

NO. 40450-8-II

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

JASON ROSS BURNS, APPELLANT

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DIVISION II
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STATE OF WASHINGTON
BY DEPUTY

Appeal from the Superior Court of Pierce County
The Honorable Lisa Worswick

No. 09-1-03784-3

BRIEF OF RESPONDENT

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A. ISSUE PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Whether the trial court's jury instruction number 12 properly instructed the jury with respect to the standard of proof of the school-zone enhancements to count I.

B. STATEMENT OF THE CASE.

1. Procedure

On August 18, 2009, Jason Ross Burns, hereinafter referred to as "defendant," was charged by information with two counts of unlawful delivery of a controlled substance. CP 1-2. An amended information was filed on October 7, 2009, which added a school-zone enhancement to counts I and II and also added count III, unlawful possession of an imitation controlled substance with intent to distribute, and count IV, unlawful possession of a controlled substance –forty grams or less of marijuana. CP 3-5. Finally, on February 11, 2010, the State filed a second amended information, which changed counts I and II to unlawful sale of a controlled substance, and added count V, unlawful possession of a controlled substance, but retained the sentence enhancements on counts I and II. CP 152-54; RP 5-11, 60-65. The trial court allowed this second amended information to be filed, but dismissed count V on defendant's

motion. RP 8-9, 60-65. The defendant was then arraigned on this second amended information and entered pleas of not guilty to all counts. RP 9-11.

On February 10, 2010, the defendant, who had previously been represented by an appointed attorney, was allowed on his motion, and after extensive colloquy, to proceed pro se with his former attorney as “stand-by counsel.” 02/10/2010 RP 3-19. *See* 01/07/2010 RP 3-19; 01/29/2010 RP 2-7.

The case was called for trial on February 11, 2010. RP 3. The court excluded witnesses and denied the defendant’s motion to suppress pursuant to Criminal Rule 3.6. RP 30-58.

However, the court later considered an oral motion to suppress evidence and, after a brief hearing and argument, granted that motion and suppressed any evidence seized from the defendant’s residence. RP 65-70, 120-37; CP 227-30. The State noted that this ruling “render[ed] it impossible to proceed on Counts III and IV.” RP 139. Although those counts do not seem to have been formally dismissed, the jury was not instructed on these counts and was given no verdict forms pertaining to them. *See* RP 139; RP 483-92; CP 186-206.

The court conducted a Criminal Rule 3.5 hearing on February 16, 2010. RP 70-120. Detective Duane Dobbins and the defendant testified at

that hearing. RP 70-103; 103-114. The court then heard argument and ruled the defendant's statements to Detective Dobbins to be admissible at trial. RP 115-20.

On February 17, 2010, the defendant moved to dismiss for prosecutorial misconduct, and the court subsequently denied this motion. RP 139-41; 473-83.

A jury was then selected and sworn in. RP 146-47.

Additional motions in limine were heard on February 17, 2010. RP 151-65.

The State and the defendant then gave their opening statements. RP 165-74, 174.

The State subsequently called Bradford Lampman to testify. RP 175-246. After the direct examination of Lampman, the defendant moved for a mistrial and that motion was denied. RP 212-14. The State called Naval Criminal Investigative Service Special Agent Steven St. John, RP 255-63, Kitsap County Sheriff's Detective Duane Dobbins, RP 263-332, 368- 89, 393-462, Franklin Boshears, RP 334-58, and Maude Kelleher. RP 462-68.

The State rested. RP 468. The defense rested immediately afterwards without calling any witnesses or otherwise offering any evidence. RP 468.

The defendant moved to dismiss the school zone enhancement pertaining to count II, and the court denied that motion. RP 468-71.

The court and parties considered jury instructions on February 23, 2010. RP 483-92. The defendant did not object to jury instruction number 12 or any of the court's instructions to the jury. RP 483-92; RP 516.

The court read the instructions to the jury, RP 493, and the parties gave their closing arguments thereafter. RP 493-509; RP 509-14; RP 514-16.

On February 24, 2010, the jury returned verdicts of guilty of unlawful sale of a controlled substance as charged in count I, and not guilty of unlawful sale of a controlled substance as charged in count II. RP 526-27; CP 207-08. It returned a special verdict with respect to count I, which indicated that the defendant sold a controlled substance within 1,000 feet of a school or school bus route stop, RP 527; CP 209. Given its verdict with respect to count II, the jury answered the special verdict with respect to that count negatively. RP 527; CP 238.

On March 24, 2010, a sentencing hearing was held at which the defendant was found to have an offender score in excess of 9 and a standard range sentence of 100 months and one day to 120 months in total confinement. RP 539; CP 213-26. The court sentenced the defendant to

an exceptional sentence below the standard range of 96 months in total confinement on count I plus 24 months in total confinement for the school-zone sentence enhancement, for a total of 120 months in total confinement. RP 533-44; CP 213-26.

The defendant filed a timely notice of appeal on March 24, 2010. RP 545-46; CP 231.

2. Facts

Bradford Lampman had used drugs for approximately fifteen years. RP 176-77. He used marijuana, Oxycontin, heroin, and methadone. RP 177. Lampman testified that his heroin usage had “destroyed a lot of things,” including his family. RP 180-81. Although Lampman testified that it had been about four months since he last used heroin, Lampman stated that when he was using, he got his heroin from the defendant. RP 182-85.

Lampman indicated that when he was stopped for driving on a suspended license, he was asked by a police officer if he would be willing to assist in some investigations. RP 183. Lampman testified that he agreed because there had been moral issues “riding on [his] conscience for a long time.” RP 183-84.

He stated that, at the time he agreed to assist police, he had been “buying quarters, quarter ounces to half ounces” of heroin from the defendant. RP 185-86. When he bought heroin from the defendant, Lampman would call him and then go to the defendant’s house to exchange the money for the heroin. RP 186-87.

Lampman testified that he first did a “controlled buy” for the police, which began when he called the defendant on the telephone and arranged to buy “a half ounce.” RP 191. The police then searched Lampman, provided him with money, and watched him as he went to the defendant’s house. RP 190-94. Once there, Lampman handed the defendant the money and the defendant gave him a half ounce of heroin. RP 194-98. Lampman met with detectives, gave Detective Dobbins the heroin he had purchased, and submitted to a search to confirm that he was not in possession of any other money, drugs, or contraband. RP 197-98; RP 271.

Lampman participated in another buy from the defendant about two weeks later. RP 199-200. Lampman made a telephone call to the defendant on speaker phone while Detective Dobbins listened. RP 200-01. Lampman asked the defendant about buying another half ounce of heroin. RP 200-01. The defendant indicated that Lampman would have to give him a ride to another dealer named “Jed” to pick up the heroin. RP

201-03. Lampman was then searched by the police and “wired with audio-visual communication” that allowed the buy to be recorded. RP 202-03.

When Lampman picked up the defendant, the defendant was “really sick at the time withdrawing [sic] from heroin.” RP 204. Lampman drove him to Jed’s house and the defendant went inside and returned with a half-ounce of heroin. RP 205-06. Lampman then drove the defendant to the defendant’s residence, where they weighed the drug and the defendant was given a two-gram “finder’s fee” or “tax.” RP 206-07, 188-89, 235-36. Lampman then returned to the detectives, submitted to a search, and turned over the remainder of the heroin. RP 207-08.

Kitsap County Sheriff’s Detective Duane Dobbins testified that he was a member of the West Sound Narcotics Enforcement Team (WestNET) and indicated that WestNET investigations are focused on “mid to upper level drug traffickers.” RP 263-67.

Dobbins explained what a “controlled buy” entails. RP 271. The process starts with police searching the informant and his or her vehicle for drugs, paraphernalia, weapons, or money. RP 271. If police do not find anything in those searches, they give the informant an agreed upon amount of money to purchase a previously-agreed amount of narcotics. RP 271. The cash which is used is photocopied and the serial numbers of

the bills recorded. RP 271. Police then observe the informant until he or she enters into a place to complete the actual buy. RP 271-72, 276. Once the informant has completed the transaction, he or she again meets with police in a secure location and hands over the purchased drugs. RP 272. The police again search the informant and vehicle for any drugs or money. RP 272. If nothing is found, the purchased drugs are weighed. RP 272. A post-operation interview of the informant may then be conducted. RP 272.

Detective Dobbins indicated that WestNET performed two buys from the defendant using informant Lampman and attempted a third. RP 278-79.

The first occurred on July 17, 2009. RP 279. Detectives met Lampman at the Fred Meyer parking lot and searched Lampman and his vehicle. RP 280-83. Lampman intended to buy about "a half ounce of black tar heroin" from the defendant. RP 283. Detective Dobbins then gave Lampman \$260.00 in "prerecorded WestNET funds," which he first photocopied. RP 283-84. Lampman then drove to the defendant's residence and Dobbins followed in his own vehicle. RP 286-88. There were two other officers in separate vehicles maintaining surveillance as well. RP 289. Lampman was in the defendant's residence about twenty-five minutes and then returned to his vehicle and drove back to the Fred

Meyer parking lot. RP 288-89. Dobbins followed him back. RP 289. Once there, Lampman got out of his vehicle and got into Dobbins' vehicle. RP 289. Dobbins could "smell the vinegar odor associated with black tar heroin," as Lampman turned over to him, "a small ball, approximately 11 or 12 grams of black tar heroin in a plastic baggy." RP 289-90. Detective Dobbins conducted a field test of the substance and confirmed that it was heroin. RP 290, 372. Lampman and his vehicle were then searched again and nothing was found. RP 294.

Lampman was then interviewed regarding what happened. RP 295-96. He indicated that once in the boarding house in which the defendant lived, he went to the defendant's room and found the defendant and his wife, Sheri, present. RP 302. They engaged in conversation and during that conversation, Lampman gave the defendant the \$260.00 of WestNET cash. RP 302. The defendant grabbed a digital scale and weighed out approximately a half ounce of heroin. RP 302. Lampman then broke off one or two grams of heroin from that half ounce and gave it to the defendant "as compensation for doing the deal with him." RP 302. Lampman said they engaged in a little more conversation before he left the residence and drove to the Fred Meyer where he met with Dobbins. RP 302-03.

On August 10, 2009, Lampman and Dobbins again met at the Fred Meyer parking lot so that Lampman could make a controlled purchase of a half ounce of heroin from the defendant. RP 303-04. Detectives searched both Lampman and his vehicle for “money, contraband, drugs, et cetera,” and found nothing. RP 304. Lampman called the defendant with his telephone and Detective Dobbins could hear them agree that Lampman would come by to pick up something. RP 306. Lampman told the detective that he needed to pick up the defendant and take him to “his source” because he did not have the heroin on him at the time. RP 306.

Lampman was outfitted with a covert surveillance camera. RP 308. He then drove to the defendant’s residence, picked him up, and drove him to the residence of the defendant’s source. RP 308-12. Three to four officers were involved in the surveillance of Lampman during this time. RP 311-12. Once there, the defendant went into the residence and Lampman remained in the vehicle. RP 314. Five to ten minutes later, Lampman left with the defendant and returned to the defendant’s residence. RP 315-16. Both Lampman and the defendant then walked into the defendant’s residence and Lampman emerged alone about five to ten minutes later. RP 316. Lampman drove back to the Fred Meyer, where he gave Dobbins two “pieces of black tar heroin that looked to be approximately a half ounce.” RP 316-17. Lampman and his vehicle were

again searched for weapons, drugs, or contraband and nothing was found.
RP 317-18.

Lampman stated that after he gave the defendant the \$260.00, the defendant went into the second house, and emerged about five minutes later with about a half ounce of heroin and a syringe loaded with what he believed to be heroin. RP 323-24. The defendant injected himself with the syringe and the two then went back to the defendant's residence, where the defendant allowed Lampman to weigh the heroin. RP 324. After weighing it, Lampman broke off the defendant's two grams, gave them to him, and then left the residence and returned to the Fred Meyer. RP 324.

The weight of the heroin purchased in the first controlled buy was 11.1 grams and that in the second buy was 12.7 grams. RP 322-23. On October 20, 2009, Franklin Boshears, a forensic scientist at the Washington State Patrol Crime Laboratory, RP 335-36, tested the substances purchased in the two buys and found that they contained heroin. RP 348-53. The heroin purchased by Lampman from the defendant on July 17, 2009 and August 10, 2009, was admitted into evidence. RP 373.

On August 17, 2009, Detective Dobbins served a search warrant on the defendant's residence. RP 325-26; RP 453. A digital scale was

recovered from the top dresser drawer in the defendant's bedroom during that search. RP 455.

The defendant was ultimately arrested at that residence. RP 325-26. Dobbins read the defendant the *Miranda* warnings and the defendant agreed to talk with him in Dobbins' vehicle. RP 326-27. Naval Criminal Investigative Service Special Agent Steve St. John sat in the back seat of that vehicle during that conversation. RP 255-59, 327.

The defendant told Detective Dobbins that he and his wife are both heroin addicts and the defendant admitted that he sells heroin in order to pay the bills. RP 328. The defendant did identify two people from whom he purchased heroin, and agreed to do controlled buys from them for the detectives. RP 327-30. Ultimately, however, the defendant did not work for the detectives as an informant. RP 369.

Detective Dobbins testified that, at the time of the two transactions, the defendant's residence was "in fairly close proximity" to Fern Hill elementary school. RP 386. Dobbins used a Stanley measuring wheel to measure the walking distance from "the front steps of the defendant's residence" to the property line of that elementary school and found that the distance between the two was 631.5 feet. RP 387-88. A straight line between these two points would have been shorter. RP 388. The detective then continued measuring with the measuring wheel and found

that the distance from the front steps of the defendant's residence to the corner of the school building itself was 853 feet. RP 388-89.

Maude Kelleher, the "lead routing specialist" with the Tacoma School District, oversaw "all of the transportation needs" of the school district, including "routing, general ed and special ed students to and from school." RP 463. Kelleher testified that there were two Tacoma public schools within 1000 feet of the defendant's residence: Baker Middle School and Fern Hill Elementary school. RP 465. There was also one school bus route stop within 1000 feet of that residence. RP 465. Kelleher prepared a map which depicted the location of the defendant's residence surrounded by a circle, which described a 1,000-foot radius around that residence. RP 466. Within that circle were depicted the school bus stop, Baker Middle School, and Fern Hill Elementary school. RP 466. That map was admitted into evidence. RP 467.

C. ARGUMENT.

1. THE TRIAL COURT'S JURY INSTRUCTION NUMBER 12 PROPERLY INSTRUCTED THE JURY WITH RESPECT TO THE STANDARD OF PROOF OF THE SCHOOL-ZONE ENHANCEMENTS TO COUNT I.

"Jury instructions are sufficient if they are supported by substantial evidence, allow the parties to argue their theories of the case and, when read as a whole, properly inform the jury of the applicable law." *State v.*

Fleming, 155 Wn. App. 489, 503-04, 228 P.3d 804 (2010) (citing *State v. Clausing*, 147 Wn.2d 620, 626, 56 P.3d 550 (2002)); *State v. Mills*, 154 Wn.2d 1, 109 P.3d 415 (2005); *State v. Riley*, 137 Wn.2d 904, 909, 976 P.2d 624 (1999). The standard for review applied to a challenge to a trial court's instructions depends on whether the trial court's decision is based upon a matter of law or of fact. *State v. Walker*, 136 Wn.2d 767, 771, 966 P.2d 883 (1998). "[A] trial court's choice of jury instructions," is reviewable only "for abuse of discretion." *Fleming*, 155 Wn. App. at 503; *State v. Lucky*, 128 Wn.2d 727, 731, 912 P.2d 483 (1996), *overruled on other grounds by State v. Berlin*, 133 Wn.2d 541, 544, 947 P.2d 700 (1997). However, "an alleged error of law in jury instructions" is reviewed *de novo*, *Fleming*, 155 Wn. App. at 503; *State v. Bashaw*, 169 Wn.2d 133, 140, 234 P.3d 195 (2010), and in the context of the instructions as a whole. *State v. Woods*, 143 Wn.2d 561, 590, 23 P.3d 1046 (2001) (quoting *State v. Benn*, 120 Wn.2d 631, 654-55, 845 P.2d 289 (1993)).

In a criminal case, "[j]ury instructions, taken in their entirety, must inform the jury that the State bears the burden of proving every element of a criminal offense beyond a reasonable doubt." *State v. Pirtle*, 127 Wn.2d 628, 656, 904 P.2d 245 (1995). See *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); *State v. Byrd*, 125 Wn.2d 707, 713, 887 P.2d 396 (1995). "[A] jury instruction that relieves the prosecution of its burden of proof is subject to harmless error analysis." *State v. Jennings*,

111 Wn. App. 54, 62, 44 P.3d 1 (2002); *Neder v. United States*, 527 U.S. 1, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999).

With respect to instructing the jury on sentence enhancements, the Washington State Supreme Court has held that “proof beyond a reasonable doubt” is required “to establish facts which, if proved, will increase a defendant’s penalty.” *State v. Tongate*, 93 Wn.2d 751, 754, 613 P.2d 121 (1980); *State v. Pam*, 30 Wn. App. 471, 473, 635 P.2d 766 (1981); *State v. Eker*, 40 Wn. App. 134, 697 P.2d 273 (1985). See *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004) (holding that any fact, other than that of a prior conviction, that increases the applicable punishment, must be found by a jury beyond a reasonable doubt absent waiver or stipulation by the defendant). Therefore, “if the State requests a special verdict, the jury must be given an instruction, independent of the instructions for the crimes charged, which states that there must be proof beyond a reasonable doubt” of the fact which enhances the sentence. *State v. Beaton*, 34 Wn. App. 125, 129, 659 P.2d 1129 (1983).

In the present case, the jury convicted the defendant of unlawful sale of a controlled substance in violation of RCW 69.50 as charged in count I. Count I also included a school zone or school bus route stop enhancement, under RCW 9.94.533(6) and 69.50.435(c)-(d). CP 152-54; 186-206. RCW 9.94A.533(6) provides that

[a]n additional twenty-four months shall be added to the standard sentence range for any ranked offense involving a violation of chapter 69.50 RCW if the offense was also a violation of RCW 69.50.435 or 9.94A.605.

RCW 69.50.435(c)-(d) provides that

[a]ny person who violates RCW 69.50.401 by manufacturing, selling, delivering, or possessing with intent to manufacture, sell, or deliver a controlled substance listed under RCW 69.50.401... (c) Within one thousand feet of a school bus route stop designated by the school district; (d) Within one thousand feet of the perimeter of the school grounds... may be punished by a fine of up to twice the fine otherwise authorized by this chapter, but not including twice the fine authorized by RCW 69.50.406, or by imprisonment of up to twice the imprisonment otherwise authorized by this chapter, but not including twice the imprisonment authorized by RCW 69.50.406, or by both such fine and imprisonment.

The trial court instructed the jury, in its instruction number 12, that

If you find the defendant guilty of counts I or II, it will then be your duty to determine whether the defendant committed the crime or crimes within one thousand feet of a school or school bus route stop designated by a school district. You will be furnished with special verdict forms for this purpose and shall fill in the blank with the answer “yes” or “no” according to the decision you reach. 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 200 (emphasis added).

The “special verdict form” with respect to count I, read:

We, the jury, having found the defendant guilty of the crime of unlawful sale of a controlled substance as charged in count I, return a special verdict by answering as follows:

On July 17, 2009, did the defendant sell a controlled substance within one thousand feet of a school or school bus route stop designated by a school district?

ANSWER: _____ (Yes or No).

CP 209.

Thus, in the present case, the State was clearly seeking to increase the defendant’s sentence on count I by asking the jury to find, by special verdict, that the crime alleged in this count occurred “within one thousand feet of a school or school bus route stop designated by a school district.” *Id.* However, the State requested and the trial court gave the jury an instruction pertaining specifically and solely to these special verdict forms, which stated that “[i]n order to answer the special verdict form “yes”, you must unanimously be satisfied beyond a reasonable doubt that “yes” is the correct answer.” CP 200 (emphasis added). Therefore, the jury in the present case was “given an instruction, independent of the instructions for the crimes charged, which states that there must be proof beyond a reasonable doubt” of the fact which enhances the sentence. *State v. Beaton*, 34 Wn. App. 125, 129, 659 P.2d 1129 (1983). As a result, instruction 12 clearly instructed “that the jury must make its finding

beyond a reasonable doubt,” *Tongate*, 93 Wn. 2d at 754. Therefore, instruction number 12 properly informed the jury of the standard of proof of the school-zone enhancements and the special verdict should be affirmed.

Although the defendant now argues, based on *Tongate*, that instruction number 12 was “erroneous” because it “did not separately instruct the jury” that the State had the burden of proving the enhancements beyond a reasonable doubt, Appellant’s Brief, p. 6-9, the defendant misinterprets *Tongate*. The Court in *Tongate* was not concerned with enunciation of the burden of proof, but with instruction on the standard of proof. Specifically, the Court noted that “[i]t cannot be assumed that a reasonable jury, in the absence of an explicit instruction on the *standard of proof*, will understand the applicable standard to be applied to the separate finding.” *Tongate*, 93 Wn. 2d at 754-56. It therefore held that the jury must be given an instruction, independent of the instructions for the crimes charged, which states that “the jury must make its finding beyond a reasonable doubt.” *Tongate*, 93 Wn.2d 754-56; *State v. Beaton*, 34 Wn. App. 125, 129, 659 P.2d 1129 (1983).

In the present case, instruction 12 did exactly that. It specifically informed the jury that “[i]n order to answer the special verdict form “yes,” you must unanimously be satisfied beyond a reasonable doubt that “yes” is

the correct answer,” CP 200. Therefore, instruction number 12 gave exactly the instruction demanded by *Tongate*. Because it properly informed the jury of the standard of proof of the school-zone enhancement, the special verdict should be affirmed.

It should, perhaps, also be noted that the defendant did not, at trial or here, raise any issue regarding to the unanimity language of instruction 12. *See* RP 483-92; RP 516; RP 1-546; Appellant’s Brief, p. 1-11. Because appellate courts will generally “not consider issues raised for the first time on appeal.” *State v. Kirkman*, 159 Wn.2d 918, 926, 155 P.3d 125 (2007) (citing *State v. Tolias*, 135 Wn.2d 133, 140, 954 P.2d 907 (1998); *State v. McFarland*, 127 Wn.2d 322, 332-33, 899 P.2d 1251 (1995)); RAP 2.5(a), and the defendant has not raised this issue on appeal, nor articulated any exception to this rule, *see* RAP 2.5(a), Appellant’s Brief, p. 1-11, this issue should be considered waived. *See Bashaw*, 169 Wn.2d at 146 (noting that the rule that a non-unanimous jury decision that the State has not proven a special finding beyond a reasonable doubt is a final determination “is not compelled by constitutional protections against double jeopardy, but rather by the common law precedent of this court, as articulated in *Goldberg*.” (internal citations omitted)).

Therefore, the defendant’s conviction and the sentence enhancement should be affirmed.

D. CONCLUSION.

Because the trial court's jury instruction number 12 properly instructed the jury with respect to the standard of proof of the school-zone enhancement to count I, the special verdict pertaining to that enhancement should be affirmed.

DATED: November 30, 2010

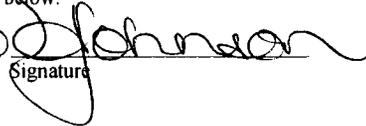
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The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

11/30/10 
Date Signature