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

STATE OF WASHINGTON,	)	No. 65176-5-I
	)	
Respondent,	)	
	)	
v.	)	
	)	
JAVON DASHAUN PITCHFORD,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	FILED: March 19, 2012
	)	

Ellington, J. — Javon Pitchford was convicted of rape in the first degree. The court imposed a sentence within the standard range, including a firearms enhancement based on the jury's special verdict. He contends the court coerced the jury into its guilty verdict and that he was deprived of effective assistance of counsel. He further contends the jury instructions concerning the special verdict violated his constitutional right to jury unanimity and that that the State failed to prove his criminal history at sentencing. We affirm Pitchford's first degree rape conviction, but vacate the firearms sentence enhancement and remand for resentencing.

BACKGROUND

Javon Pitchford was charged with the crimes of rape in the first degree and robbery in the first degree following events that took place on October 23, 2008. Around one o'clock that morning, Pitchford encountered a woman named Suzy G. in

the parking lot behind a pub in downtown Renton. Their accounts of what happened after that differ.

At trial, Suzy testified that Pitchford, a stranger at the time, asked her whether she wanted to "smoke a bowl," which she understood to mean smoke marijuana.[1] As they walked away from the bar, Pitchford pulled out a pipe used to smoke methamphetamine. Suzy told him she did not smoke meth and wanted to go back to the bar. Pitchford then pulled a gun and directed her toward a dimly lit park along the Cedar River where he took approximately $300 from her purse and forced her to engage in oral and vaginal intercourse.

Pitchford testified that he and Suzy had previously done drugs together and had a sexual relationship. He said the morning of October 23, they smoked meth and that she performed oral sex on him in the park. He said she became irritated with him when he refused to give her any crack, and she left. He denied taking any money from Suzy or having a gun.

The jury convicted Pitchford of rape in the first degree and acquitted him of robbery in the first degree. The jury's special verdict found he was armed with a firearm when he committed the rape. At sentencing, the court accepted the State's determination of Pitchford's criminal history and offender score. The court imposed a sentence within the standard range plus a firearm enhancement: an indeterminate sentence of 210 months to life.

DISCUSSION

[1] Report of Proceedings (RP) (Feb. 1, 2010) at 23.

Judicial Coercion

Pitchford contends the court's interaction with the jury had a coercive effect on their deliberations. After the jurors asked the court what to do given that it was "deadlocked nine guilty and three not guilty,"[2] the court addressed them:

> The court has received your inquiry about what happens if the jury is deadlocked.
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> 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 . . . around three hours. It is not unusual after that amount of time for you not to be unanimous one 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 reread to you instruction number two, which you may be familiar with, you probably are, but I think it really provides a useful guide for you in terms of where you go from here.
>
> And it reads as follows:
>
> "As jurors, you have a duty to discuss the case with one another and to deliberate in an effort to reach a unanimous verdict. Each of you must decide the case for yourself but only after you consider the evidence impartially with your fellow jurors.
>
> "During your deliberations, you should not hesitate to reexamine your views and to change your opinions based upon further review of the evidence and these instructions.
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> "You should not, however, surrender your honest belief about the value or significance of evidence solely because of the opinions of your fellow jurors nor should you change your mind just for the purpose of reaching a verdict."
>
> So I am going to ask that you continue to, your deliberations at

[2] RP (Feb. 5, 2010) at 68.

this point.[3]

Pitchford claims the court deprived him of his constitutional right to due process and violated CrR 6.15. We disagree.

A defendant's right to a fair trial before an impartial jury is protected by due process provisions of the state and federal constitutions.[4] 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.[5] A trial court judge must not bring coercive pressure on jury deliberations.[6]

CrR 6.15 was adopted to curtail judicial coercion of a deadlocked jury and interference in the jury's deliberative process.[7] 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 no agreement; or (3) the length of time a jury should deliberate.[8] But the trial court is afforded broad discretion to decide whether a jury is deadlocked and is allowed to instruct the jury to continue deliberating, so long as the instruction adheres to the requirements of due process and CrR 6.15.[9]

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[3] RP (Feb. 5, 2010) at 69-71.

[4] U.S. Const. amends. VI, XIV; Wash. Const. art. I, §§ 3, 22.

[5] State v. Goldberg, 149 Wn.2d 888, 892, 72 P.3d 1083 (2003) (quoting State v. Boogaard, 90 Wn.2d 733, 736, 585 P.2d 789 (1978)).

[6] Boogaard, 90 Wn.2d at 736-37.

[7] State v. Watkins, 99 Wn.2d 166, 175, 660 P.2d 1117 (1983); Boogaard, 90 Wn.2d at 736.

[8] CrR 6.15(f)(2); see also Watkins, 99 Wn.2d at 175; Boogaard, 90 Wn.2d at 736.

[9] Watkins, 99 Wn.2d at 175; State v. Jones, 97 Wn.2d 159, 163, 641 P.2d 708 (1982).

To show that a trial court improperly coerced the jury with supplemental instructions to continue deliberating, the defendant must establish a reasonably substantial possibility that the trial court's intervention improperly influenced the jury.[10] In reviewing whether this was the case, we consider all the circumstances surrounding the court's intervention.[11]

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.[12] The suggested colloquy, directed toward the jury, inquires as to whether there is a reasonable probability of the jury reaching a verdict within a reasonable time.[13]

Here, the court did not employ WPIC 4.70, but its interaction with the jury was not coercive. It did not suggest the jury was required to reach an agreement, inform the jury of any consequences of disagreement, or place any time constraints on the jury's continued deliberations.

Comparing his own case to Iverson v. Pacific American Fisheries,[14] Pitchford contends the jurors' awareness that the court knew they were split nine to three for a guilty verdict, and the subsequent guilty verdict, is definitive evidence that the court's instructions were coercive. But this ignores the fact that in Iverson, the jury had been

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[10] Watkins, 99 Wn.2d at 177-78 (discussing Boogaard).

[11] Id. at 177.

[12] 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 4.70, at 143 (3rd ed. 2008) (WPIC).

[13] Id.

[14] 73 Wn.2d 973, 442 P.2d 243 (1968).

deliberating for eight hours when it indicated a possible deadlock and informed the court it was split nine to three for the defendant, and that it returned its verdict for the defendant only ten minutes after the court instructed it to continue deliberations.[15]

Here, the jury had deliberated only three hours before informing the court of its split. After the court's instructions to continue deliberating, which occurred at about 10 a.m. on Friday, the jury deliberated for the rest of the day and almost all of Monday morning.[16] It returned a verdict of guilty on the charge of rape in the first degree and found Pitchford had had a firearm during the commission of that crime. The jury acquitted Pitchford of the robbery charge.

There is no indication the jury was coerced into rendering a particular verdict within any set amount of time. We reject Pitchford's contentions to the contrary.

Ineffective Assistance of Counsel

Pitchford next argues his attorney's failure to offer an instruction on the statutory defense of consent deprived him of his constitutional right to effective assistance of counsel. We disagree.

A criminal defendant has a constitutional right to effective assistance of

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[15] Iverson, 73 Wn.2d at 974-75.

[16] The length of time the jury deliberated after the court's intervention is relevant to whether the jury was coerced by the court. State v. McCullum, 28 Wn. App. 145, 153, 622 P.3d 873 (1981), rev'd on other grounds, 98 Wn.2d 484, 656 P.2d 1064 (1983).

[17] Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). To prevail on a claim of ineffective assistance of counsel, the defendant must show that counsel's representation was deficient and that the defendant was prejudiced. Id. at 687; State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). If the court decides that either prong has not been met, it need not address the other prong. State v. Garcia, 57 Wn. App. 927, 932, 791 P.2d 244 (1990).

counsel.[17] To determine if defense counsel's failure to propose an appropriate jury instruction constitutes ineffective assistance of counsel, appellate courts review whether: (1) the defendant was entitled to the instruction; (2) the failure to request the instruction was tactical; and (3) the failure to offer the instruction prejudiced the defendant.[18] Courts are required to begin their analysis with a strong presumption of competence.[19] To show prejudice, the defendant must establish a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different.[20] We review ineffective assistance of counsel de novo.[21]

Pitchford was charged under RCW 9A.44.040(1)(a), which describes the crime of rape in the first degree, in part, as, "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 . . . [u]ses or threatens to use a deadly weapon or what appears to be a deadly weapon." "Forcible compulsion" is statutorily defined as "physical force which overcomes resistance, or a threat, express or implied, that places

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[17] Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). To prevail on a claim of ineffective assistance of counsel, the defendant must show that counsel's representation was deficient and that the defendant was prejudiced. Id. at 687; State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). If the court decides that either prong has not been met, it need not address the other prong. State v. Garcia, 57 Wn. App. 927, 932, 791 P.2d 244 (1990).

[18] State v. Powell, 150 Wn. App. 139, 154-58, 206 P.3d 703 (2009).

[19] Strickland, 466 U.S. at 689-90. A lawyer's strategic choices made after thorough investigation of the law and the facts rarely constitute deficient performance. Id. at 690; State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004).

[20] Strickland, 466 U.S. at 694. Prejudice is not established by showing that counsel's error had some conceivable effect on the outcome of the proceeding. Id. at 693.

[21] Id. at 698.

a person in fear of death or physical injury."[22] The court instructed the jury based on the statutory definitions of rape in the first degree, including the State's burden to prove beyond a reasonable doubt that forcible compulsion occurred.

Pitchford's defense was that the sexual encounter with Suzy was consensual. Consent is a defense upon which the defendant has the burden of proof, and is defined under RCW 9A.44.010(7) as "freely given agreement to have sexual intercourse or sexual contact."[23] Pitchford's attorney did not propose a separate instruction on the consent defense. Pitchford alleges counsel was thereby ineffective.

Assuming Pitchford was entitled to the instruction, he fails to overcome the presumption that counsel made a legitimate tactical decision. The interplay between the State's burden to prove forcible compulsion beyond a reasonable doubt and the defendant's opportunity to prove consent by a preponderance[24] is likely a baffling area for juries, especially where there is no relevant factual difference—as there would be, for example, where the defendant admitted using force but contended it was consensual. It is a legitimate tactic to focus the jury's attention on the State's high burden of proof of force by avoiding introduction of a potentially confusing inquiry about defendant's burden to prove the consent defense. Further, because both the State's theory and the defense rested upon the same evidence, and the jury found beyond a reasonable doubt that Pitchford engaged in sexual intercourse with Gregory by forcible

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[22] RCW 9A.44.010(6).

[23] State v. Gregory, 158 Wn.2d 759, 803, 147 P.3d 1201 (2006); see also State v. Camara, 113 Wn.2d 631, 636, 781 P.2d 483 (1989).

[24] See Gregory, 158 Wn.2d at 801-04; Camara, 113 Wn.2d 631 at 640.

compulsion, it necessarily rejected Pitchford's defense that she consented to the encounter. A jury instruction about this defense would not have changed the outcome of the proceeding.

Pitchford's attempt to draw a parallel between his own case and Powell fails. In Powell, the defendant was accused of second degree rape for engaging in sexual intercourse with a person who was incapable of consent by reason of being physically helpless or mentally incapacitated.[25] Powell asserted that statutory defense of "reasonable belief," asserting that he reasonably believed the woman with whom he had intercourse was capable of consent.[26] His attorney did not propose a jury instruction on the reasonable belief defense.

The court concluded that the absence of an instruction on the reasonable belief defense deprived the jury of an opportunity to acquit Powell.[27] It reasoned that if the jury had found that Powell had proved by a preponderance of the evidence that he reasonably believed the alleged victim was capable of consent and that the State had proved beyond a reasonable doubt that the alleged victim was, in fact, incapable of consent, the jury would not have had a means to acquit Powell based on his successful defense.[28] That is not the case here where, had the jury believed Pitchford's consent defense, it could not also have found that he forcibly compelled Gregory into sexual intercourse.[29]

Special Verdict Jury Instructions

Pitchford contends the jury was incorrectly instructed that unanimity was

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[25] Powell, 150 Wn. App. at 142.

[26] Id. at 152.

[27] Id. at 156.

[28] Id. at 156-57.

[29] See Camara, 113 Wn.2d at 636-37, 640 (there is a conceptual overlap between the element of forcible compulsion in a first degree rape charge and the consent defense).

required to answer the special verdict form for firearm enhancement. We agree.

The defendant in a criminal case may be convicted only by a unanimous verdict from a 12-person jury.[30] Under State v. Bashaw, the court must instruct the jury that unanimity is required to answer "yes" on a special verdict form, but that unanimity is not required to answer "no."[31] Because this is an issue of constitutional magnitude, a defendant may raise it for the first time on appeal.[32]

Here, the jury was provided with a special verdict form 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?"[33] The instruction provided to the jury regarding the special verdict form read:

> 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 of 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."[34]

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[30] U.S. Const. amends. VI, XIV; Wash. Const. art. I, §§ 21, 22; State v. Williams-Walker, 167 Wn.2d 889, 895-97, 225 P.3d 913 (2010).

[31] 169 Wn.2d 133, 145-47, 234 P.3d 195 (2010) (discussing State v. Goldberg, 149 Wn.2d 888, 72 P.3d 1083 (2003)).

[32] State v. Ryan, 160 Wn. App. 944, 948-49, 252 P.3d 895 (2011) rev. granted; 172 Wn.2d 1004, 258 P.3d 676 (2011); but see State v. Morgan, 163 Wn. App. 341, 351-53, 261 P.3d 167 (2011); State v. Nunez, 160 Wn. App. 150, 159, 248 P.3d 103, rev. granted 172 Wn.2d 1004, 258 P.3d 676 (2011). On January 12, 2012, our Supreme Court heard oral argument on this issue of whether a Bashaw error is of constitutional magnitude that may be raised for the first time on appeal. See RAP 2.5.

[33] Clerk's Papers at 45.

[34] Clerk's Papers at 38.

The jury answered "yes" on the special verdict form.

The instruction fails to make clear that the jury did not need to be unanimous to answer "no" on the special verdict form. Consistent with our recent decision in State v. Reyes-Brooks, we remand for the resentencing court to impanel a jury to consider the factual basis for the firearm enhancement in this case with proper instructions.[35]

Accuracy of Judgment and Sentence

Pitchford contends the State did not meet its burden to prove his criminal history at sentencing. We agree.

To properly calculate a defendant's offender score and sentence, the Sentencing Reform Act of 1981, chapter 9.94A RCW, requires sentencing courts to determine a defendant's criminal history based on his prior convictions and the level of seriousness of the current offense.[36] The State must prove a defendant's criminal history by a preponderance of the evidence.[37] A defendant waives the right to object to the inclusion of a prior conviction when the defendant affirmatively acknowledges that the conviction was properly included in his offender score.[38] But a defendant's silence

[35] 165 Wn. App. 193, 267 P.3d 465, 469 (2011); see also RCW 9.94A.537(2) ("In any case where an exceptional sentence above the standard range was imposed and where a new sentencing hearing is required, the superior court may impanel a jury to consider any alleged aggravating circumstances listed in RCW 9.94A.535(3), that were relied upon by the superior court in imposing the previous sentence, at the new sentencing hearing.").

[36] RCW 9.94A.505; State v. Ross, 152 Wn.2d 220, 229, 95 P.3d 1225 (2004).

[37] State v. Hunley, 161 Wn. App. 919, 927, 253 P.3d 448, review granted, 172 Wn.2d 1014, 262 P.3d 63 (2011).

[38] Ross, 152 Wn.2d 220, 229-32, 95 P.3d 1225 (2004) (court refused to accept challenge to offender score where defendants had affirmatively acknowledged prior out-of-state convictions were properly included in their offender scores); but see Hunley, 161 Wn. App. at 928-29 (RCW 9.94A.530(2) statement that failure to object to

on the issue is not sufficient to constitute such waiver.[39]

Prior to sentencing, both the State and defense submitted presentence reports to the trial court. The State's presentence report detailed Pitchford's criminal history and the State's offender score calculation, including one adult felony conviction and five juvenile felony adjudications for a total offender score of three.[40] At sentencing, the defense agreed to the State's calculation of the offender score.

Pitchford correctly points out that his counsel's agreement regarding the offender score calculation is not affirmative acknowledgment of criminal history constituting waiver.[41] On remand for resentencing, the State may present all relevant evidence regarding Pitchford's criminal history.[42]

The court's instruction to the jury to continue deliberations was not coercive and Pitchford was not deprived of effective assistance of counsel. We affirm his conviction for first degree rape. We reverse the firearms sentence enhancement and remand for resentencing consistent with this opinion.

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conviction history presented at time of sentencing constitutes "acknowledgment" held unconstitutional) (Supreme Court oral argument docketed for March 13, 2012).

[39] Hunley, 161 Wn. App at 928-29.

[40] Based on this offender score, the State determined Pitchford's standard range sentence, accounting for the firearm enhancement, was 180 to 220 months. The defense presentence report acknowledged the State's determination of Pitchford's standard range.

[41] See State v. Lucero, 168 Wn.2d 785, 789, 230 P.3d 165 (2010).

[42] See RCW 9.94A.530(2); Hunley, 161 Wn. App. at 929. Given our conclusion on this issue, we need not address the parties' arguments pertaining to calculation of Pitchford's offender score and correction of the judgment and sentence documents as the parties will have an opportunity to resolve these matters during resentencing.

Ellington, J.

WE CONCUR:

Leach, A.C.J.

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