

No. 45736-9

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

**Allen Proshold,**

Appellant.

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Cowlitz County Superior Court

Cause No. 13-1-01004-3

The Honorable Marilyn K. Haan

**Appellant's Supplemental Brief**

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## **SUPPLEMENTAL ISSUES AND ASSIGNMENTS OF ERROR**

1. The convictions infringed Mr. Proshold's right to a fair trial by an impartial jury.
2. External time pressures forced the jury to reach a unanimous verdict before 3:00 p.m. on Monday, November 25<sup>th</sup>, 2013.
3. The trial court erred by twice instructing jurors to continue deliberating while failing to insulate them from the external time pressures imposed by Juror No. 5's impending departure.

**ISSUE 1:** An accused person has the constitutional right to a jury verdict uninfluenced by outside factors. In this case, jurors deliberated until late evening one day, and returned knowing that one of their number would have to catch a train at 3:00 p.m. Did the trial court's failure to insulate jurors from an external time pressure violate Mr. Proshold's right to due process and his right to a jury trial under the Sixth and Fourteenth Amendments and Wash. Const. art. I, § 3, 21, and 22?

4. Mr. Proshold was denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel.
5. Defense counsel was ineffective for failing to ask that an alternate juror deliberate in place of one whose impending train voyage placed external time pressure on the deliberation process.

**ISSUE 2:** The Sixth and Fourteenth Amendments guarantee an accused person the effective assistance of counsel. Here, defense counsel unreasonably failed to ask the court to substitute an alternate juror for one scheduled to leave on a 3:00 o'clock train on the afternoon of the second day of deliberation. Was Mr. Proshold denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel?

## **SUPPLEMENTAL FACTS AND PRIOR PROCEEDINGS**

Mr. Proshold's jury trial on charges of rape, attempted robbery, assault, and kidnapping commenced on Wednesday, November 20, 2013. CP 1; RP 8-12. After jury selection, the bailiff notified the court and counsel that Juror No. 5 had train tickets and would be leaving "on Monday to Thanksgiving somewhere." RP 37-38. The prosecuting attorney said "[W]e'll be fine." RP 38. Defense counsel made no comment. RP 38. The judge took no action. RP 38.

On the morning of Friday, November 22<sup>nd</sup>, the court instructed the jury, counsel presented closing arguments, and the jury received the case. RP 399-450. At approximately 5:30 p.m., jurors indicated they were deadlocked. RP 459-462. The judge instructed them to continue deliberating. RP 462. The jury resumed deliberations until the judge released jurors for the weekend shortly after 8:50 p.m. RP 465-468.

On Monday morning, the jury deliberated for another hour, and indicated again that it had reached an impasse. RP 469. When asked, the presiding juror responded that there was a reasonable probability of reaching verdicts on the rape, attempted robbery, and kidnapping charges, but not on the assault charge. RP 471-472. The judge instructed the jury to continue deliberating. RP 477.

At 12:40 p.m., the court noted that Juror No. 5 had brought her luggage to court and “made it very clear... about her needing to catch a train.” RP 482. The prosecutor noted that the juror’s train would leave at 3:00 p.m., and indicated his preference “that we not intrude and we just—...if they want or need something, they’ll let us know, but... absent that, just to let it run its course.” RP 483, 484. The judge agreed. RP 483. Initially, defense counsel did not object or voice a preference. RP 483. After the judge had announced her decision, Mr. Proshold’s attorney suggested that “[w]e could always then bring in the alternate and let them go until Christmas.” RP 484.<sup>1</sup> The court declined. RP 484.

The jury reached a verdict around 2:19 p.m. RP 485. It acquitted Mr. Proshold of rape and attempted robbery, but convicted him of assault and kidnapping. RP 486-487; CP 36-39. Court recessed at 2:29 p.m. RP 494.

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<sup>1</sup> Counsel apparently meant the phrase “let them go until Christmas” to mean “let them continue deliberating until Christmas,” without the hindrance posed by Juror No. 5’s schedule.

## ARGUMENT

### **I. MR. PROSHOLD’S CONVICTIONS VIOLATED HIS RIGHT TO DUE PROCESS AND HIS RIGHT TO A JURY TRIAL.**

#### A. Standard of review.

Constitutional violations are reviewed *de novo*. *State v. Zillyette*, 178 Wn.2d 153, 161, 307 P.3d 712 (2013). A manifest error affecting a constitutional right may be raised for the first time on review.<sup>2</sup> RAP 2.5(a)(3). A claim of outside influence affecting a jury verdict raises a manifest error affecting a constitutional right. *See State v. Ford*, 171 Wn.2d 185, 188, 250 P.3d 97 (2011) (addressing judicial coercion).

#### B. The pressure of one juror’s impending departure for vacation improperly influenced the jury’s verdict and violated Mr. Proshold’s right to a fair trial.

The state and federal constitutions guarantee an accused person the right to a fair trial by an impartial jury. U.S. Const. Amends. VI, XIV; Wash. Const. art. I, §§ 3, 22. The constitutional right to a jury trial includes “the right to have each juror reach his [or her] verdict uninfluenced by factors outside the evidence, the court’s proper instructions, and the arguments of counsel.” *State v. Boogaard*, 90 Wn.2d

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<sup>2</sup> The court has discretion to review other issues argued for the first time on appeal. RAP 2.5(a); *see State v. Russell*, 171 Wn.2d 118, 122, 249 P.3d 604 (2011).



733, 736, 585 P.2d 789 (1978). A verdict coerced by improper time pressure cannot stand. *Id.*

In *Boogaard*, the trial judge asked each juror if the jury could reach a verdict in half an hour. After this individualized poll, the court instructed jurors to continue deliberating. The jury reached a verdict after thirty minutes. *Id.*, at 735. The Supreme Court reversed, holding that the proceedings “unavoidably tended to suggest to minority jurors that they should ‘give in’ for the sake of that goal which the judge obviously deemed desirable namely, a verdict within a half hour.” *Id.*, at 736.

The court reached a similar result in *State v. Crowell*, 92 Wn.2d 143, 594 P.2d 905 (1979). In that case, a bailiff told jurors that the jury “‘would be required to remain in the jury room until they had reached a decision,’ and that if the jury did not reach ‘a verdict by 10:00 o’clock it was to be called a hung jury.’” *Id.*, at 147. The Supreme Court reversed, holding that these remarks “are of the type that would prejudice a jury and necessitate a new trial.” *Id.*

This case also requires reversal. Twice, the court instructed jurors to continue deliberating. RP 462, 477. The court did not tell the jury what would happen if jurors didn’t reach a unanimous verdict by the time Juror No. 5 had to catch her 3:00 o’clock train. These circumstances placed

pressure on the jury to reach their verdicts before 3:00 p.m. on Monday. The jury did so, delivering their verdicts around 2:20 p.m. RP 485.

By instructing jurors to continue deliberating, and by failing to reassure them that Juror No. 5 would not be forced to miss her train, the trial judge created circumstances that pressured jurors into returning unanimous verdicts. Because of this, the guilty verdicts must be vacated and the case remanded for a new trial. *Boogaard*, 90 Wn.2d at 736.

This is so even though the trial judge did not affirmatively direct jurors to return a verdict quickly. Although the Supreme Court has noted “[i]mportant distinctions... between a case where a court official urges jurors to haste and a case where the jurors have their own motives for haste,”<sup>3</sup> the distinction does not distinguish *Boogaard* from Mr. Proshold’s case. As the *Jackman* court noted, the critical issue is whether “jurors suffer an outside influence on their decisionmaking...” *Jackman*, 113 Wn.2d at 779.<sup>4</sup>

In this case, the trial court knew of a strong external time pressure weighing on the jury: Juror No. 5—who had brought her luggage to court—was “very clear” that she needed “to catch a train.” RP 482.

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<sup>3</sup> *State v. Jackman*, 113 Wn.2d 772, 779, 783 P.2d 580 (1989).

<sup>4</sup> In *Jackman*, the jury elected as foreperson a man whom they knew would not waste time because he “was overdue for a vacation.” *Id.*, at 777. Although jurors presumed the foreperson would have a general desire to hurry things along, no specific external time pressure impinged on the jury’s deliberations.

Despite this, the judge took no steps to insulate the jury from this external deadline. The judge had two alternates available; either could have started deliberations in place of Juror No. 5. RP 445-448. Furthermore, the judge could have reassured the jury that Juror No. 5 would not be forced to miss her train.

The trial judge's dual admonishments to continue deliberating, combined with her failure to insulate the jury from external time pressures deprived Mr. Proshold of his right to a fair trial by an impartial jury. *Boogaard*, 90 Wn.2d at 736. His convictions must be reversed and the case remanded for a new trial. *Id.*

**II. MR. PROSHOLD DEPRIVED OF HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.**

**A. Standard of Review**

An ineffective assistance claim presents a mixed question of law and fact, requiring *de novo* review. *In re Fleming*, 142 Wn.2d 853, 865, 16 P.3d 610 (2001); *State v. Horton*, 136 Wn. App. 29, 146 P.3d 1227 (2006).

- B. The Sixth and Fourteenth Amendments guarantee an accused person the effective assistance of counsel.

The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right... to have the Assistance of Counsel for his defense.” U.S. Const. Amend. VI. This provision applies to the states through the Fourteenth Amendment. U.S. Const. Amend. XIV; *Gideon v. Wainwright*, 372 U.S. 335, 342, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). Likewise, art. I, § 22 of the Washington Constitution provides, “In criminal prosecutions, the accused shall have the right to appear and defend in person, or by counsel....” Wash. Const. art. I, § 22. The right to counsel is “one of the most fundamental and cherished rights guaranteed by the Constitution.” *United States v. Salemo*, 61 F.3d 214, 221-222 (3<sup>rd</sup> Cir. 1995).

An appellant claiming ineffective assistance must show (1) that defense counsel’s conduct was deficient, falling below an objective standard of reasonableness; and (2) that the deficient performance resulted in prejudice, meaning “a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have differed.” *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004) (citing *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)).

The strong presumption of adequate performance is only overcome when “there is no conceivable legitimate tactic explaining counsel’s performance.” *Reichenbach*, 153 Wn.2d at 130. Any trial strategy “must be based on reasoned decision-making...” *In re Hubert*, 138 Wn. App. 924, 929, 158 P.3d 1282 (2007). There must be some indication in the record that counsel was actually pursuing the alleged strategy. *See, e.g., State v. Hendrickson*, 129 Wn.2d 61, 78-79, 917 P.2d 563 (1996) (the state’s argument that counsel “made a tactical decision by not objecting to the introduction of evidence of... prior convictions has no support in the record.”)

- C. Defense counsel provided ineffective assistance by failing to ask the trial judge to substitute an alternate juror in place of one whose scheduled train journey imposed an external time pressure on the jury’s deliberations.

The Sixth Amendment right to the effective assistance of counsel exists in order to protect an accused person’s fundamental right to a fair trial. *Lockhart v. Fretwell*, 506 U.S. 364, 369, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993). The right to a fair trial includes the right to a decision based solely on the evidence. *Mach v. Stewart*, 137 F.3d 630, 633 (9th Cir. 1997) (citing *Smith v. Phillips*, 455 U.S. 209, 217, 71 L.Ed.2d 78, 102 S.Ct. 940 (1982)). A jury’s decision may not be influenced by “factors outside the evidence,” such as external time pressures. *Boogaard*, 90

Wn.2d at 736. A verdict coerced by improper time pressure cannot stand.

*Id.*

Here, counsel made no effort to safeguard his client's right to a fair verdict, free from the outside influence of external time pressures.

Counsel knew that one juror would have to catch a train before the jury even began deliberating. RP 37-38. On the second day of deliberations, counsel knew that the juror had brought her luggage to court. RP 483-484.

Counsel's only comment regarding the appropriate procedure came after the judge had announced her decision. RP 484. At that point, counsel suggested that the court bring in an alternate. RP 484.

Mr. Proshold's attorney should have made a more vigorous objection. He should also have asked the court to substitute an alternate juror as soon as it became clear that the jury had not finished deliberating at the end of the first day. Counsel's failure to do so deprived Mr. Proshold of his right to the effective assistance of counsel. *Reichenbach*, 153 Wn.2d at 130.

This error prejudiced Mr. Proshold. There is a reasonable possibility that the outcome would have differed had counsel asserted his client's rights. *Reichenbach*, 153 Wn.2d at 130. Accordingly, Mr.

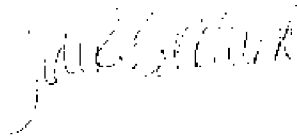
Proshold's convictions must be reversed and the case remanded for a new trial. *Id.*

**CONCLUSION**

The jury that returned guilty verdicts in Mr. Proshold's case faced an external time pressure occasioned by Juror No. 5's scheduled 3:00 p.m. departure. Defense counsel should have objected and asked that an alternate juror be substituted for Juror No. 5. Accordingly, Mr. Proshold's convictions must be reversed and the case remanded for a new trial.

Respectfully submitted on July 17, 2014.

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I certify that on today's date:

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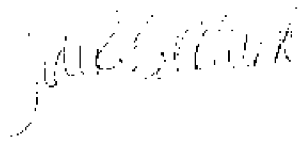
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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on July 17, 2014.



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**BACKLUND & MISTRY**

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