

NO. 69217-8-I

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

REC'D  
NOV 22 2013  
King County Prosecutor  
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL BAILEY,

Appellant.

03-01-2013  
10:00 AM  
W

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

The Honorable LeRoy McCullough, Judge

REPLY BRIEF OF APPELLANT

JARED B. STEED  
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC  
1908 E Madison Street  
Seattle, WA 98122  
(206) 623-2373

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A. ARGUMENT IN REPLY

BAILEY IS ENTITLED TO A NEW TRIAL BECAUSE THE TRIAL COURT FAILED TO ADEQUATELY INQUIRE INTO WHETHER JURORS WERE UNABLE TO HEAR CRUCIAL TRIAL TESTIMONY.

Before sentencing, Michael Bailey's attorney moved for a new trial. He argued several jurors disclosed after the verdict that "half the jury" could not hear Ashley Valle's testimony. CP 71-78; 3RP 189. Declarations from defense counsel and a defense intern stated one juror informed the bailiff of the difficulty hearing the testimony. 3RP 176. The trial court denied the motion, noting it was uncertain how many jurors heard what portions of the testimony. 3RP 196. The court did not question the jury to determine how many jurors did not hear the testimony. Brief of Appellant (BOA) at 11-24.

Bailey contends, for reasons set forth more fully in the opening brief, that the trial court's failure to question the jurors was an abuse of discretion entitling Bailey to a new trial. BOA at 11-24. The State maintains the court properly exercised its discretion. Brief of Respondent (BOR) at 12-29. For the following reasons, Bailey asks this Court to reject the State's arguments.

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). BOA at 13. The State attempts to distinguish State v. Jackson,<sup>1</sup> on the basis that Bailey cannot meet the prima facie showing of juror bias necessary for the “preferred, but not required,” evidentiary hearing. BOR at 17-21, 23-24. The State’s attempt to distinguish Jackson fails because Jackson necessarily supports Bailey’s argument here.

Jackson, an African America, was charged with robbery and burglary. During voir dire the trial court asked the prospective jury panel whether anything would prevent them from trying the case impartially. No jurors responded. Among the jurors chosen was a Caucasian man, Juror X, who indicated he felt good making credibility determinations. Jackson, 75 Wn. App. at 538-39.

After the jury found Jackson guilty, he moved for a new trial based on Juror X’s bias. Jackson submitted a certification from another juror who overheard Juror X making repeated disparaging comments about “coloreds.” Jackson, 75 Wn. App. at 539-40.

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<sup>1</sup> 75 Wn. App. 537, 543, 879 P.2d 307 (1994), rev. denied, 126 Wn.2d 1003 (1995).

The State argued Jackson failed to establish juror misconduct. In the alternative, the State argued the trial court should conduct an evidentiary hearing before granting the motion for new trial. Jackson, 75 Wn. App. at 540. The trial court denied the motion, concluding the certification did not reveal any “sort of racial prejudice or bias.” Jackson, 75 Wn. App. at 542. However, the trial court noted that even if the certification revealed racial bias, nothing indicated Juror X found Jackson guilty on that basis alone. Jackson, 75 Wn. App. at 540-42.

On appeal, Jackson argued the trial court abused its discretion by denying the motion because Juror X failed to reveal his racial bias during voir dire. Jackson, 75 Wn. App. at 542. The Court of Appeals agreed Jackson was entitled to a new trial. Jackson, 75 Wn. App. at 542, 545.

The Court concluded Juror X’s statements revealed his predisposed aversion of, and tendency to make generalizations about, African Americans. The Court presumed these predisposed discriminatory views affected Juror X’s ability to decide Jackson’s case fairly and impartially. However, the Court declined to resolve the case on the basis of Juror X’s misconduct. Rather, the Court concluded that “as a matter of due process,” the trial court should have conducted an evidentiary hearing before ruling on Jackson’s motion for a new trial. Jackson, 75 Wn. App. at 543.

The Court concluded when there is a prima facie showing of juror misconduct, “an evidentiary hearing is always the preferred course of action.” Jackson, 75 Wn. App. at 544. As the Court noted, a hearing would have helped the trial court make a determination -- based on juror X’s responses, credibility, and demeanor -- whether or not he held a racial bias that prevented him from deciding the case fairly and impartially. The parties could also have examined other jurors to determine whether race played a role during their deliberations. Jackson, 75 Wn. App. at 544.

The Court concluded an evidentiary hearing was the only appropriate course of action the trial court could have taken given Jackson’s prima facie showing of racial bias and because the trial turned on witness credibility. However, the Court remanded Jackson’s case for a new trial instead of an evidentiary hearing. The Court concluded a new trial was warranted because it would be difficult for jurors to adequately recall the circumstances and because neither party asked for an evidentiary hearing. Jackson, 75 Wn. App. at 544.

Like Jackson, here the trial court erred in denying Bailey’s motion for a new trial without first conducting an evidentiary hearing. Bailey made a prima facie showing that some of the jurors were unable to hear Valle’s testimony. Neither the State nor the trial court disputed the veracity of Bailey’s affidavits in support of the motion. 3RP 189. Rather,

the trial court denied the motion because it was uncertain what percentage of jurors heard what portions of the testimony. 3RP 196.

As in Jackson, an evidentiary hearing was the only appropriate course of action. Valle's testimony was critical to Bailey's defense. BOA at 18-22; 3RP 184-85, 195. Like Jackson, an evidentiary hearing would have helped the trial court and parties make a determination based on the juror's responses, credibility, and demeanor as to how much, if any, of Valle's testimony they heard. Instead, by choosing to ignore the problem of uncertainty, the court failed to exercise its fact-finding discretion.

Jackson likewise supports Bailey's argument that he is entitled to a new trial. Bailey was convicted on June 7, 2012; nearly one and a half years ago. Several more months may pass before this Court issues an opinion. As in Jackson, "given this passage of time and the associated difficulty of obtaining both juror witnesses and adequate recollections[.]" remand for a new trial is the appropriate remedy.

For the aforesaid reasons, the State's attempt to distinguish Jackson fails. Bailey made a prima facie showing that some of the jurors were unable to hear Valle's testimony. The trial court abused its discretion by denying Bailey's motion for a new trial without holding an evidentiary hearing.



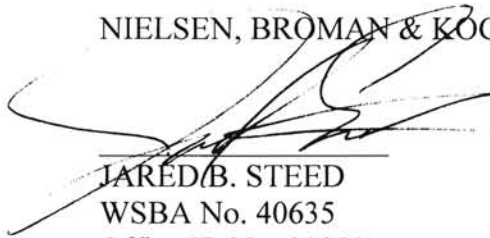
B. CONCLUSION

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

DATED this 22<sup>nd</sup> day of November, 2013.

Respectfully submitted,

NIELSEN, BROMAN & KOCH

A handwritten signature in black ink, appearing to read 'Jared B. Steed', is written over a horizontal line. The signature is stylized and somewhat cursive.

JARED B. STEED  
WSBA No. 40635  
Office ID No. 91051  
Attorneys for Appellant

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STATE OF WASHINGTON	)	
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Respondent,	)	
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vs.	)	COA NO. 69217-8-1
	)	
MICHAEL BAILEY,	)	
	)	
Appellant.	)	

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**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 22<sup>ND</sup> DAY OF NOVEMBER, 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY 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 22<sup>ND</sup> DAY OF NOVEMBER, 2013.

X *Patrick Mayovsky*