

63069-5

63069-5

NO. 63069-5-1

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

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STATE OF WASHINGTON,

Respondent,

v.

DINDO PANGILIAN,

Appellant.

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

The Honorable Charles R. Snyder, Judge

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OPENING BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Trial counsel rendered ineffective assistance of counsel by failing to object to a jury instruction that misstated the law regarding jury unanimity on the special verdict.

2. The trial court erred by answering a question from the deadlocked jury in a manner that coerced the jury into reaching a unanimous verdict on the special verdict.

Issues Pertaining to Assignments of Error

1. The State charged Dindo Pangilinan with burglary in the first degree with sexual motivation. The jury received a special verdict form asking them to decide whether the burglary had been committed with a sexual motivation. The court instructed the jury that in order to answer “no” on the special verdict form, all twelve jurors must unanimously have a reasonable doubt as to whether the State proved that Pangilinan committed the crime with a sexual motivation. Yet, binding authority from the Supreme Court states that unanimity is not required for a jury to answer “no” on a special verdict. Did defense counsel err in failing to object where the court’s instruction misstates the law, thereby making it more difficult for a jury to answer “no” on a special verdict form?

2. The jury submitted a question to the trial court during deliberations that asked: "Does the jury have to answer the special verdict form if they cannot agree unanimously yes or no?" CP 35. The trial court acknowledged to counsel that the instructions given to the jury did not provide guidance on this point. Yet, the trial court directed the jury to read the instructions as given. CP 36. The instructions stated that the jury must fill in "yes" or "no" on the special verdict and that the decision must be unanimous. Did the trial court's direction to the jury coerce holdout jurors to abandon their positions in order to reach a unanimous agreement, thereby depriving Pangilinan of his right to a jury trial?

B. STATEMENT OF THE CASE

1. Procedural Facts

The Whatcom County Prosecuting Attorney charged appellant Dindo Pangilinan with Burglary in the First Degree (with Sexual Motivation) and Possession of Marijuana. CP 70-71. The case proceeded to a jury trial in December 2008. The jury found Pangilinan guilty of both counts and by special verdict concluded that Pangilinan committed the burglary with sexual motivation. CP 31-33. The court sentenced Pangilinan to 15 months for the burglary and added a 24-month enhancement for the sexual

motivation finding. CP 15-28. Pangilinan filed a timely notice of appeal. CP 2.

## 2. Trial Testimony

On the evening of September 27, 2008, Pangilinan met up with some people at a home in Bellingham before the group walked downtown to attend the opening of a new snowboard shop.<sup>1</sup> 2RP 213-14. Several young women attending Western Washington University rented the home where the gathering took place. 1RP 77-78. One of the women living there, Maggie Brewe, approached Pangilinan, introduced herself, and asked if he knew anyone else at the party. 1RP 81. Pangilinan explained that a friend had told him about the gathering, but had not yet arrived. 1RP 82. He did not know anyone else at the party. 2RP 213. The group left together and walked downtown. 2RP 214. Pangilinan went with the crowd to the snowboard shop and then headed out on his own to visit some downtown bars. 2RP 214.

Pangilinan stayed downtown until the bars closed, and then returned to the home where the group had gathered earlier in the evening to retrieve his iPod. 2RP 214-15. Pangilinan approached

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<sup>1</sup> 1RP is December 15, 2008; 2RP is December 16, 2008; 3RP is December 17, 2008; 4RP is February 9, 2009; 5RP is February 17, 2009.

the house and found that the front door was not locked, but the chain was on. 2RP 214. He bypassed the chain, entered the house, and found his iPod. 2RP 215. Pangilinan needed a place to sleep for the night since his home in Lake Padden was a long way from Bellingham and he did not have a car. 2RP 215.

Pangilinan went upstairs, removed his shirt, and got in bed with a sleeping young woman, Maggie Brewe, whom he had met earlier in the evening. 1RP 93. After a few minutes, Pangilinan started talking to Brewe and kissed her on the forehead. 1RP 93. Pangilinan testified that he thought Brewe had been flirting with him and believed that she would be open to his advances. 2RP 232-34. Brewe left her bed and ran to find a roommate. 1RP 94. One of the girls called the police. 1RP 96. When police arrived, Pangilinan was still laying in Brewe's bed. 2RP 115. Police arrested Pangilinan for burglary with sexual motivation and for possessing a baggie of marijuana found near Brewe's bed. 2RP 121. Pangilinan acknowledged that the marijuana was his. 2RP 273.

During closing argument, the prosecutor explained that Pangilinan was guilty of burglary because he entered the home unlawfully and assaulted Brewe while there. 2RP 258. The

prosecutor also argued that Pangilinan had committed the burglary for sexual gratification. 2RP 260. Defense counsel argued that Pangilinan's actions amounted only to trespass. 2RP 267.

The jury received three verdict forms. CP 31-33. Verdict Form A involved the burglary and possession of marijuana charges; Verdict Form B applied to the lesser included offense of trespass; and the Special Verdict Form asked whether Pangilinan had committed the burglary with a sexual motivation. CP 31-33.

The trial court also instructed jurors on how to use the special verdict form:

You will also be given a special verdict form for the crime of Burglary in the First Degree charged in Count I. If you find the defendant not guilty of this crime, do not use the special verdict form. If you find the defendant guilty of the crime of Burglary in the First Degree, you will then use the special verdict form and fill in the blank with the answer "yes" or "no" according to the decision you reach. Because this is a criminal case, all twelve of you must agree in order to answer the special verdict form. In order to answer the special verdict form "yes" you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you unanimously have a reasonable doubt as to this question, you must answer "no".

CP 60-61 (emphasis added).

After beginning deliberations, the jury submitted a note to the court, asking: "Does the jury have to answer the special verdict form if they cannot agree unanimously yes or no?" CP 35. The trial court attempted to locate both the prosecutor and the defense attorney to discuss how to respond to the jury's inquiry, but due to snowy conditions, the court was unable to contact defense counsel. 3RP 287.

The court recognized that the instructions given to the jury did not provide guidance on how to answer if jurors were unable to reach unanimous agreement: "The instructions . . . don't say what you should do if you cannot reach unanimity on the issue of the special verdict form." 3RP 289. The court conferred with the prosecutor and sent the following reply to the jury: "The jury is to consider and apply the court's instructions as a whole, apply the standards found therein in determining the answer on the special verdict form." CP 36.

Fifteen minutes after receiving the court's answer, the jury returned a verdict finding Pangilinan guilty of burglary and answered "yes" on the special verdict form, concluding that he had committed the crime with a sexual motivation. CP 32.

C. ARGUMENT

1. DEFENSE COUNSEL RENDERED INEFFECTIVE ASSISTANCE BY FAILING TO OBJECT TO AN INSTRUCTION THAT ERRONEOUSLY STATED THE JURY MUST REACH A UNANIMOUS DECISION IN ORDER TO ANSWER "NO" ON THE SPECIAL VERDICT.

Both the federal and state constitutions guarantee the right to effective representation. U.S. Const. Amend. 6; Wash. Const. art. 1, § 22. An appellate court reviews claims for ineffective assistance of counsel de novo. State v. Shaver, 116 Wn. App. 375, 382, 65 P.3d 688 (2003). The appellate test for ineffective assistance of counsel is "whether, after examining the whole record, the court can conclude that appellant received effective representation and a fair trial." State v. Ciskie, 110 Wn.2d 263, 284, 751 P.2d 1165 (1988). Washington has adopted the two-part Strickland<sup>2</sup> test to determine whether a defendant had constitutionally sufficient representation. State v. Cienfuegos, 144 Wn.2d 222, 226, 25 P.3d 1011 (2001).

First, the "defendant must show that counsel's performance was deficient." Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). To establish deficient

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<sup>2</sup> Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

performance, a defendant must “demonstrate that the representation fell below an objective standard of reasonableness under professional norms . . . .” State v. Townsend, 142 Wn.2d 838, 843-44, 15 P.3d 145 (2001). Second, the “defendant must show that the deficient performance prejudiced the defense.” Strickland, 466 U.S. at 687. This requires the defendant to prove that, but for counsel's deficient performance, there is a “reasonable probability” the outcome would have been different. Strickland, 466 U.S. at 694.

Here, defense counsel's representation was deficient because counsel failed to object to a misstatement of the law in WPIC 160.00. Specifically, defense counsel should have objected to the following statement: “Because this is a criminal case, all twelve of you must agree in order to answer the special verdict form.” CP 60. This statement conflicts with binding Supreme Court precedent holding that unanimity is not required for a jury to answer “no” on a special verdict form. State v. Goldberg, 149 Wn.2d 888, 893-94, 72 P.3d 1083 (2003).

In Goldberg, the State charged the defendant with premeditated murder in the first degree with an aggravating circumstance. Goldberg, 149 Wn.2d at 890. The statutory

aggravating factor was that the defendant allegedly killed the victim because of his role as a witness in a dissolution proceeding. Goldberg, 149 Wn.2d at 890-91. As to the special verdict form for the aggravating factor, jurors were instructed:

In order to answer “yes”, you must *unanimously* be satisfied beyond a reasonable doubt that “yes” is the correct answer. If you have a reasonable doubt as to the question, you must answer “no”.

Goldberg, 149 Wn.2d at 893 (emphasis in original).

The jury returned a verdict concluding that the defendant was guilty of first-degree murder. Goldberg, 149 Wn.2d at 891. But the jury answered “no” on the special verdict form asking whether the crime was committed because of the victim’s role as a witness in an adjudicative proceeding. Goldberg, 149 Wn.2d at 891. The court polled the jury by a show of hands on how many had voted “no” on the special verdict form. Goldberg, 149 Wn.2d at 891. One juror raised a hand; however, three jurors had actually voted “no.” Goldberg, 149 Wn.2d at 891.

The trial court sent the jury home for the night and ordered that deliberations resume the following morning. Goldberg, 149 Wn.2d at 891. After three hours of additional deliberations, the jury

returned a unanimous finding that the State had proved the aggravating factor. Goldberg, 149 Wn.2d at 892.

The Court of Appeals affirmed Goldberg's convictions. Goldberg, 149 Wn.2d at 892. The Supreme Court, however, vacated the finding on the aggravating factor. Goldberg, 149 Wn.2d at 894. The Supreme Court stated that the trial court erred by ordering the jury to continue deliberations because the jury need not be unanimous in order to answer "no" on the special verdict:

In Goldberg's case, the trial court evidently concluded the jury was deadlocked on the special verdict instruction and ordered continued deliberations toward unanimity. We must decide whether such unanimity is required. We hold it is not.

As indicated above, when the jury returned its verdict and answered "no" on the special verdict form, the trial judge acted as if the jury were deadlocked on this issue and ordered continued deliberations. This was error. When a jury is deadlocked on a general verdict, the trial court has the authority, within limits, to instruct the jury to continue deliberations. CrR 6.16(a)(3). That authority does not exist with respect to a jury's answer to a special finding as given in this case.

Here, the jury performed as it was instructed. It returned a verdict of guilty as to the crime, for which unanimity was required, and it answered "no" to the special verdict form, where under instruction 16, unanimity is not required in order for the verdict to be final. We find no error in the jury's initial verdict in this case which would require

continued deliberations. As instructed in this case, when the verdict was returned, the jury's responsibilities were completed and the jury's judgment should have been accepted. We hold that it was error for the trial court to order continued deliberations and we vacate the finding on the aggravating factor.

Goldberg, 149 Wn.2d at 893-94.

Following Goldberg, WPIC 160.00 was modified to reflect the holding by listing two options for instructing the jury regarding when it is appropriate to answer "no" on the special verdict form. One option was: "If any one of you has a reasonable doubt as to the question, you must answer 'no'." 11A Washington Practice: Washington Pattern Jury Instructions: Criminal 160.00, at 274 (Supp. 2005). The other option was: "If you unanimously have a reasonable doubt as to this question, you must answer 'no'." 11A Washington Practice: Washington Pattern Jury Instructions: Criminal 160.00, at 274 (Supp. 2005).

The comment explained that the two options stemmed from differing interpretations of Goldberg:

If a trial judge interprets Goldberg as applying the law of the case doctrine or a similar theory, then the judge would have discretion to instruct jurors differently in other cases. A judge following this interpretation would use the second of the two bracketed sentences at the end of the instruction,

thereby requiring unanimity among jurors before they could answer “no” on the special verdict.

If a judge interprets Goldberg as applying to all special verdicts, and further that jurors should be instructed that they need not be unanimous in order to answer “no,” then the judge should use the first of the two bracketed sentences at the end of the instruction. The committee has revised this bracketed sentence by adding the words “any one of” in order to more clearly inform the jury that a single juror’s reasonable doubt is sufficient for a “no” answer.

11A Washington Practice: Washington Pattern Jury Instructions: Criminal 160.00, comment at 276 (Supp. 2005).

Three years after WPIC 160.00 was modified to include this alternative language, a published case from Division Three of the Court of Appeals concluded that Goldberg did not apply expansively to all cases involving special verdicts: “We do not believe that the court [in Goldberg] intended to hold that special verdicts were to have unanimity requirements different from general verdicts.” State v. Bashaw, 144 Wn. App. 196, 202, 182 P.3d 451 (2008), review granted, 165 Wn.2d 1002, 198 P.3d 512 (2008).

The Committee on Jury Instructions modified WPIC 160.00 in 2008 to reflect the court’s decision in Bashaw. 11A Washington Practice: Washington Pattern Jury Instructions: Criminal 160.00 (3d ed. 2008). The committee deleted the alternative language in the

instruction that permitted the jury to answer “no” on a special verdict if any one of the jurors had a reasonable doubt. The comment explained the rationale behind the change:

Subsequently, the Court of Appeals held in State v. Bashaw . . . that Goldberg did not alter the general rule that unanimous jury verdicts are required in criminal cases. The Bashaw court approved an instruction stating that “since this is a criminal case, all twelve of you must agree on the answer to the special verdict.” For the 2008 edition, the committee has modified the instruction in accordance with Bashaw.

11A Washington Practice: Washington Pattern Jury Instructions: Criminal 160.00, comment (3d ed. 2008).

The current version of WPIC 160.00 is an inaccurate statement of the law because the instruction does not reflect the Supreme Court’s holding in Goldberg. That decision is binding precedent. In this case, trial counsel was ineffective for failing to object to the inclusion of WPIC 160.00 as written. Trial counsel did not bring the unanimity issue presented in Goldberg to the trial court’s attention or propose an alternate instruction that could have cured the defects in WPIC 160.00.

Trial counsel’s failure to raise the issue of jury unanimity is deficient performance. A brief reading of the comment in Washington Practice immediately following the current version of

WPIC 160.00 identifies jury unanimity as a potential issue: “After Goldberg, it was not clear whether the jury always needs to be unanimous in order to answer a special verdict question ‘no.’ Because the opinion could have been read in two different ways, the previous version of this instruction included bracketed alternative language.” 11A Washington Practice: Washington Pattern Jury Instructions: Criminal 160.00, comment (3d ed. 2008).

Moreover, the Supreme Court accepted review of Bashaw on December 2, 2008, indicating that the decision – and its attempt to limit Goldberg – was of questionable validity. See Bashaw, 165 Wn.2d 1002. Trial in Pangilinan’s case did not even start until December 15. 2RP 3.

Competent counsel conducts research and stays abreast of current happenings in the law. Bush v. O’Connor, 58 Wn. App. 138, 148, 791 P.2d 915 (1990) (“an attorney unquestionably has a duty to investigate the applicable law”); State v. Jury, 19 Wn. App. 256, 263, 576 P.2d 1302 (reasonable attorney conduct includes a duty to investigate the facts and law), review denied, 90 Wn.2d 1006 (1978); see also Strickland, 466 U.S. at 690-91 (“counsel has a duty to make reasonable investigations”).

That an instruction is based on a WPIC does not defeat an ineffective assistance claim where counsel had reason to know the instruction was incorrect. State v. Kylo, \_\_\_ Wn. 2d \_\_\_, \_\_\_ P.3d \_\_\_ (No. 81164-4, Slip op. filed September 3, 2009, at 8-13) (counsel deficient for proposing WPIC where proper research would have indicated pattern instruction flawed). Trial counsel should have objected to WPIC 160.00 on the basis that it conflicts with the Supreme Court's holding in Goldberg and proposed that the trial court instruct the jury using the previous version of WPIC 160.00. ("If any one of you has a reasonable doubt as to the question, you must answer 'no'.") 11A Washington Practice: Washington Pattern Jury Instructions: Criminal 160.00, at 274 (Supp. 2005) .

Defense counsel's failure to object to an instruction that misstated the law is deficient performance. State v. Ermert, 94 Wn.2d 839, 849-50, 621 P.2d 121 (1980). In Ermert, trial counsel "failed to object to an instruction on the grounds that it incorrectly set out the elements of the offense with which his client was charged." Ermert, 94 Wn.2d at 849-50. Additionally, defense counsel failed to cite applicable case law to the trial court and did not propose an alternate instruction that cured the defects in the

original. Ermert, 94 Wn.2d at 851 n.1. The Supreme Court concluded that the errors made by trial counsel denied the defendant a fair and impartial trial. Ermert, 94 Wn.2d at 851.

Here, trial counsel's deficient performance prejudiced the defense and there is a great likelihood that the outcome would have been different if counsel had objected to WPIC 160.00 and proposed an instruction accurately stating that the jury need not be unanimous to answer "no" on the special verdict form. The jury's question indicates that after deliberating for some time, they were deadlocked on the issue of whether Pangilinan had committed the crime with a sexual motivation. ("Does the jury have to answer special verdict form if they cannot agree unanimously yes or no?") CP 35.

Had the instructions properly reflected the court's holding in Goldberg, the jury would have received the following instruction: "If any one of you has a reasonable doubt as to the question, you must answer 'no'." 11A Washington Practice: Washington Pattern Jury Instructions: Criminal 160.00, at 274 (Supp. 2005). With such an instruction, the jury would have answered "no" on the special verdict form when they were unable to agree on the verdict instead of submitting a question to the trial court asking for further

clarification. A negative finding on the special verdict form would have reduced Pangilinan's sentence by 24 months. CP 16.

2. THE TRIAL COURT VIOLATED PANGILINAN'S RIGHT TO JURY TRIAL BY ANSWERING THE JURY'S QUESTION IN A MANNER THAT COERCED THE JURORS TO REACH UNANIMOUS AGREEMENT.

After beginning deliberations, the jury submitted a note to the court, asking: "Does the jury have to answer the special verdict form if they cannot agree unanimously yes or no?" CP 35. The court recognized that the instructions given to the jury did not explain how to answer the special verdict form if the jurors were unable to reach a unanimous agreement. 3RP 289. Yet, the court directed the jury to re-read the instructions and apply the standards set forth in them. CP 36.

The instructions stated that the jury must answer either "yes" or "no" on the special verdict form if they concluded that Pangilinan was guilty of burglary: "If you find the defendant guilty of the crime of Burglary in the First Degree, you will then use the special verdict form and fill in the blank with the answer 'yes' or 'no' according to the decision that you reach." CP 60 (emphasis added). The instructions also stated that all twelve jurors "must agree in order to answer the special verdict form." CP 60 (emphasis added). Fifteen

minutes after receiving the court's answer, the jury returned a verdict finding Pangilinan guilty of burglary and answered "yes" on the special verdict form, concluding that he had committed the crime with a sexual motivation. CP 32.

The right to a jury trial includes "the right to have each juror reach his verdict uninfluenced by factors outside the evidence, the court's proper instructions, and the arguments of counsel." State v. Boogaard, 90 Wn.2d 733, 736, 585 P.2d 789 (1978) (citations omitted). Instructions that suggest "a juror who disagrees with the majority should abandon his conscientiously held opinion for the sake of reaching a verdict invades that right, however subtly the suggestion may be expressed." Boogaard, 90 Wn.2d at 736 (citations omitted) (emphasis added). "After jury deliberations have begun, the court shall not instruct the jury in such a way as to suggest the need for agreement, the consequences of no agreement, or the length of time a jury will be required to deliberate." CrR 6.15(f)(2).

Because Pangilinan's right to a jury trial is a constitutional right and the trial court's answer amounted to coercion to reach a unanimous verdict, this Court can consider the argument despite trial counsel's failure to object to the trial court's written response to

the jury. RAP 2.5(a)(3); State v. Walsh, 143 Wn.2d 1, 7, 17 P.3d 591 (2001); State v. Tolias, 135 Wn.2d 133, 140, 954 P.2d 907 (1998).

Here, the jury's question to the court communicated that it had reached a decision and needed some administrative guidance regarding how to fill out the special verdict form. Yet, the court's answer amounted to a coercive direction to deliberate further because the instructions stated that: (1) the jurors had a non-discretionary duty to fill in an answer on the special verdict form, (2) the only options for answering the verdict were "yes" or "no", and (3) they had to come to a unanimous agreement in order to answer "no" on the special verdict form. The court's answer was coercive because it stated, in effect, that the jury must reach a unanimous agreement, thereby signaling to any holdout jurors that they should abandon their positions. This was error.

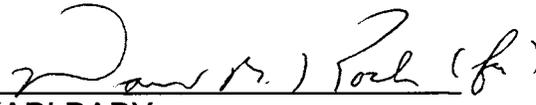
D. CONCLUSION

Defense counsel was ineffective, easing the State's proof of sexual motivation. Moreover, the trial court erred when it instructed the jury it had to be unanimous on the special verdict. This Court should strike the sentencing enhancement.

DATED this 11<sup>th</sup> day of September 2009.

Respectfully submitted,

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Containing a copy of the opening brief, re Dindo Pangillian  
Cause No. 63069-5-I, in the Court of Appeals, Division I, for the state of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the  
foregoing is true and correct.



John Sloane  
Office Manager  
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Done in Seattle, Washington

9-11-09  
Date

