SUMMARY
November 15, 2018

2018COA166

No. 18CA0625, People v. Burke — Criminal Procedure — Motion for New Trial; Evidence — Witnesses — Competency of Juror as Witness

A defendant convicted of burglary filed a motion for a new trial based on an anonymous juror's response to a post-verdict attorney evaluation. In the evaluation, the juror indicated that he or she may have failed to follow the trial court's instruction that jurors must not consider the defendant's decision not to testify. Without taking additional evidence, the trial court granted defendant's motion for a new trial. A division of the court of appeals reverses the trial court's order granting defendant a new trial, holding that the anonymous juror's statement is inadmissible under Colorado Rule of Evidence 606(b) to impeach the verdict. The majority further concludes that the circumstances do not warrant

recognizing a constitutional exception to Rule 606(b), distinguishing *Pena-Rodriguez v. Colorado*, ___ U.S. ___, 137 S. Ct. 855, 867 (2017). The special concurrence, on the other hand, would remand the matter for a hearing on defendant's motion for a new trial.

COLORADO COURT OF APPEALS **2018COA166**

Court of Appeals No. 18CA0625
Mesa County District Court No. 15CR591
Honorable Richard T. Gurley, Judge

The People of the State of Colorado,

Plaintiff-Appellant,

v.

Shannon Deane Burke,

Defendant-Appellee.

ORDER REVERSED AND CASE
REMANDED WITH DIRECTIONS

Division I
Opinion by JUDGE WELLING
Bernard, J., concurs
Taubman, J., specially concurs

Announced November 15, 2018

Daniel P. Rubinstein, District Attorney, Richard B. Tuttle, Assistant District Attorney, Grand Junction, Colorado, for Plaintiff-Appellant

Megan A. Ring, Colorado State Public Defender, Sarah A. Kellogg, Deputy State Public Defender, Denver, Colorado, for Defendant-Appellee

¶ 1 The People appeal the trial court's order granting the motion of defendant, Shannon Deane Burke, for a new trial. The People contend that the trial court granted Burke's motion based on evidence that was inadmissible under CRE 606(b). We agree and reverse the trial court's order.

I. Background

¶ 2 Burke was charged with second degree burglary and theft after breaking into her ex-boyfriend's home. A jury convicted Burke of the burglary charge.[1] After trial, the jury commissioner sent an attorney performance evaluation form to the jurors. Jurors' responses to these evaluation requests are anonymous. On one of the evaluation responses that was directed to Burke's counsel, an anonymous juror wrote "[h]ard to believe a client when they choose to remain silient [sic]." Burke then moved for a new trial, arguing that the statement showed that at least one juror had disregarded the trial court's instructions and based his or her decision on an impermissible basis. The trial court found that the anonymous juror's statement was evidence that there had been jury misconduct

[1] The jury acquitted Burke of theft.

and, therefore, concluded that CRE 606(b) did not render the juror's statement inadmissible. Without taking additional evidence, the trial court granted Burke's motion for a new trial. The People appeal the trial court's order.

¶ 3 On appeal, the People contend that CRE 606(b) precluded the trial court from considering the anonymous juror's statement as a basis to grant Burke a new trial. They contend that the anonymous juror's statement was inadmissible under the plain language of CRE 606(b), which bars admission of any juror testimony or statement to impeach a verdict where the testimony or statement concerns what occurred during jury deliberations. The People further contend that the trial court erroneously concluded that the juror's statement was evidence of misconduct, arguing that misconduct is not shown by the juror's statement and cannot be shown without conducting the specific sort of inquiry into the juror's deliberative process that CRE 606(b) prohibits.

¶ 4 Burke responds that the trial court properly found that CRE 606(b) did not apply to the anonymous juror's statement. In the alternative, Burke contends that the trial court's order granting a new trial should be affirmed because the juror's statement shows

that the juror deliberately concealed during voir dire a bias against defendants who exercise their constitutional right to remain silent. Burke also contends that, even assuming CRE 606(b) applies, a constitutional exception to the rule is warranted.

¶ 5 We agree with the People and conclude that the anonymous juror's statement was inadmissible under CRE 606(b). We conclude that the trial court, therefore, erroneously granted Burke's motion for a new trial based on the anonymous juror's statement alone. We further conclude that a constitutional exception to CRE 606(b) is not warranted under these circumstances. We, therefore, reverse the trial court's order granting Burke's motion for a new trial.

II. Standard of Review

¶ 6 A trial court's decision to grant or deny a defendant's motion for a new trial is one we review for an abuse of discretion. *People v. Bueno*, 2018 CO 4, ¶ 19. The trial court abuses its discretion if its decision is manifestly unreasonable, arbitrary, or unfair, or if it bases its decision on an erroneous view of the law. *Id.*

III. CRE 606(b)

¶ 7 In Colorado, the testimony of jurors is governed by CRE 606(b). Pursuant to that rule, jurors are generally prohibited from testifying regarding their deliberative process:

> [A] juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith.

Id.

But there are three exceptions to this general prohibition:

> [A] juror may testify about (1) whether extraneous prejudicial information was improperly brought to the jurors' attention, (2) whether any outside influence was improperly brought to bear upon any juror, or (3) whether there was a mistake in entering the verdict onto the verdict form.

Id.

¶ 8 Finally, whether a trial court may consider evidence from a juror turns on whether the juror would be permitted to testify about such a matter:

> A juror's affidavit or *evidence of any statement by the juror* may not be received on a matter

> about which the juror would be precluded from testifying.

CRE 606(b) (emphasis added).

¶ 9 Thus, CRE 606(b) provides that a juror's testimony, affidavit, statement, or other evidence may not be admitted to impeach the verdict unless that evidence falls within one of the three exceptions in subparts (1)-(3). These exceptions permit juror testimony about "exposure of a jury to information or influences outside of the trial process itself," *People v. Harlan*, 109 P.3d 616, 625 (Colo. 2005), and also permit, pursuant to the 2007 amendments, testimony about "whether there was a mistake in entering the verdict onto the verdict form," *Malpica-Cue v. Fangmeier*, 2017 COA 46, ¶ 12 (quoting CRE 606(b)).

¶ 10 In its application, CRE 606(b) "strongly disfavors any juror testimony impeaching a verdict, even on grounds such as mistake, misunderstanding of the law or facts, failure to follow instructions, lack of unanimity, or application of the wrong legal standard." *Harlan*, 109 P.3d at 624. CRE 606(b)'s exclusionary principle is broad and "in terms of subject, . . . reaches everything which relates to the jury's deliberations, unless one of the exceptions applies."

Stewart v. Rice, 47 P.3d 316, 321 (Colo. 2002) (quoting Christopher B. Mueller, *Jurors' Impeachment of Verdicts and Indictments in Federal Court Under Rule 606(b)*, 57 Neb. L. Rev. 920, 935 (1978)). The rule "has three fundamental purposes: to promote finality of verdicts, shield verdicts from impeachment, and protect jurors from harassment and coercion." *Stewart*, 47 P.3d at 322.

¶ 11 CRE 606(b) does not preclude jurors from discussing their service after the fact, "including their deliberations, how they viewed the evidence and reached their verdict, and how they view the intent and meaning of their verdict." *Id.* at 325. "[N]one of this," however, "can become evidence unless one or both of the CRE 606(b) exceptions apply to the case." *Id.* (discussing pre-2007 amendment version of CRE 606(b) that included only the two exceptions under subparts (1) and (2)). Although "[a]ttorneys may benefit from learning how the jurors viewed their case," they "may not make jurors witnesses except under the provisions of 606(b)." *Id.* To do so "requires a proper showing that the juror testimony, affidavit, or statement is admissible under the rule's exceptions." *Id.*

IV. Analysis

¶ 12 The issue presented by this appeal is whether the trial court abused its discretion in relying on the unsworn post-trial statements of an anonymous juror to grant Burke a new trial. We conclude that it did.

¶ 13 Burke advances three arguments on appeal as to why the trial court did not err. First, she argues that the trial court correctly found that CRE 606(b) did not apply to the anonymous juror's statement. Second, she argues that the trial court's order granting her a new trial should be affirmed because the juror's statement establishes that the juror concealed a bias during voir dire. Third, she argues that, even assuming CRE 606(b) applies, we should recognize a constitutional exception to the rule where, as here, the juror demonstrates a bias against the defendant based on her exercise of a constitutional right.

¶ 14 We conclude that CRE 606(b) precluded the trial court from relying on the anonymous juror's statement to grant Burke a new trial. We further conclude that a new constitutional exception to CRE 606(b) is not warranted. We address each of Burke's arguments, in turn, below.

A. The Anonymous Juror's Statement was Inadmissible Under CRE 606(b)

1. Additional Background

¶ 15 In opposing Burke's motion for a new trial, the prosecution relied on *People v. Collins*, 730 P.2d 293 (Colo. 1986), for the proposition that juror affidavits may be used to impeach a criminal verdict only if there have been external influences on the jury or juror misconduct. In *Collins*, the defendant appealed the trial court's denial of his motion for a new trial after his conviction for first degree assault and crime of violence. *Id.* at 295. In his motion, the defendant had relied on juror affidavits alleging that at least five jurors had "misunderstood or failed to follow" the trial court's instruction that their verdict must be unanimous. *Id.* at 302.

¶ 16 On appeal, the defendant argued that the jurors' failure to follow the court's unanimity instruction constituted jury misconduct that rendered the verdict invalid. *Id.* Our supreme court disagreed and affirmed the conviction. *Id.* It held that the juror affidavits on which the defendant relied in seeking a new trial were inadmissible under CRE 606(b) because "[a] juror may not

testify as to the wrong exercise of his judgment or his confusion on the law or the facts or his misunderstandings." *Id.* at 301-02.

¶ 17 Distinguishing *Collins*, the trial court found the anonymous juror's statement in this case established that "a juror clearly disregarded the law they were instructed to follow — not that they didn't understand the law." Finding that the anonymous juror's statement showed that he or she "refus[ed] to follow not only the admonitions of the court during voir dire" but also the court's jury instructions, the trial court characterized this as "misconduct." Relying on Colorado precedent holding that CRE 606(b) does not bar the use of juror's statements to impeach a verdict where there has been "jury misconduct," the trial court then concluded that CRE 606(b) did not preclude consideration of the juror's statement. And the juror's statement was the only evidence relied on by the trial court to grant Burke's motion for a new trial.

2. The Trial Court's Reliance on *Collins* Is Misplaced

¶ 18 Burke contends that the trial court properly distinguished *Collins* in concluding that CRE 606(b) did not preclude consideration of the anonymous juror's statement as grounds to impeach the verdict. We disagree that *Collins* is distinguishable or

that it supports the trial court's conclusion that CRE 606(b) does not apply to the anonymous juror's statement.

¶ 19 The record does not support a finding that the anonymous juror's statement was evidence of misconduct — and not instead confusion, mistake, or misunderstanding. But to ascertain whether the juror's failure to follow instructions was intentional or accidental, a court would need to examine the juror's mental processes during deliberation, which CRE 606(b) expressly prohibits. CRE 606(b); *see People v. Graham*, 678 P.2d 1043, 1048 (Colo. App. 1983) ("Impeachment of a verdict on grounds which delve into the mental processes of jury deliberation is not permitted."). Because CRE 606(b) prohibits any such inquiry, we cannot agree with the trial court's finding that there was evidence of jury misconduct.

¶ 20 The trial court's conclusion that the anonymous questionnaire establishes jury "misconduct" is further belied by our case law. Both *Stewart*, 47 P.3d at 321, and *Graham*, 678 P.2d at 1048, concerned jurors' statements that one or more jurors had not followed the court's instructions. These statements were held to be inadmissible under CRE 606(b) in each case. In *Stewart*, a juror

"alleged that the jury had not read the court's instructions, or had misunderstood them." *Id.* at 326. Our supreme court affirmed the defendant's conviction, concluding that the jurors' statements "testify to the jury's deliberative process and the intent and meaning of the jury's verdict," and so violated CRE 606(b). *Id.*

¶ 21 In *Graham*, several jurors provided affidavits alleging that other jurors had considered the defendant's failure to testify when deliberating on his guilt. 678 P.2d at 1046. In holding that CRE 606(b) barred the use of the jurors' statements to impeach the verdict, the division in *Graham* also concluded that the juror statements were not evidence of jury "misconduct." *Id.* at 1048 ("Here, we find no indication of jury tampering, coercion, bribery, or gross misconduct so as to allow impeachment of the verdict for misconduct.").

¶ 22 These cases support our conclusion that the anonymous juror's statement in this case was inadmissible under CRE 606(b) and was not evidence of misconduct. Instead, it was evidence that, at most, the juror disregarded or did not follow the court's instruction. While this is certainly troubling, Burke has not cited any case in which a juror's failure to follow the court's instructions

was held to constitute jury misconduct or in which a court allowed the use of juror testimony or affidavits alleging a failure to follow instructions to impeach a verdict, notwithstanding CRE 606(b). Nor are we aware of any such decisions.

¶ 23 We conclude, therefore, that the trial court misapplied *Collins* to determine that the anonymous juror's statement was evidence of juror "misconduct" such that CRE 606(b) did not apply. Because the facts in this case are not materially distinguishable from those in *Collins*, and because none of the three exceptions provided under CRE 606(b) are applicable — and Burke does not contend otherwise — we further conclude that CRE 606(b) precluded the trial court from considering the anonymous juror's statement as grounds to impeach the verdict and grant Burke a new trial.

B. Anonymous Juror's Comment Is Not Evidence of Concealment of Bias During Voir Dire and Is Not Grounds for Impeaching the Verdict

¶ 24 Burke contends that the trial court's order should be affirmed because the record shows that a juror intentionally concealed bias during voir dire. Burke argues that, notwithstanding the extensive discussion between defense counsel and prospective jurors during voir dire focused on whether they would be able to follow the law

that a jury cannot hold a defendant's exercise of her right to remain silent against her, the anonymous juror's statement shows that the juror must have deliberately concealed a bias — or an unwillingness to follow this command — during voir dire, and that such concealment is evidence of actual bias entitling Burke to a new trial. We are not persuaded.

¶ 25 For the reasons set forth above in Part IV.A, we conclude that the anonymous juror's statement was inadmissible under CRE 606(b), whether characterized as failure to follow instructions or a concealment of bias. The anonymous juror's statement, therefore, cannot be used to impeach a verdict on any ground, including based on a claim that a juror concealed a bias during voir dire. *See Warger v. Shauers*, 574 U.S. ___, ___, 135 S. Ct. 521, 525 (2014) ("We hold that Rule 606(b) applies to juror testimony during a proceeding in which a party seeks to secure a new trial on the ground that a juror lied during *voir dire*.").

C. No Constitutional Exception to CRE 606(b)

¶ 26 Burke contends that, even if the anonymous juror's statement is inadmissible under CRE 606(b), we should recognize a constitutional exception to the rule where, as here, the juror's

statement reflects a bias against the defendant for the exercise of a fundamental constitutional right. We are not persuaded.

¶ 27 The United States Supreme Court recently recognized a limited constitutional exception to Rule 606(b). In *Pena-Rodriguez v. Colorado*, 580 U.S. ___, ___, 137 S. Ct. 855, 867 (2017), the Court recognized an exception to Rule 606(b)'s no-impeachment rule "when a juror's statements indicate that racial animus was a significant motivating factor in his or her finding of guilt." In so holding, the Court explained that "racial bias [is] a familiar and recurring evil that, if left unaddressed, would risk systemic injury to the administration of justice." *Id.* at ___, 137 S. Ct. at 868. Distinguishing previous cases in which it declined to recognize a constitutional exception to Rule 606(b) based on evidence of drug and alcohol abuse by jurors, *see Tanner v. United States*, 483 U.S. 107 (1987), or evidence that a juror concealed pro-defendant bias during voir dire, *see Warger*, 574 U.S. ___, 135 S. Ct. 521, the Court explained that "[t]he behavior in those cases is troubling and unacceptable, but each involved anomalous behavior from a single jury — or juror — gone off course," *Pena-Rodriguez*, 580 U.S. at ___, 137 S. Ct. at 868. If *Pena-Rodriguez* establishes a line between

cases where a constitutional exception is warranted and those where one is not, then this case — because it does not involve juror bias that relates to any characteristic personal to the defendant, and because it involves anomalous behavior from a single juror — lies on the other side of the divide from *Pena-Rodriguez*, among the numerous cases where no constitutional exception is warranted.

¶ 28 Among the cases in which the Court has declined to recognize an exception to Rule 606(b) on constitutional grounds is *Warger*, in which a juror testified that another juror lied during voir dire about whether she could be impartial. *See* 574 U.S. at ___, 135 S. Ct. at 525. The Court in *Warger* declined to recognize a constitutional exception to Rule 606(b) under these circumstances and held that Rule 606(b) precluded consideration of the juror's testimony. *Id.* at ___, 135 S. Ct. at 524. It reasoned that, "[e]ven if jurors lie in *voir dire* in a way that conceals bias, juror impartiality is adequately assured by the parties' ability to bring to the court's attention any evidence of bias before the verdict is rendered, and to employ nonjuror evidence even after the verdict is rendered." *Id.* at ___, 135 S. Ct. at 529.

¶ 29 Burke contends that, notwithstanding *Warger*, this case is analogous to *Pena-Rodriguez* because a juror's bias against a defendant for exercising her right not to testify cannot be shown without using post-verdict juror testimony. But Burke's reliance on *Pena-Rodriguez* is unpersuasive. In *Pena-Rodriguez*, the Court reasoned that juror reports before the verdict were not a reliable, alternative safeguard of juror impartiality in that case because of "[t]he stigma that attends racial bias," which "may make it difficult for a juror to report inappropriate statements during the course of juror deliberations." 580 U.S. at ___, 137 S. Ct. at 869. But there is no comparable stigma for persons who are biased against defendants who decline to testify in their own defense.

¶ 30 Simply put, we conclude that *Pena-Rodriguez* does not support the recognition of a separate constitutional exception to CRE 606(b) under these circumstances, as Burke argues. Nor are we persuaded that the circumstances here are such that a constitutional exception is warranted.

V. Conclusion

¶ 31 The trial court's order granting Burke's motion for a new trial is reversed, and we remand this case for reinstatement of the jury's verdict.

JUDGE BERNARD concurs.

JUDGE TAUBMAN specially concurs.

JUDGE TAUBMAN, specially concurring.

¶ 32 In this challenge by the People to the trial court's grant of the motion for new trial filed by defendant, Shannon Deane Burke, the majority reverses the trial court based on evidence that it concluded was inadmissible under CRE 606(b). I substantially disagree with the majority for two reasons: (1) the issue of Burke's entitlement to a fair trial can be addressed without implicating Rule 606(b); and (2) to the extent that Rule 606(b) is applicable, I conclude that an exception to that rule should apply here based on the Supreme Court's recent decision in *Pena-Rodriguez v. Colorado*, 580 U.S. ___, 137 S. Ct. 855 (2017).

¶ 33 Because resolution of these two questions may require the presentation of additional evidence, I agree with the majority that the trial court's decision should be reversed, but I would remand the case to the trial court for further proceedings.

I. Background

¶ 34 Shortly after Burke was convicted by a jury of second degree burglary, an anonymous juror wrote in an attorney performance evaluation questionnaire directed at defense counsel, "Hard to

believe a client when they chose to remain sil[]ent." Burke had invoked her constitutional right not to testify at her trial.

¶ 35 Based on the questionnaire comment, Burke moved for a new trial under Crim. P. 33, alleging that, "[b]ecause at least one juror was not forthcoming during voir dire, and did not honor Ms. Burke's right to remain silent, Ms. Burke did not receive a fair trial by an impartial jury." In response, the People argued that CRE 606(b) barred evidence of the juror's post-trial comment and, in any event, Burke's contention that the anonymous juror was biased was "purely speculative."

¶ 36 The trial court granted Burke's motion without a hearing, concluding that Burke had sufficiently demonstrated that one juror had "disregarded the law they were instructed [on] and swore they would follow." The trial court stated that it could "see[] no other rational way to construe the comment other than that the juror who completed it did, in fact, consider [Burke's] decision not to testify notwithstanding the clear admonishment against doing so."

¶ 37 The People appealed.

II. Standard of Review

¶ 38 "The decision of a trial court to grant or deny a new trial is a matter entrusted to the court's discretion and will not be disturbed on review absent an abuse of that discretion." *People v. Wadle*, 97 P.3d 932, 936 (Colo. 2004). To the extent a trial court resolves questions of fact and applies standards of law in considering a motion for a new trial, it would "necessarily abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence." *Id.* (quoting *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990)).

III. Right to an Impartial Jury and CRE 606(b)

¶ 39 As relevant here, CRE 606(b) provides that,

> [u]pon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith. . . . A juror's affidavit or evidence of any statement by the juror may not be received on a matter about which the juror would be precluded from testifying.

As the majority acknowledges, Rule 606(b) "strongly disfavors any juror testimony impeaching a verdict, even on grounds such as mistake, misunderstanding of the law or facts, failure to follow instructions, lack of unanimity, or application of the wrong legal standard." *People v. Harlan*, 109 P.3d 616, 624 (Colo. 2005), *as modified on denial of reh'g* (Apr. 18, 2005).

¶ 40 In several cases interpreting the federal counterpart to CRE 606(b), the Supreme Court has similarly expressed a strong regard for "the weighty government interest in insulating the jury's deliberative process." *Tanner v. United States*, 483 U.S. 107, 120 (1987); *see also Warger v. Shauers*, 574 U.S. ___, ___, 135 S. Ct. 521, 525 (2014) ("Rule 606(b) applies to juror testimony during a proceeding in which a party seeks to secure a new trial on the ground that a juror lied during *voir dire*."). In *Tanner*, the Court rejected the notion that precluding the defendant from presenting juror testimony concerning juror intoxication ran afoul of the Sixth Amendment, stating that his "interests in an unimpaired jury . . . are protected by several aspects of the trial process." 483 U.S. at 127. The Court reiterated that conclusion three decades later in *Warger*, stating that "a party's right to an impartial jury remains

protected despite Rule 606(b)'s removal of one means of ensuring that jurors are unbiased." 574 U.S. at ___, 135 S. Ct. at 529. "Even if jurors lie in *voir dire* in a way that conceals bias, juror impartiality is adequately assured by the parties' ability to bring to the court's attention any evidence of bias before the verdict is rendered, and to employ nonjuror evidence even after the verdict is rendered." *Id.* The *Warger* Court noted, though, "[t]here may be cases of juror bias so extreme that, almost by definition, the jury trial right has been abridged." *Id.* Thus, the *Warger* Court reserved the issue of "whether the usual safeguards are or are not sufficient to protect the integrity of the process." *Id.*

¶ 41 Nevertheless, in *Pena-Rodriguez v. Colorado*, the Supreme Court concluded that CRE 606(b)'s no-impeachment rule must yield to a defendant's claims that a juror's racial bias rendered his or her trial fundamentally unfair. The Court held

> that where a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee.

580 U.S. at ____ 137 S. Ct. at 869.

¶ 42 In *People v. Dunoyair*, 660 P.2d 890, 895 (Colo. 1983), the supreme court stated that when a juror knowingly conceals bias or hostility towards the defendant, a new trial might well be necessary. As the supreme court acknowledged, "In such instances the juror's deliberate misrepresentation or knowing concealment is itself evidence that the juror was likely incapable of rendering a fair and impartial verdict in the matter." *Id.*

¶ 43 In *Allen v. Ramada Inn, Inc.*, 778 P.2d 291, 292 (Colo. App. 1989), a division of this court reversed the defendant's conviction and concluded that a new trial was necessary because two jurors had not truthfully answered a question during voir dire about being raped. The division noted that untruthful answers on voir dire concerning material matters did not entitle a party to a new trial as a matter of right, but may be grounds for a new trial.

¶ 44 Similarly, in *Black v. Waterman*, 83 P.3d 1130, 1137 (Colo. App. 2003), a division of this court noted that the purpose of voir dire is to determine whether any potential juror has beliefs that would interfere with the party's right to receive a fair and impartial trial. *Id.* Significantly, the division in *Black* discussed the

relationship between voir dire and Rule 606(b). The division explained that under Rule 606(b), a court must exclude juror testimony or affidavits divulging juror deliberations, thought processes, confusion, mistake, intent, or other verdict impeaching grounds. Nevertheless, the division concluded that Rule 606(b) "does not bar inquiry into matters that arise before jury deliberations begin." *Id.* at 1137.

¶ 45 Balancing parties' right to a fair trial against the limitations of Rule 606(b), the division concluded that, while that part of juror affidavits discussing juror deliberations was barred by Rule 606(b), an evidentiary hearing was required concerning one juror's alleged failure to disclose bias during voir dire. Accordingly, the division vacated the trial court's order denying a motion for new trial in part and remanded the case for an evidentiary hearing and factual findings on whether the juror in question misrepresented or concealed her beliefs during voir dire.

IV. Analysis

¶ 46 In my view, the same result should obtain here. The statement at issue here that led the trial court to grant Burke's motion for a new trial concerned an attorney performance

evaluation questionnaire which suggested that one juror held against Burke her exercise of her constitutional right to remain silent. If this juror determined before jury deliberations began not to follow the trial court's admonition that a defendant in a criminal case has no obligation to testify, then Rule 606(b) would not be implicated at all. As the trial court noted, "In this case CRE 606 and its prohibitions are inapplicable because neither party is asking for the juror to testify concerning anything prohibited by CRE 606."

¶ 47 Thus, on remand, the trial court could hold an evidentiary hearing at which it could determine the identity of the juror and whether the challenged statement was made intentionally or as a suggestion to defense counsel in future cases. If the trial court were to conclude that the statement was made intentionally, the trial court could also determine whether the juror's refusing to follow the trial court's instructions occurred before jury deliberations began.

V. CRE 606(b)

¶ 48 The second issue presented here is whether the Supreme Court's opinion in *Pena-Rodriguez* should be extended to apply where a juror refuses to follow a trial court's instructions

concerning a defendant's constitutional right not to testify. I believe that *Pena-Rodriguez* should be so extended. When *People v. Pena-Rodriguez*, 2012 COA 193, 412 P.3d 461, was decided by a division of our court, I dissented from the majority's conclusion that CRE 606(b)'s no-impeachment rule should prevail over a defendant's claim that a juror's racial bias rendered his trial fundamentally unfair. Although the majority's decision was affirmed by the Colorado Supreme Court, 2015 CO 31, 350 P.3d 287, the United States Supreme Court reversed. 580 U.S. ___, 137 S. Ct. 855. It held for the first time that an exception to the CRE 606(b) no-impeachment rule should apply in those circumstances. *Id.* at ___, 137 S. Ct. at 871.

¶ 49 In my view, the Supreme Court's decision in *Pena-Rodriguez* should be extended to those circumstances where a juror demonstrates bias against a defendant who exercises a fundamental constitutional right, such as the right to remain silent.

¶ 50 It cannot be denied that this is a significant issue in trials of criminal defendants. We have often encountered challenges to the seating of jurors who expressed hesitation about their ability not to hold against a defendant his or her right not to testify. *See, e.g.*,

People v. Clemens, 2017 CO 89, 401 P.3d 525, 529 (stating that a potential juror's desire to hear both sides is reasonable); *People v. Deleon*, 2017 COA 140, ¶ 45, ___ P.3d ___, ___ ("Few rights that our constitution affords to criminal defendants are more difficult for a prospective juror to grasp and give full effect to than the right of a criminal defendant not to testify at his own criminal trial.") (Welling, J., dissenting) (*cert. granted* May 21, 2018). Consequently, it is not surprising that this issue would arise in the context of a juror suggesting that the defendant's case would have been stronger if he or she testified.

¶ 51 I do not agree with the People that extending the Supreme Court's decision in *Pena-Rodriguez* in this regard would open the floodgates to allow challenges to juror deliberations in any conceivable circumstance.

¶ 52 While I agree with the majority's conclusion reversing the trial court's order, I would remand for an evidentiary hearing on Burke's motion. Although I consider her motion insufficient to warrant a new trial, I would direct the trial court on remand to reconvene the jury, attempt to identify the anonymous juror who wrote the

questionnaire comment,[2] and query whether the juror's bias affected his or her deliberations. *See Pena-Rodriguez*, ¶¶ 124-25, 412 P.3d at 486; *cf. Tanner*, 483 U.S. at 127 (noting that the trial court there "held an evidentiary hearing giving petitioners ample opportunity to produce nonjuror evidence supporting their allegations").

V. Conclusion

¶ 53 Accordingly, I concur with the majority's conclusion that the trial court's order must be reversed, but I would remand for further proceedings.

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[2] Although the juror completed the questionnaire anonymously, identifying that juror may be easier because he or she also commented, "Had a hard time hearing despite repeated requests to speak louder."