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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

81633-6

NO. 25748-7

**COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,

RESPONDENT,

vs.

BERTHA I. BASHAW.,

APPELLANT.

RESPONDENT'S BRIEF

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TABLE OF CONTENTS

ISSUES RAISED ON APPEAL3

I. STATEMENT OF THE CASE3

II. LAW AND ANALYSIS.....3

III. CONCLUSION8

TABLE OF AUTHORITIES

Decisions – State

State v. Clayton, 84 Wn.App. 318, 319-320 (1996),.....5

State v. Goldberg, 149 Wn.2d 888, 893 (2003).....7, 8

State v. Gene Jones, 166 P.3rd. 782, 785 (2005).....4

State v. McGee, 122 Wn.2d 783, 785 (1993).....5

State v. Rooth, 129 Wn.App. 761, 773 (2005)4

State v. Trout, 125 Wn.2d 403, 409 (2005)4

State v. Wade, 92 Wn.App. 885, 889 (1998).....4

State v. Wimbs, 74 Wn.App. 511, 515 (1994).....5

Other

ER 201 (b).....6

ER 401.....3

ER 402.....4

RCW 69.50.435(1)(a)(b).....4

Washington Pattern Jury Instruction (WPIC).....6, 7, 8

Webster’s New World Dictionary of the American Language;
Second College Edition.....6

ISSUES RAISED ON APPEAL

1. The trial court did not abuse its discretion when it allowed Detective Lewis to testify regarding the distances between the location of the three methamphetamine buys and the Republic School District Bus Stop, as measured by a wheel tape measure.
2. The Special Verdict should be upheld as a standard WPIC given with the standard instructions.

I. STATEMENT OF THE CASE

The State herein adopts the defendant's statement of the case. Specific facts will be dealt with as required by the issues.

II. LAW AND ANALYSIS

1. **The trial court did not abuse its discretion when it allowed Detective Lewis to testify regarding the distances between the location of the three methamphetamine buys and the Republic School District Bus Stop as measured by a wheel tape measure.**

ER 401 – Definition of Relevant Evidence:
'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more

probable or less probable than it would be without the evidence.

ER 402 – Relevant Evidence Generally

Admissible; Irrelevant Evidence Inadmissible:

All relevant evidence is admissible, except as limited by constitutional requirements or otherwise provided by statutes by these rules, or by other rules or regulations applicable in the courts of this state. Evidence which is not relevant is not admissible.

“Absent an abuse of discretion, we will not disturb on appeal a trial court’s ruling. 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 Wade, 92 Wn.App. 885, 889, (1998). (internal citations and quotation marks omitted throughout).

RCW 69.50.435(1)(a)(b) provides that the State make seek a sentencing enhancement, when the defendant has sold drugs within one thousand feet of a school zone or a school bus stop. “When reviewing a challenge to the sufficiency of the evidence, we view the evidence in the light most favorable to the State to determine whether any rational trier of fact could have found the essential elements beyond a reasonable doubt.” State v. Gene Jones, 166 P.3rd 782, 785, (2007). In State v. Trout, this Court stated: “A claim of insufficient evidence admits the truth of the State’s evidence.” 125 Wn.App. 403, 409, (2005). Finally, in State v. Rooth, Division II of our Court of Appeals noted: “This court defers to

the fact finder's resolution of conflicting testimony, witness credibility and persuasiveness of the evidence." 129 Wn.App. 761, 773, (2005).

In State v. Clayton, this Division of the Washington State Court of Appeals determined that one thousand feet from a school zone means that from the school zone the act or crime must have occurred within those one thousand feet. 84 Wn.App. 318, 319-320, (1996). The Court noted that one thousand feet from the perimeter of the school zone to the perimeter of the property where the crime took place was insufficient. *Id.*, at 320-321.

In State v. McGee, our Supreme Court found that the definition of the drug enhancement was unambiguous. McGee, 122 Wn. 2d 783, 785, (1993). In State v. Wimbs, our Supreme Court held that the definition in the enhancement encompasses a radius of one thousand feet from a school zone. 74 Wn.App. 511, 515, (1994).

In his testimony, Detective Lewis (an experienced drug detective) stated: that he borrowed the measuring tape wheel from the Republic Police Department; that he had used that type of device before; that it's the type of device ordinarily used in law enforcement work; and that he had the same type of device at his office, and he specifically described how he operated it on this occasion. RP 177 – 178, 181. Further on cross examination, Lewis testified: that he was not sure where the Republic Police Department got their measuring tape wheel; that he

purchased his from a law enforcement catalog; and he was unaware of any type of certification offered or required to use a measuring tape wheel. RP 179. Finally, the State is not aware of any such program either.

In two of the above cited drug cases, as in the case at bar, the officer used a rolotape or wheel tape measure. Webster's New World Dictionary Of the American Language; Second College Edition defines tape measure as: "a tape which marks in inches, feet, etc. for measuring." The State herein asks the Court to take Judicial Notice under ER 201(b), that tape measure and tape wheels are commonly used measuring devices. The defendant's assertion that a the wheel tape measure is a new or complicated novel technology that requires certification in its use is simply unfounded. Finally, the jury found the Detective's testimony on the distance between each of the drug buys and the school bus stop to be credible.

1. The Special Verdict should be upheld as a standard WPIC given with the standard instructions.

Washington Pattern Jury Instruction, (WPIC) 50.50 – Enhanced Sentence-Controlled Substance Violations – Concluding Instruction:

If you find the defendant guilty it will then be your duty to determine whether or not the defendant committed that crime within one thousand feet of a school, bus route stop..... **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 . . . 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 yes.

The defense relies on State v Goldberg, wherein our Supreme Court determined that a unanimous verdict of no was not required to an aggravating factor in a homicide case, at 149 Wn.2d 888, 893, (2003). Like the case at bar, the WPIC for these aggravators does not require unanimity for a finding of no, only for a finding of yes.

WPIC 30.03 – Aggravated First Degree Murder – Aggravating Factors states: If you find the defendant guilty of premeditated murder in the first degree . . . you must then determine whether (any of) the following aggravating circumstance(s) exist(s):

The State has the burden of proving the existence of an aggravating circumstance beyond a reasonable doubt. In order for you to find that there is an aggravating circumstance in this case, **you must unanimously agree that the aggravating circumstance has been proved beyond a reasonable doubt.** (You should consider each of the aggravating circumstances above separately. **If you unanimously agree that a specific aggravating circumstance has been proved beyond a reasonable doubt, you should answer the special verdict “yes” as to that circumstance.** (emphasis added).

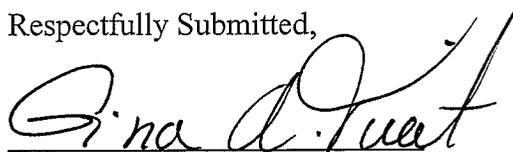
In Goldberg, the trial court added the following to the WPIC: "If you have a reasonable doubt as to the question you must answer no." Goldberg at 893. In addition, the trial court in Goldberg instructed the jury to continue deliberations after they informed the court they were dead locked as to the special verdict. Goldberg at 891. The case at bar is distinguishable from Goldberg on three points: (1) the Judge did not coerce the jury into reaching a guilty verdict on the special circumstance; (2) the jury did not tell the Court that it could not reach a unanimous decision on the special circumstance; and (3) the Court read the standard WPIC unlike the Court in Goldberg.

III. CONCLUSION

The fact finder found Lewis credible. Additionally, the Court did not err in giving the standard WPIC instruction of the sentencing enhancement in the case at bar. The jury was not coerced and did not come back with a finding of no. Therefore, the verdict in this cause of action should be upheld.

Dated this 31 day of October, 2007.

Respectfully Submitted,



Gina A. Tveit, WSBA#19607
Deputy Prosecuting Attorney

CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that I mailed a true and correct copy of the foregoing Brief of Respondent to the Court of Appeals, Division III, P.O. Box 2159, Spokane, WA 99201 David N. Gasch, Attorney at Law, P.O. Box 30339, Spokane, WA 99223-3005, Bertha I. Bashaw, #301755, Pine Lodge Correction Center for Women, P.O. Box 300, Medical Lake, WA 99022 on November 1, 2007.



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