SUPREME COURT NO. _____

NO. 33714-6-III

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DALE TUCKER, JR.,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PEND ORIELLE COUNTY

The Honorable Patrick Monasmith, Judge

CORRECTED PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner Dale Tucker, Jr., appellant below, asks this Court to review the decision of the Court of Appeals referred to in section B.

B. COURT OF APPEALS DECISION

Tucker seeks review of the Court of Appeals decision in State v. Dale Tucker, Jr., No. 33714-6-III (Slip Op. filed October 25, 2016).[1]

C. REASON TO ACCEPT REVIEW

This Court should accept review because the Court of Appeals decision conflicts with this Court's decisions in State v. Lamar, 180 Wn.2d 576, 327 P.3d 46 (2014) which holds that for a constitutionally unanimous verdict in a criminal trial, the deliberations leading to the verdict must be "the common experience of all" the jurors.[2] Review is also warranted because this case involves a significant question of law under the state and federal constitutions involving how to properly instruct a jury to ensure constitutionally valid verdicts in criminal trials. For these reasons, review is warranted under RAP 13.4(b)(1) & (3).

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[1] A copy of the decision is attached an appendix.

[2] Lamar, 180 Wn.2d at 585, quoting People v. Collins, 17 Cal.3d 687, 552 P.2d 742 (1976).

D. ISSUE PRESENTED FOR REVIEW

For a constitutionally valid jury verdict in a criminal trial, should the jury be instructed that deliberation may only occur in the jury room, only when all twelve jurors are present, and only as a collective?

E. STATEMENT OF THE CASE

The Pend Oreille County Prosecutor charged Tucker with residential burglary and second degree theft. CP 1-3. The prosecution alleged Tucker unlawfully entered the home of his recently deceased grandmother, Betty Durfee, with intent to commit a crime, and thereafter removed over $750 in property. CP 3-7.

At trial, the prosecution presented the testimony of Pend Oreille County Court Clerk Rachel Johnson, the trustee for the irrevocable trust created by Betty Durfee's passing - Marie Clifner, two of Durfee's grandchildren - Cheyenne and Robert Bradbury (Cheyenne and Robert), and the investigating officer - Deputy Travis Stigall. RP[3] 69-248. Tucker did not testify.

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[3] There are two consecutively paginated volumes of verbatim report of proceedings for the dates of July 9, 16, 23, 30, 31 & August 20, 2015, referenced herein as "RP." A supplemental verbatim report of proceedings was prepared for that part of July 30, 2015, immediately following completion of jury selection, but filed after the Brief of Appellant was filed in the Court of Appeals. That report of proceedings will be referenced as "SuppRP."

Through Clerk Johnson the prosecution introduced a certified copy an order that precluded Tucker from entering his grandmother's property from October 29, 2014, through October 26, 2016. RP 71-72; Ex. 1.

Trustee Clifner testified Durfee passed away April 6, 2015, and thereafter her estate became the property of an irrevocable trust, the beneficiaries of which were Durfee's children and grandchildren, except Tucker. RP 76, 82-83. Clifner claim she was in control of the trust, and had never given Tucker permission to enter or remove anything from Durfee's property or residence. RP 77, 82. Clifner testified the trust would not be distributed until on or after September 27, 2015. RP 82.

According to Cheyenne, she went to the Durfee property on May 17, 2015, and noticed several things missing or out of place, so she called her brother, Robert. RP 98-99. When Robert arrive, they entered the home and discovered several items missing, including several heaters, a radio, a set of antlers and the memory cards from two motion-sensitive video surveillance cameras mounted inside the residence. RP 99-100, 106-07, 138-39.

In addition to the missing memory cards, Robert noted the cameras had also been unplugged, but not before recording the intruder and transmitting that footage to a laptop he had set up in case the memory

cards got removed. RP 141, 178-80. Robert determined the final recordings on the cameras were from May 8, 2015, and depicted Tucker inside the house removing meat from a freezer in the kitchen. RP 142.

In addition to the interior video cameras, there was a motion-sensitive "game camera" set up outside to capture still images of any motion in the driveway/parking area outside the home. RP 100. Like the video footage, still images from the game camera appear to show Tucker carrying a bucket towards the house, in addition to pictures of an SUV similar to Tucker's girlfriend, and other unidentified vehicles and people coming and going during the period between May 7-17, 2015. RP 102-03, 129-30, 143, 187, 191-93, 240-41, 245-47.

Deputy Stigall responded on May 17th to the Durfee property. RP 204-05. Stigall noted that in addition to missing items from the residence, it appeared someone had also broken into or simply entered several of the outbuildings on the property, including a motorhome. RP 206-07, 210, 212-13. According to Stigall, it appeared as if someone had possibly been living in the motorhome, and possibly using drugs, as suspected methamphetamine was found inside. RP 207.

Stigall agreed that someone other than Tucker could have been living in the motorhome and therefore were responsible for the missing

items instead of Tucker. RP 233, 248. Stigall noted, however, that the missing antlers and one of the missing heaters were recovered from Tucker's mother's home. RP 223-24, 226.

In closing argument, Tucker's counsel conceded it was Tucker depicted in the videos from inside the home, but argued the prosecution failed to meet its burden to proved the charged crimes beyond a reasonable doubt, and that if the jury was inclined to convict Tucker of any crimes, it should only be the lesser included offenses of first degree criminal trespass and third degree theft. RP 285-86, 290, 292-93.

Thereafter the jury acquitted Tucker of second degree theft, but found him guilty of residential burglary and the lesser included offense of third degree theft. CP 46-48: RP 303.

On appeal, Tucker Argued he was denied of his constitutional rights to fair trial and unanimous jury verdicts because the trial court failed to instruct the jury that deliberation may only occur in the jury room, only when all twelve jurors are present, and only as a collective. Brief of Appellant (BOA) at 5-14. The Court of Appeals, Division Two, rejected this argument, concluding Tucker could not raise the issue for the first time on appeal because it did not involve "manifest error affecting a constitutional right[.]" Appendix at 1. Specifically, the court found that

because Tucker could not point to evidence showing the jury deliberated improperly, any alleged prejudice was "pure speculation." Appendix at 5.

F. ARGUMENT

REVIEW SHOULD BE GRANT REVIEW BECAUSE THE LOWER COURT'S DECISION CONFLICTS WITH THIS COURT'S DECISION IN LAMAR, AND BECAUSE IT INVOLVES A SIGNIFICANT CONSTITUTION QUESTION REGARDING JURY DELIBERATONS.

In Washington, criminal defendants have a constitutional right to trial by jury and unanimous verdicts. Wash. Const. art. I, §§ 21 & 22[4]; State v. Ortega–Martinez, 124 Wn.2d 702, 707, 881 P.2d 231 (1994). One essential elements of this right is that the jurors reach unanimous verdicts,

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[4] Wash. Const. art I, § 21 provides:

> The right of trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts not of record, and for a verdict by nine or more jurors in civil cases in any court of record, and for waiving of the jury in civil cases where the consent of the parties interested is given thereto.

Wash Const. art I, § 22 provides:

> In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of

and that the deliberations leading to those verdicts be "the common experience of all of them." State v. Fisch, 22 Wn. App. 381, 383, 588 P.2d 1389, 1390 (1979) (citing People v. Collins, 17 Cal.3d 687, 552 P.2d 742 (1976)). Thus, constitutional "unanimity" is not just all twelve jurors coming to agreement. It requires they reach that agreement through a completely shared deliberative process. Anything less is insufficient.

In 2014, this Court concurred with the California Supreme Court's description of how a constitutionally correct unanimous jury verdict is reached, and how it is not:

> "The requirement that 12 persons reach a unanimous verdict is not met unless those 12 reach their consensus through deliberations which are the common experience of all of them. It is not enough that 12 jurors reach a unanimous verdict if 1 juror has not had the benefit of the deliberations of the other 11. Deliberations provide the jury with the opportunity to review the evidence in light of the perception and memory of each member. Equally important in shaping a member's viewpoint are the personal reactions and interactions as any individual juror attempts to persuade others to accept his or her viewpoint."

Lamar, 180 Wn.2d at 585 (quoting Collins, 17 Cal.3d at 693).

> the county in which the offense is charged to have been committed and the right to appeal in all cases: . . .

This heightened degree of unanimity necessitates, for example, that when a juror is replaced on a deliberating jury, the reconstituted jury must be instructed to begin deliberations anew. State v. Ashcraft, 71 Wn. App. 444, 462, 859 P.2d 60, 70 (1993) (citing CrR 6.5). Failure to so instruct deprives a criminal defendant of his right to a unanimous jury verdict and requires reversal. Lamar, 180 Wn.2d at 587-89; State v. Blancaflor, 183 Wn. App. 215, 221, 334 P.3d 46 (2014); Ashcraft 71 Wn. App. at 464. A trial court's failure to properly instruct the jury on the constitutionally required format for deliberating towards a unanimous verdict is error of constitutional magnitude that may be raised for the first time on appeal. Lamar, 180 Wn.2d at 585-86.

Sometimes juries are instructed on the need for this heightened degree of unanimity,[5] such as in California, where at least one jury was instructed they "'must not discuss with anyone any subject connected with this trial,' and 'must not deliberate further upon the case until all 12 of you are together and reassembled in the jury room.'" Bormann v. Chevron

[5] Undersigned counsel notes most criminal courts do not give a written instruction informing the jury it may not deliberate except in the jury room and only when all 12 jurors are present. Of the criminal appeals counsel has handled since first identifying the issue raised herein in early 2016, about half the trial courts do, however, give an oral admonishment to this effect after closing arguments are complete. The issue is not raised in those cases.

USA, Inc., 56 Cal. App. 4th 260, 263, 65 Cal. Rptr. 2d 321, 323 (1997) (quoting BAJI No. 1540, a standardized jury instruction); see also, United States v. Doles, 453 F. App'x 805, 810 (10th Cir. 2011) ("court instructed the jury to confine its deliberations to the jury room and specifically not to discuss the case on breaks or during lunch."). In this regard, this Court's Committee on jury instructions recommends trial courts provide an instruction at each recess that includes:

> During this recess, and every other recess, do not discuss this case among yourselves or with anyone else, including your family and friends. This applies to your internet and electronic discussions as well — you may not talk about the case via text messages, e-mail, telephone, internet chat, blogs, or social networking web sites. Do not even mention your jury duty in your communications on social media, such as Facebook or Twitter. If anybody asks you about the case, or about the people or issues involved in the case, you are to explain that you are not allowed to discuss it.

WPIC 4.61 (emphasis added).

The Committee also recommends an oral instruction following jury selection explaining the trial process, and includes the following admonishment about the process after closing arguments are made:

> Finally: You will be taken to the jury room by the bailiff where you will select a presiding juror. The presiding juror will preside over your discussions of the case, which are called deliberations. You will then deliberate in order to reach a decision, which is called a verdict. Until you are in the jury room for those deliberations, you must not discuss

> the case with the other jurors or with anyone else, or remain within hearing of anyone discussing it. "No discussion" also means no e-mailing, text messaging, blogging, or any other form of electronic communications.

WPIC 1.01, Part 2.

The same instruction also provides:

> You must not discuss your notes with anyone or show your notes to anyone until you begin deliberating on your verdict. This includes other jurors. During deliberation, you may discuss your notes with the other jurors or show your notes to them.

Id.

The Committee has also prepared a Juror Handbook. WPIC Appendix A. It advises readers that as a juror, "DON'T talk about the case with anyone while the trial is going on. Not even other jurors." Id., at 9.

These WPIC-based admonishments, if provided, make clear that deliberations may only occur after all the evidence is in, and only then when jurors are in the jury room. What they fail to make clear, however, is that any deliberations must involve all twelve jurors. Thus, for example, in a four-count criminal trial, the pattern instructions do not prohibit the presiding juror from assigning three jurors to decide each count, with the understanding that the other nine jurors will adopt the conclusion of those three on that count for purposes of the unanimous verdict requirement. Such a process clearly violates the constitutional requirement that

deliberations leading to verdicts be "the common experience of all of [the jurors]," but does not violate any WPIC instructions. State v. Fisch, 22 Wn. App. at 383.

Here, what instructions the record shows the court did provide to Tucker's jury, failed to make clear the constitutional unanimity requirement that deliberation occur in the jury room, only then when all twelve jurors are present, and only as a collective.

The record shows the Tucker's jury was admonished immediately following jury select that:

> But after you're instructed by the law by the court the lawyers make closing arguments. You'll then be taken to the jury room by the bailiff. You'll select a presiding juror. The presiding juror will preside over your discussions of the case. Those are called deliberations. You'll deliberate in order to reach a decision, which is called a verdict. Until you are in the jury room for deliberations you must not discuss the case with other jurors or anyone else or even remain within hearing of anyone discussing the case. And I guess in this day and age no discussion also means no emailing, blogging, texting, etcetera, no electronic communications.

SuppRP 7. This is essentially the recommended language from WPIC 1.01, advising the jury not to talk about the case with anyone, including other jurors, until begin the deliberative process.

What the record does show is the trial court gave no pre-recess admonishment not to discuss the case twice during the proceeding. RP

132, 249. The court did admonishments the jury from discussing the case among themselves or with others at the end of the day on July 30th, and again at the lunch break on July 31st, after both sides had rested, but neither time was the admonishment as thorough as set forth in WPIC 4.61. RP 149-50, 253-54.

In the written instructions provided at the conclusion of trial, the court informed the jury "During your deliberations, you must consider the instructions as a whole." CP 21 (last page of Instruction 1). And the following instruction informs the jury that they "have a duty to discuss the case with one another and to deliberate in an effort to reach a unanimous verdict." CP 22 (Instruction 2).

Instruction 19 instructed the jury on how to initiate and carry out the deliberative process. CP 39-41. Like the first two instructions, Instruction 19 also reminds the jurors they each have the right to be heard during deliberations. CP 39.

Missing from the record, however, are any written or oral jury instructions informing the jury of its constitutional duty to deliberate only when all 12 jurors are present, and only as a collective. Nor does it reveal the court ever admonishing the jurors that they were precluded from discussing the case with anyone during any recess, as recommended by

WPIC 4.61 ("During this recess, and every other recess, do not discuss this case among yourselves or with anyone else, including your family and friends." (emphasis added)).

The court's failure to instruct the jury that deliberation may only occur when all twelve jurors are present and only as a collective constituted manifest constitutional error. Lamar, 180 Wn.2d at 585-86. This error is presumed prejudicial, and the prosecution bears the burden of showing it was harmless beyond a reasonable doubt. Lamar, 180 Wn.2d at 588 (citing State v. Lynch, 178 Wash.2d 487, 494, 309 P.3d 482 (2013)).

The test for determining whether a constitutional error is harmless is "[w]hether it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002) (quoting Neder v. United States, 527 U.S. 1, 15, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999)). Restated, "An error is not harmless beyond a reasonable doubt where there is a reasonable probability that the outcome of the trial would have been different had the error not occurred. A reasonable probability exists when confidence in the outcome of the trial is undermined." State v. Powell, 126 Wn.2d 244, 267, 893 P.2d 615 (1995) (citations omitted). It is

undermined here because the prosecution cannot meet its burden to show harmlessness.

That Tucker's jurors had opportunities for improper deliberations is not just theoretical. For example, the record shows the jury deliberated for less than one hour to reach verdicts on two counts. See CP 89-90 (minutes show jury excused to begin deliberation at about 2:52 pm on July 31st, and the verdicts were read approximately 53 minutes later at about 3:45 pm). In light of the brief period of deliberation, and that they began late on a Friday in the middle of summer, there is a reasonable probability that to speed up the process so they could all start their summer weekend, the presiding juror divided the jury in two and had six jurors decide each count, with each group agreeing to follow the recommendation of the other. Such a process would clearly violate the "common experience" requirement for constitutionally valid unanimity, but not the instruction provided. Lamar, 180 Wn.2d at 585.

There is also the very likely scenario of one or more jurors leaving to briefly use a bathroom while the remaining jurors continued to discuss the case. The record fails to show the jury was ever properly instructed not to engage in such improper deliberations. As such, the jury was ignorant as to how to reach constitutional unanimity.

In light of the court's written and oral instructions, which only limited their ability to discuss the case to fellow jurors, there is a reasonable possibility some jurors discussed the case without the benefit of every other juror's presence. Nothing informed them such discussions were not allowed. There was nothing provided to inform them there verdicts must be the product of "the common experience of all of them." Fisch, 22 Wn. App. at 383. If even just one of the jurors was deprived of deliberations shared by the other eleven, then the resulting verdict is not "unanimous." Lamar, 180 Wn.2d at 585; Collins, 17 Cal.3d at 693.

Unfortunately, the Court of Appeals failed to recognize the breadth of this Court's decision in Lamar, instead finding it "inapposite because no alternate juror was seated here." Appendix at 5, n.2. The lower court correctly notes Lamar involved the trial court's failure to instruct the jury to begin deliberations anew when an alternate juror replaced one of the sitting jurors during deliberations. Id. But the court then makes the error of limiting the legal rule expressed in Lamar to that specific factual scenario. Nothing in Lamar warrants such a limitation. The decision provides insightful discussion about the general concept of constitutional jury unanimity, and, like many other courts, recites California Supreme Court's "common experience of all" language used to describe what is

required for a constitutional unanimous verdict. Lamar, 180 Wn.2d at 585 (quoting Collins, 17 Cal.3d at 693).

And although this particular issue has historically been raised in the context of reconstituted juries, as in Lamar, such juries are not the only ones that must be informed how to properly deliberate, instead all juries do. The lower court's attempt to limit Lamar to its particular facts should be rejected.

In the same vein, the lower court concluded Tucker failed to show he was prejudiced by the failure to properly instruct the jury and therefore concluded the issue could not be raised for the first time on appeal. Appendix at 5. This also conflicts with Lamar. There, this Court noted;

> For a claim of error to qualify as a claim of manifest error affecting a constitutional right, the defendant must identify the constitutional error and show that it actually affected his or her rights at trial. The defendant must make a plausible showing that the error resulted in actual prejudice, which means that the claimed error had practical and identifiable consequences in the trial. State v. Davis, 175 Wn.2d 287, 344, 290 P.3d 43 (2012); State v. Gordon, 172 Wn.2d 671, 676, 260 P.3d 884 (2011); State v. O'Hara, 167 Wn.2d 91, 99, 217 P.3d 756 (2009). "[T]o determine whether an error is practical and identifiable, the appellate court must place itself in the shoes of the trial court to ascertain whether, given what the trial court knew at that time, the court could have corrected the error." O'Hara, 167 Wn.2d at 100. "If the trial court could not have foreseen the potential error or the record on appeal does not contain sufficient facts to review the claim, the alleged error is not manifest." Davis, 175 Wn.2d at 344.

Lamar, 180 Wn.2d at 583.

Tucker met this standard. As already noted, despite a recommendation from this Court's jury instruction committee to give WPIC 4.61 at every recess, it was never given to Tucker's jury. Thus, they were never told not to deliberate during recesses, even after they began deliberations. Nothing informed them that if one juror needed to use the bathroom, all of them had to stop discussing the case. It is thus eminently plausible that less than all 12 of Tucker's jurors were discussing the case during their deliberations. Moreover, in light of the extensive recommendations from the WPIC Committee to ensure jurors are instructed by the courts to limit deliberations to the jury room, Tucker's trial judge could and should have foreseen the potential error, and moved to correct it (for the most part by simply following the WPIC Committee's jury instruction recommendations). This did not happen.

Tucker satisfied the RAP 2.5(a)(3) requirements, just as the petitioner in Lamar had. The lower court's contrary finding conflicts with Lamar and therefore review is warranted. RAP 13.4(b)(1).

This case also raises significant questions of constitutional law, to wit; in order to satisfy a criminal defendant's constitutional right to unanimous verdicts, must juries be affirmatively instructed that

deliberations may only occur in the jury room, only when all 12 jurors are present, and only as a collective? Therefore review is warranted under RAP 13.4(b)(3)

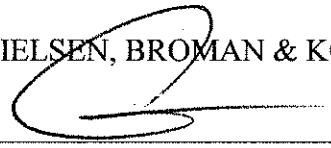
G. CONCLUSION

For the reasons stated herein, this Court should accept review.

DATED this 21ST day of November 2016

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



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APPENDIX

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CASE # 337146
State of Washington v. Dale D. Tucker, Jr.
PEND OREILLE CO SUPERIOR COURT No. 151000554

Dear Counsel:

Enclosed please find a copy of the opinion filed by the Court today.

A party need not file a motion for reconsideration as a prerequisite to discretionary review by the Supreme Court. RAP 13.3(b); 13.4(a). If a motion for reconsideration is filed, it should state with particularity the points of law or fact which the moving party contends the court has overlooked or misapprehended, together with a brief argument on the points raised. RAP 12.4(c). Motions for reconsideration which merely reargue the case should not be filed.

Motions for reconsideration, if any, must be filed within twenty (20) days after the filing of the opinion. Please file an original and two copies of the motion (unless filed electronically). If no motion for reconsideration is filed, any petition for review to the Supreme Court must be filed in this court within thirty (30) days after the filing of this opinion (may be filed by electronic facsimile transmission). The motion for reconsideration and petition for review must be received (not mailed) on or before the dates they are due. RAP 18.5(c).

Sincerely,

Renee S. Townsley

Renee S. Townsley
Clerk/Administrator

RST:ko
Attach.
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FILED

OCTOBER 25, 2016

In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON, Respondent, v. DALE TUCKER, JR., Appellant.	)	No. 33714-6-III UNPUBLISHED OPINION

KORSMO, J. — Dale Tucker, Jr., appeals his convictions for residential burglary and third degree theft. He contends the trial court's failure to instruct the jury that deliberations must include all twelve jurors at all times deprived him of a fair trial and unanimous jury verdicts. Since Mr. Tucker shows no manifest error affecting a constitutional right, we decline to address this issue raised for the first time on appeal and affirm the convictions.

FACTS

The State charged Mr. Tucker with residential burglary and second degree theft. The case proceeded to a jury trial. The State produced evidence that Mr. Tucker was prohibited by a court order from entering his deceased grandmother Betty Durfee's residence near Newport. On May 8, 2015, Mr. Tucker unlawfully entered the residence and was recorded on video taking meat from a freezer in the kitchen. The video showed Mr. Tucker pulling his shirt up over his face when he saw the cameras. Among items missing from the residence were food, heaters, a radio, and antlers. Mr. Tucker's cousin Robert Bradbury had set up cameras inside and outside the Durfee residence. Mr. Bradbury and another cousin, Cheyenne Bradbury, each identified Mr. Tucker as the person in the kitchen video and in outdoor still pictures recorded on May 8. A sheriff's deputy who had known Mr. Tucker since grade school likewise identified him as the person in the kitchen video. The defense did not present any evidence.

There were no objections to the jury instructions or requests for additional instructions. Instruction 2 provided in part:

> As jurors, you have a duty to discuss the case with one another and to deliberate in an effort to reach a unanimous verdict. Each of you must decide the case for yourself, but only after you consider the evidence impartially with your fellow jurors[.]

Clerk's Papers at 22. Instruction 19 set out the deliberations process and unanimity requirement for the jury to return a verdict.

The jury found Mr. Tucker guilty of residential burglary and lesser degree third degree theft. The jury reached its verdict in approximately 51 minutes. Mr. Tucker appealed the judgment and sentence.

ANALYSIS

1. *Claimed Instructional Error*

Mr. Tucker contends that by failing to instruct the jury that its deliberations must involve all twelve jurors collectively at all times, the trial court violated his right to a fair trial and unanimous verdicts.

Mr. Tucker did not request such an instruction below, nor did he otherwise object to the trial court's instructions given. Thus, RAP 2.5(a) precludes him from raising this issue for the first time on appeal unless he can show that lack of the additional instruction is a "manifest error affecting a constitutional right." RAP 2.5(a)(3); *State v. O'Hara*, 167 Wn.2d 91, 98, 217 P.3d 756 (2009). In assessing whether a claimed error is "manifest," the trial record must be sufficiently complete for this court to determine whether the asserted error "actual[ly] prejudice[d]" the appellant by having "practical and identifiable consequences [at] trial." *Id.* at 98-99 (citations omitted). "If the facts necessary to adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown and the error is not manifest." *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995).

The Washington State Constitution requires that in a criminal prosecution an impartial jury render a unanimous verdict. Const. art. I, §§ 21, 22; *State v. Lamar*, 180 Wn.2d 576, 583, 327 P.3d 46 (2014). As further recognized in *Lamar*:

> The requirement that 12 persons reach a unanimous verdict is not met unless those 12 reach their consensus through deliberations which are the common experience of all of them. It is not enough that 12 jurors reach a unanimous verdict if 1 juror has not had the benefit of the deliberations of the other 11. Deliberations provide the jury with the opportunity to review the evidence in light of the perception and memory of each member. Equally important in shaping a member's viewpoint are the personal reactions and interactions as any individual juror attempts to persuade others to accept his or her viewpoint.

Id. at 585 (quoting *People v. Collins*, 17 Cal. 3d 687, 693, 552 P.2d 742, 131 Cal. Rptr. 782 (1976)); *see also State v. Fisch*, 22 Wn. App. 381, 383, 588 P.2d 1389 (1979) (citing 12-juror consensus requirements as stated above in *Collins* and finding no violation).

Mr. Tucker asserts the trial court's failure to instruct the jury that deliberation may only occur when all twelve jurors are present collectively is manifest constitutional error because it left his jurors with "not just theoretical" opportunities for improper deliberations that would violate the "common experience" requirement for constitutionally valid unanimity. Br. of Appellant at 13. For example, he posits that because the jury reached verdicts on two counts in less than one hour on a summer Friday afternoon, there is a reasonable probability the presiding juror sped up the process to finish before the weekend by dividing the jury in two, with six jurors deciding each count and each group agreeing to follow the recommendation of the other. He also contends it is likely that one

or more jurors left the jury room to use the restroom while the remaining jurors continued to discuss the case, yet the record fails to show the jury was ever properly instructed not to engage in such improper deliberations. Finally, he contends there is a reasonable possibility that some jurors discussed the case outside of every other juror's presence—whether by telephone, over lunch, simply walking to and from the jury room, or even in the jury room itself—and the court gave no admonishment against such discussions.[1]

Mr. Tucker's arguments are based on pure speculation about juror conduct or what might have occurred during deliberations. No facts in the record support his example allegations that any juror failed to follow the court's instructions or otherwise acted improperly, that deliberations ever lacked a jury member, or that the verdicts were not the unanimous consensus of all twelve jurors. He thus shows no manifest error affecting a constitutional right and we decline to address the merits of his nonpreserved claim of error.[2]

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[1] The record shows the trial court did give such admonishments to the jury at the outset of trial, as well as a similar instruction at the close of the first day of trial and again at the lunch recess on the second day of the two-day trial. *See* Suppl. Report of Proceedings at 6-15; Report of Proceedings at 149, 253-54.

[2] We do observe that Mr. Tucker's cited cases involving manifest constitutional error for unanimity violations when the court failed to instruct the jury to start deliberations anew upon seating of an alternate juror are inapposite because no alternate juror was seated here. *See Lamar*, 180 Wn.2d at 586; *State v. Blancaflor*, 183 Wn. App. 215, 224-25, 334 P.3d 46 (2014); *State v. Ashcraft*, 71 Wn. App. 444, 462-64, 859 P.2d 60 (1993). Mr. Tucker cites no other authority that manifest constitutional error occurred here.

2. *Appellate Costs*

Mr. Tucker requests that we exercise our discretion and decline to award appellate costs to the State if he does not prevail on appeal. He reasons that the trial court found he lacks sufficient funds to prosecute an appeal and was therefore indigent and entitled to review at public expense. Analogizing to *State v. Blazina*, 182 Wn.2d 827, 834, 344 P.3d 680 (2015) (trial court must make individualized findings of current and future ability to pay before imposing legal financial obligations), he asserts his ability to pay must be determined before appellate costs are imposed. The State has not responded to Mr. Tucker's request.

RAP 14.2 states, "A commissioner or clerk of the appellate court will award costs to the party that substantially prevails on review, unless the appellate court directs otherwise in its decision terminating review." Under RCW 10.73.160(1), we have broad discretion to grant or deny appellate costs to the prevailing party. *See State v. Nolan*, 141 Wn.2d 620, 626, 8 P.3d 300 (2000); *State v. Sinclair*, 192 Wn. App. 380, 388, 367 P.3d 612 (2016). Although Mr. Tucker has made his request in his opening brief as suggested by *Sinclair*, he has not moved to extend time in order to comply with this court's June 10, 2016 general order governing requests to deny an appellate cost award. Given the timing of the filing of Mr. Tucker's opening brief (April 29, 2016, prior to the filing of our general order), we deny his request without prejudice to his prompt filing of a motion to

extend time and the motion and supporting updated financial disclosure required by our general order.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Korsmo, J.

WE CONCUR:

Fearing, C.J.

Siddoway, J.

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

November 21, 2016 - 3:13 PM

Filing Petition for Review

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