

**FILED**

**MAY 23 2008**

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

**81633-6**

Supreme Court No. \_\_\_\_\_  
Court of Appeals No. 25748-7-III

IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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**FILED**  
MAY 29 2008  
CLERK OF SUPREME COURT  
STATE OF WASHINGTON  
*MC*

STATE OF WASHINGTON,

Respondent,

vs.

BERTHA I BASHAW,

Defendant/Petitioner.

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PETITION FOR REVIEW

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

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**I. IDENTITY OF PETITIONER.**

Petitioner, Bertha I. Bashaw, asks this Court to accept review of the Court of Appeals decision terminating review, designated in Part II of this petition.

**II. COURT OF APPEALS DECISION.**

Petitioner seeks review of the Court of Appeals decision filed April 24, 2008, which affirmed her conviction. A copy of the Court's published opinion is attached as Appendix A. This petition for review is timely.

**III. ISSUES PRESENTED FOR REVIEW.**

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?

**IV. 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)<sup>1</sup> Dahl got \$250 for three “buys” per person--\$125 when he completed the buys, and the other \$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

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<sup>1</sup> Citations to the trial transcript are designated “RP.” Citations to the sentencing hearing, which was separately numbered, are designated “11/17/06 RP.”

“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)

**V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED.**

The considerations which govern the decision to grant review are set forth in RAP 13.4(b). Petitioner believes that this Court should accept review of these issues because the decision of the Court of Appeals is in conflict with other decisions of this Court, the U.S. Supreme Court and the Court of Appeals (RAP 13.4(b)(1) and (2)), and/or involves a significant question of law under the Constitution of the United States and state constitution (RAP 13.4(b)(3)), and/or involves issues of substantial public interest that should be determined by the Supreme Court (RAP 13.4(b)(4)).

**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.

On review, the Court of Appeals first misstated Ms. Bashaw's argument as being "that certification of the device was required before a foundation was established." Slip Op. p. 3. This is incorrect. The only

mention of “certification” was the detective’s testimony that he did not know if the device had ever been certified. Instead, Ms. Bashaw’s argument, pursuant to Boker, is that the detective had insufficient knowledge of this particular device to establish a reasonable basis for believing the device would produce reasonably reliable results under the circumstances in which it was used.

The Court of Appeals acknowledged that “perhaps more testimony could have been elicited concerning the accuracy of the measurements,” but still found no abuse of discretion. Slip Op. p. 4. In reaching its conclusion the Court relied on ER 901(a), authentication rule, and ER 901(b)(9), which states: “Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.” Slip Op. pp.3-4.

Even assuming the Court is correct that ER 901 is applicable to the present case,<sup>2</sup> the latter portion of ER 901(b)(9), “showing that the process or system produces an accurate result,” was not met here for the reasons previously stated.

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<sup>2</sup> The Court cites State v. Roberts, 73 Wn. App. 141, 144-45, 867 P.2d 697, review denied, 124 Wn.2d 1022 (1994), for the proposition that “ER 901 governs the admission of measuring devices.” Slip Op. p. 3. The undersigned author can find no such sweeping assertion in the Roberts opinion, and believes ER 901 would apply only if authentication were required. Moreover, Ms. Bashaw’s objection was for lack of adequate foundation not lack of authentication.

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

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

In order to answer the special verdict form "yes", you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you have a reasonable doubt as to the question, you must answer "no".

Id.

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

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

If you find the defendant guilty, you will complete Special Verdict Form A. *Since this is a criminal case, all twelve of you must agree on the answer to the special verdict.* If you find from the evidence that the State has proved beyond a reasonable doubt that the defendant delivered the controlled substance to a person within one thousand feet of a school bus route stop designated by a school district, it will be your duty to answer the Special Verdict Form A yes.

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

(RP 464-66, emphasis added)

This instruction incorrectly requires jury unanimity for the jury to answer “no” to the special verdict, contrary to Goldberg and contrary to the Court of Appeals’ interpretation of the Goldberg ruling in the present case. *See Slip Op. pp. 5-8.* Thus, if the jury was deadlocked, instead of just answering “no,” it would feel compelled by this instruction to

continue deliberations to reach unanimity.<sup>3</sup> Since this instruction misstates the law, the special verdict must be stricken.

**VI. CONCLUSION.**

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

Respectfully submitted May 23, 2008,



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David N. Gasch  
Attorney for Petitioner  
WSBA #18270

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<sup>3</sup> The Court of Appeals ignores this effect of the erroneous instruction on the deliberation process when it states Ms. Bashaw has no basis for challenge since all jurors concurred in their answer to the special verdict.

**FILED**

APR 24 2008

In the Office of the Clerk of Court  
WA State Court of Appeals, Division III

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

<b>STATE OF WASHINGTON,</b>	)	<b>No. 25748-7-III</b>
	)	
<b>Respondent,</b>	)	
	)	
<b>v.</b>	)	<b>Division Three</b>
	)	
<b>BERTHA IOLA BASHAW,</b>	)	
	)	
<b>Appellant.</b>	)	<b>PUBLISHED OPINION</b>

KORSMO, J. —A jury convicted Bertha Bashaw of three counts of delivery of a controlled substance – methamphetamine – and unanimously found that the offenses occurred within 1,000 feet of a school bus stop. She appeals the convictions, contending that the court erred in permitting testimony based on a measuring wheel and that the school zone enhancement instruction erroneously required jury unanimity to answer “No.” Concluding there was no abuse of discretion in the evidentiary ruling and no error in the instruction, we affirm.

The jury heard and apparently accepted the testimony of a confidential informant that he three times purchased methamphetamine from Ms. Bashaw at locations on or near the old Vaagen Mill property outside Republic. A school bus stop is located near the weigh station at the site. A detective testified that he used a rolling wheel measuring

**APPENDIX "A"**

device to calculate the distance from the bus stop to the three transaction locations. Two were within 100 to 150 feet of the stop; the other was 924 feet.

Defense counsel raised a foundation objection to the detective's testimony. The detective explained that he borrowed the measuring device from the city police chief and it was similar to one he had used in the past. He did not believe there was any certification process for the measuring wheel, which was a device law enforcement regularly used to measure distances. The trial court overruled the objection, determining that the lack of certification went to the weight to be given the evidence rather than its admissibility.

The trial court also instructed the jury, pursuant to 11 *Washington Practice, Washington Pattern Jury Instructions: Criminal* 50.60, at 666 (2d ed. 1994) (WPIC), that it had to be unanimous to return a verdict of either "Yes" or "No" on the special interrogatories that asked whether the offenses occurred within 1,000 feet of a school bus stop. There was no objection to the instruction.

The jury found Ms. Bashaw guilty on all three counts. The jury also unanimously found that each offense occurred within 1,000 feet of the school bus stop. The trial court polled the jury at defense request. The polling confirmed the written verdicts. After receiving standard range concurrent sentences of 36 months, Ms. Bashaw appealed to this court.

*Evidentiary Ruling*

The decision to admit or exclude evidence at trial is reviewed for manifest abuse of discretion. *State v. Wittenbarger*, 124 Wn.2d 467, 490, 880 P.2d 517 (1994); *Boyd v. Kulczyk*, 115 Wn. App. 411, 416, 63 P.3d 156 (2003). Discretion is abused when it is exercised on untenable grounds or for untenable reasons. *State ex rel. Carrol v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

The trial judge reasoned that the measuring wheel was ordinarily used in police business and the detective was experienced in using the device, so lack of any certification went to the weight to be given the evidence rather than its admissibility. We agree.

Appellant contends, as she did at trial, that certification of the device was required before a foundation was established. She has provided no relevant authority requiring certification of measuring devices, and we have found none. Appellant has not indicated who certifies such devices nor shown any statute or regulation requiring such. Her claim that the machine is not certified was an argument for the jury to consider. It was not a foundational bar to admission of the testimony.

ER 901 governs the admission of measuring devices. *State v. Roberts*, 73 Wn. App. 141, 144-445; 867 P.2d 697, *review denied*, 124 Wn.2d 1022 (1994). ER 901(a) states the basic rule: "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the

matter in question is what its proponent claims.” By way of illustration, ER 901(b)(9) shows one way of establishing foundation: “Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.” The detective testified here that he was familiar with the type of device and that police routinely used them for measuring distances during investigations. That testimony satisfies the basic requirement of ER 901(a) that a proponent establish that an item is what it is claimed to be. While perhaps more testimony could have been elicited concerning the accuracy of the measurements, we cannot say that the trial court abused its discretion in finding that a proper foundation had been established. The examples in ER 901(b) are illustrative rather than mandatory.

The trial court did not abuse its considerable discretion. Appellant’s challenges went to the weight to be given the evidence rather than its admissibility.

*Instruction*

Appellant also argues that the enhancement instruction used in this case, and by implication the pattern instruction, are erroneous in requiring unanimity to answer the special interrogatory. She claims that *State v. Goldberg*, 149 Wn.2d 888, 72 P.3d 1083 (2003), compels a different result. We do not believe it does. However, even if that case bears her reading, she was not harmed by the instruction. The polling confirmed that the jury’s verdict was unanimous.

The *Goldberg* court noted that “Washington requires unanimous jury verdicts in criminal cases.” *Id.* at 892-893 (citing *State v. Stephens*, 93 Wn.2d 186, 190, 607 P.2d 304 (1980)). That policy is reflected in the standard verdict forms used in criminal cases. If the jury unanimously agrees that the case was not proven beyond a reasonable doubt, the jury is instructed to return a verdict of “Not Guilty.” If the jury is unanimously convinced of guilt beyond a reasonable doubt, it is told to return a “Guilty” verdict. *See, e.g.*, 11A WPIC 180.01, *supra*, at 398. A Washington jury typically is not told what to do if it is unable to agree.<sup>1</sup>

In *Goldberg*, an aggravated murder prosecution, the jury had been directed to answer whether or not a statutory aggravating factor under chapter 10.95 RCW had been proven. The jury was instructed:

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.”

149 Wn.2d at 893. In its emphasis on the word “unanimous,” the *Goldberg* court appeared to say that the specific language of the special verdict form used there did not appear to require unanimity to return a negative finding. The court was even clearer in

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<sup>1</sup> One exception to the rule involves jury consideration of lesser included or lesser degree offenses. In that circumstance, in order to implement *State v. Labanowski*, 117 Wn.2d 405, 816 P.2d 26 (1991), the concluding instructions expressly instruct the jury that lesser offenses may be considered if there is a failure to agree on the greater charge. *E.g.*, 11A WPIC 180.05, *supra*, at 398; 11A WPIC 180.06, *supra*, at 402. Another exception involves special verdicts used to determine the basis for a conviction in alternative means cases. 11A WPIC 164.00, *supra*, at 280-81 (Supp. 2005).

stating later that “under instruction 16, unanimity is not required in order for the verdict to be final.” *Id.* at 894. Other language in the *Goldberg* opinion appears to require unanimity on special verdicts. As noted previously, the opinion states that unanimity is required in criminal cases. *Id.* at 892-893.

Unlike *Goldberg*, the instruction used in this case carried an additional sentence of import. The jury was expressly told: “Since this is a criminal case, all twelve of you must agree on the answer to the special verdict.” Appellant contends that this portion of the instruction is error. She argues that *Goldberg* requires a negative finding whenever any juror is not satisfied that the special verdict was not proven beyond a reasonable doubt.

While the *Goldberg* opinion focused on the specific instruction used at trial, that instruction in turn was based on the pattern instruction found in former WPIC 160.00. In particular, the concluding sentence of the instruction used in *Goldberg*, quoted above, is taken directly from the pattern instruction. *See* 11A WPIC 160.00, *supra*, at 395.

*Goldberg* never addressed the pattern instructions. Thus, the authors of the Washington Pattern Instructions Criminal subsequently wrote a special comment and alternative language for WPIC 160.00 in light of *Goldberg*. They noted that the opinion could be interpreted expansively or narrowly, and tailored alternatives for the pattern instruction accordingly. The particular emphasis of the comment was on whether the court truly intended to do away with the unanimity requirement on all special verdicts. *See* 11A WPIC 160.00, *supra*, at 274-276 (Supp. 2005).

We do not believe that the court intended to hold that special verdicts were to have unanimity requirements different from general verdicts. There is no discussion in *Goldberg* of the pattern instructions. There is no discussion of special verdicts in general or the policy of permitting one juror to acquit on a special verdict. In short, there is simply no indication that either the pattern instructions or the policy of unanimous special verdicts were at issue in *Goldberg*.

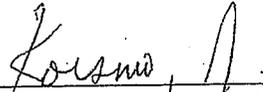
There also is no discussion of legislative intent on the topic. The Legislature has authorized numerous special findings and sometimes has directed that affirmative findings unanimously be proven beyond a reasonable doubt. *E.g.*, RCW 9.94A.605(2) (manufacturing methamphetamine with child on premises). Nothing in *Goldberg* addresses legislative history or intent in this regard. In short, appellant's construction of *Goldberg* extends the principle of that case beyond what the opinion itself appears to do. We will not extend that opinion to all special verdicts.

Reading *Goldberg* in such a manner also would put it in conflict with an earlier death penalty case, *State v. Mak*, 105 Wn.2d 692, 757, 718 P.2d 407, *cert. denied*, 479 U.S. 995 (1986), *overruled on other grounds by State v. Hill*, 123 Wn.2d 641, 645, 870 P.2d 313 (1994). There the Washington Supreme Court approved an instruction, now published as WPIC 31.09, that expressly required unanimity to answer either "Yes" or

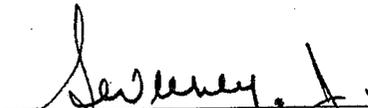
“No” to the statutory question about the existence of the alleged aggravating factor.<sup>2</sup> See 11 WPIC 31.09, *supra*, at 362-363

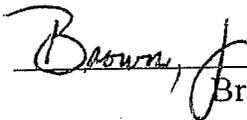
In any respect, Ms. Bashaw has no basis for challenge. The jury was polled, at her request, and unanimity was confirmed. All 12 jurors concurred in the finding that the offenses occurred within 1,000 feet of the school bus stop. Where all 12 affirmed the written finding, there is no basis for believing that telling the jurors that they had to be unanimous to return a negative finding could have harmed appellant.

The convictions and sentences are affirmed.

  
\_\_\_\_\_  
Kotsmo, J.

WE CONCUR:

  
\_\_\_\_\_  
Sweeney, J.

  
\_\_\_\_\_  
Brown, J.

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<sup>2</sup> The verdict form also expressly permits jurors to return a “no unanimous verdict” and tells jurors what the consequence of such a verdict is. See 11 WPIC 31.09.