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Division I
State of Washington

Supreme Court No.: 90750-1
Court of Appeals No.: 70023-5-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ROBERT PENA,

Petitioner.

FILED
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STATE OF WASHINGTON

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER AND THE DECISION BELOW

Robert Pena requests this Court grant review pursuant to RAP 13.4(b) of the decision of the Court of Appeals, Division One, in *State v. Pena*, No. 70023-5-I, filed June 9, 2014. Mr. Pena's motion to reconsider, requesting that the court address issues raised in his statement of additional grounds but not decided by the opinion, was denied on July 29, 2014. Copies of the opinion and order denying the motion for reconsideration are attached as appendices.

B. ISSUES PRESENTED FOR REVIEW

1. A juror who cannot hear the evidence and the court's instructions cannot be fair under the law. A jury comprised of a juror who cannot listen to and participate in deliberations cannot achieve unanimity. This Court should grant review to determine whether a trial court abuses its discretion by denying a continuance of sentencing to allow the accused to further investigate the extent to which a juror was able to participate in trial and deliberations where the juror was unable to hear when the court polled the jury and during portions of voir dire, and where defense counsel had worked diligently to track down the jurors but had been unable to complete the task. RAP 13.4(b)(3), (4).

2. Whether the Court should grant review where the Court of Appeals approves of a jury instruction that dilutes the burden of proof and

misstates the law in conflict with *State v. Emery*, 174 Wn.2d 741, 278 P.3d 653 (2012)? RAP 13.4(b)(1), (3).

3. Should the Court grant review of the significant constitutional question whether the right to a public trial was violated where the trial court did not call prospective jurors back into open court before excusing them after a recess had been announced and where the record does not reflect what happened to one of the prospective jurors? RAP 13.4(b)(3).

4. Should the Court grant review to decide whether Mr. Pena was denied an impartial jury when prospective jurors indicated bias but were not further questioned and the issue was raised in the statement of additional grounds but ignored by the Court of Appeals? RAP 13.4(b)(3), (4).

5. Should the Court grant review to determine whether trial counsel was ineffective for failing to call alibi witnesses where evidence supporting the defense was elicited in the initial trial on the same charges, the witnesses were on the defense witness list, the witnesses were available to testify, and counsel asserted an alibi defense would be presented? RAP 13.4(b)(3), (4).

6. Should review be granted to determine whether Mr. Pena was denied due process by trial counsel and the prosecutor's manufacturing of

false evidence or perjured testimony by the complaining witness? RAP 13.4(b)(3), (4).

7. Should review be granted where the trial court allowed the jury unlimited review of a video exhibit of the alleged victim's interview with a child specialist in violation of Mr. Pena's right to confront and cross-examine witness and due process and in violation of Criminal Rule 6.15? RAP 13.4(b)(3), (4).

8. Whether the accumulation of errors denied Mr. Pena a constitutionally fair trial, warranting review under RAP 13.4(b)(3)?

C. STATEMENT OF THE CASE

Robert Pena became acquainted with Ashley P. while taking a course in Auburn, Washington. 10/24/12 II RP 21-22; 10/25/12 RP 4.[1] After discovering their daughters were in the same daycare program, they decided to get together with Mr. Pena's girlfriend and the mother of his daughter, Bridget Lyons, and their daughters at Ashley's apartment.[2] 10/24/12 II RP 23-27. Ashley testified the gathering occurred on October 8, 2011. At that time, Ashley lived in a small two-bedroom apartment; the

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

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

living room, dining room and kitchen were steps from and largely visible to each other. 10/24/12 II RP 19; 10/25/12 RP 12-13, 21, 58-59. That evening, the adults talked almost the entire time in the dining room while the children played in the living room. 10/24/12 II RP 27, 37-43, 51; 10/25/12 RP 35-36; 10/29/12 RP 37. Ashley testified she knew Ms. Lyons from high school, so they had a lot to discuss. 10/24/12 II RP 27-28.[3]

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

Mr. Pena was arrested at his school, the Green River Community College, a couple weeks later. 10/25/12 RP 146-47. He was charged with

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

child molestation in the first degree; an initial trial resulted in a hung jury. 9/4/12 RP 318-20; CP 1-2 (information), 18 (amended information), 36 (mistrial verdict form). Apparently, less than five minutes after Miranda left Ashley's apartment to put her son to bed, L. ran back to her apartment, slammed the door and told her mother that "that man over there" rubbed her leg in the living room while repeating "good girl" and followed her into the bathroom, where L. told him she was looking for a clock, and rubbed his hand under her clothes in her "crotch." 10/24/12 II RP42; 10/25/12 RP 42-47, 69; 10/29/12 RP 31-32. Ashley was unaware that anything had occurred until Miranda told her what L. reported. 10/24/12 II RP 45, 51. Miranda and Ashley testified they told Ms. Lyons what L. had reported and decided Ms. Lyons and Mr. Pena should leave with their daughter when he returned from the store. 10/24/12 II RP 46-47; 10/25/12 RP 48-51, 64-65.

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

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

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

with "increased volume into the microphone"). The following colloquy occurred:

> The Court: Juror 2, this was your individual verdict?
> Juror No. 2: I can't –
> The Court: Is this how you voted?
> Juror No. 2: (Nodded affirmatively.) I can't hear you.
> The Court: You can't hear me?
> Juror No. 2: What is she saying?
> The Court: Juror 2, can you hear me at all without the – can you hear me now?
> Juror No. 2: Okay.
> The Court: Can you hear me now?
> Juror No. 2: Yeah.
> The Court: Okay. Was this your individual verdict, is this how you voted?
>
> Juror No. 2: Yes.
> The Court: Was it the verdict of the entire panel?
> (Off the record.)
> The Court: Was it how the entire jury panel voted?
> Juror No. 2: I can't hear.
> The Court: Did the entire jury panel vote to convict?
> Juror No. 2: Yes.
> The Court: Okay.

10/30/12 RP 3-4.

Mr. Pena was convicted as charged. CP 36, 63, 71-82; 10/30/12 RP 2. Following the verdict, defense counsel filed a motion for a new trial and for time to investigate the extent of juror number two's inability to hear the trial and deliberations. CP 64. The court granted defense counsel time to investigate, and Mr. Pena waived his right to speedy sentencing to accommodate his right to a trial by jury and by a unanimous jury.

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

D. ARGUMENT IN FAVOR OF GRANTING REVIEW

1. The Court should grant review of the trial court's denial of Mr. Pena's motion for continuance and for release of juror contact information to investigate a juror who could not hear proceedings and may not have been able to participate in deliberations because it affects his right to jury impartiality and unanimity and review is in the substantial public interest.

An accused has a right to trial by an impartial jury and to be convicted only if that jury is unanimously convinced of guilt beyond a reasonable doubt. Const. art. I, §§ 21, 22; U.S. Const. amends. VI, XIV. In reviewing a denial of a motion for continuance for an abuse of discretion, this Court must "carefully review the factual basis upon which the trial court relied" to ensure that its denial of the continuance was not manifestly unreasonable. *State v. Iniguez*, 167 Wn.2d 273, 280, 217 P.3d 768 (2009); *State v. Woods*, 143 Wn.2d 561, 604, 23 P.3d 1046 (2001). A careful review of the record substantiates the concern that juror number two could not effectively participate in proceedings and continuing sentencing would not have been prejudicial.

Mr. Pena was prejudiced by the denial of the motion for continuance. The record shows substantial likelihood that juror number two could not have participated in deliberations, did not hear trial evidence, and did not hear the court's instructions. The State argued and the court accepted that the juror knew how to ask for assistance when needed, so the court could presume the juror could hear at all other times. 10/23/12 RP 147-50. In fact, however, the record shows the opposite. During the return of the verdict and polling of the jury, juror number two never stated she could not hear until she was individually questioned by the court and could not respond. 10/30/12 RP 2-4. Unless juror two's ability to hear was compromised only at the precise moment when the court began polling her, which would be a rather unlikely coincidence, juror two sat through at least the court's introductory remarks, the foreperson's delivery of the verdict and the polling of the foreperson and juror one without providing any indication that she could not hear. 10/30/12 RP 2-3. If juror number two did not ask for assistance then, one cannot presume from the lack of request that she was, in fact, able to hear the entirety of the trial. Furthermore, it appears juror two did not raise her initial inability to hear immediately. She apparently requested a listening device on the second day of voir dire—having sat through the first day before bringing the matter to the bailiff's attention. 10/24/12 RP 4.

A continuance was also warranted because Mr. Pena acted diligently by moving promptly for a mistrial but admitting the record was insufficient and requesting time to investigate. 10/23/12 RP 133-45; CP 64-65. During the time granted for investigation, defense counsel hired an investigator, who worked to contact Mr. Pena's jury. The investigator did locate a juror and made several attempts to contact that juror. 10/23/12 RP 147. But the juror did not respond. *Id.* Thus, Mr. Pena's diligence had not yet produced results and a further continuance was necessary. Mr. Pena further requested that the trial court provide him with the contact information used to process the jury summonses for the jury. 10/23/12 RP 147-48.

Upon careful review of the record, the trial court's denial of a continuance and of access to juror contact information was based on untenable grounds. This Court should grant review because the matter implicated Mr. Pena's right to an impartial, unanimous jury and because the public has a substantial interest in ensuring the fairness of criminal trials and the propriety of juror deliberations.

2. The Court should grant review because the opinion below contravenes this Court's decision in *Emery* and authorizes a jury instruction that dilutes the burden of proof.

"The jury's job is not to determine the truth of what happened; a jury therefore does not 'speak the truth' or 'declare the truth.'" *State v. Emery*, 174 Wn.2d 741, 760, 278 P.3d 653 (2012) (quoting *State v. Anderson*, 153 Wn. App. 417, 431, 220 P.3d 1273 (2009)). Rather, "a jury's job is to determine whether the State has proved the charged offenses beyond a reasonable doubt." *Id.*

Nonetheless, here the trial court instructed the jury that proof beyond a reasonable doubt means that, after considering the evidence, the jurors had "an abiding belief in the truth of the charge." CP 53 (Instruction # 2). By equating proof beyond a reasonable doubt with a "belief in the truth" of the charge, the court confused the critical role of the jury. The "belief in the truth" language encourages the jury to undertake an impermissible search for the truth and invites the error identified in *Emery*, 174 Wn.2d at 741. This Court did not comment on the propriety of this language in *State v. Bennett*, 161 Wn.2d 303, 165 P.3d 1241 (2007). But the language contravenes *Emery* and misstates and dilutes the burden of proof. This Court should grant review and hold that directing the jury to treat proof beyond a reasonable doubt as equivalent to

an "abiding belief in the truth of the charge," misstates the prosecution's burden, confuses the jury's role, and denies an accused person his right to a fair trial by jury. *See* U.S. amends. VI, XIV; Const. art. I, §§ 21, 22.

3. The Court should grant review of several violations of the right to a public trial, which were left uncorrected by the Court of Appeals.

The Washington Constitution mandates that criminal proceedings be open to the public without exception. Const. art. I, § 10; Const. art. I, § 22. Article I, section 10 requires that "Justice in all cases shall be administered openly." Article I, section 22 provides that "In criminal prosecutions, the accused shall have the right to . . . a speedy public trial." These provisions serve "complementary and interdependent functions in assuring the fairness of our judicial system." *State v. Bone-Club*, 128 Wn.2d 254, 259, 906 P.2d 325 (1995). The federal constitution also guarantees the accused the right to a public trial. U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . ."); *see* U.S. Const. amends. I, V.

While article I, section 10 clearly entitles the public and the press to openly administered justice, public access to the courts is further supported by article I, section 5, which establishes the freedom of every person to speak and publish on any topic. *Seattle Times Co. v. Ishikawa*,

97 Wn.2d 30, 36, 640 P.2d 716 (1982); *Federated Publ'ns, Inc. v. Kurtz*, 94 Wn.2d 51, 58-60, 615 P.2d 440 (1980).

The public trial guarantee ensures "that the public may see [the accused] is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions." *Bone-Club*, 128 Wn.2d at 259 (quoting *In re Oliver*, 333 U.S. 257, 270 n.25, 68 S. Ct. 499, 92 L. Ed. 682 (1948)). "Be it through members of the media, victims, the family or friends of a party, or passersby, the public can keep watch over the administration of justice when the courtroom is open." *State v. Wise*, 176 Wn.2d 1, 5, 288 P.3d 1113 (2012). "Openness thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system." *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 508, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984) (*Press-Enterprise I*).

The right to a public trial includes the right to have public access to jury selection. *E.g.*, *Presley v. Georgia*, 558 U.S. 209, 213, 130 S. Ct. 721, 175 L. Ed. 2d 675 (2010); *Sublett*, 176 Wn.2d at 71-72; *Wise*, 176 Wn.2d at 11-12; *State v. Lormor*, 172 Wn.2d 85, 93, 257 P.3d 624 (2011); *State v. Strode*, 167 Wn.2d 222, 226-27, 217 P.3d 310 (2009); *Orange*, 152 Wn.2d at 804. "The process of juror selection is itself a matter of

importance, not simply to the adversaries but to the criminal justice system." *Press-Enterprise I*, 464 U.S. at 505.

The trial court violated Mr. Pena's and the public's right to open jury selection by excusing three prospective jurors outside the presence of the public and after announcing a recess. First, the court dismissed two jurors by contacting them in the jury room rather than in open court. 10/23/12 RP 56-58. The next day, juror number 35 was also excused by contact with the jury room rather than in open court. 10/24/12 RP 28-29. Although this Court has repeatedly held that jury selection must be open to the public unless the *Bone-Club* requirements are complied with, the Court has not specifically addressed whether jurors may be informed they are excused outside the presence of the public. The Court should grant review of this important constitutional issue that is also of substantial public interest.

Mr. Pena also contends the lack of record on prospective juror number 2 violates his right to a public trial. Prospective juror number 2 appears at the start of jury selection, never appears in the record to have been excused or struck, yet is not sat on the final jury panel. *See* St. of Add'l Grounds at 9-10. If juror 2 was not excused or struck in open court, it must have been done off the record. *Id.* The Court of Appeals opinion holds "But there is a clear record showing how each party exercised their

challenges and which jurors constituted the final panel." App. A at 6. Mr. Pena agrees that, for every other panel member, the record is clear. But the record (the minutes, clerk's papers, and verbatim reports) does not reflect what transpired to prospective juror number 2. This Court should grant review and hold that the failure to create a record (written or oral) during jury selection violates an accused's and the public's right to open jury selection.

4. The Court should grant review to decide whether Mr. Pena was denied an impartial jury when prospective jurors indicated bias but were not further questioned, an issue raised in the statement of additional grounds but ignored by the Court of Appeals.

The Court of Appeals opinion does not address Mr. Pena's claim that he was denied an impartial jury. St. of Add'l Grounds at 10-18; *see* U.S. Const. amend. VI; Const. art. I, § 22; *State v. Gentry*, 125 Wn.2d 570, 615, 888 P.2d 1105 (1995). Jurors number 8 (seat 8) and 58 (seat 5) requested private questioning and never received it. 10/23/12 RP 13, 20. Mr. Pena asserts they sat on the jury without the court or the parties learning why they wanted private questioning and what bias they had. In addition, juror number 41 (seat 10), juror number 15 (seat 3), and the hard-of-hearing juror eventually seated as juror number 2 also presented grounds that could have denied Mr. Pena a fair trial. As presented in Mr.

Pena's statement of additional grounds, for example, juror 15 stated he would "probably sway towards the victim." St. of Add'l Grounds at 11.

Mr. Pena also alleges it was ineffective assistance on the part of his trial counsel to fail to thoroughly voir dire these jurors and to allow juror number two's hearing impediment to go unchecked, thereby denying Mr. Pena a fair trial by an impartial jury. St. of Add'l Grounds at 18-27.

This Court should grant review and decide the important constitutional question of whether Mr. Pena was denied a fair and impartial jury. This Court should also grant review because the Court of Appeals declined to address these issues, even upon Mr. Pena's motion to reconsider. *Compare* App. B. *with* Mtn to Reconsider, No. 70023-5-I (Jun. 27, 2014); *see* RAP 13.4(b)(4); RAP 10.10(c); *Cowles Pub. Co. v. Spokane Police Dept.*, 139 Wn.2d 472, 485, 987 P.2d 620 (1999) (Ireland, J. concurring) (noting public interest in ensuring elected officials comply with their official duties and in ensuring the fairness of governmental processes).

5. The Court should grant review to determine whether trial counsel was ineffective for failing to call alibi witnesses.

All criminal defendants have the constitutional right to the effective assistance of counsel. U.S. Const. amends. VI, XIV; Const. art. I, § 22; *State v. Grier*, 171 Wn.2d 17, 32, 246 P.3d 1260 (2011); *State v.*

A.N.J., 168 Wn.2d 91, 96-97, 225 P.3d 956 (2010); *Strickland v. Washington*, 466 U.S. 668, 684-85, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

This Court should grant review to determine whether Mr. Pena was denied the effective assistance of trial counsel where counsel failed to call alibi witnesses. The issue is particularly important and ripe for review because these witnesses were on the defense witness list, the witnesses were available to testify, at the first trial defense counsel elicited testimony that Mr. Pena was not at the scene of the crime on the alleged date, and counsel asserted the defense would include alibi. *See* St. of Add'l Grounds at 27-33 (presenting factual record and legal grounds, also presenting argument on cumulative attorney error).

6. **The Court should grant review to determine whether Mr. Pena was denied due process by trial counsel and the prosecutor's knowing use of false evidence or perjured testimony.**

An accused is guaranteed due process. Const. art. I, § 3; U.S. Const. amend. XIV. Mr. Pena argues defense counsel and the prosecutor committed misconduct by knowingly using false evidence or perjured testimony. Before the second trial, defense trial counsel and the prosecutor agreed the prosecutor "was going to instruct the alleged victim to answer the same way she did in the prior trial," that she did not

recognize anyone in the courtroom as the perpetrator, although she had since been told it was Mr. Pena. 10/23/12 9-10. Mr. Pena argues "the state and defense counsel put together a scheme to keep the jury from seeing that the alleged victim had been influenced, by the state, to know who Mr. Pena was." St. of Add'l Grounds at 36. Mr. Pena asserts their misconduct violated his right to due process. *Id.* at 33-36. This Court should grant review of this important constitutional issue.

7. The Court should grant review to determine whether a new trial is warranted where the trial court allowed the jury unfettered access to a video exhibit submitted by the State.

In his Statement of Additional Grounds, Mr. Pena argues the trial court improperly allowed the jury "unfettered access of the DVD" of the child interview. St. of Add'l Grounds at 36-45; *see* U.S. Const. amend. VI (right to confrontation and cross-examination); U.S. Const. amend. XIV; Const. art. I, § 22; CrR 6.15(f) (deliberating jury's access to evidence should not be unfairly prejudicial and should minimize likelihood of ascribing undue weight to particular evidence). He argues the decision was an abuse of discretion, elicited an unduly prejudicial emotional response, afforded the DVD undue weight, violated his right to confront witnesses, and violated due process and his right to a fair and impartial jury. St. of Add'l Grounds at 36-45. The appellate opinion does not

address any part of this argument. *See* App. A. This Court should grant review to address Mr. Pena's argument or remand to the Court of Appeals to resolve this issue in the first instance.

8. The accumulation of the above errors presents a significant constitutional issue that warrants review by this Court.

The accumulation of errors in the trial court "violated the due process guarantee of fundamental fairness." *Taylor v. Kentucky*, 436 U.S. 478, 488, 98 S. Ct. 1930, 56 L. Ed. 2d 468 (1978); *accord* U.S. Const. amend. XIV; Const. art. I, § 3; *Williams v. Taylor*, 529 U.S. 362, 396-98, 120 S. Ct 1479, 146 L. Ed. 2d 435 (2000); *State v. Coe*, 101 Wn.2d 772, 789, 684 P.2d 668 (1984). The above errors created a cumulative and enduring prejudice that was likely to have materially affected the jury's verdict, requiring reversal of the convictions. The Court should accept review of this independently significant constitutional issue.

E. CONCLUSION

On each of these bases, the Court should grant review of the Court of Appeals opinion affirming Mr. Pena's conviction. In the alternative, the Court should remand for the Court of Appeals to consider the issues raised in Mr. Pena's statement of additional grounds that remain unaddressed following his motion to reconsider.

DATED this 27th day of August, 2014.

Respectfully submitted,

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Washington Appellate Project
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APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	No. 70023-5-I
Respondent,	)	DIVISION ONE
v.	)	
ROBERT DAMIAN PENA,	)	UNPUBLISHED OPINION
Appellant.	)	FILED: June 9, 2014

BECKER, J — During trial, a juror requested a listening device and appeared to have difficulty hearing questions from the trial court when the jury returned its guilty verdict. The defendant contends the trial court erred by refusing to give him access to juror contact information and more time to investigate. Because the defendant's suspicion that the juror's hearing impairment prevented her from being a competent juror was based solely on speculation, the trial court did not abuse its discretion.

In 2012, Robert Pena attended a social function where he had contact with a child aged eight. The child's description of Pena's conduct led to the State charging him with child molestation in the first degree. His first trial resulted in a hung jury. At the second trial, the jury convicted him as charged.

At the second trial, during voir dire, a member of the venire panel asked the bailiff for a listening device and was given one. This person was ultimately

seated as juror two. After deliberations, the jury returned a guilty verdict. The trial court then polled the jury to ensure the verdict was unanimous. Upon the court's questioning of juror two, the following colloquy occurred:

> THE COURT: Juror 2, this was your individual verdict?
> JUROR NO. 2: I can't --
> THE COURT: Is this how you voted?
> JUROR NO. 2: (Nodded affirmatively.) I can't hear you.
> THE COURT: You can't hear me?
> JUROR NO. 2: What is she saying?
> THE COURT: Juror 2, can you hear me at all without the -- can you hear me now?
> JUROR NO. 2: Okay.
> THE COURT: Can you hear me now?
> JUROR NO. 2: Yeah.
> THE COURT: Okay. Was this your individual verdict, is this how you voted?
> JUROR NO. 2: Yes.
> THE COURT: Was it the verdict of the entire jury panel?
> (Off the record.)
> THE COURT: Was it how the entire jury panel voted?
> JUROR NO. 2: I can't hear.
> THE COURT: Did the entire jury panel vote to convict?
> JUROR NO. 2: Yes.
> THE COURT: Okay.

Based on this exchange, Pena moved for a new trial and requested that sentencing be delayed so he would have the opportunity to investigate the extent of the juror's hearing impairment during trial. The court continued the matter for more than two months. During this time, Pena's investigator contacted only one juror, who did not respond to requests to discuss the case. Pena requested an additional continuance. He also asked the trial court to disclose juror contact information or recall the jury for questioning. The court denied both requests. The court reasoned that the record showed only that the juror had trouble hearing at one specific moment and had asked for help when she needed it:

> The only thing that we knew or know now, is that the juror was having difficulty with the listening device when I was polling her. She did, obviously, have the ability to ask for help when she needed it, because that's why she had a listening device in the first place.

Pena appeals. He assigns error to the trial court's denial of his motion to delay sentencing and the refusal to disclose juror contact information. He contends he should have been allowed to conduct further investigation because if the juror was unable to hear the trial, his right to a unanimous jury was violated.

We review the denial of a motion for continuance for an abuse of discretion. State v. Iniguez, 167 Wn.2d 273, 280, 217 P.3d 768 (2009). The trial court's decision will not be disturbed on appeal absent a showing that the court abused its discretion and the defendant was prejudiced by that decision. State v. Barnes, 58 Wn. App. 465, 471, 794 P.2d 52 (1990), aff'd in part, rev'd in part, 117 Wn.2d 701, 818 P.2d 1088 (1991). Discretion is abused if it is exercised on untenable grounds or for untenable reasons. State v. Melton, 63 Wn. App. 63, 66, 817 P.2d 413 (1991), review denied, 118 Wn.2d 1016 (1992).

Pena cites State v. Turner, 186 Wis.2d 277, 521 N.W.2d 148 (1994). There, the Wisconsin Supreme Court examined a case where at least two jurors, and potentially as many as six, could not hear material testimony at trial. Turner, 186 Wis.2d at 281. In that case, the record disclosed 23 points where either the court or attorneys noted that the jury was having trouble hearing. Turner, 186 Wis.2d at 280. The trial court had also received information from its bailiff that two of the jurors used hearing aids and were functionally deaf. Turner, 186 Wis.2d at 281. Once the trial court questioned the jurors, it became clear that

one of the jurors, and perhaps two, had not heard much if any of the testimony. Turner, Wis.2d at 282. The court concluded that the defendant's state and federal constitutional right to an impartial jury and due process were violated. Turner, Wis.2d at 285.

Pena also relies on State v. Hayes, 270 Kan. 535, 17 P.3d 317 (2001). In Hayes, a juror who was hard of hearing requested the transcript of the defendant's testimony. Hayes, 270 Kan. at 537. The trial court questioned the juror, and he indicated that he was unable to hear any of the testimony. Hayes, 270 Kan. at 540. Despite this, the court refused to read back any of the transcribed testimony to the juror. Hayes, 270 Kan. at 540. The Kansas Supreme Court concluded that the trial court had an obligation to read back the transcript of the testimony or to respond in some meaningful way to the juror's request. Hayes, 270 Kan. at 540. Under these circumstances, the trial court abused its discretion when it refused to declare a mistrial. Hayes, 270 Kan. at 540.

Here, there are only two instances in the record where the juror's hearing was mentioned: during voir dire and during the polling of the jury. The juror was proactive enough to request a listening device at the beginning of the trial. She demonstrated a willingness to contact the bailiff when she had trouble hearing, and she similarly spoke up when she could not hear the trial judge polling the jury. Turner and Hayes both involved significantly more concrete evidence that jurors could not hear crucial testimony and so they do not persuade us that an error occurred in this case.

Pena contends that the trial court should have assisted with his investigation by disclosing jury contact information. However, individual juror information is presumptively private under GR 31(j):

> Individual juror information, other than name, is presumed to be private. After the conclusion of a jury trial, the attorney for a party, or party pro se, or member of the public, may petition the trial court for access to individual juror information under the control of court. Upon a showing of good cause, the court may permit the petitioner to have access to relevant information. The court may require that juror information not be disclosed to other persons.

Under this rule, even upon a showing of good cause, whether or not to disclose a juror's personal information is discretionary with the trial court. Because the trial court had already granted Pena a continuance to investigate the matter, and no additional information had been found, it was speculation as to whether or not the juror had actually had any trouble at all. As a result, we cannot conclude that the trial court abused its discretion by refusing to disclose juror information and grant a continuance.

Another issue Pena raises on appeal is the language in the burden of proof instruction. The trial court used the "abiding belief" language in 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 4.01 (3d ed. Supp. 2011) (WPIC). But Pena adopted this instruction at trial when he said through counsel that, "The set that the State proposed, I would adopt with the exception of the one that has to do with witnesses with special training and experience." Pena therefore waived any objection to the "abiding belief" language. Regardless, WPIC 4.01 is a proper instruction. State v. Lane, 56 Wn.

App. 286, 299, 301, 786 P.2d 277 (1989); State v. Bennett, 161 Wn.2d 303, 306, 165 P.3d 1241 (2007).

Pena filed a pro se statement of additional grounds alleging, among other things, violations of his rights to a public trial. His claim is based in part on the fact that some jurors were questioned about sensitive matters outside the presence of the other jurors. However, contrary to Pena's assertions, the record does not indicate that the courtroom was ever closed. While the other jurors were not present in the courtroom at the time, there is no indication in the record that the court ordered that the public be excluded from the courtroom. A violation of the right to a public trial may occur where the questioning is done in chambers or outside the courtroom or when the courtroom was closed. See, e.g., State v. Strode, 167 Wn.2d 222, 217 P.3d 310 (2009); State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995). Because the courtroom was never actually closed, we do not find a violation of his right to a public trial.

Pena expresses concern about the fact that juror 35 was excused after failing to return from a court break. The parties and the court agreed to excuse the juror, and they did so in open court. We are unaware of authority that would require review in this situation. The same is true with respect to the fact that two potential jurors were dismissed in open court with no objection after the court realized it had neglected to swear them in.

Pena suggests that there is no record showing that the person originally seated as juror two was excused. But there is a clear record showing how each party exercised their challenges and which jurors constituted the final panel. In

short, we see no basis in these circumstances for a claim that the right to a public trial was compromised.

Finally, Pena makes a claim for ineffective assistance of counsel on the grounds that his lawyer failed to present alibi witnesses. The decision of whether or not to call a witness is generally a matter of trial tactics and will not support a claim of ineffectiveness of counsel. State v. Byrd, 30 Wn. App. 794, 638 P.2d 601 (1981). The record here furnishes no reason to depart from that rule.

Affirmed.

Becker, J.

WE CONCUR:

Dwyer, J.

Cox, J.

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APPENDIX B

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

STATE OF WASHINGTON, Respondent, v. ROBERT DAMIAN PENA, Appellant.	)	No. 70023-5-I ORDER DENYING MOTION FOR RECONSIDERATION

Appellant, Robert Pena, has filed a motion for reconsideration of the opinion filed June 9, 2014, and the court has determined that said motion should be denied. Now, therefore, it is hereby

ORDERED that appellant's motion for reconsideration is denied.

DONE this 29th day of July, 2014.

FOR THE COURT:

Becker, J.

Judge

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DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 70023-5-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

☒ respondent Lindsey Grieve, DPA
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Date: August 28, 2014