

No. 65176-5-I

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

STATE OF WASHINGTON,

Respondent,

v.

JAVON PITCHFORD,

Appellant.

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

REPLY BRIEF OF APPELLANT

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COURT OF APPEALS
DIVISION ONE
SEATTLE, WASHINGTON
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A. ARGUMENT IN REPLY

1. THE TRIAL COURT VIOLATED MR. PITCHFORD'S RIGHT TO DUE PROCESS AND CrR 6.15 WHEN IT INSTRUCTED THE JURY IT WAS TOO EARLY TO BE DEADLOCKED

After the jury indicated it was unable to reach a unanimous verdict as to guilt or innocence, the trial court told the jury it had not been deliberating long enough to be deadlocked and re-read a jury instruction that emphasized the jury's duty to deliberate in order to reach a unanimous verdict. As a result, Mr. Pitchford's constitutional right to due process and a fair trial was violated, and his conviction must be reversed.

When a jury indicates it is unable to reach a unanimous verdict, due process requires that the trial court judge not bring any coercive pressure to bear on the jury deliberations. State v. Boogaard, 90 Wn.2d 733, 736-37, 585 P.2d 789 (1978). CrR 6.15(f)(2) was adopted to curtail judicial coercion of a deadlocked jury and interference in the jury's deliberative process. State v. Watkins, 99 Wn.2d 166, 175, 660 P.2d 1117 (1983); Boogaard, 90 Wn.2d at 736. The rule prevents the trial court from instructing a potentially deadlocked jury in a manner that suggests (1) the need for agreement, (2) the consequences of not agreeing on a

unanimous verdict, or (3) the length of time the jury should deliberate. Id.; CrR 6.15(f)(2); State v. Despenza, 38 Wn.App. 645, 651, 689 P.2d 87, rev. denied, 103 Wn.2d 1005 (1984).

WPIC 4.70 provides a guide to the trial court judge navigating a sensitive discussion with a deliberating jury which complies with CrR 6.15(f).¹ Washington Supreme Court Committee on Jury Instructions, 11 Wash. Pract. Pattern Jury Instructions Criminal, WPIC 4.70, at 142-46 (3rd ed. 2008) (WPIC). The comments to the pattern instruction mirror the language of CrR 6.15(f) and make it clear that “it is not proper to give any further instruction to an apparently deadlocked jury as to the need for agreement, or the consequences of no agreement, or to suggest the length of time the jury will be required to deliberate.” Id. at 143.

The State acknowledges that the trial court disregarded CrR 6.15(f) and the procedure for questioning a potentially deadlocked jury found at WPIC 4.70. Brief of Respondent at 10. The State

¹ The State argues the trial court was in a sensitive position because the defendant could argue his double jeopardy rights were violated if the court erroneously discharged the jury. Brief of Respondent at 8 (citing State v. Jones, 97 Wn.2d 159, 163, 641 P.2d 708 (1982)). Mr. Pitchford, however, requested the court declare a mistrial and discharge the jury, 4RP 68-69, and he therefore could not claim the constitutional prohibition against double jeopardy rights was violated. United States v. Dinitz, 424 U.S. 600, 607-09, 96 S.Ct. 1075, 45 L.Ed.2d 267 (1976); compare Jones, 97 Wn.2d at 161 (court sua sponte declared mistrial without giving counsel the opportunity to agree or object). Moreover, the court may discharge a jury that is “hopelessly deadlocked” without creating a double jeopardy violation. Jones, 97 Wn.2d at 164.

nonetheless argues that the trial court's discussion with the jurors was noncoercive. In making this argument, the State ignores the trial court's insinuation that the jury had not reached the minimum period of time it was required to deliberate. 4RP 69-70. The court told the jury that it was not uncommon for jurors to be split "at this stage in the proceedings" and that "in my view it's too early to be talking about a deadline." 4RP 70.

The State argues re-reading Instruction 2 (WPIC 1.04) was not coercive because the instruction told the jurors not to surrender their beliefs for the sake of reaching a unanimous verdict. Brief of Respondent at 12. The instruction, however, highlighted to the jurors their "duty to discuss the case with one another and to deliberate in an effort to reach a unanimous verdict." CP 23; 4RP 70. The instruction also encouraged jurors to "reexamine your own views and to change your opinions based upon further review of the evidence and these instructions." CP 23; 4RP 70-71.

The State's argument suggests the trial court's procedure was not coercive because the trial court did not ask the jury foreman or other jurors any questions, as the court may not ask a jury to identify the numerical split of their votes. Brief of Respondent at 10-11; Boogaard, 90 Wn.2d at 738-40. The jury,

however, had already revealed the vote split as 9 guilty and 3 not guilty and was well aware that the judge knew the vote breakdown. CP 16. In that circumstance, the court's re-reading of Instruction 2 was particularly coercive.

In Iverson v. Pacific American Fisheries, 73 Wn.2d 973, 442 P.2d 243 (1968), the jury foreman sent a note outlining the voting history and asking what to do in light of the jurors' inability to reach a verdict. The court responded by reading WPI 1.05, which is similar to WPIC 1.04, the instruction read by the trial court in Mr. Pitchford's case.² Iverson, 73 Wn.2d at 974, n.2; CP 23; 4RP 70-71; WPIC 1.04. The Iverson Court found that re-reading WPI 1.05 had a coercive effect because the jurors knew the trial court had been informed they stood 9 to 3 in favor of the defendant and "represents almost conclusive evidence that two jurors were pressured into a change of position." Id. at 975. In light of the court's reading of the pattern instruction and the jury's subsequent quick return of a verdict, the court granted a new trial. Id. The court explained:

² WPI 1.05 is set forth in the Iverson opinion. Iverson, 73 Wn.2d at 974 n.2. Both WPI 1.05 and WPIC 1.04 instruct the jurors to discuss the case with each other in order to arrive at a verdict, with the proviso that no individual juror is required to surrender her honest convictions. WPIC 104.

This, however, is not a criticism of the instruction, but recognition of its probable coercive effect when the jurors knew that the trial court had been advised how they stood on the merits of the case. Such knowledge by the jurors is the salient and distinguishing characteristic of this case.

Id. at 975-76.

Mr. Pitchford also does not attack Instruction 2; it was the court's rereading of the instruction to a jury the court knew was deadlocked 9 to 3 to convict that was prejudicial, as the instruction emphasizes the importance that the jurors reach an agreement. The instruction was read to a jury that (1) was told it had not been deliberating long enough to be deadlocked and (2) knew that the judge was aware of the vote split. In this circumstance, the rereading of Instruction 2 and judge's statement that the jury had not been deliberating long enough was probably coercive. Iverson, 73 Wn.2d at 975-75. Mr. Pitchford's conviction must be reversed. Boogaard, 90 Wn.2d at 740.

2. THE FIREARM ENHANCEMENT MUST BE VACATED BECAUSE THE JURY WAS INCORRECTLY INSTRUCTED THAT IT WAS REQUIRED TO UNANIMOUSLY ANSWER THE SPECIAL VERDICT FORM AND REFUSED TO ACCEPT THE JURY'S SPLIT VOTE ON THE SPECIAL VERDICT FORM

After the court ordered the jury to continue deliberating as discussed in Section 1, the jury formulated a new question that revealed it had probably reached a unanimous verdict on the underlying crime of rape but not as to the special verdict form. CP 47; 4RP 72. The written jury instructions had incorrectly informed the jury that it had to be unanimous to give either an affirmative or a negative answer to special verdict form. CP 38. In response to the jury's question, the court ordered it to continue deliberating in order to reach a unanimous verdict. 4RP 75-76. The jury announced its decision approximately 45 minutes later, answering the special verdict form in the affirmative. CP 45; SuppCP 87; 4RP 76.

Mr. Pitchford's case is thus remarkably similar to State v. Goldberg, 149 Wn.2d 888, 891-93, 72 P.3d 1083 (2003), where the court ruled the trial court should have accepted the jury's "no" answer on the special verdict form even though it did not appear to be unanimously decided, as unanimity is not required to return a negative answer on an aggravating factor.

The parties frame the issue by focusing on cases that discuss under what circumstances a trial court improperly coerces a jury toward a unanimous verdict when one is required. The issue here, however, is somewhat different. In Goldberg's case, the trial court evidently concluded the jury was deadlocked on the special verdict instruction and ordered continued deliberations toward unanimity. We must decide whether such unanimity is required and hold it is not.

Id. at 983. The Goldberg Court therefore vacated the verdict on the aggravating factor, leaving the defendant with a conviction for first degree murder rather than aggravated first degree murder. Id. at 895. Just as in Goldberg, the trial court should not have ordered Mr. Pitchford's jury to continued deliberating in order to reach a unanimous answer to the special verdict form.

The State responds that Mr. Pitchford may not raise this issue for the first time on appeal. Brief of Respondent at 15-16. Two divisions of this Court have reached different conclusions as to whether improperly instructing the jury that it had to be unanimous to answer a special verdict form in the negative constitutes a manifest constitutional error, and the Supreme Court accepted review of both on August 9, 2011. State v. Ryan, 160 Wn.App. 944, 252 P.3d 895, rev. granted, ___ Wn.2d ___ (No. 85947-7) (2011); State v. Nunez, 160 Wn.App. 150, 248 P.3d 103, rev.

granted, ___ Wn.2d ___ (No. 85789-0) (2011).³ The State thus argues this Court should follow the Division Three opinion, Nunez.

Mr. Pitchford's case, however, presents an even stronger constitutional error than that found in Ryan or Nunez, as the jury in his case announced it was unable to reach a unanimous decision on the special verdict form for the firearm enhancement. If the jury had been properly instructed and the court had not ordered the jury to continue deliberating until a unanimous decision was reached, the jury would have answered "no" on the special verdict form and Mr. Pitchford's sentence would be 60 months shorter.

Judicial interference with the jury's verdict is an issue of constitutional magnitude that may be raised for the first time on appeal. State v. Ford, 171 Wn.2d 185, 188-89, 250 P.3d 97 (2011) (C. Johnson, J., lead opinion), 194-95 (Stevens, J., dissenting). Here, the jury should have been instructed that it did not have to be unanimous to answer the special verdict form in the negative. By ordering the jury to continue deliberating instead of accepting its verdict, the trial court improperly interfered in their deliberations. Mr. Pitchford may raise this issue, as it is a manifest error affecting

³ Other Division Three cases follow the Nunez decision. State v. Rodriguez, ___ Wn.App. ___, 2011 WL 3672299 (No. 26839-9-III, 8/23/11); State v. Bea, ___ Wn.App. ___, 254 P.3d 948 (2011); State v. Turnipseed, 162 Wn.App. 60, 255 P.3d 843 (2011).

his right to a jury verdict uninfluenced by coercive pressure by the court. U.S. Const. amends. VI, XIV; Const. art. I §§ 3, 21, 22; Boogaard, 90 Wn.2d at 736-37.

In addition, Mr. Pitchford may address his constitutional right to due process for the first time on appeal. RAP 2.5(a) permits this Court to address constitutional issues because those issues may result in a serious injustice to a litigant. RAP 2.5(a); State v. Scott, 110 Wn.2d 682, 686, 757 P.2d 492 (1988). Appellate courts have thus addressed due process and other constitutional claims for the first time on appeal. In re Detention of Strand, 167 Wn.2d 180, 204, 217 P.3d 1159 (2009) (unauthorized mental health examination); Conner v. Universal Utilities, 105 Wn.2d 168, 171, 712 P.2d 849 (1986) (procedural due process); In re J.R., 156 Wn.App. 9, 18, 230 P.3d 1087 (2010) (substantive due process challenge to RCW 13.34.315), rev. denied, 170 Wn.2d 1006 (2010); Parmelee v. O'Neel, 145 Wn.App. 223, 232-33, 186 P.3d 1094 (2008) (constitutionality of libel statute), reversed in part on other grounds, 168 Wn.2d 515 (2010); State v. Harris, 102 Wn.App. 275, 279, 6 P.3d 1218 (2000) (violation of plea agreement), aff'd, State v. Sanchez, 146 Wn.2d 339 (2002). As this Court ruled, a jury instruction that incorrectly informed the jury a negative decision on

special verdict forms addressing aggravating circumstances must be unanimous is a constitutional issue that may be raised for the first time on appeal. Ryan, 160 Wn.2d at 897.

3. MR. PITCHFORD DID NOT RECEIVE THE EFFECTIVE ASSISTANCE OF COUNSEL GUARANTEED BY THE FEDERAL AND STATE CONSTITUTIONS

The accused has the constitutional right to effective assistance of counsel. U.S. Const. amends. VI, XIV; Const. art. I, § 22; Kimmelman v. Morrison, 477 U.S. 365, 377, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986); State v. A.N.J., 168 Wn.2d 91, 98, 225 P.3d 956 (2010). Mr. Pitchford's defense to first degree rape was that he and Ms. Grayson had consensual intercourse, but defense counsel did not propose that the jury be instructed on the consent defense. In response to Mr. Pitchford's ineffective assistance of counsel argument, the State argues that defense counsel's decision not to offer a consent instruction was a valid tactical decision. Brief of Respondent at 18-23.

The well-known standard of review of an ineffective assistance of counsel claim requires this Court to determine (1) whether the attorney's performance fell below objective standards of reasonable representation, and, if so, (2) whether counsel's

deficient performance prejudiced the defendant. Strickland v. Washington, 466 U.S. 688, 687-88, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); A.N.J., 168 Wn.2d at 226. The reviewing court will not find deficient performance if defense counsel's conduct appears to be "legitimate trial strategy or tactics." State v. Grier, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011) (quoting State v. Kylo, 169 Wn.2d 856, 863, 215 P.2d 177 (2009)).

Not all tactical decisions, however, are immune from attack. Grier, 171 Wn.2d at 33-34; State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004) (no tactical reason not to bring meritorious suppression motion); State v. Aho, 137 Wn.2d 736, 745-46, 975 P.2d 512 (1999) (no tactical reason to propose jury instructions that could lead to conviction under a statute not in effect during charging period). "The relevant question is not whether counsel's choices were strategic, but whether they were reasonable." Roe v. Flores-Ortega, 528 U.S. 470, 481, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000).

The State argues that Mr. Pitchford's lawyer made a tactical decision not to raise a consent defense because the defendant has the burden of proving consent. Brief of Respondent at 21. The burden, however, is only by a preponderance of the evidence.

State v. Gregory, 158 Wn.2d 759, 801-04, 147 P.3d 1201 (2006) (no due process violation in requiring defendant to prove consent by preponderance of evidence). Mr. Pitchford met the burden by testifying that he had sexual intercourse with Ms. Graydon in exchange for drugs. 3RP 129-34; 4RP 14-15. His testimony was confirmed by Mr. Murray's testimony that he saw Ms. Graydon and Mr. Pitchford together that night, and they both appeared normal. 3RP 90-93, 95, 103-04, 106-07. Additionally, the forensic evidence was consistent with Mr. Pitchford's testimony that they had oral intercourse in contrast with Ms. Graydon's testimony that she was forced to submit to vaginal and anal intercourse. 2RP 47, 49-53, 143, 148.

Mr. Pitchford clearly raised a consent defense. Counsel mentioned that his client and Ms. Grayson had consensual sex or sex in exchange for drugs several times during his closing argument. 4RP 56, 58, 59, 61. The State acknowledges that Mr. Pitchford raised a consent defense, but nonetheless claims Mr. Pitchford's attorney made tactical decision to challenge the State's proof of forcible compulsion instead of requesting consent instruction. But defense counsel never argued that the State had not proven forcible compulsion beyond a reasonable doubt, even

though he addressed the State's burden of proof in his closing argument. 4RP 55-61. In fact, the term "forcible compulsion" is not mentioned anywhere in the audible portions of his closing argument. Id. Defense counsel did not intelligently attack the State's proof of forcible compulsion, and thus defense counsel could not have made a tactical decision to forgo a consent instruction in favor of attacking the State's proof of that element of the crime.

In State v. Powell, 150 Wn.App. 139, 155, 206 P.3d 703 (2009), this Court found there was no tactical reason for trial counsel to fail to propose a statutory defense to second degree rape where (1) the evidence supported the instruction, (2) defense counsel argued the statutory defense, and (3) the defense was consistent with the defense theory of the case. Accord In re Personal Restraint of Hubert, 138 Wn.App. 924, 926, 158 P.3d 1282 (2007); State v. Kruger, 116 Wn.App. 685, 693-94, 67 P.3d 1147 (deficient performance to fail to request a voluntary intoxication instruction where defense counsel challenged intent element of third degree assault), rev. denied, 150 Wn.2d 1024 (2003). Mr. Pitchford's case meets the three criteria, and his

counsel's failure to propose a consent instruction was deficient, not tactical.

Finally, the State suggests that defense counsel possibly did not request a consent instruction because it "could have confused the jury as to whether the State still had to prove forcible compulsion." Brief of Respondent at 22. While forcible compulsion and lack of consent may "overlap," instructions may still properly inform the jury as to the State's burden of proof. State v. Camera, 113 Wn.2d 631, 640, 781 P.2d 483 (1989). Well-crafted jury instructions would not confuse the jury, and the possibility of juror confusion does not excuse defense counsel from submitting instructions that fit the defense he raised and argued in Mr. Pitchford's case.

Defense counsel's failure to propose instructions on consent was not a tactical decision, but deficient performance. The error prejudiced Mr. Pitchford, because the jury was left with no way to consider his consent defense. Mr. Pitchford's conviction must be reversed and remanded for a new trial. Powell, 150 Wn.App. at 157-58.

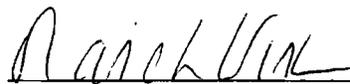
B. CONCLUSION

Mr. Pitchford's conviction must be reversed and remanded for a new trial because (1) the trial court coerced the deadlocked jury by requiring them to continue deliberation because it was "too early" to be deadlocked and (2) his defense counsel did not propose an instruction on his consent defense.

In the alternative, the firearm enhancement must be vacated because the jury was incorrectly instructed that it had to be unanimous to answer "no" on the special verdict form and the trial court required the jury to continue deliberating until it reached a unanimous answer rather than accepting their split vote as a "no" answer.

DATED this 29th day of August 2011.

Respectfully submitted,



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DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 65176-5-I
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)	
JAVON PITCHFORD,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 29TH DAY OF AUGUST, 2011, 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:

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