

NO. 34546-3

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**COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

AARON MICHAEL WESTBY, APPELLANT

FILED  
COURT OF APPEALS  
DIVISION II  
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STATE OF WASHINGTON  
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Appeal from the Superior Court of Pierce County  
The Honorable Sergio Armijo

No. 05-1-02210-0

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**BRIEF OF RESPONDENT**

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Was the court's ex parte communication with the jury harmless error when that communication did not convey any affirmative information and could not possibly have prejudiced the defendant?
2. Did the trial court properly deny defendant's motion for a new trial where defendant was not prejudiced by the court's content neutral response to a jury question made outside the presence of the defendant?
3. Did the defendant receive constitutionally effective assistance of counsel where counsel's conduct did not prejudice defendant?

B. STATEMENT OF THE CASE.

1. Procedure

On May 9, 2005, the Pierce County Prosecutor's Office filed an information charging appellant, AARON MICHAEL WESTBY, hereinafter "defendant," with; assault in the first degree against Deputy M. Carey (Count 1); assault in the second degree against Deputy K. Devaney (Count 2); assault in the second degree against Deputy J. Syler (Count 3); assault in the third degree against Deputy D. Butts (Count 4); attempting

to elude a pursuing police vehicle (Count 5); and, resisting arrest (Count 6). CP 1-5.

Just before trial, the Prosecutor amended the information reducing the assault charge Count 1 from first to the second degree. CP 6-8.

The matter came on for trial before the Honorable Sergio Armijo on December 12, 2005. RP 1. After hearing the evidence, the jury convicted defendant as charged. CP 42-47, RP 535-537.

On January 6, 2006, the court continued sentencing at defendant's request to afford defendant an opportunity to file a motion for a new trial. RP 542, 546. The basis of the motion was an allegation that the court did not adequately follow the procedure called for by CrR 6.15(f) for responding to jury questions. CP 58-51.

The court denied defendant's motion based on its finding that defendant had not been prejudiced and that the motion was untimely. RP 556-559, 561.

After denying defendant's motion the court proceeded with the sentencing. Id. at 561. The parties agreed that defendant's offender score was 9 for each count. Id. at 564. The court ordered concurrent sentences. Counts 1 through 3, all assault in the second degree, carried the longest standard range sentences of 63-84 months. The court imposed a sentence of 74 months on each of these counts. CP 42-47, RP 564. The court imposed the high end standard range sentences on Count 4 and Count 5. Id. The court also imposed various legal financial obligations. Id.

Defendant timely appealed from this judgment and sentence. CP 107-120.

2. Facts

On the evening of May 5, 2005, Deputy David Shaffer responded to a dispatch regarding a check forgery complaint made by an employee of Mi Piacce Restaurant located at 417 South Garfield. RP 56, 374-375. The police dispatcher provided Deputy Shaffer with a description of the suspect vehicle that included its make, model, and license plate number. RP 84-85. Deputy Shaffer went to the home address of the registered owner of the suspect vehicle at the 1300 block of 119 Street South. Once in the vicinity of the owner's address, Deputy Shaffer identified and stopped the suspect vehicle. RP 85-86. Deputy Shaffer contacted the two occupants of the vehicle. Defendant was the driver. RP (December 13, 2005) 88. Amber Farrington, the registered owner of the vehicle, was in the front passenger seat. RP 85, 88, 90.

Deputy Shaffer made arrangements for a person from Mi Piacce Restaurant to come to the scene to identify defendant and Farrington. The person from the restaurant identified Farrington as the suspect. RP 90. As Deputy Shaffer was concluding his investigation, defendant asked if, "Farrington was being arrested," to which Deputy Shaffer responded yes. Id.

Defendant then started the engine and speed off. RP 91, 375.

Deputy Shaffer ran back to his patrol car, pursued defendant, and radioed for assistance. RP 91, 123. Defendant turned off his headlights and drove into the oncoming lane of travel to evade Deputy Shaffer. RP 91. Deputy Shaffer determined that the risk to the public was too great to warrant chase and ended his pursuit. RP 94.

Deputy Mario Carey responded to Deputy Shaffer's call for assistance, RP 123, but deactivated his overhead lights and slowed his speed when Deputy Shaffer called off the pursuit over the radio. RP 126. After deactivating his emergency lights and slowing, Deputy Carey observed defendant, with his head lights off, speeding north on Park towards 112th Street. RP 127-128. Defendant then turned west on 112<sup>th</sup> Street. Id. Deputy Carey was traveling east on 112<sup>th</sup> Street. Id. As defendant approached Deputy Carey on 112<sup>th</sup> street, he swerved into the oncoming lanes towards Deputy Carey's patrol car. RP 130-131. Deputy Carey maneuvered his patrol car completely off the road in order to avoid being struck by defendant's vehicle. Id. Defendant's actions prompted Deputy Carey to reinitiate the pursuit. RP 131. While pursuing defendant, Deputy Carey observed defendant again swerve into the opposite lane of travel and aim his vehicle at another patrol car. RP 141. While traveling west on 84<sup>th</sup> street, defendant, for a third time, swerved into the opposite lane of travel at two patrol cars traveling east, running the deputies off the road. Id. Shortly after this incident, Deputy Carey

was able to execute a pursuit interdiction technique (“pit maneuver”)<sup>1</sup>, forcing defendant’s vehicle to stop. RP 142.

Defendant got out of the car and fled on foot climbing over a nearby chain linked fence. RP 143. Deputy Carey lifted the bottom of fence to allow a police dog access to defendant. RP 143-144. Defendant reached back over the fence, struck Deputy Carey twice on the top of the head, and grabbed onto his hair. Id. After the police dog got under the fence, Deputy Carey climbed over the fence and with the assistance of five other officers, took defendant into custody. RP 144-145. Defendant bit and struck the officers as they did this. Id.

At trial, defendant testified that he fled because he feared being arrested for driving with a suspended license. RP 375, 379. Defendant testified that he did swerve at the patrol cars, but that he did not “purposefully aim [his] vehicle at the police officers’ vehicles[.]” RP 378, 383.

During deliberations the jury submitted two questions in writing to the court. The jury asked whether it could review non-admitted police reports and whether instruction 10 only applied to “the incident on 112<sup>th</sup> Street and Park[] [o]r to the whole chase.” CP 10, RP 535. The court

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<sup>1</sup> In executing a pit maneuver, the pursuing officer will place his front fender against a rear quarter panel of the fleeing vehicle. By slightly turning into the vehicle while pressing the accelerator, the officer is able to spin the vehicle in a controlled fashion. Spinning the vehicle generally causes the tires to immediately rotate in the opposite direction which kills the engine. RP (December 13, 2005) 137-138.

responded ex parte “no” to the first question and did not answer the second question. Id.

Both of the parties were advised of the jury questions and allowed to review them before the verdict was delivered. RP 535. Defendant did not object. Id. Neither party requested supplemental instructions nor further deliberations. Id.

C. ARGUMENT.

1. THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR WHEN IT PROVIDED A CONTENT NEUTRAL RESPONSE TO A JURY QUESTION WITHOUT REQUIRING DEFENDANT’S PRESENCE.

“It is settled in this state that there should be no communication between the court and the jury in the absence of the defendant.” State v. Caliguri, 99 Wn.2d 501, 508, 664 P.2d 466 (1983); CrR 6.15(f)(1)<sup>2</sup>.

Although an improper communication between the court and the jury is an

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<sup>2</sup> CrR 6.15(f)(1) The jury shall be instructed that any question it wishes to ask the court about the instructions of evidence should be signed, dated, and submitted in writing to the bailiff. The court shall notify the parties of the contents of the questions and provide them an opportunity to comment upon an appropriate response. Written questions from the jury, the court response and any objections thereto shall be made a part of the record. 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 the jurors will give undue weight to such evidence. Any additional instruction upon any point of law shall be given in writing.

error of constitutional dimensions, the communication may be so inconsequential as to constitute harmless error. State v. Bourgeois, 133 Wn.2d 389, 407, 945 P.2d 1120 (1997). While it is the State's burden to show the error is harmless beyond a reasonable doubt, a defendant must first raise at least the possibility of prejudice from improper communication. Id.

A trial court's response to a jury's question, if it is neutral and supplies no affirmative information, is clearly not prejudicial. State v. Allen, 50 Wn. App. 412, 419-20, 749 P.2d 702 (1988). The following ex parte statements between a judge and jury in response to jury questions have been found to be neutral communication: "[y]ou should follow the instructions and you should answer the questions as put to you in the special verdict form," In Re Howerton, 109 Wn. App. 494, 506, 36 P.3d 565 (2001); "[r]ead your instructions and continue with your deliberations," Allen, 50 Wn. App. At 419-20; [y]ou are bound by the instructions already given to you," State v. Langdon, 42 Wn. App. 715, 717-18, 713 P.2d 120 (1986); a court's direction to the bailiff to inform the jury foreman that an instruction "meant exactly what was written in the instruction," State v. Russell, 25 Wn. App. 933, 947-48, 611 P.2d 1320 (1980).

Here, the jury asked two questions, however, there is only one communication at issue, because the court only responded to one question. The jury asked whether it could review police officer reports not entered into evidence, and whether “instruction 10 only appl[ied] to the incident on 112<sup>th</sup> and Park[,] [o]r to the whole case.” (CP 10). The court responded simply by stating “no” to the first question and did not respond to the latter. RP 535.

Instead of saying “no,” it would have been preferable for the court to have responded by telling the jury to refer to their instructions. However, the court’s response was neutral because it did not supply any affirmative information, rather it mirrored jury instruction number one. Instruction one states in relevant part, “the only evidence you are to consider consists of the testimony of the witnesses and the exhibits admitted into evidence.” CP 136-167.

Defendant has never claimed that the court’s response was incorrect and has never suggested how the court’s response could have possibly prejudiced him. Prior to receiving the verdict, the court informed the parties of the jury’s questions and how the court had responded. Id. The court handed the written questions to defense counsel to review. Defendant neither objected to the court’s response nor requested the court to give supplemental instructions. Defendant did not claim that he was

prejudiced by the court's action in giving the responses without him being present. Defendant did not suggest in his motion for a new trial how he could possibly have been prejudiced. CP 48-51. Likewise, defendant does not now on appeal suggest how he was possibly prejudiced. (Brief of Appellant at 4-12). Because defendant does not meet the threshold requirement of establishing the possibility of prejudice, he cannot claim that the alleged error caused him harm. Moreover, even if defendant had objected at trial or suggested at any point how he could have been prejudiced, the court's communication did not convey any affirmative information. As a result any error was clearly harmless.

Defendant relies on State v. Ratliff, 121 Wn. App. 642, 90 P.3d 79 (2004), to argue that the court's ex parte communication with the jury constitutes reversible error. However, Ratliff is distinguished from this case. In Ratliff the court provided prejudicial facts not introduced in evidence at trial when it responded to jury questions. Ratliff, 121 Wn. App. at 647-48. The court in Ratliff revealed the following substantive facts to the jury outside of the presence of the parties; that the vehicle in which a gun was found belonged to the defendant, that the defendant was in custody at the time of a lineup, and that the defendant was arrested in Washington County, Oregon. The appellate court concluded that the trial court's answers prejudiced the defendant because they violated the

Washington State Constitution article IV, section 16, which commands that “judges shall not charge juries with respect to matters of fact.” Id.

Additionally, Ratliff is distinguished from this case by the fact that there the defendant raised the possibility of prejudice. Ratliff, 121 Wn. App. at 647. There defendant argued that the trial court’s answers possibly prejudiced defendant because they allowed the jury to “draw negative conclusions about [the defendant’s] arrest.” Id. The defendant in this case, on the other hand, does not suggest how he was possibly prejudiced by the court responding “no” when the jury asked whether it could review reports not admitted into evidence.

Here, unlike Ratliff, the court’s answers did not inform the jury on a substantive fact or point of law. The court’s one word response, “no,” did not convey any affirmative information and could not have prejudiced defendant. While the appropriate practice is to communicate with a deliberating jury only with all counsel present, the communication here was inconsequential and did not prejudice the defendant. Accordingly, the harmless error here is not reversible. See State v. Russell, 25 Wn. App. 933, 947-948, 611 P.2d 1320 (1980).

2. THE TRIAL COURT PROPERLY EXERCISED  
ITS DISCRETION WHEN IT DENIED  
DEFENDANT’S MOTION FOR NEW TRIAL.

A new trial is necessitated only when the defendant “has been so prejudiced that nothing short of a new trial can insure that the defendant will be treated fairly.” State v. Bourgeois, 133 Wn.2d 389, 407, 945 P.2d 1120 (1997) (citing State v. Russell, 125 Wn.2d 24, 85, 882 P.2d 747 (1994); see also State v. Lemieux, 75 Wn.2d 89, 91, 448 P.2d 943 (1968) (“Something more than a possibility of prejudice must be shown to warrant a new trial.”)).

The granting or denial of a new trial is a matter primarily within the discretion of the trial court, and the decision will not be disturbed unless there is a “clear abuse of discretion.” Bourgeois, 133 Wn.2d at 406 (citing State v. Bartholomew, 98 Wn.2d 173, 211, 654 P.2d 1170 (1982)). An abuse of discretion occurs only “when no reasonable judge would have reached the same conclusion.” Bourgeois, 133 Wn.2d at 406 (quoting Sofie v. Fibreboard Corp., 112 Wn.2d 636, 667, 771 P.2d 711, 780 P.2d 260 (1989)).

Here a new trial was not necessitated because, as argued above, defendant was not prejudiced by the court’s ex parte communication with the jury. The trial court accordingly denied defendants motion.

3. DEFENDANT RECEIVED  
CONSTITUTIONALLY EFFECTIVE  
ASSISTANCE OF COUNSEL THROUGHOUT  
THE PROCEEDINGS BELOW.

A defendant's right to counsel is guaranteed by both the United States Constitution and the Washington State Constitution. See U.S. Const. amend 6; Const. art. 1, § 22. Similarly, it is well established in Washington courts that a defendant has the right to effective assistance of counsel in any criminal proceeding. See, e.g. State v. Stewart, 113 Wn.2d 462, 467, 780 P.2d 844 (1989). If that assistance of counsel is ineffective, the defendant's right to counsel has been violated.

The test for ineffective assistance of counsel has two parts: (1) the defendant must show that defense counsel's conduct was deficient, i.e., that it fell below an objective standard of reasonableness; and (2) the defendant must show that such conduct caused actual prejudice, i.e., that there is a reasonable possibility that, but for the deficient conduct, the outcome of the proceedings would have been different. State v. McFarland, 127 Wn.2d 332, 334-35, 899 P.2d 1251 (1995) (citing State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987) (applying the two-prong test from Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984))).

With respect to the first prong of the test, scrutiny of counsel's performance is highly deferential, and there is a strong presumption of reasonableness. If counsel's conduct can be characterized as legitimate trial strategy or tactics, it cannot serve as a basis for a claim of ineffective assistance. State v. Mak, 105 Wn.2d 692, 731, 718 P.2d 407, cert. denied, 479 U. S. 995 (1986). As to the second prong, a defendant bears the burden of showing, based on the record developed in the trial court, that the result of the proceeding would have been different but for counsel's deficient representation. Thomas, 109 Wn.2d 222, 743 P.2d 816 at 225-26.

Here, defendant informed the court that he intended to file a motion for a new trial and requested the court to continue sentencing. RP 542-547. Defendant filed his motion, however, it was untimely. RP 558-559. Counsel informed the court that he was not able to file the motion because he was on vacation. RP 559. It cannot be argued that counsel's delay was legitimate trial strategy.

Defendant, however, fails to meet his burden under the second prong. Defendant cannot show, nor does he claim on appeal, that but for counsel's failure to timely file his motion that the outcome of motion hearing for a new trial would have been different. (Brief of Appellant at 11). Regardless of whether the motion was untimely, the court determined

that the court's handling of the jury questions did not influence the jury or prejudice the defendant, and therefore did not warrant retrial. RP 561, 556-558. Accordingly, counsel's delay did not prejudice defendant.

D. CONCLUSION.

For the reasons stated above, the State respectfully requests that the Court affirm defendant's convictions.

DATED: JANUARY 17, 2007.

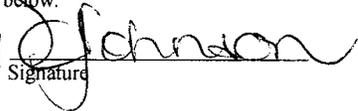
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Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

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