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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

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NO. 34546-3-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

AARON MICHAEL WESTBY, Appellant.

APPELLANT'S BRIEF

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PM 9/18/06

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CrR 7.5	10
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I. ASSIGNMENTS OF ERROR

1. The trial court erred by failing to inform the parties that the jury had questions.
2. The trial court erred by failing to consult with the parties on the answers to be submitted to the jury.
3. The trial court erred by answering the jury questions without having Westby and his counsel present.
4. The trial court erred by failing to put his answers to the jury in writing and in the record.
5. The trial court erred by denying Westby's motion for new trial.
6. The trial court erred by finding that the judge had complied with the court rules in the way he handled the jury questions.
7. Westby's trial counsel was ineffective for failing to bring a timely motion for new trial.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Was defense counsel ineffective for failing to make a timely motion for new trial based on the Judge's unconstitutional ex parte contact with the jury and violation of CrR 6.15(f)(1)?

III. STATEMENT OF THE CASE

This case arises from charges brought in connection with a police pursuit. On May 5, 2005, police pulled over the car driven by Aaron Westby as part of a criminal investigation involving Westby's passenger, Amber Farrington. (RP 83-85) When it became clear that Farrington was being arrested, Westby suddenly sped away. (RP 90)

With speeds reaching no higher than 45 m.p.h. in a 35 m.p.h. zone, the officer giving chase decided to break-off the pursuit, judging that the public safety would best be served by letting Westby go. (RP 93)

Another deputy, Deputy Carey, had responded to the call and saw Westby coming toward him with his headlights off. (RP 127-28) Coming through the intersection, Westby's vehicle veered into the opposite lanes and the deputy feared Westby might ram his car. (RP 130) Carey pulled his vehicle off the road and Westby veered back into his lane without hitting Carey's car. (RP 131)

Carey then began a fresh pursuit of Westby that eventually involved several police vehicles. During the course of this chase, Westby allegedly veered toward two other police vehicles that were in the oncoming lanes. (RP 262, 310, 341)

Eventually, police forced Westby's car off the road. (RP 142-43) Westby got out of his vehicle and began to run away. (RP 143) Several police officers jumped on Westby and subdued him with tasers, fists, and a K-9 police dog. (RP 144-45, 159)

Westby was charged with three counts of Assault in the Second Degree, having allegedly used his car as a deadly weapon against the officers; Assault in the Third Degree for allegedly biting an officer during the struggle; Attempting to Elude a Police Vehicle; and Resisting Arrest. (CP 6-8)

At trial, Westby admitted that he had attempted to elude the police vehicles because he knew his license was suspended and did not want to be arrested. (RP 375) Further, Westby admitted that he was guilty of resisting arrest. (RP 523) However, Westby denied having intentionally assaulted the officers with his car—Westby testified that he might have swerved into oncoming lanes during the chase, but only to avoid hitting other vehicles, not to hit police vehicles. (RP 377, 379, 383) Further, Westby said that while he did initially run away from his car, he gave up to police when the K-9 was launched, but police assaulted him anyway. (RP 384-87) He further denied intentionally biting Deputy Butts. (RP 388)

The case was submitted to the jury for consideration. During deliberation, the jury submitted at least two jury questions (two on the record, the others not). (RP 535) Without informing either of the parties, and without putting his answers in writing, the judge told the jury no to the first question and did not answer the others. (RP 535, CP 9, 10) The judge did not inform the parties until they reached court to hear the jury's verdict. (RP 535)

The jury found Westby guilty on all charges. (CP 42-47) Following the verdict, Westby made a motion for new trial based on the judge's failure to tell him about the jury's questions and give him a meaningful opportunity to suggest a response. (RP 552-53) The judge denied the motion, deeming it to be untimely and ruling that there was no error in the way he handled the questions. (RP 558-59, 561)

Westby was sentenced in the high end of the standard range. (RP 570) This appeal timely follows.

IV. ARGUMENT

ISSUE 1: DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO MAKE A TIMELY MOTION FOR NEW TRIAL BASED ON THE JUDGE'S UNCONSTITUTIONAL EX PARTE CONTACT WITH THE JURY AND VIOLATION OF CRR 6.15(F)(1).

A. Procedural Facts

On December 16, 2005, at 9 a.m., the jury began deliberations in this case. According to the Clerk's minute entries, the jury presented questions to the court at 10:43 a.m. and 1:30 p.m. (CP 48, Supp. CP) The questions were: "Can we look at police reports from Carey, Devaney, Syler," (CP 9), and: "Does instruction 10 only apply to the incident on 112th and park. Or does it imply the whole chase." (CP 10). According to the minutes, the jury reached a verdict at 2:58 p.m. and the parties arrived at 3:30 p.m. to take the verdict. (CP 48-49, Supp. CP) Before bringing the jury out, the Judge stated for the record the following:

THE COURT: The jury has a verdict, from what I understand. Let's get the jury in here.

Excuse me. On the record, they did ask for the police reports and we told them no. They asked for something else and I didn't answer them. They had a couple of questions that weren't on the record.

Do you want to read them?

MR. McNEISH: Yes.

(RP 535) After counsel read the questions, the jury was brought out and the verdict was read. (RP 535) There is no written record of the Judge's answer or answers to the jury and only two jury questions are contained in the record, although the Judge's statement makes it seem there may have been more questions.

On January 6, 2006, Westby's counsel informed the court that his client had filed a motion for new trial. (RP 543) Although Westby's pro se motion had apparently been lost, Westby's counsel asked the court for time to brief the motion for new trial and secure the record from the day of the verdict. (RP 543) Defense counsel also requested that the court grant an extension to the 10 day time (from the date of the verdict) to file this motion. (RP 543) The court granted a continuance for sentencing, set briefing for three weeks out, and set a hearing date for February 3. (RP 546)

At the motion hearing, the Judge ruled that the motion was denied, "for all the reasons outlined by the State," which were: (1) it was untimely, (2) the court complied with the court rules, and (3) Westby had not suggested how the court should have answered. (RP 561, 558-59)

B. Did the court violate CrR 6.15(f)(1)?

The Judge violated CrR 6.15(f)(1) in the way he handled the jury questions. CrR 6.15(f) states:

The jury shall be instructed that any question it wishes to ask the court about the instructions or evidence shall 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 on the appropriate response. Written questions from the jury, the court's 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.

The trial court violated CrR 6.15(f)(1) when it (1) failed to notify the parties prior to the jury reaching a verdict, (2) failed to give the parties a meaningful opportunity comment on the appropriate response, and (3) failed to put it's responses in writing and in the record.

In *State v. Ratliff*, 121 Wn. App. 642, 90 P.3d 79 (Div. II, 2004), the judge took the jury's questions outside the presence of the parties and without notifying them. The State in that case conceded that the trial court had erred. 121 Wn. App. at 646. The court held that the judge had violated former CrR 6.15(f)(1) and the defendant's right to be present at all stages of the proceedings when he failed to notify the parties of the jury's questions. *Id.* At 646. Both of these conclusions apply equally here.

Just as in *Ratliff*, the judge here violated the rule. The jury asked for clarification of the law and the record. These questions should have been discussed between the court and the parties and a response agreed upon. At the point the judge brought this matter to the attention of the parties, it was too late because the jury had already reached its verdict. The rule clearly requires the judge to notify the parties and give them an opportunity to comment. Giving an "opportunity" hours after the questions and after the answer has been given (or not given) and the jury has already reached a verdict is clearly not the "opportunity" contemplated

by the rule. Further, the judge failed to respond in open court or in writing, which is conduct clearly prohibited by the rule. Thus, the court was in clear violation of CrR 6.15(f)(1).

C. Did the Judge violate Westby's constitutional right to be present at all proceedings?

The Judge impermissibly communicated ex parte with the jury in violation of Westby's constitutional right to appear and defend himself in person and through counsel at all stages of the proceeding. The core of the constitutional right to be present is the right to be present when evidence is being presented. *United States v. Gagnon*, 470 U.S. 522, 526, 105 S.Ct. 1482, 84 L.Ed.2d 486 (1985) (per curiam). Beyond that, the defendant has a "right to be present at a proceeding 'whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge. . . .'" *Gagnon*, 470 U.S. at 526, 105 S.Ct. at 1484 (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 54 S.Ct. 330, 78 L.Ed. 674, 90 A.L.R. 575 (1934)). Further, any communication by the judge to the jury during deliberations without the presence of the accused and the accused's counsel is presumed to be prejudicial. *State v. Waite*, 135 Wash. 667, 238 P. 617 (1925); *State v. Shutzler*, 82 Wash. 365, 144 P. 284 (1914); *State v. Wroth*, 15 Wash. 621, 47 P. 106 (1896); *Linbeck v. State*, 1 Wash. 336, 25 P. 452 (1890). Because this is a

constitutional error, the court must reverse unless the State demonstrates beyond a reasonable doubt that the outcome would have been the same absent the errors. *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985); *State v. Ratliff*, 121 Wn. App. 642, 646, 90 P.3d 79 (2004).

Without a clear record of all of the jury's questions and no record of the judge's response(s), it is all the more clear that this should not have been done without the presence of the defendant. We cannot now say whether the agreed response would have differed from the judge's response. We cannot even say with certainty what the judge's response to the jury was. Therefore, the State cannot show beyond a reasonable doubt that there was no prejudice from this error.

C. Should the denial of the motion for new trial be reversed?

In general, a ruling on motion for new trial will not be reversed absent a showing of abuse of discretion. *State v. Balisok*, 123 Wn.2d 114, 117, 866 P.2d 631 (1994). In this case, the Judge erred in finding that his ex parte communication with the jurors over their questions complied with the court rules and erred in denying the motion for new trial. Further, he erred in finding that it was the defense responsibility to show prejudice when (1) the judge's actions in dealing with the jury off the record kept the defense from determining if the judge's answers were in compliance with the law, and (2) as a constitutional error, it was the State's burden to

show that the defense was NOT prejudiced. The denial on the merits was an abuse of discretion.

D. Was counsel ineffective for failing to bring the motion for new trial in a timely manner?

The court also denied the motion based on it having been untimely filed. CrR 7.5(b) states: “A motion for new trial must be served and filed within 10 days after the verdict or decision. The court on application of the defendant or on its own motion may in its discretion extend the time.” The tenth day after the verdict was December 26, 2005. January 6, 2006, was the day defense counsel first made its motion and the written memorandum was filed on January 20.

A criminal defendant’s constitutional right to counsel includes the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The fundamental question in judging any claim of ineffective assistance of counsel is “whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” *Strickland*, 466 U.S. at 686. To prevail on such a claim, the defendant must show both ineffective representation and resulting prejudice. *State v. Mak*, 105 Wash.2d 692, 731, 718 P.2d 407, cert. denied, 479 U.S. 995 (1986).

The first element is met by showing that counsel's conduct fell below an objective standard of reasonableness. *Strickland*, 466 U.S. at 687-88. Matters that go to trial strategy or tactics do not constitute deficient performance. *State v. Garrett*, 124 Wash.2d 504, 520, 881 P.2d 185 (1994); *Mak*, 105 Wash.2d 692.

The second element of an ineffective assistance claim is whether there is a reasonable probability that, but for counsel's unprofessional errors, the outcome of the proceeding would have been different. *Strickland*, 466 U.S. at 694.

In this case, the Judge clearly violated the court rules and Westby's constitutional rights by taking the jury's questions off the record and answering at least one without the presence of the parties. There is no strategic reason for the failure to file a timely motion for new trial on these grounds. By failing to file in a timely manner, defense counsel prejudiced Westby's ability to challenge his conviction on that basis and the untimely nature of the motion was one of the grounds for its denial.

Because counsel's performance in this area fell below an objective standard of reasonableness and prejudiced Westby's

motion for new trial, it should be deemed ineffective assistance.

Therefore, the case should be remanded for a new trial, or in the alternative, a new argument on the motion for a new trial before a new judge and with new counsel.

V. CONCLUSION

For the reasons stated above, Westby asks that the court reverse his conviction and remand for a new trial, or in the alternative that the court's denial of his motion for new trial be reversed and the case remanded for new argument and a decision on the merits.

DATED: September 18th, 2006.

By: Rebecca W. Bouchey
Rebecca Wold Bouchey #26081
Attorney for Appellant

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STATE OF WASHINGTON

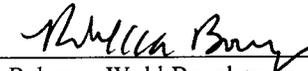
CERTIFICATE OF SERVICE

I certify that on the 18th day of September 2006, I caused a true and correct copy of this FILED

Appellant's Brief to be served on the following via prepaid first class mail:

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ATTACHMENT 1:
MEMORANDUM OF JOURNAL ENTRY
(SUPPLEMENTAL CLERK'S PAPERS)

IN THE SUPERIOR COURT, PIERCE COUNTY, WASHINGTON

STATE OF WASHINGTON

Cause Number: 05-1-02210-0

vs.

MEMORANDUM OF JOURNAL ENTRY

WESTBY, AARON MICHAEL

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Judge: SERGIO ARMIJO

MINUTES OF PROCEEDING

rest at this time. Jurors excused for lunch recess. **11:17 AM** Court takes short recess. **11:33 AM** Court resumes. Judge and counsel review jury instructions. **12:37 PM** Court takes lunch recess. **01:49 PM** Court resumes. Judge and counsel colloquy in regards to jury instructions. **02:18 PM** Jurors seated. Judge reads jury instructions to jurors. **02:38 PM** Closing arguments by Atty. Schacht. **03:19 PM** Court takes short recess. **03:32 PM** Court resumes. Jurors seated. Closing arguments by Atty. McNeish. Judge and counsel sign Stipulation and Order For Return of Exhibits and Order Allowing Jury To Separate. **04:04 PM** Jurors return to jury room. Judge and counsel colloquy in regards to excluded information that should not of been heard by jury by Atty. McNeish prior objections. **04:09 PM** Jurors seated. Atty. McNeish continues with closing arguments. **04:10 PM** Closing arguments by Atty. Schacht. **04:18 PM** Juror #13 is excused as alternate juror. **04:20 PM** Jurors excused for the day. To return tomorrow at 8:45 AM to start deliberations. **04:22 PM** Court adjourns.

End Date/Time: 12/16/05 10:34 AM

Judicial Assistant: Lupe Torres

Court Reporter: CARLA HIGGINS

Start Date/Time: 12/16/05 10:34 AM

~~December 16, 2005 09:00 AM~~ Jurors arrive to start deliberations. **10:30 AM** Jurors take short recess. ~~10:43 AM~~ Jurors return from short recess. Continue deliberations. ~~Juror #2 presents question to court~~ **11:56 AM** Jurors take lunch recess. ~~01:30 PM~~ Juror #2 presents question to court. Jurors continue to deliberate on case. ~~02:50 PM~~ ~~verdict~~ Parties called to return to court room. ~~03:35 PM~~ Parties arrive **03:40 PM** Jurors seated. Judge reads verdict forms. **03:45 PM** Jurors excused from this case. **03:47 PM** Judge signs Scheduling Order for Sentencing for 1-6-6 @ 1:30 PM and Order Establishing Conditions Pending Sentencing paperwork. Copies of Jurors questions (2) by Juror #2 given to both counsel per request of Atty. McNeish. **03:50 PM** Court adjourns.

End Date/Time:

JUDGE SERGIO ARMIJO Year 2005

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