

NO. 65176-5-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

JAVON PITCHFORD,

Appellant.

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STATE OF WASHINGTON
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE BRUCE HELLER

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED.

1. The trial court may inquire of the jury and instruct the jury during deliberations, in order to determine whether they are hopelessly deadlocked, as long as the court does not coerce the jury. Here, the trial court's interaction with the jury was not coercive as is demonstrated by the fact that the jury continued to deliberate for another full day, and did not reach a guilty verdict on all counts. Should the defendant's claim that the trial court coerced the jury be rejected?

2. The state supreme court has held that a special verdict instruction that informs the jury that they must be unanimous to answer in the negative is an incorrect statement of law based on Washington's common law. May this issue be raised for the first time on appeal where it has no constitutional basis?

3. In order to establish ineffective assistance of counsel, a defendant must overcome the strong presumption that the challenged actions are legitimate strategy, and must show prejudice. Here, the presumption of competence cannot be overcome because defense counsel legitimately chose to focus the jury's attention on the State's burden of proving forcible compulsion, rather than requesting an instruction that places the burden on the

defendant to prove lack of consent. Moreover, because the jury necessarily disbelieved the defendant's claim of lack of consent, counsel's decision was not prejudicial. Has the defendant failed to establish ineffective assistance of counsel?

B. STATEMENT OF THE CASE.

1. PROCEDURAL FACTS.

Javon Pitchford was charged with the crimes of rape in the first degree and robbery in the first degree. CP 13-14. The State alleged that Pitchford was armed with a firearm during the commission of both crimes. CP 13-14. The jury convicted Pitchford of rape in the first degree and acquitted him of robbery in the first degree. CP 44, 46. The jury found that Pitchford was armed with a firearm when he committed the rape. CP 45. Pitchford received an indeterminate sentence of 210 months to life. CP 56.

2. FACTS OF THE CRIME.

On the night of October 22, 2008, the victim, S.G., went to the Williams Avenue Pub in downtown Renton to participate in a poker tournament. RP 2/1/10 13, 15. Sometime around 1 a.m.,

she stepped out the back door of the pub to smoke a cigarette. RP 1/28/10 76; RP 2/1/10 19. A man she did not know, later identified as Javon Pitchford, approached her and asked her if she'd like to "smoke a bowl." RP 2/1/10 23. She agreed, thinking he was referring to smoking marijuana in the alley behind the bar, which was common among some of the bar's patrons. RP 2/1/10 23.

Pitchford said he did not want to smoke behind the bar, and started leading S.G. away from the bar. RP 2/1/10 27. As they walked further from the bar, S.G. became nervous and stated that she wanted to go back. RP 2/1/10 28. Pitchford pulled out a glass pipe used for smoking methamphetamine, and S.G. told him that she did not smoke "meth." RP 2/1/10 29. As she turned to return to the bar, Pitchford pulled out a silver gun and stated, "you're not going anywhere." RP 2/1/10 31. He pulled her toward a dimly lit park along the Cedar River. RP 2/1/10 34, 39. When she tried to engage him in conversation and begged him not to shoot her he told her to "shut up, bitch." RP 2/1/10 35-38. He grabbed her purse, dumped the contents out and told her to give him money. RP 2/1/10 39. He took approximately \$300 from her purse, and then forced her to engage in oral and vaginal intercourse.

RP 2/1/10 45-53. He displayed the gun during the rape, but dropped it on the ground. RP 2/1/10 53-54.

As Pitchford searched for his gun in the dark, he allowed S.G. to leave, telling her to "go get your shit, bitch." RP 2/1/10 65. As she collected her purse and the items that had been dumped out, she saw a man and woman approach Pitchford. RP 2/1/10 65. They stopped to assist Pitchford in looking for his gun as S.G. ran back to the bar. RP 2/1/10 67. As S.G. was leaving the scene of the rape, she noticed that the SIM card¹ was missing from her cell phone, rendering it inoperable. RP 2/1/10 69. Pitchford yelled, "Bitch, you're not going to get any cops on that phone." RP 2/1/10 69.

S.G. ran back to the Williams Avenue Pub and told the bartender that she had been raped. RP 2/1/10 70. They called 911, and Officer Mark Hume arrived within minutes. RP 1/28/10 76; RP 2/1/10 70-74. He found S.G. standing outside the bar with the bartender. RP 1/28/10 73. She was shaking and crying. RP 1/28/10 74. She directed him to the location where the rape

¹ "SIM" stands for subscriber identity module and is a portable memory device used in some cellular phones.

occurred. RP 1/28/10 88. There, the officer found what appeared to be semen on a bench. RP 1/28/10 88; RP 2/1/10 75.

S.G. did not know the name of her attacker, and was unable to positively identify Pitchford from a photographic montage.

RP 2/3/10 37, 59. However, she was able to describe the visible scar over Pitchford's eye. RP 2/1/10 25; RP 2/2/10 90. Eventually, police identified Jesse Murray and Malileah Henderson as the two people that assisted Pitchford in looking for his gun after the rape. RP 2/3/10 47-57. Murray confirmed Pitchford's identity, and Pitchford was arrested in Atlanta, Georgia, in February of 2009. RP 2/3/10 55-57, 64, 66; RP 2/4/10 5. DNA analysis of the semen found on the bench resulted in a match with Pitchford: the estimated probability of selecting an unrelated individual at random from the United States population with the same profile is 1 in 330 quadrillion. RP 2/2/10 132-40. In court, S.G. identified Pitchford as the man that attacked her. RP 2/2/10 88.

The 911 tape was played for the jury, and photographs of S.G.'s broken purse and cell phone, with a missing SIM card, were admitted at trial. RP 1/28/10 56-58; RP 2/2/10 90-92.

Pitchford testified that he and S.G. are acquaintances and that on October 23, 2008, they engaged in consensual sex and smoked methamphetamine together, and had done so on two prior occasions. RP 2/3/10 122-30. He claimed that S.G. was irritated after their encounter because the methamphetamine was not very good. RP 2/3/10 131-32. He denied having a gun, although he admitted to being a drug dealer. RP 2/3/10 121, 135.

Jesse Murray testified for the defense. RP 2/3/10. He was in jail for a drug offense at the time of his testimony. RP 2/3/10 82. He admitted seeing Pitchford and S.G. together in the park along the Cedar River on the night of the rape, but claimed that S.G. seemed fine. RP 2/3/10 78-81. He admitted helping Pitchford look for something he had dropped. RP 2/3/10 92. He denied in his testimony that Pitchford had a gun. RP 2/3/10 107. Detective Montemayor testified in rebuttal that when Jesse Murray was interviewed prior to trial, he said he saw Pitchford with a gun that night. RP 2/4/10 18-19.

C. ARGUMENT.

1. PITCHFORD HAS FAILED TO ESTABLISH JUDICIAL COERCION OF THE DELIBERATIVE PROCESS OR A REASONABLY SUBSTANTIAL POSSIBILITY THAT THE JURY WAS IMPROPERLY INFLUENCED.

Pitchford contends that the trial court violated his right to due process and violated CrR 6.15 when it instructed the jury to continue deliberating after having failed to come to an agreement during three hours of deliberation. Pitchford's claim is without merit. The trial court properly exercised its broad discretion in concluding that the jury was not yet hopelessly deadlocked, and in instructing them to deliberate further. The court's interaction with the jury was not coercive, and the circumstances show that the jury was not improperly influenced or coerced.²

CrR 6.15(f)(2) provides that "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

² Defense counsel requested that the trial court declare a mistrial rather than instructing them to continue deliberating, and thus the claim of error was preserved below. RP 2/5/10 69. Moreover, a claim of judicial coercion has been held to be a manifest error affecting a constitutional right that may be raised for the first time on appeal. State v. Ford, 171 Wn.2d 185, 188, 250 P.3d 97 (2011).

deliberate." The purpose of the rule is to prevent judicial interference in the deliberative process. State v. Boogaard, 90 Wn.2d 733, 736, 585 P.2d 789 (1978). The right to a fair trial demands that the trial judge not pressure a criminal jury to reach a particular verdict, or to reach a verdict in a specific amount of time. Id. at 736-37.

Indications that a jury may be deadlocked place the trial judge in a difficult position. If the judge erroneously discharges the jury when further deliberations may have produced a fair verdict, then the defendant can claim that his double jeopardy rights will be violated by retrial. State v. Jones, 97 Wn.2d 159, 163, 641 P.2d 708 (1982). However, if the judge fails to discharge a jury when the jury is unable to reach a verdict after protracted deliberations, then

the defendant can claim that the judge coerced the jury. Id. at 164. Recognizing the "difficult and delicate" nature of the situation, appellate courts grant trial judges broad discretion in deciding whether a jury is deadlocked and accord "great deference" to their decision. State v. Watkins, 99 Wn.2d 166, 660 P.2d 1117 (1983); Jones, 97 Wn.2d at 163.

In exercising its discretion in determining whether a jury is deadlocked, the trial court should consider the length of deliberations in light of the complexity of the case, and may inquire how the jury stands numerically but not with respect to guilt or innocence. Jones, 97 Wn.2d at 164. The trial court is also allowed to instruct the jury to continue deliberations upon a determination that the jury is not deadlocked, as long as the instruction does not suggest that the jury must reach agreement, inform the jury of the consequences of disagreement, or suggest the length of time that the jury will be required to deliberate. Watkins, 99 Wn.2d at 175.

WPIC 4.70 sets forth a suggested colloquy when the jury has indicated that it may be deadlocked.³ The colloquy inquires as to whether there is a reasonable probability of reaching a verdict. WPIC 4.70. The inquiry is directed to the presiding juror, and then to the other jurors if the court deems it appropriate.

In the present case, the trial court did not employ the suggested colloquy from WPIC 4.70, but the court's interaction was in no way coercive. After the jury informed the trial court in its inquiry, and of its own accord, that the jury was "deadlocked nine

³ WPIC 4.70 reads as follows:

I have called you back into the courtroom to find out whether you have a reasonable probability of reaching a verdict. First, a word of caution: Because you are in the process of deliberating, it is essential that you give no indication about how the deliberations are going. You must not make any remark here in the courtroom that may adversely affect the rights of either party or may in any way disclose your opinion of this case or the opinions of other members of the jury.

I am going to ask your presiding juror if there is a reasonable probability of the jury reaching a verdict within a reasonable time. The presiding juror must restrict *[his][her]* answer to "yes" or "no" when I ask this question and must not say anything else.

(Address the following question(s) to the presiding juror:) Is there a reasonable probability of the jury reaching a verdict within a reasonable time *[as to all of the counts][as to all of the defendants]?* *[Is there a reasonable probability of the jury reaching a verdict within a reasonable time as to any [count][defendant]??]*

(The judge may wish to ask the other jurors for an indication as to their agreement or disagreement.)

[The bailiff will now take you back to the jury room in order to continue your deliberations [and complete the verdict form or forms as to any [count][defendant] on which you are able to reach a verdict].]

guilty and three not-guilty," the trial court did not inquire of the jurors but merely addressed them. The trial court stated:

Good morning, ladies and gentlemen. The Court has received your inquiry about what happens if the jury is deadlocked.

I wanted to indicate to you that it is not uncommon for jurors, during their deliberations, to be split as you appear to be at this stage in the proceedings; however, that doesn't necessarily mean that you're deadlocked.

We've had a trial that took approximately one week. You've been deliberating for approximately half a day. After going out to lunch you probably started deliberating at 1:30 or 2:00 and you've been here for about an hour I believe you started at 9:30, so that's around three hours. It is not unusual after that amount of time for you not to be unanimous one way or the other. Sometimes it takes awhile. At least we need to go through the process and in my view it's too early to be talking about a deadlock.

Now, what I want to do is to reread to you instruction number two, which you may be familiar with, you probably are, but I think it really provides a useful guide for you in terms of where you go from here.

And it reads as follows:

"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 deliberations you should not hesitate to reexamine your views and to change your opinions 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."

So I am going to ask that you continue to--your deliberations at this point.

RP 2/5/10 69-71.

In light of the circumstances, the trial court did not abuse its broad discretion in instructing the jury to deliberate further. The trial court had a tenable basis for directing the jury to continue deliberations given that the jury had only deliberated for approximately three hours. The trial court did not suggest that the jury was required to reach an agreement, inform the jury of the consequences of disagreement, or place any time constraints on the jury's deliberations. There is nothing coercive about the trial court's interaction with the jury in this case.

Pitchford argues that the trial court's interaction with the jury suggested that they were required to return with a unanimous verdict. This argument is contradicted by the record. The trial court reread Instruction 2, which explicitly instructed the jurors not to surrender their honest beliefs or change their minds "just for the purpose of reaching a verdict." RP 2/5/10 71.

In order to show that the trial court improperly coerced the jury with supplemental instructions to continue deliberating, the defendant must show more than a remote or speculative possibility that the court influenced the jury. Id. at 177. The defendant must establish a reasonably substantial possibility that the trial court's intervention improperly influenced the jury. Id. at 178. The reviewing court considers all the circumstances surrounding the trial court's intervention. Watkins, 99 Wn.2d at 177. The reviewing court considers the length of time the jury deliberated after the court's intervention as relevant to whether there is a reasonably substantial possibility that the jury was coerced. State v. McCullum, 28 Wn. App. 145, 153, 622 P.3d 873 (1981), reversed on other grounds, 98 Wn.2d 484, 656 P.2d 1064 (1983).

In the present case, the trial court's interaction with the jury was not coercive, and the circumstances show that the jury was not coerced into reaching a unanimous verdict. After the initial interaction between the trial court and the jury, which occurred at approximately 10:00 a.m. on Friday, the jury deliberated for the rest of that day and almost all of Monday morning. RP 2/5/10 68-71; 2/8/10 72-75; CP 16, 47. At approximately 11:30 a.m. on Monday, the jury indicated they had reached a verdict as to rape in the first

degree, but were still deadlocked as to the special verdict.

RP 2/8/10 72-77; CP 44-45, 47.⁴ After two of the jurors indicated to the trial court that further deliberations could lead to a verdict, the court sent the jurors back and verdicts were returned one hour later, at 12:41 p.m. RP 2/8/10 73-75; CP 77. Significantly, the jury acquitted Pitchford of Count II, robbery in the first degree. There is no evidence that the trial court coerced the jury into reaching a quick verdict or into rendering a verdict of guilty on the charges. Pitchford's claim that the trial court violated his right to due process and CrR 6.15 should be rejected.

2. PITCHFORD'S CHALLENGE TO THE SPECIAL VERDICT INSTRUCTION MAY NOT BE RAISED FOR THE FIRST TIME ON APPEAL.

Citing the recent case of State v. Bashaw, 169 Wn.2d 133, 234 P.3d 195 (2010), Pitchford challenges the jury instruction for the firearm enhancement allegation, arguing that the jury should not have been told that it had to be unanimous to answer in the negative. However, Pitchford did not object to this instruction

⁴ When the second inquiry was submitted by the jury, the parties agreed that the trial court should inquire as to whether the jurors all agreed that they were deadlocked and the trial court did so. RP 2/8/10 72-75.

below. The claimed error is not of constitutional magnitude, and he may not raise it for the first time on appeal.

The trial court provided the jury with a special verdict form for the firearm enhancements. The instruction for the special verdict form stated, in pertinent part:

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 38 (Instruction No. 16). The court asked whether Pitchford had any objection to the instructions, and his attorney replied that he did not. RP 2/3/10 70-76.

Pursuant to RAP 2.5(a), the appellate court may consider an issue raised for the first time on appeal only when it involves a "manifest error affecting a constitutional right." RAP 2.5(a)(3). In order to raise an error for the first time on appeal under this rule, the appellant must demonstrate that (1) the error is manifest, and (2) the error is truly of constitutional dimension. State v. O'Hara, 167 Wn.2d 91, 98, 217 P.3d 756 (2009). "'Manifest' in RAP 2.5(a)(3) requires a showing of actual prejudice." State v. Kirkman, 159 Wn.2d 918, 935, 155 P.3d 125 (2010).

In Bashaw, the supreme court indicated that the claimed error is not of constitutional dimension. Citing State v. Goldberg, 149 Wn.2d 888, 72 P.3d 1083 (2003), the court held that "a unanimous jury decision is not required to find that the State has failed to prove the presence of a special finding increasing the defendant's maximum allowable sentence." Bashaw, 169 Wn.2d at 146. The court appears to have acknowledged that this rule was not of constitutional dimension, stating that "[t]his rule is not compelled by constitutional protections against double jeopardy, but rather by the common law precedent of this court, as articulated in Goldberg." Bashaw, 169 Wn.2d at 146 n.7 (citations omitted). The court then discussed the policy justifications for this common law rule. Id. at 146-47. See State v. Nunez, 160 Wn. App. 150, 159, 248 P.3d 103 (2011) (holding the error is not of constitutional magnitude). But see State v. Ryan, 160 Wn. App. 944, 252 P.3d 895 (2011) (holding the error is of constitutional magnitude). Pitchford may not raise this claim of error, based on common law rather than constitutional law, for the first time on appeal.

Finally, while this Court is bound by Bashaw, the State respectfully submits that the holding in that case is incorrect, and offers the following argument in order to preserve the issue. The

state constitutional right to jury trial in criminal matters stems from Const. art. I, § § 21 and 22 and includes the right to a twelve person jury and the right to a unanimous verdict. State v. Stegall, 124 Wn.2d 719, 723-24, 881 P.2d 979 (1994); State v. Stephens, 93 Wn.2d 186, 190, 607 P.2d 304 (1980). A defendant cannot waive the unanimity requirement. State v. Noyes, 69 Wn.2d 441, 446, 418 P.2d 471 (1966). When it was enacting sentencing enhancement statutes, the legislature is presumed to have been familiar with the requirement of jury unanimity. The legislature explicitly gave force to a non-unanimous verdict in only one sentencing statute: aggravated first-degree murder. See RCW 10.95.080(2). For all other sentencing statutes, consistent with the dictates of Const. art. I, § 21, the legislature's procedure requires unanimity before a sentencing verdict can be rendered. Bashaw was wrongly decided because it failed to recognize there is a constitutional right to a unanimous verdict in criminal matters that the defendant cannot waive.

3. PITCHFORD HAS FAILED TO ESTABLISH INEFFECTIVE ASSISTANCE OF COUNSEL BECAUSE COUNSEL MADE A REASONABLE TACTICAL DECISION NOT TO UNDERTAKE THE BURDEN OF PROVING CONSENT.

Pitchford alleges that he was denied effective assistance of counsel at trial. His claim of ineffective assistance of counsel should be rejected. Counsel's decision not to request an instruction placing the burden of proving lack of consent on the defense was a reasonable tactical decision. Moreover, Pitchford cannot show actual prejudice. Thus, he has failed to establish ineffective assistance of counsel.

A criminal defendant has a constitutional right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The benchmark for judging a claim of ineffective assistance of counsel is whether counsel's conduct "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Id. at 686.

The petitioner has the burden of establishing ineffective assistance of counsel. Id. at 687. To prevail, the defendant must show that: (1) counsel's representation was deficient, meaning it fell below an objective standard of reasonableness based on

consideration of all the circumstances (the performance prong); and (2) the defendant was prejudiced, meaning there is a reasonable probability that the result of the proceeding would have been different (the prejudice prong). Id. at 687; State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). If the court decides that either prong has not been met, it need not address the other prong. State v. Garcia, 57 Wn. App. 927, 932, 791 P.2d 244 (1990).

The inquiry in determining whether counsel's performance was deficient is whether counsel's assistance was reasonable considering all of the circumstances. Strickland, 466 U.S. at 688. Courts are required to begin their analysis with a strong presumption of competence. Id. at 689. This presumption of competence includes a presumption that the challenged actions were the result of reasonable trial strategy. Id. at 689-90. If counsel's conduct can be characterized as a legitimate trial strategy, the performance prong is not met. State v. Grier, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011); State v. Garrett, 124 Wn.2d 504, 520, 881 P.2d 185 (1994). Courts should recognize that, in any given case, effective assistance of counsel can be provided in countless ways, with many different tactics and strategic choices. Strickland, 466 U.S. at 689. The

defendant must establish deficient performance based on the record.

Grier, 171 Wn.2d at 29.

In addition to overcoming the strong presumption of competence, the petitioner must affirmatively show prejudice.

Strickland, 466 U.S. at 693. Prejudice is not established by showing that counsel's error had some conceivable effect on the outcome of the proceeding because virtually any act or omission would meet such a low standard. Id. The defendant must establish a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. Id. at 694. In assessing prejudice, the reviewing court must presume that juries act according to the law. Grier, 171 Wn.2d at 34. The difference between Strickland's prejudice standard and a more-probable-than-not standard is slight. Harrington v. Richter, ___ U.S. ___, 131 S. Ct. 770, 792, 178 L. Ed. 2d 624 (2011).

RCW 9A.44.040(1)(a) defines the crime of rape in the first degree, in part, as "A person is guilty of rape in the first degree when such person engages in sexual intercourse with another person by forcible compulsion where the perpetrator uses or threatens to use a deadly weapon or what appears to be a deadly weapon." Forcible compulsion is statutorily defined, in part, as

"physical force which overcomes resistance, or a threat, express or implied, that places a person in fear of death or physical injury." RCW 9A.44.010(6). Consent is statutorily defined as "freely given agreement to have sexual intercourse or sexual contact." RCW 9A.44.010(7).

Prior to 1975, the crime of rape was defined as "sexual intercourse . . . committed against the person's will and without the person's consent." RCW 9.79.090 (1974). The State bore the burden of proving lack of consent under the prior statute. State v. Camara, 113 Wn.2d 631, 636, 781 P.2d 483 (1989). When the criminal law was recodified in 1975, the crime of rape was redefined, separated into degrees, and lack of consent was removed from the definition of the crime. Id.

Consent remains a valid defense to the crime of rape in the first degree. Id. However, it is an affirmative defense and thus, the defense bears the burden of proving consent. Id. at 640. Although Washington courts have recognized a "conceptual overlap" between the concepts of forcible compulsion and consent, this conceptual overlap does not require the State to prove lack of consent. Id. at 640; see also State v. Gregory, 158 Wn.2d 759, 802-04, 147 P.3d 1201 (2006) (approving Camara). The State

does, however, bear the burden of proving forcible compulsion.

Gregory, 158 Wn.2d at 808.

In the present case, there is no question that the defense was predicated on the notion that S.G. and Pitchford had consensual sex. Pitchford testified that S.G. agreed to sexual contact in exchange for methamphetamine that they smoked together. RP 2/3/10 130, 135. In closing argument, counsel began by focusing on the burden of proof and arguing that the State had failed to prove the crime beyond a reasonable doubt because S.G. and Pitchford "had consensual sex." RP 2/4/10 55-56.

If Pitchford's counsel had requested and received an affirmative defense instruction on consent, the burden of proving consent would have been placed on the defense. This could have confused the jury as to whether the State still had to prove forcible compulsion. It was a reasonable tactical decision to focus the jury's attention on the State's ability to prove forcible compulsion beyond a reasonable doubt. Pitchford cannot establish deficient performance.

Pitchford also cannot establish prejudice. Instructions are sufficient if they permit each party to argue its theory of the case, are not misleading, and properly inform the jury of the applicable

law. State v. Brown, 132 Wn.2d 529, 605, 940 P.2d 546 (1997). Here, the instructions as given allowed defense counsel to argue that S.G. and Pitchford had consensual sex, and that the State failed to prove forcible compulsion. If the jury had found Pitchford to be a credible witness, this strategy would have led to an acquittal. The jury did not find Pitchford's testimony credible. Pitchford cannot establish a reasonable probability that the result of the trial would have been different if the jury had been instructed that Pitchford had the burden of proving consent. Pitchford's ineffective assistance of counsel claim must be rejected.

4. THIS CASE SHOULD BE REMANDED FOR CORRECTION OF APPENDIX B TO THE JUDGMENT AND SENTENCE.

At sentencing, the parties agreed that Pitchford's offender score was three based on one prior adult conviction and five prior juvenile adjudications. Supp CP ___ (sub 80). The judgment and sentence properly reflects an offender score of three, although it lists only the adult conviction in Appendix B. CP 59. Appendix B should include the five prior juvenile adjudications as well. This case should be remanded for an order correcting Appendix B to properly reflect Pitchford's criminal history. Without that correction,

the judgment and sentence is invalid on its face because, on the face of the document, the offender score appears to be incorrect. See In re Personal Restraint of Thompson, 141 Wn.2d 712, 10 P.3d 380 (2000).

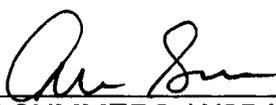
D. CONCLUSION.

Pitchford's conviction should be affirmed, and the case remanded to the superior court solely for the purpose of amending Appendix B of the judgment and sentence to properly reflect Pitchford's criminal history.

DATED this 8th day of July, 2011.

Respectfully submitted,

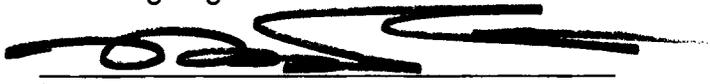
DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 
ANN SUMMERS, WSBA #21509
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Elaine Winters, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. PITCHFORD, Cause No. 65176-5-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.



Name
Done in Seattle, Washington

07-08-11

Date

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