

70303-0

70303-0

NO. 70303-0-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

DANIEL BARTELS,

Appellant.

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE ELIZABETH J. BERNS

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**BRIEF OF RESPONDENT**

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**A. ISSUES PRESENTED**

1. Pursuant to CrR 6.15(f), a trial court has discretion to grant or deny a jury's request to rehear or replay evidence during deliberations. An abuse of discretion occurs only when no reasonable person would take the view adopted by the trial court. Here, the trial court denied the deliberating jury's request to repeat a stipulation about the outcome of prosecutions against two codefendants whose cases had been resolved prior to trial. The stipulation had been read to the jury prior to opening statements and was never marked nor offered as an exhibit during the trial. Did the trial court abuse its discretion by refusing to repeat the stipulation?

**B. STATEMENT OF THE CASE**

1. PROCEDURAL FACTS

Appellant Daniel Bartels and two codefendants, Eric Gilliam and Emanuel Brown, were charged by Information with first-degree robbery alleged to have occurred on December 14, 2011. CP 1.

Gilliam and Brown each pled guilty to first-degree robbery. 2RP 5.<sup>1</sup> Bartels proceeded to a jury trial before the Honorable Elizabeth Berns, and the State added a firearm enhancement. CP 10-11, 14-15. He was found guilty as charged, and the jury affirmatively found that he or an accomplice was armed with a firearm during the commission of the robbery. CP 16-17. He was sentenced to the low end of the standard range (31 months), plus 60 months for the firearm enhancement, for a total sentence of 91 months. CP 60-69. He timely appealed. CP 70.

## 2. SUBSTANTIVE FACTS

### a. Trial Testimony

On December 13, 2011, Bartels arranged via text messages to purchase a pound of marijuana from a medical marijuana provider named Keith Blaisdell. 5RP 29-32. The deal was to take

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<sup>1</sup> The verbatim report of proceedings consists of twelve volumes, which will be referred to as follows:

- 1RP—March 4, 2013
- 2RP—March 5, 2013
- 3RP—March 6, 2013
- 4RP—March 7, 2013
- 5RP—March 11, 2013
- 6RP—March 12, 2013
- 7RP—March 13, 2013
- 8RP—March 14, 2013
- 9RP—March 18, 2013
- 10RP—March 19, 2013
- 11RP—March 20, 2013
- 12RP—May 3, 2013

place at the Silverwood Apartments, a large complex in Des Moines, Washington. 5RP 32. Blaisdell went to the apartment complex that night, but when Bartels was unable to meet right away he got nervous and left. 5RP 37-38. The two communicated via text again the next morning, and agreed to meet at 11:30 a.m. at the Silverwood. 9RP 37.

Unknown to Blaisdell, Bartels was also texting and communicating via phone calls with Brown and Gilliam, keeping the two updated on when Blaisdell would arrive. 9RP 31-40. At one point, Gilliam texted Bartels "let's do it rite [sic] now people get jacked in daylight all the time." 9RP 33.

When Blaisdell arrived at the Silverwood Apartments on the morning of December 14, he backed his truck into a stall in the northeast corner of the south parking lot and waited for Bartels with the engine running. 5RP 48. Blaisdell had a pound and a half of various strains of marijuana with him, which were divided into a total of four small and ten large clear plastic bags. 5RP 43-44. Each was labeled by hand with the particular strain it contained. The names included "Island Skunk," "Pineapple Diesel," and "ANPJ." 5RP 30-31.

Bartels appeared and got into the passenger seat. 5RP 49, 51. The two began discussing the deal. 5RP 52. Gilliam then appeared at the passenger door, opened it, and pointed a revolver at Blaisdell's head while threatening to shoot him. 5RP 53, 59; 7RP 13. At about the same time, Brown opened the driver's side door and began going through Blaisdell's pockets, telling him "be cool." 5RP 59. Blaisdell tried to put the truck in gear and drive off, but Bartels jammed the lever into park and removed the keys. 5RP 56. While Gilliam held Blaisdell at gunpoint and Brown went through his pockets, Bartels was reaching in the back of the cab to grab the bags of marijuana. 5RP 60. Bartels also demanded Blaisdell's cell phone, but Blaisdell did not know where it was. 5RP 61.

Blaisdell saw the cylinder on the revolver Gilliam was pointing at him begin to turn, and knew that meant the gun was about to fire. 5RP 61. Blaisdell tried to push the gun away; in the struggle that followed he testified that both Bartels and Gilliam were hitting him in the head. 5RP 62. Gilliam fired; the bullet struck Blaisdell on the right side of his head, traveled along the outside of his skull under the skin, and exited without penetrating his skull. 5RP 63; 6RP 15.

Stunned and bleeding, Blaisdell pulled his own pistol from a holster on his right hip and fired one round towards the passenger side while Bartels was still in the passenger seat. 5RP 63-65. He fell out of the truck on the driver's side while Brown, Gilliam, and Bartels fled towards the north parking lot of the apartment complex. 5RP 66-67. At some point they turned back towards Blaisdell, who fired two more shots in their direction. 5RP 66. Blaisdell then went to the manager's office to get help. 5RP 66.

Des Moines Police Officer Fred Gendreau responded to the shooting call at the Silverwood Apartments. 3RP 26. While en route, he was flagged down by Gilliam, who was driving a white Lexus. 3RP 34, 41. Bartels was in the front passenger seat bleeding from a gunshot wound to his abdomen; Brown was in the rear driver's side passenger seat bleeding from a gunshot wound to his shoulder. 3RP 38, 41. Bartels fell out of the car, and Officer Gendreau noticed a small baggie of marijuana that was about to fall out of his sweatshirt pocket. 3RP 38-39. The baggie was labeled "ANPJ." 3RP 47. Another baggie of marijuana labeled "Island Skunk"<sup>2</sup> was found in Bartels's clothing at Harborview Medical

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<sup>2</sup> The transcript incorrectly reflects the wording on the baggie as "Alan Skunk."

Center. 4RP 146, 154. Gilliam handed Officer Gendreau a phone belonging to Bartels. 3RP 48.

Detective Paul Young served a search warrant on the white Lexus and recovered a black Coogi jacket with blood on it. 7RP 15, 21-22. In one pocket of that jacket he located Brown's cell phone and identification cards; in the other he found a baggie of marijuana labeled "Pineapple Diesel." 7RP 27, 29-30, 33, 36. He also found Blaisdell's wallet in a pouch on the back of the driver's seat directly in front of where Brown was seated when Gilliam flagged down Officer Gendreau. 7RP 37-38.

Officer Justin Langhofer responded to the shooting call at the Silverwood Apartments. 4RP 39. Along the route the defendants fled he located a small baggie of marijuana labeled "Diesel." 4RP 43. In the north parking lot, he found blood on the ground near a white Chevrolet Caprice; blood was also visible in the backseat. 4RP 48. Det. Young searched the Caprice. 6RP 114. In the trunk he located three bags of marijuana labeled "Island Skunk," "ANPJ," and "Pineapple Diesel." 6RP 118-27. He swabbed the blood in the back seat for later DNA testing. 6RP 129-30. He also found Gilliam's wallet in a compartment in the driver's door. 6RP 132-33.

Blaisdell identified Gilliam in a photo montage as the man who held the gun on him; he identified Bartels from a separate montage as the man who set up the deal. 7RP 13-14. DNA testing on the black Coogi jacket and the swabs from the backseat of the Caprice revealed that the blood was Brown's and estimated the probability of randomly selecting an individual with an identical profile at one in 770 quintillion. 8RP 8, 35-36.

b. Stipulation

Prior to jury selection, Bartels told the court that he wanted to inform the jury that Gilliam and Brown had pled guilty to first-degree robbery for their roles in the crime, and that he had been discussing the idea of doing so with the State. 2RP 5-6. The next day, the parties notified the court that an agreement as to the language had been reached, and Bartels indicated he wanted the court to inform the jury as part of the preliminary instructions. 3RP 6. The State agreed to that plan. 3RP 6. After additional discussion of the language, the court read preliminary instructions to the jury. 3RP 6-15. At the conclusion of the preliminary instructions, the court stated:

I've been asked to provide some specific information prior to opening arguments. Eric Gilliam and Emanuel Brown were also charged as defendants in this case. Eric Gilliam and Emanuel Brown were previously adjudicated guilty of robbery in the first degree.

3RP 15. The portion of the stipulation that had been reduced to writing was filed. CP 12-13. Neither Bartels nor the State had the stipulation marked as an exhibit or offered it as such during trial.

11RP 8.

During deliberations, the jury sent a note to the court asking the court to "please restate the opening statement about Mr. Gilliam and Mr. Brown indicating action already enforced regarding both of them." CP 18. The State opposed granting the jury's request, arguing that the stipulation was never marked as an exhibit nor offered during the presentation of evidence, and that it was therefore akin to repeating testimony. 11RP 4-5. The State also argued that the jury had all of the information it needed to determine the roles Gilliam and Brown played in the robbery.

11RP 7. Bartels asserted that the information was "very important" and, after the court asked for more detail as to why he believed it

was so important, went on to say it was “imperative” and “imperative for the presentation of the case and for the jury’s understanding of what was presented to them.” 11RP 5-6.

In its oral ruling denying the jury’s request to repeat the information, the court broke the issue down into what it termed the “substantive” and the “procedural” questions. 11RP 8. With respect to the substantive question, the court stated it was not convinced that the information was imperative, that it was the “crux” of the case, or that it really “aid[ed] the jury in maintaining its direction in addressing the matter before it concerning Mr. Bartels.” 11RP 8. With respect to the procedural question, the court noted that it was read prior to opening statements, it was never marked nor offered as an exhibit by either party, and that as a result the court did not believe it was appropriate to repeat it for the jury during deliberations. 11RP 8-9. Instead, the court answered the jury’s query by directing them to consider instructions 1 and 17. CP 19.

**C. ARGUMENT**

1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DECLINED TO REPEAT A STIPULATION FOR THE JURY DURING DELIBERATIONS.

Bartels contends the trial court abused its discretion when it refused, in response to a question the jury submitted during deliberations, to re-read information presented to the jury before opening statements that was never introduced as evidence by either the State or the defense during the actual presentation of evidence. He is incorrect. The court acted well within its discretion to deny the jury's request.

CrR 6.15(f) governs the manner in which trial courts address questions posed by juries during deliberations. It provides in relevant part:

. . . . The court shall respond to all questions from a deliberating jury in open court or in writing. *In its discretion, the court may grant a jury's request to rehear or replay evidence*, but should do so in a way that is least likely to be seen as a comment on the evidence, in a way that is not unfairly prejudicial and in a way that minimizes the possibility that jurors will give undue weight to such evidence. . . .

CrR 6.15(f) (*emphasis added*). As is apparent from the plain language of the rule, the decision whether to grant a deliberating

jury's request to rehear evidence lies squarely within the discretion of the trial court, which may, or may not, grant such a request.

A trial court abuses its discretion "only when no reasonable person would take the view adopted by the trial court." State v. Castellanos, 132 Wn.2d 94, 96, 935 P.2d 1353 (1997), citing State v. Huelett, 92 Wn.2d 967, 969, 603 P.2d 1258 (1979). Put another way, an abuse of discretion occurs if the trial court's decision

is manifestly unreasonable or based on untenable grounds or untenable reasons. A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard.

In re Marriage of Littlefield, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997) (internal citations omitted).

Here, Bartels claims that "the trial court abused its discretion by denying the jury's request to have stipulated evidence regarding Gilliam [sic] and Brown's prior convictions repeated." Brief of Appellant at 11. Yet nothing in the language of CrR 6.15(f) requires that a court repeat evidence to a deliberating jury simply because the jury has asked it to do so. As noted above, the rule is permissive ("in its discretion, the court may grant a jury's request to

rehear or replay evidence . . .”), not mandatory. Accordingly, the decision to deny the jury’s request is well within “the range of acceptable choices” available to the trial court. Littlefield, 133 Wn.2d at 47.

Moreover, CrR 6.15(f) cannot be read to create a presumption that evidence *will* be repeated upon request. Rather, in the event that a court chooses to repeat evidence, it “should do so in a way that is least likely to be seen as a comment on the evidence, in a way that is not unfairly prejudicial and in a way that minimizes the possibility that jurors will give undue weight to such evidence. . . .” CrR 6.15(f). No test is set forth in the rule, in caselaw, or in any statute setting forth factors the court must consider when it *denies* a request to repeat evidence during deliberations. The factors set forth in the rule may certainly be used to inform such a decision, but there is no requirement that they do so.

The lack of any express requirements that must be considered when a trial court denies a request to repeat evidence is important to bear in mind when determining whether the trial court abused its discretion here. Indeed, far from dismissively or for no discernible reason denying the jury’s request, the record

demonstrates that the trial court's decision was carefully considered. In making its ruling, the court stated:

All right. So really we have—there are two issues here regarding this question: One has to do with the information itself, so what I'll deem as the substantive issue. The other has to do with the procedural, what I'll term as a procedural issue in so much as the fact that this is a statement that was read by the Court to the jury prior to opening, it was noted as a stipulation, and then it was simply filed.

The—and I want to address the—the first being substantive matters. I'm not convinced that it is imperative given the statement that was read, the matter involving the two other defendants. I'm not convinced that it's imperative, and I don't see that it's the crux of the case or that it really aids the jury in maintaining its direction in addressing the matter before it concerning Mr. Bartels.

As far as the second issue, what I've deemed or called procedural issue, I have greater concerns about that. This was an agreed paragraph by both counsel. Court was asked to read that to the jury. That was noted as a stipulation and then it was filed. It was not marked as an exhibit, and there was no offer to enter that as an exhibit. Both counsel had the opportunity to ask that that be marked and entered into evidence. That was not done.

The jury is to have only the evidence that was admitted at trial at its disposal and, quite frankly, in terms of repeating statements made during the trial, I don't—I don't feel that it's appropriate to do so with this statement. So I'm not going to provide them with that statement in a written form or in an oral form.

11RP 8-9.

As is clear from the court's oral ruling, the information the jury asked to have repeated fell in a legal gray area in terms of whether it would more properly be considered an exhibit or testimony. The court explicitly noted it had been read to the jury prior to opening statements, but had not been marked or offered as an exhibit despite both State and defense having had an opportunity to do so. The distinction mattered. On the one hand, the jury was properly instructed that it could consider "the testimony that you have heard from witnesses, stipulations and the exhibits that I have admitted during the trial," and that "the exhibits that have been admitted will be available to you in the jury room." CP 21. On the other hand, the jury had also been properly instructed that "testimony will rarely, if ever, be repeated for you during your deliberations," (CP 40) and improper repetition of testimony may be reversible error. See, e.g., State v. Koontz, 145 Wn.2d 650, 41 P.3d 475 (2002) (conviction for second-degree assault of child reversed and remanded for new trial where trial court improperly played videotaped testimony of three witnesses during jury deliberations). Faced with a situation for which there was no clear answer, the trial court can hardly be said to have abused its

discretion by erring on the side of caution and declining to repeat the information for the jury.

Bartels nevertheless contends that the trial court's ruling "deprived the jury of the opportunity to decide the case based on all the evidence." Brief of Appellant at 15. He is wrong. The information the court declined to repeat was read clearly and unambiguously immediately prior to opening statements. 3RP 15. The timing of when it was to be read was affirmatively suggested by Bartels's trial counsel. 3RP 6. Despite being present when the jury was told it would be allowed to take notes and would receive notebooks "after opening statements," he made no request to alter the timing of when the jury would be informed about Brown and Gilliam. 3RP 12. He then declined to have the stipulation marked as an exhibit and entered into evidence during the remainder of the trial. 11RP 8. He also made no mention of Brown or Gilliam having been previously convicted for their participation during the entirety of his closing argument. See 10RP 54-74. The court's response to the jury's inquiry—directing the jurors to instructions 1 and 17—in no way conveyed a message that the jury was precluded from considering that information, or that it was unimportant. CP 19.

In short, nothing about the manner in which the stipulation was presented or the trial court's decision not to repeat it during deliberations can be said to have "deprived" the jury of the opportunity to consider all of the evidence.

Moreover, to the extent that any error at all can be discerned from this record, Bartels must bear the responsibility for creating it given that the court adopted his suggestion for reading it as part of its preliminary instructions, he never had it marked nor offered it as an exhibit, and he chose not to mention it at all during his closing argument. The doctrine of invited error precludes a party from setting up an error at trial and then complaining of it on appeal. State v. Pam, 101 Wn.2d 507, 511, 680 P.2d 762 (1984), *overruled on other grounds by* State v. Olson, 126 Wn.2d 315, 893 P.2d 629 (1995). Bartels should be precluded from complaining of any error in the court's refusal to repeat evidence of Brown's and Gilliam's convictions.

Finally, even if this Court holds that the trial court abused its discretion by refusing to repeat the evidence, and even if Bartels cannot be said to have invited the error, any error was harmless. Bartels appears to concede that the nonconstitutional standard

applies, as he notes correctly that “an evidentiary error requires reversal if, within reasonable probability, the error materially affected the verdict.” Brief of Appellant at 15, citing State v. Everybodytalksabout, 145 Wn.2d 456, 468-69, 39 P.3d 294 (2002). Here, the evidence against Bartels was overwhelming. Text messages demonstrated that he knew the robbery was going to occur and in fact kept Brown and Gilliam apprised of when Blaisdell would arrive at the Silverwood Apartments. Marijuana taken during the robbery was found on his person. In addition, the roles of Brown and Gilliam were clearly demonstrated through the testimony and exhibits. The court’s refusal to repeat the stipulation about the involvement of the latter two in no way precluded the jury from determining that Brown and Gilliam were responsible for committing a first degree robbery, just as Bartels was. As a result, it simply cannot be said that there is a reasonable probability that the error materially affected the verdict.

**D. CONCLUSION**

The trial court did not abuse its discretion when it declined to repeat the stipulation regarding Brown’s and Gilliam’s prior

convictions during the jury's deliberations. Bartels received a fair trial, and his conviction should be affirmed.

DATED this 24<sup>th</sup> day of March, 2014.

Respectfully submitted,

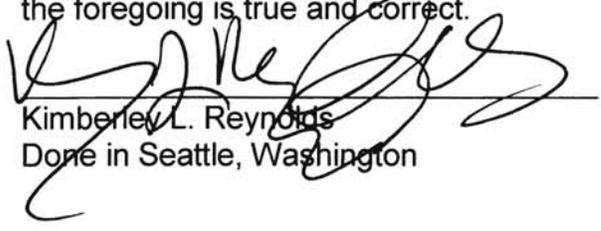
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Jared B. 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 Notice of Appearance and Brief of Respondent, in STATE V. DANIEL ROSS BARTELS, Cause No. 70303-0-1, 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.

  
\_\_\_\_\_  
Kimberley L. Reynolds  
Done in Seattle, Washington

3/24/14  
Date