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SUPREME COURT NO. _____
COA NO. 75975-2-I

IN THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JEREMY BLAKELY,

Petitioner.

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

The Honorable Andrea Darvas, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Jeremy Blakely asks this Court to accept review of the Court of Appeals decision designated in Part B of this petition.

B. COURT OF APPEALS DECISION

Blakely requests review of the decision in State v. Jeremy Blakely, Court of Appeals No. 75975-2-I (slip op. filed May 14, 2018), attached as appendix A.

C. ISSUE PRESENTED FOR REVIEW

Whether reversal is required because the trial court violated petitioner's constitutional right to a unanimous jury verdict in failing to instruct the reconstituted jury to disregard prior deliberations and the error cannot be deemed harmless beyond a reasonable doubt?

D. STATEMENT OF THE CASE

The State charged Jeremy Blakely with premeditated first degree murder while armed with a firearm and first degree unlawful possession of a firearm. CP 21-22. The case proceeded to a jury trial. After both sides conducted closing argument, jurors 3 and 9 were chosen as alternates. RP[1] 1742. The court told jurors 3 and 9 "you won't be deliberating, at least not

[1] The verbatim report of proceedings is referenced as follows: RP - 10 consecutively paginated volumes consisting of 8/11/16, 8/15/16, 8/16/16, 8/17/16, 8/18/16, 8/22/16, 8/23/16, 8/24/16, 8/25/16, 8/29/16, 8/30/16, 8/31/16, 9/6/16, 9/7/16, 9/8/16, 9/9/16, 10/6/16, 10/28/16.

right now." RP 1742. The court admonished the alternate jurors not to communicate about the case with anyone and not to allow themselves to be exposed to any case information because, if a juror became ill or had a family emergency before the jury reached a verdict, "then we will be calling you in, first Juror Number 9, then Juror Number 3, and requesting you to deliberate as part of the jury and have the jury with one or both of you start the deliberations all over again." RP 1742.

The court then addressed "the jurors who are deliberating in this case. So, let me say a word or two about deliberations. We not only are allowing you to talk about the case now, we are strongly encouraging you all to talk about the case. And you will be able to take your Jury Instructions, as well as your notes, back into the jury room with you." RP 1742-43. The court told the jurors they would observe the court's schedule during deliberations. RP 1743. "It's now about ten minutes to 4:00, so you probably won't get too much done today because we're going to ask you to suspend your deliberations at 4:00 and then come back tomorrow morning and resume deliberations." RP 1743. The court explained why jurors were to observe court hours during their deliberations and told jurors the amount of time taken for deliberations was completely up to them. RP 1744. The clerk's minutes show the jury retired to begin

deliberations at 3:53 pm. CP 117. At 4:00, the jury was excused, "to return to resume their deliberations at 9:00 am on 9/9/16." CP 117.

At 9 a.m. the following day, the jury returned to resume deliberations. CP 118. Juror 5 notified the court that she needed to leave due to a family emergency. CP 118. According to the clerk's minutes, Juror 9 was contacted and, upon arrival, the jury began deliberations "anew." CP 118. That afternoon, the reconstituted jury found Blakely guilty of second degree felony murder and unlawful firearm possession. CP 72, 75; RP 1756-60.

A week later, the State requested a declaration from the bailiff to ascertain whether the jury followed constitutionally required procedures after one of the original jurors was excused and replaced by the alternate. CP 103-22. According to the State, the court did not formally instruct the reconstituted jury on the record that it needed to disregard all previous deliberations and begin the deliberative process again. CP 105. The State recognized it faced a significant challenge in establishing this constitutional error was harmless beyond a reasonable doubt. CP 105. The State provided a declaration from the presiding juror, which stated the bailiff told the reconstituted jury on September 9 to start deliberations over again and disregard anything they had previously talked about prior to the alternate joining them. CP 121-22. The State wanted to verify the

presiding juror's declaration through the bailiff's declaration "with the specific goal of determining whether the Defendant's right to a unanimous jury verdict was fully protected despite the absence of a formal instruction pursuant to CrR 6.5 after the jury was reconstituted." CP 107.

The court held a hearing on the matter. RP 1766-82. The State reiterated that "it is an error of constitutional magnitude for the Court to fail to instruct a newly reconstituted jury on the record that they must disregard deliberations and begin anew. That was not done in this case." RP 1766-67. The court responded, "It wasn't done because it was my understanding that the jury had not commenced deliberations at the time that the alternate juror was called in to join them." RP 1767. The State wanted to make a record as to what happened to avoid reversal on appeal. RP 1767. The State noted if the 12 jurors were "behind the closed door" without the alternates and bailiff, "even if it's for one minute, I think that we are to presume that they began deliberations." RP 1769.

At the State's urging, the court allowed the bailiff testify on the matter. RP 1769-70. Defense counsel thought anything the bailiff had to say would not alleviate the error of the court's failure to instruct the jury to disregard previous deliberations and deliberate anew. RP 1770. The court said the issue was whether the jury began deliberations. RP 1771.

Bailiff Ware testified that she advised the 12 jurors on September 8 that the only thing they were to do was to select the presiding juror because the exhibits would not be brought to them until the next morning. RP 1773, 1775-76. They were not affirmatively directed to refrain from talking about the case and the bailiff denied that she prevented them from doing so. RP 1776-77. She did not tell them that they could not start deliberating. RP 1778. Rather, she said she would release them and they only needed to select the presiding juror. RP 1777-78. She left the jurors alone for five minutes maximum. RP 1775. The bailiff was aware they could talk about the case without having the exhibits in front of them and could start deliberations when they chose to do so. RP 1778. The bailiff acknowledged that in five minutes they "certainly" could have started deliberations because "I can't prohibit them from doing that." RP 1779.

The alternate juror arrived at about 10:30 a.m. the next morning. RP 1774. The bailiff "informed" them "they could now start talking about the case and if there was anything that they needed to do from scratch, they needed to start it all over again." RP 1774. As described by the bailiff, "when I brought Juror Number [9] back into the jury room, I then said, okay, now you need to start from scratch." RP 1776. She did not read a jury instruction about restarting deliberations. RP 1780. The court

later entered writing findings of fact and concluded Blakely's right to a unanimous jury verdict was preserved. CP 81-83.

On appeal, Blakely argued his right to a unanimous jury verdict was violated because the trial court failed to instruct the jury on the record to disregard prior deliberations and begin anew. The Court of Appeals held the error was harmless beyond a reasonable doubt. Slip op. at 10.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. THE COURT'S FAILURE TO INSTRUCT THE RECONSTITUTED JURY TO DISREGARD PRIOR DELIBERATIONS VIOLATED BLAKELY'S RIGHT TO JURY UNANIMITY AND WAS NOT HARMLESS BEYOND A REASONABLE DOUBT.

The Washington Constitution requires that a jury render a unanimous verdict in a criminal prosecution. State v. Lamar, 180 Wn.2d 576, 583, 327 P.3d 46 (2014) (citing Wash Const. art. I, §§ 21, 22). CrR 6.5 provides that once "the jury has commenced deliberations prior to replacement of an initial juror with an alternate juror, the jury shall be instructed to disregard all previous deliberations and begin deliberations anew." The purpose of CrR 6.5 is to "assure jury unanimity — to assure the parties, the public and any reviewing court that the verdict rendered has been based upon the consensus of the 12 jurors who rendered the final verdict, based upon the common experience of all of them." State v. Ashcraft, 71 Wn. App. 444, 466, 859 P.2d 60 (1993). It is "reversible

error of constitutional magnitude to fail to instruct the reconstituted jury *on the record* that it must disregard all prior deliberations and begin deliberations anew." State v. Blancaflor, 183 Wn. App. 215, 222, 334 P.3d 46 (2014) (quoting Ashcraft, 71 Wn. App. at 464).

The trial court did not instruct the reconstituted jury on the record to disregard previous deliberations and deliberate anew after one of the jurors was excused from service and the alternate juror joined the jury. The Court of Appeals agreed the trial court violated Blakely's constitutional right to jury unanimity, but concluded the error was harmless beyond a reasonable doubt because there was "affirmative evidence" showing unanimity was nonetheless achieved. Slip op. at 7-10. As addressed below, whether this error was harmless presents a significant question of constitutional law under RAP 13.4(b)(3).

a. The jury poll does not render the unanimity error harmless and the Court of Appeals decision conflicts with precedent on this point.

The Court of Appeals relied on the jury poll following the verdict as evidence that unanimity was preserved. Slip op. at 9-10. This conflicts with State v. Stanley, 120 Wn. App. 312, 318, 85 P.3d 395 (2004), which squarely rejected the claim that polling the jury can substitute for instructing the reconstituted jury. This conflict with precedent warrants reviews under RAP 13.4(b)(2).

In support of its harmless error analysis, the Court of Appeals cited Lamar, 180 Wn.2d at 587, for the proposition "[w]hen properly carried out, polling a jury is evidence of jury unanimity." Slip op. at 9. The Court of Appeals misapplied Lamar on this point because the discussion on polling in Lamar was not part of the harmless error analysis but rather went to whether error occurred at all. Lamar, 180 Wn.2d at 588. The Court of Appeals, having already found the error, erred in relying on the jury poll as part of its harmless error analysis. Stanley, 120 Wn. App. at 318.

In any event, Lamar cautioned "polling may not be effective to establish that a defendant's right to unanimity was secured if the record affirmatively shows a reason to seriously doubt that the right has been safeguarded." Lamar, 180 Wn.2d at 587. In Lamar, polling the jury did not establish unanimity where the trial court instructed the jury to deliberate together only with respect to whatever remained to be addressed. Id. at 585, 588. In that circumstance, "none of the jurors would have had any reason to doubt the propriety of this process and each would naturally respond that the verdict was his or her own." Id. at 588. In other words, the jury poll did not show the reconstituted jury disregarded prior deliberations and began them anew. The same reasoning applies in Blakely's case. The reconstituted jury was polled to ensure that each juror agreed with the verdict, but in the absence of proper court instruction to

disregard prior deliberations and begin anew, the polling merely shows agreement with a verdict reached by unconstitutional means.

State v. Bashaw, 169 Wn.2d 133, 234 P.3d 195 (2010), overruled by State v. Nunez, 174 Wn.2d 707, 285 P.3d 21 (2012) is instructive. In Bashaw, this Court held the trial court erred in instructing the jury that it needed to be unanimous in order to return a special verdict finding on an aggravating circumstance. Id. at 145. Nunez later overruled Bashaw, holding there is no error in this regard. Nunez, 174 Wn.2d at 719. But what is significant for Blakely's appeal is the Bashaw court's harmless error analysis, which was not repudiated and remains sound. Per Bashaw: "The State argues, and the Court of Appeals agreed, that any error in the instruction was harmless because the trial court polled the jury and the jurors affirmed the verdict, demonstrating it was unanimous. This argument misses the point. The error here was the procedure by which unanimity would be inappropriately achieved." Bashaw, 169 Wn.2d at 147. "The result of the flawed deliberative process tells us little about what result the jury would have reached had it been given a correct instruction." Id. at 147.

The same goes for Blakely's case. The jury poll here is the result of a flawed deliberative process. The error is the procedure by which

unanimity was inappropriately achieved, i.e., lack of court instruction to disregard prior deliberations and being anew.

b. The Court of Appeals improperly relied on a juror declaration that inheres in the verdict to avoid reversal.

The Court of Appeals relied on a juror's declaration to find harmless error. Slip op. at 10. The declaration states in relevant part "[a]fter the alternate juror joined the rest of us on September 9, 2016, making us twelve jurors again, we started deliberations totally over again from scratch and disregarded everything we had previously discussed." CP 119. The juror's declaration, in revealing the thought process of the jury, inheres in the verdict and thus cannot be used to affirm the verdict. The Court of Appeals disregard of the established rule that the thought processes of the jury are off-limits conflicts with a lengthy line of precedent and raises an issue of substantial public interest, warranting review under RAP 13.4(b)(1) and (4).

"Central to our jury system is the secrecy of jury deliberations." Long v. Brusco Tug & Barge, Inc., 185 Wn.2d 127, 131, 368 P.3d 478 (2016). Courts cannot consider matters that inhere in the verdict. Id. at 129, 131. There are two tests for determining whether facts in a juror declaration inhere in the verdict. Id. at 131. Under the first test, facts "linked to the juror's motive, intent, or belief, or describ[ing] their effect

upon" the jury inhere in the verdict and cannot be considered. Id. (quoting Gardner v. Malone, 60 Wn.2d 836, 841, 376 P.2d 651 (1962)). "This includes facts touching on the mental processes by which individual jurors arrived at the verdict, the effect the evidence may have had on the jurors, and the weight particular jurors may have given to particular evidence." Long, 185 Wn.2d at 131-32 (citing Cox v. Charles Wright Academy, Inc., 70 Wn.2d 173, 179-80, 422 P.2d 515 (1967)). The second test asks "whether facts alleged in juror declarations can be rebutted by other testimony without probing any juror's mental processes." Long, 185 Wn.2d at 132 (citing Gardner, 60 Wn.2d at 841).

Blakely's case implicates both tests. The issue must be delicately approached. A court cannot use a juror's declaration to determine whether jurors disregarded previous deliberations and began the deliberative process anew without delving into the mental processes of the jurors. Whether prior deliberations were disregarded is part of the "mental processes by which individual jurors arrived at the verdict." Long, 185 Wn.2d at 131. As such, the factual allegation inheres in the verdict.

In Lamar, the Supreme Court recognized it had no way of knowing "what actually occurred" in the jury room once the alternate juror joined in "and so do not know what was addressed." Lamar, 180 Wn.2d at 587. The Supreme Court refused to inquire because "a court must not intrude

into the jury deliberations to determine what the jury has decided or why, or how the jury viewed the evidence." Id. To determine whether any prior deliberation was actually disregarded would inevitably require probing into the thought process of each juror. First, the court would need to determine what was deliberated upon by the original jury, which reveals juror thought processes. Then the court would need to determine whether the initial deliberation was later put out of the minds of the original jurors, which again requires intrusion into the thought process. And the court would need to verify that what was discussed amongst the reconstituted jury was not presented as a matter that had already been decided before the jury was reconstituted.

Further, there is no way to rebut the presiding juror's factual allegation that prior deliberations were disregarded without probing that juror's mental processes and those of the other 11 jurors. The allegation inheres in the verdict for this reason as well. Long, 185 Wn.2d at 132. How does the presiding juror know whether the other 10 original jurors disregarded prior deliberations? Whether they in fact did so is a matter of knowledge personal to each individual juror. The presiding juror is not competent to speak for them on the matter. To rebut the declaration, the mental processes of the other jurors would need to be probed to determine, as a factual matter, whether each actually disregarded prior deliberations.

This why courts rely on jury instructions to determine whether a reconstituted jury has deliberated anew. Because jurors are presumed to follow the court's instructions, the jury's deliberative process can be ascertained in light of the instruction without delving into the actual deliberative process that inheres in the verdict. When the reconstituted jury is instructed to disregard prior deliberation and deliberate anew, the jury is presumed to do so. See Lamar, 180 Wn.2d at 586 ("We presume they followed the instruction given when the alternate joined the deliberating jury."). Any other approach intrudes into the sanctity of the jury room.

Also, the presiding juror did not testify at the hearing. The presiding juror's declaration is hearsay. It is error to rely on a juror affidavit that constitutes inadmissible hearsay. State v. Jackman, 113 Wn.2d 772, 777, 783 P.2d 580 (1989).

In a footnote, the Court of Appeals claimed Blakely challenged the "admissibility" of the presiding juror's declaration as hearsay and as an impermissible intrusion into the jury deliberation process but because he "did not object to the declaration below, he waived any objection to the evidence on appeal." Slip op. at 10, n.4. On appeal, Blakely does not object to the "admissibility" of the declaration because the declaration was never "admitted" into evidence in the first place. The State simply filed it

as part of its request for a declaration from the bailiff. CP 103, 120-22. And then the trial court, without any notice to Blakely, entered written findings and conclusions based in part on that declaration.[2] CP 81-83. Blakely was not given an opportunity to object to admissibility or an opportunity to object to the trial court's reliance on the declaration in entering findings and conclusions.

Regardless of admissibility, Blakely's objection on appeal is the use of that declaration to uphold the verdict. No one disputes the declaration is hearsay. The Court of Appeals did not dispute the relevant part of the juror's declaration inheres in the verdict. This Court has recognized in the context of determining jury unanimity that courts "must not intrude into the jury deliberations to determine what the jury has decided or why, or how the jury viewed the evidence." Lamar, 180 Wn.2d at 587. Yet the trial court, and the Court of Appeals, has done just that in relying on the juror declaration to uphold the verdict. The individual or collective thought processes leading to a verdict cannot be considered because they inhere in the verdict. State v. Ng, 110 Wn.2d 32, 43, 750 P.2d 632 (1988). This rule applies not only to attempts to impeach a

[2] Even the State is baffled about the appearance of those findings and conclusions, writing it is "unclear from the record" why the trial court filed them. Brief of Respondent at 7. Neither party requested that the court enter findings and the court gave no indication it intended to do so at the hearing. RP 1766-82.

verdict, Long, 185 Wn.2d at 131, but also attempts to sustain one. O'Brien v. City of Seattle, 52 Wn.2d 543, 547, 327 P.2d 433 (1958). The juror's declaration stating "we started deliberations totally over again from scratch and disregarded everything we had previously discussed" inheres in the verdict and must be disregarded as a matter of law.

c. The judge's comment made before the jury was reconstituted cannot substitute for the instruction that needs to be given at the time the jury is reconstituted.

In finding harmless error, the Court of Appeals observed "[t]he trial court informed the alternates that, if either of them should be needed, the jury would 'start the deliberations all over again.'" Slip op. at 9. To be precise, the court told the two alternates that if one of the jurors was unable to serve, "then we will be calling you in . . . and requesting you to deliberate as part of the jury and have the jury with one or both of you start the deliberations all over again." RP 1742. The judge directed this comment at the alternate jurors, not the entire jury. In addition, the court did not tell the jury that it must start their deliberations all over again. It was framed as a request, not an instructional command.

The Supreme Court recognizes the timing of an instruction on unanimity is important. The "critical point" is when an alternate juror is seated, not before. Lamar, 180 Wn.2d at 586. There is no authority for the proposition that an instruction given *before* the jury begins

deliberations and *before* the jury is reconstituted protects the right to jury unanimity when a jury is *later* reconstituted. CrR 6.5 fixes the timing of the instruction to a point after deliberations have commenced and an alternate juror replaces an initial juror.

Consistent with CrR 6.5, case law requires the instruction be given to the reconstituted jury, not to the jury before it is reconstituted. Blancaflor, 183 Wn. App. at 225; Ashcraft, 71 Wn. App. at 464; Stanley, 120 Wn. App. at 313. This makes sense because the point at which the jury is reconstituted is the point in time where the command must be heeded. Jurors are given many instructions prior to deliberations, and it would be easy for a juror to forget one of the oral instructions given at that time, especially an instruction predicated on an event that may or may not happen. Rather than letting a conditional instruction be buried amidst the flurry of other instructions given before deliberations, the court must give the instruction at the time it is needed in clear and certain language. The law requires the jury to be instructed after the jury is reconstituted.

Compounding the problem, the trial court's comment was conditionally phrased. The court in effect told the jury that in the event an alternate juror was needed to deliberate, the jury would be instructed to start over again. The jury was not actually instructed to do anything at the time the court made its comment. The court's comment was directed at a

future event. When that future event materialized, the court did not instruct the jury to disregard prior deliberations and deliberate anew.

Even if the trial court's comment is afforded the dignity of a jury instruction, such instruction must make the law manifestly apparent to the average juror. State v. Borsheim, 140 Wn. App. 357, 366, 165 P.3d 417 (2007). Telling the jury to start deliberations all over again does not capture the legal requirement that all previous deliberations must be disregarded. Deliberation can start over amongst the jurors with previous deliberations being kept in mind.

d. The bailiff's comment cannot substitute for proper court instruction.

The Court of Appeals also relied on the purported fact that "[w]hen the alternate was seated on September 9, the bailiff instructed the jurors to begin deliberations anew." Slip op. at 9. That's not what happened. The bailiff used the colloquialism of starting "from scratch," but did not tell jurors to disregard prior deliberations and deliberate anew. To be precise, the bailiff "informed" jurors that "they could now start talking about the case and *if there was anything that they needed to do from scratch*, they needed to start it all over again." RP 1774. The bailiff left it up to the jury to determine whether "there was anything that they needed to do from

scratch." At no time did the bailiff tell the jury what they needed to do "from scratch."

Also, the bailiff's "instruction" cannot serve as a legal substitute for the trial court's instruction. Ashcraft held that the *trial court's* failure to instruct the reconstituted jury on the record constitutes manifest constitutional error. Ashcraft, 71 Wn. App. at 467. The obligation to instruct the reconstituted jury rests solely with the trial judge. The judge's duty is a matter of constitutional law. Const. art. IV, § 16. Only the judge has authority to instruct the jury on the law. State v. Clausing, 147 Wn.2d 620, 628, 56 P.3d 550 (2002). Jurors take an oath to follow the court's instructions. RP 194; WPIC 1.01. There is no corollary oath for following a bailiff's instruction. None of the court's instructions inform the jury that it must follow an instruction from the bailiff. See RP 204 (describing role of bailiff to jury). The bailiff has no authority to give instructions that are properly reserved for the judge alone. Further, a jury is presumed to follow a trial court's instructions to begin deliberations anew. State v. Wirth, 121 Wn. App. 8, 13, 85 P.3d 922 (2004). There is no presumption in the law that jurors follow a bailiff's instruction. This is unsurprising, as bailiffs have no authority to give instruction.

The trial court's failure to instruct the reconstituted jury on the record that it was to disregard prior deliberations and deliberate anew is

constitutional error. Nothing that happened prior to reconstitution or after reconstitution rendered the error harmless beyond a reasonable doubt.

F. CONCLUSION

For the reasons stated, Blakely requests that this Court grant review.

DATED this 14th day of June 2018.

Respectfully submitted,

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APPENDIX A

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. JEREMY BLAKELY, Appellant.	)	No. 75975-2-I
	)	DIVISION ONE
	)	UNPUBLISHED OPINION
	)	FILED: May 14, 2018

SPEARMAN, J. — When an alternate juror is seated, the trial court must instruct the reconstituted jury to begin deliberations anew. This instruction serves to protect the defendant's right to a unanimous jury verdict. The trial court in this case seated an alternate juror and failed to instruct the reconstituted jury, an error of constitutional magnitude. The record, however, is sufficient for the State to meet its burden of proving beyond a reasonable doubt that the error was harmless. We affirm.

FACTS

Following an altercation, Blakely fatally shot Richard Napier. The State charged Blakely with murder in the first degree, assault in the first degree, and unlawful possession of a firearm. Blakely's theory was that he acted in self-defense.

The parties presented evidence at a lengthy trial. On the last day, September 8, the court instructed the jury as to deliberations and reaching a unanimous verdict.[1] The parties then presented closing arguments. Closing arguments concluded at 3:47 p.m. The trial court addressed the 14 jurors, thanked them for their diligence, and chose the two alternates. The court instructed the alternates to maintain the prohibition on discussing the case and stated that, in the event one or both of them was called in, the jury would recommence deliberations:

> I have to burden you, however, with observing the same restrictions you've been observing throughout the trial. . . And the reason for that is if someone becomes ill or has a family emergency on the rest of the panel before the jury is able to reach a verdict on all the questions before the jury, then we will be calling you in. . . and requesting you to deliberate as part of the jury and have the jury with one or both of you start the deliberations all over again.

Verbatim Report of Proceedings (VRP) at 1742. Addressing the rest of the jurors, the court continued:

> The rest of you, ladies and gentlemen, will be the jurors who are deliberating in this case. So, let me say a word or two about deliberations. We not only are allowing you to talk about the case now, we are strongly encouraging you all to talk about the case. . . It's now about ten minutes to 4:00, so you probably won't get too much done today because we're going to ask you to suspend your deliberations at 4:00 and then come back tomorrow morning and resume your deliberations.

Id. at 1742-43. The court instructed the jurors that their discussions about the case should take place only in the jury room when all 12 jurors were present. "So, again," the court stated, "if somebody needs to take a bathroom break or

[1] Blakely does not challenge these instructions.

something like that, perfectly fine, but please stop talking about the case until that person is able to rejoin you." Id. at 1743. The court dismissed the jurors to the jury room at 3:53 p.m. The court instructed the alternates to accompany the jury in order to receive their certificates. The jury was dismissed for the day at 4:00 p.m.

The next morning, before beginning deliberations, one of the 12 jurors informed the bailiff that she had a family emergency and needed to leave. According to the clerk's minutes, an alternate arrived at 10:15 a.m. and the jury began deliberations anew. The reconstituted jury deliberated for about five hours. At 3:38 pm, the jury found Blakely guilty of second degree felony murder and unlawful possession of a firearm. The court polled each juror, asking whether the verdicts reflected their individual decision and the decision of the unanimous jury. Each juror answered in the affirmative.

A week later, the State requested a declaration from the bailiff to determine whether the jury followed constitutionally required procedure when seating the alternate juror. The State noted that the court did not instruct the reconstituted jury on the record that it needed to disregard all previous deliberations and begin the deliberative process anew. The State asserted that failure to so instruct the jury is an error of constitutional magnitude. The State argued, however, that it may be able to prove that the error was harmless in this case. The State attached a declaration from the presiding juror.

In the declaration, the presiding juror stated that, on the first day of deliberations, the 12 jurors were alone in the jury room for three to five minutes.

The next day, the bailiff told the remaining 11 jurors not to begin deliberations until the alternate arrived and to disregard anything they had discussed the previous day. The presiding juror declared that, after the alternate arrived, "we started deliberations totally over again from scratch and disregarded everything we had previously discussed." Clerk's Papers (CP) at 122.

The parties questioned the bailiff at a hearing on October 6. The bailiff testified that, when the jury was released on September 8, she accompanied all 14 jurors to the jury room. She provided the entire group with information about how to contact her and what to do if they had a question. The bailiff told the 12 jurors that they would not receive the exhibits that evening, instructed them to select a presiding juror, and stated that she would be back to dismiss them for the day in a few minutes. The bailiff walked the two alternates out and then returned to dismiss the 12 jurors. She stated that the jurors were alone in the room for at most five minutes. On cross examination, the bailiff stated that she did not know what the jurors discussed during those few minutes and "[t]hey certainly could have" discussed the case. VRP at 1779.

The morning of September 9, according to the bailiff, the 12 jurors gathered in the hallway as instructed. One of the jurors informed the bailiff that she had a family emergency and had to leave. The bailiff stated that she immediately informed the judge, contacted the first alternate, and emailed counsel. The bailiff advised the remaining 11 jurors not to discuss the case. She testified that, when the alternate arrived, she told the jurors to begin anew:

> Right around 10:30 is when the alternate juror arrived and then I informed them, once the alternate juror was ushered into the jury room, that they could now start talking about the case and if there was anything that they needed to do from scratch, they needed to start it all over again. So, if they needed to select the presiding juror again, now that the alternate was there, they would need to do that again as well.

VRP at 1774.

On October 28, the same day that it entered its judgment and sentence, the court entered findings of fact and conclusions of law concerning the alternate juror. The court found the bailiff's testimony and the juror's declaration credible. Based on this evidence, the record of proceedings, and the clerk's minutes, the court found "beyond a reasonable doubt that the replacement of an original juror with an alternate juror did not infringe upon the defendant's right to a unanimous jury verdict and that the defendant's right to a unanimous jury verdict has been preserved." CP at 83.

DISCUSSION

Blakely contends the court's failure to instruct the reconstituted jury violated his constitutional right to a unanimous verdict. We review claims of constitutional error de novo. State v. Stanley, 120 Wn. App. 312, 314, 85 P.3d 395 (2004) (citing State v. Pirtle, 127 Wn.2d 628, 656-57, 904 P.2d 245 (1995)).

The Washington Constitution guarantees criminal defendants the right to a unanimous verdict. State v. Lamar, 180 Wn.2d 576, 583, 327 P.3d 46 (2014) (citing CONST. art. I §§ 21, 22). Jury unanimity is only achieved when the verdict is reached through consensus, based on "'deliberations which are the common experience of all. . . .'" Id. at 585 (quoting People v. Collins, 17 Cal.3d 687, 693,

552 P.2d 742 (1976)). While each juror must participate, "there are no requirements as to how much or how long a juror must speak, listen, or deliberate before forming an opinion." State v. Morfin, 171 Wn. App. 1, 10, 287 P.3d 600 (2012).

To assure jury unanimity when an alternate juror is seated, CrR 6.5 provides that "[i]f the jury has commenced deliberations prior to replacement of an initial juror with an alternate juror, the jury shall be instructed to disregard all previous deliberations and begin deliberations anew." We have consistently held that a trial court commits reversible error of constitutional magnitude when it fails to instruct the reconstituted jury, on the record, to disregard all prior deliberations and begin deliberations anew. State v. Blancaflor, 183 Wn. App. 215, 222, 334 P.3d 46 (2014); State v. Chirinos, 161 Wn. App. 844, 848, 255 P.3d 809 (2011); Stanley, 120 Wn. App. at 315-16; State v. Ashcraft, 71 Wn. App. 444, 464, 859 P.2d 60 (1993). The error is presumed to be prejudicial. Ashcraft, 71 Wn. App. at 465. The State may overcome the presumption by proving beyond a reasonable doubt that the error was harmless. Id.

In this case, the parties dispute whether the jurors began deliberations in the few minutes they were alone in the jury room on September 8. Blakely argues that the trial court dismissed the jurors to begin deliberations and we must presume they followed this instruction.

The State argues that the jurors did not begin deliberations on September 8. The State asserts that we may draw this inference based on the short time the jurors were alone in the jury room, the fact that they did not receive exhibits, and

the bailiff's instruction that they select a presiding juror. The State's position is that, because no deliberations occurred on September 8, no instruction was necessary on September 9 to preserve jury unanimity.

We agree with Blakely. Absent evidence to the contrary, "we presume that the jury, as originally constituted, followed the court's instructions to begin deliberations after retiring to the jury room." Blancaflor, 183 Wn. App. at 226 (citing Lamar, 180 Wn.2d at 586). The trial court dismissed the jurors on September 8 with the instruction to "talk about the case," "suspend [their] deliberations at 4:00," and "resume [their] deliberations" the next morning. VRP at 1742-43. We presume the jury followed these instructions.

The record supports this presumption. The bailiff testified that she told the jurors they would not receive the exhibits that day and they should select a presiding juror. She also stated that she did not know what the jurors discussed while they were alone in the jury room and they "certainly could have" discussed the case. VRP at 1779. The presiding juror stated that, when the alternate juror was seated on September 9, the jurors "disregarded everything [they] had previously discussed," indicating that they discussed the case on September 8.[2] CP at 122.

We conclude that the jury followed the court's instructions and began deliberations on September 8. The trial court erred in failing to instruct the

[2] The State asserts that any discussion as to who would be presiding juror is not part of the jury's deliberations. Because there is no evidence that the jury's discussion on September 8 was limited to selecting a presiding juror, we do not reach the issue.

reconstituted jury as required by CrR 6.5. The failure to instruct the reconstituted jury to disregard prior deliberations and begin anew is reversible error of constitutional magnitude. Ashcraft, 71 Wn. App. at 464. See also Blancaflor, 183 Wn. App. at 222; Chirinos, 161 Wn. App. at 848; Stanley, 120 Wn. App. at 315-16.

The State argues that the lack of instruction was only a rule violation, not an error of constitutional magnitude. Noting that the Supreme Court has never ruled on this issue, the State urges us not to follow the Ashcraft line of cases as wrongly decided.[3] The State contends that where, as here, the jury as a whole was properly instructed as to unanimity before deliberations, the defendant has the burden to show that constitutional error occurred and resulted in actual prejudice. The State points to no authority holding that an instruction given before the jury begins deliberations protects the right to unanimity when an alternate is later seated.

We reject the State's argument. Defendants have a constitutional right to a unanimous verdict. Lamar, 180 Wn.2d at 583. Because we may not "intrude into the jury deliberations to determine what the jury has decided or why," we must presume the jury follows instructions. Id. at 587 (citing State v. Elmore, 155 Wn.2d 758, 770-71, 123 P.3d 72 (2005)). Instructing the reconstituted jury serves

[3] In Lamar, the trial court failed to give a CrR 6.5 instruction and erroneously instructed the jury to bring the alternate juror "up to speed." Lamar, 180 Wn.2d at 580-81. We held that the lack of instruction was constitutional error. Id. at 581. The Supreme Court affirmed but under a different analysis. Id. at 579. Because the erroneous instruction was constitutional error, the Lamar court did not address whether the lack of CrR 6.5 instruction was constitutional error. Id. at 586-87.

to assure "that the verdict rendered has been based upon the consensus of the 12 jurors who rendered the final verdict, based upon the common experience of all of them." Ashcraft, 71 Wn. App. at 466 (citing State v. Fisch, 22 Wn. App. 381, 383, 588 P.2d 1389 (1979)). Absent a proper instruction to the reconstituted jury, we may not presume that unanimity has been preserved. As this court has repeatedly stated, the lack of instruction to the reconstituted jury was constitutional error. The State has the burden to prove beyond a reasonable doubt that the error was harmless. Id. at 465.

The State contends the error was harmless because the poll of the jury and the record as a whole clearly demonstrate that the verdict was unanimous. When properly carried out, polling a jury is evidence of jury unanimity. Lamar, 180 Wn.2d at 587. Polling is not sufficient to establish unanimity, however, where "the record affirmatively shows a reason to seriously doubt that the right has been safeguarded." Id. at 587-88 (citing State v. Badda, 63 Wn.2d 176, 182-83, 385 P.2d 859 (1963)).

In this case, the trial court properly polled the jury. Each juror affirmed that the verdict was his or her individual decision and that of the unanimous group. The polling is evidence that the verdict was unanimous.

The record supports this evidence. The jury received a proper unanimity instruction before deliberations began. The trial court informed the alternates that, if either of them should be needed, the jury would "start the deliberations all over again." Id. at 1742. When the alternate was seated on September 9, the bailiff instructed the jurors to begin deliberations anew. The presiding juror

declared that the jury followed this instruction: "[a]fter the alternate juror joined the rest of us on September 9, 2016, making us twelve jurors again, we started deliberations totally over again from scratch and disregarded everything we had previously discussed."[4] CP at 122. Considering the polling of the jury and the record as a whole, we conclude the State has met its burden of proving beyond a reasonable doubt that the error was harmless.

Affirmed.

WE CONCUR:

Spearman, J.

Trickey, J

Becker, J.

[4] Blakely challenges the admissibility of the presiding juror's declaration. He objects to the declaration as hearsay and an impermissible intrusion into the jury deliberation process. Because Blakely did not object to the declaration below, he waived any objection to the evidence on appeal. State v. Perez-Cervantes, 141 Wn.2d 468, 482, 6 P.3d 1160 (2000). See also State v. Guloy, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985) (evidentiary challenge only preserved if party challenged the evidence below on the same grounds raised on appeal).

NIELSEN, BROMAN & KOCH P.L.L.C.

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