NO. 48289-4-II

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

STATE OF WASHINGTON,

Respondent,

v.
EARL POLLEY
Appellant.

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

The Honorable Kathryn Nelson, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The state failed to prove beyond a reasonable doubt that Mr. Polley committed identity fraud.

2. The state failed to prove beyond a reasonable doubt that Mr. Polley committed forgery.

3. The trial court abused its discretion in admitting cell phone texts without a proper foundation.

4. Mr. Polley was denied his right to present a defense by the trial court suppressing other suspect evidence.

5. Mr. Polley was denied his right to present a defense by the trial court suppressing exculpatory evidence.

6. Mr. Polley was denied his due process right to a fair trial by the trial court's failure to investigate a drunken juror.

7. Mr. Polley was denied his due process right to a fair trial by counsel's failure to move to dismiss the drunken juror.

8. Mr. Polley was denied his due process right to a fair trial by the trial counsel's failure to move for a mistrial following notice of the drunken juror.

Issues Presented on Appeal

1. Did the state fail to prove beyond a reasonable doubt that Mr. Polley committed identity fraud where there was insufficient evidence connecting him to the stolen items?

2. Did the state fail to prove beyond a reasonable doubt that Mr. Polley committed forgery where there was insufficient evidence connecting him to the checks I nthe backpack?

3. Did the trial court abuse its discretion in admitting cell phone texts without a proper foundation when no one could verify that the cell phone number belonged to Mr. Polley?

4. Was Mr. Polley denied his right to present a defense by the trial court suppressing other suspect evidence including evidence that others were charged with possessing the same personal identification and financial information located in the backpack?

5. Was Mr. Polley denied his right to present a defense by the trial court suppressing exculpatory evidence.

6. Was Mr. Polley denied his due process right to a fair

trial by the trial court's failure to investigate a drunken juror oin the morning before the beginning of deliberations?

7. Was Mr. Polley denied his due process right to a fair trial by counsel's failure to move to dismiss the drunken juro?.

8. Was Mr. Polley denied his due process right to a fair trial by the counsel's failure to move for a mistrial following notice of the drunken juror?

B. STATEMENT OF THE CASE

Earl Polley was charged with driving with a suspended license third degree, forgery, and nine counts of identity theft against: Debbie Anderson, Aaron Bedeker, Willie Horace (deceased), Scott Jester, Ronald Chrum, Keith Jester, David Estes, Brandon Cohen, Christopher Lennox; and Brittany Radar. CP 1-6. Mr. Polley was convicted as charged. CP 66-67, 78-92. This timely appeal follows. CP 98.

a. Trial Facts

Someone obtained, possessed, and used personal and financial information regarding a large group of people, named as

victims in this case. CP 1-6. Doreen Silvernail, Mr. Polley's aunt found a backpack in her garage where Mr. Polley's father resided. RP 136. She believed the backpack belonged to one of her grandchildren. RP139. Mr. Polley was not permitted to stay in the garage, but Ms. Silvernail saw him come onto her property and enter the garage in March 2015. RP 137-38.

Inside the backpack Ms. Silvernail discovered personal and financial information regarding many people she did not know, including, checks, mail, W-2 forms, drivers' licenses, and social security cards. RP 141. Ms. Silvernail did not recollect seeing any mail addressed to Mr. Polley inside the backpack, but the police located mail addressed to Mr. Polley at 10415 Broadway Avenue South, Tacoma, Washington the same address on his suspended driver's license. RP 142, 223, 293-94. There was also mail addressed to Mr. Polley at 308 197th St. E Spanaway, WA 98387, but Mr. Polley never received any mail at that address. RP 217-223, 478.

Ms. Silvernail asked Mr. Polley's father for Mr. Polley's cell phone number. RP 142. Ms. Silvernail made a telephone call to the

number and texted to that number a message indicating that if the backpack was not retrieved by 10:00, she would call the sheriff. RP 112, 146-147.

Ms. Silvernail called the sheriff because no one retrieved the backpack. RP 148, 164. Prior to the police arriving, Ms. Silvernail emptied the contents of the backpack onto her living room table. RP 164-65. Officer Alexa Moss reviewed the material which contained different social security cards, identity cards, bank accounts from different bank in other's names, checks made out to Mr. Polley and Steve McClendon, credit cards, W-2 forms, Sears accounts, money grams, public storage business cards with a gate access code and mail addressed to Mr. Polley. RP 162-248. The backpack also contained checks numbered #21506 and #21526 with Mr. Polley's name and a signature.

Officer Moss could not determine who wrote Mr. Polley's name on any of the documents or checks, and none of the checks with Polley's name on them had been cashed. RP 251. The police did not attempt to conduct any fingerprint or DNA analysis on the back pack or its contents. RP 249. The police also did not present

any handwriting analysis to determine who wrote the checks with Mr. Polley's and Mr. McClendon's names.

Mr. Polley unsuccessfully moved to admit evidence regarding Daniel Espinoza and Rachel Thorsness who were also charged with identity fraud related to the contents of the backpack. RP 6-21.

b. Cell Phone Text.

On grounds of lack of a foundation, the defense unsuccessfully moved to suppress a cell phone text allegedly sent to Mr. Polley from Ms. Silvernail, and allegedly responded to by Mr. Polley. RP 75-80. Ms. Silvernail made a telephone call to a number Mr. Polley's father gave her. RP 105-07, 146-47. Ms. Silvernail was not sure that the number was actually Mr. Polley's. Id. In response to the call, someone texted: "Who is this?" RP 110-11, 113, 146-47.

In response, Ms. Silvernail texted: "'your aunt you're always leaving things here. I am not happy with what I found. You need to get your things out now. If you don't get your things tonight, I will turn them over to the sheriff." RP 110-11, 146-47 "You have until 10:00." RP 110-11, 146-47. In response to those texts, some

texted. "Yep. Will, and there is no way you could have found it was put away." and if I had a ride, I would have already been there to get the backpack." "Wow." RP 110-11, 146-47. Ms. Polley never had any other communication from the person with whom she texted. RP 112, 148.

c. Trial Facts Continued.

Deputy Sheriff Chad Hellisgo contacted Mr. Polley on March 27, 2015 while Mr. Polley was driving a friend's car. RP 344. Mr. Polley was arrested for driving with a suspended license and read his Miranda rights. RP 357-58. Helligso testified that he informed Polley that he was going to jail regarding an item left at a relative's house. RP 360, 444-45. The officer testified that he never mentioned a "backpack". RP 360-62. Mr. Polley testified that Helligso informed him that a backpack was left at his aunt's house. RP 444-45.

All of the named victims: Ronald Chrum; Scott Jester; David Estes; Keith Jester; Brittany Radar; Brandon Cohen; Aaron Bedeker; Debbie Anderson; and Christopher Lennox, except Willie Horace (deceased), testified that they did not know Mr. Polley and

never gave him permission to obtain or use any of their personal or financial information (RP 191-92, 255-280, 298-312, 335-340, 374-389.

Mr. Polley testified that he had never seen the backpack or its contents. Id. Mr. Polley has received mail at 10415 Broadway Ave. South, Tacoma, WA 98444 but never at 308 197th Street South, Spanaway, Washington 98444. RP 468.

Mr. Polley testified that the cell phone number his aunt used was not his. RP 412-446. Mr. Polley never gave his father his cell phone number; Ms. Silvernail never called him, and Mr. Polley never received a telephone call or texts from Ms. Silvernail. . RP 412-446.

C. ARGUMENT

1. THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THE ELEMENTS OF THE NINE COUNTS OF IDENTITY THEFT IN THE SECOND DEGREE.

The state failed to prove beyond a reasonable doubt that Mr. Polley committed nine counts of identity theft in the second degree.

Due process requires the State to prove every element of the

charged crime beyond a reasonable doubt. *State v. Kalebaugh*, 183 Wn.2d 578, 584, 355 P.3d 253, (2015). To determine if the State presented sufficient evidence, this Court views the evidence in the light most favorable to the prosecution to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Condon*, 182 Wn.2d 307, 314, 343 P.3d 357 (2015).

An appellant's claim of insufficient evidence admits the truth of the State's evidence and "'all inferences that reasonably can be drawn [from it].' " *Condon*, 182 Wn.2d at 314 (alteration in original) (quoting *State v. Salinas*, 119 Wbn.2d 192, 201, 829 P.2d 1068 (1992)).

To prove identity theft in the second degree under RCW 9.35.020, the state must establish beyond a reasonable doubt that Mr. Polley knowingly obtained, possessed, used, or transferred a means of identification or financial information of another person, living or dead, with the intent to commit, or to aid or abet, any crime. RCW 9.35.020(1); *State v. Sells*, 166 Wn.App. 918, 923, 271 P.3d 952 (2012), *review denied,* 176 Wn.2d 1001 (2013). The state

must prove that the defendant intended to commit a crime. *State v. Fedorov*, 181 Wn.App. 187, 197-98, 324 P.3d 784, *review denied*, 181 Wn.2d 1009 (2014).

Possession alone does not support an inference of intent to commit a crime. *State v. Vasquez*, 178 Wn.2d 1, 8, 309 P.3d 318 (2013). When intent is an element of a crime, it may be inferred " 'if the defendant's conduct and surrounding facts and circumstances plainly indicate such an intent as a matter of logical probability.' " Vasquez, 178 Wn.2d at 8 (internal quotations omitted). In *Vasquez,* the Court instructed that although intent is typically proved from circumstantial evidence, it may not be inferred from evidence that is " 'patently equivocal.'" Id.

Rather, the state must offer possession together with some corroborating evidence. *Vasquez*, 178 Wn.2d at 8 In, *Vasquez,* the issue was whether the evidence was sufficient to show the intent to injure or defraud that is needed to prove forgery. *Vasquez*, 178 Wn.2d at 13. The court held that the defendant's possession of forged identification cards alone was not sufficient to prove the necessary intent, and noted that the defendant's ready admission

to a security guard that the cards were forged refuted the intent that he intended to defraud the guard. *Vasquez*, 178 Wn.2d at 14-16.

Here, the State did not prove: (1) that Polley possessed other persons' personal financial and identification information; (2) with intent to commit a crime. The state proved that there were many financial and identification documents in a backpack in Mr. Polley's aunt's garage. The state did not however prove beyond a reasonable doubt that the back containing this contraband belonged to Mr. Polley or that he had evert possessed the backpack. The police did not attempt to take fingerprint evidence. The police did not attempt to obtain a signature analysis and there was no one who could identify the backpack as belonging to Mr. Polley.

Mr. Polley testified that after his arrest, the officer informed him that he was being arrested based on the contents of a backpack left at a relatives. RP 444-45. The officer testified that he never mentioned a "backpack". RP 360-62. Regardless, MR. Polley's response that he had a back pack later described as camouflage, did not establish that Polley possessed the non-

camouflage backpack in the aunt's garage. RP 415. Mr. Polley was adamant that he never possessed any of the items retrieved from the backpack his aunt located in her garage. RP 416-44, 470-77, 481.

According to Ms. Silvernail, she texted to a cell number she obtained from Polley's father. RP 142. Ms. Silvernail admitted that she could not verify that the number belonged to MR. Polley's cell phone and she also admitted that she did not know who texted her in response to her telephone call. RP 143-44. After she called the number given by Mr. Polley's father, Ms. Silvernail received a text stating "who is this?". RP 145. After Ms. Silvernail identified herself she never received confirmation that Mr. Polley was the person responding. RP 148. Mr. Polley testified that his father did not have his cell phone number and Mr. Polley never received a text from his aunt. RP 413-14.

This information taken in the light mist favorable to the state does not support an inference beyond a reasonable doubt Mr. Polley possessed the backpack containing the personal information of other persons. Accordingly, this Court must reverse the identify

theft convictions and remand for dismissal with prejudice.

2. THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THE ELEMENTS OF FRAUD.

To prove fraud, the state was required to prove:

> (1) A person is guilty of forgery if, with intent to injure or defraud:
> (a) He or she falsely makes, completes, or alters a written instrument or;
> (b) He or she possesses, utters, offers, disposes of, or puts off as true a written instrument which he or she knows to be forged.
> ....

RCW 9A.60.020.

Like the identity fraud charges, the state was unable to prove beyond a reasonable doubt that Mr. Polley possessed or altered the fraudulent checks. The evidence established that the checks were in the backpack in Ms. Silvernail's garage, but there was no handwriting analysis, DNA or fingerprint analysis to connect Mr. Polley to the backpack and checks.

Even when viewing the evidence in the light most favorable to the state, the reasonable inferences do not establish the essential elements of the crime of forgery. Rather the state presented

evidence to establish the mere possibility that Mr. Polley was involved in the forgery - which is insufficient to establish the essential elements beyond a reasonable doubt. *Condon*, 182 Wn.2d at 314.

Accordingly, this Court must reverse and remand the forgery conviction for dismissal with prejudice.

3. MR. POLLEY WAS PREJUDICED BY THE TRIAL COURT'S ABUSE OF DISCRETION IN ADMITTING EVIDENCE OF CELL PHONE TEXTS WITHOUT A PROPER FOUNDATION

Over repeated objection, the trial court allowed the State to present the content of text messages Ms. Silvernail received from a cell phone she believed was Polley's but in fact she did not know who sent the texts. RP 143; Exhibit 41, 42. The state asserted, but could not prove that these texts were sent by Mr. Polley. RP 105-156. Mr. Polley argued unsuccessfully that the state had not presented sufficient proof of authenticity of the texts or the identity of the sender. RP 119-23.

A trial court's admission of evidence is reviewed for abuse

of discretion. *State v. Magers,* 164 Wn.2d 174, 181, 189 P.3d 126 (2008). Abuse of discretion occurs when a trial court's decision is manifestly unreasonable or based on untenable grounds. *Magers,*164 Wn.2d at 181. The purpose of authentication is to establish that "the thing" authenticated is what it purports to be. *State v. Monson*, 113 Wn.2d 833, 837, 784 P.2d 485 (1989).

Pursuant to ER 901(a), "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." This requirement is met "if sufficient proof is introduced to permit a reasonable trier of fact to find in favor of authentication or identification." *State v. Bradford,* 175 Wn. App. 912, 928, 308 P.3d 736 (2013), *review denied,* 179 Wn.2d 1010, 316 P.3d 494 (2014) (citing *State v. Danielson,* 37 Wn. App. 469, 471, 681 P.2d 260 (1984)).

For example, in *Bradford*, Division One found that the State introduced sufficient evidence to support a finding that text messages read to the jury and contained in an examination report

had been authenticated and were what the State purported them to be, namely text messages written and sent to a stalking victim's friend by the defendant. *Bradford*, 175 Wn. App. at 928. The evidence included testimony that: for a substantial period of time, Bradford telephoned the victim and appeared at her place of employment on a frequent basis; Bradford also regularly appeared outside of the victim's house; and the content of the text messages themselves indicated that Bradford was the individual who sent them. *Bradford,* 175 Wn. App. at 928-29.

The State charged Mr. Polley with identify theft, which it attempted to confirm by virtue of the text message it attributed to Mr. Polley indicating that Ms. Silvernail could not have found the backpack. Without the text messages, there was no factual support connecting Mr. Polley to the backpack and insufficient evidence connecting Mr. Polley to these charges and convictions.

Unlike in *Bradford*, the State did not provide sufficient supporting evidence that Mr. Polley was the individual responsible for sending the text messages to Ms. Silvernail's cellular telephone. Silvernail did not know Mr. Polley's telephone number, she obtained the number from Mr. Polley's father who did not testify, and Mr.

Polley testified that his father did not have his cell phone number. RP 413.

Mr. Polley also presented evidence that he had a different cell phone number. RP 413. The State did not present any evidence that Mr. Polley owned or ever possessed the phone that the text messages were sent from. There was simply no evidence to establish that the text messages were actually what they purported to be.

Accordingly, the State failed to sufficiently authenticate the text messages, and the trial court erred by admitting them over defense objection to Mr. Polley's prejudice.

a. Error Prejudicial

This Court will reverse an error in admitting evidence where the error is prejudicial to the defendant. *State v. Thomas*, 150 Wn.2d 821, 871, 83 P.3d 970 (2004). When the error is based on violation of an evidentiary rule rather than a constitutional mandate, the reviewing courts apply the test where evidentiary error is prejudicial when within reasonable probabilities, the trial's outcome

would have differed had the error not occurred. *Thomas*, 150 Wn.2d at 871.

Here, Mr. Polley was prejudiced because without the texts, within reasonable probabilities, the trial's outcome would have differed had the error not occurred because there was insufficient evidence connecting Mr. Polley to the backpack and its contents.

Accordingly, this Court must reverse and remand for a new trial.

4. THE TRIAL COURT DENIED MR. POLLEY HIS DUE PROCESS RIGHT TO PRESENT A DEFENSE.

The trial court violated Mr. Polley's right to present a defense by prohibiting him from introducing other suspect evidence and exculpatory y evidence.

This Court reviews a trial court's decision to admit or exclude evidence for abuse of discretion. *State v. Franklin*, 180 Wn.2d 371, 377 n.2, 325 P.3d 159 (2014). This Court reviews the denial of this Sixth Amendment right de novo. *State v. Jones*, 168 Wn.2d 713, 719, 230 P.3d 576 (2010). An erroneous evidentiary ruling that violates the defendant's constitutional rights is presumed prejudicial

unless the state can show the error was harmless beyond a reasonable doubt. *Franklin*, 180 Wn.2dat 377 n. 2; *State v. Dye*, 178 Wn.2d 541, 548, 309 P.3d 1192 (2013).

Both the Sixth Amendment of the United States Constitution and article 1, section 22 of the Washington Constitution guarantee the criminal defendant's right to present a defense. *State v. Starbuck*, 189 Wn.App. 740, 750, 355 P.3d 1167 (2015), *review denied,* 185 Wn.2d 1008 (2016). A criminal defendant does not have a constitutional right to present irrelevant or inadmissible evidence. *Starbuck*, 189 Wn.App. at 750.

The standard for the relevance of other suspect evidence is whether it tends to connect someone other than the defendant with the crime. *Franklin*, 180 Wn.2d at 381; *State v. Downs*, 168 Wn. 664, 667, 13 P.2d 1 (1932). Before the trial court admits "other suspect" evidence, the defendant must present a combination of facts or circumstances pointing to a non-speculative link between the other suspect and the crime. *Franklin*, 180 Wn.2d at 381. The inquiry focuses on whether the evidence tends to create a reasonable doubt as to the defendant's guilt, and not on whether it

establishes the third party's guilt beyond a reasonable doubt. Id.

The defendant bears the burden of establishing the relevance and materiality of "other suspect" evidence. *Starbuck*, 189 Wn.App. at 750-51. In establishing a foundation for admission, the defendant must show a clear nexus between the other person and the crime. Id. The proposed evidence also must show that the third party took a step indicating an intent to act on the motive or opportunity to commit the crime. Id. The defendant must show more a possibility that the third party committed the crime. *State v. Rehak*, 67 Wn.App. 157, 163, 834 P.2d 651 (1992).

a. The Court Ruling Prohibiting Other Suspect Evidence Violated Polley's Right to Present a Defense.

The trial court erred because Mr. Polley demonstrated motive and opportunity by both other suspects and Thorsness was charged with identity fraud. RP 8. The trial court in this case excluded evidence showing that other people had both the motive and opportunity to commit the crimes. More than that, the excluded evidence, taken together, amounts to a chain of circumstances that tends to create reasonable doubt as to Polley's guilt.

Here, the “other suspect” evidence would have provided several important facts to support Mr. Polley’s defense. First, Tina James received Mr. Polley’s mail for three years but that ended and she gave all of his mail and documents to a third party she believed was taking those items to Ms. Silvernail’s house. RP 7-8. Second, Ms. Silvernail called 911 to report that a friend of Mr. Polley’s, Mr. Espinoza, dropped off the backpack at her house. RP 8. Third, Rachel Thorsness and Mr. Espinoza were also charged with possessing one of the victims, Brittany Rader’s, identification information. RP 8.

This evidence is a more than a vague link between the other suspects and the crimes. It is a clear nexus between Thorsness and Espinoza and the crimes. This evidence also shows that Thorsness and Espinoza committed a crime and possessed identifying information and also indicates an intent to act on the motive or opportunity to commit more identify theft crimes. Id. This evidence is more than a mere possibility that Thorsness and Espinoza committed the crimes.

The other evidence that James and Espinoza along with Mr.

Silvernail knew that someone else dropped off the backpack, when viewed as a whole, creates a reasonable doubt as to Mr. Polley's guilt. Accordingly, the trial court abused its discretion in denying other suspect evidence to Mr. Polley's prejudice.

Contrary to the court's ruling that Mr. Polley could argue reasonable inferences from the evidence, he could not in any manner present his defense without the other suspect evidence. RP 8-9.

b. The Error Was Not Harmless.

The trial court's error directly affected Polley's right, under both the state and federal constitutions, to present witnesses on his own behalf. *Franklin*, 180 Wn.2d at 382. The error is therefore constitutional in nature.

"[C]onstitutional error is presumed to be prejudicial and the State bears the burden of proving that the error was harmless. A constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error." *State v. Watt,* 160 Wn.2d 626, 635, 160 P.3d 640 (2007).

Here, the state could not connect Mr. Polley to the backpack. No one saw Mr. Polley deliver the backpack, the state did not have any fingerprint or DNA evidence connecting Mr. Polley to the backpack, and the other suspect evidence creates reasonable doubt that the jury could have reached the same verdict had it known of these other suspects and heard the other evidence that someone else dropped off the backpack at Ms. Silvernail's house.

The trial court's refusal to permit this evidence denied Mr. Polley his righto explain that someone else delivered the backpack, and others were charged with identity fraud related to some of the same victims. This was prejudicial because if the jury had been allowed to consider all of the other suspect evidence, it may have reached a different verdict. Accordingly, the trial court erred in excluding other suspect evidence in this case, and the error was not harmless beyond a reasonable doubt. This Court must reverse Polley's convictions and remand for a new trial.

5. JUROR MISCONDUCT DENIED MR, POLLEY HIS DUE PROCESS RIGHT TO A FAIR TRIAL.

A criminal defendant is entitled to trial by a fair and

impartial jury. U.S. CONST. amend. VI, XIV § 1; WASH. CONST. art. I, § 3, 21, 22; *Duncan v. La.*, 391 U.S. 145, 177, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968). After closing arguments, a friend of Mr. Polley, Mathew Brooks, who was in the galley, reported to the court that he saw juror #11 intoxicated, coming out of a casino that same morning. RP 566. The prosecutor offered that juror #11 did not seem drunk and the court did not make any inquiry. RP 574. The defense did not move for dismissal of the juror or move for a mistrial but just made a record. RP 566-67.

RCW 2.36.110 requires the trial court to excuse an unfit juror. Id; *State v. Hughes*, 106 Wn.2d 176, 204, 721 P.2d 902 (1986); *State v. Jorden*, 103 Wn.App. 221, 226-27, 11 P.3d 866 (2000). This means that the trial court has a continuous obligation to excuse any juror who is unfit and unable to perform the duties of a juror. *Jorden,* 103 Wn.App. at 227.

CrR 6.5 provides that in the event a juror is unfit, "the trial judge may conduct brief voir dire before seating such alternate juror for any trial or deliberations." Id. RCW 2.36.110 provides:

> It shall be the duty of a judge to excuse from further jury service any juror, who in the opinion of the judge, has manifested unfitness as a juror by reason of bias, prejudice, indifference, inattention or any physical or mental defect or by reason of conduct or practices incompatible with proper and efficient jury service.

Id.

RCW 2.36.110 and CrR 6.5 together impose a duty on the judge to investigate allegations of juror misconduct. *State v. Berniard*, 182 Wn.App. 106, 116-17, 327 P.3d 1290 (2014). In *Berniard*, this Court held that dismissal of a deliberating juror without examining her violated defendant's jury trial rights. *Berniard*, 182 Wn.App. at 116-17.

Here, the issue was not dismissal of a juror without inquiry, but rather retention of a juror without inquiry. When the judge learned that juror #11 was unfit, she refused to make any inquiry to determine the juror's fitness required under RCW 2.36.110 and Cr 6.5. This lack of inquiry coupled with counsel's failure to demand an inquiry to determine juror #11's fitness, denied Mr. Polley his right to a fair and impartial jury of his peers. *Berniard*, 182 Wn.App. at 116-17.

Once the court was aware of the possibility of juror unfitness,

to protect Mr. Polley's rights, it was required to make at least some minimal inquiry into the juror's fitness. RCW 2.36.110 and Cr 6.5. The failure to do so denied Mr. Polley his right to a fair trial. U.S. CONST. amend. VI, XIV § 1; WASH. CONST. art. I, § 3, 21, 22; *Duncan*, 391 U.S. at 177. Accordingly, this Court must reverse and remand for a new trial.

6. TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO MOVE FOR A MISTRIAL.

Defense counsel failed to move for a mistrial or inquiry into juror number 11's fitness after it learned that juror #11 was drunk the morning of deliberations.

The standard of review for a challenge to the effective assistance of counsel is de novo. *State v. Cross,* 156 Wn.2d 580, 605, 132 P.3d 80, *cert. denied,* 549 U.S. 1022 (2006). A defendant has an absolute right to effective assistance of counsel in criminal proceedings. *State v. Grier*, 171 Wn.2d 17, 34, 246 P.3d 1260 (2011); *Strickland v. Washington,* 466 U.S. 668, 684–86, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Sixth Amendment to the U.S. Constitution and Washington article I, section 22.

While counsel is presumed effective, this presumption is overcome where the defendant establishes that (1) defense counsel's representation was deficient; falling below an objective standard of reasonableness, and (2) the deficient performance prejudiced the defendant. *State v. Sutherby,* 165 Wn.2d 870, 883, 204 P.3d 916 (2009); *State v. McFarland,* 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

More than the mere presence of an attorney is required. *State v. Hawkins,* 157 Wn.App. 739, 747, 238 P.3d 1226 (2010), *review denied,* 171 Wn.2d 1013 (2011). A deficient performance claim can be based on a strategy or tactic when the defendant rebuts the presumption of reasonable performance by demonstrating that "there is no conceivable legitimate tactic explaining counsel's performance." *Grier*, 171 Wn.2d at 33; citing, *State v. Reichenbach,* 153 Wn.2d 126, 130, 101 P.3d 80 (2004); *State v. Aho,* 137 Wn.2d 736, 745–46, 975 P.2d 512 (1999).

Trial strategies and tactics are thus not immune from attack on grounds of ineffective assistance of counsel. "The relevant question is not whether counsel's choices were strategic, but

whether they were reasonable." *Roe v. Flores–Ortega,* 528 U.S. 470, 481, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000) (finding that the failure to consult with a client about the possibility of appeal is usually unreasonable).

Prejudice is established if the defendant can show that "there is a reasonable probability that, but for counsel's unprofessional errors, the outcome of the proceeding would have been different." *State v. Nichols,* 161 Wn.2d 1, 8, 162 P.3d 1122 (2007). If a party fails to satisfy one element, a reviewing court need not consider both *Strickland* prongs. *State v. Foster,* 140 Wn.App. 266, 273, 166 P.3d 726, *review denied,* 162 Wn.2d 1007 (2007).

The failure to move for a mistrial or move to voir dire the drunk juror in this case cannot be considered tactical because the right to a jury of fit peers is fundamental to the due process right to a fair trial. U.S. CONST. amend. VI, XIV § 1; WASH. CONST. art. I, § 3, 21, 22; *Duncan*, 391 U.S. at 177. Defense counsel knew enough to make a record, but inexcusably failed to at least voir dire of the jury to determine his fitness. The failure to do so and to move

for a mistrial, ultimately prohibits a finding of due process because the evidence without more indicated that the jury was unfit to deliberate.

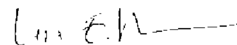
Accordingly, counsel's performance was deficient, Mr. Polley was prejudiced, and this Court must remand for reversal for a new trial.

D. CONCLUSION

Mr. Polley respectfully requests this Court reverse and dismiss his nine identity fraud convictions and one forgery conviction for insufficient evidence. In the alternative, to satisfy due process, Mr. Polley requests reversal and remand for a new trial.

DATED this 24th day of May 2016

Respectfully submitted,



LISE ELLNER
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I, Lise Ellner, a person over the age of 18 years of age, served the Pierce County Prosecutor's Office 'pcpatcecf@co.pierce.wa.us'and Earl Polley DOC# 781500 Airway Heights Corrections Center P.O. Box 2049

Airway Heights, WA 99001 May, 24 2016. Service was made by electronically to the prosecutor and to Mr. Polley by depositing in the mails of the United States of America, properly stamped and addressed.

____Signature

ELLNER LAW OFFICE

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