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No. 63069-5-I

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

STATE OF WASHINGTON, Respondent,

vs.

DINDO LOMIBAO PANGILINAN, Appellant.

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether a defendant has shown ineffective assistance of counsel resulting in actual prejudice based on counsel's failure to object to a WPIC-based special verdict instruction regarding unanimity and to argue that caselaw called the language of the instruction into doubt where that caselaw was subsequently interpreted narrowly and where the jury was unanimous in its special verdict finding.
2. Whether a defendant has established a reasonably substantial probability that a judge's intervention improperly influenced the jury's verdict where the judge's answer to the question from the jury regarding the need to be unanimous was neutral, did not convey any information about their need to be unanimous or the consequence of not being unanimous and didn't direct them to continue deliberating.

B. FACTS

1. Procedural facts

Appellant Dindo Pangilinan was charged by information on October 1, 2008 with Burglary in the First Degree, in violation of RCW 9A.52.020, along with the special allegation of sexual motivation pursuant to RCW 9.94A.127/RCW 9.94A.835, and with the gross misdemeanor of unlawful possession of marijuana, for acts he committed on or about September 28, 2008. CP 70-71. Pangilinan was convicted by a jury of both counts, with a finding of the special allegation of sexual motivation, and was sentenced pursuant to RCW 9.94A.712 on the burglary conviction. CP 15-19, 32-33.

2. Substantive facts

On or about September 28, 2008 some young women who lived in a house near Western Washington State University had planned to have a gathering of their friends at their house between 9 and 10 p.m. in order to go as a group to the opening party of a snowboard shop that was owned by friends of one of the girls. RP 29-30, 32, 57-58, 77, 79.¹ Although seven young women lived in the house, only Maddie, Maggie, Courtney, Leah, Nichole and Wesley were home that evening. RP 55, 56, 78. Alex, a friend of Leah's, had come up from Issaquah to visit and was going to stay the night. RP 29, 56.

While friends were gathering at the house, Leah saw Pangilinan, whom she didn't know, sitting off in a corner by himself, not talking to anyone. RP 59-60. When Maggie found out that none of the roommates knew who he was, she went up to him and asked him who he was. RP 61, 80-81. Pangilinan said his name was John, that he was a transfer student from California, that he didn't know any of the roommates, but that a friend of his did and was supposed to meet him there. RP 81-82. Maggie told him to introduce her to his friend when he got there, but the friend never showed up. RP 82. Around 10 p.m. everyone in the house, about 15

¹ The verbatim report of proceedings for the 3.5 hearing on Dec. 15 and 16, 2008 are referred to by "RP", as the numbering is sequential,. All other volumes are referred to by date.

to 20 persons, left to walk down to the board shop. RP 33, 88. Maggie locked the door. RP 87. Pangilinan walked with the group to the board shop. RP 63. While he was there, he asked about Alex. RP 63.

When Leah, Alex and Maddie returned to the house around 1:30 a.m. they watched television, had pizza and then went to sleep. RP 35, 64. Maggie arrived home around 2:30 a.m., locked the door, set the chain and went to bed. RP 92- 93.

Sometime after 3 a.m., Alex, who was sleeping on the couch in the downstairs living room, heard a jiggling at the front door. RP 35-37. She wasn't sure whether to let the person in or not. Then she heard something or someone at the window and then heard jiggling at the front door again. RP 38-39. She saw the door open part way because the chain was on, and then saw a hand come around and undo the chain. RP 39. The person, Pangilinan, came in the door and went into the kitchen and started eating some pot roast that had been in a crock pot. RP 41-42. Alex, who couldn't tell who the person was at the time, figured it must be someone the young women knew because he was eating their food. RP 42.

Pangilinan then came back into the living room, fiddled with something, shined a light on Alex's face while she pretended to be asleep and then left the room. RP 43-44. Alex at this point was scared, so she texted Leah that someone was in the house and to come get her. RP 45-46.

When Leah didn't respond, she called Leah's cell phone. Leah came down and the two of them went into Leah's bedroom and discussed what to do. RP 47-48, 65-66. They decided to check the bedrooms for the guy and went into Maggie's, which was next to Leah's, and saw him lying propped up on his side with the hood of his jacket on his head. RP 48, 66-68. They went back to Leah's room and Leah figured out from Alex's description that it couldn't be Maggie's boyfriend. RP 68. Alex punched in 911 on her cell, and they stood with their backs against the door to Leah's bedroom while they debated what to do. RP 49.

In the meantime, Maggie had woken up when she felt someone getting into her bed. RP 93. At first she thought it was her boyfriend. As she was facing him, Pangilinan touched her back and started talking to her, telling her something about how beautiful she was, and kissed her on her forehead. RP 93, 101, 245-46. After about five to seven minutes, Maggie realized it wasn't her boyfriend, so she turned over and tried to figure out what to do next. RP 93-95. She wasn't sure if he had a weapon. RP 95. Pangilinan then put his hand up Maggie's shirt, touching her stomach, and she removed it. RP 94, 246-47. Tugging at her sweats, he then tried to put his hand down her pants. After taking his hand away, she sat up in bed, looked at him, recognized him from earlier in the evening, and ran out of the room. RP 94, 96, 247.

While Alex and Leah were standing with their backs against Leah's door, Maggie came running to the door and told them to let her in. RP 50, 69, 97. Maggie was hysterical, and Alex went into the closet to call the police while Leah held the door shut. RP 50, 69, 97.

When the police arrived about 10-15 minutes later, they found Pangilinan still in Maggie's bed. RP 70, 97, 115, 127. He was lying in the bed with no shirt on, but with his jeans on. RP 115. After he was in custody, a baggy with marijuana in it was found near him. RP 118, 129. After he was read his rights, Pangilinan initially told the officers that he had been at the house earlier in the evening for a party and had been invited by a friend of a friend, but that the friend didn't show up because the party wasn't exciting enough. RP 129-30, 163. Pangilinan didn't remember the name of the friend who invited him. RP 130, 163. He said after he went to the bars downtown to drink with some friends, he came back to the house to get his iPod, that the door was open, so he just let himself in. RP 131, 164. He said he found his iPod by the front door, and that he had just decided to crash there. RP 132-33, 165. He admitted the marijuana was his. RP 133. Pangilinan told the officers that he had been drinking and smoking marijuana, but he didn't smell of alcohol, although he was acting lethargic. RP 133, 164.

Later, when asked, he admitted that he had come back to the house because he knew there were a lot of hot girls in the house. RP 165. When he was asked if he came back for a specific girl, he said that he could have had any one of the girls in the house. RP 166. He told the officer that he had tried the front door first, but it was locked so he tried a window, but that was locked, and so he went back to front door and defeated the lock. RP 166.² He said that he used his cell phone to search for his iPod and to look at the girl sleeping on the couch. RP 167,169. He said he didn't leave because it was a long way home and that he didn't crash on one of the couches because he was looking for a bed. RP 167-68. He said he found a bed with a girl in it, got in and fell asleep for about a half hour. RP 170. When asked, he said that he had started rubbing the girl's back, then she rolled over and he kissed her forehead. When asked if he intended to rape her or to just "get some," he said he was just trying "to get some." RP 172. He thought it was okay because she didn't tell him to stop. RP 172. He told the officer he touched her stomach and started to touch her breast and then she calmly walked out of the room. RP 172.

² The chain on the door was longer than normal and someone could reach in and unchain it. RP 167.

Maggie identified Pangilinan and told one of the officers that he had been rubbing her back, kissing her forehead and rubbing her stomach. RP 119, 122.

At trial Pangilinan testified that he was told about the gathering and went, that he talked with Maggie and that she challenged him a little about why he was there. RP 213-14. He testified that all girls flirt with him some, that he returned to the house after being downtown at the bars, and the front door was unlocked but the chain was on. RP 214. He testified he bypassed the chain to get his iPod, which he found, but decided to sleep there because he lived a ways off. RP 215. He admitted to kissing Maggie on the forehead and touching her back and stomach, but denied putting his hand up her shirt or down her pants. RP 216, 236. He admitted he told the officer that he went there to “get some,” but said the officer was putting words in his mouth. RP 217. On cross, he testified that Maggie was flirting with him a little earlier in the evening, that he recognized her when he got into bed, and that he had been thinking he could have any of the girls that night. RP 233. He admitted he told her she was beautiful and that he thought she was going to “go on with it” after he kissed her. He testified:” I was trying to get it on with her, but, yeah, she could have said no.” RP 235.

C. ARGUMENT

Pangilinan first asserts that his counsel was ineffective for failing to object to the special verdict paragraph of the concluding instruction instructing the jury that they had to be unanimous one way or the other regarding the sexual motivation allegation, asserting that this misstated the law. Specifically, he asserts that had defense counsel adequately researched the issue, he would have objected based on the case of State v. Goldberg.³ Defense counsel was not ineffective because the instruction was in accord with the Washington Pattern Instructions (WPICs), and Goldberg does not hold that such an instruction misstates the law regarding this allegation. Moreover, Pangilinan has failed to demonstrate actual prejudice because the jury in fact found unanimously that he did commit the burglary with sexual motivation.

Pangilinan also asserts that the trial court erred in answering a question from the jury regarding unanimity on the special allegation of sexual motivation and thereby coerced the jury into making the finding of sexual motivation. Pangilinan asserts he may assert this for the first time on appeal because it involves an issue of juror unanimity. A defendant may raise the issue that the jury was not properly instructed that it had to

³ State v. Goldberg, 149 Wn.2d 888, 72 P.3d 1083 (2003).

be unanimous for the first time on appeal. This case, however, does not involve an issue where the jury was *not* informed that it had to be unanimous, and there is no constitutional right to a jury instruction stating that the jury does *not* have to be unanimous. Even if Pangilinan had met his burden to demonstrate manifest error of constitutional magnitude, the judge's response, referring the jury back to the instructions as a whole, was neutral, did not require the jury to continue deliberating and was not coercive.

1. **Defense counsel was not ineffective in failing to object to the WPIC-based special verdict instruction based on Goldberg where Goldberg subsequently was interpreted narrowly and there is no actual prejudice where the jury was unanimous when it answered the special verdict "yes."**

Pangilinan asserts that defense counsel was ineffective for failing to object to a portion of the concluding instruction regarding the special verdict on the basis that it was a misstatement of the law under State v. Goldberg, 149 Wn.2d 888, 72 P.3d 1083 (2003). He acknowledges that State v. Bashaw⁴ holds contrary to his position, but asserts that since that case is pending review defense counsel was ineffective for failing to argue that the instruction misstated the law. Goldberg does not stand for the

⁴ State v. Bashaw, 144 Wn. App. 196, 182 P.3d 451), *rev. granted*, 165 Wn.2d 1002 (2008)

proposition that an instruction in accord with WPIC 160 is a misstatement of the law. Goldberg held that under the instructions given in that case it was error for the judge to require the jury to continue deliberating after it had returned a verdict of “no.” Therefore counsel was not ineffective for failing to object to the special verdict instruction in this case. Even if Goldberg stands for the proposition that a jury must only be unanimous to answer a special verdict “yes” and not to answer “no,” Pangilinan cannot demonstrate actual prejudice from the instruction because the jury was unanimous in answering “yes” to the special allegation.

In order to demonstrate ineffective assistance of counsel, a defendant must show that (1) his counsel’s representation fell below a minimum objective standard of reasonableness based on all the circumstances, and (2) there is a reasonable probability that but for counsel’s unprofessional errors, the outcome would have been different. State v. Benn, 120 Wn.2d 631, 663, 845 P.2d 289 (1993), *cert. den.*, 510 U.S. 944 (1993); State v. Wilson, 117 Wn. App. 1, 15, 75 P.3d 573, *rev. den.*, 150 Wn.2d 1016 (2003). It is not ineffective assistance of counsel for counsel to propose a jury instruction based on an unquestioned WPIC. State v. Studd, 137 Wn.2d 533, 551, 973 P.2d 1049 (1999). It is the defendant’s burden to overcome the strong presumption that counsel’s representation was effective. Wilson, 117 Wn. App. at 15; Strickland v.

Washington, 466 U.S. 668, 690, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

In order to show prejudice, “[i]t is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding ... not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding.” State v. West, 139 Wn.2d 37, 46, 983 P.2d 617 (1999) (citing Strickland, 466 U.S. at 693). State v. Mannering, 150 Wn.2d 277, 285-86, 75 P.3d 961 (2003). A reviewing court need not address both prongs of the test if a petitioner fails to make a sufficient showing under one prong. State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). Defendant must meet both parts of the test or his claim of ineffective assistance fails.

In Goldberg, the jury was instructed that in order to answer the special verdict form “yes,” the jury had to “unanimously be satisfied beyond a reasonable doubt,” but that if it had “a reasonable doubt as to the question, [it] must answer no.” Goldberg. 149 Wn.2d at 893. The jury returned a verdict of guilty as to the charged crime and answered no as to the special verdict. *Id.* at 891. However, when the jury was polled it was clear that they were not unanimous in answering the special verdict “no.” *Id.* After the court inquired as to whether the jury could reach a unanimous verdict as to the aggravating factor, the jury answered no. *Id.* Despite objection from counsel, the court returned the jury to

deliberations, and the jury reached a verdict of “yes” after an additional three hours of deliberations. *Id.* at 891-92. On appeal, the court held that the trial court did not have the authority under CrR 6.16(a)(3), polling of the jury, to return a jury to deliberations once it had answered the special interrogatory. *Id.* at 894.

While Pangilinan asserts that Goldberg decided the question as to whether a jury must be unanimous in order to answer a special verdict no, the case subsequently has been interpreted by two Court of Appeal Divisions more narrowly than Pangilinan desires. *See, State v. Bashaw*, 144 Wn. App. 196, 202, 182 P.3d 451, *rev. granted*, 165 Wn.2d 1002 (2008); *State v. Coleman*, ___ Wn. App. ___, 216 P.3d 479 (2009). The decision in Goldberg was predicated on the jury having been instructed it did not have to be unanimous in order to answer the special verdict “no.”

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.

Goldberg, 149 Wn.2d at 894.

In Bashaw, Division III directly addressed whether a jury instruction requiring jury unanimity to answer either *yes or no* to a special verdict on a sentencing enhancement was erroneous, pursuant to Goldberg. The court in Bashaw first noted that the jury is not usually told what it is supposed to do if it is unable to agree. Bashaw, 144 Wn. App. at 201. The court then addressed the Goldberg opinion:

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

Id. at 202. The court noted that in addition to there not having been any discussion of the pattern instructions, there also had been no discussion as to legislative intent. Id. The Goldberg court's failure to address those issues, as well as a potential conflict with a death penalty case, made it unlikely that the court's opinion was as expansive as the appellant desired. Id. at 202-03. Ultimately, the court found that any error was harmless because the jury had returned a unanimous verdict of "yes" as to the sentencing enhancement. Id. at 203.

In addressing a special verdict on an aggravating factor under RCW 9.94A.537, the court in Coleman found Goldberg dispositive on the

facts of the case. The court held that even if the legislature required unanimity in order to answer “no” on an aggravating factor under the statute, the jury was instructed that it didn’t have to be unanimous in order to answer the special verdict “no,” just like the instructions in Goldberg. Coleman, ¶28. It noted that when the State did not object to the aggravating factor instructions, they became the law of the case, and under those instructions it had been error for the court to treat the jury’s “no” answer as if the jury were deadlocked and to return them to deliberations. *Id.* at ¶28-29.

The special allegation charged here was sexual motivation under RCW 9.94A.835. The legislature requires a prosecutor to file this allegation where sufficient admissible evidence exists that would justify a finding of sexual motivation. RCW 9.94A.835(1). The legislation specifically requires the jury, or judge, to “find a special verdict *as to whether or not* the defendant committed the crime with a sexual motivation.” RCW 9.94A.835(2) (emphasis added). A prosecutor is not permitted to withdraw the allegation once filed without permission of the court, and the court is not to permit withdrawal unless there was an error in filing it or certain specified evidentiary concerns exist. RCW 9.94A.835(3). Given the “whether or not” language in the legislation, the statute requires juror unanimity in order to answer “yes” or “no” on the

special verdict form, particularly given the strict requirements regarding the filing and withdrawal of the allegation. To permit the jury to not agree in order to answer “no” would be for the jury to render an incomplete verdict, to fail to answer the question the legislature wants answered: whether *or not* the defendant acted with sexual motivation in committing the crime.

In its concluding instruction, the court here instructed the jury in relevant part:

When completing the verdict forms begin with verdict form A. You will first consider the crime of Burglary in the First Degree as charged in count I. If you unanimously agree on a verdict, you must fill in the blank provided in verdict form A for this count the words “not guilty” or the word “guilty”, according to the decision you reach. *If you cannot agree on a verdict, do not fill in the blank for this count provided in Verdict Form A.*

You must next consider, on verdict form A, the crime of Unlawful Possession of Marijuana as charged in count II. If you unanimously agree on a verdict, you must fill in the blank provided in verdict form A for this count the words “not guilty” or the word “guilty”, according to the decision you reach.

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.”

If you find the defendant not guilty of the crime of Burglary in the First Degree or if after full and careful consideration of the evidence, you cannot agree on that crime, you will consider the lesser crime of Criminal Trespass in the First Degree. If you unanimously agree on a verdict, you must fill in the blank provided in the verdict form B the words “not guilty” or the word “guilty”, according to the decision you reach. *If you cannot agree on a verdict, do not fill in the blank provided Verdict Form B.*

Because this is a criminal case, *each of you must agree for you to return a verdict.* When all of you have so agreed, fill in the proper form of verdict or verdicts to express your decision. The presiding juror must sign the verdict form(s) and notify the bailiff. ...

Inst. 21, CP 60-61. This instruction was in accord with WPIC 151 and

160. The court also instructed the jury:

As jurors, you have a duty to discuss the case with one another and to deliberate in an effort to reach a unanimous 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 your fellow jurors. *Nor should you change your mind just for the purpose of reaching a verdict.*

Inst. 2, CP 41. This instruction was in accord with WPIC 1.04.

The special verdict paragraph of the concluding instruction is not a misstatement of the law. The language here is identical to that in WPIC 160. Bashaw explains that the Goldberg opinion did not address the validity of WPIC 160 since there was no discussion in Goldberg of that WPIC. Pangilinan asserts that defense counsel should have been aware that review was granted on Bashaw and therefore he should have argued that the instruction was incorrect under Goldberg. While review was granted on Bashaw, it appears that the Supreme Court was most interested in the evidentiary issue presented in that case.⁵ Pangilinan's reading of Goldberg is too broad. Moreover, Goldberg did not address the specific legislative language of the special allegation in this case. Defense counsel was not ineffective in not objecting to the paragraph in the concluding instruction regarding the special verdict.

Moreover, the instructions as a whole provided the required guidance as to returning a verdict, particularly where juries are not generally required to be informed as to what to do when they are *not* in agreement. Inst. 2 informed the jurors not to change their individual vote

⁵ The stated issue for the case is:

Whether, in a prosecution for delivery of a controlled substance within 1,000 feet of a school bus stop, the trial court erred in admitting testimony on bus stop distances without requiring the State to show that the device used to measure the distances was accurate and reliable.

just in order to reach a verdict. The concluding instruction as a whole did not require them to return a verdict. They were informed that in order to reach a verdict, they needed to be unanimous, but nothing informed them that they were required to return a verdict as to the special allegation.

The jury could have chosen not to return a verdict if they weren't in agreement, but in fact they were. And as such, even assuming that the instruction was misleading or erroneous, Pangilinan cannot demonstrate actual prejudice. This is not the case, as in Goldberg, where the jury actually returned a verdict "no" and then the judge returned the jury to deliberations, where thereafter the jury returned a verdict of "yes." The jury never informed the judge that it was deadlocked, and the judge's answer to the jury's question was neutral and did not require them to continue deliberating even if they had been split. Pangilinan speculates that if the jury had been instructed that they had to answer "no" if any of them had a reasonable doubt, that the jury would have answered "no" to the special verdict form. Such speculation does not demonstrate actual prejudice, and here the jury was unanimous in answering "yes."

2. Pangilinan has failed to demonstrate that the judge's neutral answer to the jury's question created a reasonably substantial possibility of improperly influencing the jury.

Pangilinan alternatively asserts that the trial court coerced the jury's finding on the special verdict when it answered a question from the jury during its deliberations regarding whether the jury had to be unanimous in its answer. Specifically, he asserts that the court violated CrR 6.15(f)(2) in doing so. He may not raise this issue for the first time on appeal unless he can demonstrate that this issue constitutes a manifest error of constitutional magnitude. While the right to a unanimous jury verdict is an issue that is generally permitted to be raised for the first time on appeal, Pangilinan presents the inverse of the issue, the alleged right to a jury instruction informing the jury that they don't have to be unanimous. There is no such constitutional right. Even assuming that he may assert this issue for the first time on appeal, the court's answer to the jury's question was neutral and did not require the jury to continue deliberating. Pangilinan's speculative argument fails to establish a reasonably substantial possibility that the verdict was improperly influenced by the trial court's answer to the jury's question.

Under RAP 2.5(a), an error is waived if not preserved below unless it is a "manifest error affecting a constitutional right." RAP 2.5(a)(3);

State v. Scott, 110 Wn.2d 682, 686-87, 757 P.2d 492 (1988); State v. Lynn, 67 Wn. App. 339, 342, 835 P.2d 251 (1992). RAP 2.5(a)(3) is not intended to afford defendants a means for obtaining new trials whenever they can identify a constitutional issue not raised before the trial court. Scott, 110 Wn.2d at 688. “To meet RAP 2.5(a) and raise an error for the first time on appeal, an appellant must demonstrate (1) manifest error, and (2) the error is truly of constitutional magnitude.” State v. O’Hara, 167 Wn.2d 91, 98, 217 P.3d 756 (2009). In order to show “manifest” error, the appellant must show how the error actually prejudiced his case, such that it had “practical and identifiable consequences in the trial.” *Id.* at 99. Unless the defendant can establish that a failure to comply with the procedural requirements of the court rules constitutes a manifest error of constitutional magnitude, failure to raise such an issue below waives the issue. *See, State v. Williams*, 137 Wn.2d 746, 748, 975 P.2d 963 (1999) (failure to raise issue regarding court’s failure to comply with procedural requirements of CrR 3.5 waived issue on appeal).

Under the court rules, a jury may ask the judge questions during its deliberations and the judge may in its discretion answer them. CrR 6.16(f)(1). However, once the jury has begun deliberations the court may not instruct the jury regarding the need for agreement or the effect of no agreement.

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). This rule precludes the giving of instructions to a deadlocked jury that suggest: (1) the need for agreement, (2) the consequences of no agreement, and (3) the length of time the jury will be required to deliberate. State v. Watkins, 99 Wn. 2d 166, 175, 660 P.2d 1117 (1983). It does not, however, prohibit all instructions. *Id.*

Supplemental instructions given to the jury must not coerce the jury into arriving at a verdict. Watkins, 99 Wn.2d at 176. In order to show improper influence on a verdict, the defendant “must establish a reasonably substantial probability that the verdict was improperly influenced by the trial court’s intervention.” *Id.* at 177-78. It is not enough to show a mere tendency to influence the verdict: there must be more than “mere speculation about how the trial’s court’s intervention might have influenced the jury’s verdict.” *Id.*

Communications between the judge and jury in violation of CrR 6.15(f) are subject to harmless error in which the State bears the burden of proving the error harmless beyond a reasonable doubt. State v. Allen, 50 Wn. App. 412, 419, 749 P.2d 702, *rev. denied*, 110 Wn.2d 1024 (1988). Such an error is harmless if the judge’s communication was “negative in

nature and conveyed no affirmative information.” Id. (*quoting State v. Russell*, 25 Wn. App. 933, 948, 611 P.2d 1320 (1980)). A neutral instruction merely directing the jury to refer to the previous instructions is harmless error. Id. at 420.

In *Watkins*, after having been informed by jury note that the jury believed it was deadlocked, but wanted to adjourn until Monday, the court instructed the jury to continue deliberating. *Watkins*, 99 Wn.2d at 170. The jury then sent another note that they believed they were deadlocked. The parties agreed to submit two different verdict forms to the jury. Id. at 171. Along with the verdict forms, the judge submitted a supplemental instruction, to which defense objected, that stated that it was not necessary for the jury to agree on the first degree assault charge if they could agree on second degree assault. Id. Shortly after the jury was given the supplemental instruction and verdict forms, it announced it had reached a verdict, which was guilty of second degree assault. The *Watkins* court found that the supplemental instruction did not violate CrR 6.15(f) because it did not suggest a need for the jury to agree, did not inform the jury of the consequence of not agreeing and did not tell them how long they had to deliberate. Id. at 175-76. The court rejected as too remote and speculative defendant’s argument that the supplemental instruction in effect told the jury that a verdict on second degree assault would be

reasonable. Id. 177-78. It found that the supplemental instruction was carefully neutral in its wording and clarified an ambiguity in the prior instructions and did not impermissibly coerce the jury into reaching a verdict. Id. at 178-79.

Here, the jury never informed the judge that it was deadlocked. It simply inquired whether they had to fill out the form if they couldn't agree.⁶ The judge's answer referred them to all of the prior instructions and to consider the standards set forth therein.⁷ The response was neutral and did not suggest a need for the jury to agree, did not inform them of the consequence of failure to agree and never suggested a time limit. As such, it did not violate CrR 6.15(f). As a neutral instruction simply referring the jury to previous instructions, it in no way impermissibly influenced the jury to reach a verdict. Pangilinan's argument to the contrary is pure speculation.

Pangilinan suggests that the case of State v. Boogaard, 90 Wn.2d 733, 585 P.2d 789 (1978), directs a different result. However, unlike the facts in this case, in Boogaard the judge found out the jury was split 10-2 after sending the bailiff to inquire of the jury, then called the jury in to find

⁶ The question was: "Does the jury have to answer special verdict form if they cannot agree unanimously yes or no?" CP 35.

⁷ The judge's answer was: "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.

out the history of the vote, how long the vote had stood at each division and whether the jury thought they could reach a decision in half an hour. Id. at 735. The jury reached a verdict 30 minutes thereafter. Id. The court found that the judge's inquiry in and of itself was grounds for reversal. Id. at 738. The court concluded that the inquiry on the vote split combined with the question as to whether the jury could reach a verdict in a half hour was impermissibly coercive. Id. at 739. The judge here, however, never inquired whether the jury was split or suggested a time limit on deliberations. Boogard's facts distinguish it from this case.

The facts in this case do not even rise to the level of those in Watkins, and in another case, State v. Lee, 77 Wn. App. 119, 889 P.2d 944 (1995), *rev'd on other grounds*, 128 Wn.2d 151, 904 P.2d 1143 (1995) where the courts' actions were found not to be coercive. In Lee after learning that some of the jurors thought they were deadlocked, the court asked the jurors individually whether each thought further deliberations would be beneficial and whether there was a reasonable probability of the jury reaching a verdict on one or both counts. Lee, 77 Wn. App. at 125. Only three jurors felt that a verdict might be possible on one count. The judge then ordered the jury to continue deliberating. The Lee court found that the judge's actions in trying to determine whether the jury was truly

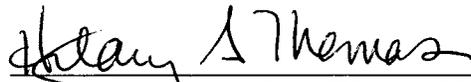
deadlocked were carefully thought out and had not suggested that the jury reach a verdict. Id.

In our case the judge simply answered a question from the jury, a question which did not even necessarily signify that the jury was deadlocked. Its answer was neutral, referring the jury back to the rest of the instructions. The judge did not order the jury to continue deliberating. Pangilinan has failed to demonstrate that the judge's neutral response to the jury's question created a reasonably substantial probability of improperly influencing the jury's verdict. Moreover, Pangilinan as much as admitted he committed the burglary with sexual motivation when he testified that he was "trying to get it on with her."

D. CONCLUSION

The State respectfully requests that this court affirm the jury's verdict that Pangilinan committed the burglary with sexual motivation.

Respectfully submitted this 17th day of December, 2009.

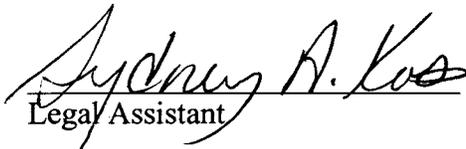

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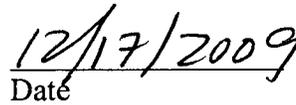
CERTIFICATE

I certify that on this date I placed in the United States mail with proper postage thereon, or otherwise caused to be delivered, a true and correct copy of the document to which this certificate is attached to this Court, and appellant's counsel, addressed as follows:

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