69217-8

69217-8

NO. 69217-8-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL BAILEY,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JUDGE LEROY MCCULLOUGH

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. A trial court may order a new trial in certain instances when it affirmatively appears that a substantial right of the defendant's was materially affected. A defendant is entitled to a new trial only where he can show that he was so prejudiced that nothing short of a new trial will ensure fairness. A trial court's denial of a motion for new trial is reviewed for abuse of discretion, and will be upheld unless no reasonable judge would have made the same decision. In support of his motion for a new trial, Bailey produced vague hearsay statements of jurors indicating that they had not heard the testimony of a witness. It was unclear how many jurors might have had difficulty hearing, and what portion of the testimony they may not have heard. The record does not reflect that any juror ever complained of difficulty hearing. There was no dispute over what the witness testified to, the defense argued its theory of the case in closing, and the case did not turn solely on the credibility of that witness. Was the court required to conduct an evidentiary hearing prior to ruling on Bailey's motion for a new trial?

2. Whether the jurors heard crucial testimony is a question of fact for the trial court. In the event this Court determines that the trial court erred when it denied Bailey's motion for a new trial without

conducting an evidentiary hearing, should this Court remand for such a hearing to occur?

3. To establish that his counsel was ineffective for not requesting an evidentiary hearing on his motion for a new trial, Bailey must show that it was objectively unreasonable for his trial counsel to not request such a hearing, and that he would have likely prevailed on his motion for a new trial had the evidentiary hearing occurred. Legitimate strategy cannot support an ineffective assistance of counsel claim. It was a reasonable tactical decision to proceed with affidavits containing the facts as presented in the light most favorable to Bailey. Was Bailey's counsel deficient for not requesting an evidentiary hearing? Where it is not clear what the jurors would have testified to at an evidentiary hearing, has Bailey failed to establish a reasonable probability that his motion for a new trial would have been granted had his attorney requested such a hearing?

B. STATEMENT OF THE CASE

1. THE ROBBERY.

At approximately 2:30 in the morning of October 17, 2011, Kisha Brown awoke to the sound of an angry male voice outside of her apartment window ordering, "Get your jeans off or I'll cut you. Hurry

up." 2RP 31-32.[1] Brown immediately heard a second male voice quietly saying, "I can't." Id. Brown noted that the second male voice sounded scared, even "terrified." 2RP 32, 45. Brown heard the first male voice repeat his command to "get your jeans off or I'll cut you." 2RP 32. Brown called 911. Id. While she was on the telephone with 911, the noise outside stopped. Id. A couple of minutes later Brown heard what sounded like ladies' high-heeled shoes "clacking," and a car driving away. 2RP 33.

About 2:45a.m., Leonard Weekly, who lived just up the hill from Kisha Brown's apartment, was awoken to someone banging on his front door. 2RP 47, 56. Weekly saw a bloodied male outside. 2RP 48. Weekly retrieved his handgun and then cracked his garage door, telling the man to "[g]et on the ground." Id. After Weekly ascertained that the male was not a threat, he told the man to stand up. 2RP 49. At that point, he realized that the man had no pants on, and had blood on his hand and his t-shirt. 2RP 50. The man was scared, appeared "in shock," and told Weekly, "You got to help me." 2RP 51, 53.

The man, who Weekly later learned was Daniel Chang,[2] told Weekly that he had been gambling at the Muckleshoot Casino.

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[1] The verbatim report of proceedings consists of 6 volumes and will be referred to herein as follows: 1RP (May 3, 2012), 2RP (May 7, 9, 24, and 29, 2012), 3RP (May 30, 2012), 4RP (May 31, 2012), 5RP (June 4 and August 17, 2012), and 6RP (June 5, 6, and 7, 2012).

[2] 2RP 48.

2RP 54-55. Chang told Weekly that he had met a girl at the casino, who he later left with in her car. Chang said that the girl had stopped at the apartments down the hill from Weekly's house, at which time an African-American man made him take his pants off and had taken his money. 2RP 55.

Chang, who owned a business that sold high-end collectible game cards, had, in fact, been at the Muckleshoot earlier that night, playing craps. 2RP 87-88; 3RP 102. Chang was a friendly and outgoing individual who frequently enjoyed the social aspects of the casino and gaming environment. 3RP 104-05. Although Chang gambled within his means, the amount of money he gambled was fairly significant, entitling him to "player points" and comps. 2RP 106; 4RP 273.

Chang arrived at the Muckleshoot on the evening of October 16, 2011 at about 7:00p.m. 3RP 102. By 10:00p.m., Chang had lost approximately $3,000. 3RP 106-07. He drew another $5,750 against his credit card at the cash cage of the casino. Id. Chang then began to play craps on the smoking side of the casino floor. 3RP 107. While Chang was at the craps table on the smoking side, Appellant Michael Bailey and Ashley Valle approached. 3RP 109-11. Valle was very friendly, and Chang struck up a conversation with her. Bailey, on the other hand, seemed standoffish. 3RP 111.

Bailey left the table, but Valle remained, and chatted with Chang. 3RP 112-13. Over the course of the evening, Chang continued to play craps at the same table. 3RP 113-17. Although Valle left the table on three occasions for short periods, she returned to Chang each time. 3RP 112-16. Valle denied that Bailey was her boyfriend. 3RP 116, 124. She and Chang flirted, and talked about maybe getting something to eat together. 3RP 117-18. Valle and Chang exchanged phone numbers. 3RP 116, 119.

After some time, Chang and Valle left the craps table together. 3RP 118. Chang had $5600 in chips. 3RP 120. He had "colored up," or exchanged the lesser-amount chips for larger-value chips, but he did not cash his chips in at the cage because he thought he might be back to play later that night. 3RP 120-21. Valle mentioned that she had to "take care of some things" with her friend, Bailey. 3RP 119. She told Chang to meet her in the parking lot. 3RP 121. When Chang got into the elevator to go to the parking lot, Bailey was in the elevator. 3RP 122. Bailey was aggressive with Chang, saying, "Why are you talking to my girl? Why are you messing with her?" Id. Upon exiting the elevator, Chang saw two casino security officers and told them that Bailey was harassing him. 3RP 123.

Approximately 20 minutes later, Valle picked up Chang in her car. 3RP 125. She told Chang that she lived nearby and that she wanted to stop by her house. 3RP 127. A short distance from the casino, Valle stopped her car at an apartment complex; she stopped off of a main road, and near a fence. 3RP 128. After parking, Chang noticed that Valle was texting on her phone. 3RP 129. He asked her if she needed to get something from her house, or if they were going to get something to eat. Id. Valle began smoking marijuana and asked Chang if he wanted to as well. Id. Chang declined, and decided that he wanted to end the encounter because the situation did not feel right to him. 3RP 129-30.

Wanting to leave, Chang told Valle he needed to get some air, and got out of her car. 3RP 130. Valle did not respond. 3RP 131. Right after Chang exited the car, he was approached from behind by a male who told Chang that if he moved, he would kill him. 3RP 132. Chang was scared, but pushed away from the man, getting a glimpse of him in the process. 3RP 133. Chang recognized the man as Bailey, Valle's companion from the casino. 3RP 136-37. When Chang tried to run, Bailey grabbed onto Chang's hoodie, and Chang fell to the ground. Id.

After Chang had fallen to his knees, Bailey put a knife to Chang's neck, told him that he would cut him, and to take off his pants. 3RP 134-35. Chang was not sure how many times Bailey told him to take off

his pants, but he did as he was told, because he "didn't want to die." 3RP 135. The $5600 in casino chips was in Chang's pants, along with other personal items. 3RP 121, 126.

After he took off his pants and after Bailey and Valle left, Chang ran away. 3RP 138. He jumped over several fences, cutting himself in the process. 3RP 139. Chang ran up the hill and knocked on Weekly's door. 3RP 140.

During the police investigation, Chang picked Valle's picture out of a photo montage. 3RP 143; 5RP 94. He was unable to pick with certainty any one picture from a montage that included Bailey. 3RP 143-44; 5RP 97-98. The investigating detective noticed a "fresh-looking" red mark on Chang's neck, consistent with where he said that Bailey had held the knife. 3RP 145; 5RP 101.

Security video footage from the casino showed Valle and Bailey entering together at approximately 10:01p.m. 3RP 330. The footage showed them approaching Chang's craps table at approximately 12:05a.m. 3RP 153-54. About six minutes later, the video shows Bailey leaving the table. 3RP 156-57. Five minutes later, Valle is seen leaving the table and contacting Bailey. 3RP 158. She returned to the craps table just a minute or two later. 3RP 159. The video footage showed the remainder of Valle and Chang's interaction at the craps table. 3RP 160-65, 219-23.

Chang and Valle are seen on the security footage leaving the craps table together at approximately 1:29a.m. 3RP 223. At 1:47a.m., both Bailey and Chang can be observed getting onto the elevator to the parking garage. 3RP 226-27. At 1:49a.m., the video shows them exiting the elevator, with Bailey attempting to engage Chang in some manner. 3RP 227-28. At 2:14a.m., Valle can be seen driving into the parking lot, where Chang was waiting. 3RP 230. The video shows Valle's car leaving at approximately 2:15a.m. Id.

When Valle and Bailey were arrested, their cell phones were placed in evidence. 5RP 73-77, 102. Detective Dentz from the Bellevue Police Department was able to extract the text messages, both incoming and outgoing, from Bailey's phone. 3RP 192-93; 5RP 112-15.[3] Valle's phone had a lock that prevented Dentz from retrieving her text messages. 3RP 192.

Just prior to 1:00a.m. on October 17, 2011, there started a series of texts between Bailey and Valle. Ex. 10; 5RP 111-15. Texts from Bailey to Valle included, "Should i come over there and play it off," "Ok im goin to the house to get money then, ill be rite back," "I got my eye on u," and "No kissing in the mouth." Ex. 10; 5RP 111-13. At 2:18a.m, Bailey

[3] The text messages in Bailey's phone were both directed to and received from the nickname "Nikki." Ex. 10; 5RP 111-15. Valle's middle name is Nicole, and she admitted that Bailey called her by the nickname "Nicky." 5RP 146.

texted Valle, "Make sure that on him first." Ex. 10; 5RP 113. At 2:20a.m, Bailey texted Valle, "Whos the van." Id. At 2:21a.m., Bailey texted Valle, "Does he have the cpis on him." Ex. 10; 5RP 114. At 2:23am, Valle texted Bailey, "Just do it." Id. Finally, at 2:25a.m., Valle texted Bailey again, "Hury." Id. It was approximately five minutes later, at 2:30a.m, that Kisha Brown called 911 to report hearing a man outside of her window saying, "Get your jeans off or I'll cut you. Hurry up." 2RP 31-32.

2. THE TRIAL.

Bailey and Valle were both charged in King County Superior Court with Robbery in the First Degree. CP 1. Valle pled guilty to Theft in the First Degree and Assault in the Second Degree. 5RP 151. As part of her guilty plea, she adopted a statement that read, "On October 17th, in King County, together with Michael Bailey, [I] did intentionally assault Daniel Chang with a deadly weapon, to whit [sic] a knife, that Michael Bailey had a knife, and took the property with [my] assistance." 5RP 150.

Bailey went to trial on amended charges of first-degree robbery with a deadly weapon enhancement. CP 36. During Bailey's trial, Valle testified that she had gone to the Muckleshoot Casino with Bailey. 5RP 143, 152. She admitted meeting Chang and spending time with him

at the craps table. 5RP 143-44. She claimed that Chang was highly intoxicated. 5RP 156-57. She claimed that Chang asked her if she was an escort. 5RP 159.

Valle claimed that ultimately she and Bailey left the casino, and that she drove him a short distance away to meet a friend. 5RP 160-61. She testified that she had no plans to meet back up with Bailey that night, and that she was going to go home. 5RP 162. However, she said that after she dropped Bailey off, Chang called and asked her to come and pick him up because he was "too intoxicated to drive." 5RP 162. Valle drove back to the casino and picked up Chang. 5RP 163.

Valle claimed that upon Chang entering her car, she "realized it was a mistake" because Chang immediately took his pants off. 5RP 152, 163. Valle said that Chang got into the back seat. 5RP 163. She testified that he rubbed her inner legs while she was driving, tried to kiss her face, and was "aggressive" with her. 5RP 164. Valle testified that she stopped the car, and, at that point, she was considering making a "business arrangement" with Chang. Id. She stated that Chang was masturbating in the backseat while she considered the idea. Id.

Valle claimed that Chang then pulled her head toward his private part. 5RP 165. She became angry because they had not agreed to anything at that point. Id. However, she said that she "ended up forgiving

at the same time because he was drunk." Id. When Valle pulled away from Chang, she said he became angry and took the keys from her ignition. Id. Valle claimed that Chang told her he would return the keys if she would "suck his dick." 5RP 166. She suggested that they go inside, but he "didn't like that," and hopped out of her car, with no pants on, but with her keys in his hand. Id. Valle claimed that she managed to get the keys back from Chang, and drove away. 5RP 166-67. She testified that she drove to a 7-Eleven to buy a few things, and that she threw Chang's pants away at the 7-Eleven. 5RP 168-69.

Valle further testified that she had not read her guilty plea statement before pleading guilty. She claimed that she pled guilty because she did not want to have to "tell this story." 5RP 170. At first Valle appeared to admit that she knew she was signing the statement of guilt under penalty of perjury. 5RP 172. She later testified that she was not aware that she was "swearing" to it. Id. Bailey did not testify. 6RP 420. The jury found Bailey guilty as charged. CP 69-70.

3. THE MOTION FOR NEW TRIAL.

Prior to sentencing, Bailey filed a motion for new trial based on trial irregularity. In support of his motion, he presented two identical affidavits, one from his attorney, and one from an intern with his

attorney's office. According to the affidavits, they had spoken informally with "several" members of the jury after the verdict. CP 75, 77. The affidavits stated that during this informal discussion, one of the male jurors said that "half of them could not hear Ashley Valle during her testimony." CP 76, 77. A female juror indicated that "the jury" had told the bailiff about it. CP 76, 78. These two jurors "decided to rely" on the notes of the other jurors. Id. After argument, the court denied Bailey's motion for a new trial. CP 95; 5RP 196.

Bailey was sentenced to a total of 75 months incarceration, and 18 months of community custody. CP 87-88; 5RP 203. Bailey filed this timely appeal. CP 94.

C. ARGUMENT

1. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION WHEN IT DENIED BAILEY'S MOTION FOR A NEW TRIAL.

In a post-verdict motion for a new trial, Bailey submitted two identical affidavits that contained vague hearsay regarding the jurors' ability to hear witness Valle. He argues that these affidavits imposed upon the trial court an affirmative obligation to *sue sponte* bring the jurors back to court and conduct an evidentiary hearing regarding what portion of the testimony they did or did not hear.

This argument should be rejected. Bailey did not make a sufficient affirmative showing that he received an unfair trial, or that an evidentiary hearing was warranted. As such, the trial court's denial of his motion for a new trial was a proper exercise of discretion.

For certain enumerated reasons, a trial court may grant a defendant a new trial "when it affirmatively appears that a substantial right of the defendant was materially affected." CrR 7.5(a). Those reasons include:

> (2) Misconduct of the prosecution or jury;
>
> . . .
>
> (5) Irregularity in the proceedings of the court, jury or prosecution . . . by which the defendant was prevented from having a fair trial;
>
> . . .
>
> (7) That the verdict or decision is contrary to law and the evidence;
>
> (8) That substantial justice has not been done.

CrR 7.5(a). When a motion for new trial is made "based on matters outside the record, the facts shall be shown by affidavit." CrR 7.5(a).

A defendant is entitled to a new trial only where he can show that he was so prejudiced that nothing short of a new trial can ensure that he will be treated fairly. State v. Pete, 152 Wn.2d 546, 552, 98 P.3d 803 (2004) (citations omitted). A trial court's decision to grant or deny a motion for new trial is a matter within its sound discretion, and will be

reversed only for abuse of that discretion. State v. Copeland, 130 Wn.2d 244, 294, 922 P.2d 1304 (1996) (citing State v. Balisok, 123 Wn.2d 114, 117, 866 P.2d 631 (1994)). An abuse of discretion occurs only when *no reasonable judge* would have reached the same decision. Pete, 152 Wn.2d at 552 (citing State v. Bourgeois, 133 Wn.2d 389, 406, 945 P.2d 1120 (1997)).

Ashley Valle testified on June 4th and June 5th. 5RP 141-71; 6RP 368-87. The trial was audio-recorded on June 4th, and a court reporter was present on June 5th. A microphone was used to amplify Valle's voice during the entirety of her testimony. 5RP 142, 189-90, 196; 6RP 373, 382. On one occasion on June 4th, during direct examination, the prosecutor asked Ms. Valle to speak up. 5RP 148. Also, once during cross-examination that day, the prosecutor stated he had not heard Valle's answer to a question, and she was asked to repeat it. 5RP 159. On one occasion on June 5th, the court asked Valle to keep her voice up. 6RP 370. At no time during any portion of Valle's testimony, did any of the jurors indicate that they had a problem hearing Valle. At no time did Bailey or his attorney complain that they could not hear Valle. The trial record is utterly silent as to any difficulty the jury may have had hearing Valle.

In support of a post-verdict motion for new trial, Bailey's attorney and her intern submitted affidavits stating that after the verdict, they had

spoken with "several" jurors. CP 75, 77. According to the affidavits, one of the male jurors said that "half of them could not hear Ashley Valle during her testimony." CP 76-77. The affidavits also indicated that one of the female jurors said that they had told the bailiff about the issue. CP 76, 78. Finally, the affidavits stated that these two jurors relied on the notes of their fellow jurors when they realized that testimony would not be repeated. Id.

The affidavits were not from the jurors themselves, but instead were hearsay declarations from counsel about what they were told. The affidavits contained no specific information regarding how many jurors had trouble hearing Valle, or what part of Valle's testimony they were unable to hear—whether it was all of the testimony, a portion of it, and if so, what portion. In sum, the information was second-hand and vague. Nonetheless, Bailey argues that the trial court "failed to exercise its fact-finding discretion" by not calling the jurors back to court and conducting an evidentiary hearing.

Bailey points to no persuasive authority that the trial court had an obligation *post-verdict* to conduct an evidentiary hearing based on the vague hearsay information that he presented. Because Bailey did not make a strong affirmative showing that a juror missed crucial testimony,

the court properly exercised discretion when it denied his motion without further proceedings.

A similar fact pattern appears in only one published Washington case, State v. Denney, 4 Wn. App. 604, 483 P.2d 141 (1971). After Denney was convicted, he moved to arrest judgment based on his attorney's affidavit that a juror had informed the attorney post-verdict that he had not heard one of the witnesses. According to counsel, the other jurors informed the non-hearing juror of what the witness's testimony had been. There was no allegation that the juror had been misinformed as to the witness's testimony. Denney, 4 Wn. App. at 605. The Court of Appeals affirmed the trial court's denial of Denney's motion to arrest judgment, finding that the witness's testimony was immaterial to the charge, and as such the trial court had not abused its discretion in determining that the defendant's right to a fair trial was not prejudiced. Id. at 607. The court also concluded that the record did not support a finding that a new trial was warranted based on the "inherent physical disqualification of the juror." Id.

Here, the trial court determined, and the State conceded, that Denney was not directly on point because Valle's testimony was more central to the issues at trial. 5RP 184-85, 195. However, the trial court properly recognized Denney to support the conclusion that whether or not

Bailey had been prejudiced in his right to a fair trial was a matter within its discretion.

Washington case law involving juror bias, discovered post-verdict, is instructive. This Court has held that in a post-verdict motion for new trial, where the moving party has made a *prima facie* showing of bias, an evidentiary hearing is the preferred, but not required, course of action. State v. Jackson, 75 Wn. App. 537, 543-44, 879 P.2d 307 (1994). In Jackson, the defendant presented a sworn affidavit from a juror post-verdict, stating that she had heard another juror make comments indicating his racial bias against African-Americans. 785 Wn. App. at 539-40. The defendant argued that he was entitled to a new trial due to the juror's failure to reveal this bias when questioned during *voir dire*. Id. at 542.

This Court held that due process required the trial court to have conducted an evidentiary hearing because the defendant had made a *prima facie* showing of bias, and because the specific facts of the case warranted it (the defendant and his alibi witnesses were all African-American and juror bias could easily influence its credibility determinations). In other words, not only had Jackson made a sufficient showing of a juror's racial bias based on credible, first-hand evidence, such racial bias was a central concern to the case.

This case is different. First, Bailey did not make a sufficient affirmative showing that one or more jurors did not hear crucial testimony. Rather than presenting sworn affidavits from the jurors themselves, with specific information about what they did or did not hear, Bailey instead relied solely on his attorney's recitation of vague information that the jurors provided during unsworn, informal conversation. It is unreasonable to believe that "half" of the jurors missed a substantial portion of Valle's testimony or that none of them spoke up and indicated on the record that they were having trouble hearing. Bailey simply did not present sufficient information that jurors missed crucial testimony.

Second, unlike Jackson, the circumstances of Bailey's case are not such that an evidentiary hearing was warranted. There was no dispute as to what Valle's testimony was. There was also no indication that any juror who might have missed a portion of Valle's testimony was incorrectly advised by other jurors as to what that testimony was. See Denney, 4 Wn. App. at 605 ("It is not contended the juror was incorrectly informed as to her testimony"). Bailey conceded that he was able to argue his theory of the case, based on Valle's testimony, during closing argument. 5RP 190, 196. Bailey also conceded that the jurors were able to observe Valle's demeanor. Id.

At the beginning of the case, the jury was told, "At all times, keep your minds open to the notes or memories of your fellow jurors." 2RP 24. At the conclusion of the case, the jury was instructed:

> During your deliberations, you may discuss any notes that you have taken during the trial, if you wish. You have been allowed to take notes to assist you in remembering clearly, not to substitute for your memory or the memories or notes of other jurors. Do not assume, however that your notes are more or less accurate than your memory.
>
> You will need to rely on your notes and memory as to the testimony presented in this case. Testimony will rarely, if ever, be repeated for you during deliberations.
>
> If, after carefully reviewing the evidence and instructions, you feel you need to ask the court a legal or procedural question that you have been unable to answer, write the question out simply and clearly. In your question, do not state how the jury has voted. The presiding juror should sign and date the question and give it to the bailiff. I will confer with the lawyers to determine what response, if any, can be given.

CP 65.

Despite being provided a mechanism through which they could ask the court questions, the jury never asked about what to do in the event they missed a portion of the testimony, nor did they ask to have any testimony repeated. 5RP 196. Therefore, the jury appears to have resolved any questions it might have had about Valle's testimony to its satisfaction. Courts are reluctant to inquire into how a jury arrives at its verdict.

Balisok, 123 Wn.2d at 117. The mental processes by which individual jurors reach their respective conclusions inhere in the verdict, and affidavits concerning them are inadmissible to impeach the verdict. Cox v. Charles Wright Academy, Inc., 70 Wn.2d 173, 179-80, 422 P.2d 515 (1967); State v. Ng, 110 Wn.2d 32, 43, 750 P.2d 632 (1988). See also State v. Marks, 90 Wn. App. 980, 986, 955 P.2d 406 (1998) (Jurors may provide only factual information regarding actual conduct, not about how such conduct affected their deliberations). In sum, if two jurors indicated that, because testimony would likely not be repeated for them, they relied on the notes of the jurors who could hear Valle, such statements inhered in the verdict and cannot be considered by the court.

Finally, unlike Jackson (where the defendant and his alibi witnesses were African-American, and a juror had exhibited bias against African-Americans), this case did not hinge solely on the credibility of Valle and Chang. As the trial court pointed out when denying Bailey's motion for a new trial, there were two independent witnesses, Kisha Brown and Leonard Weekly, who both corroborated Chang's version of events, and discredited Valle's. 5RP 196. Moreover, Valle was impeached with her prior inconsistent guilty plea statement that she signed under penalty of perjury. 5RP 196. Her explanation (that she did not read the statement, and did not want to tell anyone "the real story" due to

embarrassment) was easily discredited by the fact that she was willing to come to court and tell her embarrassing story to strangers in Bailey's trial. Again, there was no indication that any juror who might not have heard her explanation was given incorrect information by the other jurors about what she testified to. Finally, the text messages sent between Bailey and Valle just minutes before Brown called 911 fully corroborate Chang's version of events. The jurors did not render a verdict based solely on a credibility determination between Valle and Chang.

In sum, the determination as to whether a juror was so inattentive that the defendant was prejudiced is a matter addressed to the trial court's discretion, and is reviewable only for abuse. State v. Hughes, 106 Wn.2d 176, 204, 721 P.2d 902 (1986). Bailey's vague hearsay information was insufficient to provide an affirmative showing that his right to a fair trial was materially affected. CrR 7.5(a). Given the facts of this case, this Court cannot say that it was an abuse of discretion to deny Bailey's motion without holding a fact-finding hearing.

Bailey cites to a number of out-of-state cases[4] for the proposition that the trial court had an obligation to question the jurors to ascertain what they did or did not hear. See Brf. of Appellant at 14-16. However, all of the cited cases involve the same inapposite fact-pattern. In each of them, the trial court was alerted to the potential problem of a sleeping juror *prior to deliberation and prior to the verdict.*[5] Although a trial court has a continuous obligation to ensure that the jury is able to perform its duties, the trial court here was unaware of any potential problem until *after* those duties had been completed—after the verdict was rendered. After the jury has been discharged, it is incumbent upon the defendant to make an affirmative showing that his substantial rights were materially

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[4] Bailey cites to State v. Hampton, 201 Wis.2d 662, 549 N.W.2d 756 (Wis. App. 1996), People v. South, 177 A.D.2d 607, 576 N.Y.S.2d 314 (N.Y. App. Div. 1991), People v. Valerio, 141 A.D.2d 585, 529 N.Y.S.2d 350 (N.Y. App. Div. 1988), Commonwealth v. Braun, 74 Mass. App. Ct. 904, 905 N.E.2d 124 (Mass. App. Ct. 2009), State v. Reevy, 159 N.J. Super. 130, 387 A.2d 381 (N.J. Super. Ct. App. Div. 1978), and People v. Buel, 53 A.D.3d 930, 861 N.Y.S.2d 535 (N.Y. App. Div. 2008).

[5] Together, RCW 2.36.110 and CrR 6.5 place a continuous obligation on the trial court to excuse any juror who is unfit or unable to perform the duties of a juror. State v. Jorden, 103 Wn. App. 221, 226-27, 11 P.3d 866 (2000). A trial court must "excuse from further jury service any juror, who in the opinion of the judge, has manifested unfitness as a juror by reason of ... inattention ... or by reason of conduct or practices incompatible with proper and efficient jury service. RCW 2.36.110. CrR 6.5 requires that, "If at any time *before submission of the case to the jury* a juror is found unable to perform the duties the court shall order the juror discharged." CrR 6.5 (emphasis added). If a juror is truly sleeping, he should be dismissed. Jorden, 103 Wn. App. at 226-27. A trial court's decision to excuse or not excuse a juror is reviewed for abuse of discretion. Hughes, 106 Wn.2d at 204; Jorden, 103 Wn. App. at 226-27. Courts are "unwilling to impose on the trial court a mandatory format for establishing such a record. Instead the trial judge has discretion to hear and resolve the misconduct issue in a way that avoids tainting the juror and, thus, avoids creating prejudice against either party." Jorden, 103 Wn. App. at 226-27.

affected. CrR 7.5. Bailey's out-of-state authority relating to the *pre-verdict* obligations of a trial court is irrelevant.

Finally, should Bailey develop additional evidence outside the existing record to support a claim that his right to a fair trial was prejudiced, he is not left without recourse. The proper avenue for relief would be a timely, properly supported, personal restraint petition. State v. Tolias, 135 Wn.2d 133, 140, 954 P.2d 907 (1998); State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

2. EVEN IF THE TRIAL COURT WAS REQUIRED TO CONDUCT AN EVIDENTIARY HEARING PRIOR TO RULING ON BAILEY'S MOTION, THE REMEDY IS NOT A NEW TRIAL.

Even if this Court decides that the trial court abused its discretion when it denied Bailey's motion for new trial without conducting an evidentiary hearing, the remedy would not be, as Bailey advocates, a new trial. Rather, in such event, this Court should remand for an evidentiary hearing to determine what testimony, if any, the jury missed, and what effect that might have had on Bailey's right to a fair trial.

Whether a juror, or jurors, committed misconduct is a question of fact for the court. Dean v. Group Health Co-op, 62 Wn. App. 829, 837, 816 P.2d 757 (1991). This Court held in Jackson, that where the defendant produced an affidavit outlining a *prima facie* showing of juror

bias, *and* where the facts of the case warranted, the trial court was required to have conducted an evidentiary hearing, because "it is possible that the State could have rebutted the inference of racial bias through further inquiry at an evidentiary hearing." 75 Wn. App. at 544. The court went on to say, "Had that approach been taken, then the parties would have had the opportunity to examine juror X," and "juror X would have had the opportunity to explain his statements and the context in which they were made." Id.

On appeal, however, the State did not ask the court to remand for an evidentiary hearing, and two and a half years had passed since the trial. Jackson, 75 Wn. App. at 544. Stating, "Given this passage of time and the associated difficulty of obtaining both juror witnesses and adequate recollections, coupled with the fact that we have not been asked to remand the matter for an evidentiary hearing in the event we do not affirm," the court reversed and granted a new trial.[6] Id.

Here, if this Court determines that Bailey made a sufficient affirmative showing that jurors missed crucial testimony, the State should be given the opportunity to rebut such a showing, and the jurors should be provided an opportunity to explain their out-of-court statements, and to

[6] One judge dissented on this point, stating, "I see no reason why an evidentiary hearing could not now be ordered." Jackson, 75 Wn. App. at 546 (Baker, J. dissenting).

place them into context. Moreover, Bailey's trial concluded in June of last year; the passage of time is not such that obtaining witnesses and adequate recollections would likely be difficult. In the event this Court does not affirm the trial court, the State asks that the matter be remanded for an evidentiary hearing.

Bailey's argument in support of reversal of his conviction is unpersuasive. First, it assumes that his affidavits *conclusively* establish that the jury missed crucial testimony, and that no question of fact remains. That cannot be the case given that the affidavits consist solely of hearsay statements of the jurors, and that the hearsay statements attributed to them are ambiguous and vague. Secondly, Bailey argues that he is entitled to a new trial *regardless of whether the jury failed to hear material evidence.* He supports this illogical contention with inapt cases where some intervening action prevented the court from being able to determine whether prejudice occurred or not. Plainly, if the jury heard Valle's testimony, Bailey has not established that he is entitled to a new trial. And here, nothing has occurred since Bailey's counsel spoke with the jurors. An evidentiary hearing would resolve any relevant questions.

3. TRIAL COUNSEL WAS NOT INEFFECTIVE FOR NOT REQUESTING AN EVIDENTIARY HEARING.

Finally, Bailey argues that his trial counsel was ineffective for not requesting that the court *voir dire* the jurors prior to ruling on his motion for a new trial. However, as Bailey has established neither deficient performance nor prejudice, his argument should be rejected.

An ineffective assistance of counsel analysis begins with the strong presumption that counsel's representation was effective and competent. State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). For Bailey to overcome this strong presumption, he must prove by a preponderance (1) that his trial counsel's performance was so deficient that it fell outside the wide range of objectively reasonable behavior based on consideration of all the circumstances of the case; and (2) that this deficient performance prejudiced him, i.e., that there is a reasonable probability that but for counsel's objectively unreasonable representation, the results of trial would have been different. State v. Grier, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011); Strickland v. Washington, 466 U.S. 668, 689, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). If the defendant fails to prove either prong of this test, the inquiry must end. State v. Hendrickson, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

Conduct that can be characterized as legitimate strategy is not deficient. Grier, 171 Wn.2d at 33. The presumption of reasonableness can be overcome only by showing that there is no conceivable legitimate tactical reason for counsel's conduct. Id.

Bailey cannot meet this burden. First, he has failed to establish that his attorney's decision was not tactical. Bailey's attorney, after having an informal discussion with jurors, may have reasonably determined that Bailey's best chance of prevailing on a motion for new trial was to present the "facts" in the light most favorable to him, i.e., through her own affidavit outlining what the jurors had told her, and without the benefit of cross-examination by the State. That she had such a strategy is certainly plausible in light of the fact that the jurors' comments appear to have been made during informal discussion. It is not clear what the jurors would have said, under oath, had they known that it was important to be specific and precise in their responses.

Moreover, even if counsel was deficient for not requesting the evidentiary hearing, Bailey has failed to establish the requisite prejudice—that there is a reasonable probability that the court would have granted his

motion for a new trial. As outlined above, it is unclear from Bailey's affidavits the potential extent to which some jurors (and how many jurors) missed crucial testimony. It is equally unclear that if the trial court had held an evidentiary hearing, the jurors' testimony would have established that Bailey was entitled to a new trial. It is uncertain what the jurors would have testified to, or whether their remarks to counsel were simply made off-the-cuff during informal conversation, without any knowledge of their importance.

In fact, after the motion was denied, Bailey's counsel asked the court to "order the jury room to give contact information to the defense" for the purpose of conducting further investigation. 5RP 197. The court told counsel to "come back and see me" if the jury room needed such an order. Id. The fact that counsel never returned certainly supports a conclusion that further investigation was unfruitful. Bailey cannot establish that he would have prevailed on his motion for a new trial had his counsel requested an evidentiary hearing. Bailey has failed to establish either prong of ineffective assistance of counsel.

D. CONCLUSION

For all of the above-stated reasons, the State respectfully requests that this Court affirm the trial court's denial of Bailey's motion for a new trial.

DATED this 23rd day of September, 2013.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Jared Steed, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the BRIEF OF RESPONDENT, in STATE V. MICHAEL BAILEY, Cause No. 69217-8 -I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 13 day of September, 2013

Name
Done in Seattle, Washington