69217-8

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NO. 69217-8-I

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

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL BAILEY,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable LeRoy McCullough, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in denying appellant's motion for a new trial.

2. The trial court erred when it failed to investigate whether jurors were unable to hear trial testimony.

Issues Pertaining to Assignments of Error

1. Did the trial court commit reversible error by denying the appellant's motion for a new trial without first questioning the jury after receiving reliable information that some members did not hear one witness' testimony?

2. Was defense counsel ineffective for failing to object to the trial court's failure to question the jurors?

B. STATEMENT OF THE CASE

1. Trial Testimony

In October 2011, appellant Michael Bailey and Ashley Valle went to the Muckleshoot Casino. 3RP[1] 143, 152. Bailey and Valle met Daniel Chang at the craps table. 2RP 108-10. Chang had already lost $5,800 that evening and was trying to win his money back. 2RP 106-07.

[1] This brief refers to the verbatim report of proceedings as follows: 1RP – May 3, 2012; 2RP – May 7, 9, 24, 29, 30, 2012, June 5, 2012; 3RP – June 4, 2012 and August 17, 2012.

Chang initially believed Bailey and Valle were together. 2RP 110, 309. Valle denied Bailey was her boyfriend. 2RP 116, 124. Chang said Valle was friendly, but described Bailey as "standoffish." Chang did not get Bailey's name. 2RP 111.

Eventually, Bailey left the craps table. Valle stayed at the table with Chang. 2RP 112. Chang drank three or four alcoholic drinks and bet between $100 and $500 per hand at the craps table. 2RP 105, 115. At one point, Chang had about $5,600 worth of casino chips in his pants pocket. 2RP 120-21.

Chang flirted with Valle and the two exchanged telephone numbers. 2RP 116-17, 160, 223. On three occasions, Valle left Chang alone at the craps table for about 20 minutes. 2RP 112-16. Eventually, Chang and Valle left the table together. 2RP 118-19. Valle told Chang her friend was not doing well but did not elaborate. 2RP 220-21. Chang made plans to meet up with Valle again after she "took care of some things." 2RP 119.

About 20 minutes later, Valle text messaged Chang and told him to meet her in the casino parking garage. 2RP 121. On his way to the parking garage, Chang encountered Bailey in the casino elevators. 2RP Bailey asked Chang, "why are you talking to my girl? Why are you messing with her?" Bailey made no verbal threats, but Chang found

Bailey's "mannerisms" threatening. When the elevator opened Chang told security guards that Bailey was harassing him. Chang left and continued toward the parking garage. 2RP 122-25; 3RP 11. About 25 minutes later, Valle picked Chang up in her car. 2RP 125. Chang did not tell Valle about his encounter with Bailey in the elevator. 3RP 19, 160.

Chang testified that Valle drove toward her house about one mile from the casino. 2RP 127-29. After she parked she began text messaging with someone and smoking marijuana. Chang became uncomfortable with the drug use and decided to get out of the car. 2RP 129-30; 3RP 41, 51.

Chang was about five feet away from the car when he was approached from behind by a man with a knife. The man said he would kill Chang if he moved. Chang could not see the man's face. 2RP 131-32.

Chang tried to run away but fell when the man grabbed the hood of his sweatshirt. 2RP 133, 233. The man said he would kill Chang if he looked at him or ran away again. 2RP 134, 38. The man put the knife to Chang's throat and told him to take off his pants. 2RP 137-38. At that moment Chang recognized Bailey's voice from the elevator encounter. 2RP 136, 236; 3RP 135. Chang took his pants off and gave them to Bailey. 2RP 135, 138. Chang had a wallet with credit cards, keys, cell phone, and poker chips in his pant pockets. 2RP 150, 310, 322; 3RP 133.

Around the same time, Kisha Brown was awoken to a man yelling "get the jeans off or I'll cut you." 2RP 31-32, 36. She heard a second male voice quietly saying he could not. 2RP 31-32, 45. Brown called 911 and told police she was hearing a "rape." 2RP 32, 37, 39. Brown never looked out her window to identify the people. 2RP 32, 28.

After Bailey disappeared, Chang began running down the street. Chang knocked on several neighborhood doors before Leonard Weekley opened his door and let him inside. 2RP 55, 138-40; 3RP 49, 63. Chang was naked from the waist down and had bloodied hands. 2RP 50. Weekley's wife called 911. 2RP 50. Chang told Weekley he had been at the Muckleshoot casino gambling, went home with a girl, and was ordered to take off his pants by black male with a knife. 2RP 51, 55. Weekley did not see any cuts on Chang's body. 2RP 58.

Chang spoke with Detective Buie Arneson the next day. 3RP 91. He identified Valle in a photo montage. 3RP 94. Chang did not positively identify Bailey in a photo montage. 3RP 98, 134. He identified Bailey's picture along with two others as being "closest to the person" who took his pants. 2RP 237-38; 3RP 98, 134-35. Arneson saw a red mark on the left side of Chang's neck which he believed was consistent with a knife mark. 3RP 101. Chang acknowledged he was not cut by Bailey. 2RP 290-91.

Police recovered several text messages sent between Bailey and Valle's telephone numbers. 3RP 102-03, 107. Outgoing messages from Bailey's telephone number read: "I got my eye on u," "no kissing in the mouth," "Make sure that on him first," and "does he have the cpis on him?" Messages sent to Bailey's telephone number read: "Just do it" and "Hury." 3RP 108-14.

Based on this evidence, Bailey was charged with one count of first degree robbery with a deadly weapon. 1RP 2; CP 36. Before Bailey's trial, Valle pleaded guilty to two counts of first degree theft and one count of second degree assault. 1RP 94-95; 3RP 150, 170-72.

Valle's testimony at Bailey's trial differed from Chang's account of what happened the night of the incident. Valle explained that on one of the occasions she left Chang alone at the craps table she drove Bailey to Auburn Way and dropped him off to meet his friend Nick. 3RP 146-48, 161-62.

Chang called Valle repeatedly and said he was too intoxicated to drive. 3RP 162. She went back to the casino and picked Chang up. Chang was intoxicated. 3RP 148, 162. When Chang said he wanted to speak with Valle she parked the car about a block from her house. 3RP 148-49, 164.

Chang became sexually aggressive and took his pants off in the car. 2RP 377; 3RP 152, 163. He asked Valle if she was an escort. 3RP 159. Chang began masturbating and pulled Valle's head toward him. 2RP 372; 3RP 165. When Valle pushed Chang off her he took the car keys out of the ignition. Chang said he would give Valle the keys back if she participated in oral sex with him. 3RP 165-66. When Valle refused, Chang became mad and got out of the car without his pants. 3RP 166. Valle then took the car keys out of Chang's hand and drove away, leaving Chang outside. 3RP 166-67. Valle stopped the car a short time later and threw Chang's pants in the garbage. She did not take anything from the pant pockets before hand. 3RP 169.

Valle explained that although she signed a statement as part of her guilty plea that said she assisted Bailey in intentionally robbing Chang that was not what happened. 3RP 150, 170-72. Valle said she pled guilty because she was scared about being in trouble. 3RP 170.

Valle acknowledged text messaging Bailey earlier in the evening, but denied doing so while she was in the car with Chang. 3RP 149. She denied sending the "just do it" and "hury" text messages. 2RP 378. Valle denied seeing Bailey after she parked the car with Chang inside. 3RP 149. Valle denied seeing Bailey attack Chang with a knife or calling him to

come do so. 2RP 378; 3RP 149. Chang's cell phone, keys, and credit cards were not used after they were taken. 2RP 322.

After hearing the above, a King County jury found Bailey guilty as charged. CP 70; 2RP 505-08. The jury also found Bailey was armed with a deadly weapon during the robbery. CP 69. The trial court sentenced Bailey to standard range prison sentence of 51 months. The court also imposed a consecutive 24-month deadly weapon enhancement. CP 84-92; 3RP 203. Bailey timely appeals. CP 94.

2. New Trial Motion

Before sentencing, Bailey's attorney moved for a new trial under CrR 7.5(a), alleging several juror members disclosed after the verdict that "half the jury" was unable to hear Valle's testimony. CP 71-78. Declarations from defense counsel and a defense intern stated one juror informed the bailiff of the difficulty hearing the testimony. CP 75-78. It is unclear what the bailiff did with this information. 3RP 176. When Valle's testimony was not repeated, those jurors who failed to hear it relied on the notes of the jurors who had. CP 75-78.

The State did not dispute the veracity of counsel's motion and declaration, but maintained Bailey was not denied a fair trial because there was no evidence the jurors were incorrectly informed from the notes what Valle's testimony was. Supp. CP ___ (sub no. 67, State's Response to

Defendant's Motion for New Trial, dated 8/17/12, at 4). The State asserted that given the other evidence at trial, it was not "overwhelming[ly] significan[t]" that some jurors may not have heard Valle's testimony. Id. at 5.

During oral argument on the motion, defense counsel reiterated that Valle's testimony was crucial to the defense theory that Bailey was not involved in the alleged robbery, but that Chang had fabricated his story about being robbed after Valle fled with his pants in response to his attempted sexual assault of her. 3RP 176-180. Defense counsel distinguished the State's reliance on State v. Denney,[2] noting that in that case the testimony that was not heard had no bearing on the verdict. 3RP 178-79. Counsel noted that had the jurors disclosed their inability to hear the testimony before the verdict, curative steps could have been taken. 3RP 192. Instead, counsel noted, "Mr. Bailey made decisions about whether or not he should testify based on the evidence that we thought had been properly presented to the jury." 3RP 176.

In response, the State maintained Bailey received a fair trial. 3RP 181, 193. The State argued that even if some jurors did not hear Valle's testimony they could still fully evaluate the issue of guilt based on Bailey's closing argument, Valle's demeanor, her plea agreement

[2] State v. Denney 4 Wn. App. 604, 605, 483 P.2d 141 (1971).

statement, and the notes of jurors who had heard the testimony. 3RP 181-83. The State said the jury's failure to submit a written request to the court requesting to listen to Valle's testimony again demonstrated they were satisfied they had all the necessary information. 3RP 187. However, the State acknowledged Denney was not directly on point, because "Ms. Valle's testimony was more central to the decision at issue," than was the testimony at issue in Denney. 3RP 184-85.

The defense recognized that "as far as I could tell" jurors were able to observe Valle's demeanor regardless of whether they heard her testimony. 3RP 190. Defense counsel noted however, that Valle's explanation of her guilty plea statement was an important part of her testimony. 3RP 188. As for why the jury did not submit a written request to hear Valle's testimony again, defense counsel noted that "after they talked to the bailiff they realized they were not going to be able to hear that testimony again." 3RP 191.

Responding to the court's questions, defense counsel noted he was not certain what percentage of Valle's testimony the six jurors did not hear. It was his "impression" that the six jurors failed to hear any of the testimony, but acknowledged none of the "9 or 10" jurors with whom he spoke was specific about this point. 3RP 189. The prosecutor had a

different impression: "I think we just don't know what, exactly, those six heard and did not hear." 3RP 189.

The trial court denied Bailey's motion, reasoning that although "this is a case that's different from State v. Denney," Bailey had not proven that he was denied a fair trial or that the decision was contrary to law. 3RP 195.

The Court noted jurors did not request to hear Valle's testimony again and could assess her demeanor even if they could not hear her testimony. The court noted defense counsel argued his theory in closing argument and other evidence supported the verdict, including Valle's guilty plea statement and another witness who testified to hearing a man order someone to take his pants off. 3RP 196.

Finally, the court noted, "Nor do we have a percentage indicating who heard what. We don't know if those six people didn't hear Ms. Valle, according to them, understood 10 percent, 20, we don't know what they heard; and I cannot conclude that in this courtroom, with an amplified system, that they didn't hear anything." 3RP 196.

Defense counsel asked whether the "Court would order the jury room to give contact information to the defense so that we can investigate how much the – at what percentage the jurors actually did hear of that testimony?" The Court told defense counsel to "come back and see me" if

the jury room told him such an order was needed. 3RP 197. There is no evidence such an order was ever obtained.

C. ARGUMENT

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN DENYING BAILEY'S MOTION FOR NEW TRIAL WITHOUT ADEQUATELY INQUIRING INTO WHETHER JURORS' WERE UNABLE TO HEAR CRUCIAL TRIAL TESTIMONY

Both the United States and Washington constitutions guarantee the right to a fair and impartial jury trial. U.S. Const. amend. V, VI; Wash. Const. art. I, §§ 3, 22. The failure to provide defendant with a fair trial violates minimal standards of due process. State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984); State v. Jackson, 75 Wn. App. 537, 543, 879 P.2d 307 (1994), rev. denied, 126 Wn.2d 1003 (1995). Under CrR 7.5, trial courts are authorized to grant a new trial in several enumerated circumstances, including whenever a trial irregularity prevented the defendant from receiving a fair trial. CrR 7.5(a)(5). The rule provides in relevant part as follows:

> **(a) Grounds for New Trial.** The court on motion of a defendant may grant a new trial for any one of the following causes when it affirmatively appears that a substantial right of the defendant was materially affected:
>
> (1) Receipt by the jury of any evidence, paper, document or book not allowed by the court;

(2) Misconduct of the prosecution or jury;

(3) Newly discovered evidence material for the defendant, which the defendant could not have discovered with reasonable diligence and produced at the trial;

(4) Accident or surprise;

(5) Irregularity in the proceedings of the court, jury or prosecution, or any order of court, or abuse of discretion, by which the defendant was prevented from having a fair trial;

(6) Error of law occurring at the trial and objected to at the time by the defendant;

(7) That the verdict or decision is contrary to law and the evidence;

(8) That substantial justice has not been done.

When the motion is based on matters outside the record, the facts shall be shown by affidavit.

CrR 7.5.

A trial court's ruling on a motion for a new trial is reviewed for an abuse of discretion. State v. Balisok, 123 Wn.2d 114, 117, 866 P.2d 631 (1994). The court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard. In re Marriage of Littlefield, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997) (citing State v.

Rundquist, 79 Wn. App. 786, 793, 905 P.2d 922 (1995), rev. denied, 129 Wn.2d 1003 (1996)). "The range of discretionary choices is a question of law and the judge abuses his or her discretion if the discretionary decision is contrary to law." State v. Neal, 144 Wn.2d 600, 609, 30 P.3d 1255 (2001).

a. The Court Had A Duty To Voir Dire The Jury

The trial court abused its discretion by denying the motion without further investigation. Although the trial court acknowledged the importance of Valle's testimony, it nonetheless denied the motion because there was no "percentage indicating" how many jurors heard what portions of Valle's testimony. The Court could have determined that percentage by questioning the jurors. An essential element of a fair trial is a jury capable of deciding the case based on the evidence before it. State v. Momah, 167 Wn.2d 140, 152, 217 P.3d 321 (2009). A defendant is denied due process when a juror cannot hear all the relevant evidence. State v. Turner, 186 Wis.2d 277, 284, 521 N.W.2d 148 (Wis. App. 1994). "A juror who has not heard all the evidence in the case is grossly unqualified to render a verdict." People v. Simpkins, 16 A.D.3d 601, 792 N.Y.S.2d 170 (N.Y. App. Div. 2005).

Because cases discussing a juror's inability to hear a witness's testimony are fact specific, there is no case factually identical with

Bailey's case. Cases that address sleeping jurors are instructive. See State v. Kettner, 337 Wis.2d 461, 474, 805 N.W.2d 132 (recognizing fundamental inquiry in sleeping juror and hearing-impaired juror cases is the same).

In State v. Hampton, the defendant moved for a mistrial because a juror slept during testimony. 201 Wis.2d 662, 666-67, 549 N.W.2d 756 (Wis. App. 1996). The trial court denied the motion without questioning the juror. Hampton, 201 Wis.2d at 667. The Court of Appeals remanded for an evidentiary hearing to allow the trial court to conduct a hearing to determine the length of time the juror was sleeping, the importance of the testimony missed, and whether such inattention prejudiced the defendant. Hampton, 201 Wis.2d at 673-74. The Court reasoned that since the State conceded the juror had been sleeping, the trial court erroneously exercised its discretion by summarily foreclosing further inquiry. Hampton, 201 Wis.2d at 671-72.

In People v. South, the trial court committed reversible error in failing to conduct proper inquiry after defense counsel informed the court a juror was sleeping, even though the court found the juror had closed his eyes for only short periods of time. 177 A.D.2d 607, 607-08, 576 N.Y.S.2d 314 (N.Y. App. Div. 1991). Under these circumstances, the trial court should have conducted "a probing and tactful inquiry to determine

whether juror number 9 was unqualified to render a verdict based upon her apparent sleeping episodes." South, 177 A.D.2d at 608.

In People v. Valerio, the trial court committed reversible error in failing to inquire of two jurors, where the court noted they were dozing during a read back of testimony and defense counsel suggested the court conduct an in camera inquiry of one juror whose eyes were closed and seemed asleep. 141 A.D.2d 585, 586, 529 N.Y.S.2d 350 (N.Y. App. Div. 1988). Valerio recognized a defendant is deprived of his constitutional right to a jury trial and entitled to a new one when the court unjustifiably fails to investigate an allegedly sleeping juror and allows that juror to deliberate. Valerio, 141 A.D.2d at 586. "It is incumbent upon the trial court to conduct a probing and tactful inquiry to determine whether a sworn juror is unqualified. The court may not speculate upon the juror's qualifications but must ascertain the juror's state of mind and must place its reasons for excusing or retaining the juror on the record." Valerio, 141 A.D.2d at 586.

In Commonwealth v. Braun, the judge abused his discretion by failing to voir dire the juror where there was a real basis for concluding the juror was sleeping during testimony and the judge's instructions. 74 Mass. App. Ct. 904, 905, 905 N.E.2d 124 (Mass. App. Ct. 2009). "That the judge was not certain whether the juror was sleeping and was

unwilling to make such a finding should not have ended the inquiry. Uncertainty that a juror is asleep is not the equivalent of a finding that the juror is awake." Braun, 74 Mass. App. Ct. at 905.

By not conducting a voir dire, the trial court in Bailey's case "prevented himself from obtaining the information necessary to a proper exercise of discretion." Braun, 74 Mass. App. Ct. at 905; see also State v. Reevey, 159 N.J. Super. 130, 133-34, 387 A.2d 381 (N.J. Super. Ct. App. Div. 1978) (defense counsel informed court juror was sleeping; trial judge should have conducted a hearing and questioned the juror as to whether she was in fact dozing or sleeping, or whether she was listening to the summations and the charge with her eyes closed); cf. People v. Buel, 53 A.D.3d 930, 931, 861 N.Y.S.2d 535 (N.Y. App. Div. 2008) (court questioned juror, who explained he was tired but had heard the testimony and had not fallen asleep; based on this appropriate inquiry, court had an adequate basis for its conclusion the juror had not missed significant portions of the trial testimony and, therefore, was not grossly unqualified to continue to serve as a juror).

In State v. Jorden, the appellate court was unwilling to impose a mandatory format for establishing whether a juror engaged in misconduct. Rather, the court held the trial judge has discretion to resolve the issue "in a way that avoids tainting the juror and, thus, avoids creating prejudice

against either party." 103 Wn. App. 221, 229, 11 P.3d 866 (2000), rev. denied, 143 Wn.2d 1015 (2011). Jorden, 103 Wn. App. at 229.

The Court did not fault the trial judge for not questioning the juror in that case because: (1) questioning may have been embarrassing to the juror; (2) if the judge had questioned her, the parties presumably would also have been entitled to question her, which may have put her in an adversarial position with the State; and (3) if the juror denied sleeping, the State may have proposed calling other jurors to report their observations, which could have put the juror in an adversarial position to the other juror-witnesses. Jorden, 103 Wn. App. at 228. These concerns do not apply to Bailey's case; the jury already returned a verdict and there was no risk of pitting any of the jurors against either party. Furthermore, unlike sleeping in court, there is nothing embarrassing about not being able to hear testimony. Indeed, judges and counsel often direct witnesses to speak up.

The trial court could not have fairly determined how many jurors missed some of Valle's testimony without asking them. The court acknowledged as much: "Nor do we have a percentage indicating who heard what. We don't know if those six people who didn't hear Ms. Valle, according to them, understood 10 percent, 20, we don't know what they heard[.]." 3RP 196. By choosing to ignore the problem, the court failed to exercise its fact-finding discretion.

b. Failure to Conduct Appropriate Inquiry Constitutes Reversible Error.

Where a juror is unable to hear material testimony, prejudice is presumed. Turner, 185 Wis.2d at 284-85. Material evidence is "[o]f such a nature that knowledge of the item would affect a person's decision making; significant; essential." Black's Law Dictionary 1066 (9th ed. 2009).

It was undisputed Valle's testimony was crucial to Bailey's defense. 3RP 184-85, 195. During two days of testimony, Valle explained Chang pursued her for sexual services. Valle explained Chang took his pants off during a sexual assault in her car and that she threw them away after fleeing from Chang. She denied seeing Bailey attack Chang with a knife and denied Bailey was even at the scene of the alleged robbery.

The importance of Valle's testimony distinguishes this case from Denney, the only Washington State case discussing prejudice arising from a juror's physical inability to hear a witness's testimony. There, one juror did not hear the testimony of witness Louise Ledford during Denney's forgery trial. 4 Wn. App. 604, 605, 483 P.2d 141 (1971). In order to get property back from a recently vacated apartment Ledford and Denney met with the apartment landlord. Ledford told the landlord Denney was her

husband William Ledford. In exchange for the property, Denney gave the landlord check signed by William Ledford Jr. Denney, 4 Wn. App. at 605-06.

The "only substantial dispute in the evidence" arose when Ledford testified the landlord knew the check "wasn't any good," when she accepted it. Denney, 4 Wn. App. at 606. Denney maintained this testimony supported his defense theory that the landlord accepted the check, knowing that it was 'void' and that there was an agreement between the landlord, Ledford, and him that Ledford would return to claim the property and check in about a week. Because of this arrangement Denney maintained he had no intent to defraud and did not present the check as a genuine instrument. Denney, 4 Wn. App. at 606.

After the jury found Denney guilty, the juror disclosed his inability to hear Ledford's testimony but said other members of the jury told him what her testimony was. The trial court denied Denney's motion for a new trial based on the juror's disclosure. Denney, 4 Wn. App. at 605.

The Court of Appeals agreed, finding Ledford's testimony was immaterial to the issue of forgery. The Court noted the intent of the person writing the check was the critical fact, not whether the person receiving the check had reason to believe it was forged. Because the Court found substantial evidence supported the jury's finding that Denney

forged and uttered the check with intent to defraud, it concluded Denney was not necessarily prejudiced by the juror's inability to hear Ledford's testimony. Denney, 4 Wn. App. at 606-07.

In contrast, other jurisdictions have addressed the situation at issue here, where a juror indicates they did not hear material testimony. Turner was charged with three counts of sexual assault of a child. Turner, 186 Wis.2d at 279. Throughout the trial, the court and parties noted the jury appeared to have trouble hearing the complaining witness's testimony. Turner, 186 Wis.2d at 280-81. When questioned by the trial court, two jurors acknowledged that due to hearing impairments they did not hear some of the testimony of two of the complaining witnesses. Turner's motion for a mistrial was denied, and the trial proceeded with a sound amplification system. Turner, 186 Wis.2d at 282.

On appeal, Turner argued he was denied the right to an impartial jury and the right to a unanimous jury verdict. Turner, 186 Wis.2d at 279. Noting "it was critical for each juror to hear the testimony from each witness and relate that testimony to the witness's demeanor," the Court concluded Turner's constitutional rights to an impartial jury and due process were violated. Turner, 186 Wis.2d at 284-85.

The Court concluded that, "once it is determined that a juror missed material testimony which bears on a defendant's guilt or

innocence, prejudice must be assumed 'for the sake of insured fairness.'" Turner, 186 Wis.2d at 284-85 (citing Commonwealth v. Brown, 231 Pa. Super. 431, 332 A.2d 828, 832.) The Court expressly rejected the State's contention that "putting all the witnesses together resulted in the jury getting enough evidence to fairly judge Turner." Turner, 186 Wis.2d at 285.

As in Turner, this Court must presume prejudice because jurors did not hear at least some of Valle's material testimony. Bailey, however, is entitled to a new trial regardless of whether the jury failed to hear material evidence. This case presents the question of what should happen when the trial court fails to conduct an adequate inquiry into whether jurors' were unable to hear trial testimony, thereby preventing the defendant from demonstrating prejudice altogether.

Under that circumstance, courts have held the failure to conduct inquiry when needed is reversible error. Valerio, 141 A.D.2d at 586; South, 177 A.D.2d at 607-08; Braun, 74 Mass. App. Ct. at 905; cf. People v. McClenton, 213 A.D.2d 1, 6, 630 N.Y.S.2d 290 (N.Y. App. Div. 1995) (removal of a juror could have proved unnecessary had the court conducted appropriate inquiry into the claimed misconduct, but lack of such inquiry "means that it will never be known whether this defendant was tried by a jury which did not engage in premature deliberations, did

not commence deliberations with a predisposition toward a finding of guilt, or did not operate under a time constraint for reaching its verdict.").

Inquiry is needed in other contexts to ensure the protection of important constitutional rights. For example, reversal of a defendant's conviction is required if the trial court knows or reasonably should know of a potential attorney-client conflict and the trial court fails to conduct an adequate inquiry after timely objection. State v. McDonald, 143 Wn.2d 506, 513-14, 22 P.3d 791 (2001); State v. Regan, 143 Wn. App. 419, 425-26, 177 P.3d 783 (2008). Due process requires inquiry once reason to doubt competency exists. In re Pers. Restraint of Fleming, 142 Wn.2d 853, 863, 16 P.3d 610 (2001).

Protection of a defendant's fundamental constitutional right to a fair jury trial is entitled to no less consideration. There was a sufficient basis for the trial court to reasonably know several jurors likely missed at least portions of a material witness's testimony. Voir dire of the jury was needed to ensure Bailey's right to a fair trial.

c. Bailey's Counsel was Ineffective in Failing to Object to the Trial Court's Failure to Question the Jury.

Every criminal defendant is guaranteed the right to the effective assistance of counsel under the Sixth Amendment of the United States Constitution and Article I, Section 22 of the Washington State

Constitution. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P. 2d 816 (1987). Defense counsel is ineffective where (1) his performance is deficient and (2) the deficiency prejudices the defendant. Strickland, 466 U.S. at 687; Thomas, 109 Wn.2d at 225-26.

Deficient performance is that which falls below an objective standard of reasonableness. Thomas, 109 Wn.2d at 226. Only legitimate trial strategy or tactics constitute reasonable performance. State v. Aho, 137 Wn.2d 736, 745, 975 P.2d 512 (1999). To demonstrate prejudice, the defendant need only show a reasonable probability that, but for counsel's performance, the result would have been different. Thomas, 109 Wn.2d at 226. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Thomas, 109 Wn.2d at 226.

There was no legitimate reason for defense counsel not to object to the trial court's failure to question the jurors. Bailey had already been found guilty. And as discussed above, the court it could not fairly decide counsel's new trial motion without questioning the jurors themselves. By failing to request such questioning, defense counsel deprived himself of the evidence necessary to prevail on his motion. Defense counsel's deficient performance also prejudiced Bailey. Valle's testimony was crucial to Bailey's defense. Even if one juror did not hear Valle's

testimony, then Bailey was convicted by a juror who necessarily did not consider all the evidence. Counsel's failure to request questioning of the juror undermines confidence in the outcome of Bailey's case. This Court should reverse his convictions.

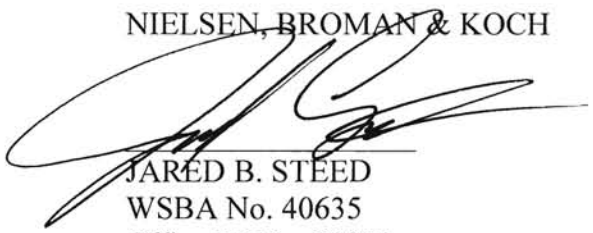
D. CONCLUSION

For the reasons discussed above, this Court should reverse Bailey's conviction and remand for a new trial.

DATED this 21st day of June, 2013.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



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

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
vs.	)	COA NO. 69217-8-I
	)	
MICHAEL BAILEY,	)	
	)	
Appellant.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 21ST DAY OF JUNE, 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] MICHAEL BAILEY
DOC NO. 360745
MONROE CORRECTIONAL COMPLEX
P.O. BOX 777
MONROE, WA 98272

SIGNED IN SEATTLE WASHINGTON, THIS 21ST DAY OF JUNE, 2013.

X Patrick Mayovsky