

NO. 70023-5-I

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

STATE OF WASHINGTON,

Respondent,

v.

ROBERT PENA,

Appellant.

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

APPELLANT'S REPLY BRIEF

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A. ARGUMENT IN REPLY

This Court should vacate the judgment and remand to allow Robert Pena to continue to investigate juror two's inability to hear and to require the trial court to provide access to juror contact information.

As set forth in Mr. Pena's opening brief, the trial court abused its discretion in failing to grant a continuance to allow Mr. Pena to further investigate juror number two's ability to hear during trial and deliberations. Juror two requested a listening device, only after proceedings commenced, and yet could not hear the court's questions posed to her at the end of trial. 10/23/12 RP 4; 10/30/12 RP 2-4. The record shows substantial likelihood that, in between these events, juror two could not hear trial evidence or the court's instructions. Even more probably, because it immediately preceded her known inability to hear in court, juror two may not have been able to participate in deliberations. The trial court abused its discretion by denying Mr. Pena the opportunity to investigate.

In response, the State repeatedly contends that juror two's inability to hear was "isolated and momentary." *E.g.*, Resp. Br. at 5, 9-10. But the record does not show that characterization to be true. In fact, the opposite is suggested. 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, as the State's response brief would require. In fact, it appears juror two also 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.

The State's response contains a substantial internal contradiction. The State argues, in part, that the record is undeveloped on juror two's inability to hear. *E.g.*, Resp. Br. at 10. On the other hand, the State makes its own inferences from the record, without noting the assumptions it is making. For example, the State argues juror two "informed the court immediately that she was unable to hear"

at polling. Resp. Br. at 11. But the record does not show when juror two ceased being able to hear the proceedings. *See* 10/30/12 RP 3-4. Mr. Pena sought to continue sentencing so he could discover whether the juror could participate in deliberations, hear the evidence and listen to the judge's instructions. Contrary to the State's argument, it cannot be said juror two "immediately" informed the court the moment she could no longer hear. In fact, the clear implication is to the contrary, because juror two did not mention an inability to hear until she was directly questioned by the court. 10/30/12 RP 1-4.

Similarly, the State's assertion that juror two "took her listening device off" during polling before answering the court's questions is based off the prosecutor's post-verdict brief, not the court reporter's transcript. *See* Resp. Br. at 11 (citing CP 254 (State's response to defense motion for a new trial after conviction)). The verbatim report does not reflect what occurred that eventually allowed juror two to answer the court's questions. 10/30/12 RP 3-4.

Finally, this Court should hold not only that the trial court erred in denying a continuance to allow further investigation of juror two but also that the trial court should have allowed access to juror information under General Rule 31(j). Mr. Pena investigated jurors on his own

during the first continuance. Without the court's disclosure of juror information, Mr. Pena had limited success. His lack of success absent the disclosure and the evidence that juror two's inability to hear may have denied him a fair trial by twelve jurors constitute good cause for the disclosure. The trial court abused its discretion in failing to grant Mr. Pena's request for disclosure under GR 31(j).

B. CONCLUSION

As set forth herein and in the opening brief, this Court should reverse Mr. Pena's conviction because the trial court improperly instructed the jury as to the burden of proof. Alternatively, this Court should vacate the sentence and remand for further proceedings because the trial court abused its discretion by denying a continuance and denying access to juror contact information so that Mr. Pena could determine the extent to which juror number two could not hear the proceedings and deliberations.

DATED this 27th day of January, 2014.

Respectfully submitted,



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DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 28TH DAY OF JANUARY, 2014, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

<input checked="" type="checkbox"/> LINDSEY GRIEVE, DPA KING COUNTY PROSECUTOR'S OFFICE APPELLATE UNIT 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) () ()	U.S. MAIL HAND DELIVERY _____
<input checked="" type="checkbox"/> ROBERT PENA 865073 COYOTE RIDGE CORRECTIONS CENTER PO BOX 769 CONNELL, WA 99326-0769	(X) () ()	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 28TH DAY OF JANUARY, 2014.

X _____ *fnv*

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