

FILED

JUL 09 2007

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

81633-6

No. 25748-7-III
IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

BERTHA I. BASHAW,

Defendant/Appellant.

Appellant's Brief

DAVID N. GASCH
WSBA No. 18270
P.O. Box 30339
Spokane, WA 99223-3005
(509) 443-9149
Attorney for Appellant

TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR.....4

B. STATEMENT OF THE CASE.....4

C. ARGUMENT.....7

 1. The trial court abused its discretion in allowing Detective Lewis to testify to the distances between the location of the three buys and the school bus stop, because the detective relied solely on a measuring device whose reliability he knew nothing about.....7

 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.....9

D. CONCLUSION.....11

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<u>Bokor v. Department of Licensing</u> , 74 Wn.App. 523, 874 P.2d 168 (1994).....	8, 9
<u>State v. Goldberg</u> , 149 Wn.2d 888, 72 P.3d 1083 (2003).....	9, 10
<u>State v. Jackson</u> , 102 Wn.2d 689, 689 P.2d 76 (1984).....	7
<u>State v. Lane</u> , 125 Wn.2d 825, 889 P.2d 929 (1995).....	7
<u>State v. Stephens</u> , 93 Wn.2d 186, 607 P.2d 304 (1980).....	9
<u>State v. Valdobinos</u> , 122 Wn.2d 270, 858 P.2d 199 (1993).....	7
<u>State v. Wade</u> , 92 Wn.App. 885, 966 P.2d 384 (1998).....	7

Statutes

U.S. Const. art. I, § 21.....	9
-------------------------------	---

A. ASSIGNMENTS OF ERROR

1. The trial court erred in allowing Detective Lewis to testify to the distances between the three “buy” locations and a school bus route stop.

2. The trial court erred in instructing the jury it had to be unanimous on the answer to the special verdict.

Issues Pertaining to Assignment of Error

1. Did the trial court abuse its discretion in allowing Detective Lewis to testify to the distances between the location of the three buys and the school bus stop, where the detective relied solely on a measuring device whose reliability he knew nothing about?

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?

B. STATEMENT OF THE CASE

Convicted felon Russell Dahl entered into a contract with the police whereby he would buy drugs from people, while under police surveillance, in exchange for money. (RP 78-79, 386)¹ Dahl got \$250 for three “buys” per person--\$125 when he completed the buys, and the other

¹ Citations to the trial transcript will be designated “RP.” Citations to the sentencing hearing, which was separately numbered, will be designated “11/17/06 RP.”

\$125 after he had testified against the person in court. Id. Dahl told the drug task force he thought he could buy drugs from his former acquaintance, Bertha Bashaw. (RP 383) Bertha had no prior criminal history, whatsoever. (11/17/06 RP 5)

Dahl knew Bertha and her husband when they had previously worked together during the demolition of the old Vaagen Mill in Republic, Washington. (RP 383-84)

Dahl purchased methamphetamine three times from Bertha while under partial police surveillance. (RP 391-93, 400, 405-06) The first buy occurred approximately one quarter mile from the old Vaagen Mill site. (RP 425) The other two buys occurred in the upper parking lot at the old Vaagen Mill site. (RP 430)

There is a school bus route stop near the old weigh station at the driveway to the old Vaagen Mill site. (RP 52-54) Detective Lewis testified, over defense objection for lack of foundation, that he measured the distance from the three buy locations to the bus stop at 924 feet, 100-150 feet, and 100-150 feet respectively. (RP 176-82) The detective used “one of those rolling wheel measurers you can zero out and roll along ahead of you and it counts feet.” (RP 176) The defense objection was based on the lack of any certification for the measuring device. (RP 176-

77) The detective testified on voir dire that he had borrowed the device from the local police department; he had never used it before; and he did not know if the device had ever been certified. (RP 179) The court overruled the defense objection. (RP 182)

The jury was instructed in pertinent part regarding the special verdicts for each of the three counts of delivery:

... 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)

Bertha Bashaw was convicted of three counts of delivery of a controlled substance, methamphetamine. The jury answered "yes" to the special verdict on all three counts. (RP 504-05) Bertha received a sentence of 36 months, based on a standard range of 12+ to 20 months. The 36-month sentence was based on the provisions of RCW 69.50.435(1)(c) allowing doubling of the sentence based on the special verdict. (11/17/06 RP 20-21)

C. ARGUMENT

1. The trial court abused its discretion in allowing Detective Lewis to testify to the distances between the location of the three buys and the school bus stop, because the detective relied solely on a measuring device whose reliability he knew nothing about.

Appellate courts overturn a trial court's evidentiary ruling for an abuse of discretion. State v. Lane, 125 Wn.2d 825, 889 P.2d 929 (1995). An abuse of discretion occurs when the trial court bases its decision on untenable grounds or exercises discretion in a manner that is manifestly unreasonable. State v. Valdobinos, 122 Wn.2d 270, 279, 858 P.2d 199 (1993). Evidentiary errors are harmless unless the outcome of the trial would have differed had the error not occurred. State v. Wade, 92 Wn.App. 885, 890, 966 P.2d 384 (1998), *citing* State v. Jackson, 102 Wn.2d 689, 695, 689 P.2d 76 (1984).

Here, the trial court improperly allowed Detective Lewis to testify to the distances between the location of the three buys and the school bus stop, because the detective relied solely on a measuring device whose reliability he knew nothing about.

An officer cannot reasonably rely on data obtained from a technical device unless he has some understanding of how it works or assurances of

its reliability from an expert knowledgeable about the underlying principles on which the device is based. Bokor v. Department of Licensing, 74 Wn.App. 523, 526, 874 P.2d 168 (1994). The officer must also have a reasonable basis for believing the device will produce reasonably reliable results under the circumstances in which it is used, including adequate maintenance and correct operation. Id.

In Bokor, the court of appeals held the trial court quite properly gave no weight to the results of a portable breath test in determining whether the trooper had probable cause to believe Mr. Bokor was intoxicated. Id. The State presented no evidence which would permit the trier of fact to conclude the trooper reasonably relied on the results of the portable testing device. Id. In addition, the State cited no authority for the admissibility of such tests; the sole evidence of reliability was that of the trooper who testified the device had given comparable results to a BAC in the past; there was no evidence past performance would be a reliable predictor of correct results in the present case; and there was no evidence the trooper had any training or expertise in statistical analysis. Id.

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. (RP 179)

Thus, as in Bokor, it was unreasonable for the detective to rely solely on data obtained from the measuring device to establish that the deliveries occurred within 1000 feet of a school bus stop. Therefore, the trial court abused its discretion in allowing that testimony because it based its decision on untenable grounds and exercised its discretion in a manner that was manifestly unreasonable.

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.

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. 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)

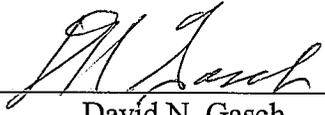
This instruction incorrectly requires jury unanimity for the jury to answer "no" to the special verdict, contrary to Goldberg. Thus, if the jury

was deadlocked, instead of just answering “no,” it would feel compelled by this instruction to continue deliberations to reach unanimity. Since this instruction misstates the law, the special verdict must be stricken.

D. CONCLUSION

For the reasons stated, the special verdicts should be stricken on all three counts and the total sentence reduced to 18 months.

Respectfully submitted July 9, 2007.



David N. Gasch
Attorney for Appellant
WSBA #18270