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Court of Appeals
Division I
State of Washington

SUPREME COURT NO. 91061-8

NO. 69217-8-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL BAILEY

Petitioner.

FILED
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CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

CRF

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

The Honorable Leroy McCullough, Judge

PETITION FOR REVIEW

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TABLE OF CONTENTS

	Page
A. <u>IDENTITY OF PETITIONER</u>	1
B. <u>COURT OF APPEALS DECISION</u>	1
C. <u>ISSUES PRESENTED FOR REVIEW</u>	1
D. <u>GROUND FOR REVIEW</u>	2
E. <u>RELEVANT FACTS</u>	2
F. <u>ARGUMENT IN SUPPORT OF REVIEW</u>	8
1. REVIEW SHOULD BE GRANTED BECAUSE THE COURT OF APPEALS OPINION CONFLICTS WITH STATE V. JACKSON	8
2. REVIEW SHOULD BE GRANTED BECAUSE WHETHER BAILEY RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL IS A SIGNIFICANT QUESTION OF LAW UNDER THE WASHINGTON AND UNITED STATES CONSTITUTIONS.....	13
G. <u>CONCLUSION</u>	15

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

State v. Aho
137 Wn.2d 736, 975 P.2d 512 (1999)..... 13

State v. Bailey
No. 69217-8-I entered on October 27, 2014..... 1

State v. Davenport
100 Wn.2d 757, 675 P.2d 1213 (1984)..... 8

State v. Denney
4 Wn. App. 604, 483 P.2d 141 (1971)..... 9

State v. Jackson
75 Wn. App. 537, 879 P.2d 307 (1994)
rev. denied, 126 Wn.2d 1003 (1995)..... 1, 2, 8, 9, 10, 11, 12

State v. Momah
167 Wn.2d 140, 217 P.3d 321 (2009)..... 8

State v. Thomas
109 Wn.2d 222, 743 P. 2d 816 (1987)..... 13

FEDERAL CASES

Strickland v. Washington
466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)..... 13

OTHER JURISDICTIONS

People v. Simpkins
16 A.D.3d 601, 792 N.Y.S.2d 170 (N.Y. App. Div. 2005) 9

State v. Turner
186 Wis.2d 277, 521 N.W.2d 148 (Wis. App. 1994) 9

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>RULES, STATUTES AND OTHER AUTHORITIES</u>	
RAP 13.4.....	1, 2, 15
U.S. Const. amend. V	8
U.S. Const. amend. VI	8, 13
Const. art. I, § 3	8
Const. art. I, §, 22.....	8, 13

A. IDENTITY OF PETITIONER

Petitioner, Michael Bailey, the appellant below, asks this Court to review the decision referred to in Section B.

B. COURT OF APPEALS DECISION

Bailey requests review of the Court of Appeal's unpublished decision in State v. Bailey, No. 69217-8-I entered on October 27, 2014.¹

C. ISSUES PRESENTED FOR REVIEW

1. In State v. Jackson,² Division One held that where a prima facie showing of a juror's inability to decide a case fairly and impartially is presented, it is error for the trial court to rule on a motion for new trial without conducting an evidentiary hearing even in the absence of a request to do so. Bailey's attorney moved for a new trial and supported that motion with declarations showing several jurors could not hear crucial trial testimony. Yet, the trial court denied the motion without questioning the jurors to determine how many did not hear the testimony. The Court of Appeals disagreed that Jackson controlled the outcome of the case. Should review should be granted under RAP 13.4(b)(2) because the Court of Appeals opinion conflicts with State v. Jackson?

¹ The decision is attached as an appendix.

² 75 Wn. App. 537, 879 P.2d 307 (1994), rev. denied, 126 Wn.2d 1003 (1995).

2. Bailey's attorney failed to request an evidentiary hearing based on the motion for new trial. Should review be granted under RAP 13.4(b)(3), because whether Bailey received ineffective assistance of counsel is a significant question of law under the Washington and United States constitutions?

D. GROUNDS FOR REVIEW

Review should be granted under RAP 13.4(b)(2) because the Court of Appeals opinion conflicts with State v. Jackson, 75 Wn. App. 537, 879 P.2d 307 (1994), rev. denied, 126 Wn.2d 1003 (1995), and under RAP 13.4(b)(3), because whether Bailey received ineffective assistance of counsel is a significant question of law under the Washington and United States constitutions.

E. RELEVANT FACTS³

The state charged Bailey with first degree robbery with a deadly weapon based upon an alleged incident involving Daniel Chang. CP 1-6. Chang met Bailey and Ashley Valle at the Muckleshoot Casino. 2RP⁴ 108-10; 3RP 143, 152. Chang later left the casino with Valle. 2RP 125;

³ Bailey presented a more detailed statement of facts in the Brief of Appellant (BOA), at pages 1-10, which he incorporates herein by reference.

⁴ The index to the citations to the record is found in the BOA at 1, n.1

3RP 148, 162. Valle and Chang's trial testimony differed as to what happened after they left the casino together.

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. After getting out of the car Chang was robbed at knifepoint. He did not see the robber's face. 2RP 131-32. Chang did not positively identify Bailey in a photo montage as person who robbed him. 2RP 237-38; 3RP 98, 134-35. Chang testified however, that he recognized Bailey's voice from the casino. 2RP 136, 236; 3RP 135.

In contrast, Valle explained that before leaving the casino with Chang she drove Bailey to meet his friend. 3RP 146-48, 161-62. Valle went back to the casino and picked Chang up after he repeatedly called Valle to say he was too intoxicated to drive. 3RP 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 pleaded guilty to two counts of first degree theft and one count of second degree assault before Bailey's trial. 1RP 94-95; 3RP 150, 170-72. Valle testified 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 text messages to Bailey's phone that read: "Just do it" and "Hury." 2RP 378; 3RP 108-14. 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.

Before sentencing, Bailey's attorney moved for a new trial, 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.

Defense counsel noted 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. 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.

The State did not dispute the veracity of counsel's motion and declaration, and acknowledged Valle's testimony was central to the case. CP 96-100; 3RP 184-85. The State nonetheless 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. CP 96-100. 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. CP 96-100. The State maintained 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 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.

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.

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 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.

The Court of Appeals concluded the evidence submitted by Bailey's attorney in support of the motion for a new trial did not rise to the level of prima facie evidence required by Jackson. Thus, the Court concluded Jackson was distinguishable from Bailey's case. Appendix at 9-11. The Court also concluded Bailey's attorney's failure to request an evidentiary hearing was neither deficient nor prejudicial. Appendix at 14-15.

F. ARGUMENT IN SUPPORT OF REVIEW

1. REVIEW SHOULD BE GRANTED BECAUSE THE COURT OF APPEALS OPINION CONFLICTS WITH STATE V. JACKSON

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).

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); See also State v. Denney, 4 Wn. App. 604, 607, 483 P.2d 141 (1971) (acknowledging that a defendant may be prejudiced in his right to a fair trial if one of the jurors was unable to hear material testimony).

Here, several jurors disclosed after the verdict that “half the jury” could not hear Valle’s testimony. CP 71-78; 3RP 189. Declarations from defense counsel and a defense intern supported Bailey’s motion for a new trial and explained that 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. Yet, the court did not question the jury to determine how many jurors did not hear the testimony. The trial court abused its discretion by denying the motion without further investigation. Jackson is on point and the Court of Appeals erred in concluding otherwise. Appendix at 9-11.

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.

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, 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.

The Court of Appeal'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.

2. REVIEW SHOULD BE GRANTED BECAUSE WHETHER BAILEY RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL IS A SIGNIFICANT QUESTION OF LAW UNDER THE WASHINGTON AND UNITED STATES CONSTITUTIONS.

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 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. As acknowledged by the State, Valle's testimony was central to Bailey's defense. 3RP 184-85. 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.

The Court of Appeals erred in concluding Bailey received affective assistance of counsel. Appendix at 14-15. There is a reasonable probability the outcome would be different but for defense counsel's conduct. Bailey's constitutional right to effective assistance counsel was violated. The constitutional error here was not harmless.

G. CONCLUSION

The Court of Appeals decision conflicts with Jackson. RAP 13.4(b)(2). It also implicates a significant question of constitutional law. RAP 13.4(b)(3). For the reasons stated above, appellant respectfully asks this Court to grant review.

DATED this 24th day of November, 2014.

Respectfully submitted,


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APPENDIX

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	No. 69217-8-1
Respondent,)	
)	DIVISION ONE
v.)	
)	
MICHAEL JOSEPH BAILEY,)	UNPUBLISHED OPINION
)	
Respondent.)	FILED: <u>October 27, 2014</u>

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COURT OF APPEALS DIVISION ONE
STATE OF WASHINGTON

SPEARMAN, C.J. — After Michael Bailey was convicted of robbery in the first degree, he filed a motion for new trial, alleging he was denied a fair trial because several jurors did not hear the testimony of a key witness. The motion was supported by declarations from Bailey’s attorney and her intern regarding conversations with some members of the jury following the verdict. The declarations asserted that one juror told them, “half of them could not hear” the witness’s testimony and that a second juror said, “the jury told the Court’s bailiff about the problem. . . .” Clerk’s Papers (CP) at 75-78. Bailey did not ask the court to query the jury about its ability to hear the testimony in question prior to ruling. The trial court denied the motion for new trial. Bailey appeals, arguing the trial

No. 69217-8-I/2

court erred when it denied his motion without first recalling the jury for questioning. He also argues that the assistance provided by his trial counsel was ineffective. We affirm.

FACTS

On the evening of October 16, 2011, Daniel Chang was in the Muckleshoot Casino in Auburn, Washington. He had been at the casino for several hours and around midnight he was at a craps table. Michael Bailey and Ashley Valle approached Chang and began conversing with him. Bailey soon left, but Valle stayed behind and continued talking to Chang. On three occasions, Valle left the craps table for about 20 minutes, but each time she returned and continued the conversation with Chang.

Eventually Chang and Valle exchanged telephone numbers and made plans to leave the casino together. By the time Chang and Valle decided to leave, Chang had amassed about \$5,600 worth of casino chips. Before leaving, Valle arranged to meet Chang in the parking lot after "tak[ing] care of some things with her friend," Bailey. ³ ¹ Verbatim Report of Proceedings (VRP) at 119.

Chang testified that upon meeting Valle in the parking lot, the two left the casino together in Valle's car. She drove to a secluded, dimly lit area, parked the car, and began sending a series of text messages on her phone. When Chang

¹ Verbatim Report of Proceedings (VRP): (1) May 3, 2012; (2) May 7, 9, 24, and 29, 2012; (3) May 30, 3012; (4) May 31, 2012); (5) June 4, 2012 and August 17, 2012; (6) June 5, 6, and 7, 2012.

No. 69217-8-1/3

asked whether they were going to get something to eat, Valle pulled some marijuana from her purse and began smoking it. Chang declined to smoke with her because he "doesn't do drugs." 3 VRP at 129. Chang testified that the situation was beginning to make him very nervous and he decided he should leave. He told Valle that he was going to get some air and got out of the car.

Chang walked about five feet from the car when a man approached him from behind and put a knife to his throat. 3 VRP at 131. The man said "if you move, I'm going to kill you." 3 VRP at 132. Chang explained that he suspected Bailey was his assailant when he first heard the assailant's voice and because, as the assailant stood behind him, he felt about the same build as Bailey. After a few moments, when the man had made no demands of him, Chang decided to run. He pushed away with his right hand and began to run. As he did this, he got a glance at the man and confirmed that it was Bailey. Chang got no more than ten feet away before Bailey grabbed him by the hood of his sweatshirt, causing Chang to fall to his knees. When Bailey placed the knife even harder against his neck, Chang put up his hands and asked "[w]hat do you want from me." 3 VRP at 134. Bailey replied, "[I]f you look at me again, or if you, you know, whatever, you know, do anything, I'm going to kill you; I'm going to cut you." 3 VRP at 134.

Bailey told Chang to take off his pants. Chang did so and gave his pants to Bailey. After hearing nothing for a few minutes, Chang put on his shoes and ran. During the course of his escape, Chang climbed through several barbed wire

No. 69217-8-1/4

fences. He sustained a number of lacerations and also lost whatever remaining clothes he had on. After knocking on the doors of a few houses to ask for help, a man offered Chang assistance and called the police.

Detective Buie Arneson of the Auburn Police Department was assigned to investigate the case. Detective Arneson testified that he showed two separate photo montages to Chang, one containing a photo of Valle and the other a photo of Bailey. Chang identified one photo from the first montage as that of Valle, but he was unable to positively identify a person from the montage containing Bailey's photo. Detective Arneson also identified photographs that he took of Chang's neck, which showed "a small, thin red line next to some other redness" consistent with where Chang said that Bailey had held the knife.

Detective Arneson testified that after the arrest of Bailey and Valle, two cell phones had been recovered from them and placed into evidence. Pursuant to a search warrant, an effort was made to search both of the phones. A lock on one of the phones prevented the disclosure of any information. The other phone revealed an exchange of several text messages with a phone number associated with Valle at about the time of the robbery.² Text messages to Valle's phone number read: "I got my eye on u," "[n]o kissing in the mouth," "[m]ake sure that

² In addition, in her testimony, Valle conceded that she had exchanged texts with Bailey that night but could not recall the specific content of the texts. Bailey does not appear to dispute that the evidence reasonably supports the conclusion that the phone searched belonged to him.

No. 69217-8-1/5

on him first," and "does he have the cpis [sic] on him?" Messages received from Valle's phone number read: "Just do it" and "Hury" [sic]. Exhibit 10.

The latter two messages from Valle were received at approximately 2:25 a.m. A few minutes later, at about 2:30 a.m., a witness who lived near the location of the robbery, testified to being awakened by a man behind her apartment building yelling "[g]et the jeans off or I'll cut you" and a second man quietly saying "I can't." 2 VRP at 31-32; Exhibit 10. The witness called 911 to report the incident.

In her testimony, Valle admitted to pleading guilty to two counts of first degree theft and one count of second degree assault as a result of the incident with Chang. She agreed that in her guilty plea statement, she admitted assisting Bailey in the robbery. But she denied that the statement was true, insisting that she pleaded guilty because she was scared and because she was embarrassed about telling her story to "fourteen strangers." 5 VRP at 171. Valle testified that Chang was highly intoxicated and when he got into her car he immediately "took his pants off" and moved to the backseat. While she was driving, Chang tried to rub her inner legs and kiss her face. 5 VRP at 163. She parked the car near her apartment and asked Chang to "slow down." 5 VRP at 164. At that point, according to Valle, Chang got angry because Valle was not responding to his sexual advances. He stole her car keys and said he would only give them back in exchange for sexual favors. She testified that she was eventually able to get her

No. 69217-8-1/6

car keys back, at which point she drove away quickly, leaving Chang on the street, naked from the waist down.

Valle also testified that she had dropped Bailey off elsewhere some time prior to this incident and did not text message him while she was with Chang. She also claimed not to have seen Bailey in the area during her encounter with Chang in the car.

On June 7, 2012, a jury found Bailey guilty of robbery in the first degree. On June 18, 2012, Bailey filed a motion for a new trial under CrR 7.5(a)(5), (7) and (8).³ He submitted declarations from his trial counsel and her intern in support of the motion, which set forth, in relevant part:

³ CrR 7.5 states in relevant part:

(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:

...

(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;

...

(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.

No. 69217-8-1/7

3. Following the verdict, several jurors⁴ remained to speak with both counsel.
...
5. Juror No. 4...noted, and the jurors present agreed, that half of them could not hear Ashley Valle during her testimony.
6. One of the female jurors...(either Juror No. 2, 8 or 9), indicated the jury told the Court's bailiff about the problem and that some of them had not heard Ms. Ashley's [sic] testimony.
7. These two jurors indicated that because the testimony was not to be repeated, they decided to rely on the notes of the jurors who could hear.
8. Ashley Valle's testimony was crucial to the Defense case in challenging the allegations made against him because it supported the Defense theory of the case.

CP at 75-78. Bailey did not ask the court to recall the jury and query them as to their ability to hear Valle's testimony and, other than the declarations of his counsel and her intern, he offered no evidence or testimony. On August 18, 2012, after hearing oral argument, the court denied the motion for new trial, finding that Bailey failed to prove that he was prevented from having a fair trial, that the jury's decision was contrary to the law and the evidence, or that substantial justice had not been done. The trial court sentenced Bailey to a 51 month term of confinement, the bottom of the standard range, plus 24 months for a statutory deadly weapon enhancement. Bailey appeals.

⁴ At oral argument on the motion, Bailey's attorney clarified that nine or ten of the jurors remained to speak with the attorneys after deliberations.

DISCUSSION

Both the United States and Washington constitutions guarantee a criminal defendant the right to a fair and impartial jury trial. U.S. CONST. Amend. V, VI; WASH. CONST. Art. I, §§ 3, 22; State v. Jackson, 75 Wn. App. 537, 543, 879 P.2d 307 (1994) (juror bias). "To effectuate this fundamental right it is incumbent on the trial judge to ensure that all the jurors hear the evidence, the arguments, and the judge's legal instructions." Commonwealth v. Braun, 74 Mass.App.Ct. 904, 905, 905 N.E.2d 124 (2009) (citing Commonwealth v. Keaton, 36 Mass.App.Ct. 81, 87, 628 N.E.2d 1286 (1994)); see also State v. Denney, 4 Wn. App. 604, 607, 483 P.2d 141 (1971) (acknowledging that a defendant may be prejudiced in his right to a fair trial if one of the jurors was unable to hear material testimony).

Bailey argues that the trial court erred when it denied his motion for a new trial without, sua sponte, recalling and querying the jurors to determine what testimony they could or could not hear and whether their inability to hear impacted their ability to fairly and completely weigh the evidence. He argues this failure to recall and question the jurors deprived the trial court of the information necessary to properly exercise its discretion. We disagree.

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). An abuse of discretion occurs "when a decision is 'manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. A discretionary decision rests

No. 69217-8-1/9

on 'untenable grounds' or is based on 'untenable reasons' if the trial court relies on unsupported facts or applies the wrong legal standard; the court's decision is 'manifestly unreasonable' if the court, despite applying the correct legal standard to the supported facts, adopts a view 'that no reasonable person would take.'"

Mayer v. Sto Indus., Inc., 156 Wn. 2d 677, 684, 132 P.3d 115, 118 (2006)

(internal citations omitted).

Bailey likens this case to Jackson, 75 Wn. App. 537, but the case is distinguishable.⁵ In Jackson, the defendant filed a motion for a new trial after having been found guilty by a jury of one count each of first degree robbery and first degree burglary. The motion was supported by a juror's certification relating specific comments and statements made by "juror X"—a white man—during deliberations that "taken as a whole, create[d] a clear inference of racial bias." 75 Wn. App. at 543. We noted that resolution of the case turned on witness credibility and that Jackson, who was African-American, had presented five African-American witnesses in support of an alibi defense, while the State's two witnesses were white. Id. at 539. Thus, if juror X held certain discriminatory views it "could affect his ability to decide Jackson's case fairly and impartially." Id. at 543. We concluded that because Jackson had made a prima facie showing of

⁵ The parties appear to agree there is no Washington case law on point. A similar fact pattern appears in one published case, Denney, *supra*. But both Bailey and the State agree that Denney is distinguishable because in that case, the testimony that the juror was unable to hear was immaterial to the ultimate issues at trial. Here, the jurors are alleged to have had difficulty hearing testimony which was central to the ultimate issues at trial.

No. 69217-8-I/10

racial bias on the part of one of the jurors, it was error for the trial court to rule on Jackson's motion without conducting an evidentiary hearing, even in the absence of a request to do so.⁶ Id. at 543-44.

Bailey contends that, like Jackson, the declarations of his attorney and her intern are sufficient to establish a prima facie showing that he did not receive a fair trial. Thus, he argues the trial court abused its discretion when it failed to sua sponte recall the jurors for questioning. We disagree. As the trial court noted in this case, the declarations as to the jurors' comments were scant in detail and inconclusive. Although one of the jurors reported that "half of them could not hear Ashley Valle during her testimony" and another juror reported that "the jury" told the court's bailiff that some of them had not heard Valle's testimony, it was not at all clear whether the jurors who reported the concern were unable to hear the testimony themselves or were expressing what other jurors had said.⁷ CP at 76, 78. Nor was it clear what portion of Valle's testimony, if any, the jurors were unable to hear. At oral argument before the trial court, Bailey's attorney conceded that she was not certain what percentage of Valle's testimony the jurors were unable to hear. Although it was her impression that six jurors failed to

⁶ We noted that Jackson, not only did not request an evidentiary hearing, he objected to the State's request for one. We concluded that Jackson's refusal to agree to such a hearing did not waive his right to argue he was denied the right to due process, because he "was entitled to take the position that he had made a sufficient showing of racial bias." Jackson, 75 Wn. App. at 544, n.4.

⁷ There is no indication in the record as to whether the court's bailiff agreed that the jurors had reported problems hearing the witness.

No. 69217-8-I/11

hear any of the testimony, she acknowledged that none of the jurors with whom she spoke were specific about this point.

Jackson is also distinguishable because in this case there was substantial evidence before the trial court that contradicted the assertion that the jurors were unable to hear Valle's testimony. Valle's testimony lasted for two days, during which time a microphone was used to amplify her voice. There were three instances in which Valle was asked to speak up. First, the prosecutor asked Valle to speak up during direct examination on June 4, 2012. Second, during cross-examination the same day, the prosecutor stated he had not heard Valle's answer to a question and she was asked to repeat it. And third, during her June 5, 2012 testimony, the trial court reminded Valle to keep her voice up. But, there is no indication in the record that the jurors expressed in any manner to the trial court that they had a problem hearing Valle. No notes were received from the jury during its deliberations asking to hear Valle's testimony again. In addition, other than the times indicated above, no other person in the courtroom, including Bailey and his attorney, complained of being unable to hear Valle testify. Thus, Jackson is of no help to Bailey.

In support of his arguments Bailey also cites State v. Jorden, 103 Wn. App. 221, 227-29, 11 P.3d 866 (2000) and several foreign cases involving jurors who have fallen asleep during portions of a trial: State v. Hampton, 201 Wis.2d 662, 666-67, 549 N.W.2d 756 (1996); People v. South, 177 A.D.2d 607, 607-08,

No. 69217-8-1/12

576 N.Y.S.2d 314 (1991); People v. Valerio, 141 AD.2d 585, 586, 529 N.Y.S.2d 350 (1988); and Braun, 74 Mass. App. Ct. at 905. His reliance on these cases is misplaced.

In Jorden, the defendant argued on appeal that it was error for the trial court to deny his request that the court question a juror before dismissing her for being inattentive during the trial. He contended that in the absence of such an inquiry the court failed to establish whether the juror had missed important testimony or whether her conduct had prejudiced either party. We found the defendant's reliance on CrR 6.5 was misplaced because the rule only applies when a case has already gone to the jury and, of necessity, an alternate juror must be recalled to substitute for a juror unable to continue.⁸ Id. at 227. In that circumstance, inquiry of the excused juror and the alternate may be necessary to "verif[y] that the juror is unable to serve ... [and] that the alternate has remained impartial after being temporarily dismissed." Id. (Citations omitted). But we were "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

⁸ CrR 6.5 provides in relevant part:

When jurors are temporarily excused but not discharged, the trial judge shall take appropriate steps to protect alternate jurors from influence, interference or publicity, which might affect that jurors ability to remain impartial and the trial judge may conduct brief voir dire before seating such alternate juror for any trial or deliberations.

No. 69217-8-1/13

issue in a way that avoids tainting the juror and, thus, avoids creating prejudice against either party.” Id. at 229.

Bailey argues that because the Jorden court’s concerns regarding tainting or prejudicing a juror are not present in this case we should reach a different result. We disagree. The trial court allowed the parties to argue and to present evidence.⁹ The judge also appropriately relied on his own observations of the jury during the trial. Id. at 229. Additionally, it was undisputed that the court had an amplification system for testifying witnesses and that neither the jurors, court staff nor counsel (except upon the three occasions previously noted) had complained of difficulty hearing Valle’s testimony. As in Jorden, there was ample evidence before the trial judge to enable him to decide whether Bailey was entitled to a new trial.

Bailey’s reliance on the “sleeping juror” cases is likewise misplaced. In each case, the trial court had taken notice of a juror who appeared to be asleep, dozing, or had closed eyes during portions of trial; thus, it was undisputed that the jurors in question may have missed pertinent testimony. In each case, the trial court declined to conduct an evidentiary hearing or grant a mistrial, despite its own observations of an apparently sleeping juror. And, in each case, the appellate court reversed the defendant’s conviction, finding that the trial court

⁹ Although Bailey did not offer any witnesses, the trial court expressed a willingness to hear testimony on the issue, if requested.

No. 69217-8-1/14

had prevented itself from obtaining the information necessary to a proper exercise of discretion as to the juror's fitness. By contrast, in this case, neither the trial court nor any other trial participant took notice of any hearing difficulty demonstrated or expressed by the jury.

We conclude the trial court did not abuse its discretion when it did not sua sponte recall the jury for questioning prior to ruling on Bailey's motion for a new trial. There was no error.

Bailey also argues that his trial counsel's failure to ask the court to recall and query the jury constituted ineffective assistance. We begin with the strong presumption that counsel's representation was effective and competent. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). For Bailey to overcome this strong presumption, he must show that counsel's performance was deficient and that the deficient performance resulted in prejudice. State v. Nichols, 161 Wn.2d 1, 8, 162 P.3d 1122 (2007). To show deficient performance, Bailey must show that his lawyer's performance fell below an objective standard of reasonableness based on all the circumstances. Id. (Citing McFarland, 127 Wn.2d at 344-35). Conduct that may be characterized as legitimate strategy or tactics is not deficient. State v. Grier, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011). Prejudice is established by showing there is a reasonable probability that, but for

No. 69217-8-1/15

counsel's error, the outcome of the proceeding would have been different. Id. at 34. Bailey cannot meet this burden.

First, Bailey does not establish that his attorney's decision to not ask the court to recall the juror for questioning was not a legitimate tactical choice. Bailey's attorney, having interviewed some of the jurors, may have concluded that Bailey's best chance of prevailing on the motion was to present the evidence through declarations of counsel and her intern instead of the actual testimony of the jurors. Given counsel's representations to the trial court at oral argument, it is unclear what the jurors would have said under oath had they known it was important to be specific and precise in their responses. Additionally, more than two months had passed since counsel had last spoken to the jurors. It was not unreasonable for counsel to conclude that their memories regarding what they were able to hear of Valle's testimony may have faded and been less persuasive than the assertions in her and her intern's declarations.

Moreover, even if counsel was deficient, Bailey cannot establish that he was prejudiced. First, he cannot show that even had the request been made, it would have been granted. Second, even if the request had been granted, Bailey cannot show that the result would have been a new trial. Bailey's argument that his trial counsel's assistance was ineffective fails.

Statement of Additional Grounds

In a statement of additional grounds for review under RAP 10.10, Bailey asserts that the prosecutor committed misconduct during closing arguments by misleading the jury and improperly shifting the burden of proof. The argument lacks merit.

In order to establish prosecutorial misconduct, a defendant must prove that the prosecutor's conduct was improper and that it prejudiced his right to a fair trial. State v. Gregory, 158 Wn.2d 759, 858-59, 147 P.3d 1201 (2006); State v. Jackson, 150 Wn. App. 877, 882, 209 P.3d 553 (2009). A prosecuting attorney commits misconduct by making a closing argument that shifts and misstates the burden of proof. State v. Dixon, 150 Wn. App. 46, 55, 207 P.3d 459 (2009); United States v. Perlaza, 429 F.3d 1149, 1171 (9th Cir. 2006). Similarly, "[m]isstating the basis on which the jury can acquit insidiously shifts the requirement that the State prove the defendant's guilt beyond a reasonable doubt. In re Glasmann, 175 Wn.2d 696, 713, 286 P.3d 673 (2012) (citing State v. Fleming, 83 Wn. App. 209, 213, 921 P.2d 1076 (1996)). Failure to object to a prosecutor's improper remark constitutes a waiver, unless the remark was so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been cured by an instruction to the jury. Gregory, 158 Wn.2d at 858-59 (internal citations omitted).

No. 69217-8-I/17

In this case, the State's closing argument included several statements by the prosecutor that a mark on Chang's neck after the alleged incident was from a knife. Bailey did not object to these statements at trial. He now argues that (1) the statements were false or misleading and therefore constituted misconduct, (2) the misconduct was flagrant and ill-intentioned, and (3) the prosecutor's misconduct was presumptively prejudicial because it infringed his constitutional right to a fair trial. These arguments lack merit.

The State's theory at trial was that Bailey had robbed Chang at knifepoint. In support of this theory, Chang testified that Bailey committed these acts. And, although Chang denied being cut by Bailey's knife, he also identified a photo of his neck that showed "where the knife marked." He indicated that there was a red line visible in the photo "consistent with where the knife had been on [his] neck." 3 V.R.P. at 145. Thus, the prosecutor's statements that the mark on Chang's neck was consistent with a knife being held up to it were not false or misleading, but merely reflected the evidence presented by the State at trial.

Bailey also argues that the prosecutor improperly shifted the burden of proof. He argues again that the misconduct was flagrant and ill-intentioned and the prosecutor's misconduct was presumptively prejudicial because it infringed his constitutional right to a fair trial. We disagree.

With respect to the State's burden of proof, the prosecutor made the following statements:

No. 69217-8-I/18

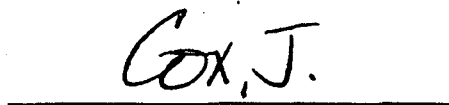
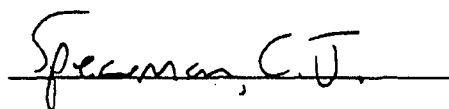
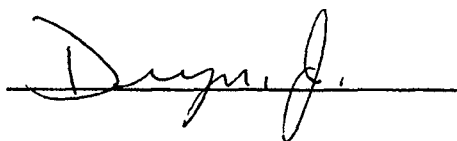
Going back to those six elements, there are things I don't have to prove. I don't have to prove the value of what was taken off of Daniel Chang; I don't have to prove all of Daniel Chang's movements that particular night. All I've got to prove is that he got out of the car and somebody used a knife to take property from him.

6 VRP at 451. Prior to making these statements, the prosecutor directed the jurors to the "reasonable doubt" and "to convict" instructions, walking them through the State's burden of proof and the six elements of robbery in the first degree "one by one." 6 VRP at 428-33. Only then did he point out, by way of contrast, what the State was not required to prove—namely the value of the items stolen. Read in this context, these statements cannot reasonably be understood to improperly shift or misstate the burden of proof.

Bailey fails to establish prosecutorial misconduct.¹⁰

Affirm.

WE CONCUR:



¹⁰ Bailey also contends that trial counsel's failure to object to the prosecutor's statements at closing constituted ineffective assistance of counsel. As discussed previously, in order to prevail on an ineffective assistance of counsel claim, Bailey must establish deficient performance by his attorney and resulting prejudice. Strickland, 466 U.S. at 689. Because Bailey fails to demonstrate prosecutorial misconduct he cannot establish that trial counsel's failure to object on that basis was deficient performance.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON

Respondent,

vs.

MICHAEL BAILEY,

Petitioner.

)
)
) SUPREME COURT NO. _____
) COA NO. 69217-8-1
)
)
)
)

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 24TH DAY OF NOVEMBER, 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **PETITION FOR REVIEW** 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 24TH DAY OF NOVEMBER, 2014.

X Patrick Mayovsky

NIELSEN, BROMAN & KOCH, PLLC

November 24, 2014 - 1:43 PM

Transmittal Letter

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