

65176-5

65176-5

No. 65176-5-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

JAVON PITCHFORD,

Appellant.

---

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

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BRIEF OF APPELLANT

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**A. ASSIGNMENTS OF ERROR**

1. The trial court's statements to the deadlocked jury violated Mr. Pitchford's constitutional right to due process and a fair trial.

2. The trial court's statements to the deadlocked jury violated CrR 6.15(f)(2).

3. The trial court erred by instructing the jury it had to be unanimous to answer the special verdict form. (Instruction 16, CP 38)

4. Mr. Pitchford did not receive the effective assistance of counsel required by the federal and state constitutions because his attorney did not request a jury instruction on the common law defense of consent which was supported by facts elicited at trial.

**B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. The accused's constitutional right to due process and a fair trial includes the requirement that the jury reach its verdict uninfluenced by factors other than the evidence, argument of counsel, and jury instructions. Mr. Pitchford's jury announced it was deadlocked at 9 to 3 to convict after between three and four and a half hours of deliberation. The court told the jury that juries were commonly split after that amount of time and it did not mean

they were deadlocked and ordered them to continue deliberating. Did the trial court's comments suggest the need for agreement or the length of time the jury would be required to deliberate in violation of CrR 6.15(f)(2)? Where the minority jurors could interpret the court's comments as a suggestion that they give in for the sake of the unanimous verdict the judge wanted, is there a reasonable possibility that the court's comments improperly influenced the verdict in violation of Mr. Pitchford's constitutional right to due process? (Assignments of Error 1, 2)

2. To find a firearm enhancement applies to a crime, the jury must unanimously agree the enhancement is proven beyond a reasonable doubt, but the jury need not be unanimous to conclude the enhancement was not found. Mr. Pitchford's jury found he was armed with a firearm after being instructed it had to be unanimous to answer the special verdict form in the negative and ordered to continue deliberating. Must the firearm enhancement be vacated? (Assignment of Error 3)

3. The accused has the constitutional right to effective assistance of counsel at trial, and defense counsel is responsible for investigating the law and facts of the case. Mr. Pitchford was charged with rape and presented testimony that the sexual

intercourse was consensual. Was Mr. Pitchford's constitutional right to effective assistance of counsel violated when his attorney did not offer an instruction on the defense of consent? (Assignment of Error 4)

### C. STATEMENT OF THE CASE

Javon Pitchford and Suzy Graydon encountered each other on October 23, 2008, in the parking lot behind the Williams Avenue Pub in downtown Renton; tavern patrons often gathered in the parking lot to smoke cigarettes and marijuana. 2RP 20, 23; 3RP 122; 4RP 7-8.<sup>1</sup> Mr. Pitchford had methamphetamine and crack cocaine, and the two walked to a trail along the Cedar River where they smoked the methamphetamine. 1RP 18-19; 3RP 127-28, 132. They stopped at a bench where Ms. Graydon performed oral sex on Mr. Pitchford. 3RP 129-30; 4RP 14.

The quality of the methamphetamine, however, was quite poor. Ms. Graydon wanted to smoke Mr. Pitchford's cocaine and there was a minor argument when he refused. 3RP 131-34; 4RP 14-15. Additionally, Mr. Pitchford mentioned to Ms. Graydon that

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<sup>1</sup> The report of proceedings of Mr. Pitchford's jury trial and sentencing hearing consists of six volumes. Four volumes will be cited in this brief:

1RP – January 28, 2010

2RP – February 1-2, 2010

3RP – February 3, 2010

4RP – February 4, 5, 8, 19 and April 4, 2010

her boyfriend Jeff might have heard about their relationship. 4RP 15-16.

Jesse Murray and his girlfriend Malileah Henderson were at the park on the other side of the Cedar River that evening. 3RP 89-90. Mr. Murray noticed Mr. Pitchford, who was a friend, walking down the street with Jeff's girlfriend, possibly holding hands.<sup>2</sup> 3RP 90, 95, 103. Later, after moving to the other side of the river, Mr. Murray saw Mr. Pitchford and Ms. Graydon looking for something under the bench. 3RP 91-92, 104, 106. Mr. Murray stopped and helped Mr. Pitchford look for a ring. 3RP 106-07. He described Ms. Graydon, as calm, and he did not notice anything unusual. 3RP 92, 106. As Ms. Graydon left the area, she said something about losing her money. 3RP 93, 111.

Mr. Pitchford had first met Ms. Graydon several months earlier playing pool at nearby Rubitino's Tavern, which had a reputation for having a drug-using clientele. 3RP 89, 92, 123. After flirting and having a drink together, Ms. Graydon overheard Mr. Pitchford discuss a drug transaction, and she mentioned that she

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<sup>2</sup> Ms. Graydon testified that when she left the Williams Avenue Pub that evening, she was heading to Rubitino's to see if her friend Jeff was there. 2RP 113. Jeff, a struggling methamphetamine addict, lived in an apartment above Rubitino's. 2RP 114-15, 118. He was also known by his nickname, "Hard Pop." 2RP 118; 3RP 81-82, 125.

also used drugs. 3RP 123-24. Mr. Pitchford then gave Ms. Graydon some methamphetamine in exchange for oral sex. 3RP 125. Several weeks later they were both at the William Avenue Pub, and they used drugs and had a similar sexual encounter after driving to a more private location in Mr. Pitchford's car. 3RP 125-27, 147-48.

Mr. Pitchford described himself as a small-time drug dealer who, in addition to his regular job, sold cocaine to people he felt comfortable with; he also used methamphetamine. 3RP 136-38. Mr. Pitchford said that he and Ms. Graydon were attracted to each other, but they were both in relationships. 3RP 139-40, 142-43, 147-48.

After the encounter on October 23, however, Graydon ran back to the Williams Avenue Pub and reported to the bartender and the police that she had been raped. 2RP 70. Mr. Pitchford was charged with rape in the first degree and robbery in the first degree, both with firearm enhancements. CP 1-2, 13-14.

At a jury trial before the Honorable Bruce Heller, Ms. Graydon testified that she had never met Mr. Pitchford before October 23, but agreed to "smoke a bowl" with him when they passed each other in the parking lot behind the Williams Avenue

Pub. 2RP 20-25, 88-89. Mr. Pitchford, however, wanted to move to a less conspicuous location; they walked away and Mr. Pitchford pulled out a pipe for smoking methamphetamine. 2RP 27-28. Ms. Graydon testified that she did not use methamphetamine and tried to go back to the pub, but Mr. Pitchford broke the glass pipe and pulled up his shirt, displaying a gun. 2RP 30-32. He then grabbed Ms. Graydon's coat and directed her several blocks to a staircase that led down to the trail along the Cedar River. 1RP 17-18; 2RP 34-38.

According to Ms. Graydon, after they reached the trail, Mr. Pitchford demanded her money, ripped open her purse, and went through her wallet. 2RP 39-40. After Ms. Graydon directed him to where her cash was hidden, Mr. Pitchford demanded that Ms. Graydon sit on a bench and perform oral sex. 2RP 47, 49-52. When he did not climax, he had her kneel on the bench while he attempted vaginal sex. 2RP 53, 59. Ms. Graydon believed Mr. Pitchford climaxed and dropped his gun. 2RP 53-54, 63. She grabbed her things and Mr. Pitchford's hat, and ran up the stairs out of the park. 2RP 63-66, 68-69. Ms. Graydon discovered that the sim card had been removed from her cell phone, so she ran to the pub. 2RP 65-66, 68-70.

Ms. Graydon had heard people at a park on the other side of the river. 2RP 47-48. A couple appeared at the bottom of the stairs as Ms. Graydon was leaving, and they helped Mr. Pitchford look around the bench with a flashlight. 2RP 66, 72-73.

When the police arrived in response to Ms. Graydon's 911 call, she showed them the bench and ledge in the park. 1RP 86; 2RP 75-76. The detectives located semen on the ground near the bench which matched Mr. Pitchford's DNA. 1RP 36, 88, 41-43; 2RP 139-40.

Ms. Graydon was taken to the hospital and underwent a sexual assault examination. 1RP 90; 2RP 76. The hospital nurse described Ms. Graydon as distraught and anxious and said she appeared to have been crying. 3RP 20. Ms. Graydon also had bruise on her right buttock, which could have been recent or several days old, and complained of a headache. 3RP 32. The Washington State Crime Laboratory forensic examiner did not detect sperm cells in any of the swabs from the rape kit and detected only one sperm cell on Ms. Graydon's underpants. 2RP 143, 148.

Ms. Graydon gave the police her clothing, purse, cell phone, and a hat she said belonged to her attacker. 1RP 54; 2RP 63, 98,

116. The purse contained a broken narcotics pipe. 1RP 54, 57-58. Mr. Pitchford was a possible contributor to the DNA found on the brim of the hat. 2RP 140-42.

The jury convicted Mr. Pitchford of rape in the first degree with a firearm and found him not guilty of first degree robbery. CP 43-46. The court gave him a maximum term of life and a minimum term of 150 months plus a 60-month firearm enhancement, for a total of 210 months. CP 56. This appeal follows. CP 63.

#### D. ARGUMENT

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

Instructing the jury in a manner that suggests that the jury needs to reach an agreement or that there is a length of time the jury must deliberate violates a criminal defendant's constitutional right to due process and a fair trial. State v. Boogaard, 90 Wn.2d 733, 735, 585 P.2d 789 (1978). Mr. Pitchford's conviction must be reversed because the trial court's comments improperly coerced the jury in violation of his constitutional right to a fair trial.

a. Due process prohibits the trial court from making statements that could coerce a deadlocked jury. A criminal

defendant's right to a fair trial before an impartial jury is protected by the federal and state constitutions. U.S. Const. amends. VI, XIV; Const. art. I §§ 3, 22. The Washington Constitution further requires a twelve-person jury unanimously find every element of the crime beyond a reasonable doubt. Const. art. I, §§ 21, 22; State v. Ortega-Martinez, 124 Wn.2d 702, 707, 881 P.2d 231 (1994). Additionally, each juror must be permitted to reach his verdict uninfluenced by factors other than the evidence, the court's proper instructions, and argument of counsel. State v. Goldberg, 149 Wn.2d 888, 892, 72 P.3d 1083 (2003); Boogaard, 90 Wn.2d at 736. Thus, due process requires that the trial court judge not bring coercive pressure on the jury deliberations. Boogaard, 90 Wn.2d at 736-37.

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.<sup>3</sup> Id; CrR 6.15(f)(2).

Here, the trial court coerced the jury by instructing them in a manner that suggested the need for agreement and that there was a minimum amount of time they were required to deliberate which they had not yet reached.

b. The trial court told the jury it had not been deliberating long enough and required them to continue deliberations. Jury deliberations began at 12:16 pm on February 4, 2010. SuppCP \_\_\_ at page 12 (clerk's minutes, sub. no. 69A) (hereafter clerk's minutes). The next morning at 9:51 am, the jury sent a written question to the court asking what would happen if they were deadlocked:

What happens if the jury is deadlocked 9 guilty & 3 not guilty . . . and so on and so forth.

CP 16.

Mr. Pitchford asked the court to declare a mistrial. 4RP 68-69. The court, however, felt the jury had only been deliberating for

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<sup>3</sup> CrR 6.15(f)(2) reads:

After jury deliberation has 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.

about three hours<sup>4</sup> and decided to read Instruction 2, which instructs the jurors not to be afraid to re-examine their views during the deliberation process. 4RP 70-71.

Once the jury entered the courtroom, however, the court did more than re-read Instruction 2. Instead, the court informed the jury that “it was not unusual” for a jury to not be unanimous after only three hours of deliberation in a week-long trial<sup>5</sup> and it was “too early” to discuss the possibility of a deadlock. 4RP 70.

. . . The court has received your inquiry about what happens if the jury is deadlocked.

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

We’ve had a trial that took approximately one week. You’ve been deliberating for approximately half a day. After going out to lunch you probably started deliberating at 1:30 or 2:00[,] and you’ve been here for about an hour[.] I believe you started at 9:30, so that’s around three hours. It is not unusual after that amount of time for you not to be unanimous one

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<sup>4</sup> The jury was probably deliberating between 3 and 4 hours. The minutes for February 4 do not indicate that the jury was given a lunch break. If not, they deliberated until 4:00 pm, a total of 3 hours and 43 minutes, on February 4. Clerk’s Minutes at 12. The next day they deliberated for over an additional hour, from 9:45 to 10:51 am. CP 16; Clerk’s Minutes at 13.

<sup>5</sup> While the trial lasted six days, the case took less than four full court days due to numerous recesses and partial days. February 1 (trial from 1:45 to 4:00 pm); February 2 (trial from 9:21 to 11:48 am); February 3 (full trial day); February 4 (court begins at 10 am, jury begins deliberating at 12:16). Clerk’s Minutes at 2-12.

way or the other. Sometimes it takes a while. At least we need to go through the process and in my view it's too early to be talking about a deadlock.

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

4RP 70. The court then read Instruction 2 and told the jury to return to the jury room to continue deliberations. 4RP 70-71; CP 22-23. The jury deliberated another five hours and reached a verdict on the underlying crime but could not unanimously answer the special verdict form. Clerk's Minutes at 13-14; CP 43-47.

c. The court's oral instructions improperly coerced the jury by stating that juries are commonly unable to reach a unanimous verdict in three hours, thus suggesting both the need for agreement and that there is a minimum period of time a jury is required to deliberate. When the jury asked the court what would happen if it were unable to reach a unanimous verdict, the court replied in a manner that violated Mr. Pitchford's right to a fair trial. The court stated that juries are commonly unable to reach a verdict within three hours and that the jury needed to deliberate longer. 4RP 114. This suggested to the jury that they were supposed to return a

unanimous verdict and, to that end, there was a minimum time greater than three hours during which they must deliberate.

In Boogaard, the trial court faced with a deadlocked jury asked the jury foreman about the history of the jury voting and if the foreman believed the jury could reach a verdict within 30 minutes. Boogaard, 90 Wn.2d at 735. The jury was ordered to deliberate and returned a verdict within the time allotted. Id. The Washington Supreme Court concluded the judge's inquiry constituted coercion because it "unavoidably suggested to the minority jurors that they should 'give in' for the sake of that goal which the judge obviously desired – namely, a verdict within a half hour." Id. at 736. The judge in Mr. Pitchford's case was aware that the current vote was 9 to 3 to convict based upon the jury's written question. CP 16; 4RP 68. The court's comments could easily be interpreted by the minority jurors as a direction that they should similarly "'give in' for the sake of the goal the judge obviously desired" -- a unanimous verdict.

Additionally, the court did not inquire of the jury foreman as to whether it was likely the jury could reach a verdict in a reasonable period of time. The Washington Pattern Jury Instructions provide an instruction for judges to read when the jury

indicates it may be deadlocked or the court is considering possible discharge for that reason. Washington Supreme Court Committee on Jury Instructions, 11 Wash. Pract. Pattern Jury Instructions Criminal, WPIC 4.70, at 143, WPIC 4.81 at 168 (3<sup>rd</sup> ed. 2008) (WPIC). The instruction simply calls for the court to ask the presiding jury if “there is a reasonable probability of the jury reaching a verdict within a reasonable time.” WPIC 4.70. No additional comment is recommended.

The court reading the pattern instruction gives no indication of what a reasonable time period would be, the possible consequences of inability to reach a unanimous verdict, or the length of time the jury would be required to deliberate. WPIC 4.70. Here, however, the trial court did not use this neutral instruction or ask the jury foreman if the jury was likely to reach a verdict within a reasonable timeframe. Instead, the court told the jury it had not been deliberating long enough and ordered the jury to continue deliberations, thus signaling the court’s desire for a unanimous verdict.

d. Mr. Pitchford’s conviction must be reversed. A claim of jury coercion is a manifest constitutional error that may be raised for the first time on appeal. State v. Ford, \_\_\_ Wn.2d \_\_\_, 350

P.3d 97, 2011 WL 1196316 at ¶ 7 (C. Johnson, J., lead opinion), ¶ 21 (Stevens, J., dissenting) (No. 83617-5, 3/31/11); RAP 2.5(a). When the defendant argues the court's instructions to the jury constitute coercion, the conviction will be reversed if the defendant establishes "a reasonably substantial possibility that the verdict was improperly influenced by the trial court's intervention." *Id.* at ¶ 17 (Madsen, J., concurring in result only, agreeing with dissent concerning correct standard of review), ¶ 21 (Stevens, J., dissenting); Watkins, 90 Wn.2d at 178. Thus, the Boogaard Court reversed the defendant's conviction because it concluded the court's comments "tended to and most probably did" influence the minority jurors. Boogaard, 90 Wn.2d at 740.

The court's comments in this case were no doubt well-intentioned. However, they telegraphed to the jury that lack of unanimity was a common occurrence that required further deliberation and that there was a minimum period of time the jury was required to deliberate that it had not yet achieved. Given the court's understanding that the vote was 9 to 3 to convict, the court's statement telegraphed the court's desire for not just a unanimous verdict, but also a guilty one. This inference was borne out when the jury returned a verdict four and a half hours later, but was still

unable to unanimously answer the special verdict form. CP 47; Clerk's Minutes at 13-14.

Nor, as in Boogaard, were any of the judge's statements to the jury necessary, as the court had already decided to require further deliberations. 4RP 69; Boogaard, 90 Wn.2d at 740. The court's instructions to the deadlocked jury constituted jury coercion requiring the reversal of Mr. Pitchford's conviction. Id.

2. THE FIREARM ENHANCEMENT MUST BE  
VACATED BECAUSE THE JURY WAS  
INCORRECTLY INSTRUCTED THAT IT WAS  
REQUIRED TO UNANIMOUSLY ANSWER THE  
SPECIAL VERDICT FORM

The defendant in a criminal case may not be convicted unless a twelve-person jury unanimously finds every element of the crime beyond a reasonable doubt. U.S. Const. amends. VI, XIV; Const. art. I, §§ 21, 22; State v. Williams-Walker, 167 Wn.2d 889, 895-97, 225 P.3d 913 (2010); Ortega-Martinez, 124 Wn.2d at 707. The jury was thus required to unanimously find the State had proved Mr. Pitchford was armed with a firearm during the commission of the crime in order to answer "yes" on the special verdict form. Unanimity, however, is not required for a "no" answer. State v. Bashaw, 169 Wn.2d 133, 146-47, 234 P.3d 195 (2010); Goldberg, 149 Wn.2d at 894. Because the jury was incorrectly

instructed it had to be unanimous in order to answer “no” on the special verdict form, the firearm enhancement must be vacated.

Bashaw, 169 Wn.2d at 148; Goldberg, 149 Wn.2d at 895.

a. The trial court incorrectly told the jury its answer on the special verdict form had to be unanimous. The jury was provided with a special verdict form for Count 1 that required it to answer “yes” or “no” to the question, “Was the defendant JAVON PITCHFORD armed with a firearm at the time of the commission of the crime of Rape in the First Degree as charged in Count I?” CP 45. The trial court instructed the jury that it had to be unanimous as to the answer on the special verdict form. CP 38. Instruction 16 reads:

You will also be given special verdict forms for the crimes charged in Counts I and II. If you find the defendant not guilty of these crimes, do not use the special verdict forms. If you find the defendant guilty for these crimes, you will then use the special verdict forms and fill in the blank with the answer “yes” or “no” according to the decision you reach. Because this is a criminal case, all twelve of you must agree in order to answer the special verdict forms. In order to answer the special verdict forms “yes,” you must unanimously be satisfied beyond a reasonable doubt that “yes” is the correct answer. If you unanimously have a reasonable doubt as to this question, you must answer “no.”

CP 38 (emphasis added). The jury, however, was unable to make a unanimous finding on the special verdict form and sent a question to the court:

What should we do if we've reached a verdict on Form A, [b]ut can't reach a verdict on "Special Verdict" Form A?

CP 47.

The prosecutor directed the court to a pattern instruction addressing this problem, and the court briefly recessed to obtain a copy. 4RP 72. Although the pattern instruction requires the court to ask the presiding juror if there was a reasonable possibility of reaching a verdict within a reasonable period of time, the court asked this question of each of the jurors. 4RP 73; WPIC 4.79. After a show of hands, the court learned that two jurors believed further deliberation might be fruitful. 4RP 73-75. The court therefore concluded the jury was not deadlocked and ordered them to continue deliberating. 4RP 75. Thirty minutes after being told to continue deliberating, the jury announced its verdict, which included a "yes" answer on the special verdict form. CP 45; Clerk's Minutes at 14; 4RP 76.

An instruction similar to the one given in this case was found to be incorrect in Bashaw, *supra*. In Bashaw, the defendant was

charged with three counts of delivery of a controlled substance, and the State also alleged each offense was committed within 1,000 feet of a school bus route stop. Bashaw, 169 Wn.2d at 137. The school zone enhancement statute required the court to double the defendant's maximum sentence if the jury found an enhancement. Id.; RCW 69.50.435(1). The jury was instructed that "all twelve of you must agree on the answer to the special verdict." Id. at 139.

Relying upon its prior opinion in Goldberg, supra, the Bashaw Court found the jury had been improperly instructed because "a unanimous jury decision is not required to find that the State has failed to prove the presence of a special finding increasing the defendant's maximum allowable sentence." Bashaw, 169 Wn.2d at 145 (citing Goldberg, 149 Wn.2d at 895). The court concluded it could not determine how the jury would have answered the special verdict forms if it had been properly instructed and thus the error was not harmless beyond a reasonable doubt. Id. at 147-48. The court therefore vacated the sentencing enhancements and remanded for the imposition of a sentence without the enhancements. Id. at 148. The jury instruction in Mr. Pitchford's case also informed the jury that it had to be unanimous

to answer the special verdict form questions in the negative, and his firearm enhancement should similarly be vacated. 4RP 114.

Additionally, as in Goldberg, the trial court refused to permit the jury to return no answer to the special verdict. The Goldberg jury had reached a guilty verdict on first degree murder and answered “no” on a special verdict form addressing a factor that would have raised the crime to aggravated first degree murder. Goldberg, 149 Wn.2d at 891. When the court polled the jury, however, only one juror indicated that was his or her verdict. Id. The presiding juror later informed the court there was no reasonable possibility the jury could unanimously agree on the special verdict form answer, but, as in Mr. Pitchford’s case, the court ordered the jury to continue deliberating. The jury then returned a “yes” answer to the special verdict form after three additional hours of deliberation. Id. at 891-92.

The Goldberg Court held that the court had no authority under CrR 6.15(f)(2) to treat the jury as deadlocked and that the jury was not required to be unanimous in order to answer the special verdict form in the negative. Id. at 894. Similarly, the trial court should have permitted the jury to return its guilty verdict for

the rape charge and answer the special verdict form “no” when it could not reach a unanimous decision

b. Mr. Pitchford may raise this issue for the first time on appeal. Mr. Pitchford’s lawyer did not object to the trial court’s instruction requiring unanimity to answer “no” on the special verdict form or when the court required the jury to continue deliberating when it was unable to reach a unanimous decision on the special verdict. Appellate courts do not normally address issues that were not addressed by the trial court, but constitutional issues are an exception to this rule because they 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). Mr. Pitchford’s constitutional right to a fair jury determination of the facts of his case was violated when the jury was incorrectly instructed as to unanimity and required to continue deliberating. This is a constitutional issue this Court should address in his appeal. State v. Ryan, \_\_\_ Wn.App. \_\_\_, 2011 WL 1239796 at ¶¶ 10-13 (No. 64726-1-I, 4/4/11); accord Ford, 2011 WL 1196316 at ¶¶ 7, 21; RAP 2.5(a).

c. The firearm enhancement must be stricken. Because the jury was improperly instructed and coerced, Mr. Pitchford’s firearm enhancement must be vacated unless the State can demonstrate

the error was harmless beyond a reasonable doubt. Bashaw, 169 Wn.2d at 147-48. The State cannot demonstrate that the court's requirement that the jury be unanimous was harmless because, when it had reached a unanimous verdict on the underlying crime, the jury told the court it had not reached a unanimous decision on the special verdict form. CP 47. Had the court correctly informed the jury its decision did not need to be unanimous, it would not have found the special verdict. This Court thus cannot conclude the error was harmless beyond a reasonable doubt. Bashaw, 169 Wn.2d at 147-48.

Mr. Pitchford's firearm enhancement must be vacated and his case remanded to the superior court for a sentence without the enhancement. Bashaw, 169 Wn.2d at 148; Goldberg, 149 Wn.2d at 895.

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

Consent is a defense to first degree rape, and Mr. Pitchford presented a consent defense. Defense counsel, however, did not offer a jury instruction on the consent defense and the jury thus never had the opportunity to consider it. Mr. Pitchford's conviction

must be reversed because he did not not receive effective assistance of counsel.

a. Mr. Pitchford had the constitutional right to effective assistance of counsel. A criminal defendant has the constitutional right to the assistance of counsel.<sup>6</sup> U.S. Const. amends. VI, XIV; Const. art. I, § 22; State v. A.N.J., 168 Wn.2d 91, 96-97, 225 P.3d 956 (2010). Counsel's critical role in the adversarial system protects the defendant's fundamental right to a fair trial. Strickland v. Washington, 466 U.S. 668, 684-85, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); United States v. Cronin, 466 U.S. 648, 656, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984). "[T]he very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free." Herring v. New York, 422 U.S. 853, 862, 95 S.Ct. 2550, 45 L.Ed.2d 593 (1975). The right to counsel therefore necessarily includes the right to effective

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<sup>6</sup> The Sixth Amendment provides in pertinent part, "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

The Fourteenth Amendment states in part, ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . ."

Article I, Section 22 provides in part, "In all criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel . . ."

assistance of counsel. Kimmelman v. Morrison, 477 U.S. 365, 377, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986); A.N.J., 168 Wn.2d at 98.

When reviewing a claim that trial counsel was not effective, appellate courts utilize the two-part test announced in Strickland. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). Under Strickland, the appellate court must determine whether (1) the attorney's performance fell below objective standards of reasonable representation, and, if so, (2) counsel's deficient performance prejudiced the defendant. Strickland, 466 U.S. at 687-88; Thomas, 109 Wn.2d at 226. Ineffective assistance of counsel is a mixed question of law and fact reviewed de novo. Strickland, 466 U.S. at 698; A.N.J., 168 Wn.2d at 109.

A lawyer's strategic choices made after thorough investigation of the law and the facts rarely constitute deficient performance. Strickland, 466 U.S. at 690. In reviewing the first prong of the Strickland test, the appellate courts presume that defense counsel was not deficient, but this presumption is rebutted if there is no possible tactical explanation for counsel's performance. Strickland, 466 U.S. at 689-90; State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). The appellate court will find prejudice under the second prong if the

defendant demonstrates “counsel’s errors were so serious as to deprive the defendant of a fair trial.” Strickland, 466 U.S. at 687.

b. Defense counsel was ineffective for failing to offer an instruction on the statutory defense of consent. Mr. Pitchford was charged with first degree rape under RCW 9A.44.040(1)(a). CP 1, 13. The charged portion of the statute reads:

(1) A person is guilty of rape in the first degree when such person engages in sexual intercourse with another person by forcible compulsion where the perpetrator or an accessory:

(a) Uses or threatens to use a deadly weapon or what appears to be a deadly weapon.

RCW 9A.44.040(1)(a).<sup>7</sup>

Consent is a defense to the crime of rape, and the term “consent” is defined by statute.<sup>8</sup> State v. Camara, 113 Wn.2d 631, 636, 781 P.2d 483 (1989); RCW 9A.44.010(7). Defense counsel, however, did not propose a jury instruction on the consent defense, and none was given. SuppCP \_\_\_ (Defense Instructions to the Jury, sub. no. 71, 2/3/10). Defense counsel did propose an instruction

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<sup>7</sup> “‘Forcible compulsion’ means physical force which overcomes resistance, or a threat, express or implied, that places a person in fear of death or physical injury to herself or himself or another person, or in fear that he or she or another person will be kidnapped.” RCW 9A.44.010(6).

<sup>8</sup> “‘Consent’ means that at the time of the act of sexual intercourse or sexual conduct there are actual words or conduct indicating freely given agreement to have sexual intercourse or sexual contact.” RCW 9A.44.101(7).

based upon the statutory definition of consent, but did not except to the court's failure to give the instruction. Id.; 4RP 23.

Washington's Pattern Jury Instructions contain an instruction setting out the consent defense available in rape cases. WPIC

18.25. The pattern instruction provides:

A person is not guilty of rape if the sexual intercourse is consensual. Consent means that at the time of the act of sexual intercourse there are actual words or conduct indicating freely given agreement to have sexual intercourse.

The defendant has the burden of proving that the sexual intercourse was consensual by a preponderance of the evidence. Preponderance of the evidence means that you must be persuaded, considering all the evidence in the case, that it is more probably true than not true. If you find that the defendant has established this defense, it will be your duty to return a verdict of not guilty [on this charge].

Id.

The defendant in a criminal case has the right to a correct statement of the law and to have the jury instructed on a defense that is supported by substantial evidence. Thomas, 109 Wn.2d at 228; State v. Powell, 150 Wn.App. 139, 154, 206 P.3d 703 (2009). To determine if defense counsel's failure to propose an appropriate jury instruction constitutes ineffective assistance of counsel, appellate courts necessarily review three questions: (1) was the

defendant entitled to the instruction; (2) was the failure to request the instruction tactical, and (3) did the failure to offer the instruction prejudice the defendant. Powell, 150 Wn.App. at 154-58.

i. A consent defense instruction would have been given if offered. To warrant a consent defense instruction, Mr. Pitchford simply had to produce some evidence to support it. Powell, 150 Wn.App. at 154. In determining if the defendant has met this burden, the court must review the entire record in the light most favorable to the defendant, keeping in mind that the jury, not the court, weighs the evidence and determines witness credibility. State v. Ginn, 128 Wn.App. 872, 879, 117 P.3d 1155 (2005), rev. denied, 157 Wn.2d 1010 (2006).

Mr. Pitchford testified that he and Ms. Graydon had consensual intercourse the night of the charged offense and on two previous occasions. Mr. Murray also testified that Ms. Graydon seemed calm and nothing appeared unusual when he saw her with Mr. Pitchford that night. Thus, the court would have given a consent defense if requested.

ii. Mr. Pitchford's trial attorney did not make a tactical decision not to offer an instruction on his consent defense. In order to make informed decisions about how to best represent his client,

defense counsel must investigate both the law and facts of the case. Strickland, 466 U.S. at 690-91; State v. Kylo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009); Powell, 150 Wn.App. at 155. See American Bar Association, Standards for Criminal Justice: Prosecution and Defense Function, Standard 4-4.1(a) (3<sup>rd</sup> ed. 1993).

Defense counsel is ineffective if he fails to propose an instruction that assists the jury in understanding a critical component of the defense. “Where counsel in a criminal case fails to advance a defense authorized by statute, and there is evidence to support the defense, defense counsel’s performance is deficient.” In re Personal Restraint of Hubert, 138 Wn.App. 924, 926, 158 P.3d 1282 (2007). This Court has thus held that trial counsel was ineffective for failing to propose the statutory reasonable belief defense to rape under the portion of the statute criminalizing sex with a person who is incapable of consent by reason of physical helplessness. Powell, 150 Wn.App. at 153-55; Hubert, 138 Wn.App. at 929-30.

In Hubert, there was evidence to show the complaining witness was awake during the sexual encounter and the defendant agreed to end the encounter as soon as the complainant

requested. Hubert, 138 Wn.App. at 926-27, 929. Defense counsel confessed he was not familiar with the statutory defense, and this Court granted Hubert's personal restraint petition because there was no legitimate tactical reason for defense counsel to fail to propose the instruction. Id. at 929, 932. "An attorney's failure to investigate the relevant statutes under which his client is charged cannot be characterized as a legitimate tactic." Id. at 929-30.

Similarly, this Court found on direct appeal that trial counsel's failure to request a reasonable belief instruction was deficient performance because, with the exception of the complaining witness, the State's witnesses did not testify she appeared too drunk or otherwise incapacitated to make decisions. Powell, 150 Wn.App. at 154. Defense counsel's closing argument indicated he may have been aware of the reasonable belief defense, but this Court found no reasonable tactical basis not to propose the instruction. Id. at 155.

But we are aware of no objectively reasonable tactical basis for failing to request a "reasonable belief" instruction when (1) the evidence supported such an instruction, (2) defense counsel, in effect, argued the statutory defense, and (3) the statutory defense was entirely consistent with the defendant's theory of the case. Thus, as in Hubert, we hold that failure to request such an instruction under these circumstances was deficient performance.

Id.

Here, Mr. Pitchford's defense was that the sexual intercourse was consensual, and that was the focus of defense counsel's closing argument. Defense counsel argued the defense in closing. 4RP 56-61. A reasonably competent attorney would have read relevant cases concerning the consent defense prior to trial, reviewed the pattern jury instruction, and been sufficiently aware of the defense to propose a consent instruction. Given the facts of this case and defense presented, defense counsel's failure to propose a consent defense instruction was deficient performance.

iii. Mr. Pitchford was prejudiced by the failure of his attorney to propose a consent instruction. Mr. Pitchford was entitled to an instruction on the defense of consent, as he presented evidence that the sexual intercourse was consensual.

The jury, however, did not have the opportunity to determine if Mr. Pitchford was proved consent by a preponderance of the evidence because they were not provided with instructions on the statutory defense. Without the consent defense, the jury had (1) no way to recognize and weigh the legal significance of the defense

witness's testimony or the portions of defense counsel's closing argument concerning consent, and (2) no way to acquit Mr. Pitchford if they were persuaded by a mere preponderance of the evidence that the intercourse was consensual. Instead, the jury had no alternative but to convict Mr. Pitchford. See, Powell, 150 Wn.App. at 156. Mr. Pitchford was thus prejudiced by his lawyer's deficient performance. Id. at 156-57.

c. Mr. Pitchford's conviction must be reversed. Mr. Pitchford did not receive a fair trial because his attorney did not propose an instruction concerning the consent defense that he raised. This Court should reverse his conviction and remand for a new trial. Powell, 150 Wn.App. at 157-58.

#### E. CONCLUSION

Mr. Pitchford's conviction must be reversed and remanded for a new trial because (1) the trial court coerced the deadlocked jury by telling the jurors that juries are commonly not unanimous after three hours of deliberation and requiring them to continue to deliberate and (2) his defense counsel did not propose a consent instruction when Mr. Pitchford raised a consent defense. In the alternative, the firearm enhancement must be vacated because the

jury was incorrectly instructed it had to be unanimous in order to provide a negative answer to the special verdict form.

DATED this 13<sup>th</sup> day of May 2011.

Respectfully submitted,



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Elaine L. Winters – WSBA # 7780  
Washington Appellate Project  
Attorneys for Appellant

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

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

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, ANN JOYCE, STATE THAT ON THE 13TH DAY OF MAY, 2011, I CAUSED THE ORIGINAL **OPENING 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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APPELLATE UNIT	( )	HAND DELIVERY
KING COUNTY COURTHOUSE	( )	_____
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SEATTLE, WA 98104		

[X] JAVON PITCHFORD	(X)	U.S. MAIL
302998	( )	HAND DELIVERY
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**SIGNED** IN SEATTLE, WASHINGTON THIS 13TH DAY OF MAY, 2011.

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