70023-5

70023-5

No. 70023-5-I

WASHINGTON COURT OF APPEALS
DIVISION ONE

STATE OF WASHINGTON,
Respondent,

vs

ROBERT DAMIAN PENA,
Appellant.

STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW UNDER RAP 10.10

ROBERT DAMIAN PENA
Appellant, Pro se.

COYOTE RIDGE CORRECTIONAL COMPLEX
1301 NORTH EPHRATA AVENUE
POST OFFICE BOX 769
CONNELL, WA 99326-0769

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

UNITED STATES CONSTITUTION

WASHINGTON STATE CONSTITUTION

SUPREME COURT CITATIONS

FEDERAL CASE CITATIONS

WASHINGTON CASE CITATIONS

REVISED CODES OF WASHINGTON (RCW)

TREATISES

COURT RULES

OTHER AUTHORITIES

WASHINGTON COURT OF APPEALS
DIVISION ONE

STATE OF WASHINGTON, Respondent, VS ROBERT D. PENA, Appellant, Pro-se.	C.O.A. NO. 70023-5-I STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW (RAP 10.10)

I, Robert Damian Pena, hereby submit my Statement of Additional Grounds for Review (RAP 10.10) that were not addressed by my attorney.

INTRODUCTION

Mr. Pena was tried and convicted after two trials. 6VRP 1-9. The first trial ended with a 6/6 hung jury. The charging document alleges that on or about October 8, 2011 Mr. Pena performed the acts against Lawnna Leinegang ("LL"). CP's at 1; and 65. The information and testimony produced during trial alleges the 10/08/11 date specifically. See 3VRP 5, 21, 24, 50, 51; 4VRP 5, 9, 12, 14, 17, 18, 20, 21, 22, 23, 25, 32, 39, 54, 56,

PLEASE NOTE:

1VRP is 10/23/2012 Voir Dire pages 4-132, 11/30/2012 Sentencing Hearing/Motion for New Trial pages 133-145, January 25, 2013 Motion for New Trial Hearing pages 146-151, and 2/5/2013 Sentencing pages 152-171;
2VRP is 10/24/2012 Cont'd Voir Dire pages 1-96;
3VRP is 10/24/2012 Trial pages 1-55;
4VRP is 10/25/2012 Trial pages 1-165;
5VRP is 10/29/2012 Trial pages 1-103;
6VRP is 10/30/2012 Verdict pages 1-9;
CP is Clerk's Papers.

58, 59, 62, 64, 65, 66, 71, 72, 73, 120, 124; 5VRP 59, 64, 71, 79; and the prosecutions closing 95-96. Trial counsel failed to call any alibi witnesses and rested at the close of the state's case. 5VRP 53. Defense counsel admits that she has 7 other case settings on this day. 5VRP 56. (Inclusively, 3VRP 5 is the officer who responded to the 911 call on October 8, 2011; after which the alleged acts had happened moments before.

ADDITIONAL GROUND ONE

Jury selection is, of course, a crucial part of any criminal case. See Gomez v US, 490 US 858, 873, 109 S.Ct. 2237, 104 L.Ed.2d 923, cert. granted and judgment vacated by Salazar v US, 491 US 902, 109 S.Ct. 3181, 105 L.Ed.2d 690 (1989) ("Jury selection is the primary means by which a court may enforce a defendant's right to be tried by a jury free from ethnic, racial, or political prejudice . . . or predisposition about the defendant's culpability. . ."). However, they do not have a right to close the proceedings without a State v Bone-Club, 128 Wn.2d 254, 258-9, 906 P.2d 325 (1995) determination.

PUBLIC TRIAL VIOLATION

The following events happened during seperate recesses, and were transcribed. The court took a break (Session Break). It began by Ms. Lam (State) asking to go to the restroom. Break was taken from 11:19:34 - 11:24:04. The bailiff asked if the court wanted the jurors? The court requested only Juror 3. 1VRP 26. (In this instance the court never reconvened as in a later instance of a break. (See 1VRP 112)).

Later, after a lunch break, Judge Spearman realized she did not swear in privately questioned jurors, and dismissed two jurors (19 & 33). 1VRP 56-58. The court did this by contacting the jury room telling them that they were excused. 1VRP 58.

During the second day of voir dire, a recess was taken consisting of a closed court. 2VRP 28. After everyone left, the court instructed:

> "Have a seat, counsel. Juror 35 seems to be missing, no one can find him. So rather than hold up everything, I don't know how you both feel about excusing him, but anyways, no one can find him. We'll have all the jurors here, so if he shows up, tell the jury room we're excusing juror 35 and to bring all the other jurors. All right. I will be out again. Recess Taken.

2VRP 28-29. The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a . . . public trial." Article I, §22 of the Washington Constitution similarly guarantees that "i[n] criminal prosecutions the accused shall have the right . . . to have a . . . public trial." It further provides in article I, §10 that "[j]ustice in all cases shall be administered openly."

The public trial right is protected by both our state and federal constitutions and is designed to "ensure a fair trial, to remind officers of the court of the importance of their functions, to encourage witnesses to come forward, and to discourage perjury." State v Brightman, 155 Wn.2d 506, 514, 122 P.3d 150 (2005) (citing Waller v Georgia, 467 US 39, 46-7, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984)).

The guaranty of open proceedings extends in criminal cases

to "'[t]he process of juror selection,' which 'is itself a matter of importance, not simply to the adversaries but to the criminal justice system.'" In re Orange, 152 Wn.2d 795, 804, 100 P.3d 291 (2004) (quoting Press-Enter. Co. v Superior Court (Press-Enter. 1), 464 US 501, 505, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984)).

The presumption that trials should be open may be overcome "only by an overriding interest based upon findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered." Orange, 152 Wn.2d at 806, 100 P.3d 291 (quoting Waller, 467 US at 45, 104 S.Ct. 2210 (quoting Press-Enter. 1, 464 US at 510, 104 S.Ct. 819)). To assure the right to an open and public trial, the trial court must ensure that the following five criteria are satisfied:

> 1. The proponent of closure or sealing must make some showing [of a compelling interest], and where that need is based on a right other than an accused's right to a fair trial, the proponent must show a "serious and imminent threat" to that right;
>
> 2. Anyone present when the closure motion is made must be given an opportunity to object to the closure;
>
> 3. The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests;
>
> 4. The court must weigh the competing interests of the proponent of closure and the public;
>
> 5. The order must be no broader in its application or duration than necessary to serve its purpose.

State v Bone-Club, 128 Wn.2d 254, 258-9, 906 P.2d 325 (1995) (citing Allied Daily Newspapers of WA v Eikenberry, 121 Wn.2d 205, 210-11, 848 P.2d 1258 (1993)). Thus, in order to support closure

during jury selection, a trial court must engage in the Bone-Club analysis; failure to do so results in a violation of the defendant's public trial rights. Brightman, 155 Wn.2d at 515-6, 122 P.3d 150 (citing Orange, 154 Wn.2d at 809, 100 P.3d 291).

In Press-Enter. 1, the court held that voir dire proceedings are presumptively open to the public and press and that to overcome the presumption, a trial court "must" [1] make specific findings that: (emphasis added).

1. Closure is essential to preserve a higher value;
2. The order of closure is no broader than necessary; and
3. No less restrictive alternatives would adequately protect the specified interests.

The denial of a constitutional right to a public trial is one of the limited classes of fundamental rights not subject to harmless error analysis. State v Strode, 167 Wn.2d 222, 217 P.3d 310 (2009) (citing Neder v US, 527 US 1, 8, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999). This is so because denial of the public trial right is deemed a structural error and prejudice is necessarily presumed. Strode also affirmed that it "has never found a public trial right violation to be [trivial or] de minimis." See State v Easterling, 157 Wn.2d 167, 180, 137 P.3d 825 (2006).

---

1. RAP 1.2(b) The command "must" is used in the rules to emphasize that noncompliance will result "in more severe than usual sanctions." When a party fails to do what s/he "should," the appellate court has wide discretion in fashioning a sanction. RAP 1.2(b); 18.9. When a party fails to do what s/he "must," the failure is governed by RAP 1.2(b) or 18.8 (b). State v Ashbaugh, 90 Wn.2d 432, 438, 583 P.2d 1206 (1978).

THE PUBLIC TRIAL RIGHT

The principle that justice cannot survive behind the walls of silence is reflected in the Anglo-American distrust for secret trials. In re Oliver, 333 US 257, 268, 68 S.Ct. 499, 92 L.Ed. 682 (1948). The public trial guarantee has been considered so important that courts have reversed convictions where the courtroom was closed for the announcement of the verdict, US v Canady, 126 F.3d 352, 364 (2d Cir. 1997), cert. denied, 522 US 1134, 118 S.Ct. 1092, 140 L.Ed.2d 148 (1998); where the trial inadvertently ran so late one night that the public was unable to attend, Walton v Briley, 361 F.3d 431, 433, (7th Cir. 2004); and where the trial was closed for the testimony of just one witness, US v Thunder, 438 F.3d 866, 868 (8th Cir. 2006).

Likewise, the Washington Supreme Court has vigilantly protected the right to an open and public trial. Strode, Supra. (Right to open trial applies to portion of jury selection conducted in chambers); Easterling, Supra. (State constitution requires open and public trials); Orange, Supra. (Reversing conviction where court was closed during voir dire and holding that juror selection is a matter of importance, not simply to the adversaries but to the criminal justice system); Bone-Club, Supra. (Reversible error to close courtroom during suppression motion); Seattle Times Co. v Ishikawa, 97 Wn.2d 30, 36, 640 P.2d 716 (1982) (Setting forth guidelines that "must" be followed prior to closing a courtroom or sealing documents) (emphasis added).

Our founders were smart. They knew that "'[w]ithout

publicity, all other checks are insuffcient: in comparison of publicity, all other checks are of small account. Recordation, appeal, whatever other institutions might present themselves in the character of checks, would be found to operate rather as cloaks than checks; as checks in reality, as checks only in appearance.'" Oliver, 333 US 257, 271, 68 S.Ct. 499 (quoting 1 JEREMY BENTHAM, Rationale of Judicial Evidence 524 (1827)). Judicial secrecy, however manifested, must be resisted.

The Washington Court of Appeals Division Two has recently held that randomly selecting jurors during a recess implicates a defendant's right to a public trial, thus requiring a Bone-Club analysis. Under the "Experience and Logic" test, juror selection is usually conducted in open court; and the Bone-Club factors must be considered. See State v Jones, 175 Wn. App. 87, 303 P.3d 1084 (Div. 2 2013).

In the present case, a recess was taken and without the Bone-Club factors being considered, excused Juror 35. 2VRP 28-29. This juror never shown unfitness to be a juror in this case. This violation is substantially equal to State v Jones, Supra.; and State v Hummel, 165 Wn. App. 749, 774, 266 P.3d 269 (2012), rev. denied, 176 Wn. 2d 1023, 297 P.3d 708 (2013) which was reversed and remanded because the court took a recess and performed voir dire. See instances of jurors being dismissed during court recesses at 1VRP 26; 56-58; and 2VRP 28-9.

ADDITIONAL GROUND TWO

VANISHING JUROR - Public Trial Violation

Juror #2, was seated in the jury box from the start of voir

dire in this case. This juror is seperate from Juror 53 of whom was deaf and later took this seat. See 2VRP 95. Juror #2 was heard from at 1VRP 131; 2VRP 55-6; 87-8. The last time she was heard from was 2VRP 87-8. This juror simply vanished from the proceedings. The record is void of any dismissal of this juror. Juror 2 was present up until the empaneling. As the court requested to fill the box, deaf juror 53 became juror 2. The court, state, or defense, never excused her for cause, or used a peremptory challenge; at least not on the record, in open court.

Mr. Pena has a Constitutional right to be present for jury selection process. This juror never manifested unfitness to ethnic, racial, or political prejudice, or predisposition about defendant's culpability. See Gomez v US, 490 U.S. 858, 873, 109 S.Ct. 2237, 104 L. Ed.2d 923 (1989); State v Irby, 170 Wn.2d 874, 246 P.3d 796 (2011) (holding defendant's absence from dismissal of potential jurors violated his right to due process under the federal constitution, as well as his right to appear and defend in person under state constitution). For-cause excusals and peremptory challenges are done during voir dire which is typically an open proceeding. See State v Wilson, 298 P.3d 148, 157 (2013).

In comparison, State v Slert, 169 Wn. App. 766, 282 P.3d 101 (2012), rev. granted, 176 Wn.2d 1031, 299 P.3d 20 (2013) held an in chambers conference and subsequent dismissal of jurors was part of the jury selection process, to which the public trial right applied, and the resulting dismissal of jurors violated the right to be present during critical stages of proceedings.

VANISHING JUROR - Missing Portions of the Record

There is no record of the original Juror #2 ever being excused, at least not in open court on the record. If the court excused juror #2, it is not part of the record. There is a probable likelihood that this perfect juror was excused and a devoid record as to why is prejudicial. We know that she wasn't excused in the peremptory challenges at 2VRP 92-95. So what happended to this juror that showed no biased opinions or prejudice?

The Sixth Circuit Court of Appeals has held on Federal habeas corpus relief based upon a missing transcript will only be granted where the petitioner can show prejudice. The absence of a portion of the record is not reversible error unless the defendant can demonstrate prejudice. See State v Miller, 40 Wn. App. 483, 488-89, 698 P.2d 1123, rev. denied, 104 Wn.2d 1010 (1985).

In the Fifth Circuit if trial counsel and the counsel on appeal are the same, the defendant must show prejudice from the defect in the record; however, if the counsel are different, reversal is automatic. US v Brumley, 560 F.2d 1268 (5th Cir. 1977); Miller, 40 Wn. App. at 488 n. 3, 698 P.2d 1123. See also State v Burton, 165 Wn. App. 866, 884-85, 269 p.3d 337 (2012).

The missing portion of the transcript here is essential to determine why juror 2 suddenly went missing and no longer existed. See State v Tilton, 149 Wn.2d 775, 72 P.3d 735 (2003). We can presume, from the fact that juror 2 went missing, the court did an off the record for cause challenge of juror 2, thus being a closed

proceeding and prejudice is presumed. We cannot truly know, the record is devoid of anything as to where this juror went. Juror 2 simply vanished and all we can discern from the record is the court moved juror 53 into the jury box and was seated in seat 2; knowing this seat was empty. 2VRP 95. Unquestionably, the missing portion of the record with dismissal of a juror is prejudicially done; or alternatively, prejudice must be predsumed if this juror was excused off the record, violating Mr. Pena's right to a public trial.

ADDITIONAL GROUND THREE

RIGHT TO FAIR TRIAL BY IMPARTIAL AND UNBIASED JURY

Actual bias is the existence of a state of mind on the part of a juror in reference to the action, or to either party, which satisfies the court that the person cannot try the issue impartially and without prejudice to the substantial rights of a party.

RCW 4.44.170(2) (alteration in original). The following jurors sat on the jury:

> 25 is seat 1, 53 is 2, 15 is 3, 59 is 4, 58 is 5, 6 is 6, 44 is 7, 8 is 8, 38 is 9, 41 is 10, 46 is 11, 54 is 12, 13 is 13, 14 is 14. Jurors 7 (44) and 13 (13) were the alternates. 2VRP 95.

These are instances of Juror(s) who are unsatisfactory for this juries sevice:

Juror 8 (seat 8) requested private questioning (1VRP 13) and never received it. Juror 15 (seat 3) said that she could not be fair and impartial. 1VRP 127. Juror 41 (seat 10) works for fire service and does calls. 1VRP 64-71. Thinks he could be open

minded although would swing towards the victim. 1VRP 66-7. Juror 58 (seat 5) requested private questioning (1VRP 20) and did not receive that and was never once questioned about his reason or his ability to serve impartially on the jury. Juror 53 (seat 2) is a deaf juror. 2VRP 4 where she finally received a listening device on the second day of voir dire. This juror was never questioned to her ability to serve on the jury or to her impartiality.

Although the instances above show prejudice or that they should not be sitting on this jury; the most prejudicial are Juror(s) 15 and 41. Juror 15 sat on the jury and definitively stated before hearing any evidence after Judge Spearman asked:

> "Do any prospective jurors feel that they, just by the nature of the charges, they feel they couldn't be a fair and impartial juror? . . . And if you could put your card down when you're -- I call you. Juror 15 had raised their card. 1VRP 127. Juror 15 the next day stated that he thought that he shouldn't let his personal life affect this case, so I'm fine with it. Court: Okay. So you're -- Juror 15: Yeah, I can have an open mind and I can give this trial a chance. 2VRP 14-5. Juror 15 is a Mandated Reporter. 2VRP 89-90.
>
> Judge Spearman asked juror 41: So, you say -- are you saying that you sort of already assume that if there's allegations of sexual abuse, that the defendant's guilty? Juror 41: I don't know. It's tough for me to say that. I like to think that I have an open mind. But, at the same time, I dont like -- you know, I go on calls and you see a victim, and they're telling you one thing and, you know, I just don't have much compassion for the other person, I guess is the end result. 1VRP 64. Later during the same line of questioning; Judge Spearman asked: And where is your compassion going to be? Or is that going to play a role? Juror 41: It's a -- yeah, I guess I did -- at this point I don't have compassion to either/or. <u>And if I did, honestly, it'd probably sway towards the victim</u>.

Mr. Pena has a constitutional right to be tried by an impartial jury. U.S. Const. Amend. VI; WA Const. art. I, § 22 (amend 10); <u>State v Davis</u>, 141 Wn.2d 798, 824-25, 10 P.3d 977

(2000). The state and federal constitutions provide that the right to trial by jury shall be preserved and remain inviolate. U.S. Const. Amend. VII; WA Const. art. I, § 21. The right of trial by jury means a trial by an unbiased and unprejudiced jury free of disqualifying misconduct. Smith v Kent, 11 Wn. App. 439, 443, 523 P.2d 446 (1974). This right is the right to receive a fair trial by a panel of impartial, indifferent jurors. State v Latham, 100 Wn.2d 59, 62-3, 667 P.2d 56 (1983) (citing Irvin v Dowd, 366 US 717, 722, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961). In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, "indifferent" jurors. The failure to accord the accused a fair hearing violates even the minimal standards of due process of the Fifth Amendment. Oliver, 333 US 257, 68 S.Ct. 499.

"[M]ore important than speedy justice is the recognition that every defendant is entitled to a fair trial before 12 unprejudiced and unbiased jurors. Not only should there be a fair trial, but there should be no lingering doubt about it." Davis, 141 Wn.2d at 825, 10 P.3d 977. In Dyer v Calderon, 151 F.3d 970 (9th Cir. 1998) the court held that the presence of a biased juror cannot be harmless; the error requires a new trial without a showing of actual prejudice. Like a judge who is biased, the presence of a biased juror introduces a structural defect not subject to harmless error analysis. See generally Arizona v Fulminante, 499 US 279, 307-310, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991). Dyer, 151 F.3d at 973 n. 2 (citations omitted in part).

It is apparent that Mr. Pena has a right to a trial by jury, and that right includes an unbiased and unprejudiced jury. State v Parnell, 77 Wn.2d 503, 508, 463 P.2d 134 (1969). When a criminal trial is conducted in a manner that renders it fundamentally unfair by depriving the defendant of fundamental rights, reversal of the conviction is ordinarily automatic. Washington v Recuenco, 548 US 212, 218, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006); Neder, 527 US at 8, 119 S.Ct. 1827.

In State v Jackson, 75 Wn. App. 537, 879 P.2d 307 (1994) rev. denied, 126 Wn.2d 1003 (1995), a juror simply made reference to African Americans as "coloreds" and told another juror that the worst part of a recent trip he took is he had to associate with "coloreds." Id., at 540. Division One reversed based upon predisposition to make generalizations about African Americans. Id., at 543.

In State v Witherspoon, 82 Wn. App. 634, 919 P.2d 99 (1996) a juror expressed concern about African Americans and candidly admitted prejudice and ultimately agreed he would presume Witherspoon innocent. Id., at 637-8. Division Three reversed the conviction based on this context of reasoning of impartiality.

These cases are central to how little of a biased statement could provide basis for excusal for cause based upon prejudice. Juror 15's statement by raising her placard openly admitted that she could not be fair and impartial. It was the following day, during voir dire that she recited she could give the trial a chance. This juror absolutely should have been excused for cause

and the court abused its discretion for not doing so. As for Juror 41, he thinks that he can be fair and impartial, yet would feel compassion for the victim. These instances are not conclusive statements of impartiality, but maybe they will be impartial. These jurors statements show partiality and actual bias in favor of the state (victim), in violation of defendant's right's to fair trial.

ACTUAL AND IMPLIED BIAS

In U.S. v Gonzalez, 214 F.3d 1109 (9th Cir. 2000) provides analysis of the two types of bias "actual and implied," that is . . . bias in fact or bias conclusively presumed as a matter of law. Gonzalez, 214 F.3d at 1111. Although "[b]ias can be revealed by a juror's express admission of that fact, . . . more frequently, jurors are reluctant to admit actual bias, and the reality of their biased attitudes must be revealed by circumstantial evidence." Id., at 1112; (citation omitted). In contrast, implied bias presents a mixed question of law and fact. Dyer, 151 F.3d at 973.

Although actual bias is more common ground for excusing jurors for cause, "[i]n extraordinary cases, courts may presume bias based upon the circumstances." Dyer, 151 F.3d at 981; See also Smith v Phillips, 455 U.S. 209, 222, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982) (O'Connor, J. concurring). "Unlike the inquiry for actual bias, in which we examine the jurors answers on voir dire for evidence that she was in fact partial, 'the issue for implied bias is whether an average person in the position of the

juror in controversy would be prejudiced.'" Gonzalez, 214 F.3d at 1112 (citations omitted) (emphasis added). Accordingly, we have held that prejudice is to be presumed "where the relationship between a prospective juror and some aspect of the litigation is such that it is highly unlikely that the average person could remain impartial in his deliberation under the circumstances." Tinsley v Borg, 895 F.2d 520, 527 (9th Cir. 1990) (quoting Person v Miller, 854 F.2d 656, 664 (4th Cir. 1988)). We have also stated that the relevant question "is whether '[the] case present[s] a relationship in which the 'potential for substantial emotional involvment, adversely affecting impartiality, is inherent.'" U.S. v Plache, 913 F.2d 1375, 1378 (9th Cir. 1990) (quoting Tinsley, 895 F.2d at 527) (in turn, quoting U.S. v Eubanks, 591 F.2d 513, 517 (9th Cir. 1979)).

In the present case, Juror 15 one day cannot be fair and impartial and then comes back the next day after reflection or talking to her family, decided that she "shouldn't let her personal life affect the case." (Simply put, if she had talked to her family, then she failed to follow the judges instructions of not talking about the case with anyone). Juror 41 held bias towards the defendant by having compassion for the alleged victim. Further, Juror(s) 8 and 58 requested private questioning which neither of them received, to determine why they would request private questioning. Juror 8 did participate in voir dire (2VRP 56, 67-8, 84-5, and 90) but never revealed why she requested private questioning. 1VRP 13; CP 90. Juror 58 also requested

private questioning (1VRP 20; see also Juror Questionnaires (CP at 90)), but not once was questioned and never once participated in voir dire to reveal the reason for the request. It can be assumed that these jurors have some issue, or emotional involvment, that would adversely affect their ability to be fair and impartial; and were completely uncomfortable talking about any aspect or experience, they wanted to talk privately about.

In Gonzalez, they applied this standard and have found implied bias in cases where the juror in question has had some personal experience that is similar or identical to the fact pattern at issue in the trial. Tinsley, 895 F.2d at 527-29 (cataloguing cases in which implied bias has been found).

The Tinsley court stated for a presumption of bias to be held there needs to be a personal connection between the juror and defendant, the victim, or any other witness. Id., at 529. For example, in Eubanks, 591 F.2d at 517, the court found implied bias where the sons of a juror in a heroin distribution case were themselves heroin users and had served lengthy prison sentences. Similarly, in Dyer, the court found implied bias where the brother of a juror in a murder case had been murdered and did not reveal it. Dyer, 151 F.3d at 981-82. The court took precedent from other circuits. In Henley v Godinez, 975 F.2d 316, 319-20 (7th Cir. 1992), found implied bias in a trial for murder and burglary when the hotel rooms of the deliberating jurors were broken into. The court based its conclusion on the assumption that the recent burglary would make the jurors incapable of fairly deliberating in

a case in which the murder was committed in connection with a burglary. Similarly, in Burton v Johnson, 948 F.2d 1150, 1159 (10th Cir. 1991), found implied bias in a case in which both the juror and the defendant had been involved in abusive family situations.

Because the implied bias standard is essentially an objective one, a court will, where the objective facts require a determination of such bias, hold that a juror must be recused even where the juror affirmatively asserts (or even believes) that he or she can and will be impartial. Gonzalez, 214 F.3d at 1113. See Dyer, 151 F.3d at 982 ("Even if the putative juror swears up and down that it will not affect his judgment, we presume conclusively that he will not leave [it] . . . at the jury room door.").

In the case at bar, Juror 41 made a statement that reflects emotional involvement and impartiality that is determinate upon their ability or willingness to serve impartially. This shows that implied bias exists in the mind of this juror. See 1VRP 63-71 wherein he never affirmatively answered that he could be fair and impartial. This also serves Juror 15 who expressed she could not be fair and impartial. 1VRP 127. See Gonzalez, 214 F.3d at 1113; Dyer, 151 F.3d at 984 (holding that juror's responses and conduct, in combination with personal history, "add[ed] up to that rare circumstance where we must presume juror bias"); Burton, 948 F.2d at 1159.

///

DUTY OF THE COURT

The presiding judge has a duty to excuse any juror who has manifested unfitness as a juror, such as those stated from the record. These include bias, prejudice, indifference, inattention or any physical or mental defect or by reason of conduct or practices incompatible with proper jury service. State v Tingdale, 117 Wn.2d 595, 600, 817 P.2d 850 (1991). The touchstone of a fair trial is an impartial trier of fact -- a jury capable and willing to decide the case solely on the evidence before it. McDonough Power Equip., Inc. v Greenwood, 464 U.S. 548, 554, 104 S.Ct. 845, 78 L.Ed.2d 663 (1984) (quoting Smith, 455 U.S. at 217, 102 S.Ct. 940) (Emphasis added).

The record reflects all types of biases and prejudice of jurors, and two jurors that skated through without any questioning to their ability to serve fair and impartially. See State v Irby, 170 Wn.2d 874, 900, 246 P.3d 796 (2011) (potential jurors released for cause due to implied biases related to trial).

ADDITIONAL GROUND FOUR

INEFFECTIVE AND DEFICIENT PERFORMANCE OF TRIAL COUNSEL

Inadequate Voir Dire

Mr. Pena had a 6/6 hung jury in the first trial, and did not receive a fair trial by an impartial jury the second, or a jury free from disqualifying conduct. In the second trial, Jurors went throughout voir dire without raising their hands on any given subject or participating in voir dire; or being called upon by trial counsel. This cannot be considered by any means strategic in determining bias and prejudice, or whether jurors 53 & 58 are qualified to serve.

Juror 58 in the questionnaire requested private questioning. 1VRP 20; CP 90. He was never once interviewed by the court, state or defense as to why he requested this. He went through the trial in seat 5, and no one bothered to include him in voir dire, nor did s/he put up a hand to be questioned. This is equally the case with Juror 53, who is presumed so deaf she needed a listening device; and requested it on the second day of voir dire. See 2VRP 4. Although, we have no idea if she is in fact the juror at this point, it is not revealed until later at 5VRP 4, when the court asked Juror 2 (53) if she needed the listening device. Then it became decisively clear in the verdict (6VRP 3-4) that Juror 2 has a serious hearing issue that could be considered disqualifying conduct under RCW 2.36.110.

The Due Process Clause of the Fourteenth Amendment guarantees a defendant not only an impartial jury, but also adequate voir dire in order to identify unqualified jurors. See Morgan v Illinois, 504 US 719, 729, 112 S.Ct. 2222, 119 L.Ed.2d 492 (1992) ("Part of the guarantee of a defendant's right to an impartial jury is an adequate voir dire to identify unqualified jurors"). A jurors failure to speak during voir dire constitutes an irregularity affecting the substantial rights of the parties. When the failure relates to material questions, the appropriate remedy is to grant a new trial. Robinson v Safeway Stores, Inc., 113 Wn.2d 154, 159, 776 P.2d 676 (1989) (quoting Gordon v Deer Park School Dist. 414, 71 Wn.2d 119, 122, 426 P.2d 824 (1967)).

The unwillingness of jurors 53 and 58 not to answer any questions posed to the venire panel denied Mr. Pena adequate voir dire to identify if they were qualified to serve on the jury. CrR 6.4(b) provides:

> "A voir dire examination shall be conducted for the purpose of discovering any basis for a challenge for cause and for the purpose of gaining knowledge to enable an intelligent exercise of peremptory challenges.
>
> The judge shall initiate the voir dire examination by identifying the parties and their respective counsel and by briefly outlining the nature of the case. The judge and counsel may then ask the prospective jurors questions touching on their qualifications to serve as jurors in the case, subject to the supervision of the court as appropriate to the facts of the case.

CrR 6.4(b). Juror misconduct can occur when jurors conceal information relevant to the case.

In Smith v Kent, 11 Wn. App. 439, 523 P.2d 446 (1976), the Plaintiff was injured by a rock that was thrown from a dump truck traveling in front of the plaintiff's automobile. During voir dire, one juror failed to reveal his experience as a truck driver when asked about previous employment. The court found this misrepresentation warranted the granting of a new trial. See Smith, 11 Wn. App. at 443-45, 523 P.2d 446.

Here, Juror 58 requested, by juror questionnaire, to be interviewed privately. 1VRP 20; CP 90. Nothing ever was discussed or revealed as to why he wanted to be questioned in private. He never raised his hand to speak about any of the questions posed to the jury; and he was never called upon to speak.

Secondly, is Juror 53, who we find out during the verdict

(6VRP) that she is so deaf it places in question whether she followed the trial court Jury Instruction No. 9 telling the jury they have a duty to deliberate. This places her service in question because she never once raised her hand during voir dire in response to any questioning; and secondly, trial counsel failed to call on them to speak on any subject matter whatsoever. These jurors actions, or inaction, presumptively affected the substantial State and Federal Constitutional rights of defendant to a fair trial, and is considered juror misconduct for failing to speak during voir dire.

RIGHT TO FAIR TRIAL BY IMPARTIAL COMPETENT JURORS

A juror with a hearing impediment went undetected until late in voir dire, and raises questions as to whether or not this juror heard anything at all or actively participated in deliberations. As the facts state above of Juror 53 (seat 2) the court did not become aware of any problems until the second day of voir dire. 2VRP 4. The court had no idea how bad this was at this time and was not fully discovered until 6VRP 3-4 when the verdict was in; only after turning the volume up on the audio system to maximum capacity could she hear. (It is reasonable to assume the volume was not set to maximum capacity on day one of voir dire).

Juror 58 requested private questioning (1VRP 20; and CP 90) and not one time did trial counsel interview this juror during voir dire. This is equally true for Juror 53 who counsel also failed to interview during voir dire. Egregiously, both of these jurors (53 and 58) had no comments or replies to any voir dire questioning to implement a line of interrogation.

Significantly, this information provides that these jurors are unable to clearly deliberate or meaningfully participate in jury service. The questions that were posed elicited responses from all of the other jurors to the questions, yet these two were zombies to the whole process. They could not be evaluated to check for any bias or prejudice. They had no comments whatsoever on any matter, other than a need for a listening device for Juror 53; or private questioning for #58. This places in question whether juror 53 heard anything at all during the first day of voir dire; and juror 58 being so inattentive or indifferent that it prevented participation.

The Legislature's policy of providing competent jurors is a fundamental right. The presiding judge has a duty to excuse any juror who has manifested unfitness as a juror. These include bias, prejudice, indifference, inattention or any physical or mental defect or by reason of conduct or practices incompatible with efficient jury service. State v Tingdale, 117 Wn.2d 595, 600, 817 P.2d 850 (1991) (emphasis added); see generally RCW 2.36.110. A Juror's failure to speak during voir dire regarding material facts or issues can amount to juror misconduct. Allyn v Boe, 87 Wn. App. 722, 729, 943 P.2d 364 (1997).

RCW 2.36.110 gives the trial court a continuous obligation to excuse any juror who is unfit and unable to perform the duties of a juror. This is a continuous obligation of the trial court to excuse unfit jurors upon manifestation. The statute reads as follows:

> "It **shall** be the duty of a judge to excuse from further jury service any juror, who in the opinion of the judge, has manifested unfitness as a juror by reason of bias, prejudice, indifference, inattention or any physical or mental defect or by reason of conduct or practices incompatible with proper and efficient jury service.

RCW 2.36.110 (Emphasis added). "RCW 2.36.110 and CrR 6.5 places a continuous obligation on the trial court to excuse any juror who is unfit and unable to perform the duties of a juror." State v Jordan, 103 Wn. App. 221, 227, 11 P.3d 866 (2000). When determining whether circumstances establish juror misconduct, the trial court need not follow any specific format. Jordan, 103 Wn. App. at 229, 11 P.3d 866; see also US v Gupta, 699 F.3d 682 (2d Cir. 2011). "When there has been a material departure from the statutes, the court will presume prejudice. Tingdale, 117 Wn.2d at 600, 817 P.2d 850.

Here, the trial court seated these two jurors at the completion of the inadequate voir dire creating the prejudice, by having indifferent, inattentive, and physically incompatible jurors seated on the jury.

In Roche Fruit Co. v Northern Pacific RY., 18 Wn.2d 484, 139 P.2d 714 (1943) this court held:

> "[A] litigant is entitled to have his case submitted to a jury selected in the manner required by law; and further, that, if the selection is not made substantially in the manner required by law, an error may be claimed without showing prejudice, which will be presumed. But it will only be presumed when there has been a material departure from the statute.

Roche, 18 Wn.2d at 487, 139 P.2d 714. In Delong v Brumbaugh, 703 F.Supp. 399, 405 (W.D. PA. 1989) (deaf juror excluded from jury

service); People v Green, 148 Misc.2d 666, 669, 561 N.Y.S.2d 130, 133 (Cty. Ct. 1990) (prosecutor exercised peremptory strike against prospective juror solely because she was hearing impaired).

The jury selection process in the present case concerning Juror(s) 58 (seat 5) and 53 (seat 2) substantially prejudiced Mr. Pena and his right to a fair trial. There is no way to determine whether they were qualified to serve as jurors on this case. Their conduct of indifference, inattention or physical defects were prevalent, yet the court, and counsel left them to chance. There was a material departure from the statutes and court rules implicating Mr. Pena's rights to a fair trial; unfairness and prejudice should be presumed for the inadequate voir dire of these jurors. See Tingdale, Supra.; State v Marsh, 106 Wn. App. 801, 807, 24 P.3d 1127 (2001); see also State v Patrick, 180 Wash. 56, 58-9, 39 P.2d 390 (1934) (Juror unqualified to serve is not legal jury or legal trial).

DUTIES OF JURORS

In State v Morfin, 171 Wn. App. 1, 10, 287 P.3d 600 (2012) can help provide guidance for us relating to juror 53 (seat 2). This case resorted to Washington Pattern Jury Instructions Criminal ("WPIC") which contains the following:

> Juror's Duty to Consult with One Another
>
> As jurors, you have a **duty** to discuss the case with one another and to deliberate in an effort to reach a verdict. Each of you must decide the case for yourself, but only after you consider the evidence impartially with your fellow jurors. During your deliberations, you should not hesitate to re-examine your own views and to change your opinion

> based upon further review of the evidence and these instructions. You should not, however, surrender your honest belief about the value or significance of evidence solely because of the opinions of your fellow jurors. Nor should you change your mind just for the purpose of reaching a verdict. (Emphasis added).

11 WA Practice: WPIC 1.04 (3d Ed. 2008). Juror 53's deafness could attribute the common assumption, based especially upon the verdict malfunction, that she was unable to participate meaningfully in reaching the verdict, or quite possibly the entire trial. This position should be presumptively assumed since she never once raised her hand or placard to voice any opinion on any of the matters during voir dire. The above instruction has been cited with approval in State v Watkins, 99 Wn.2d 166, 175-6, 660 P.2d 1117 (1983); see Jury Instruction No. 9.

It is apparent during deliberations a juror must participate by discussing the case with his or her colleagues, **listening to others'** view points, formulating his or her own opinion. Morfin, 171 Wn. App. at 10, 287 P.3d 600. (Emphasis added). The trial court abused its discretion in not providing the juror information. It was needed to inquire into whether juror 53 actively participated in the deliberations as the court instructed, considering that this juror did not participate in voir dire. It is reasonable to assume she did not participate in deliberations, based upon the voir dire record. It could be reasonably presumed juror 58 also failed to participate in deliberations based upon the record of voir dire showing indifference and inattention by providing no comments to voir dire questioning.

FAILING TO PARTICIPATE

Jurors 53 and 58 failed to participate in the voir dire process. Throughout all of voir dire they never once raised their hand or placard to voice any opinion to any of the subject matter. This is further egregious by the mere fact that no one from the court, state, or defense questioned these jurors who sat in judgment of Mr. Pena. These facts should constitute a departure from the statutes and Mr. Pena's rights to a fair trial by impartial jury. We have no idea whether or not these two jurors had any bias or anything about them and/or what they believe, or experiences they had.

Juror 53 (2) the only time during voir dire she spoke is the second day, when the court at 2VRP4 states:

> . . . the bailiff is now going to get a listening device for one of the jurors who couldn't hear anything yesterday you know. I was telling the bailiff, you know, I think what happens sometimes is they -- they do ask them ten times, does anyone need a listening device, they don't get a response, but maybe they can't hear the question; right? I mean, because it happens a lot.

2VRP 4 in pertinent part (Emphasis added). This, significantly shows why Juror 53 did not participate in voir dire. At this point the court should have dismissed her for cause or re-asked all of the questions posed the previous day. Instead the court continued and Juror 53 went on throughout voir dire being unquestioned, and was eventually seated in the "vanishing" juror's seat #2. 2VRP 94-5.

Mr. Pena is entitled to be tried by 12, not 9, or even 10, impartial and unprejudiced jurors, Parker v Gladden, 385 US 363,

366, 87 S.Ct. 468, 17 L.Ed.2d 420 (1966), unfortunately, this was not the case here and reversal and remand should be warranted for a new trial.

ADDITIONAL GROUND FIVE

INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

Failure to Call Alibi Witnesses

Mr. Pena enjoys the right under both the Sixth Amendment to the United States Constitution and article I, §22 of the Washington Constitution to obtain witnesses and present a defense. State v Sanchez, 171 Wn. App. 518, 288 P.3d 351 (2012) (citations omitted).

Counsel's choice of an all or nothing defense was reasonable, yet she failed to present any alibi witnesses. Considering there was an alibi, counsel's performance was unreasonable and prejudiced the defense, because there is a reasonable probability that the results of the proceeding would have been different [had she presented the alibi witnesses]. See Strickland v Washington, 466 US 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); State v Brockob, 159 Wn.2d 311, 344-45, 150 P.3d 59 (2006).

Ordinarily, trial counsel is given considerable deference and strong presumption that performance is reasonable. State v Grier, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011). "To rebut this presumption, the defendant bears the burden of establishing the absence of any 'conceivable' legitimate tactic explaining counsel's performance.'" Grier, 171 Wn.2d at 42, 246 P.3d 1260

(quoting State v Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004)).

During testimony in the second trial, state witnesses attested that the "alleged" events had taken place on the 8th of October. See Certificate of Probable Cause and 3VRP 5, 21, 24, 50, 51; 4VRP 5, 9, 12, 14, 17, 18, 21, 22, 23, 25, 32, 39, 54, 56, 58, 59, 62, 64, 65, 66, 71, 72, 73, 120, 124; 5VRP 59, 64, 71, 79 and 95. In context, the witnesses, charging document and the jury instructions alleged October 8, 2011. The police on the stand even referred to his notes to say that the 911 call was placed on the 8th of October, 2011, and was the day the alleged event happened. 3VRP 5. Further, during closing arguments of the prosecution (5VRP at 95-96) absolutely declares the testimony of police, investigators and the 911 call, allege the October 8, 2011 date.

This date would have been rebutted by the alibi witnesses, which were on the witness list and were available to testify, had they been called. Counsel took an "all or nothing" approach. Although a legitimate trial strategy, it hinged primarily upon witnesses of Mr. Pena's providing testimony he was not there on the specific date in question. His witnesses had no concern of the subject one way or the other. Counsel's failure to call these witnesses for the defense in an "all or nothing" approach was deficient and was as if counsel didn't perform at all.

Mr. Pena was under the assumption and belief that these witnesses would be called to rebut the state's witnesses that he

was at their apartment on October 8, 2011. Counsel never consulted with him not to present his alibi witnesses, and to pursue the all or nothing defense. This is deficient performance and highly prejudicial because there is no legitimate, strategic or tactical reason not to present an alibi witness defense.

Undeniably, the result of the proceeding would have been different had counsel presented defense witnesses who had no interest in the outcome. Counsel's tactics and strategy were unreasonable in light of her not introducing the alibi witnesses, or questioning 2 jurors during voir dire. These errors prejudiced the defense and the "error [is] so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Strickland, 466 US at 687, 104 S.Ct. 2052.

Defense counsel "simply did not get the job done." This failure prejudiced the defense because the alibi would have placed Mr. Pena at a different location on that date. See State v Weber, 137 Wn. App. 852, 155 P.3d 947 (2007); and questioning the jurors would have revealed whether they were qualified to serve impartially.

Mr. Pena's attorney stated in a Pre-Trial Brief her defense is general denial and alibi. CP 62B at 2 (First Trial). The second trial it was "the defense remains general denial with a possible alibi witness defense." CP 87 at 2. During the first trial defense elicited information from Bridget Lyons stating that Mr. Pena was attending a funeral on the October 8, 2011 date and could not have been the one who did the alleged acts. 8/29/2012

VRP 231-34. During cross-examination Ms. Lapps asked of Ms. Lyons the following:

Q. When the detective talked to you in 2011, did she ever tell you about the date in question?

A. I don't remember.

Q. And does October 8, 2011 stick out to you for any reason?

A. Yes.

Q. What reason does October 8, 2011, stand out to you?

A. That was the date of the memorial of a very close family friend.

Q. What was the name of that family friend?

A. Cynthia -- I can't even say it. Cynthia Omtvedt.

MS. O'DONNELL: I'm sorry. What was the last name?

THE WITNESS: Omtvedt.

Q. (Ms. Lapps) And, in terms of your relationship with Ms. Omtvedt, what was your relationship with her?

A. She was a mother figure.

Q. And, on that day, October 8th, 2011, what time was the memorial?

A. Approximately 3:30.

Q. Okay. What time did it end?

A. Approximately 5:30.

Q. And, after 5:30, what did -- well, was Mr. Pena with you at that memorial?

A. Yes.

Q. Did he leave with you from there?

A. Yes.

Q. What did you do after 5:30 that day?

A. I invited a few friends over to my house for support, and we sat at home, and made dinner, and watched TV.

Q. Who were the friends that came over?

A. Amanda McMullen, Adopho, and Tony, friends from church.

Q. And what did you have for dinner?

A. Tacos, I believe.

Q. And -- I'm sorry -- did you do something else, then, with them over?

A. Excuse me?

Q. I'm sorry was there something else, then, aside from dinner with the friends?

A. No. We were just making dinner and watching movies.

Q. Now, did any of them -- how late did they stay? How late did Tony stay?

A. Until about 10:30, 11:00.

Q. And what about Adopho?

A. Adopho and Amanda both spent the night.

8/29/2012 VRP 231-33.

Ms. Lyons is a witness for the State, but the mother of Mr. Pena's child and even though she held a biased position that most likely negated the fact that she was a witness for the prosecution, Mr. Pena received a hung jury of 6/6. Additionally, had she called the named witnesses as she briefed in the pre-trial and that Ms. Lyons named, the results of the second trial would have been acquittal.

This argument is brought by using the facts that were elicited from the first trial, because in the second trial counsel failed to elicit this favorable testimony, or even call the alibi witnesses. "Denial of right to secure attendance of material alibi witnesses deprived defendant of right to present his side of the story where his defense rested completely on material alibi witnesses and alibi was his best defense; conviction so obtained was repugnant to concept of justice at core of the Sixth Amendment. Hardin v Estelle, 365 F. Supp. 39 (W.D. Tex 1973) aff'd 484 F.2d 944 (5th Cir.. 1973); see also Madrigal v Yates, 662 F. Supp.2d 1162 (C.D. Cal. 2009).

CUMULATIVE ATTORNEY ERROR

Here, as in Madrigal, the Ninth Circuit has repeatedly recognized that, in claims of ineffective assistance of counsel, prejudice may result for the cumulative impact of multiple deficiencies. In the case at bar, the attorney failed to perform adequate voir dire on jurors who sat in judgment; failed to call alibi witnesses; and failed to assert her objection to the DVD of the Child Interview being allowed into the jury's deliberations. "When an attorney has made a series of errors that prevents the proper presentation of a defense, it is appropriate to consider the cumulative impact of the errors in assessing prejudice." Turner v Duncan, 158 F.3d 449, 457 (9th Cir. 1998).

In the case at bar, counsel tried to establish the alibi through the prosecutions witness Ms. Lyon's who, as defendant's girlfriend was in a biased position, and only in the first trial. There is no legitimate strategy or tactic to not call or put on defense witnesses establishing an alibi in the second trial. The failure to adequately present an alibi defense is made all the more egregious by the fact that the three alibi witnesses, if called, would have significantly bolstered defendant's alibi defense, considering there is thirty-five pages (roughly) of testimony alleging a specific date.

Counsel's all or nothing defense, although legitimate does not preclude the use of alibi witnesses. The events alleged of October 8, 2011 were provided by tremendous testimony, specific to that date. If the alibi witnesses had been called by the defense,

ear marks of Ms. Lyons' testimony would have rebutted the alleged date of events, therefore, making the State's case unreliable. This would have supported the defense's positiion of denial and alibi. It would further show the events were the result of recent fabrication and outside influences, since the alleged victim could not even identify Mr. Pena when asked in the first trial. See VRP 189 and 212 of August 29, 2012.

There is a reasonable probability had counsel not been deficient, the proceeding would have been different, and counsel's errors had a substantial injurious effect on the proceedings. A proceeding is unreliable when there is a breakdown in the adversarial process that our system [of justice] counts on to produce just results. See In re Crace, 174 Wn.2d 835, 843-44, 280 P.3d 1102 (2012); State v Crawford, 159 Wn.2d 86, 99-100, 147 P.3d 1288 (2006) (prejudice by counsel's error(s) that affected his right to counsel, and to fair trial under the Sixth Amendment) (quoting Strickland, 466 US at 693, 104 S.Ct. 2052).

ADDITIONAL GROUND SIX

TRIAL COUNSEL AND PROSECUTORIAL MISCONDUCT

False Testimony-Witness Tampering

The prosecutor and defense counsel knowingly used false evidence or perjured testimony thereby violating Mr. Pena's right to due process. See State v Lopez, 142 Wn. App. 341, 174 P.3d 1216, 1224 (2007).

In the present case, during the first trial (August 29, 2012 VRP 189 and 212) the witness could not identify defendant. At the

start of the second trial, the prosecution and defense considered this and consulted the trial court if the victim could answer falsely concerning knowing defendant. 1VRP 9-10.

The Rules of Professional Conduct ("RPC") 3.3 states: (in pertinent part)

> (a) A lawyer shall not knowingly:
> (4) offer evidence that the lawyer knows to be false.

RPC 3.3 (a) (4). Further, a lawyer shall not "[f]alsify evidence, counsel or assist a witness to falsely testify, or offer an inducement to a witness that is prohibited by law." RPC 3.4 (b); see State v McCreven, 170 Wn. App. 444, 475, 284 P.3d 793 (2012) (RPC 3.3 cmt. 1 ("fair competition in the adversary system is secured by prohibitions against . . . improperly influencing witnesses").

Washington law clearly discourages interfering "with the process of obtaining truthful testimony, either oral or written, in any official proceeding either by threats, intimidation, coercion or inducement." Barnett v Sequim Valley Ranch, LLC, 174 Wn. App. 475, 302 P.3d 500, 508 (2013).

The collusion by defense counsel, the state and the trial court is in direct violation of the law, and the Rules of Professional Conduct; and more specifically, considered witness tampering. A person commmits the crime of tampering with a witness when he or she has reason to believe a person is about to be called as a witness in any official proceeding, or a person whom he or she has reason to believe may have information relevant to a criminal investigation to testify falsely. See generally RCW

9A.72.120; State v Ralph, 175 Wn. App. 814, 308 P.3d 729, 732 n.2 (2013).

The attorney's and court committed misconduct to procure false testimony from a witness, when they knew it was false. RPC 8.4 states: (in pertinent part)

> It is professional misconduct for a lawyer to:
>
> (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
>
> (c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation;
>
> (d) engage in conduct that is prejudicial to the administration of justice;
>
> (h) in representing a client, engage in conduct that is prejudicial to the administration of justice toward judges, other parties and/or their counsel, witnesses and/or their counsel, jurors, or court personnel or officers, that a reasonable person would interpret as manifesting prejudice or bias . . .

RPC 8.4 (a) (c) (d) and (h).

In State v Floyd, 11 Wn. App. 1, 5, 521 P.2d 1187 (1974) held that preparing a witness for his stint on the witness stand does not necessarily mean that the prosecution knowlingly used misleading or false testimony in building its case. It may be no more than a legitimate part of good trial preperation. By this, we do not mean to say that it is ever permissable to encourage or suggest to a witness that he testify falsely, or even allow false or misleading testimony to stand uncorrected. Id. (quoting Napue v Illinois, 360 US 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959).

In Mooney v Holohan, 294 US 103, 55 S.Ct. 340, 79 L.Ed. 791, 98 A.L.R. 406 (1935) wherein the Supreme Court held it was reversible error for the prosecution to suborn perjury to seek a

conviction. Alcorta v Texas, 355 US 28, 78 S.Ct. 103, 2 L.Ed.2d 9 (1957) extended the Mooney doctrine to the prosecutor's use of evidence known to be false was further enlarged to place upon the prosecutor an affirmative duty to correct state witnesses who testify falsely. Napue, Supra. See State v Finnegan, 6 Wn. App. 612, 616, 495 P.2d 674 (1972).

In the present case, the state and defense counsel put together a scheme to keep the jury from seeing that the alleged victim had been influenced, by the state, to know who Mr. Pena was. This testimony would have been unfavorable to the state's case had it been presented to the jury how she come to recognize the defendant when she couldn't in the first trial. The misconduct of the attorney's and court prejudiced the defense by the inappropriate and misleading use of false evidence.

ADDITIONAL GROUND SEVEN

JURY ACCESS TO CHILD INTERVIEW DVD

Abuse of Discretion

Decisions involving evidentiary issues lie largely within the sound discretion of the trial court and will not be reversed on appeal absent a showing of abuse of discretion. Maehren City of Seattle, 92 Wn.2d 480, 488, 599 P.2d 1255 (1979). An abuse of discretion occurs only when no reasonable person would take the view adopted by the trial court. State v Huelett, 92 Wn.2d 967, 969, 603 P.2d 1258 (1979).

Rule 6.15 of the Superior Court Criminal Rules ("CrR") provides when the jury retires for deliberations it "shall take

with it the instructions given, all exhibits received in evidence and a verdict form or forms." Neither the Rules of Evidence ("ER") nor the CrR's specifically address whether a jury may have unlimited access to audio tape exhibits and playback equipment during deliberations; however, exhibits taken to the jury room generally may be used by the jury. State v Castellanos, 132 Wn.2d 94, 97, 935 P.2d 1353 (1997).

In the present case, the trial court allowed the DVD of the child interview and a computer to play it, stop it, hold and replay it, and without the transcript of the interview. This was unduly prejudicial, to allow unfettered access of the DVD to the jury. The DVD did not meet fundamental constitutional rights of due process by confrontation or cross-examination. It was used only to emphasize a weak case when there was no corroborating evidence from the 7 witnesses or any physical evidence of an assault, and the defense was general denial and alibi. This elicited an emotional response from the jury seeing a child give an interview about sexual abuse; but not the transcript of the DVD needed to understand what was being said. Clearly, it was used only to invoke an emotional response from the jury to L.L.'s interview, that had no due process protections.

Significantly, the Confrontation Clause is only satisfied when the defense is given full and fair opportunity to probe and expose [testimonial] infirmities [such as forgetfulness, confusion, or evasion] through cross-examination, thereby calling to the attention of the factfinder the reasons for the scant

weight to the witness' testimony. Delware v Fensterer, 474 US 15, 22, 106 S.Ct. 292, 88 L.Ed.2d 15 (1985). This DVD contained none of those protections.

"The primary object of the constitutional provision in question was to prevent depositions or ex parte affidavits such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." Mattox v US, 156 US 237, 242-43, 15 S.Ct. 337, 39 L.Ed. 409 (1895); see also Maryland v Craig, 497 US 836, 845, 110 S.Ct. 3157, 111 L.Ed.2d 666 (1990).

The Confrontation Clause restricts the introduction of out-of-court statements which are those where state actors are involved in a formal, out-of-court interrogation of a witness to obtain evidence for trial; such as we seen in Mr. Pena's case. Further, is the transcript of the DVD both produced out of court, wasn't allowed back with the jury, or any police reports, which this basically is because of it being an interview with a person that works in the prosecutor's office. See Crawford v Washington, 541 US 36, 43-4, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). Even where such an interrogation is conducted with all good faith, introduction of the resulting statements at trial can be unfair to

the accused if they are untested by cross-examination. Whether formal or informal, out-of-court statements can evade the basic objective of the Confrontation Clause, which is to prevent the accused from being deprived of the opportunity to cross-examine the declarant about statements taken for use at trial. See Davis v Washington, 547 US 813, 823-24, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006).

Here, the state wanted to satisfy the juries expectations that her weak case had been proven, by submitting a DVD (much like a police report) to the jury to use during deliberations freely. This kept the jury from making any negative inferences against the state's case, by using the DVD's unreliable statements to penalize the defendant by finding him guilty.

Comparatively, the first trial ended in a hung jury after a 6/6 split; they were not allowed the unfettered access to the DVD. In the second trial, defense counsel objected, half-heartedly, to allow the DVD to go back with the jury, and didn't agree when asked further by the court. 5VRP 102-03.

In State v Frazier, 99 Wn.2d 180, 191, 661 P.2d 126 (1983) noted steps taken by the trial court to avoid undue prejudice. Those included allowing the taped statement to be admitted as a jury exhibit without further comment and without a playback machine. This forced the jury to request additional replays of the tape, and thus "the trial court judge assured himself that he would be apprised of and would retain some degree of control over the number of times the jury could review that particular piece of evidence. Id.

Consequently, CrR 6.15 relates to the instructions given to the jury. CrR 6.15(f) requires: (in pertinent part)

> (1)The jury shall be instructed that any question it wishes to ask the court about the instructions or evidence should be signed, dated and submitted in writing to the bailiff. The court shall notify the parties of the contents of the questions and provide them an opportunity to comment upon an appropriate response. Written questions from the jury, the court's response and any objections thereto shall be made part of the record. The court shall respond to all questions from a deliberating jury in open court or in writing. In its discretion, the court may grant a jury's request to rehear or replay evidence, but should do so in a way that is least likely to be seen as a comment on the evidence, in a way that is not unfairly prejudicial and in a way that minimizes the possibility that jurors will give undue weight to such evidence.

CrR 6.15(f)(1) (emphasis added). In the present case, the trial court abused its discretion by allowing the unfetterd access and control of the DVD to the deliberating jury. This placed undue emphasis on the interview, and secretly allowed the jury to view, at will, what they pleased without court control of what they viewed. This interview was not subject to confrontation or cross-examination protections, required for due process. See State v Ross, 42 Wn. App. 806, 812, 714 P.2d 703 (1986). The test for prejudice in this situation is:

> "When evidence is likely to stimulate an emotional response rather than a rational decision, a danger of unfair prejudice exists."

State v Powell, 126 Wn.2d 244, 264, 893 P.2d 615 (1995). Here there is a child being interviewed by a person (Carolyn Webster) who works in, and gets paid by the prosecutor's office. 4VRP 99-102, 105-07. There is no cross-examination during this one-sided interview, which presents a clear danger of prejudice by the jury;

by overemphasizing the one-sided interview in a weak case. The transcripts were provided to each juror to have during the trial, but they were not allowed to take them back with them to the jury room. 4VRP 2-3; 93-94. Yet, the judge allowed the DVD to go back for the jury to view in any fashion they propend. This interview was used only to overemphasize and infer guilt when the state hasn't proven their case. This can be considered an outside influence even though it was admitted at trial. It does not carry with it any protections afforded by the United States Constitution under confrontation and cross-examination, thus denying appellant his right to due process.

The United States Supreme Court has observed that communications between an outside party and the jury may constitute an "outside influence" that implicates the Sixth Amendment. Parker v Gladden, 385 US 363, 364-65, 87 S.Ct. 468, 17 L.Ed.2d 420 (1966). Outside influences are constitutionally suspect because they are not subject to full judicial protection of the defendant's Sixth Amendment rights to confrontation and cross-examination. Id. Moreover, even if one jurors impartiality is overcome by an improper influence, the defendant's right to an impartial jury has been denied. Id. at 366, 87 S.Ct. 468. ("[P]etitioner [is] was entitled to be tried by 12, not 9, or even 10, impartial and unprejudiced jurors.") (Brackets [is] mine). It is reasonable to assume, considering the State said that they would set up the equipment, that someone was in the jury room, with the jurors, that wasn't a juror. See 5VRP 102-03.

The Sixth and Fourteenth Amendments to the United States Constitution and Washington Const. Art. I, §22 guarantee a defendant the right to a fair trial and impartial jury. Davis, 141 Wn.2d at 824, 10 P.3d 977. The right to a fair and impartial jury is protected by the procedures contained in Chapter 4.44 RCW and by Court Rule. These protections govern not only the information that can be conveyed to a jury, but also the manner in which the information may be delivered. The Pattern Jury Instructions reflect these concerns. Prospective jurors are advised they will not be provided with a written copy of the testimony during deliberations. 11 Washington Pattern Jury Instructions ("WPIC"): Criminal 1.01 (2d Ed. 1994); WPIC 1.02. Other WPIC's reinforce the manner in which questions of fact or law that the jury may have should be addressed once deliberations have begun. State v Koontz, 145 Wn.2d 650, 654, 41 P.3d 475 (2002).

Viewed in light of the principle that a jury must remain impartial as it determines facts, reading back testimony during deliberations is disfavored. US v Portac, Inc., 869 F.2d 1288, 1295 (9th Cir. 1989). Whether a jury should reread transcripts is dependent upon the particular facts and circumstances of the case and must be weighed against the danger that the jury "may place undue emphasis on testimony considered a second time at such a late stage of the trial." US v Montgomery, 150 F.3d 983, 999 (9th Cir. 1998) (quoting US v Sacco, 869 F.2d 499, 501 (9th Cir. 1989).

The Ninth Circuit Court of Appeals examined a case much like the one at hand. It considered a challenge to the replay of a child victims videotaped testimony concerning sexual abuse by the defendant. US v Binder, 769 F.2d 595, 602 (9th Cir. 1985). In Binder, there was no physical evidence directly linking the defendant to the alleged sexual abuse. The prosecution presented seven witnesses in addition to the two child victims testifying by videotape, but none of the witnesses could corroborate the children's specific allegations. The defendant testified in his own defense and denied any criminal conduct. The defendant asserted the children were acting vindictively. The videotape was played in the jury room rather than in open court and the jury was allowed to review the video in an abridged fashion. Koontz, 145 Wn.2d at 655, 41 P.3d 475.

As stated, these facts are surprisingly similar to the present case, except there is only one alleged victim, and the video (DVD) was of the child interview "specialist" working for the King County Prosecutor's Office and wasn't subject to cross-examination or confrontation rights protection. The defendant asserted this never happened. The DVD was allowed over objection to go back to the jury room and for the jury to have full control over the viewing of it, which unduly emphasized the child's testimony.

The Ninth Circuit held that replaying the videotaped testimony was an abuse of discretion. Binder, 769 F.2d at 598. The court determined that allowing the jury to see and hear the

children's videotaped testimony a second time during deliberations unduly emphasized their testimony. Binder, 769 F.2d at 601. In addition to the effect the video replay had on the defense's case, the court emphasized that, by allowing the jury to view the tape in the jury room and in abridged form, the manner of replay constituted harmful error. Binder, 769 F.2d 602.

The Washington Supreme Court in Koontz agreed and concluded from their review of the principles and cases dealing with this issue, the unique nature of videotaped testimony **requires** trial courts to apply protections against undue emphasis that consider both the effect and manner of video replay. Trial courts must consider how the replay can be limited to respond to the jury's request and the procedures necessary to protect the parties.

In the present case, we have no idea what the jury did or what portions of the DVD they reviewed. We do know that the transcript of the interview was not allowed to go back with them. The jury had total control over what they watched or didn't watch. The jury never requested to view the DVD, the state offered to provide it in case they wanted to view it and then they wouldn't have to find defense counsel, who was busy with 7 other cases, and not having to wait for the defendant to be called over from the jail. Further, it was the judges understanding that the jury could watch the DVD over and over, and asked defense counsel if it was ok, in which no reply was given to the inquiry. 5VRP 102-03.

Koontz described protections necessary to prevent undue emphasis in the manner of video replay which include replay in

open court, court control over replay, and review by both counsel before presentation to the jury. Other protections include the extent to which the jury is seeking to review facts, the proportion of testimony to be replayed in relation to the total amount of testimony presented, and the inclusion of elements extraneous to a witness' testimony. A determination to allow videotape replay should balance the need to provide relevant portions of testimony in order to "answer a specific jury inquiry" against the danger of allowing a witness to testify a second time. It is seldom proper to replay the entire testimony of a witness. These considerations are not exhaustive but should be evaluated before a videotape replay is presented to a deliberating jury. Koontz, 145 Wn.2d at 657, 41 P.3d 475 (emphasis added).

Here, trial court abused its discretion because it did not weigh any particular facts or circumstances of the case and allowed the DVD, replay equipment into the jury room which placed emphasis on the interview that didn't meet constitutional standards of due process by cross-examination and confrontation protections of the state and federal constitutions. There was no specific inquiry of the jury to see the DVD. The only reason the state requested this visual aid (DVD) to be sent back to the jury, which excluded the actual testimony (transcript) of the DVD was to invoke an emotional response from the jury to the charge. This unquestionably denied Mr. Pena the right to a fair trial by an impartial jury by placing undue emphasis on an untested interview of a young child, who could not even identify Mr. Pena. See August 29, 2012 VRP 189; 212 (could not identify defendant).

ADDITIONAL GROUND EIGHT

CUMULATIVE ERROR DOCTRINE

Mr. Pena is entitled to a new trial because of a series of errors that cumulatively, effected the trial.

The application of the doctrine is limited to instances when there have been several trial errors that standing alone may not be sufficient to justify reversal, but when combined, may deny a defendant a fair trial. See State v Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). In State v Alexander, 64 Wn. App. 147, 158, 822 P.2d 1250 (1992), was reversed because a witness suggested victims story was consistent and truthful, prosecutor impermissibly elicited the defendant's identity from the victim's mother, and the prosecutor repeatedly attempted to introduce inadmissble testimony during trial and in closing. In State v Badda, 63 Wn.2d 176, 183, 385 P.2d 859 (1963) three instructional errors and prosecutor's remarks during voir dire required reversal. In State v Whalon, 1 Wn. App. 785, 804, 464 P.2d 730 (1970) reversed a conviction because courts rebuke of defense counsel in presence of jury, court refused testimony of defendant's wife, and jury listening to tape recording of line-up in the absence of court and counsel. See generally Mancuso v Olivarez, 292 f.3d 1370, 1381 (9th Cir. 1996) ("Cumulative error applies where, 'although no single trial error examined in isolation is sufficiently prejudicial to warrant reversal, the cumulative impact of multiple errors may still prejudice a defendant.'" Id.; see also US v Anekwu, 695 F.3d 967, 988 (9th Cir. 2012).

In the present case, the errors' impact on justice and fairness cannot be deemed harmless in light of the issues presented. If no single issue is significant to require relief; cumulatively, they establish unfairness and prejudice.

CONCLUSION

Overall, the entire jury selection process was riddled with deficiencies and errors. These errors created and caused Constitutional violations of due process, and other fundamental rights protected by the United States and Washington Constitutions that significantly infected and prejudiced the entire trial, making the verdict suspect.

Appellant's trial attorney prejudiced his case because there is no strategic reason not to adequately perform voir dire; call alibi witnesses; or remain taught on her objection to the DVD being allowed back to the jury room. These errors had "substantial and injurious effects" [or influence] in determining the jury's verdict. See Brecht v Abrahamson, 507 US 619, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993); (quoting Kotteakos v US, 328 US 750, 776, 66 S.Ct. 1239, 90 L.Ed.2d 1557 (1946).

For the reason(s) established, this court should reverse and remand this case for a new trial with instructions.

Respectfully submitted this 27th day of January, 2014.

ROBERT DAMIAN PENA
Appellant, Pro-Se

DOC#: 865073, Unit: MSC-CB-57
Coyote Ridge Correctional Complex
1301 N. Ephrata Avenue
Post Office Box 769
Connell, WA 99326-0769

WASHINGTON COURT OF APPEALS
DIVISION ONE

STATE OF WASHINGTON, Respondent, vs. ROBERT D. PENA Appellant, Pro-Se.	NO. 70023-5-I DECLARATION OF MAILING

I, Robert D. Pena, hereby declare:

1. I am over the age of 18 and I am competent to testify herein;

2. On the below date, I caused to be placed in the U.S. Mail, first class postage prepaid, ~~1~~ TWO RP envelope(~~s~~) addressed to the below-listed individual(~~s~~):

Richard D. Johnson, Clerk/Court Administrator
WASHINGTON COURT OF APPEALS
One Union Square
600 University Street
Seattle, WA 98101-4170

Marla Zink, Attorney
Washington Appellate Project
1511 Third Avenue, Ste 701
Seattle, WA 98101

3. I am a prisoner confined in the Washington Department of Corrections ("DOC"), housed at the Coyote Ridge Correctional Complex ("CRCC"), 1301 N. Ephrata Avenue, Post Office Box 769, Connell, WA 99326-0769, where I mailed said envelope(s) in accordance with DOC and CRCC Policy 450.100 and 590.500. The said mailing was witnessed by one or more correctional staff. The envelope contained a true and correct copy of the below-listed documents:

A. DECLARATION OF MAILING; AND

B. MOTION TO EXTEND TIME TO FILE STATEMENT ADDITIONAL GROUNDS OF

4. I invoke the "Mail Box Rule" set forth in GR 3.1—the above listed documents are considered filed on the date that I deposited them into DOC's legal mail system;

5. I hereby declare under pain and penalty of perjury, under the laws of the state of Washington, that the foregoing declaration is true and accurate to the best of my ability.

Dated this 29th day of JANUARY, 2014 in Connell, WA.

ROBERT D. PENA
Appellant, Pro se.

DOC#: 865073, Unit: CB - 57
COYOTE RIDGE CORRECTIONAL COMPLEX
1301 N. Ephrata Avenue
Post Office Box 769
Connell, WA 99326-0769