

655.75-2

65575-2

NO. 65575-2-I

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION I

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STATE OF WASHINGTON,  
Respondent,  
v.  
MARY LAKILADO,  
Appellant.

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY  
THE HONORABLE BRUCE HELLER

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**BRIEF OF RESPONDENT**

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**A. ISSUES PRESENTED**

1. Whether the court's instruction defining "recklessness" was accurate and did not relieve the State of its burden of proof as to any element, where it clearly referred to an inference as to "the element" at issue and where the to-convict instruction required that the jury find the specified mental state as to each separate element.

2. Whether Lakilado waived any error premised on noncompliance with statutory procedures relating to appointment of an interpreter, where there was no objection at trial and Lakilado has established no prejudice resulting from the defective procedure.

3. Whether Lakilado has failed to establish ineffective assistance of counsel in failure to object to the defective statutory procedure in appointing the interpreter, where the court concluded that it would have appointed the same well-qualified interpreter if the correct procedure had been followed.

4. Whether the trial court properly denied the motion for new trial based on alleged errors in interpretation of the testimony of two defense witnesses, where the trial court properly concluded that the interpreter was competent and conscientious, that the clear

import of the testimony was communicated, that any errors were minor or insignificant, and that the outcome of the trial was not affected.

5. Whether Lakilado has failed to establish ineffective assistance of counsel in failure to challenge the competency of the interpreter for two witnesses, where counsel had no reason to believe that there were significant errors in the interpretation and thus no reason to raise the issue, and where Lakilado has not established prejudice, any errors were minor, the import of the testimony was communicated, and the outcome of the trial was not affected.

6. Whether Lakilado is precluded from claiming error as to the unanimity provisions in the special verdict instruction because she invited that error.

7. Whether the unanimity provisions in the special verdict instruction adequately communicated that the jury did not need to be unanimous to answer the question "no."

**B. STATEMENT OF THE CASE**

1. PROCEDURAL FACTS

The defendant, Mary Lakilado, was charged with assault in the second degree with a deadly weapon enhancement. CP 5. Lakilado was tried in King County Superior Court, the Honorable Bruce Heller presiding. 1RP 1-2.<sup>1</sup> A jury found Lakilado guilty as charged on February 4, 2009. 8RP 2.

Lakilado filed a motion for a new trial on February 17, 2009, and new counsel was substituted. CP 40; 9RP 1. The motion for new trial was heard on February 4 and 26, 2010. 9RP 7-59. The court denied the motion on April 9, 2010. 9RP 71-88; CP 343.

On May 20, 2010, the court rejected Lakilado's request for an exceptional sentence downward and imposed a standard range sentence. CP 384-91; 9RP 115.

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<sup>1</sup> The verbatim report of proceedings will be referred to in this brief as follows: 1RP - January 13, 2009; 2RP - January 26, 2009; 3RP - January 27, 2009; 4RP - January 28, 2009; 5RP - January 29, 2009; 6RP - February 2, 2009; 7RP - February 3, 2009; 8RP - February 4, 2009; 9RP - volume including February 4 and 26, April 9 and 23, and May 20, 2010.

## 2. SUBSTANTIVE FACTS

On October 7, 2007, Olympia Williams went to a house party with her coworker, Latoya Jackson, and Jackson's boyfriend Tito.<sup>2</sup> 4RP 42-44. Before the evening was over, the defendant, Mary Lakilado, became angry with Williams and struck her in the face with a glass bottle. 4RP 64, 66-72. The bottle broke on contact with Williams' face, causing serious injuries that required more than 20 stitches and left permanent scarring. 4RP 72, 77. This assault was the basis of the charge in this case.

The party was in a house rented by four men, including Babo Keny. 5RP 5, 32, 34. Keny and most of the people attending were Sudanese. 3RP 14; 5RP 6, 84-86, 89. Members of the Sudanese community often gather for house parties and for church functions. 5RP 85. Lakilado is a part of the Sudanese community. 5RP 84-85; 6RP 8-9. While Jackson's boyfriend Tito is Sudanese, Jackson and Williams are African American. 4RP 56; 5RP 25; 6RP 11.

Jackson had accompanied Tito to Sudanese parties before October 2007 and had met Lakilado four or five times. 3RP 13-14.

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<sup>2</sup> Tito's last name is not in the record.

Lakilado admitted that she knew Jackson. 6RP 38. At a prior event, Jackson had seen Lakilado with a man Lakilado described as her boyfriend. 3RP 17-18, 35.

At the party on October 7, 2007, Keny was acting as DJ, and people were drinking and dancing to loud music. 5RP 8, 34-37.

The house was crowded, various witnesses estimating 20 to more than 40 guests. 3RP 12; 4RP 54; 5RP 7, 36, 90; 6RP 11. The party was in the living and dining room. 3RP 8-10; 5RP 22-23, 42.

Williams was at the edge of the room with Jackson when she asked a male guest (who Jackson recognized as Lakilado's boyfriend) if he had a piece of gum. 3RP 17; 4RP 59-61. As he said he did not, Lakilado approached and spoke to him in a language that Williams did not understand, and the man quickly moved to another part of the room. 3RP 17-19; 4RP 61-62. Lakilado also walked away. 3RP 21, 50; 4RP 67.

Williams and Jackson walked over to Lakilado to explain that Williams had not meant any offense, but Lakilado was angry. 3RP 21-22; 4RP 62, 66-67. Lakilado suddenly smashed a glass bottle in Williams' face. 3RP 22; 4RP 66, 72. Williams was seriously injured and the rest of the guests immediately fled the house. 3RP 27;

4RP 72, 77; 5RP 43, 94. One of the renters called 911 and Williams was taken to the hospital by ambulance. 5RP 10, 73-76.

Williams identified Lakilado as her attacker in a sequential photo montage that she viewed about two weeks after the assault. 4RP 10, 13, 81-82. The room was well-lit when the assault occurred. 3RP 20; 4RP 69; 5RP 59, 102. Williams and Jackson both identified Lakilado in court as the woman who attacked Williams. 3RP 13; 4RP 64. Neither knew Lakilado's full name on the night of the assault, although Jackson recognized Lakilado from their prior meetings. 3RP 13-14, 24; 4RP 54; 5RP 74.

Lakilado testified that she did not assault anyone that night and did not see what happened to Williams. 6RP 14-15. She conceded that she had previously met Jackson and knew her. 6RP 10-11, 38. Lakilado described her appearance that night as similar to her appearance in the photograph of her that was used in the photo montage. 6RP 47-48.

Defense witness Karamella Auko was a good friend of Lakilado's who also attended the party. 5RP 84, 86-87, 106. She and Lakilado socialized at Lakilado's house prior to the party at Keny's house, and both went to another party afterward. 5RP 87, 97-99. Auko did not see the assault. 5RP 94-95.

Auko sat in a chair while people danced at the party.

5RP 90. She did not recall where Lakilado was, but said Lakilado might have been on Auko's left, although Auko did not pay attention to whether Lakilado was there the whole evening. 5RP 93-94.

Auko could not say where Lakilado was when the screaming started, Lakilado could have been in the bathroom. 5RP 107.

Keny testified that Lakilado stood near his music equipment for the entire party and never left that position. 5RP 38, 57. He did not see the assault on Williams but testified repeatedly that when the commotion occurred, Lakilado was near him. 5RP 43, 48-49, 57, 63-65.

Lakilado testified that she was near Keny for most of the evening, but did leave to use the restroom and did dance for some time. 6RP 12-13. She stated that she did not see the assault on Williams but heard people say there was a fight. 6RP 14-15.

Lakilado presented psychologist Geoffrey Loftus, who testified about the inherent problems with memory and recollection. 6RP 61-124.

Dr. Jenelle Marcereau treated Williams' injuries. She removed pieces of glass from the lacerations on Williams' face and stitched her face back together. 4RP 92-95. Dr. Marcereau

explained that such a blow to the face could easily cause serious injury or death, by causing a hemorrhage on the brain, or by cutting an artery. 4RP 95.

**C. ARGUMENT**

1. THE INSTRUCTION DEFINING THE TERM "RECKLESSLY" WAS ACCURATE AND DID NOT CREATE AN IMPROPER MANDATORY PRESUMPTION.

Lakilado claims that Instruction 11, defining "recklessly," created an impermissible mandatory presumption that relieved the State of its burden of proving an element of assault in the second degree.<sup>3</sup> This argument is without merit. The holdings of two recent cases establish that, in combination with the to-convict instruction on second-degree assault, the definition used does not create mandatory presumption.

a. Relevant Instructions.

The court's instructions to the jury included the following instructions, quoted in pertinent part.

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<sup>3</sup> Lakilado did not object to this instruction at trial, but if this Court concludes that this argument has merit, it may be raised for the first time on appeal. State v. Holzknecht, 157 Wn. App. 754, 762, 238 P.3d 1233 (2010).

Instruction 7 set out the elements of the crime:

- (1) That on or about October 7, 2007, the defendant intentionally assaulted Olympia Williams;
- (2) That the defendant thereby recklessly inflicted substantial bodily harm on Olympia Williams;
- (3) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty. ....

CP 27; see RCW 9A.36.021(1)(a) (second-degree assault).

Instruction 9 defined "intentionally":

A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result which constitutes a crime.

CP 29.

Instruction 10 defined "knowingly." CP 30.

Instruction 11 defined "recklessly":

A person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that a wrongful act may occur and this disregard is a gross deviation from conduct that a reasonable person would exercise in the same situation.

When recklessness is required to establish an element of a crime, the element is also is [sic] established if a person acts intentionally or knowingly.

CP 31.

- b. The Definition Of "Recklessly" Did Not Relieve The State Of Its Burden Of Proving An Element Of The Crime.

Instruction 11 correctly set out the statutory definition of "recklessly," which includes a presumption of recklessness based on a finding of intentional action. CP 31; RCW 9A.08.010(2).<sup>4</sup> It did not relieve the State of its burden of proving the elements of assault in the second degree, which were correctly described in the to-convict instruction. RCW 9A.36.021(1)(a); CP 27, Instruction 7. The additional language in Instruction 11, limiting the inference to "the element" when "recklessness is required to establish an element of a crime," makes it absolutely clear that the jury must find each element of the crime. CP 31.

A mandatory presumption requires the jury to find a presumed fact from a proven fact. State v. Deal, 128 Wn.2d 693, 699, 911 P.2d 996 (1996). Such a presumption violates a defendant's right to due process of law only if it relieves the State of its burden of proving an element of a crime. State v. Thomas, 150 Wn.2d 821, 844, 83 P.3d 970 (2004).

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<sup>4</sup> RCW 9A.08.010(2) provides in pertinent part: "When recklessness suffices to establish an element, such element also is established if a person acts intentionally or knowingly."

Division Two of the Court of Appeals has issued conflicting decisions as to whether the definition of "recklessly" in the former version of WPIC 10.03 created an impermissible mandatory presumption as to the crime of assault in the second degree based on infliction of substantial bodily harm. State v. Keend, 140 Wn. App. 858, 862, 166 P.3d 1268 (2007) (not an impermissible presumption); State v. Hayward, 152 Wn. App. 632, 646, 217 P.3d 354 (2009) (was an impermissible presumption). That former instruction set out the presumption simply: "Recklessness also is established if a person acts intentionally." WPIC 10.03 (1994).

This Court recently concluded that even that simple statement of the presumption did not impermissibly relieve the State of its burden of proving the element of reckless infliction of substantial bodily harm in a second-degree assault case. Holzknrecht, 157 Wn. App. at 766. Holzknrecht criticized Hayward's conclusion that a change in the WPIC instruction established that the previous version did not adequately follow RCW 9A.08.010. Holzknrecht, 157 Wn. App. at 765.

Holzknrecht concluded that the instructions given relating to the second-degree assault charge correctly informed the jury of the applicable law concerning proof of mental states. Id. at 766.

Following the reasoning of Keend, supra, this Court concluded that the instructions, including a to-convict comparable to the instruction in the case at bar, "made clear that a different mental state must be determined for each element: intent as to assault, and recklessness as to infliction of substantial bodily harm." Holzkecht, 157 Wn. App. at 766. The requirement to find a separate mental state for each of these elements was not compromised by the definition of "recklessness."<sup>5</sup> Id.

Moreover, in the case at bar, the trial court used the "recklessness" definition in the 2008 version of WPIC 10.03, which specifically limits the inference of recklessness to "the element," when "recklessness is required to establish an element of a crime," making it even more clear that the jury must find each element of the crime separately. CP 31. Under Holzkecht, this definition of "recklessness" did not relieve the State of its burden of proof as to any element of the crime.

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<sup>5</sup> Lakilado challenges Holzkecht's reliance on the plurality in State v. Sibert, 168 Wn.2d 306, 230 P.3d 142 (2010). However, Sibert did uphold the instruction challenged here in the face of a claim that it created a mandatory presumption. Id. at 315-17. Because Sibert did not involve a charge of second-degree assault, it did not control the court's conclusion in Holzkecht and it does not resolve the issue presented in the case at bar.

Moreover, Division Two recently approved the 2008 version of WPIC 10.03, distinguishing it from the version used in Hayward, in State v. McKague, 159 Wn. App. 489, 506-10, 246 P.3d 558 (2011). That court concluded that the insertion of references to "an element" and "the element" makes clear that a finding of intent as to the act of assault could not support a finding of recklessness as to the infliction of substantial bodily harm. McKague, 159 Wn. App. at 509-10. Therefore, the instruction did not create an impermissible mandatory presumption. Id. at 510.

Finally, any error in the instruction is harmless error in this case. There is a special harmless error test that applies to instructions that include impermissible mandatory presumptions. Yates v. Evatt, 500 U.S. 391, 403-06, 111 S. Ct. 1884, 114 L. Ed. 2d 432 (1991); State v. Atkins, 156 Wn. App. 799, 813, 236 P.3d 897 (2010).

The reviewing court first will "identify the evidence the jury reasonably considered under the instructions given by the court on the pertinent issue." Atkins, 156 Wn. App. at 813-14. When there are alternatives other than the presumption in the pertinent definition, as in the case at bar, the jury was not limited to considering the presumption. Id. at 814. In this case, the jury

would have considered all of the evidence, as the evidence of reckless infliction of substantial bodily harm is the same evidence that establishes the intentional assault - Lakilado's angrily smashing a bottle on Williams' face is the evidence relevant to both issues.

Additionally, as in Atkins, the court instructed the jury:

In order to decide whether any proposition has been proved, you must consider all of the evidence that I have admitted that relates to the proposition. Each party is entitled to the benefit of all of the evidence, whether or not that party introduced it.

CP 19. Based on that instruction, the court in Atkins inferred that the jury considered all the evidence relevant to the pertinent issue.

Atkins, 156 Wn. App. at 815.

The second step of the Yates test is to weigh the evidence considered against the probative force of the presumption alone - if the evidence is overwhelming there is no reasonable doubt as to the verdict, the error is harmless. Atkins, 156 Wn. App. at 815-16. Here, the unrebutted and uncontested evidence that the assailant smashed a glass bottle into Williams' face is overwhelming evidence that the assailant recklessly inflicted substantial bodily harm. This element was not contested in closing argument - the defense was limited to challenging proof of the identity of the assailant. The alleged instructional error was harmless.

2. THE TRIAL COURT PROPERLY DENIED THE MOTION FOR NEW TRIAL.

Lakilado brought a motion for new trial based on errors in following statutory procedure for qualifying an interpreter, alleged errors in interpretation, and a claim of ineffective assistance of counsel based on failure to raise these claims during trial. These claims are without merit. The error in statutory procedure was waived by Lakilado's failure to object. The trial court found that the witnesses and the interpreter understood each other; it found that differences in interpretation that might be errors were insignificant in the context of the remainder of the testimony. Because the interpretation was not flawed, defense counsel's failure to object was not ineffective. The trial court did not abuse its discretion in denying the motion for new trial.

A trial court's denial of a motion for new trial will not be reversed on appeal unless the defendant makes a clear showing that the trial court abused its discretion. State v. Pete, 152 Wn.2d 546, 552, 98 P.3d 803 (2004); State v. Lemieux, 75 Wn.2d 89, 91, 448 P.2d 943 (1968). A court abuses its discretion when its decision is exercised on untenable grounds or for untenable reasons. State v. Blackwell, 120 Wn.2d 822, 830, 845 P.2d 1017 (1993). An abuse of

discretion will be found only if no reasonable judge would have reached the same conclusion. Pete, 152 Wn.2d at 552.

The trial court did not abuse its discretion in concluding that any interpretation errors were minor and not prejudicial in this case.

a. Relevant Facts.

Walid Farhoud acted as an Arabic interpreter for defense witnesses Karamella Auko and Babo Keny at trial. CP 319; 5RP 30. On December 8, 2008, Farhoud had interpreted for Keny during a pretrial interview. CP 322-33, 46. Separate interpreters were provided throughout the trial court proceedings for defendant Lakilado. See e.g., 1RP 2-8; 4RP 3; 6RP 1; 9RP 70.

For purposes of the motion for new trial, Lakilado retained another Arabic interpreter, Nada Ali. CP 282. Ali listened to an unofficial recording of the testimony of Auko and Keny, made by the court reporter. CP 49, 283. Ali created a table of this testimony, showing English in four of its six<sup>6</sup> columns: a question asked; Ali's English interpretation of the question as Farhoud posed it to the witness in Arabic; Ali's English interpretation of the Arabic answer

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<sup>6</sup> The other two columns are in Arabic. CP 283.

given by the witness; and Farhoud's English interpretation at trial of the Arabic answer given by the witness. CP 283; 9RP 34-36. The table was filed as an appendix to the motion. CP 183-281.

The State submitted a declaration of Farhoud with his resume. CP 319-26. Farhoud has been an Arabic interpreter in federal, state, and local courts since 1985. CP 319. Among other publications, he is the author of The English-Arabic Dictionary for Legal Terms Used in U.S. Courts (2005). CP 320.

Modern Standard Arabic is the standard form of Arabic used by Arabic speakers as a universal, common dialect. CP 321. The core of the numerous regional dialects is the same. CP 321.

Farhoud stated that both witnesses, Keny and Auko, speak and understand Modern Standard Arabic and speak a Sudanese dialect that Farhoud understood. CP 321. Farhoud stated, "We had no difficulty understanding each other." CP 321. There was no declaration from Keny or Auko to the contrary.

Farhoud interpreted for Keny at the prosecutor's pretrial interview of Keny, on December 8, 2008, which defense attorney Atwood attended. CP 322. Before the interview, Farhoud confirmed that Keny understood the standard Arabic that Farhoud used and that Farhoud understood Keny's Sudanese dialect.

CP 322-23. Atwood declared that the interview "took a little more effort and clarification" than a defense interview using a different interpreter. CP 46. Atwood stated that Farhoud "took the time to make clarifications so I did not have concerns as to whether Mr. Keny was able to understand...." CP 46.

Lakilado submitted a declaration stating that she could determine that Farhoud was "making mistakes" in his interpretation. CP 286. She used her own interpreter to tell her attorney that mistakes were occurring. CP 286.

Atwood asserted that the testimony of Keny and Auko was difficult and their answers not always logical. CP 47. She did not state that she was informed of interpretation mistakes during the testimony. Atwood stated that after the testimony of both witnesses was over, Lakilado's interpreter explained that the witnesses "may have had difficulty understanding the interpreter." CP 48.

Three days after Keny and Auko testified, Lakilado testified that she did not think that Auko and the interpreter understood each other. 6RP 25. Lakilado initially said that she spoke the same Arabic dialect as Auko, but then contradicted herself and said that Auko was from a different province and that only Keny (and witness Pitia) were from the same province as Lakilado and shared the

same dialect. 6RP 25-26. Lakilado said that she could not understand different dialects. 6RP 25.

b. The Trial Court's Findings.

The trial court made extensive oral findings when it denied Lakilado's motion for new trial. 9RP 71-88. The written order denying the motion simply incorporated the reasons given in the court's oral ruling. CP 343.

The trial court noted that there are no certified Arabic interpreters in Washington. 9RP 72; CP 59. It conceded that it failed to make the inquiry into the interpreter's qualifications as required by RCW 2.43.030. 9RP 72. The court found that Lakilado waived this error by failing to object. 9RP 72.

Further, the court concluded that the failure to follow the statutory procedure was harmless and did not affect the outcome of trial. 9RP 73. The court explained that if it had heard Farhoud's impressive credentials, it would have found him qualified. 9RP 73. The court also concluded that there was no evidence that the witnesses and Farhoud had any difficulty understanding one another. 9RP 73. Based on the same finding of lack of prejudice,

the court concluded that the failure to object would not constitute ineffective assistance of counsel. 9RP 73, 87.

The trial court next addressed the claimed interpretation errors. After reviewing in detail the alleged errors in interpretation in the context of the testimony as a whole, the court concluded that the discrepancies were "either nonmaterial or they did not affect the outcome of the trial." 9RP 86. It found that "[t]he plain import of Mr. Keny and Ms. Auko's testimony as translated by Mr. [Farhoud] was that while they did not see the assault, the defendant was in another part of the room at the time of the assault."<sup>7</sup> 9RP 86. The court noted that the question of alcohol consumption was not a major issue in the case, because anger, not intoxication, was the alleged motive. 9RP 86-87. It concluded that it was "convinced that the result would have been the same even if the jury had heard Dr. Ali's interpretation." 9RP 87.

Finally, the trial court addressed the claim of ineffective assistance of counsel. The court found that both Keny and Auko would have stated that they had no difficulty communicating in court, based on Farhoud's declaration to that effect and the

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<sup>7</sup> Auko testified that she did not recall where Lakilado was when the screaming started. 5RP 106-07; CP 279.

absence of any declaration from either witness contradicting it. 9RP 88. The court noted that Lakilado's assertions during trial that there were errors in the translation had little weight, given her inability to understand English. 9RP 75, 88. It also found that Farhoud's requests for clarification during the trial interpretation reflected conscientiousness in the face of ambiguity and not incompetence. 9RP 78-79, 88. Therefore, the court held that there was no basis for counsel to object and the failure to object to any error in interpretation did not affect the outcome. 9RP 74-75, 88.

c. Lakilado Waived The Errors In Complying With The Statutory Procedure For Qualifying An Interpreter.

The trial court properly concluded that Lakilado waived her claim of noncompliance with the statutory procedure by failing to raise it when the interpreter was sworn. Because the court held that it would have accepted interpreter Farhoud had it examined his qualifications at the time, Lakilado suffered no prejudice as a result of the statutory error and thus, it is not a basis for reversal.

In Washington, every non-English-speaking person who is subpoenaed to appear at a legal proceeding is entitled to the services of a court-appointed, qualified interpreter. RCW 2.43.030.

The interpreter must abide by the code of ethics and take an oath to interpret the person's statements "to the best of the interpreter's skill and judgment." RCW 2.43.050; GR 11.2.

If the non-English-speaking person is a witness who is compelled to appear, the court must use an interpreter certified by the administrative office of the courts, unless good cause is found. RCW 2.43.030(1)(b). "Good cause" may be that no certified interpreter is reasonably available, or that there are no certified interpreters in the language spoken. Id. If the court intends to use an interpreter who is not certified, it must satisfy itself, on the record, that the interpreter is "capable of communicating effectively" with the court and the person needing the interpreter, and that the interpreter is familiar with and will abide by the code of ethics established by court rule. RCW 2.43.030(2); GR 11.2.

When defense counsel introduced Farhoud as the interpreter for defense witness Keny, counsel did not state whether Farhoud was certified. 5RP 30-31. The court administered an oath but not the oath required by RCW 2.43.050. 5RP 31. Lakilado did not object to the procedure used.

Because this error is statutory and not constitutional, RAP 2.5(a) bars consideration of the issue. A claim of error may be

raised for the first time on appeal only if it is a "manifest error affecting a constitutional right." RAP 2.5(a)(3); State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). The defendant must show both a constitutional error and actual prejudice to his rights. State v. Kirkman, 159 Wn.2d 918, 926-27, 155 P.3d 125 (2007). The general rule that statutory errors are waived unless raised contemporaneously also applies to errors in the statutory procedures relating to interpreters. State v. Serrano, 95 Wn. App. 700, 704, 977 P.2d 47 (1999).

The trial court concluded that Lakilado waived this statutory issue by failing to object. 9RP 72. Further, the court concluded that the failure to follow the statutory procedure was harmless and did not affect the outcome of trial. 9RP 73. The court noted that there are no certified Arabic interpreters in Washington. 9RP 72; CP 59. It explained that if it had heard Farhoud's "impressive" credentials, it would have found him qualified. 9RP 73. The appointment of an interpreter is within the sound discretion of the trial court. State v. Gonzales-Morales, 138 Wn.2d 374, 381, 979 P.2d 826 (1999). The court also concluded that there was no evidence that the witnesses and Farhoud had any difficulty understanding one another. 9RP 73.

In light of the trial court's findings, Lakilado has not established that the failure to make the record required by the statute rises to the level of constitutional error that caused her actual prejudice. Therefore, her objection to the statutory deficiencies was waived by failure to raise it at the time.

d. Alleged Defects In Interpretation Were Minor And Did Not Deprive Lakilado Of A Fundamentally Fair Trial.

Lakilado's claim that the interpreter used for two defense witnesses was incompetent and thus deprived her of a fair trial is not supported by the record. There is a detailed record of the interpretation and based on that record and its own observation of the trial, the trial court concluded that alleged errors in interpretation were either nonmaterial or did not affect the outcome of the trial. 9RP 86. It found that "the result would have been the same even if the jury had heard Dr. Ali's interpretation." 9RP 86-87. Lakilado has not established that the court's conclusion was a manifest abuse of discretion. A review of the alleged errors, in context, establishes that the interpretation provided was competent and did not deprive Lakilado of a fundamentally fair trial.

The Sixth Amendment guarantees an accused the right to present witnesses in his favor, and that right must include the corollary that those witnesses be able to communicate with the trier of fact. U.S. Const. amend. VI. Just as a non-English-speaking defendant has a constitutional right to an interpreter,<sup>8</sup> the State agrees that the right to an interpreter for a non-English-speaking defense witness is constitutionally guaranteed.

The constitutional right to an interpreter ensures a competent interpreter. State v. Pham, 75 Wn. App. 626, 633, 879 P.2d 321 (1994). When the competency of an interpreter is questioned, the central inquiry is the accuracy of the interpretation. State v. Teshome, 122 Wn. App. 705, 713, 94 P.3d 1004 (2004). The Seventh Circuit has framed the question as whether the accuracy and scope of a translation is subject to grave doubt. United States v. Cirrincione, 780 F.2d 620, 634 (7<sup>th</sup> Cir. 1985). "The ultimate question is whether any inadequacy in the interpretation 'made the trial fundamentally unfair.'" United States v. Valladares, 871 F.2d 1564, 1566 (11<sup>th</sup> Cir. 1989), quoting United States v. Tapia, 631 F.2d 1207, 1210 (5<sup>th</sup> Cir. 1980).

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<sup>8</sup> Gonzales-Morales, 138 Wn.2d at 378-79.

Perfection in interpretation is not required. Many languages do not have words that directly correspond to every word in English. Further, the courtroom interpreter must make quick decisions about meaning and the product may not be as polished as it would be with leisure to study and consider every possibility.

Arabic has words with many meanings, and their interpretation depends on context and the judgment of the listener as to the meaning intended. Farhoud gave an example of the word "Wallah," which could mean "I swear by Allah" or "truly," and another word, "ga'id," which can mean "sitting, standing, positioned, or located at." CP 321-22. Lakilado inadvertently makes this point herself in her claim that Farhoud erred by interpreting a word referring to the assault as "incident," because Ali interpreted it as "accident."<sup>9</sup> App. Br. at 26 n.4. Later in the document, Ali interprets the same Arabic word<sup>10</sup> previously interpreted as "accident" as "accident/incident," indicating that these are

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<sup>9</sup> At this location, Ali actually interprets the answer as referring to the "hit and accident," which may be more incriminating to Lakilado than "incident." CP 193 (2<sup>nd</sup> row).

<sup>10</sup> The identical Arabic symbol is in the Arabic answer in the table for each. CP 193, 223.

alternative meanings of the same word. Compare CP 193 (2<sup>nd</sup> row) with CP 223 (2<sup>nd</sup> row).

The foundation of Lakilado's argument is the unwarranted assumption that the interpretation offered by Ali is correct in each instance, while the interpretation of Farhoud, the court interpreter, is incorrect. The trial court carefully reviewed Ali's table comparing interpretations. It concluded that one claimed error that Lakilado characterizes as egregious was not an error at all, but was incorrectly interpreted by Ali. As the trial court concluded, the existence of a discrepancy does not establish that the court interpreter made a mistake. 9RP 79-80.

That error in Ali's interpretation is Auko's answer to defense counsel's question: "But Mary was drinking at her house?" At trial, Farhoud interpreted the answer as "Yes, it must have been that she drank at her house before the party." 5RP 103. Ali interpreted the answer as "She may have had only one drink. Because at the time she was pregnant so she could not drink." CP 273. Farhoud explained that a word was used that has multiple meanings and based on the context he believed that Auko meant that Lakilado was holding a drink and not that she was pregnant. CP 322. The court concluded that Farhoud "was probably making

the correct judgment in light of the defendant's own testimony that she did not know she was pregnant until several weeks after the assault." 9RP 85. The court also noted that it was unlikely that Auko meant to say that Lakilado could not drink because she was pregnant because Auko testified that Lakilado may have been drinking at the party. 9RP 85-86.

Lakilado testified that she did not know she was pregnant until at least a month after the assault and that she had been drinking at her house before she went to the party, corroborating the conclusion that the interpretation at trial was the correct one. 6RP 29-30, 33, 36. Lakilado testified that she did not drink too much beer at her house because she was driving; she did not suggest that she even considered the possibility that she might be pregnant. 6RP 33.

Lakilado identifies two substantive areas in which she claims that interpreter error prejudiced her defense: how much Lakilado had been drinking before the assault, and the location of Lakilado at the time of the assault. The trial court did not abuse its discretion in concluding that Lakilado has not established incompetence in either respect.

Aside from the meritless claim about omitting the reference to pregnancy in Auko's testimony, the two other statements about Lakilado's drinking that Lakilado cites as grave error were Keny's statements, in which he states that he is uncertain about whether Lakilado was drinking. App. Br. at 26. As to the first alleged error, the two interpretations are entirely consistent. Asked if he recalls whether Lakilado was drinking that night, the answers are:

Interpretation at Trial	Interpretation by Ali
She was sitting on the left side to where I was standing. I guess she was drinking because everybody was drinking. But I am not sure and I didn't really pay attention to her drinking or not.	I swear to God [well], maybe she drank, but I did not pay too much attention. I saw ... she was sitting toward my left hand side. I did not, maybe she was drinking but I did not pay attention because everybody was drinking. I did not pay attention. I mean, I am not sure.

CP 192 (bracket in original). Again as to the second alleged error, the two interpretations are indistinguishable in substance. Keny was asked on cross-examination if he did not tell the prosecutor at an interview that Lakilado was drinking or that he saw her holding a drink, the answers are:

Interpretation at Trial	Interpretation by Ali
The, I do not recall but I recall one thing that I always said: that everybody was drinking there. And I, Mary could have drank [sic] or not, but everybody was drinking.	I do not remember [what she just said]. But what I said at the time, was that all the people were drinking. I am not certain whether Mary drank, but all people had drinks. What I said was Mary might have had [alcoholic] drinks, [or] maybe she did not drink. This is what I said.

CP 219-20 (brackets in original). Moreover, the fine detail of just how uncertain Keny was about whether Lakilado had a drink has very little relevance to the issue in the case: the identity of the assailant. In addition, Lakilado testified at trial that she had been drinking before she arrived at the party. 6RP 33, 36.

Lakilado identifies as key errors three of Keny's answers relating to Lakilado's location at the time of the assault. One was in answer to a question asking whether Keny saw Auko after he heard a pop in the center of the room. The answer:

Interpretation at Trial	Interpretation by Ali
Karamella <sup>11</sup> [Auko], Karamella, Amir and Mary were standing on my left side.	Karamella was to this side. Karamella and Mary and Amir were in the same direction. They were all sitting toward the left side.

<sup>11</sup> Karamella Auko's first name is misspelled throughout Ali's table. In this brief, it is spelled correctly to avoid confusion or disrespect. 5RP 84.

CP 201. The critical error identified in this answer is Farhoud's use of the word "standing" as opposed to Ali's "sitting." App. Br. at 24. However, Farhoud explained that the Arabic word used could have either meaning, depending on context, and he concluded that Keny meant "standing" because Keny referred to a location on the exhibit where there was no furniture. CP 322. Ali's assertion of a different interpretation does not establish that Ali is correct, especially when she did not have the advantage of the context of the exhibit. The trial court concluded that even if the word "sitting" should have been used, it was insignificant as it was very clear that Keny put Lakilado in a different part of the room. 9RP 81-83. What was important to the defense was that Keny placed Lakilado far from the assault and that is clear from the testimony the jury heard.

A second key discrepancy cited as to Lakilado's location was on cross-examination of Keny, when he was asked whether he was not watching Lakilado the entire evening. The answer:

Interpretation at Trial	Interpretation by Ali
What I remember is Mary was on my side and when the incident occurred, the girl was far away when that happened. And that's what I remember.	Not all the time. But Mary was on the left hand side. Even when the accident/incident happened she was on the left hand side and the girl was in the center/middle. That is, she was far from [Mary]. I mean this is what I recall. This is what I recall.

5RP 57; CP 223 (brackets in original). The objection now raised is that the courtroom interpreter provided less specific information and emphasis, but Lakilado has not established that this variation in emphasis deprived her of a fundamentally fair trial. Indeed, Keny's next statement was that Mary never moved from his left hand side. 5RP 57. He previously unequivocally testified twice that when he heard the pop, Williams was in the center of his room and Lakilado was at his left side. 5RP 43, 49. He drew the location of Mary, away from the site of the commotion, on an exhibit. 5RP 63-65. This and the final alleged error as to location<sup>12</sup> are insignificant given Keny's repeated emphatic testimony that Lakilado was near him when the assault occurred far away from him.

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<sup>12</sup> This claim is that Keny interrupted the question, "And you are saying that you are at your DJ booth and Mary, Karamella --," answering, according to Ali, "On this side, they were toward the direction of the couch" instead of the trial interpretation, "It's on the side where the couch is." 5RP 4; CP 198-99.

Lakilado also argues that the courtroom interpreter erred in interpreting Keny's own assertion about what he had told his roommates about the assault:

Interpretation at Trial	Interpretation by Ali
I talked to them, yes, later and I told them I don't think that Mary hit that woman.	Yes, I spoke, I told them again, we spoke just like that [informally/in conversation]. I told them Mary did not hit anybody.

CP 211-12. Lakilado argues that use of the words "I don't think" in the trial interpretation did not adequately convey Keny's unequivocal position. App. Br. at 25-26. It has not been established that Ali's interpretation is more correct. Keny's unequivocal stance was clear from previous testimony, often repeated, that Lakilado was near him, on his left side, when he heard the pop. 5RP 43, 48-49, 57. As the trial court concluded, "I think" could not reasonably be considered evidence of uncertainty when Keny had just said, "I told them Mary was not involved because she was sitting on the other side when the incident happened," and repeatedly said Lakilado was not in the same area when Williams was assaulted. 5RP 48-49; 9RP 83-84.

Finally, Lakilado suggests that she might have offered a defense of accident if only Farhoud had interpreted an answer as

Ali did. The answer was in response to the question, "did you see the woman get hurt?" The interpretations:

Interpretation at Trial	Interpretation by Ali
I was playing music of Jamaica. Everybody was raising his hand up, and in the middle of the center she was there and then I hear this pop sound.	I was, yeah, I heard something that said <i>taakh</i> (bang sound), just like that. Because when she was dancing, she was dancing toward the center, where young men were. I was playing reggae music, reggae songs of Jamaica, and [when people are dancing] they all raise their glasses up.

5RP 42; CP 200 (bracket in original). The phrase that Lakilado relies upon is "[when people are dancing] they all raise their glasses up." App. Br. at 29-30. However, the reference indicating that it was people dancing who raised their glasses is in brackets, which normally indicates that the bracketed phrase is added or modified. More importantly, the prejudice alleged is that a possible defense might have "slipped by" defense counsel, but defense counsel had interviewed Keny months before trial and was present when the prosecutor interviewed Keny five weeks before trial - she did not need to rely on trial testimony to learn what Keny claimed he saw. See CP 45-46. The defense was mistaken identity, so this possible omission is irrelevant.

Notably all but one of the errors identified as relating to substantive issues were during the testimony of Keny. Farhoud had previously interpreted for Keny during an interview of Keny and had confirmed that they were able to understand one another at that time. CP 322-23. The one substantive discrepancy identified in Auko's testimony is the one previously discussed regarding the word "pregnancy," as to which the court found that the error was Ali's, and that there was no error in the trial interpretation. 9RP 85.

The list of errors cited simply as examples of incompetence with no specific substantive effect does not demonstrate incompetence. Several of these examples are requests for clarification by the witness or the interpreter, which establishes no more than the efforts made to be accurate. See 9RP 78-79 (court concludes interpreter's questions reflect conscientiousness); e.g., App. Br. at 31, n.5, CP 189; App. Br. at 34, CP 228. Other examples include references to exhibits that would make the interpretation clear. E.g., App. Br. at 32, nn.7-8, CP 194-95, 198; App. Br. at 33, n.9, CP 230. One of those includes an "[unclear]" notation in Ali's version and Lakilado identifies as error an additional line of testimony; that statement probably was made

while the witness was pointing at the exhibit referred to and was inaudible on the unofficial recording used by Ali. CP 194-95.

In one of these examples, the court interpretation is described as particularly poor but in fact makes more sense than Ali's interpretation. In answer to a question about how many people were outside, Auko's answer was:

Interpretation at Trial	Interpretation by Ali
Everybody was outside. I was the only one who was waiting there for Rebecca to come back.	There were no people outside. Everyone ran out except me. Because Rubeca was not there. I was waiting for Rubeca. Standing at the door.

5RP 100; CP 267-68. In Ali's interpretation the first two sentences are contradictory -- it appears that it was Ali who did not understand the substance of the answer.

Lakilado cites three alleged errors as affecting credibility but none would reflect on the credibility of the witness. In the first, Keny says that there were some Sudanese women at the party who he knew but did not know their names. App. Br. at 34, CP 188. Lakilado claims that Keny's credibility was hurt because the jury did not hear Ali's version, that in the Sudanese community you may not know a person's "real name." Id. Ali's version is more negative than the statement heard in court. Lakilado's suggestion that the

interpreter should have explained the answer is unpersuasive, as the interpreter is not permitted to add editorial comment. The second example of confusion regarding references to two children simply illustrates an attempt to clarify an answer. The third example, Auko's statement "This has been a long time," is claimed to be prejudicial because the jury "was aware" that the interview referred to had taken place between October and January, but (1) it would not be remarkable to refer to an interview months earlier as "a long time" ago; and (2) the jury did not know when Auko's interview occurred - the testimony cited refers only to the timing of Keny's interview. 5RP 33, 50.

The trial court noted that the witnesses did not express difficulty understanding the interpreter, although at times they did not understand counsel's question. 9RP 76. The court concluded that virtually all answers appeared responsive to the questions, observing that even English-speaking witnesses often ignore foundational questions and jump to the heart of the matter. 9RP 77.

As the trial court concluded, the plain import of Keny and Auko's testimony was communicated to the jury. 9RP 86. The court concluded that "the result would have been the same even if

the jury had heard Dr. Ali's interpretation." 9RP 87. Lakilado has not established that the trial court abused its discretion in reaching these conclusions. For the same reasons, if this court concludes that constitutional error occurred, it was harmless beyond a reasonable doubt. The interpretation may not have been perfect but it effectively conveyed the testimony of the witnesses and the minor errors that have been established did not deprive Lakilado of a fundamentally fair trial.

e. Lakilado Has Not Established Ineffective Assistance Of Counsel.

Lakilado claims that trial counsel was ineffective in failing to object to the failure to comply with RCW 2.43.030, and in failing to challenge the competency of the interpreter during trial. These claims are without merit. As the trial court concluded, the former failure was harmless, and the latter claim does not establish either deficient performance or prejudice, which are both essential components of a finding of ineffective assistance. 9RP 87-88.

To establish ineffective assistance of counsel, Lakilado must show both that defense counsel's representation was deficient, *i.e.*, that it "fell below an objective standard of reasonableness based on

consideration of all the circumstances," and that defense counsel's deficient representation prejudiced the defendant. In re Pers. Restraint of Hutchinson, 147 Wn.2d 197, 206, 53 P.3d 17 (2002) (applying the test of Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). The benchmark for judging a claim of ineffective assistance of counsel is whether counsel's conduct "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland, 466 U.S. at 686.

Judicial scrutiny of counsel's performance must be highly deferential. Strickland, 466 U.S. at 689. Every effort should be made to "eliminate the distorting effects of hindsight," and judge counsel's performance from counsel's perspective at the time. Id. In judging the performance of trial counsel, courts begin with a strong presumption that the representation was effective. Strickland, 466 U.S. at 689; Hutchinson, 147 Wn.2d at 206. Where a claim of deficiency rests on defense counsel's failure to object, the defendant bears the burden of showing that the objection likely would have been sustained. State v. Hendrickson, 129 Wn.2d 61, 79-80, 917 P.2d 563 (1996).

The trial court concluded that the failure to follow the statutory procedure was harmless and did not affect the outcome of trial. 9RP 73. The court explained that Farhoud had impressive credentials and it would have found him qualified. 9RP 73. The court also concluded that there was no evidence that the witnesses and Farhoud had any difficulty understanding one another. 9RP 73. Based on the same finding of lack of prejudice, the court concluded that the failure to object would not constitute ineffective assistance of counsel. 9RP 73, 88.

The trial court noted that defense counsel did not have a basis for evaluating the interpretation and so it concluded that the failure to object at trial was not a waiver. 9RP 75, 88. It concluded that any mention of mistakes by Lakilado would have questionable significance because Lakilado was not fluent in English. 9RP 75. Further, Lakilado asserted that she communicated the possible mistake through her own interpreter and Atwood's declaration indicated that she was told through that interpreter only that the witnesses "may have had difficulty understanding" and that occurred only after their testimony was over. CP 48, 286.

There are two flaws in Lakilado's claim on appeal that the failure to raise the issue of interpreter competence must be

deficient performance because the testimony heard by the jurors was less favorable to Lakilado than their actual testimony. First, it is premised on the conclusion that Ali's interpretation is more accurate, which has not been established. Second, defense counsel was not fluent in Arabic and could not have known that the courtroom interpretation was inaccurate, let alone that it was less favorable than what actually was said.

In addition to overcoming the strong presumption of competence and showing deficient performance, the defendant must affirmatively show prejudice. Strickland, 466 U.S. at 693. Prejudice is not established by a showing that an error by counsel had some conceivable effect on the outcome of the proceeding. Id. at 693. The defendant must establish a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. Id. at 694. Speculation that a different result might have occurred is not sufficient. State v. Crawford, 159 Wn.2d 86, 99-102, 147 P.3d 1288 (2006).

Lakilado has not shown how the alleged errors in interpretation prejudiced her case, as discussed in detail in the previous section. The trial court concluded that the differences in interpretations would not have an effect on the outcome. 9RP

74-75, 88. For the reasons discussed in the previous section of this brief, that conclusion is supported by the record. Without a showing of prejudice, the defendant's ineffectiveness claim must be rejected, even if the representation was deficient.

3. THE DEADLY WEAPON SPECIAL VERDICT INSTRUCTION DID NOT CONSTITUTE REVERSIBLE ERROR.

a. Facts.

The court's instructions to the jury initially included the 2008 version of WPIC 160.00 as Instruction 12, relating to the deadly weapon special verdict, with the following statements regarding unanimity:

Because this is a criminal case, all twelve of you must agree in order to answer the special verdict form. In order to answer the special verdict form "yes", you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you unanimously have a reasonable doubt as to this question, you must answer "no".

CP 32. However, as the court read the instructions to the jury before closing arguments, it concluded that the last sentence was incorrect. 7RP 5, 58. After consulting with the parties, who both agreed with the change, the court informed the jury:

I wanted to make a correction to jury instruction number 12, if you look at the last sentence, it says, if you unanimously have a reasonable doubt as to this question you must answer no; if you would please cross out "unanimously" in that last sentence.

7RP 5-6, 58. The court crossed out the word "unanimously" in the original set of instructions as well and initialed that change. CP 32.

b. Any Error Was Invited By Lakilado.

Even if there is error in Instruction 12, Lakilado is precluded from seeking reversal on that account, because she invited the claimed error. A defendant who invites error may not claim on appeal that he is entitled to reversal based on that error. State v. Studd, 137 Wn.2d 533, 546, 973 P.2d 1049 (1999). The invited error doctrine bars relief regardless of whether counsel intentionally or inadvertently encouraged the error. Seattle v. Patu, 147 Wn.2d 717, 720, 58 P.3d 273 (2002). A defendant who is merely silent in the face of manifest constitutional error does not fall within the invited error doctrine. State v. Stein, 144 Wn.2d 236, 241, 27 P.3d 184 (2001).

The special verdict instruction initially proposed by the State was the 2005 version of WPIC 160.00 and included no reference to a general requirement of unanimity or any direction that the jury

must be unanimous as to a verdict of "no." Supp. CP \_\_\_ (sub. #87, 1-26-09 State's Instructions To The Jury, page 18). It provided in pertinent part:

If you find the defendant guilty of this crime, you will then use the special verdict form and fill in the blank with the answer "yes" or "no" according to the decision you reach. In order to answer the special verdict "yes", you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer.

Id.

Lakilado apparently did not submit any proposed instructions. 5RP 129. However, Lakilado complained that the instructions submitted by the State were "all dated 2005" and that in December 2008, most of them were updated, a number of them including significant differences. 6RP 4. It was in response to this complaint by Lakilado that the State proposed the 2008 version of WPIC 160.00, which the trial court ultimately modified and provided to the jury, and to which Lakilado now assigns error. Supp. CP \_\_\_ (sub. #96, 2-10-09 State's Amended Instructions To The Jury, page 4); CP 32 (Court's Instruction).

Lakilado also specifically agreed with the court's modification to Instruction 12 that was made at the time it was given to the jury. 7RP 5-6, 58. Lakilado indicated her approval of the specific change

that was made to convey that the jury need not be unanimous as to a special verdict of "no." 7RP 58.

Because she caused the error he now claims is reversible, Lakilado should not now be permitted to claim this error.

- c. The Trial Court's Explicit Removal Of The Word "Unanimously" From The Sentence Relating To A Verdict Of "No" Made The Applicable Law Clear.

Citing State v. Bashaw, 169 Wn.2d 133, 234 P.3d 195 (2010), Lakilado challenges the jury instruction relating to the deadly weapon enhancement. However, the correction made by the judge in this case specifically informed the jury that it need not be unanimous to return a verdict of "no." Thus, the jury was correctly instructed.

In Bashaw, a prosecution for delivery of a controlled substance with a school bus stop enhancement, the jury was instructed as to the enhancement, "Since this is a criminal case, all twelve of you must agree on the answer to the special verdict." 169 Wn.2d at 139. Relying on State v. Goldberg, 149 Wn.2d 888, 72 P.3d 1083 (2003), the Supreme Court concluded the instruction was incorrect because, pursuant to common law, the jury need not be unanimous to answer a special verdict inquiry in the negative.

Bashaw, 169 Wn.2d at 147. The court stated that this rule was not compelled by any constitutional provision, "but rather by the common law precedent of this court, as articulated in Goldberg." Id. at 146 n.7.

Although the general statement that the jury must be unanimous to answer the special verdict was in Instruction 12 and would be error under Bashaw if it stood alone, the court's articulated "correction" that specifically eliminated the word "unanimously" in the sentence that referred to an answer of "no" made it clear that unanimity was not required to answer the special verdict "no." The instruction, as corrected orally and in writing, was not error.

- d. Any Ambiguity In The Provisions Regarding Unanimity In Instruction 12 Was Not An Error Of Constitutional Magnitude And Was Not Preserved.

A panel of this Court recently concluded that the rule of Bashaw is a constitutional rule, despite the Bashaw court's apparent statement to the contrary. State v. Ryan, No. 64726-1 (Court of Appeals, April 4, 2011). Based on that holding, this issue may first be raised on appeal as a manifest constitutional error. Id.

Based on a split in the Divisions of the Court of Appeals, the State continues to take the position that the claimed error here is not constitutional, as the Supreme Court indicated in the Bashaw opinion. Bashaw, 169 Wn.2d at 146 n.7. See State v. Nunez, 160 Wn. App. 150, 248 P.3d 103 (2011) (Bashaw error is not constitutional). If the error is not constitutional, RAP 2.5(a) bars consideration of the issue. A claim of error may be raised for the first time on appeal only if it is a "manifest error affecting a constitutional right." RAP 2.5(a)(3); McFarland, 127 Wn.2d at 333. The defendant must show that the error occurred and caused actual prejudice to her rights. Id.

Lakilado has not established that any ambiguity in the provisions regarding unanimity in Instruction 12 was an error of constitutional magnitude or caused actual prejudice to her. As a result, she has not established manifest constitutional error and this claim has been waived.

D. **CONCLUSION**

For the foregoing reasons, the State respectfully asks this Court to affirm Lakilado's conviction and sentence.

DATED this 27<sup>th</sup> day of May, 2011.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Marla Zink, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. MARY LAKILADO, Cause No. 65575-2-I, in the Court of Appeals, Division I, for the State of Washington.

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



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Name  
Done in Seattle, Washington

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