IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	NO. 63069-5-I
	)	
Respondent,	)	DIVISION ONE
	)	
v.	)	
	)	
DINDO LOMIBAO PANGILINAN,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	FILED: June 14, 2010
	)	

Lau, J. — Dindo Pangilinan appeals the jury's special verdict finding that he committed burglary in the first degree with sexual motivation, arguing that he received ineffective assistance when his attorney failed to object to an instruction and that the trial court answered a jury question in a coercive manner. Because Pangilinan fails to demonstrate ineffective assistance and fails to establish that the trial court's response constitutes a manifest error affecting a constitutional right, we affirm.

FACTS

On the evening of September 27, 2008, a large group of friends gathered at a house in Bellingham where college student Maggie Brewe lived with six other women. As the group prepared to walk downtown to a grand opening party at a snowboard and skate shop, a man arrived whom Brewe did not recognize. When she asked his name and who he knew at the house, the man said his name was "John," he was a transfer

student from California, and he was meeting a friend who knew someone at the house. Shortly thereafter, they all left the house and Brewe did not recall whether "John" attended the party at the snowboard shop. Later, Brewe returned home and went to bed.

Sometime around 3 a.m., Alex Michel, who had been sleeping on the couch, saw a man come into the house. Afraid, Michel ran upstairs to one of the other bedrooms to ask her friend what to do. Shortly thereafter, Brewe was awakened by someone getting into her bed, kissing her, and trying to put his hand up her shirt and down her pants. Brewe recognized the intruder as "John" and ran out of the room to join her roommates, who called the police. When the police arrived, they arrested the man in Brewe's bed, who was identified as Dindo Pangilinan, and discovered marijuana next to him.

The State charged Pangilinan with one count of burglary in the first degree with sexual motivation and one count of possession of marijuana. At trial, the trial court instructed the jury that if it found Pangilinan guilty of burglary, it should answer "yes" or "no" on a special verdict form regarding sexual motivation. The instruction states,

> Because this is a criminal case, all twelve of you must agree in order to answer the special verdict form. In order to answer the special verdict form "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."

During deliberations, the jury sent out a note stating, "Does the jury have to answer the special verdict form if they cannot agree unanimously yes or no?" The trial court provided the following answer in writing: "The jury is to consider and apply the court's instructions as a whole, apply the standards found therein in determining the

answer on the special verdict form."

The jury found Pangilinan guilty as charged and answered "yes" on the special verdict form. The trial court imposed a standard range sentence. Pangilinan appeals.

ANALYSIS

Pangilinan first contends that his attorney provided ineffective assistance by failing to object to the instruction concerning the special verdict.

To establish ineffective assistance of counsel, Pangilinan must show both deficient performance and resulting prejudice. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Counsel's performance is deficient if it falls below an objective standard of reasonableness based on a consideration of all the circumstances. State v. Stenson, 132 Wn.2d 668, 705-06, 940 P.2d 1239 (1997). There is a strong presumption of effective representation. State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). To prove prejudice, Pangilinan must show that but for counsel's deficient performance, there is a reasonable probability the outcome of the proceedings would have been different. State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). If Pangilinan fails to satisfy either part of the test, we need not inquire further. State v. Hendrickson, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

Pangilinan contends that his attorney should have objected to the instruction as a misstatement of the law based on State v. Goldberg, 149 Wn.2d 888, 72 P.3d 1083 (2003). In Goldberg, the jury returned its verdict and answered "no" on a special verdict form. Goldberg, 149 Wn.2d at 891. The trial court polled the jury by a show of

hands on how many had voted "no" on the special verdict and learned that only three jurors had actually voted no. Goldberg, 149 Wn.2d at 891. The trial court asked whether the jury could reach a unanimous decision on the special verdict and then instructed the jury to resume deliberations. Goldberg, 149 Wn.2d at 891. Our Supreme Court reviewed the instruction to the jury stating, "'In order to answer the special verdict form "yes", you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you have a reasonable doubt as to the questions, you must answer "no."'" Goldberg, 149 Wn.2d at 893. The Supreme Court held that when the jury answered "no" on the special verdict form, based on the instruction as given that did not require unanimity, "the jury's responsibilities were completed and the jury's judgment should have been accepted," such that trial court erred by ordering continued deliberations. Goldberg, 149 Wn.2d at 894.

But the instruction here was based on 11A Washington Practice: Washington Pattern Jury Instructions: Criminal 160.00 (3d ed. 2008) (WPIC). The comment to WPIC 160.00 states that after Goldberg, it was not clear whether unanimity was required for a "no" answer on a special verdict until this court determined in State v. Bashaw, 144 Wn. App. 196, 182 P.3d 451 (2008), review granted, 165 Wn.2d 1002 (2008), that Goldberg "did not alter the general rule that unanimous jury verdicts are required in criminal cases." 11A Washington Practice 160.00 cmt. at 630 (3d ed. 2008). In Bashaw, Division Three noted that Goldberg did not address the pattern instructions, discuss legislative history or intent regarding particular special findings or verdicts, or address policy considerations concerning special verdicts in general.

Bashaw, 144 Wn. App. at 202.

Pangilinan argues that defense counsel was required to object because the Supreme Court granted review of Bashaw on December 2, 2008, just two weeks before trial began in his case. But neither the decision granting review nor Pangilinan's speculation about the Supreme Court's ultimate decision establishes that Bashaw was wrongly decided or that WPIC 160.00 was a misstatement of the law.

Moreover, Pangilinan fails to establish prejudice. The jury answered "yes" on the special verdict form. There is no indication in the record that the decision was not unanimous. Contrary to Pangilinan's assertion, the jury's question regarding the special verdict form does not establish that the jury was actually deadlocked or could not agree on the special verdict. We cannot infer prejudice from Pangilinan's speculation that the jury would have answered "no" if it had been instructed that unanimity was not required to vote "no." Pangilinan fails to demonstrate ineffective assistance.

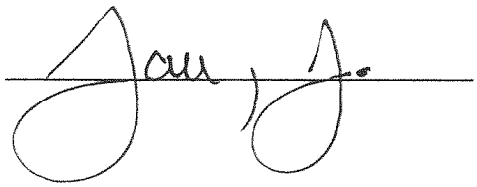
Relying on State v. Boogaard, 90 Wn.2d 733, 585 P.2d 789 (1978), and CrR 6.15(f)(2), Pangilinan next contends that the trial court violated his right to a jury trial by answering the jury's question in a coercive manner. Because he failed to object at trial, Pangilinan must establish a manifest error affecting a constitutional right, i.e., he must demonstrate actual prejudice with a plausible showing that the asserted error had practical and identifiable consequences in the trial of the case. RAP 2.5(a); State v. O'Hara, 167 Wn.2d 91, 99, 217 P.3d 756 (2009); State v. Gregory, 158 Wn.2d 759, 839, 147 P.3d 1201 (2006).

In Boogaard, the judge inquired how the jury stood numerically, asked the foreman about the history of the vote, and asked whether the jury could reach a verdict in a half hour. Boogaard, 90 Wn.2d at 735. The judge then asked each juror whether the jury could reach a verdict in a half hour, and all but one answered that it could. Thereafter, the judge instructed the jury to continue deliberations for a half hour. The jury returned with a verdict in thirty minutes. Boogaard, 90 Wn.2d at 735. Under the circumstances, the Supreme Court determined that the questioning of the individual jurors "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," and reversed the conviction. Boogaard, 90 Wn.2d at 736.

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."

The trial court's response to the jury's question did nothing more than refer the jury back to the original instructions. The trial court did not ask the jury to explain the reasons for its question or make any inquiry into the potential for a verdict. The trial court's response did not include an order to continue deliberating, did not refer to any particular part of the previous instructions, and did not suggest the need for agreement, the consequences of no agreement, or any time considerations. To establish actual prejudice, Pangilinan points only to the fact that the jury returned a verdict 15 minutes after the trial court gave its response. Pangilinan's speculation that holdout jurors were coerced to agree based on the trial court's general reference to the prior instructions "as a whole," does not establish actual prejudice.

Because Pangilinan fails to demonstrate a manifest error, we will not consider his claim further. RAP 2.5(a).



Affirmed.

WE CONCUR: