SUPREME COURT NO. 95007-5

NO. 76734-8-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

RONALD AHLQUIST,

Petitioner.

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

The Honorable David E. Gregerson, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner Ronald Ahlquist, appellant below, asks this Court to review the decision of the Court of Appeals referred to in section B.

B. COURT OF APPEALS DECISION

Ahlquist seeks review of the court of appeals decision in State v. Ahlquist, __ Wn. App. __, 2017 WL 3142427 (Slip Op. filed July 24, 2017). A copy of the slip opinion is attached as Appendix A. On August 22, 2017, the court of appeals issued an order denying Ahlquist's motion to reconsider. A copy of that order is attached as Appendix B.

C. REASONS TO ACCEPT REVIEW

This Court should accept review because the court of appeals decision conflicts with decisions of this Court,[1] and raises an issue of substantial public interest and significant questions of law under the State constitution that should be decided by this Court, to wit; whether under art. 1, § 21, juries should be instructed that deliberation may occur only when all 12 jurors are present in order to ensure the verdicts rendered are constitutionally valid? RAP 13.4(b)(1), (3) & (4).

[1]See e.g., State v. Lamar, 180 Wn2d 576, 327 P.3d 46 (2014).

D. ISSUES PRESENTED FOR REVIEW

1. Was Ahlquist deprived of his constitutional right to a fair trial and unanimous jury verdicts where the court failed to instruct that deliberations must include all jurors at all times?

2. Does the failure to instruct the jury on how to deliberate in order to reach constitutionally valid verdicts constitute structural error for which prejudice is presumed?

E. STATEMENT OF THE CASE

The Clark County Prosecutor charged appellant Ronald Ahlquist with first degree manslaughter, second degree manslaughter, two counts of second degree identity theft, and one count of first degree theft. CP 21-23. The prosecution alleged that in 2013, Ahlquist took control of his ailing elderly father's monthly Social Security (SSI) benefits, with whom he lived, by applying for and then using a debit card to access those benefits for his own use, and that in September and October 2013, he let his father starve to death by failing to provide proper care. CP 1-11.

A jury trial was held January 19-28, 2016, before the Honorable David E. Gregerson. RP[2] 1-1718. The jury found Ahlquist guilty of both manslaughter charges and both identity theft charges, and also found him

guilty of second degree theft as a lesser included offense to the first degree theft charge. CP 94, 97, 100, 103, 107; RP 1705-08. The court imposed standard range sentences for each conviction, and Ahlquist appeals the judgment and sentence. CP 113-38; RP 1750, 1752.

At trial, with regard to the theft and identify theft charges, the prosecution presented evidence that Ahlquist admitted gaining access to his father's SSI benefits by applying for a debit card and spending at least some of the proceeds on himself. RP 1163-67. The defense, however, presented evidence that Ahlquist's father and other family members approved of Ahlquist using the SSI benefits as he saw fit. RP 1443-44.

With regard to the manslaughter charges, the prosecution presented evidence that Ahlquist's father had suffered from some form of dementia, probably early onset Alzheimer's, since at least 2008, and that he got progressively more addled by the disease until in September 2013 he lacked both the desire and ability to provide any basic care for himself, such that he would have needed almost constant supervision. RP 468-85, 645, 874, 896, 904-06, 909-912. The defense, however, presented evidence that Ahlquist provided the level of care his father wanted, and

[2] There are fourteen consecutively paginated volumes of verbatim report of proceedings referenced collectively herein as "RP."

that in the end his father's desire was simply to die at home, as he had, and that any neglect was self-imposed. RP 1356, 1488, 1517-18.

On appeal Ahlquist argued his convictions should be reversed because of the trial court's failure to properly instruct the jury on how to conduct deliberations in order to reach constitutionally valid verdicts.

The court of appeals rejected Ahlquist's claim. Appendix A. The court concluded that although the error was of constitutional magnitude, it was not manifest because the record failed to show the jury ever deliberated with less than all twelve jurors in attendance. Appendix A at 2-4.

In a motion to reconsider, Ahlquist asked the court to reconsider the jury instruction issue in light of a revised claim that the failure to instruct jurors that deliberations may only occur when all twelve jurors are present constitutes "structural error" for which actual prejudice need not be shown. That motion was summarily rejected. Appendix B.

F. ARGUMENT

REVIEW IS WARRANTED TO DECIDE IF THE FAILURE TO INSTRUCT THAT DELIBERATIONS MAY ONLY OCCUR WHEN ALL TWELVE JURORS ARE PRESENT CONSTITUTES STRUCTURAL ERROR.

The court of appeal rejected Ahlquist's claim that failure to instruct the jury on how to reach a constitutionally valid unanimous verdict

requires reversal, concluding he failed to show actual prejudice, and summarily rejected the structural error claim advanced in the motion to reconsider. Appendix A at 3-4; Appendix B. This Court should grant review and find that structural error occurred that entitles Ahlquist to a new trial.

Criminal defendants in Washington have a constitutional right to trial by jury and unanimous verdicts. Wash. Const. art. I, §§ 21 & 22[3]; 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, 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

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

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 unconstitutional.

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).

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.

As discussed in detail Ahlquist's court of appeals briefing, standardized jury instructions developed in Washington (WPICs), if provided, make clear 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 always involve all twelve jurors. Missing is an instruction informing the jury that it must suspend deliberations whenever one of them is absent. Without such instruction, there is no valid basis to assume the verdicts rendered were the result of "the common experience of all of [the jurors]," which our State constitution requires. State v. Fisch, 22 Wn. App. at 383.

Here, what instructions the court did provide failed to make clear the constitutional unanimity requirement that deliberation occur in the jury room, only then when all twelve jurors are present. The Lamar Court held this type of error is presumed prejudicial, and the prosecution bears the burden of showing it was harmless beyond a reasonable doubt. 180 Wn.2d at 588 (citing State v. Lynch, 178 Wn.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 but for the error. 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 and the prosecution cannot show harmlessness.

The court of appeals rejected the above argument on the basis that the record fails to show the jury conducted any deliberations that included less that all twelve jurors. Appendix A at 2-4. Even if Ahlquist has failed to show actual prejudice (which he does not concede), reversal is still warranted. As discussed below, the failure to instruct a jury on how to achieve constitutional unanimity constitutes "structural error" for which reversal is required without a showing of actual prejudice because it renders the entire proceeding fundamentally flawed.

"Structural error is a special category of constitutional error that 'affect[s] the framework within which the trial proceeds, rather than simply an error in the trial process itself.'" State v. Wise, 176 Wn.2d 1, 13–14, 288 P.3d 1113 (2012) (quoting Arizona v. Fulminante, 499 U.S. 279, 310, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991)).

Where there is structural error, "a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair." Rose v. Clark, 478 U.S. 570, 577-78, 106 S. Ct. 3101, 92 L. Ed. 2d 460 (1986)). Structural error is not subject to harmless error analysis. Fulminante, 499 U.S. at 309-10. Nor is a defendant required to show specific prejudice to obtain relief. Waller v. Georgia, 467 U.S. 39, 49, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984).

There can be no confidence in the constitutionality of Ahlquist's convictions. They are fundamentally flawed because there is no basis to assume the verdicts rendered were unanimous as required by the State constitution and as interpreted by this Court. Lamar, 180 Wn.2d at 585.

Although we assume jurors following the instructions given, there is no basis to assume they know what to do in the absence of instruction. State v. Smith, 181 Wn.2d 508, 519 n.13, 334 P.3d 1049 (2014); State v.

Emery, 174 Wn.2d 741, 764 n.14, 278 P.3d 653 (2012). To the contrary, we assume the citizenry needs to be informed in certain contexts the specifics of the constitutional framework involved. See e.g., Miranda v. Arizona, 383 U.S. 436, 444, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966)[4]; State v. Ferrier, 136 Wn.2d 103, 116, 960 P.2d 927 (1998)[5].

The same is true in the context of jury trials. Certain concepts a criminal jury must understand to properly deliberate are so important to the framework of a criminal trial that the failure to properly instruct on them requires reversal. For example, the failure to correctly instruct a criminal jury on the "reasonable doubt" standard constitutes structural error for which reversal is automatic. Sullivan v. Louisiana, 508 U.S. 275, 281-82, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993).

> Although most constitutional errors have been held amenable to harmless-error analysis, see Arizona v. Fulminante, 499 U.S. 279, 306–307, 111 S. Ct. 1246, 1263, 113 L. Ed.2d 302 (1991) (opinion of REHNQUIST, C.J., for the Court) (collecting examples), some will always

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[4] The Fifth Amendment requires that a person interrogated in custody by a state agent must first "be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." Miranda, 383 U.S. at 444; also State v. Sargent, 111 Wn.2d 641, 648, 762 P.2d 1127 (1988) (finding Miranda warnings are required to overcome presumption that self-incriminating statements are involuntary when obtained by custodial interrogation). Where Miranda warnings are not provided, statements elicited from custodial interrogation are not admissible as evidence at trial. Miranda, 383 U.S. at 444, 476-77.

[5] A warrantless search based on consent is constitutional only when the consent is knowingly and voluntarily given.

> invalidate the conviction. Id., at 309–310, 111 S. Ct. at 1264–1265 (citing, inter alia, Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed.2d 799 (1963) (total deprivation of the right to counsel); Tumey v. Ohio, 273 U.S. 510, 47 S. Ct. 437, 71 L. Ed. 749 (1927) (trial by a biased judge); McKaskle v. Wiggins, 465 U.S. 168, 104 S. Ct. 944, 79 L.Ed.2d 122 (1984) (right to self-representation)). The question in the present case is to which category the present error belongs.

Sullivan v. Louisiana, 508 U.S. at 279.

The same reasons that a flawed reasonable doubt instruction requires automatic reversal apply here.

> The inquiry . . . is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error. That must be so, because to hypothesize a guilty verdict that was never in fact rendered—no matter how inescapable the findings to support that verdict might be—would violate the jury-trial guarantee.

508 U.S. at 279 (underline emphasis added).

Just as "a misdescription of the burden of proof . . . vitiates all the jury's findings" because it renders the mechanism by which guilty is determined fundamentally flawed, so too does the failure to educate a jury that its deliberations must comply with the constitutional requirement that they occur only when all 12 jurors are assembled together in the jury room. Id., at 281; Lamar, 180 Wn.2d at 585. This Court should grant review to decide whether the failure to adequately instruct a jury on how to reach

constitutionally unanimous verdicts constitutes structural error for which reversal is required. RAP 13.4(b)(1), (3) & (4).

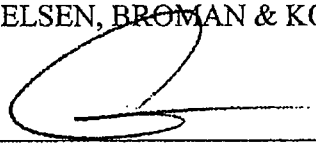
G. CONCLUSION

For the reasons stated, this Court should grant review.

DATED this 19th day of September 2017.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



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Appendix A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. RONALD ALLEN AHLQUIST II, Appellant.	)	No. 76734-8-I DIVISION ONE UNPUBLISHED OPINION FILED: July 24, 2017

BECKER, J. — Ronald Ahlquist was prosecuted for causing the death of his elderly father and taking his money. He appeals his convictions for manslaughter, theft, and identity theft. He contends the trial court should have instructed the jury that deliberations must include all 12 jurors at all times. Because Ahlquist shows no manifest constitutional error, we decline to address this issue raised for the first time on appeal. We also decline to remand for entry of written findings supporting the court's decision to admit certain statements into evidence. The lack of written findings is harmless error.

According to testimony at trial, police were dispatched to a Brush Prairie residence on October 7, 2013, to investigate a death. They found the body of Ahlquist's father wrapped in an air mattress in the back of a van. A medical examiner determined that Ahlquist's father had died from malnutrition due to dementia and neglect. Ahlquist had been his father's sole caretaker. He told

police he was not helping his father to eat and he guessed he had not seen his father for a couple of weeks before he died.

Police discovered that Ahlquist had been using a debit card issued in his father's name and associated with an account where his father's social security benefits were deposited. Ahlquist admitted to using the debit card to buy items for himself.

Trial occurred in January 2016. Ahlquist's defense was, generally, that he provided the level of care that his father wanted. He claimed that he had permission to access his father's social security benefits.

After deliberating for about four hours, the jury convicted Ahlquist and determined by special verdicts that alleged aggravating circumstances were present. Ahlquist was sentenced to 110 months of confinement. He appeals the judgment and sentence.

Ahlquist contends that he was deprived of a fair trial and his right to a unanimous verdict because the court did not specifically instruct the jury that deliberations must include all 12 jurors at all times. Criminal defendants are guaranteed the right to a unanimous verdict, reached through deliberations which are the common experience of all jurors. WASH. CONST. art. I, §§ 21, 22; State v. Lamar, 180 Wn.2d 576, 583, 327 P.3d 46 (2014). This right is violated when, for example, a court instructs the jury to bring an alternate juror "'up to speed'" on deliberations that already occurred and proceed from there. Lamar, 180 Wn.2d at 582. Such an instruction affirmatively tells the reconstituted jury not to deliberate together. Lamar, 180 Wn.2d at 582. Ahlquist contends that the brief

period of deliberations indicates a reasonable possibility that some of the 12 jurors discussed his case without the benefit of every other juror's presence.

The trial court gave a standard instruction on deliberations:

> 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. During your deliberations, you should not hesitate to re-examine your own views and to change your opinion based upon further review of the evidence and these instructions. You should not, however, surrender your honest belief about the value or significance of evidence solely because of the opinions of your fellow jurors. Nor should you change your mind just for the purpose of reaching a verdict.

See 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 1.04 (4th ed. 2016). Ahlquist did not object to this instruction, nor did he propose any alternative or additional instruction on jury deliberations. He raises the issue of jury unanimity for the first time on appeal. Thus, he is required to demonstrate manifest constitutional error. RAP 2.5(a).

An error is manifest if it caused actual prejudice, that is, if it had practical and identifiable consequences at trial. State v. Gordon, 172 Wn.2d 671, 676, 260 P.3d 884 (2011). The question is whether the error is so obvious on the record that it warrants appellate review. State v. O'Hara, 167 Wn.2d 91, 99-100, 217 P.3d 756 (2009). "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).

Ahlquist claims that the possibility of prejudice here is "not just theoretical." He asserts that the short period of deliberation means the jury may have divided

into groups to deliberate on the different charges, with the understanding that each group would then adopt the conclusions reached by the others. He suggests one or more jurors likely left to use the bathroom while the remaining jurors continued to discuss the case.

Ahlquist's hypothetical scenarios are based entirely on speculation. He fails to show manifest constitutional error, and we decline to address his argument on the merits.

Ahlquist also contends the court erred by failing to enter written findings in support of a decision to admit statements he made to police. He does not challenge the decision itself.

Before admitting a defendant's statements into evidence, a trial court must conduct a hearing and, after the hearing, enter written findings supporting its decision. CrR 3.5(a), (c). The trial court conducted the required hearing on January 19, 2016. The court then gave an oral ruling admitting Ahlquist's statements from two police interviews. The court did not enter written findings as required by CrR 3.5(c). We accept the State's concession that this was error.

Ahlquist contends the appropriate remedy is remand for entry of written findings. A court's failure to enter the findings required by CrR 3.5 is considered harmless error if the court's oral comments are sufficient to permit appellate review. State v. Cunningham, 116 Wn. App. 219, 226, 65 P.3d 325 (2003). Here, the court's oral comments on the record of the CrR 3.5 hearing are sufficient. The court explained its rationale as to why admitting the statements

would not violate Ahlquist's constitutional rights. We decline to remand for entry of written findings.

Appellate costs will not be imposed against Ahlquist absent a showing of change in his indigent status. RAP 14.2.

Affirmed.

Becker, J.

WE CONCUR:

Leach, J.

Dwyer, J.

Appendix B

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

STATE OF WASHINGTON, Respondent, v. RONALD ALLEN AHLQUIST II, Appellant.	No. 76734-8-I ORDER DENYING MOTION FOR RECONSIDERATION

Appellant, Ronald Ahlquist, has filed a motion for reconsideration of the opinion filed on July 24, 2017. Respondent, State of Washington, has not filed an answer to appellant's motion. The court has determined that said motion should be denied. Now, therefore, it is hereby

ORDERED that appellant's motion for reconsideration is denied.

DATED this 22ND day of AUGUST, 2017.

FOR THE COURT:

Becker, J.
Judge

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

September 19, 2017 - 3:18 PM

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