the Results of a Measuring Device without Any Showing of Reliability

\*3 ¶ 10 The first issue in this case concerns the showing of reliability necessary for a trial court to admit testimony about the results of a measuring device. In accordance with analogous precedent, we hold that admission of results from a distance measuring device requires a showing that the particular device was functioning properly and produced accurate results. Because the State produced no evidence that the distance measuring device here produced accurate results, its admission was error and an abuse of discretion. That error, however, was harmless as to counts II and III but not as to count I. Accordingly, we vacate the sentence enhancement with respect to count I on this basis.

#### A. Evidence Must Be Authenticated Prior to Admission

[4][5] ¶ 11 It is fundamental that evidence must be authenticated before it is admitted. See ER 901(a). Authentication requires that the proponent produce proof “sufficient to support a finding that the matter in question is what its proponent claims.” *Id.* The party offering the evidence must make a prima facie showing consisting of proof that is sufficient “to permit a reasonable juror to find in favor of authenticity or identification.” *State v. Payne*, 117 Wash.App. 99, 106, 69 P.3d 889 (2003); see also Judicial Council Cmt. 901, cited in 5C Karl B. Tegland, *Washington Practice: Evidence Law and Practice* § 901.1, at 283 n. 3 (5th ed.2007).

¶ 12 Conceptually, authentication is a process of establishing conditional relevance. See Judicial Council Cmt. 901, cited in 5C Tegland, *supra*, § 901.1, at 283 n. 3; see also Robert H. Aronson, *The Law of Evidence in Washington* § 901.05(1), at 901-12 (4th ed. 2008) (“Unless evidence is in fact what it purports to be, it is not relevant”). As observed in *Washington Practice*, “a photograph might be relevant, but only if it accurately depicts the subject”; “[an audio] recording might be relevant, but only if the sounds were recorded faithfully and the voices are accurately identified.” 5C Tegland, *supra*, § 901.1, at 283. Likewise, a distance measurement may be relevant, but only if it is accurately measured.

[6] ¶ 13 In a line of cases analogous to the present one,

the courts of this state have held that, under ER 901, speed measuring devices, such as radar devices, must be authenticated in order for their results to be admissible. See *City of Bellevue v. Mociulski*, 51 Wash.App. 855, 859-60, 756 P.2d 1320 (1988); see also *City of Bellevue v. Hellenthal*, 144 Wash.2d 425, 431-32, 28 P.3d 744 (2001) (citing *Mociulski*, 51 Wash.App. at 860-61, 756 P.2d 1320, with approval); *City of Bellevue v. Lightfoot*, 75 Wash.App. 214, 221, 877 P.2d 247 (1994) (“police traffic radar results are not admissible unless the particular radar device used is shown to be reliable”); *City of Seattle v. Peterson*, 39 Wash.App. 524, 527, 693 P.2d 757 (1985) (holding that evidence of a machine’s reliability is a prerequisite to admission of the machine’s results). Authentication of such devices requires a showing that the particular unit “was functioning properly and produced accurate results” at the time it was employed. *Lightfoot*, 75 Wash.App. at 221, 877 P.2d 247.<sup>FN2</sup>

\*4 [7][8][9][10] ¶ 14 We agree with the formulation of the Court of Appeals, as expressed in the speed measuring device line of cases, regarding the authentication required prior to admission of measurements made by mechanical devices.<sup>FN3</sup> The rules of evidence, analogous case law, and common sense all dictate that before the State introduces evidence that will result in a mandatory penalty enhancement, the State must show that the evidence it relies upon is accurate. Simply put, results of a mechanical device are not relevant, and therefore are inadmissible, until the party offering the results makes a prima facie showing that the device was functioning properly and produced accurate results. This is consistent with the rationale underlying the requirement of authentication. See 5C Tegland, *supra*, § 901.1, at 283. As such, we hold that the principle articulated in the context of speed measuring devices also applies to distance measuring devices: a showing that the device is functioning properly and producing accurate results is, under ER 901(a), a prerequisite to admission of the results.

[11][12] ¶ 15 It is true, of course, that electronic instruments differ from standard rolling wheel measuring devices in complexity. That difference, however, is properly addressed through *what* prima facie showing is required rather than *whether* a prima facie showing is required.<sup>FN4</sup> In the present case, the State failed to make a prima facie showing that the rolling wheel measuring device produced accurate results.

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Though we know that the device displayed numbers and that it “click[ed] off feet and inches” while Detective Lewis pushed it, no testimony or evidence even suggested that those numbers were accurate. 2 TR at 181. No comparison of results generated by the device to a known distance was made nor was there any evidence that it had ever been inspected or calibrated. The trial court abused its discretion by admitting the results of the rolling wheel measuring device with no showing whatsoever that those results were accurate.

*B. Improper Admission of Evidence Was Harmless as to Counts II and III but Not as to Count I*

[13][14] ¶ 16 The improper admission of evidence to support a criminal conviction may be harmless error. *State v. Flores*, 164 Wash.2d 1, 18, 186 P.3d 1038 (2008). An evidentiary error is not harmless “if, within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected.” *State v. Neal*, 144 Wash.2d 600, 611, 30 P.2d 1255 (2001) (quoting *State v. Smith*, 106 Wash.2d 772, 780, 725 P.2d 951 (1986)). The record allows us to conclude that the improper admission of the results of the rolling wheel measuring device would not have materially affected the jury’s special verdicts with respect to counts II and III. The outcome of the special verdict with respect to count I, however, might well have been different had the court excluded the results.

\*5 [15] ¶ 17 Apart from the measurements made by the rolling wheel measuring device, testimony at trial also addressed the relevant locations and distances between the drug transactions and a school bus route stop. Superintendent Chaplik testified, and, based on the jury’s verdicts, it must have believed, that the school bus stopped in “the driveway area of the Vaagen’s Mill site,” also referred to as the parking lot. 1 TR at 53. Numerous witnesses, including law enforcement officers and the confidential informant, testified that the transactions that were the basis for counts II and III took place in the parking lot. *Id.* at 110, 136, 725 P.2d 951; 3 TR at 275-77, 284-86, 322, 344-45, 358-60; 4 TR at 400, 405. Again, to reach its conclusions, the jury must necessarily have found the testimony about these locations credible. Detective Lewis estimated that the parking lot, in which the bus stopped and the transactions occurred, is no more than 150 feet long. 2 TR at 183. In the presence of such extensive testimony, much of which this jury would

necessarily have found credible to reach its verdict, we conclude that there is no reasonable probability that this jury, as instructed, would have concluded that the special verdicts relating to counts II and III did not take place within 1,000 feet of a school bus route stop if the results of the rolling wheel measuring device had been excluded.

[16] ¶ 18 As to count I, there is a reasonable possibility that the jury would have reached a different conclusion on the special verdict if the improperly admitted results had been excluded. After meeting at the parking lot of the mill, **Bashaw** and the confidential informant traveled some distance south to conduct the transaction. One detective estimated the distance was one-tenth of a mile, or 528 feet, from the parking lot entrance, 3 TR at 275, while two other detectives and the confidential informant estimated the distance was one-quarter of a mile, or 1,320 feet, *id.* at 314, 339, 725 P.2d 951; 4 TR at 391. Thus, the testimony was conflicting but weighed in favor of finding that the distance was over 1,000 feet from the parking lot. Though an aerial photograph of the area was entered into evidence, it contained no scale or other method of accurately determining distance. The photograph does not establish that the transaction occurred within 1,000 feet of a school bus route stop. As to the special verdict on count I, then, there is at least a reasonable probability that excluding the results of the rolling wheel measuring device would have materially affected the outcome. As such, the improper admission of the results of the rolling wheel measuring device was not harmless and the special verdict with respect to count I must be vacated.

II. The Trial Court Incorrectly Instructed the Jury That Its Special Finding Had To Be Unanimous.

[17][18] ¶ 19 The jury instruction issue in this case is a narrow one: when a jury has unanimously found a defendant guilty of a substantive crime and proceeds to make an additional finding that would increase the defendant’s sentence beyond the maximum penalty allowed by the guidelines, must the jury’s answer be unanimous in order to be final? We answered this question in *State v. Goldberg*, 149 Wash.2d 888, 72 P.3d 1083 (2003), and the answer is no. A nonunanimous jury decision on such a special finding is a final determination that the State has not proved that finding beyond a reasonable doubt.<sup>ENS</sup>

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\*6 ¶ 20 In *Goldberg*, the defendant was charged with first degree murder, pursuant to RCW 9A.32.030, with an aggravating circumstance enumerated in RCW 10.95.020. 149 Wash.2d at 893, 72 P.3d 1083. The finding of an aggravating circumstance would have increased the maximum penalty to “life imprisonment without possibility of release or parole.” RCW 10.95.030(1). The jury in *Goldberg* initially returned a verdict finding the defendant guilty of first degree murder but answered “no” on the special verdict form asking whether the aggravating circumstance was present. 149 Wash.2d at 891, 72 P.3d 1083. The judge polled the jury and found that one juror had voted “no” on the aggravating factor.<sup>EN6</sup> *Id.* The presiding juror informed the judge that there was no reasonable probability of the jury reaching a unanimous agreement within a reasonable time. *Id.* Despite that, the judge ordered the jury to continue deliberations the next day and the jury subsequently returned a unanimous finding that the State had proved the aggravating factor. *Id.* at 891-92, 72 P.3d 1083.

¶ 21 In resolving the appeal in *Goldberg*, we rejected the parties’ framing of the issue as one of jury coercion. *Id.* at 893, 72 P.3d 1083. Instead, the issue we addressed was “whether ... unanimity is required” for a special finding increasing the maximum penalty and we held that “it is not.” *Id.* We went on to hold that the “jury’s [nonunanimous] judgment should have been accepted” and that it was error to order continued deliberations. *Id.* at 894, 72 P.3d 1083. We concluded by stating, “[i]n sum, special verdicts do not need to be unanimous in order to be final.” *Id.* at 895, 72 P.3d 1083. The rule from *Goldberg*, then, is 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. A nonunanimous jury decision is a final determination that the State has not proved the special finding beyond a reasonable doubt.<sup>EN7</sup>

¶ 22 The rule we adopted in *Goldberg* and reaffirm today serves several important policies. First, we have previously noted that “[a] second trial exacts a heavy toll on both society and defendants by helping to drain state treasuries, crowding court dockets, and delaying other cases while also jeopardizing the interests of defendants due to the emotional and financial strain of successive defenses.” *State v. Labanowski*, 117 Wash.2d 405, 420, 816 P.2d 26 (1991). The costs and burdens of a new trial, even if limited to the determi-

nation of a special finding, are substantial. We have also recognized a defendant’s “‘valued right’ to have the charges resolved by a particular tribunal.” *State v. Wright*, 165 Wash.2d 783, 792-93, 203 P.3d 1027 (2009) (internal quotation marks omitted) (quoting *Arizona v. Washington*, 434 U.S. 497, 503, 98 S.Ct. 824, 54 L.Ed.2d 717 (1978)). Retrial of a defendant implicates core concerns of judicial economy and finality. Where, as here, a defendant is already subject to a penalty for the underlying substantive offense, the prospect of an additional penalty is strongly outweighed by the countervailing policies of judicial economy and finality.

\*7 [19] ¶ 23 Applying the *Goldberg* rule to the present case, the jury instruction stating that all 12 jurors must agree on an answer to the special verdict was an incorrect statement of the law. Though unanimity is required to find the *presence* of a special finding increasing the maximum penalty, see *Goldberg*, 149 Wash.2d at 893, 72 P.3d 1083, 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.

[20][21] ¶ 24 In order to hold that a jury instruction error was harmless, “we must ‘conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error.’” “*State v. Brown*, 147 Wash.2d 330, 341, 58 P.3d 889 (2002) (quoting *Neder v. United States*, 527 U.S. 1, 19, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999)). The State argues, and the Court of Appeals agreed, that any error in the instruction was harmless because the trial court polled the jury and the jurors affirmed the verdict, demonstrating it was unanimous. This argument misses the point. The error here was the procedure by which unanimity would be inappropriately achieved. In *Goldberg*, the error reversed by this court was the trial court’s instruction to a nonunanimous jury to reach unanimity. 149 Wash.2d at 893, 72 P.3d 1083. The error here is identical except for the fact that that direction to reach unanimity was given preemptively.

¶ 25 The result of the flawed deliberative process tells us little about what result the jury would have reached had it been given a correct instruction. *Goldberg* is illustrative. There, the jury initially answered “no” to the special verdict, based on a lack of unanimity, until told it must reach a unanimous verdict, at which point it answered “yes.” *Id.* at 891-93, 72 P.3d 1083. Given

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different instructions, the jury returned different verdicts. We can only speculate as to why this might be so. For instance, when unanimity is required, jurors with reservations might not hold to their positions or may not raise additional questions that would lead to a different result. We cannot say with any confidence what might have occurred had the jury been properly instructed. We therefore cannot conclude beyond a reasonable doubt that the jury instruction error was harmless. As such, we vacate the remaining sentence enhancements and remand for further proceedings consistent with this opinion.

#### Conclusion

¶ 26 We reach two conclusions in this case. First, testimony about the results of a mechanical device is admissible only if there is some showing that the particular measuring device was functioning properly and producing accurate results. Second, a nonunanimous special finding by a jury is a final decision by the jury that the State has not proved its case beyond a reasonable doubt. Because there was no showing that the distance measuring device employed here produced accurate results and that error was not harmless as to the special verdict on count I, and because the trial court erred in instructing the jury on the unanimity requirements for special findings, we reverse all three sentence enhancements and remand the case to the trial court for further proceedings consistent with this opinion.

WE CONCUR: CHARLES W. JOHNSON, RI-CHARD B. SANDERS, TOM CHAMBERS, MARY E. FAIRHURST, and DEBRA L. STEPHENS, Justices.

MADSEN, C.J. (dissenting).

\*8 ¶ 27 Although I have concerns about the majority's comparison of a measuring wheel to radar devices, my greater concern is with the majority's treatment of the jury instructions and its conclusion that instructional error regarding jury unanimity was not harmless.

¶ 28 First, with regard to the majority's conclusion that a measuring wheel is analogous to radar devices and thus similar authentication requirements apply before evidence of the wheels' measurements may be admitted, the analogy is inapposite. Radar measuring devices are complex machines whose operation is not within the common understanding of jurors. Further, where complicated radar devices used to measure

speed and breath testing equipment used to measure blood or breath alcohol levels are concerned, state statutes and regulations set forth the standards and requirements for admission of test results. RCW 46.61.506; CrRLJ 6.13(c), (d); IRLJ 6.6; Title 448 WAC. In contrast, there is no protocol for calibrating a measuring wheel and no rule or statute dictating testing prior to use.

¶ 29 This is logical, since, unlike a radar device or breath testing equipment, a measuring wheel does not rely for its result on complex scientific theory or complicated mechanical operation; a measuring wheel is no more than a round ruler. Its operation is within the common understanding of jurors. The accuracy of the device's result is a question of weight to be given the evidence and not admissibility. I disagree with the majority's conclusion that a measuring wheel is subject to the same authentication requirements as radar devices.

¶ 30 My greater concern, however, is that the majority concludes that error in instructing the jury on the unanimity requirements for special findings on whether Bertha Bashaw distributed a controlled substance within 1,000 feet of a school bus route stop was not harmless error. I disagree.

¶ 31 This case is unlike State v. Goldberg, 149 Wash.2d 888, 72 P.3d 1083 (2003), upon which the majority bases this conclusion. In Goldberg, an aggravated murder prosecution, the jury initially returned a verdict and answered "no" on the special verdict form for the aggravating factor that the State alleged. Id. at 891, 894, 72 P.3d 1083. The jury was polled. One juror raised a hand to confirm a "no" vote, although evidently three jurors actually voted "no." As the court explained in Goldberg, the judge then proceeded as if the jury was deadlocked and instructed the jury to continue deliberating to see if unanimity could be reached. Id.

¶ 32 At the time the jury returned its original verdict, it was close to 5:00 p.m. and the jury had been deliberating since 11:00 a.m. that day. Id. at 891, 72 P.3d 1083. The jury was instructed to resume deliberations the next day. Id. The next day, after deliberating three more hours, the jury returned a unanimous finding that the State had proved the aggravating factor. Id. at 891-92, 72 P.3d 1083.

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\*9 ¶ 33 This court concluded in *Goldberg* that unanimity is not required for a special verdict and there was no error in the jury's original verdict. *Id.* at 894, 72 P.3d 1083. The court further held that it was error for the trial court to order continued deliberations. *Id.*

¶ 34 In the present case, however, the jury returned one verdict and there is nothing to indicate there was any error in the jury's original and only verdict. Unlike in *Goldberg*, the jury was not advised, after returning a verdict, that it must continue to deliberate. Unlike in *Goldberg*, the polling of the jury showed no disagreement on the question whether the state had proved that delivery of controlled substances occurred within 1,000 feet of a school bus route stop.

¶ 35 Moreover, the jury here was advised as to what it must find to return a finding that delivery took place within 1,000 feet of a school bus route stop. Jury instruction 19 instructed the jury, as to each count of delivery of a controlled substance, that if it found the defendant guilty, it would then complete a special verdict form. This instruction also correctly told the jury with respect to each count:

If you find from the evidence that the state has proved beyond a reasonable doubt that the defendant delivered the controlled substance to a person within one thousand feet of a school bus stop route stop designated by a school district, it will be your duty to answer the special verdict form [A][B][C] "yes."

Clerk's Papers at 95-96 (Jury Instruction 19). A jury is presumed to follow the jury instructions. *State v. Gamble*, 168 Wash.2d 161, 178, 225 P.3d 973 (2010); *State v. Kirkman*, 159 Wash.2d 918, 937, 155 P.3d 125 (2007). Nothing indicates that the jury did not do so.

¶ 36 The majority suggests that a different outcome might have resulted under proper instructions. The majority is therefore either suggesting that the jury might not have followed the jury instructions when it returned its unanimous findings—which would be antithetical to the presumption that juries follow the instructions they are given, or the majority is suggesting that the jury was coerced or influenced by the unanimity instruction into reaching a conclusion it would not otherwise have reached—which is equally unacceptable given that unanimity is required for guilty verdicts. We certainly do not infer from a un-

animous verdict on guilt that the jury was coerced or improperly influenced by an instruction on unanimity. Why does the majority doubt the unanimous verdict here?

¶ 37 *Goldberg* is not the same as this case, contrary to the majority's belief. Because unanimity is not required, the original verdict form in *Goldberg* stated the jury's true, legally permissible finding. The judge rejected this true initial verdict on impermissible grounds and instead accepted a legally erroneous verdict, which was erroneous because it was arrived at only after the judge informed the jury that its initial verdict was not acceptable. We know all of this because we know what the original verdict form said; we know that the results of the jury polling confirmed the original verdict; we know what then occurred, including the judge's instruction ordering the jury to return the next day and continue deliberation with the goal to achieve unanimity; and we know that the second verdict was unanimous and contrary to the first verdict.

\*10 ¶ 38 None of these circumstances exist in the present case. All that exists is the majority's speculation that a proper instruction might have resulted in a different verdict. That speculation does not accord with the jury instructions given and the presumption that the jury would not have returned its unanimous verdict unless each of the jurors was persuaded that the State proved that the offenses occurred within 1,000 feet of a school bus route stop, as instructed.

¶ 39 For the reasons stated, I dissent. As I have noted, I am most concerned about the majority's ill-considered conclusion that the instructional error was not harmless error.

WE CONCUR: GERRY L. ALEXANDER and  
 JAMES M. JOHNSON, Justices.

FN1. The State has conceded on appeal that all three distances were the result of measurement with the same device. Wash. State Supreme Court oral argument, *State v. Bashaw*, No. 81633-6 (Sept. 17, 2009), at 21 min., 18 sec., *video recording by TVW*, Washington State's Public Affairs Network, available at <http://www.tvw.org>; Resp't's Br. at 3 (adopting *Bashaw's* statement of the case, including her assertion that all three

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distances were measured, Appellant's Br. at 5).

FN2. For speed measuring devices, this showing is now governed by CrRLJ 6.13 and IRLJ 6.6. No comparable rule exists for distance measuring devices.

FN3. For devices relying on complex scientific principles, authentication is actually a compound determination, first involving the qualifications of a witness under ER 702 and then whether the mechanical device operated reliably. *Hellenthal*, 144 Wash.2d at 432, 28 P.3d 744. No ER 702 question is before the court in this case.

FN4. Some devices operate in a manner such that any failure by the device to produce accurate results would be immediately obvious to the user (e.g., measuring tapes, yard sticks, or rulers). In such cases, it may be inferred from testimony by the user about measurements with the device that the results are accurate. This contrasts with rolling wheel measuring devices for which, like speed measuring devices, the internal workings are not observable by the user.

FN5. General verdicts in criminal cases, of course, must still be unanimous to convict or acquit. See Wash. Const. art. I, § 21; *State v. Stephens*, 93 Wash.2d 186, 190, 607 P.2d 304 (1980).

FN6. In fact, three jurors had voted “no” but only one juror raised a hand when asked. *Goldberg*, 149 Wash.2d at 891, 72 P.3d 1083.

FN7. This rule is not compelled by constitutional protections against double jeopardy, cf. *State v. Eggleston*, 164 Wash.2d 61, 70-71, 187 P.3d 233 (stating that double jeopardy protections do not extend to retrial of non-capital sentencing aggravators), cert. denied, \_\_\_ U.S. \_\_\_, 129 S.Ct. 735, 172 L.Ed.2d 736 (2008), but rather by the common law precedent of this court, as articulated in *Goldberg*.

Wash.,2010.  
 State v. Bashaw  
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# APPENDIX B



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**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF PIERCE**

STATE OF WASHINGTON,

Plaintiff,

vs.

KENNETH OZELL CAMPBELL,

Defendant.

Case No.: 08-1-05783-8

**JURY QUESTION DURING  
DELIBERATION**

The Court provides the following answer:

**Please refer to your jury instructions.**

DATED this 13th day of October, 2009.

Approved:

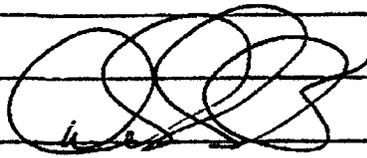
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Attorney for Plaintiff 22936

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Judge Lisa Worswick

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Attorney for Defendant

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IN REGARDS TO THE SPECIAL VERDICT FORMS  
IF WE ARE NOT IN UNANIMOUS AGREEMENT  
CAN WE RENDER THE ANSWER "NO"  
OR MUST WE ALL AGREE UNANIMOUSLY "YES"  
OR "NO" ?



10-13-09

INSTRUCTION NO. 29

For purposes of a special verdict the State must prove beyond a reasonable doubt that the defendant was armed with a firearm at the time of the commission of the crime in Count I and/or Count II.

A person is armed with a firearm if, at the time of the commission of the crime, the firearm is easily accessible and readily available for offensive or defensive use. The State must also prove beyond a reasonable doubt that there was a connection between the firearm and the defendant or an accomplice. The State must also prove beyond a reasonable doubt that there was a connection between the firearm and the crime. In determining whether these connections existed, you should consider, among other factors, the nature of the crime and the circumstances surrounding the commission of the crime.

If one person is armed with a firearm, all accomplices are deemed to be so armed, even if only one firearm is involved.

INSTRUCTION NO. 28

You will also be furnished with special verdict forms. If you find the defendant not guilty do not use the special verdict forms. If you find the defendant guilty, you will then use the special verdict forms and fill in the blank with the answer "yes" or "no" according to the decision you reach. 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 have a reasonable doubt as to the question, you must answer "no."

Because this is a criminal case, each of you must agree for you to return a verdict. When all of you have so agreed, fill in the verdict forms to express your decision. The presiding juror must sign the verdict forms and notify the judicial assistant. The judicial assistant will bring you into court to declare your verdict.

INSTRUCTION NO. 27

When you begin deliberating, you should first select a presiding juror. The presiding juror's duty is to see that you discuss the issues in this case in an orderly and reasonable manner, that you discuss each issue submitted for your decision fully and fairly, and that each one of you has a chance to be heard on every question before you.

During your deliberations, you may discuss any notes that you have taken during the trial, if you wish. You have been allowed to take notes to assist you in remembering clearly, not to substitute for your memory or the memories or notes of other jurors. Do not assume, however, that your notes are more or less accurate than your memory.

You will need to rely on your notes and memory as to the testimony presented in this case. Testimony will rarely, if ever, be repeated for you during your deliberations.

If, after carefully reviewing the evidence and instructions, you feel a need to ask the court a legal or procedural question that you have been unable to answer, write the question out simply and clearly. In your question, do not state how the jury has voted. The presiding juror should sign and date the question and give it to the judicial assistant. I will confer with the lawyers to determine what response, if any, can be given.

You will be given the exhibits admitted in evidence, these instructions and the verdict forms for recording your verdict. Some exhibits and visual aids may have been used in court but will not go with you to the jury room. The exhibits that have been admitted into evidence will be available to you in the jury room.

You must fill in the blank provided in each verdict form the words "not guilty" or the word "guilty", according to the decision you reach.

INSTRUCTION NO. 26

As jurors, you have a duty to discuss the case with one another and to deliberate in an effort to reach a unanimous verdict. Each of you must decide the case for yourself, but only after you consider the evidence impartially with your fellow jurors. During your deliberations, you should not hesitate to re-examine your own views and to change your opinion based upon further review of the evidence and these instructions. You should not, however, surrender your honest belief about the value or significance of evidence solely because of the opinions of your fellow jurors. Nor should you change your mind just for the purpose of reaching a verdict.