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STATE OF WASHINGTON

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Supreme Court No. 81633-6
Court of Appeals No. 25748-7-III

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

BERTHA I BASHAW,

Defendant/Petitioner.

SUPPLEMENTAL BRIEF

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I. ISSUES PRESENTED FOR REVIEW.

1. Did the trial court improperly allow into evidence the results or readings from the measuring device without first requiring proof that the device was so designed and constructed that, when properly operated, the results or readings are accurate?

2. Should the special verdict be vacated because the jury was incorrectly instructed it had to be unanimous to answer “no” to the special verdict?

II. STATEMENT OF THE CASE.

The facts are set forth in the initial briefs and the Petition for Review, and are incorporated herein. Additional facts will be included in the argument as necessary.

III. ARGUMENT.

Issue No. 1. The trial court improperly allowed into evidence the results or readings from the measuring device without first requiring proof that the device was so designed and constructed that, when properly operated, the results or readings are accurate.

ER 901 provides, in pertinent part, as follows:

(a) General Provision. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

(b) Illustrations. By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule: . . .

(9) Process or System. Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result . . .

Thus, before results or readings from a device employing a scientific process, system or principle are admissible in evidence, ER 901 requires proof that the device in question is so designed and constructed that, when properly operated, the results or readings are accurate. Seattle v. Peterson, 39 Wn.App. 524, 526, 693 P.2d 757 (1985). The evidentiary requirement employed in ER 901 was adopted generally by both state and federal courts prior to Washington's adoption in April 1979 of the Rules of Evidence. Peterson, 39 Wn.App. at 527, 693 P.2d 757. Frye v. United States, 293 F. 1013 (D.C.Cir.1923) held that evidence of a polygraph test based on scientific principles was not admissible until it could be shown that the test involved was generally accepted as reliable by the relevant scientific community. Only then would the court be justified in admitting the evidence.

In Peterson, the issue was whether a particular radar unit was so designed and constructed that the results produced by proper operation

were reliable. Peterson, 39 Wn.App. at 527, 693 P.2d 757. Following Frye, the Court held that if the validity of a scientific principle is a prerequisite to its admission into evidence, then consistency requires that evidence of the ability of a machine to employ that scientific principle reliably must also precede admission of the machine's results into evidence. Id.

The Court noted that the only evidence offered regarding the radar unit was the testimony of the arresting officer, who candidly acknowledged that his information about the radar device was limited to instructions on how to calibrate and operate it. Peterson, 39 Wn.App. at 529, 693 P.2d 757. No evidence was offered relating to the design and construction of the radar unit. The only evidence on the accuracy of the radar unit was the opinion of the officer that he had confidence in the accuracy of the unit. Id. Based on this lack of information, The Court held there was no basis upon which the trial court could treat the issue of the reliability or accuracy of the CMI radar unit as a matter of common knowledge in the state of Washington:

We conclude that the superior court erred in ruling that "[t]he process or system of a particular model of traffic radar is a proper subject of judicial notice.

Id.

Similarly, in State v. Canaday, 90 Wn.2d 808, 813, 585 P.2d 1185 (1978), a case involving measurement of blood alcohol, the Court cited Frye with approval and held that the reliability of scientific evidence must be shown "as a prerequisite to its admission." To the same effect are State v. Woo, 84 Wn.2d 472, 527 P.2d 271 (1974), a polygraph case, and State v. Baker, 56 Wn.2d 846, 355 P.2d 806 (1960), a Breathalyzer examination case. See also State v. Black, 109 Wn.2d 336, 745 P.2d 12 (1987) ("rape trauma syndrome" evidence inadmissible); State v. Martin, 101 Wn.2d 713, 684 P.2d 651 (1984) (hypnosis evidence inadmissible); State v. Allery, 101 Wn.2d 591, 682 P.2d 312 (1984) ("battered woman syndrome" evidence admissible); State v. Huynh, 49 Wn. App. 192, 742 P.2d 160 (1987), *review denied*, 109 Wn.2d 1024 (1988) (gas chromatography evidence inadmissible); Burkett v. Northern, 43 Wn. App. 143, 715 P.2d 1159, *review denied*, 106 Wn.2d 1008 (1986) (thermography evidence inadmissible); State v. Mulder, 29 Wn. App. 513, 629 P.2d 462 (1981) ("battered child syndrome" evidence admissible).

In the present case, the detective testified he borrowed the measuring device from the local police department, had never used it before, and did not know if the device had ever been certified or was required to be certified. (RP 178-79) Based on this limited information,

there was no basis for the trial court to find an adequate foundation had been laid to establish the reliability or accuracy of the measuring device. Thus, it was error to allow the detective to testify that the deliveries occurred within 1000 feet of a school bus stop, since that testimony was based solely on data obtained from the measuring device.

Moreover, the error is not harmless. Absent the detective's testimony, the State offered no other evidence that the distance of the location of the three buys was within 1000 feet of the school bus stop.

Issue No. 2. The special verdict should be vacated because the jury was incorrectly instructed it had to be unanimous to answer "no" to the special verdict.

Washington requires unanimous jury verdicts in criminal cases. WA Const. art. I, § 21; State v. Stephens, 93 Wn.2d 186, 190, 607 P.2d 304 (1980). As for aggravating factors, jurors must be unanimous to find the State has proved the existence of the special verdict beyond a reasonable doubt. State v. Goldberg, 149 Wn.2d 888, 892-93, 72 P.3d 1083 (2003). However, jury unanimity is not required to answer "no." Goldberg, 149 Wn.2d at 893, 72 P.3d 1083. Where the jury is deadlocked or cannot decide, the answer to the special verdict is "no." Id.

In Goldberg, the jury was given the following special verdict instruction:

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".

Id.

Although the Supreme Court vacated the special verdict for other reasons, it did not find fault with this instruction. Goldberg, 149 Wn.2d at 894, 72 P.3d 1083.

By contrast, in the present case, the jury was instructed quite differently:

If you find the defendant guilty, you will complete Special Verdict Form A. *Since this is a criminal case, all twelve of you must agree on the answer to the special verdict.* 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 route stop designated by a school district, it will be your duty to answer the Special Verdict Form A yes.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt that the defendant delivered a controlled substance to a person within one thousand feet of a school bus route stop designated by a school district, it will be your duty to answer ...Special Verdict Form A no.

(RP 464-66, emphasis added)

This instruction incorrectly requires jury unanimity for the jury to answer "no" to the special verdict, contrary to Goldberg and contrary to

the Court of Appeals' interpretation of the Goldberg ruling in the present case. State v. Bashaw, 144 Wn.App. 196, 200-03, 182 P.3d 451 (2008). The Court of Appeals misconstrues the effect of the erroneous instruction on the deliberation process when it states Ms. Bashaw has no basis for challenge since all jurors concurred in their answer to the special verdict. Bashaw, 144 Wn.App. at 203, 182 P.3d 451. The Court of Appeals failed to consider that if the jury was deadlocked, instead of just answering "no," the jury would feel compelled by this instruction to continue deliberations to reach unanimity. Since this instruction misstates the law, the special verdict must be stricken.

IV. CONCLUSION.

For the reasons stated herein, Defendant/Petitioner, Bertha I. Bashaw, respectfully asks this Court to reverse the decision of the Court of Appeals affirming her conviction, or in the alternative, strike the special verdict enhancement.

Respectfully submitted July 17, 2009,

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