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70023-5

NO. 70023-5-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

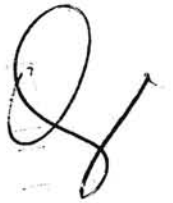
ROBERT PENA,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

APPELLANT'S **CORRECTED** OPENING BRIEF

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A. SUMMARY OF ARGUMENT

A criminal defendant has the right to a fair trial before an impartial jury that must be unanimous to convict. However, Robert Pena was denied the opportunity to investigate the extent to which a juror was able to hear the evidence, receive the court's instructions and participate in deliberations when the record shows the juror could not hear, at least during voir dire and at the time the jury was polled. The trial court's denial of a continuance was an abuse of discretion.

The trial court also improperly instructed the jury on the burden of proof, misstating the law and diluting the State's burden in violation of Mr. Pena's right to a fair trial.

B. ASSIGNMENTS OF ERROR

1. The trial court abused its discretion in denying Mr. Pena's motion to continue sentencing to allow him to further investigate a juror who could not hear.

2. The trial court abused its discretion in denying Mr. Pena's request for individual juror contact information.

3. The trial court erred in instructing the jury that an abiding belief in the truth of the charge is equivalent to proof beyond a reasonable doubt.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A criminal defendant has the constitutional right to a fair and impartial jury and to be convicted only if that jury is unanimously convinced of guilt beyond a reasonable doubt. If a juror cannot hear the evidence or the court's instructions, the juror cannot be fair under the law. If a juror cannot listen to and participate in deliberations, jury unanimity is impossible. Did the trial court abuse its discretion by denying a continuance of sentencing to allow Mr. Pena to further investigate the extent to which juror number two was able to participate in trial and deliberations where the juror was unable to hear when the court polled the jury and during portions of voir dire, and where defense counsel had worked diligently to track down the jurors but had been unable to complete the task?

2. General Rule 31(j) authorizes the trial court to release juror information to a party for good cause. Mr. Pena demonstrated good cause because juror number two could not hear during portions of the trial proceedings, the court agreed it was proper for counsel to locate the jurors to determine the extent of the hearing impairment, and an investigator was able to locate only one juror without court assistance.

Did the trial court abuse its discretion in withholding juror contact information and summonses?

3. The jury's role is to decide whether the prosecution met its burden of proof, not to search for the truth. The court instructed the jury that it could find the State met its burden of proof if it had an "abiding belief in the truth of the charge." When it is not the jury's job to determine the truth, did the erroneous instruction misstate the law and dilute the burden of proof in violation of due process by focusing the jury on whether it believed the charge was true?

D. STATEMENT OF THE CASE

Robert Pena became acquainted with Ashley P. while taking a course in Auburn, Washington. 10/24/12 II RP 21-22; 10/25/12 RP 4.¹ After discovering their daughters were in the same daycare program, they decided to get together with Mr. Pena's girlfriend and the mother of his daughter, Bridget Lyons, and their daughters at Ashley's apartment.² 10/24/12 II RP 23-27. Ashley testified the gathering

¹ The verbatim report of proceedings are referred to by the first date transcribed in each volume, i.e. the volume from Aug. 22, 23, and 27, 2012, is referred to herein as 8/22/12 RP. There are two volumes from October 24, 2012. The volume transcribed by Joseph T. Richling is referred to as "10/24/12 II RP." Ashley's last name is redacted to protect privacy by agreement with the State.

² Because Ashley and Miranda P. share the same last name, their first names are used for clarity. No disrespect is intended.

occurred on October 8, 2011. At that time, Ashley lived in a small two-bedroom apartment; the living room, dining room and kitchen were steps from and largely visible to each other. 10/24/12 II RP 19; 10/25/12 RP 12-13, 21, 58-59. That evening, the adults talked almost the entire time in the dining room while the children played in the living room. 10/24/12 II RP 27, 37-43, 51; 10/25/12 RP 35-36; 10/29/12 RP 37. Ashley testified she knew Ms. Lyons from high school, so they had a lot to discuss. 10/24/12 II RP 27-28.³

At some point, Ashley's sister Miranda P. came over spontaneously with her two children—a two-year-old boy R. and an eight-year-old girl L. 10/24/12 II RP 29-30; 10/25/12 RP 7, 27-28; 10/29/12 RP 5. Miranda and her family lived in the apartment next door and frequently came over unannounced. 10/24/12 II RP 19, 29-30; 10/25/12 RP 30. L. played in the living room with the other girls. 10/24/12 II RP 19, 40-41. A short time later, Miranda left to put R. to bed while L. remained behind for a few more minutes. 10/24/12 II RP 40-42; 10/25/12 RP 34-35, 41-42. According to Ashley, everyone got along well. 10/24/12 II RP 43-44. Mr. Pena went to the store to get

³ *But see* 10/25/12 RP 129 (Lyons testified she did not attend high school in Auburn).

snacks. 10/24/12 II RP 42. The women kept talking in the dining room and the girls played. 10/24/12 II RP 40-41.

Mr. Pena was arrested at his school, the Green River Community College, a couple weeks later. 10/25/12 RP 146-47. He was charged with child molestation in the first degree; an initial trial resulted in a hung jury. 9/4/12 RP 318-20; CP 1-2 (information), 18 (amended information), 36 (mistrial verdict form). Apparently, less than five minutes after Miranda left Ashley's apartment to put her son to bed, L. ran back to her apartment, slammed the door and told her mother that "that man over there" rubbed her leg in the living room while repeating "good girl" and followed her into the bathroom, where L. told him she was looking for a clock, and rubbed his hand under her clothes in her "crotch." 10/24/12 II RP42; 10/25/12 RP 42-47, 69; 10/29/12 RP 31-32. Ashley was unaware that anything had occurred until Miranda told her what L. reported. 10/24/12 II RP 45, 51.

Miranda and Ashley testified they told Ms. Lyons what L. had reported and decided Ms. Lyons and Mr. Pena should leave with their daughter when he returned from the store. 10/24/12 II RP 46-47; 10/25/12 RP 48-51, 64-65.

Ms. Lyons contended she was never told of the accusation and was unaware of any such circumstances. 10/25/12 RP 123-24, 130. At trial, she testified Mr. Pena and she did not go over to Ashley's apartment on October 8, 2011 because they were mourning the loss of a friend with other mutual friends following a memorial service. 10/25/12 RP 111-12. She testified they were at Ashley's on a different night. 10/25/12 RP 114-15.

Miranda and Ashley testified Miranda contacted the police after Mr. Pena and Ms. Lyons left. 10/24/12 II RP 50; *accord* 10/24/12 II RP 5-10 (testimony of police officer who responded to Miranda's call on Oct. 8, 2011). When interviewed by a child interview specialist affiliated with the King County Prosecutor's Office, L. restated what she told her mother with some discrepancies. 10/25/12 RP 54-55, 91-95; Exhibits 17& 18 (video and transcript of interview). She also testified at trial. 10/29/12 RP 4, 25-31. However, L. did not recognize Mr. Pena at trial, and her mother did not pick him out of a montage. 10/29/12 RP 39; 10/25/12 RP 139; *see* 8/30/12 RP 188-89 (L. also did not recognize Mr. Pena during first trial).

After the initial mistrial, Mr. Pena was convicted as charged. CP 36, 63, 71-82; 10/30/12 RP 2. Additional facts are set forth in the relevant argument sections below.

E. ARGUMENT

1. The trial court abused its discretion in denying Mr. Pena's motion for a continuance to further investigate the extent of juror number two's inability to hear the evidence and instructions and to participate in deliberations.

On the second day of voir dire, a prospective juror asked the bailiff for a listening device because she had been unable to hear the prior day's proceedings. 10/24/12 RP 4. A device was provided, and the prospective juror was selected for the jury, to serve as juror number two. 10/24/12 RP 4; 10/23/12 RP 134-36, 139; CP 64. After more than two full days of trial testimony, evidence and argument, and after deliberations, the jury returned to the courtroom to deliver its verdict and was polled by the court. 10/30/12 RP 2-3. It became immediately apparent to the court and the parties that juror number two could not hear the court's questions. 10/30/12 RP 3-4; CP 64-65, 67-68; *see* 10/23/12 RP 134(counsel indicates questions were posed with "increased volume into the microphone"). The following colloquy occurred:

The Court: Juror 2, this was your individual verdict?

Juror No. 2: I can't –

The Court: Is this how you voted?

Juror No. 2: (Nodded affirmatively.) I can't hear you.

The Court: You can't hear me?

Juror No. 2: What is she saying?

The Court: Juror 2, can you hear me at all without the – can you hear me now?

Juror No. 2: Okay.

The Court: Can you hear me now?

Juror No. 2: Yeah.

The Court: Okay. Was this your individual verdict, is this how you voted?

Juror No. 2: Yes.

The Court: Was it the verdict of the entire panel?

(Off the record.)

The Court: Was it how the entire jury panel voted?

Juror No. 2: I can't hear.

The Court: Did the entire jury panel vote to convict?

Juror No. 2: Yes.

The Court: Okay.

10/30/12 RP 3-4.

Defense counsel filed a motion for a new trial and for time to investigate the extent of juror number two's inability to hear the trial and deliberations. CP 64. The court granted defense counsel time to investigate, and Mr. Pena waived his right to speedy sentencing to accommodate his right to a trial by jury and by a unanimous jury.

10/23/12 RP 141-42. But when counsel reported at the next hearing that she had only been able to track down one juror, who had not responded to inquiries, and requested additional time and information on the jurors from the court, the court denied the request and Mr. Pena was sentenced. CP 70; 10/23/12 RP 146-50.

- a. This Court must carefully review the record to determine whether the trial court abused its discretion in denying a continuance.

An appellate court reviews the denial of a motion for continuance for an abuse of discretion. *State v. Iniguez*, 167 Wn.2d 273, 280, 217 P.3d 768 (2009). Discretion is abused if it is exercised on untenable grounds or for untenable reasons. *State v. Melton*, 63 Wn. App. 63, 66, 817 P.2d 413 (1991). The standard of review on this particular issue requires the appeals court to "more carefully review the factual basis upon which the trial court relied" to ensure that its denial

of the continuance was not manifestly unreasonable. *State v. Woods*, 143 Wn.2d 561, 604, 23 P.3d 1046 (2001).

A trial court should consider “various factors when exercising its discretion including: diligence, due process, the need for an orderly procedure, the possible impact on the trial, and whether prior continuances were granted.” *City of Tacoma v. Bishop*, 82 Wn. App. 850, 861, 920 P.2d 214 (1996) (citing *State v. Early*, 70 Wn. App. 452, 458, 853 P.2d 964 (1993), *review denied*, 123 Wn.2d 1004, 868 P.2d 872 (1994)).

- b. A careful review of the record substantiated the concern that juror number two could not effectively participate and a continuance would not have been prejudicial.

Mr. Pena acted diligently by moving promptly for a mistrial but admitting the record was insufficient and requesting time to investigate. 10/23/12 RP 133-45; CP 64-65. During the time granted for investigation, defense counsel hired an investigator, who worked to contact Mr. Pena’s jury. The investigator did locate a juror and made several attempts to contact that juror. 10/23/12 RP 147. But the juror did not respond. *Id.* Thus, Mr. Pena’s diligence had not yet produced results and a further continuance was necessary. Mr. Pena further requested that the trial court provide him with the contact information

used to process the jury summonses for the jury. 10/23/12 RP 147-48.

Mr. Pena acted diligently.

Mr. Pena was prejudiced by the denial of the motion for continuance. The record shows substantial likelihood that juror number two could not have participated in deliberations, did not hear trial evidence, and did not hear the court's instructions. The State argued and the court accepted that the juror knew how to ask for assistance when needed, so the court could presume the juror could hear at all other times. 10/23/12 RP 147-50. In fact, however, the record shows the opposite. During polling of the jury, juror number two did not state she could not hear until she was directly questioned by the court and could not respond. 10/30/12 RP 2-4. Unless her ability to hear was compromised only at the precise moment when the court began polling her, she sat through the court's introductory remarks, the foreperson's delivery of the verdict and the polling of the foreperson and juror number 1 without providing any indication that she could not hear. 10/30/12 RP 2-3. If juror number two did not ask for assistance then, one cannot presume from the lack of request that she was, in fact, able to hear the entirety of the trial, including deliberations and the court's instructions.

If Mr. Pena had been permitted time to amass a record showing the juror's inability to hear during the trial and deliberations, he would have had adequate support for a new trial. In *Wisconsin v. Turner*, the Wisconsin Court of Appeals held a criminal defendant's state and federal constitutional rights to an impartial jury and due process were infringed upon when either one or two jurors were unable to hear the testimony of a material witness. 186 Wis.2d 277, 521 N.W.2d 148, 151 (1994). Similarly, in *Kansas v. Hayes*, a juror was unable to hear trial testimony; the state Supreme Court reversed the denial of a mistrial, holding that the defendant's rights to an impartial jury and due process were violated when the juror could not hear the defendant's testimony. 17 P.3d 317 (Kan. 2001); accord *Kansas v. Miller*, 722 P.2d 1131, 1133-34 (Kan. Ct. App. 1986) (abuse of discretion not to declare mistrial where juror could not hear material testimony); cf. *Illinois v. Miller*, 725 N.E.2d 48, 56-58 (Ill. Ct. App. 2000) (defendant denied fair trial where jury could not hear and see all of victim's testimony because closed circuit system failed to an unknown extent).

Thus unlike *Woods*, where the record did not show a continuance for competency determination would be fruitful, Mr. Pena made a threshold showing for a continuance to further investigate juror

number two. *Woods*, 143 Wn.2d at 604-08 (affirming denial of continuance for pre-penalty phase competency determination where record does not make threshold showing of incompetence).

Further, the prejudice to Mr. Pena in denying the continuance stands in contrast to the lack of prejudice found in *State v. Herzog*, 69 Wn. App. 521, 524-25, 849 P.2d 1235 (1993). In *Herzog*, this Court reviewed the denial of a motion to continue sentencing until written results from a medical examination were available. *Id.* This Court held there was no prejudice to Mr. Herzog because the trial court considered the substance of the medical examination results at sentencing despite not having them in written form. *Id.* at 525. The trial court in *Herzog*, thus, did not abuse its discretion. Here on the other hand, the trial court could not evaluate the effect of juror number two's hearing difficulty without granting Mr. Pena further time to investigate. The court did not consider the substance of the motion for a new trial. Mr. Pena was prejudiced by the denial of his motion for a continuance.

Moreover, there would have been no comparable prejudice to the State if the court had granted a continuance. The victim and her family did not attend sentencing or submit information to the court.

10/23/12 RP 157-58. On the other hand, Mr. Pena had several

supporters in attendance at the sentencing hearing, who also spoke on his behalf. 10/23/12 RP 160-62. The State asserted at the hearing on the continuance that prejudice derived in the form of expense—Mr. Pena remained incarcerated in the county jail pending sentencing, after which he would presumably be moved to a state penitentiary. 10/23/12 RP 149. But, in either case, as the prosecutor acknowledged, he would be in the care of, and at the administrative expense of, the State. *Id.* This is hardly prejudicial to the State, and certainly even if prejudicial, is insufficient to overcome Mr. Pena’s weighty interests.

- c. The court further abused its discretion by denying Mr. Pena’s request for the court’s assistance in locating jurors.

At the initial hearing on the matter, Mr. Pena requested the court’s assistance in locating jurors and ensuring their responsiveness. 10/23/12 RP 136-40. The court denied the request for assistance, but agreed that it was important that Mr. Pena talk with multiple jurors in order to assess juror number two’s ability to hear and participate. 10/23/12 RP 136-37, 140-41. Thus, the court merely granted an initial continuance of sentencing. 10/23/12 RP 142-45. Because Mr. Pena could not locate eleven of the jurors and had spoken with none of them, he requested the court’s resources in locating jurors again at the subsequent hearing. 10/23/12 RP 146-48. Despite the court’s earlier

understanding of the importance of the investigation, the court denied the request to disclose contact information. 10/23/12 RP 149-50.

General Rule 31(j) allows the court to disclose juror information for good cause. Like the ruling on a continuance, a ruling to deny access to juror information is reviewed for an abuse of discretion. *Breckenridge v. Valley Gen. Hosp.*, 150 Wn.2d 197, 203-04, 75 P.3d 944 (2003). As set forth above, Mr. Pena had good cause to believe juror number two could not hear some or all pertinent parts of the proceedings and could not participate in deliberations. The court agreed that this was good cause for investigation that did not require inquiry into facts inherent in the verdict. *Compare* 10/23/12 RP 136-38 (noting inquiry into whether juror number two could participate did not require inquiry into the jurors' processes) *with e.g., Breckenridge*, 150 Wn.2d at 204. Moreover, Mr. Pena attempted to contact the jurors without the court's assistance. The lack of success proved the necessity of the court's disclosure under GR 31(j). The court abused its discretion in denying Mr. Pena's request for assistance in contacting the jurors.

- d. This Court should vacate the sentence and remand to allow Mr. Pena to investigate juror number two's hearing impairment.

Upon careful review of the record, the trial court's denial of a continuance was based on untenable grounds. Likewise, the court abused its discretion in failing to provide Mr. Pena with the jurors' contact information. On either or both grounds, this Court should vacate the sentence entered after the denial of a continuance and allow Mr. Pena to return to the trial court to continue investigating the extent to which juror number two was unable to listen or participate in support of Mr. Pena's motion for a new trial.

- 2. The court's instruction equating the reasonable doubt standard with an abiding belief in the truth of the charge diluted the State's burden of proof and misstated the law in violation of Mr. Pena's due process right to a fair trial.**

"The jury's job is not to determine the truth of what happened; a jury therefore does not 'speak the truth' or 'declare the truth.'" *State v. Emery*, 174 Wn.2d 741, 278 P.3d 653 (2012) (emphasis added) (quoting *State v. Anderson*, 153 Wn. App. 417, 431, 220 P.3d 1273 (2009)); *State v. Berube*, 171 Wn. App. 103, 286 P.3d 402, 411 (2012); *State v. McCreven*, 170 Wn. App. 444, 472-73, 284 P.3d 793 (2012). "[A] jury's job is to determine whether the State has proved the

charged offenses beyond a reasonable doubt.” *Emery*, 174 Wn.2d at 760.

Confusing jury instructions raise a due process concern because they may wash away or dilute the presumption of innocence. *State v. Bennett*, 161 Wn.2d 303, 315-16, 165 P.3d 1241 (2007). The court bears the obligation to vigilantly protect the presumption of innocence. *Id.* “[A] jury instruction misstating the reasonable doubt standard is subject to automatic reversal without any showing of prejudice.” *Emery*, 174 Wn.2d at 757 (quoting *Sullivan v. Louisiana*, 508 U.S. 275, 281-82, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993)).

The trial court instructed the jury that proof beyond a reasonable doubt means that, after considering the evidence, the jurors had “an abiding belief in the truth of the charge.” CP 53 (Instruction # 2). By equating proof beyond a reasonable doubt with a “belief in the truth” of the charge, the court confused the critical role of the jury. The “belief in the truth” language encourages the jury to undertake an impermissible search for the truth and invites the error identified in *Emery*, 174 Wn.2d at 741. Because the error is of constitutional dimension and affected Mr. Pena’s rights at trial by lowering the

State's burden of proof, it may be raised for the first time on appeal.

RAP 2.5(a)(3).

In *Bennett*, the Supreme Court found the reasonable doubt instruction derived from *State v. Castle*, 86 Wn. App. 48, 53, 935 P.2d 656 (1997), to be "problematic" because it was inaccurate and misleading. 161 Wn.2d at 317-18. Exercising its "inherent supervisory powers," the Supreme Court directed trial courts to use WPIC 4.01 in future cases. *Id.* at 318. WPIC 4.01 includes the "belief in the truth" language only as a potential option by including it in brackets.

The pattern instruction reads:

[The] [Each] defendant has entered a plea of not guilty. That plea puts in issue every element of [the] [each] crime charged. The [State] [City] [County] is the plaintiff and has the burden of proving each element of [the] [each] crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists [as to these elements].

A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. *[If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable*

doubt.]

WPIC 4.01.

The *Bennett* Court did not comment on the bracketed “belief in the truth” language. Notably, this bracketed language was not a mandatory part of the pattern instruction the Court approved. Recent cases demonstrate the problematic nature of such language. In *Emery*, the prosecution told the jury that “your verdict should speak the truth,” and “the truth of the matter is, the truth of these charges, are that” the defendants are guilty. 174 Wn.2d at 751. Our Supreme Court clearly held these remarks misstated the jury’s role. *Id.* at 764. However, the error was harmless because the “belief in the truth” theme was not part of the court’s instructions and because the evidence was overwhelming. *Id.* at 764 n.14.

The Supreme Court reviewed the “belief in the truth” language almost twenty years ago in *State v. Pirtle*, 127 Wn.2d 628, 656, 904 P.2d 245 (1995). However, in *Pirtle* the issue before the court was whether the phrase “abiding belief” differed from proof beyond a reasonable doubt. 127 Wn.2d at 657-58. Thus the court did not consider the issue raised here: whether the “belief in the truth” phrase minimizes the State’s burden and suggests to the jury that they should

decide the case based on what they think is true, rather than whether the State proved its case beyond a reasonable doubt. Without addressing this issue, the court found the “[a]ddition of the last sentence [regarding having an abiding belief in the truth] was unnecessary but was not an error.” *Id.* at 658.

Emery demonstrates the danger of injecting a search for the truth into the definition of the State’s burden of proof. Improperly instructing the jury on the meaning of proof beyond a reasonable doubt is structural error. *Sullivan*, 508 U.S. at 281-82. This Court should hold that directing the jury to treat proof beyond a reasonable doubt as the equivalent of having an “abiding belief in the truth of the charge,” misstates the prosecution’s burden of proof, confuses the jury’s role, and denies an accused person his right to a fair trial by jury as protected by the state and federal constitutions. U.S. amends. VI, XIV; Const. art. I, §§ 21, 22.

Because the court improperly instructed the jury here, reversal is required. *See Sullivan*, 508 U.S. at 281-82.

F. CONCLUSION

Mr. Pena’s conviction should be reversed because the trial court improperly instructed the jury as to the burden of proof. In the

alternative, this Court should hold the trial court abused its discretion by denying a continuance to determine the extent to which juror number two could not hear, vacating the sentence and remanding for further proceedings.

DATED this 9th day of December, 2013.

Respectfully submitted,



Maria L. Zink – WSBA 39042
Washington Appellate Project
Attorney for Appellant

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 70023-5-I
v.)	
)	
ROBERT PENA,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, NINA ARRANZA RILEY, STATE THAT ON THE 11TH DAY OF DECEMBER, 2013, I CAUSED THE ORIGINAL **CORRECTED OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) () ()	U.S. MAIL HAND DELIVERY _____
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SIGNED IN SEATTLE, WASHINGTON THIS 11TH DAY OF DECEMBER, 2013.

x 

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