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Supreme Court No. 83674-5
(Court of Appeals No. 37089-1-II)

83617-5

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

TYRONE D. FORD,

Respondent.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLARK COUNTY
The Honorable John Wulle

ANSWER TO MOTION FOR DISCRETIONARY REVIEW

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TABLE OF CONTENTS

	Page
A. SUMMARY OF ANSWER.....	3
B. COUNTERSTATEMENT OF ISSUE PRESENTED FOR REVIEW.....	3
C. STATEMENT OF THE CASE.....	3
D. ARGUMENT.....	7
THIS COURT SHOULD DENY REVIEW OF THE COURT OF APPEALS' DECISION BECAUSE THE DECISION IS PERFECTLY CONSISTENT WITH EXISTING LAW.	7
E. CONCLUSION.....	10

TABLE OF AUTHORITIES

Page

Cases

State v. Boogaard, 90 Wn.2d 733, 585 P.2d 789 (1978) 1, 4, 6, 7

State v. Borgeois, 133 Wn.2d 389, 945 P.2d 1120 (1977)..... 5, 6

State v. Ford, 151 Wn. App. 530, 213 P.3d 54 (2009)..... 1, 3, 4, 5, 6, 7

Other Authorities

CrR 6.15(f)(2) 1, 4, 6, 7

RAP 13.4(b) 5

A. SUMMARY OF ANSWER

The Court of Appeals' opinion is perfectly consistent with existing law. The State, in its motion for discretionary review, does not argue otherwise. Accordingly, the State's motion for discretionary review should be denied.

B. COUNTERSTATEMENT OF ISSUE PRESENTED FOR REVIEW

The State seeks review of State v. Ford, 151 Wn. App. 530, 213 P.3d 54 (2009), attached as Appendix A. Should this court accept review of the Court of Appeals' opinion when the State does not challenge State v. Boogaard,¹ and CrR 6.15(f)(2),² the existing law relied upon by the Court of Appeals in holding that the trial court improperly coerced the jury into reaching a verdict?

C. STATEMENT OF THE CASE

At 7:48 p.m., on August 28, the second day of a two-day trial, a Clark County jury retired to deliberate on Tyrone Ford's fate. CP 73-79. Mr. Ford faced two charges: rape of a child in the second degree (Count One); and rape of a child in the third degree (Count Two). CP 19. The different degrees reflected the age of L.A.K. L.A.K. was 13 years-old

¹ 90 Wn.2d 733, 585 P.2d 789 (1978)

² CrR 6.15(f)(2) After jury deliberations have begun, the court shall not instruct the jury in such a way as to suggest the need for agreement, the consequences of no agreement, or the length of time a jury will be required to deliberate.

during the first encounter and 14 years-old during the second encounter. CP 19; III-A RP at 116-19, 129, 136-37, 140.

The jury instructions told the jury that it could return a verdict on a single count if it was not unanimous on the other count. CP 34 (jury instruction 12). Each juror was told that he or she had to decide the case for him or herself. CP 24 (jury instruction 2). Only if the jury was unanimous, could it return a verdict of guilty or not guilty. CP 29, 31, 35 (jury instructions 7, 9, and 13). Moreover, the jury did not need to be unanimous on the two acts alleged as specified by jury instruction 12.

Instruction 12

There are allegations that the defendant committed acts of Rape of a Child in the Second Degree and Rape of a Child in the Third Degree on separate occasions. To convict the defendant, one or more particular acts must be proved beyond a reasonable doubt and you must unanimously agree as to which act or acts have been proved beyond a reasonable doubt. You need not unanimously agree that all the acts have been proved beyond a reasonable doubt.

CP 34.

After lengthy deliberations, and in keeping with the court's written jury instructions, the jury returned with a single verdict on August 29 at 2:01 p.m. VI RP at 433. The court asked the presiding juror if the jury had reached a unanimous verdict. The presiding juror responded, "Yes." IV RP at 390. After reviewing the verdict forms, the court announced that

the jury unanimously found Mr. Ford guilty on Court Two. IV RP at 390; CP 37. The court called a sidebar with counsel. IV RP at 390. The sidebar was not recorded. IV RP at 390. Immediately thereafter, contrary to the court's written instructions (as noted above), the trial court stated the following:

THE COURT: I'm sending the jury back to the jury room. Verdict form No. 1 is completely blank. It must be filled in. Please go with Dorothy.

IV RP at 390.

While the jury was out, the trial judge, the judge who had listened to the evidence, saw the jurors respond to the evidence, and knew the jury had engaged in a lengthy deliberation, audibly speculated about the blank verdict form on Count One:

THE COURT: I'm of the opinion that one of two things has happened. They have forgotten to fill in the form. Or in the alternative, they have reached a decision that either means they were deadlocked on Count One or that they reached a not guilty finding on Count One.

IV RP at 391.

Four to five minutes later, the jury returned with a written guilty verdict on Count One. VI RP at 434; CP 36. The presiding juror told the court that it was a unanimous verdict. IV RP at 391-92. The record indicates that the jury was polled. IV RP 392. The record does not reflect

what the judge asked or how the jurors responded to the polling. IV RP at 392.

There were no post-trial motions with respect to the verdict or how the verdict was reached. On appeal to the Court of Appeals, Mr. Ford argued that the trial court's oral instruction to the jury requiring a unanimous verdict was improper, and that the trial court coerced the verdict on Count One in violation of State v. Boogaard and CrR 6.15(f)(2) thereby depriving Mr. Ford a fair trial. Opening Brief of Appellant, pages 13-21.

The Court of Appeals thoroughly reviewed the record and the case law cited by both Mr. Ford and the State in its Brief of Respondent. Relying on State v. Boogaard, an uncontroversial case, and CrR 6.15(f)(2), Judges Bridgewater and Armstrong held that the trial court had improperly and prejudicially interfered with the jury's deliberation and reversed Count One giving the State the opportunity to retry Mr. Ford. See Appendix A. Judge Hunt authored a dissenting opinion disagreeing with the majority's conclusion that the error can be reviewed for the first time on appeal. Mr. Ford remains convicted on Count Two.

D. ARGUMENT

THIS COURT SHOULD DENY REVIEW OF THE COURT OF APPEALS' DECISION BECAUSE THE DECISION IS PERFECTLY CONSISTENT WITH EXISTING LAW.

The State asserts that the Court to Appeals' decision warrants review under all four RAP 13.4(b) criteria. But none of the criteria are actually met. The State's argument is without merit and its motion for discretionary review should be denied.

Before a Court of Appeals' opinion can be accepted for review, it must satisfy one or more of the limited criteria set forth in RAP 13.4(b):

(b) Considerations Governing Acceptance of Review. A petition for review will be accepted by the Supreme Court only: (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

Under the first and second prong, the State does not argue that Mr. Ford's opinion conflicts with other Supreme Court or Court of Appeals' opinions. Instead, the State paints with a broad brush citing generally to Borgeois for the general proposition that trial irregularities are subject to review for prejudicial error. State v. Borgeois, 133 Wn.2d 389, 409, 945 P.2d 1120 (1977). None of the cases cited in the State's motion are on

point for the very specific irregularities of jury interference, jury coercion, and instructional error all at the hands of the trial judge.

The case that the Court of Appeals relied on in reaching its decision, Boogaard, is, unlike Borgeois, 133 Wn.2d 389, very specific to the jury coercion error in Mr. Ford's case. Boogaard, 90 Wn.2d 733. In Boogaard, this Court observed:

We have heretofore recognized that the right of jury trial embodies the right to have each juror reach his verdict uninfluenced by factors outside the evidence, the court's proper instructions, and the arguments of counsel; and that an instruction which suggests that a juror who disagrees with the majority should abandon his conscientiously held opinion for the sake of reaching a verdict invades that right, however subtly the suggestion may be expressed.

Boogaard at 736. The State does not challenge the rationale of Boogaard in its motion. In fact, the State does not mention Boogaard at all even though the Court of Appeals holds that the rationale in Boogaard controls its opinion in Mr. Ford's case. Because the State does not challenge Boogaard, and Boogaard remains good law, the Court of Appeals' opinion in Mr. Ford's case is perfectly consistent with existing law.

Also curiously absent from the State's motion, is any reference to CrR 6.15(f)(2). The rule holds 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 trial court violated the rule by orally instructing the

jury that *it must* fill in the blank verdict form on Count One. The only way the jury could do that was to unanimously agree that Mr. Ford was guilty or not guilty. The Boogaard opinion relied in significant part on the language from CrR 6.15(f)(2). (“The purpose of this rule is to prevent judicial interference in the deliberative process. We have previously held that the jury should not be pressured by the judge into making a decision.” (citations omitted)) .” Boogaard, 90 Wn.2d at 736. The State, in its motion, ignores CrR 6.15(f)(2).

As for the argument under criteria (3), that there is a significant question of law under the Constitution of the State of Washington or of the United States, the State never makes any such argument. The State never cites to either the state or federal constitution in its motion.

Finally, under criteria (4), that the petition involves an issue of substantial public interest that should be determined by the Supreme Court, again the State does not tell us what that issue is and how the Court of Appeals opinion fits into that criteria.

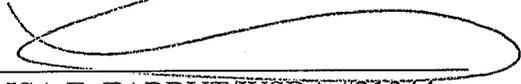
Significantly, the State offers no policy reasons why the opinion should not stand. There is no reason to believe that Washington judges will somehow be misled by this decision. Hopefully, the facts of this case are of an isolated nature and the opinion will serve, if anything, as a reminder to exercise extreme care when a jury is deliberating so as not to

suggest the need for agreement. In a practical sense, the decision stands for what seems are basic judicial principles: do not give a deliberating jury an oral instruction that contradicts the written instructions, and do not tell the jury something that is untrue, namely that in order to finish its job, the jury must unanimously find a defendant guilty or not guilty on all substantive charges.

E. CONCLUSION

The State's motion for discretionary review should be denied.

Respectfully submitted this 15th day of October 2009.



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Division Two

A

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CASE #: 37089-1-II
State of Washington, Respondent v Tyrone Dentyroll Ford, Appellant

Counsel:

An opinion was filed by the court today in the above case. A copy of the opinion is enclosed.

Very truly yours,

David C. Ponzoha
Court Clerk

DCP:cjb
Enclosure

cc: Judge John Wulle
Indeterminate Sentence Review Board

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STATE OF WASHINGTON

BY _____

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

TYRONE DENTYROLL FORD,

Appellant.

No. 37089-1-II

PUBLISHED OPINION

BRIDGEWATER, P.J. — Tyrone Dentyroll Ford appeals his convictions for second and third degree child rape. We reverse and remand Ford's conviction on count I for second degree rape of a child and affirm Ford's conviction on count II for third degree rape of a child. Because we reverse count I, we vacate the lifetime no-contact order (NCO). But because we reverse on count I, we do not reach Ford's arguments on ineffective assistance of counsel and remaining community custody conditions.

FACTS

During August and September 2006, Tyrone Ford had sex on two occasions with a minor, L.K.¹ The State charged Ford with second degree child rape (count I) and third degree child rape (count II). The different degrees reflected that L.K. was 13 years old during the first incident and 14 years old during the second incident.

¹ This court refers to victims by their initials.

During voir dire, the State asked the prospective jurors if anyone was concerned about his or her ability to be fair and impartial. Several jurors raised their hands, including Wiggs and Siciliana. Siciliana stated that as a prior victim of sexual abuse, she might be “slightly biased.” RP (Aug. 27, 2007) at 39. Similarly, Wiggs stated that her prior experience as a victim of sexual abuse would affect her ability to be fair and impartial. Following further statements regarding their feelings about abuse allegations, the trial court struck both Wiggs and Siciliana for cause.

After L.K. testified, the State sought to amend the information to conform to the proof because L.K. provided more exact information regarding the incident dates during her trial testimony. Specifically, the State sought to change the first incident date from between September 1, 2006 and September 15, 2006 to on or about August 8. The State also proposed changing the second incident date from September 16 to September 17. Over objection, the trial court granted the State’s motion to file the amended information. The trial court held that filing the amended information would not change the substantive facts of the case.

After the parties rested, the jury retired to deliberate at 7:47 P.M. The next day, the jury returned its verdict at 2:01 P.M. The trial court asked the presiding juror if the jury had reached a unanimous verdict, and the presiding juror responded, “Yes.” IV RP at 389-90. The trial court began to read the verdict form, stating that the jury found Ford guilty of third degree child rape on count II. Then the trial court paused to review the documents and called for a sidebar.

A bench conference occurred off the record.² The trial court stated, “I’m sending the jury back to the jury room. Verdict form No. 1 is completely blank. It must be filled in,” IV RP at 390, adding, “The defendant is remanded into custody at this time.” IV RP at 390. Next, the

² The respondent’s brief also contains this portion of the trial record.

37089-1-II

trial court stated, "I believe we have just a momentary delay[.] I think they just forgot to fill out the form." IV RP at 390.

After the brief recess, the trial court stated:

I'm of the opinion that one of two things has happened. They have forgotten to fill in the form. Or in the alternative, they have reached a decision that either means they were deadlocked on Count One or that they reached a not guilty finding on Count One.

I'm inclined to [] tell them if they have a question to write the question out and submit it to us. Is that agreeable?

IV RP at 391.

Both parties agreed. The jurors did not receive this communication, however, because before the trial court could deliver it, the jury was already coming back from the jury room. The trial court asked the presiding juror if the jury had reached a verdict on count I, and the presiding juror responded, "Yes." IV RP at 391-92. Then the trial court read the verdict form, stating that the jury unanimously found Ford guilty of second degree child rape, as charged in count I.

After trial, but before sentencing, the trial court granted Ford's request for a new attorney who would move for a new trial based on his current counsel's ineffective assistance. The trial court appointed another attorney to represent Ford. That attorney refused Ford's request to move for a new trial and instead sent a letter to the trial court in which he explained that he would not move for a new trial because he did not have any credible evidence to support Ford's claim that his trial counsel failed to notify Ford until after the trial had concluded about a plea offer that Ford would have taken.³ Apparently, the first attorney told the newly appointed attorney that he

³ In the attorney's letter, he stated:

Without further information of a credible nature, I cannot make a determination on the defendant's claim in this regard. Therefore, I do not feel that I can in good conscience bring an ineffective assistance claim as part of a motion for a new trial

had notified Ford about the plea offer before the end of the trial, and the newly appointed attorney did not know who to believe. The record contains no other information about this plea offer or any other pretrial proceeding.

On count I (second degree child rape), the trial court imposed a minimum sentence of 126 months and a maximum sentence of life in prison. On count II (third degree child rape), the trial court ordered Ford to serve a concurrent 34-month sentence.

The trial court ordered community custody on count I “for any period of time the Defendant is released from total confinement before the expiration of the maximum sentence.” CP at 51. The trial court also ordered community custody on count II for a period of 26-34 months, noting that the combined total time in community custody could not exceed the 60-month statutory maximum for third degree child rape.

These community custody conditions included prohibitions against (1) possessing alcohol; (2) being in places where alcoholic beverages are the primary sale item; (3) possessing paraphernalia for using or ingesting legal or illegal controlled substances; and (4) possessing, using, or owning deadly weapons as defined by a community corrections officer. The community custody conditions required Ford to take a medication called “antabuse” if instructed to do so by a community corrections officer. CP at 61. Additionally, the trial court signed a lifetime no-contact order to restrain Ford from L.K.

at this time. Again, appellate counsel may be able to develop this claim further, if new evidence presents itself.

CP at 43.

ANALYSIS

I. JURY'S FAILURE TO COMPLETE VERDICT FORM ON COUNT I

First, Ford argues that the trial court erred in coercing the jury to return a verdict on count I (second-degree child rape) in violation of CrR 6.15. Ford asserts that although the written jury instructions advised the jury that it need not reach a unanimous verdict, the trial judge orally advised the jury that it must reach a verdict and sent the jury back to the jury room for further deliberation. Although Ford did not object to this oral instruction during his jury trial, he raises it now on appeal, arguing that he is entitled to a new trial on this basis. We agree.

We may review an alleged error raised for the first time on appeal if it is a manifest error affecting a constitutional right. RAP 2.5(a)(3), *State v. Walsh*, 143 Wn.2d 1, 7, 17 P.3d 591 (2001). To raise such an issue on appeal, the defendant must identify a constitutional error and show how the alleged error actually affected the defendant's rights at trial. *State v. Kirkman*, 159 Wn.2d 918, 926-27, 155 P.3d 125 (2007). This showing of actual prejudice makes the error "manifest," allowing appellate review. *Kirkman*, 159 Wn.2d at 927.

Because the trial court is in the best position to determine if an irregularity at trial caused prejudice, we review the decision to grant or to deny a mistrial for an abuse of discretion. *State v. Weber*, 99 Wn.2d 158, 165-66, 659 P.2d 1102 (1983). An irregularity at trial is not prejudicial unless there is a reasonable probability that the trial's outcome would have differed if the error had not occurred. *State v. Thomas*, 150 Wn.2d 821, 871, 83 P.3d 970 (2004). In determining the effect of an irregularity at trial, we examine (1) its seriousness, (2) whether it involved cumulative evidence, and (3) whether the trial court properly instructed the jury to disregard it. *State v. Bourgeois*, 133 Wn.2d 389, 409, 945 P.2d 1120 (1997). We must decide whether the

record reveals a substantial likelihood that the trial irregularity affected the jury verdict, thereby denying the defendant a fair trial. *State v. Hicks*, 41 Wn. App. 303, 313, 704 P.2d 1206 (1985) (citing *State v. Davenport*, 100 Wn.2d 757, 762-63, 675 P.2d 1213 (1984)). A “strong, affirmative showing of misconduct is necessary in order to overcome the policy favoring stable and certain verdicts and the secret, frank and free discussion of the evidence by the jury.” *State v. Balisok*, 123 Wn.2d 114, 117-18, 866 P.2d 631 (1994); Br. of Resp’t at 5.

Citing *State v. Boogaard*, 90 Wn.2d 733, 585 P.2d 789 (1978), Ford argues that the trial court violated his right to a fair trial by coercing the jury to return a verdict on count I, contrary to CrR 6.15(f)(2). CrR 6.15(f)(2) provides, “After jury deliberations have begun, the court shall not instruct the jury in such a way as to suggest the need for agreement, the consequences of no agreement, or the length of time a jury will be required to deliberate.” This rule’s purpose is to prevent judicial interference with the deliberative process. *Boogaard*, 90 Wn.2d at 736.

In *Boogaard*, a prosecution for second degree theft, the jury began deliberating in mid-afternoon and had not reached a verdict by 9:30 P.M. *Boogaard*, 90 Wn.2d at 735. Because it was getting late in the evening, the trial court called the jury to the courtroom and asked each juror whether he/she thought it was possible to reach a verdict in half an hour. *Boogaard*, 90 Wn.2d at 735. All but one of the jurors answered affirmatively, and the trial judge instructed the jury to return to the jury room and continue its deliberations for a half hour. *Boogaard*, 90 Wn.2d at 735. Thirty minutes later, the jury returned a guilty verdict. *Boogaard*, 90 Wn.2d at 735. After the trial court entered judgment on the verdict, Boogaard moved for a new trial, which the trial court denied. *Boogaard*, 90 Wn.2d at 735-36.

On appeal, the Washington State Supreme Court reversed the conviction and remanded, stating:

The questioning of individual jurors, with respect to each juror's opinion regarding the jury's ability to reach a verdict in a prescribed length of time, after the court was apprised of the history of the vote in the presence of the jurors, unavoidably tended to suggest to minority jurors that they should give in for the sake of the goal which the judge obviously deemed desirable—namely, a verdict within a half hour.

Boogaard, 90 Wn.2d at 736, 741 (internal quotation marks omitted).

Here, the trial court stated, "I'm sending the jury back to the jury room. Verdict form No. 1 is completely blank. It must be filled in." IV RP at 390. The trial court's instruction to the jury directly conflicted with the trial court's jury instructions, which provided that the jury need not reach unanimous agreement on each charge. Instead, the jury could only return guilty verdicts if it unanimously agreed. Put simply, nothing in the jury instructions here required the jury to render a verdict.

The dissent makes much of the short timeframe of the incident. The jury completed the form and then returned to the courtroom after only several minutes, allegedly supporting the argument that it had merely forgotten to fill in the sheet. But, it is equally possible that the jury walked back to the jury room, determined that it had already spent too much time deliberating, and any holdouts simply acquiesced rather than require the group to start over on count I. This is the same concern that the *Boogaard* court addressed. *Boogaard*, 90 Wn.2d at 736.

The trial court did not ask the jury to clarify whether it found Ford not guilty on form no. 1 or whether it was hung on the issue and openly speculated that either could be the case. The trial court did not ask the jury if it had simply overlooked filling in the verdict sheet. We simply cannot tell why the jury did not fill in the verdict form.

We note that several Washington cases have addressed blank verdict forms in cases involving lesser-included offenses but, so far, only in the context of double jeopardy challenges. See *State v. Daniels*, 160 Wn.2d 256, 156 P.3d 905 (2007); *State v. Ervin*, 158 Wn.2d 746, 147 P.3d 567 (2006). These cases indicate that a blank verdict form did not constitute an implied acquittal barring retrial on those charges. *Daniels*, 160 Wn.2d at 264; *Ervin*, 158 Wn.2d at 757, 758. The case here is distinguishable because the trial court specifically instructed the jury, after it had begun deliberations, that it must return a verdict and this case does not involve the lesser-included-offense scenario.

We hold that under the facts of this case, it is substantially likely that the court's instruction affected the outcome of Ford's trial. We hold that this constitutes a manifest error affecting a constitutional right. It is also reversible error based on a violation of CrR 6.15(f)(2) and the same concerns the *Boogaard* court expressed.

II. LIFETIME NO-CONTACT ORDER

Next, Ford argues that the trial court erred in imposing a lifetime no-contact order with L.K. as a condition of his sentence. At the conclusion of Ford's jury trial, the jury found him guilty of second degree child rape (a class A felony) and third degree child rape (a class C felony). Ford assumes that the no-contact order applied to his class C felony.

As Ford notes in his briefing, although a lifetime no-contact order may be appropriate for class A felonies with a maximum term of life in prison, such orders cannot exceed the statutory maximum for the underlying offense. *State v. Armendariz*, 160 Wn.2d 106, 119-20, 156 P.3d 201 (2007). This provision must be vacated because we reverse count I and it is inapplicable to count II.

STATEMENT OF ADDITIONAL GROUNDS

In his SAG, Ford argues: (1) the trial court erred by allowing the State to amend the information; (2) the trial court allowed “expert-like” statements during voir dire, SAG at 11 (capitalization omitted); (3) his first counsel provided ineffective assistance; and (4) the cumulative error doctrine requires reversal. We have carefully reviewed each claim and hold that Ford’s SAG arguments lack merit.

Regarding Ford’s argument that the trial court erred by allowing the State to amend the information at trial, we find no error because the act of amending the dates did not change the substance of the offense or the degrees of the offenses.

Ford’s argument that the “expert-like statements presented during voir dire violated [his] right to an impartial jury trial” also fails. SAG at 11 (capitalization omitted). Ford contends that because two prospective jurors (Wiggs and Siciliana) spoke directly about a child’s incapability of lying and the importance of believing survivors, their bias tainted the resulting jury verdict, requiring automatic reversal. We reverse a trial court’s ruling on the scope of voir dire for an abuse of discretion if the defendant demonstrates that the abuse substantially prejudiced his case. *State v. Brady*, 116 Wn. App. 143, 147, 64 P.3d 1258 (2003) (citing *State v. Davis*, 141 Wn.2d 798, 825-26, 10 P.3d 977 (2000)), *review denied*, 150 Wn.2d 1035 (2004).

During voir dire, two jurors, Siciliana and Wiggs, stated that their past experiences as victims of sexual abuse would affect their ability to be fair and impartial. The trial court struck both Wiggs and Siciliana for cause. Ford did not object to this at trial.

Ford fails to provide any support for his argument, and instead he focuses on credibility issues, which we will not review on appeal. *Thomas*, 150 Wn.2d at 874. Even if we did consider

his argument, it is evident that the trial court did consider the effects of Wiggs's and Siciliana's statements on the other prospective jurors. Indeed, the trial court removed both of these prospective jurors for cause.

Neither do we agree with Ford's contention that these statements were "expert-like." SAG at 11 (capitalization omitted). Wiggs and Siciliana made these statements based on their personal experiences with sexual abuse; neither of these women purported to offer an expert opinion. Additionally, Wiggs and Siciliana fully disclosed their viewpoints on sexual abuse during voir dire. We find no error here.

We find no merit in Ford's argument that his first trial attorney rendered ineffective assistance in failing to (1) request a continuance when the trial court granted the State's motion to amend and (2) conduct proper voir dire. To demonstrate ineffective assistance of counsel, a defendant must make two showings: (1) that counsel's representation was deficient, and (2) that counsel's deficient representation caused prejudice. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). To show prejudice, a defendant must show that there is a reasonable probability that but for counsel's unprofessional errors the result of the proceeding would have differed. *State v. Crawford*, 159 Wn.2d 86, 99-100, 147 P.3d 1288 (2006). In general, performance is deficient when it falls below an objective standard of reasonableness, but not when undertaken for legitimate reasons of trial strategy or tactics. *State v. Horton*, 116 Wn. App. 909, 912, 68 P.3d 1145 (2003) (citing *McFarland*, 127 Wn.2d at 334).

Ford argues that his first counsel rendered ineffective assistance by failing to request a continuance after the trial court allowed the State to file an amended information. Ford argues that this was not a legitimate or tactical choice because the attorney needed more time to assess

the amendment's effects before starting trial. But the State's amendment made no substantive change to the offenses charged in the original information and had no effect on the trial court's proceedings. Consequently, his attorney's decision to proceed to trial was legitimate.

Ford argues that his first counsel rendered ineffective assistance by conducting improper voir dire. Ford contends that his attorney not only allowed two jurors to taint the jury pool with their "inflammatory and highly prejudicial statements," but he also provoked Siciliana's statement that "the most important thing you can do to support survivors is to believe them." SAG at 24 (quoting RP (Aug. 27, 2007) at 49). Contrary to Ford's argument, however, the attorney's performance was not deficient because (1) Wiggs and Siciliana primarily discussed their experiences with sexual abuse in response to the State's questions; (2) in asking Siciliana to clarify what she believed, Ford's attorney did not directly provoke her response about survivors; and (3) the attorney's decision to question Siciliana about her experience with sexual abuse was a proper tactical decision, considering that the purpose of voir dire is to determine whether any of the prospective jurors would have difficulty returning a fair and impartial verdict. Accordingly, Ford's ineffective assistance of counsel claim fails.

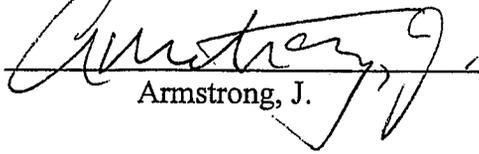
Finally, Ford argues that, "Taken together, the numerous errors in this case violated [his] right to due process. SAG at 26 (capitalization omitted). The cumulative error doctrine mandates reversal when the cumulative effect of nonreversible error(s) materially affects the trial outcome. *State v. Newbern*, 95 Wn. App. 277, 297, 975 P.2d 1041, review denied, 138 Wn.2d 1018 (1999). We find no cumulative error.

37089-1-II

We reverse Ford's count I conviction, vacate the lifetime no-contact order, and remand for a new trial. We affirm Ford's count II conviction and remand for resentencing as to count II.


Bridgewater, P.J.

I concur


Armstrong, J.

HUNT, J. — (dissenting) I respectfully dissent from the majority's decision that the trial court committed reversible error by essentially compelling the jury to complete the verdict form on count I. Although I agree with the majority's resolution of Ford's other assignments of error for both counts, I write separately to refute its conclusion that the trial court's oral instruction to the jury rose to the level of "manifest" constitutional error⁴ that Ford may raise for the first time on appeal, even though he neither objected to the trial court's oral instruction below nor proposed a different instruction or course of action. Furthermore, I agree with the State that the record fails to show a substantial likelihood that the trial court's oral instruction to the jury, to complete the verdict form on count I, affected the outcome of Ford's case.

FACTS

At trial, the jury received two verdict forms: count I for second-degree rape of a child and count II for third-degree rape of a child. After the jury informed the trial court that it had finished deliberating, the trial court asked the foreperson, "Has the jury reached a unanimous verdict?" The foreperson responded, "Yes." The trial court then asked the foreperson, "Would you pass the verdict forms to my bailiff." IV Report of Proceedings (RP) at 390. But when the trial court began reading from the verdict forms, it noticed that the jury had left count I blank, even though it had filled in count II, finding Ford guilty of third-degree rape of a child.

The trial court stated, "I'm sending the jury back to the jury room. Verdict form No. 1 is completely blank. It must be filled in." After excusing the jury, the trial court added, "I believe we have just a momentary delay[.] I think they just forgot to fill out the form." IV RP at 390. No one objected to the trial court's oral instructions; nor did anyone propose a different course of

⁴ See Majority at 5.

action. The trial court then said, "I'm inclined to have [the bailiff] tell them if they have a question to write the question out and submit it to us. Is that agreeable?" IV RP at 391. Both parties agreed; yet, before the trial court took any action, the jury returned to the courtroom with a completed verdict form on count I, finding Ford guilty of second-degree rape of a child.

ANALYSIS

The majority adopts Ford's argument, raised for the first time on appeal, that the trial court's oral instruction to the jury, that the jury "*must be in agreement* on count I," affected the outcome of the verdict, thereby denying Ford his right to a fair trial.⁵ (Emphasis added). But, contrary to Ford's argument, the trial court did not use that language, even though, as the majority notes, the trial court did not articulate the option of failing to reach a unanimous verdict. Instead the trial court stated, "I'm sending the jury back to the jury room. Verdict form No. 1 is completely blank. It *must be filled in.*" IV RP at 390 (emphasis added). In my view, the trial court's instruction under the circumstances here do not rise to the level of coercion addressed in *State v. Boogaard*, 90 Wn.2d 733, 735, 585 P.2d 789 (1978).

In *Boogaard*, after the jury had deliberated for six or seven hours, the trial court asked the bailiff to inquire "how the jury stood numerically" because it was getting late at night.⁶ When the bailiff told the trial court that the jury's vote was 10-2, the trial court polled the jurors to determine whether further deliberations would be fruitful. In spite of one juror's statement that it would not be possible to reach a verdict in 30 minutes, the trial court instructed the jury to

⁵ See Majority at 8; Br. of App. at 16.

⁶ *Boogaard*, 90 Wn.2d at 735.

deliberate for an additional half hour. Thirty minutes later, the previously deadlocked jury reached a unanimous verdict finding Boogaard guilty.

Here, in contrast, the jury informed the trial court that it had reached a verdict. Unlike the jury in *Boogaard*, the jury here said nothing about their being deadlocked, and there were no identifiable juror “holdouts.” Majority at page 7. The jury’s foreperson also responded, “Yes,” when the trial court asked if the jury had reached a “unanimous verdict.” Under these facts, the jury’s leaving one count blank on the verdict form, without comment, does not equate to the *Boogaard* jury’s clearly articulated deadlock; therefore, with all due respect to my learned colleagues, the majority’s attempted analogy to *Boogaard* does not succeed.

Similarly, I respectfully disagree with the majority’s speculation that “it is equally possible that the jury walked back to the jury room . . . and any hold outs simply acquiesced.” Majority at 7 (emphasis added). Such speculation does not satisfy the applicable standard of review, which, as the majority acknowledges, Ford must meet to raise this challenge for the first time on appeal—he must show a “manifest” error, not merely a “possible” error, affecting a constitutional right. Majority at 5, 8. Such speculation about the mere possibility of the jury’s having been “coerced” by the court’s instruction to fill in the blank does not rise to the level of “manifest” error under the facts of this case, not even under the case law that the majority cites.

On the contrary, the mere “possibility” that there may have been a hold-out juror who changed his or her vote after returning to the jury room (as was *beyond doubt* the case in *Boogaard*) does not establish “manifest” error because it does not show (1) a reasonable probability that the trial’s outcome would have differed if the [alleged] error had not occurred,⁷

⁷ Majority at 5, citing *State v. Thomas*, 150 Wn.2d 821, 871, 83 P.3d 970 (2004).

(2) “a substantial likelihood that the [alleged] trial irregularity affected the jury verdict, thereby denying the defendant a fair trial,”⁸ or (3) “[a] *strong, affirmative showing of misconduct . . .* necessary in order to overcome the policy favoring stable and certain verdicts and the secret, frank and free discussion of the evidence by the jury.”⁹ (Emphasis added).

Nor does the record reflect that the trial court told the jury that it “must be *in agreement*.” Br. of Appellant at 16 (emphasis added). This undisputed fact undermines the majority’s conclusion that the trial court’s oral instruction to fill in the blank on the verdict form “directly conflicted” with the written jury instructions, which expressly provided that the jury need not reach a unanimous verdict on each charge. Contrary to the majority’s assertion, the trial court did not orally instruct the jury to reach a “unanimous verdict” on count I.

Instead, the trial court merely sought to correct what appeared to everyone present in the courtroom to have been an inadvertent oversight by the jury: The foreperson had already announced that the jury had reached a verdict, creating an inherent inconsistency with the blank verdict form for count I. Consistent with the trial court’s appraisal,¹⁰ the jury quickly filled in the blank after they returned to the jury room, before the trial court and counsel could complete their discussion about what further action, if any, to take. In short, the record here, in stark contrast to the record in *Boogaard*, does not support the majority’s conclusion that it is

⁸ Majority at 6, citing *State v. Hicks*, 41 Wn. App. 303, 313, 704 P.2d 1206 (1985); (citing *State v. Davenport*, 100 Wn.2d 757, 762-63, 675 P.2d 1213 (1984)).

⁹ Majority at 6, citing *State v. Balisok*, 123 Wn.2d 114, 117-18, 866 P.2d 631, *cert. denied*, 536 U.S. 943 (2002); Br. of Resp. at 5.

¹⁰ “I believe we have just a momentary delay[.] I think they just forgot to fill out the form.” IV RP at 390.

“substantially likely”¹¹ that the court’s oral instruction affected the outcome of Ford’s verdict on count I. Majority at 8.

I agree with the majority that it would have been preferable for the trial court first to have brought the blank verdict form to the jury’s attention and then to have asked the jurors if they had intended to leave it blank. But I respectfully disagree with the majority’s conclusion that the trial court committed reversible error when, upon discovering the apparently inadvertently blank verdict form, the trial court simply told the jury that the form “must be filled in” with no objection by Ford. According to the foreperson, the jurors had already reached a verdict; thus, their having filled in the verdict form on count I implied that they had simply neglected to fill in the verdict form on count II. Under these circumstances, which differ dramatically from those in *Boogard*, the trial court’s oral instruction was not “substantially likely”¹² to affect the jury’s already determined, but not yet filled in, verdict form on count II.

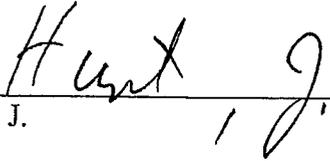
Consistent with the trial court’s action here, even Ford’s defense counsel, George Brintnall, interpreted the jury’s blank verdict form as a mere oversight. Brintnall stated that the trial court’s instruction to fill in the blank “didn’t seem to [affect the jurors’ decision] because they came back in five minutes, or four minutes” with the completed form. Brintnall added, “I could not see a procedural issue there. The jury seemed to have made a decision already, they just hadn’t filled out the forms correctly.” IV RP at 434-35.

¹¹ Nor does the majority harmonize its view—that it was “equally possible” that hold-out jurors might have abandoned their positions, Majority at 7—with the majority’s later conclusion that it was “substantially likely that the trial court’s instruction affected the outcome of Ford’s trial.” Majority at 8.

¹² Majority at 7-8.

Again, in stark contrast to the facts in *Boogard*, the record here is consistent with defense attorney Brintnall's unrefuted appraisal: After the trial court notified the jury that part of the verdict form was blank, the jury returned to jury room, completed the form, and returned to the courtroom after only a few minutes. The reasonable inference from this very short time is that the jury simply filled in the blank with its previously determined, but unrecorded, verdict on count I and spent no time on further deliberation. These facts clearly demonstrate that the trial court's instruction to the jury did not "suggest the need for agreement" or otherwise interfere with or affect the jury's deliberative process¹³ as CrR 6.15(f)(2) prohibits.¹⁴

I would hold (1) the record indicates that, after reaching a unanimous decision on count I, the jury inadvertently forgot to complete the verdict form on that count; (2) Ford fails to show that the trial court's oral instruction to the jury—that the verdict form for count I "must be filled in"—was "substantially likely" to affect that previously decided, though as yet unrecorded, verdict; and (3) the oral instruction to the jury does not rise to the level of "manifest" error that Ford can raise for the first time on appeal. I would affirm both counts.



Hunt, J.

¹³ See Majority at 6-7.

¹⁴ See Majority at 6.

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State of Washington, Petitioner, v. Tyrone D. Ford, Respondent
Supreme Court No. 83617-5

I certify that I mailed copy of Respondent's Answer to Motion for Discretionary Review
to:

Michael C. Kinnie
Clark County Prosecuting Attorney's Office
P.O. Box 5000
Vancouver, WA 98666-5000

and to:

Tyrone D. Ford/DOC#310040
Washington State Penitentiary
1313 N. th Ave.
Walla Walla, WA 99362

All postage prepaid, on October 16, 2009.

And that I delivered the original to the State Supreme for filing
on October 16, 2009.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE
OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT .

Signed at Longview, Washington, on October 16, 2009.



Lisa E. Tabbut, WSBA No. 21344
Attorney for Respondent

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