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JAN 21 2014

King County Prosecutor  
Appellate Unit

70303-0

NO. 70303-0-1

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

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STATE OF WASHINGTON,

Respondent,

v.

DANIEL BARTELS,

Appellant.

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

The Honorable Elizabeth Burns, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The trial court denied appellant a fair trial by refusing to repeat stipulated evidence in response to the jury's inquiry about what the stipulation stated.

Issue Pertaining to Assignment of Error

Before trial, the parties stipulated to language informing the jury that appellant's alleged accomplices had previously been convicted of first degree robbery as a result of their involvement in the instant incident. The trial court read the stipulation before opening statements and before it gave the jury notebooks to record evidence. The stipulated language was not otherwise of record. During deliberations, the jury asked to hear the stipulation again. Defense counsel requested the evidence be provided to the jury. The trial court declined, noting the stipulation was not admitted as an exhibit and finding the evidence was not "imperative" to the jury's deliberations. 11RP<sup>1</sup> 8. Where the inquiry suggested jurors had forgotten the stipulated evidence and the evidence went to the defense theory of the case, did the trial court err by not repeating the stipulation?

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<sup>1</sup> This brief refers to the verbatim report of proceedings 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.

B. STATEMENT OF THE CASE

1. Trial Testimony

In December 2011, appellant Daniel Bartles arranged to meet Keith Blaisdell to purchase marijuana. 5RP 47-48. Blaisdell was licensed to sell medical marijuana and had sold to Bartles before. 5RP 24-28, 115, 118; 9RP 65, 68-70, 99.

Blaisdell agreed to sell Bartles one pound of marijuana. 5RP 29-30; 9RP 72, 99-100. Bartles and Blaisdell met in the parking lot of Bartles' apartment building. 5RP 47-48; 9RP 68. Blaisdell was carrying a handgun and \$1,300 in cash. 5RP 45-46, 52-53, 133, 154-56. Bartles carried \$1,200 in cash. 9RP 72, 99.

Bartles got into the passenger seat of Blaisdell's parked truck. 5RP 51, 140; 9RP 81. Blaisdell had one and a half pounds of marijuana in the truck. 5RP 44, 136. Blaisdell also had small "sample" bags of marijuana. 5RP 44, 137, 158. Blaisdell bent down to show Bartles a "sample" bag. 5RP 53; 9RP 81, 101.

At the same time, a man came to the passenger side of the truck. He pointed a gun at the window. 5RP 53-55. Bartles' did not seem surprised and opened the truck door. 5RP 55, 77. Blaisdell tried to drive away. A second man opened Blaisdell's door and took the keys out of the ignition. The man threatened to shoot and kill Blaisdell if he moved. 5RP

53-56, 60-61, 143. The man then reached into Blaisdell's pockets. 5RP 57-58, 143.

Bartles asked Blaisdell for his cell phone and began reaching for marijuana in the back of the truck. 5RP 60-61, 69. Blaisdell did not know where his cell phone was. 5RP 61, 69. The man with the gun became angry. 5RP 61-62, 144. Blaisdell pushed the gun away from his body when he noticed the gun cylinder rotating in preparation for firing. 5RP 61-62, 144-45. Blaisdell heard a bang, became dazed, and then noticed he was bleeding. 5RP 63, 145. Blaisdell fired his own gun as he fell out of the truck. 5RP 63-68, 146-47. He fired two more shots once outside the truck. Blaisdell walked toward the apartments to ask someone to call 911. 5RP 66-68, 147-49.

Apartment maintenance supervisor John Dunn heard a loud bang and went outside. He heard two more gunshots. 3RP 52-53, 60-61, 86-87. Dunn saw Blaisdell bleeding from the right side of his head. 3RP 64. Blaisdell "stagger[ed]" toward the apartment office. 3RP 63-64. Blaisdell said he had been robbed and shot. 3RP 64, 89, 91. Dunn saw two African American men "kneeling down trying to like help each other up," near the parking lot. 3RP 69, 73, 89. The men ran when they saw Dunn. 3RP 73. Two bags of marijuana fell out of one man's pocket as he ran. 3RP 78, 89.

Police stopped a white Lexus about a mile from the apartment. 3RP 36; 9RP 88, 90-91. Eric Gilliam was driving. 3RP 41; 9RP 91. Emanuel Brown was in the back passenger seat. 3RP 41. Bartles was in the front passenger seat. Bartles had been shot in the stomach. 3RP 38; 9RP 85, 115. Gilliam told police they were robbed while selling marijuana. 3RP 43. One bag of marijuana and \$1,081 were found in Bartles' clothing. 3RP 38; 4RP 43-44, 52, 146-47, 153; 7RP 79, 82, 88.

When police arrived at the apartment Blaisdell was holding a towel to his head and talking on a cell phone. 4RP 18-19, 32, 40-41. Blaisdell said he was sitting in his truck with another person when someone shot him. 4RP 20. Paramedics removed a loaded handgun from Blaisdell's hip. 4RP 46-47, 58-60. Blaisdell was taken to the hospital for a gunshot head wound. 6RP 11-12. The bullet did not penetrate Blaisdell's scalp. 6RP 15-17, 22.

Detective Paul Young interviewed Blaisdell a short time later. 4RP 125, 144-45. Blaisdell identified Bartles in a photo montage as the person buying marijuana. 5RP 74-75, 142; 6RP 110-12; 7RP 13-14. Blaisdell's girlfriend gave Young a copy of Bartles' medical marijuana authorization. 4RP 122, 130-34; 7RP 71. Blaisdell identified Gilliam as the person holding the handgun. 5RP 74-75, 142; 6RP 112; 7RP 13. Blaisdell could not identify Brown. 5RP 74; 6RP 107-08.

Police searched the Lexus as well as a Chevy Caprice registered in Gilliam's name. 6RP 100, 114; 7RP 15. Bloody clothing, marijuana, identification belonging to Brown, and Blaisdell's wallet were found in the Lexus. 7RP 19, 22-40. Three bags of marijuana, identification belonging to Gilliam, and blood were found in the Caprice. 4RP 96, 99-100; 6RP 119-24, 127-33. No guns were found in either car. Testing on the wallet, blood, and clothing was consistent with Brown and Gilliam's DNA. 8RP 32-33, 35-36, 50, 53-54. No DNA testing was done as to Bartles. 1RP 54.

Police recovered several text messages sent between Bartles' Gilliam and Brown's telephone numbers. 9RP 15-24. Outgoing messages from Bartles' telephone number to Gilliam and Brown read: "Bro dude jus hit me up," "He already hit me, bro...I'm not sure when to do it," and "He's conin 1130." 9RP 32, 35, 38. Messages sent to Bartles' telephone number read: "Im ready when u are hit me we have to get him today," "Lets do it right now people get jacked in daylight all the time," and "we should hit him early." 9RP 32-33, 35.

Based on this evidence, Bartles was charged with one count of first degree robbery with a firearm. CP 10-11, 14-15. Before Bartles' trial, Gilliam and Brown each pleaded guilty to first degree robbery. 2RP 5-6; 3RP 6-9, 15. Gilliam and Brown did not testify at Bartles' trial.

Bartles' testimony differed from Blaisdell's account of what happened the night of the incident. Bartles intended to negotiate the purchase price of a pound of marijuana with Blaisdell. 9RP 99-100. Bartles asked Gilliam and Brown to stand visibly near the truck during the purchase as a "kind of security." 9RP 73-77, 98. Bartles did not tell Gilliam and Brown to rob Blaisdell. 9RP 80, 95, 102. Bartles did not tell Gilliam and Brown to bring weapons and denied seeing either with a gun. 9RP 77, 95.

Bartles did not see Brown or Gilliam when he got into Blaisdell's truck but he assumed they were close by. 9RP 81. Bartles heard a bang on the door while Blaisdell showed him marijuana samples. 9RP 81-82, 101. Gilliam opened the door and demanded money and marijuana from Blaisdell. 9RP 83. Bartles did not see a gun in Gilliam's hand. 9RP 83, 102. Brown opened the driver side door. 9RP 84, 103. Bartles did not see Brown or Gilliam take anything from Blaisdell. 9RP 84, 92, 103-04.

At some point Bartles was shot in the stomach. 9RP 85-86, 115. Bartles never saw Blaisdell take out a gun. 9RP 77, 89. Bartles got out of the truck and called 911. 9RP 87-88. Bartles got into the Lexus after Brown and Gilliam called him. 9RP 88, 90-91. Gilliam was driving. 9RP 91.

Bartles acknowledged having possession of two sample marijuana bags when he left the truck. 9RP 88-90, 101. He did not remember whether he paid Blaisdell for the bags. 9RP 88-89, 101. Bartles did not intend to take the bags without paying. 9RP 90. Bartles did not take any money from Blaisdell. 9RP 89. Bartles did not know how Blaisdell was injured. 9RP 102.

After hearing the above, a King County jury found Bartles guilty as charged. CP 16; 11RP 15-18; 12RP 3. The jury also found Bartles was armed with a firearm during the robbery. CP 17; 11RP 15. The trial court sentenced Bartles to a standard range prison sentence of 31 months. The court also imposed a consecutive 60-month firearm enhancement. CP 60-69; 12RP 14. Bartles timely appeals. CP 70-71.

## 2. Stipulated Evidence

Before trial, the parties agreed to inform the jury that Gilliam and Brown had previously been convicted of first degree robbery as a result of their involvement in the instant incident. 2RP 5-6; 3RP 6-9. The parties agreed the trial court should read the stipulation before opening statements. 3RP 6.

At the end of the opening instructions, the court informed the jury as follows: "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.

After eight days of testimony, the jury began deliberations. 10RP 83-85. Shortly thereafter, the jury sent a written inquiry asking the trial court to “[p]lease restate the opening statement about Mr. Gilliam and Mr. Brown indicating action already enforced regarding both of them.” CP 18; 11RP 3-4.

The prosecutor argued it would be improper to repeat the stipulation because it was read before opening statements and was not presented as evidence. The prosecutor maintained the jury had all the information needed to determine whether Bartles was an accomplice to conduct that amounted to first degree robbery. 11RP 4, 7. The prosecutor also contended repeating the stipulation would amount to a repetition of testimony because the stipulation was never marked as an exhibit and offered into evidence. 11RP 5, 7.

Defense counsel requested the stipulation be repeated because the jury may have forgotten the evidence as it “was the first little piece that they received[.]” 11RP 6. Defense counsel noted the stipulated evidence was “imperative in the case itself, it’s imperative for the presentation of the case and for the jury’s understanding of what was presented to them.” 11RP 6.

The court declined to repeat the stipulation, noting it was not marked as an exhibit and “entered into evidence.” 11RP 8-9. The court further explained, “I’m not convinced that it’s [stipulation] 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. Bartles.” 11RP 8.

After further discussion, the court responded to the jury’s inquiry by telling them to refer to jury instructions one and 17. CP 19; 11RP 9-13. Instruction one stated in relevant part, “The evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses, stipulations and the exhibits that I have admitted during the trial.” CP 21; See also CP 40-41.

C. ARGUMENT

THE TRIAL COURT DENIED BARTLES A FAIR TRIAL BY REFUSING TO REREAD STIPULATED EVIDENCE IN RESPONSE TO THE JURY'S REQUEST.

A criminal defendant has a constitutional right to a fair and impartial jury trial. U.S. Const. amend. V, VI; Wash. Const. art. I, §§ 3, 22. The failure to provide the defendant with a fair trial violates minimal standards of due process. State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984); State v. Jackson, 75 Wn. App. 537, 543, 879 P.2d 307 (1994), rev. denied, 126 Wn.2d 1003 (1995).

a. Refusal to Repeat the Stipulated Evidence was Error.

CrR 6.15 authorizes trial courts to grant a jury's request to rehear or replay evidence.<sup>2</sup>

A trial court's ruling on a jury's request is reviewed for an abuse of discretion. United States v. Delgado, 56 F.3d 1357, 1370 (11<sup>th</sup> Cir. 1995), cert. denied, 516 U.S. 954 (1995). A trial court abuses its discretion when it exercises it in a manifestly unreasonable manner or bases it on untenable grounds or reasons. State v. Morgensen, 148 Wn. App. 81, 86, 197 P.3d 715 (2008), rev. denied, 166 Wn.2d 1007 (2009). A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard. In re Marriage of Littlefield, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997) (citing State v. Rundquist, 79 Wn. App. 786, 793, 905 P.2d 922 (1995), rev. denied, 129 Wn.2d 1003 (1996)). "The range of discretionary choices is a question of law and the judge abuses his or her discretion if the discretionary decision

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<sup>2</sup> CrR 6.15(f)(1) provides:

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. Any additional instruction upon any point of law shall be given in writing.

is contrary to law.” State v. Neal, 144 Wn.2d 600, 609, 30 P.3d 1255 (2001).

An essential element of a fair trial is a jury capable of deciding the case based on the evidence before it. State v. Momah, 167 Wn.2d 140, 152, 217 P.3d 321 (2009). A defendant is denied due process when a juror cannot hear all the relevant evidence. State v. Turner, 186 Wis.2d 277, 284, 521 N.W.2d 148 (Wis. App. 1994). “A juror who has not heard all the evidence in the case is grossly unqualified to render a verdict.” People v. Simpkins, 16 A.D.3d 601, 792 N.Y.S.2d 170 (N.Y. App. Div. 2005).

Here, the trial court abused its discretion by denying the jury’s request to have stipulated evidence regarding Gilliam and Brown’s prior convictions repeated. Because cases discussing repetition of evidence are fact specific, there is no case factually identical to Bartles’ case. Cases that address the trial court’s proper repetition of other forms of trial evidence are, however, instructive.

In State v. Frazier, the court held the trial court did not abuse its discretion by twice allowing the jury to replay the defendant’s taped statement to a police officer during its deliberations. 99 Wn.2d 180, 189-91, 661 P.2d 126 (1983). In reaching its conclusion, the court cited several out-of-state cases for the proposition that taped confessions are simply modern substitutes for statements written in longhand. Frazier, 99 Wn.2d at 190.

See, e.g., State v. Gensmer, 235 Minn. 72, 51 N.W.2d 680 (1951), cert. denied, 344 U.S. 824, 73 S. Ct. 24, 97 L. Ed. 642 (1952); People v. Walker, 150 Cal. App. 2d 594, 310 P.2d 110 (1957). Frazier distinguished between written confessions and evidence such as depositions which “are said to be too susceptible of undue emphasis beyond the scope of ordinary testimony[.]” Frazier, 99 Wn.2d at 189 (citing People v. Caldwell, 39 Ill. 2d 346, 236 N.E.2d 706 (1968)).

In State v. Castellanos, the issue was whether the trial court erred by permitting deliberating jurors’ unlimited access to recordings of drug purchases between Castellanos and a wired informant. 132 Wn.2d 94, 97-102, 935 P.2d 1353 (1997). Relying primarily on Frazier, and the nature of the evidence, the court upheld the trial court’s decision to permit unlimited access to the tapes by giving the jury a playback machine. Castellanos, 132 Wn.2d at 98-100. The court distinguished between playback of recordings of criminal acts and testimonial exhibits, the latter of which are not permitted because “such documents would, in effect, ‘act as a speaking, continuous witness[.]’” Castellanos, 132 Wn.2d at 101 (quoting Pino v. State, 849 P.2d 716, 719 (Wyo. 1993)). Concluding the recordings at issue were not testimonial but rather recordings of the criminal act itself, the court found submitting the recordings to the jury was not an abuse of discretion. Castellanos, 132 Wn.2d at 102.

Finally, in Morgensen, the Court of Appeals concluded the trial court properly granted a jury's mid-deliberation request to review testimony of two witnesses by playing the audiotape transcript of their testimony. 148 Wn. App. at 90. The Court reasoned that whether a jury should rehear evidence is dependent on the particular facts and circumstances of the case. Morgensen, 148 Wn. App. at 87 (citing State v. Koontz, 145 Wn.2d 650, 41 P.3d 475 (2002)). The Court noted that whether review of witness testimony unduly emphasizes any portion of the testimony circumscribes the trial court's discretion to permit such review. Morgensen, 148 Wn. App. at 87.

The Court reasoned the audiotape was a note-taking device, akin to that permitted under CrR 6.8.<sup>3</sup> Morgensen, 148 Wn. App. at 89. The Court concluded the right to a fair and impartial jury required the trial court to balance the need to provide the jury with relevant testimony to answer a "specific inquiry" against the danger of allowing a witness to testify a second time. Morgensen, 148 Wn. App. at 88-89. The Court concluded that given

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<sup>3</sup> CrR 6.8 provides: "In all cases, jurors shall be allowed to take written notes regarding the evidence presented to them and keep these notes with them during their deliberation. The court may allow jurors to keep these notes with them in the jury room during recesses, in which case jurors may review their own notes but may not share or discuss the notes with other jurors until they begin deliberating. Such notes should be treated as confidential between the jurors making them and their fellow jurors, and shall be destroyed immediately after the verdict is rendered."

the short trial, playing the entire testimony of both witnesses eliminated any undue emphasis. Morgensen, 148 Wn. App. at 89-90.

The legal principle established in these cases applies here. There was a legitimate reason the jury wanted the stipulated evidence repeated. The stipulation was read before opening statements and before the jury received notebooks to record evidence. 3RP 12-15. The jury was thus unable to record the stipulation or to place it in context of the facts of the case. 3RP 7; 11RP 6. Indeed, the evidence of Gilliam's and Brown's convictions was the only evidence provided to the jury without aid of a recording device.

Unlike the cases cited above, the trial court failed to balance the need to answer the jury's "specific inquiry" about the stipulation against the danger of allowing the evidence to be repeated. In fact, the trial court expressed no concerns that repeating the stipulation would be unfairly prejudicial or permit the jurors to give undue weight to that evidence. Rather, the trial court refused because the stipulation was not an exhibit and because it reasoned the evidence was not "imperative" to the jury's deliberations and not the "crux of the case[.]" 11RP 8. But the stipulation was evidence the jury could properly consider. See CP 21 ("The evidence that you are to consider during deliberations consists of the testimony that you have heard from the witnesses, *stipulations* and the exhibits that I have admitted during the trial.") (emphasis added). The trial court's ruling

deprived the jury of the opportunity to decide the case based on all the evidence. As a result, Bartles was denied due process. Momah, 167 Wn.2d at 152. This Court should find the trial court abused its discretion by not repeating the stipulated evidence.

b. The Error Was Not Harmless.

The trial court's error was not harmless given the nature of the evidence and the defense theory of the case. An evidentiary error requires reversal if, within reasonable probability, the error materially affected the verdict. State v. Everybodytalksabout, 145 Wn.2d 456, 468-69, 39 P.3d 294 (2002).

The constitution guarantees criminal defendants the right to present a defense, which is itself a fundamental element of due process. Chambers v. Mississippi, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973); Washington v. Texas, 388 U.S. 14, 19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967); State v. Burri, 87 Wn.2d 175, 181, 550 P.2d 507 (1976).

The prosecutor acknowledged the main issue at trial was whether Bartels was guilty as an accomplice to Gilliam and Brown's robbery of Blaisdell. 11RP 4, 7. The defense theory was that Bartels was not involved in the robbery and therefore not liable for the actions of Gilliam and Brown. 1RP 11, 14; 9RP 87, 95, 102; 10RP 62. The evidence of Gilliam's and

Brown's convictions supported this theory by implying the only guilty parties had already been held accountable.

The trial court implicitly acknowledged the stipulation was evidence the jury could consider when it instructed the jury to reread instruction one. 11RP 12. The court's refusal to repeat the stipulation unfairly undermined the defense theory because it suggested that although proper evidence, the stipulation was not relevant to a determination of Bartels's guilt or innocence. This abuse of discretion affected the fact-finding process and undermined Bartels' defense. Reversal of the conviction is required.

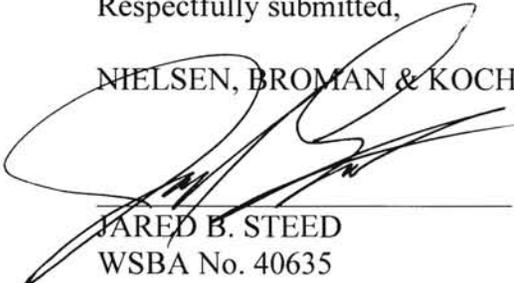
D. CONCLUSION

For the reasons discussed above, this Court should reverse Bartels' conviction and remand for a new trial

DATED this 21<sup>st</sup> day of January, 2014

Respectfully submitted,

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WSBA No. 40635

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE**

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STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
vs.	)	COA NO. 70303-0-1
	)	
DANIEL BARTELS,	)	
	)	
Appellant.	)	

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**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 21<sup>ST</sup> DAY OF JANUARY, 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] DANIEL BARTELS  
DOC NO. 366665  
COYOTE RIDGE CORRECTIONS CENTER  
P.O. BOX 769  
CONNELL, WA 99326

**SIGNED** IN SEATTLE WASHINGTON, THIS 21<sup>ST</sup> DAY OF JANUARY, 2014.

X *Patrick Mayovsky*

2014 JAN 21 PM 4:25  
COURT OF APPEALS  
STATE OF WASHINGTON