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NO. 70023-5-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

ROBERT PENA,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MARIANE SPEARMAN

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. It is within the sound discretion of the trial court to grant or deny a continuance and to release juror information, which is presumptively private. The trial court denied Pena's requests for juror information and a second continuance of the sentencing hearing to investigate a juror's ability to hear. The motions were based solely on a juror's momentary inability to hear when being polled by the court post-verdict; there is no other evidence indicating that the juror had difficulty hearing at any other time. Has Pena failed to show that the trial court abused its discretion?

2. Courts have consistently held that jurors with an abiding belief in the truth of the charge are satisfied that the defendant's guilt has been established beyond a reasonable doubt. Here, the trial court instructed the jury using the abiding belief language contained in Washington Pattern Jury Instruction 4.01. Has Pena failed to show that the jury was improperly instructed?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

Defendant Robert Pena was charged by Amended Information with one count of child molestation in the first degree;

the named victim was L. CP 18. The Honorable Brian Gain presided over Pena's first trial, which resulted in a mistrial. CP 36. In a second trial, presided over by the Honorable Mariane Spearman, the jury found Pena guilty. CP 36. The trial court¹ sentenced Pena to a standard-range indeterminate sentence of 149 months to a term of life in confinement. CP 72, 75.

2. SUBSTANTIVE FACTS.

On October 8, 2011, L. was eight years old. 10RP² 4; Ex. 17. She lived with her mother in an apartment next door to where her aunt lived. 8RP 20.³ That evening, Pena, his girlfriend, and their young daughter were visiting the apartment of L.'s aunt for the first time. 8RP 24-25.⁴ 8RP 22-23. Pena brought a bottle of Captain Morgan's rum with him and was drinking. 8RP 29. The

¹ Throughout this brief, unless otherwise specified, the phrase "trial court" refers to the court presided over by Judge Spearman.

² There are 11 volumes of verbatim report of proceedings. They will be referred to as follows: 1RP (Aug. 22, 23, and 27, 2012); 2RP (Aug. 28, 2012); 3RP (Aug. 29, 2012); 4RP (Aug. 30, 2012); 5RP (Sept. 4 and 5, 2012); 6RP (Oct. 23 and Nov. 30, 2012, and Jan. 25 and Feb. 5, 2013); 7RP (Oct. 24, 2012- morning); 8RP (Oct. 24, 2012- afternoon); 9RP (Oct. 25, 2012); 10RP (Oct. 29, 2012); and 11RP (Oct. 30, 2012).

³ L.'s mother and aunt are not referred to by name to protect the privacy of those involved.

⁴ L.'s aunt and Pena met during a smoke break while both attended different classes. 8RP 22. They became friends and realized their daughters went to the same daycare center. 8RP 23.

adults were talking in the dining room while Pena's daughter played with the daughter or L.'s aunt in the living room. 9RP 19, 36. L.'s mother stopped by the apartment unexpectedly to borrow a telephone; L.'s mother was with her son and L. 8RP 29; 9RP 33. L.'s aunt invited them inside. 9RP 34.

L.'s mother was seated in the living room watching the children play when Pena came into the room and started to talk to her. 9RP 36. L.'s mother spoke with Pena for several minutes and thought he might be intoxicated. 9RP 40. When L.'s younger brother started to fall asleep in his mother's arms, L.'s mother excused herself to take her son home. 9RP 41. L. was still playing with the other children and asked to stay. 9RP 41. L.'s mother consented and told L. that she would be back in five minutes to get her. 9RP 41.

L. was reading a book to her cousin when Pena sat down next to her on the futon. 10RP 13-14. Pena put his hand on L.'s knee and started rubbing her leg "all the way up." 10RP 10, 25-26. While rubbing L.'s leg, Pena got closer to her and kept saying, "Good girl, good girl." Ex. 17. Pena asked L. if she wanted to go to the store with him and she declined. Ex. 17. L. asked Pena what time it was because she knew she could only stay for a few

minutes. 10RP 27. Pena told L. that there might be a clock in the bathroom and took her into the bathroom with him. 10RP 27. The bathroom was not visible to the other adults from where they were seated in the dining room. 9RP 19.

In the bathroom, Pena placed L. against the sink and stood right behind her. 10RP 27. Pena put his hand inside L.'s underwear and rubbed her where she "go[es] to the bathroom." 10RP 30. Pena then put his hand up L.'s shirt and rubbed her stomach. 10RP 30. While Pena was touching L., he kept saying, "Good girl, good girl." 10RP 30-31. After "a minute or so," Pena stopped and L. ran home to her apartment. 10RP 31-32.

L. rushed into the apartment and slammed the door. 9RP 43. She looked pale and was breathing heavily. 9RP 43. She told her mother, "Mom, I'm not going back over there... because I'm freaked out and I'm really grossed out... because of that man over there." 9RP 43. L.'s mother asked her what happened. 9RP 43-44. While crying and having difficulty breathing, L. described what Pena had done to her. 9RP 44-48.

L.'s mother told L. to stay at home, and she returned to the apartment of L.'s aunt. 9RP 48. Pena had left to go to a store and was not at the apartment when L.'s mother arrived. 8RP 43-44.

L.'s mother told L.'s aunt and Pena's girlfriend what had happened and said that she was going to call the police. 9RP 50-51. L.'s aunt told Pena's girlfriend that she and Pena needed to leave. 8RP 46. A few minutes after Pena left, L.'s mother called 911. 8RP 50. A police officer came and took a report from L.'s mother that evening. 8RP 5-6.

C. ARGUMENT

1. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION BY DENYING PENA'S REQUESTS FOR A SECOND CONTINUANCE AND THE RELEASE OF JUROR INFORMATION.

Pena argues that the trial court abused its discretion in denying his requests for a continuance and the release of juror information to investigate a juror's ability to hear. This argument should be rejected. The trial court properly exercised its discretion where the motions were based on a juror's isolated and momentary inability to hear when it was not clear if her assisted listening device was functioning properly.

a. Relevant Facts.

On October 30, 2012, after the jury found Pena guilty of child molestation in the first degree, the trial court polled each juror individually. 11RP 2. The following exchange occurred while polling juror 2:

The Court: Juror 2, this was your individual verdict?

Juror No. 2: I can't –

The Court: Is this how you voted?

Juror No. 2: (Nodded affirmatively.) I can't hear you.

The Court: You can't hear me?

Juror No. 2: What is she saying?

The Court: Juror 2, can you hear me at all without the – can you hear me now?

Juror No. 2: Okay.

The Court: Can you hear me now?

Juror No. 2: Yeah.

The Court: Okay. Was this your individual verdict, is this how you voted?

Juror No. 2: Yes.

The Court: Was it the verdict of the entire jury panel?

(Off the record.)

The Court: Was it how the entire jury panel voted?

Juror No. 2: I can't hear.

The Court: Did the entire jury panel vote to convict?

Juror No. 2: Yes.

11RP 3-4.⁵

The following week, Pena filed a motion requesting additional time before sentencing to investigate juror 2's ability to hear. CP 66. The trial court granted Pena's request and continued the motion hearing from November 30, 2012 to January 25, 2013 to allow Pena's counsel more time to review the record and to investigate. CP 253; 6RP 139-40, 143.

At the following hearing, Pena's counsel stated that her investigator had not been able to contact any of the jurors directly. 6RP 147. Pena requested a second continuance to investigate and asked the court to release juror information. 6RP 147. Pena's counsel said "I think that the record is absent then in regard to

⁵ Juror 2 was wearing a listening device throughout trial and had it with her as she was being polled by the court. 6RP 138. The record does not reflect whether juror 2 had the listening device turned on or if it was functioning while she was being polled. When the trial court inquired of juror 2 individually, the juror hesitated, then took off her listening device and eventually answered the court's questions. CP 254. Pena's trial counsel stated that juror 2 requested a listening device after the jury was impaneled. CP 64. It is unclear if counsel's timing is accurate. The only request for a listening device reflected in the record was made before the jury was impaneled. 7RP 4. Following the court's hardship inquiry prior to either party commencing voir dire, the court indicated that an unknown juror had requested a listening device. 7RP 4.

whether or not juror 2 could hear throughout the proceedings.”

6RP 147. The prosecutor noted that there was no indication from juror 2 or any of the other jurors that juror 2 had difficulty hearing during trial or was unable to deliberate. 6RP 148-49. The court stated:

The only thing that we knew or know now, is that the juror was having difficulty with the listening device when I was polling her. She did, obviously, have the ability to ask for help when she needed it, because that's why she had a listening device in the first place. ***There was never any indication she had any difficulty at all during the trial, or ever, until that point.*** So, it's unclear what the cause of her difficulty was at the time I was polling her. Could have been the battery went out just then, I don't know. Who knows?

But, I don't think it's appropriate, by any means, to summon all the jurors to come back. I'm not going to do that. ***There's just not a basis*** to even, frankly—nobody knows what the issue is. So, I don't think additional time's going to help. So, I think we need to proceed to sentencing on February 5th.

6RP 150 (emphasis added). Given the lack of evidence that juror 2 was unable to hear at any time other than when she was polled, the court denied Pena's request for an additional continuance and his request for juror information. 6RP 150.

b. The Trial Court Did Not Abuse Its Discretion By Denying Pena's Request For A Second Continuance.

A trial court's decision granting or denying a continuance lies within the sound discretion of the court. State v. Herzog, 69 Wn. App. 521, 524, 849 P.2d 1235 (1993). The trial court's decision will not be disturbed on appeal absent a showing that the court abused its discretion and the defendant was prejudiced thereby. State v. Barnes, 58 Wn. App. 465, 471, 794 P.2d 52 (1990), aff'd in part, rev'd in part, 117 Wn.2d 701, 818 P.2d 1088 (1991). Discretion is abused if it is exercised on untenable grounds or for untenable reasons. Id. at 471.

Here, the trial court did not abuse its discretion in denying Pena's request for a second continuance of his sentencing hearing, and Pena has not demonstrated that he was prejudiced as a result.

There is no evidence that juror 2 had difficulty hearing at any other time during the trial proceedings. 6RP 150; see State v. Woods, 143 Wn.2d 561, 607, 23 P.3d 1046 (2001) (given dearth of any indicia of defendant's incompetence, the trial court did not err in denying a one-week continuance of the sentencing to allow the defendant to be examined). Moreover, numerous safeguards were in place to ensure that juror 2 could hear throughout the

proceedings. Juror 2 was provided with an assisted listening device, which she used throughout the trial. 6RP 138. She demonstrated an ability to notify the court when she was unable to hear by proactively requesting a listening device from the court and by notifying the court while being polled post-verdict that she could not hear the judge. 6RP 150; 11RP 3-4. Additionally, a juror interrupted proceedings when a witness was speaking quietly. 10RP 13.⁶ The court then asked the witness to speak into the microphone and to speak louder. 10RP 13.

Juror 2 was also observed during voir dire for suitability for jury service and accepted by both parties. Throughout the trial, the juror could be observed by the court, counsel, and by court personnel, none of whom expressed any concern with juror 2. 6RP 139. Furthermore, jurors are observable by each other and may report concerns to the court and court staff. Here, no concerns were expressed by any jurors. 6RP 148.

The trial court had previously granted Pena a two-month continuance to review the record and to investigate juror 2's ability to hear. CP 253; 6RP 139-40, 143. Following the first continuance,

⁶ The record does not reflect which juror was speaking, thus it is unclear whether the speaker was juror 2 or one of the other jurors. 10RP 13.

Pena did not point to anything in the record showing that the juror was unable to hear proceedings, and Pena's investigator had been unable to contact any of the jurors directly. 6RP 147. A stronger showing is usually required in support of a subsequent motion for continuance. See Herzog, 69 Wn. App. at 525.

Pena's claim that there was a "substantial likelihood" that juror 2 could not hear throughout other proceedings is simply not supported by the record and should be rejected. During the only instance when the record shows that juror 2 had difficulty hearing, the juror informed the court immediately that she was unable to hear. 11RP 3. She then took her listening device off and was able to answer the court's questions. CP 254. The record does not reflect whether the listening device was functioning properly that morning, whether the device was turned on, whether the volume was turned up, or whether the battery was working. Throughout the entire trial up to that point, there is no indication that juror 2 had difficulty hearing the proceedings. Given the present circumstances, this Court, like the trial court, should not easily jump to a conclusion that a temporary problem hearing with the assistance of a listening device supports a "substantial likelihood" that the juror could not hear throughout all other proceedings.

Similarly, Pena's claim that the trial court did not consider the substance of the motion to continue is without merit. The record demonstrates that the court considered the information and arguments presented by both parties. 6RP 133-40, 147-50. The court considered the request for a continuance in light of the information presented and the court's own observations. 6RP 150. The court concluded that there was no valid reason for further delay. 6RP 150. This conclusion was not untenable, especially given the prior continuance, the absence of any evidence suggesting that the juror had difficulty hearing at any other time, and the other safeguards in place throughout the trial.

c. The Trial Court Properly Denied Pena's Request For Juror Information.

GR 31(j) creates a presumption that juror information, other than name, is private. After trial is over, **upon a showing of good cause**, one of the parties may petition the court to allow access to juror information. GR 31(j). Upon such a showing, the trial court **may** permit access to juror information. GR 31(j). Such a decision is discretionary, and the trial court's decision is reviewed for an abuse of discretion to determine whether the decision is manifestly

unreasonable, or exercised on untenable grounds, or for untenable reasons. State v. Blazina, 174 Wn. App. 906, 909, 301 P.3d 492 (2013).

Here, sound reasons support the trial court's decision. The court found that there was not a basis to release juror information based on the absence of information indicating that juror 2 was unable to hear during the trial proceedings. 6RP 150. The court found that Pena had not shown good cause to overcome the presumption of privacy for juror information. 6RP 150. Due to the lack of information supporting Pena's request, the trial court's decision was not based on untenable grounds or reasons.

2. THE TRIAL COURT DID NOT ERR WHERE IT INSTRUCTED THE JURY USING THE "ABIDING BELIEF" LANGUAGE CONTAINED IN WPIC 4.01.

Pena argues that the court improperly instructed the jury on the burden of proof where the court used the traditional abiding belief language in Washington Pattern Jury Instructions: Criminal (WPIC) 4.01. This argument should be rejected. Pena waived this issue by adopting the abiding belief language; in any event, the use of the challenged language has consistently been upheld as a proper statement of the law.

Jury instructions, when considered in their entirety, must inform the jury that the State bears the burden of proving every essential element of a criminal offense beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 1072-73, 25 L. Ed. 2d 368 (1970). It is reversible error to instruct the jury in a manner that would relieve the State of its burden. State v. Allen, 101 Wn.2d 355, 358, 678 P.2d 798 (1984). Challenged jury instructions are reviewed de novo and are evaluated in the context of the instructions as a whole. State v. Brett, 126 Wn.2d 136, 171, 892 P.2d 29 (1995).

Here, after Pena adopted the State's offered instruction utilizing the abiding belief language, the court accordingly instructed the jury using that language. 10RP 3. Pena waived any challenge to the language; in any event, it is a correct statement of the law.

The instruction given by the court mirrored WPIC 4.01:

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. *If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.*

CP 53 (emphasis added); see 11 Wash. Prac., Washington Pattern Jury Instructions: Criminal, 4.01, at 85 (3rd ed. 2008).

The abiding belief language, as used in WPIC 4.01, has repeatedly and consistently been upheld as a correct statement of the law. See State v. Pirtle, 127 Wn.2d 628, 904 P.2d 245 (1995); State v. Lane, 56 Wn. App. 286, 786 P.2d 277 (1989); State v. Mabry, 51 Wn. App. 24, 751 P.2d 882 (1988); State v. Peterson, 35 Wn. App. 481, 667 P.2d 645, rev. denied, 100 Wn.2d 1028 (1983); State v. Price, 33 Wn. App. 472, 655 P.2d 1191 (1982); State v. Walker, 19 Wn. App. 881, 578 P.2d 83, rev. denied, 90 Wn.2d 1023 (1978); State v. Tanzymore, 54 Wn.2d 290, 340 P.2d 178 (1959). Moreover, the United States Supreme Court upheld a reasonable doubt instruction using the phrase “abiding conviction” where, similar to the instruction used here, the jurors were advised that their conclusion had to be based on the evidence in the case. Victor v. Nebraska, 511 U.S. 1, 114 S. Ct. 1239, 127 L. Ed. 2d 583 (1994).

Despite repeated confirmation of the abiding belief language, Pena cites to State v. Emery to support his claim that the challenged language encourages the jury to view its role as a search for the truth. 174 Wn.2d 741, 760, 278 P.3d 653 (2012).

Pena's reliance on Emery is misguided. In Emery, the court did not address the use of the "abiding belief" language, in jury instructions or otherwise. Rather, the court addressed burden shifting in the context of the prosecutor's closing argument that "this entire trial has been a search for the truth. And it is not a search for doubt." Id. at 758.⁷ Here, neither the prosecutor nor Pena's trial counsel argued that the jury's duty was to search for the truth. Pena's argument is without merit. The jury was properly instructed on the burden of proof through the use of WPIC 4.01.

D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm Pena's conviction.

DATED this 12 day of December, 2013.

Respectfully submitted,

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⁷ The Court found the prosecutor's "truth" statement improper, but found that any error had been cured by an instruction and had been waived by the defendant's failure to object. Emery, 174 Wn.2d at 760, 765.

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Marla L. Zink, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the BRIEF OF RESPONDENT, in STATE V. ROBERT PENA, Cause No. 70023-5 - I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 12 day of December, 2013



Name
Done in Seattle, Washington