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No. 68148-6-I

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

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DIVISION ONE
SEATTLE, WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

LAMAR CURTIS LAMAR,

Appellant.

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

The Honorable Ronald L. Castleberry

REPLY BRIEF OF APPELLANT

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A. ARGUMENT

THE ERROR IN FAILING TO REINSTRUCT THE JURY IS A MANIFEST ERROR AFFECTING A CONSTITUTIONAL RIGHT, THUS MAY BE RAISED FOR THE FIRST TIME ON APPEAL

The State's primary contention in its response brief is that Mr. Lamar has not shown the error affected his constitutional right under RAP 2.5(a), thus he cannot raise it for the first time on appeal. Respondent's Brief at 9-11. The State contends this Court's decision in *State v. Ashcraft*, 71 Wn.App. 444, 462 fn. 7, 859 P.2d 60 (1993), did not consider this issue. Respondent's brief at 9. Unfortunately for the State, *Ashcraft* spoke directly to this issue in rejecting an identical argument made by the State there:

For these reasons, we reject the State's contention that the appellant has failed to preserve these issues for appeal by failing to timely object and by failing to bring any post-trial motions. Manifest error affecting a constitutional right may be raised for the first time on appeal. RAP 2.5(a); *State v. Scott*, 110 Wn.2d 682, 688 n. 5, 757 P.2d 492 (1988) (failing to require a unanimous verdict is a "manifest" constitutional error).

Ashcraft, 71 Wn.App. at 462 fn. 7.

The State attempts to distinguish *Ashcraft* by inferring the error was in the court replacing the sitting juror with the alternate without defense counsel being present. Brief of Respondent at 10-11. The

State contends this was important because had the defense objected, the error could have been corrected. *Id.* A similar argument was made and rejected in *Ashcraft*, where the defense did object but not until after the verdict had been rendered. *Ashcraft*, 71 Wn.App. at 462. In addition, this Court refused to address the trial court's failure to provide defense counsel the opportunity to object, reversing instead on the basis of the trial court's failure to reinstruct the jury. *Id.* at 464 (“We need not decide whether the trial court's failure to make such an effort here constitutes reversible error because we fully agree with the appellant that it was 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.”)

Further, the fact the jury was polled and was found to be unanimous is of no moment. The jury in *Stanley* was polled and deemed unanimous yet this Court reversed the conviction because the trial court's failure to reinstruct the jury. *State v. Stanley*, 120 Wn.App. 312, 316-18, 85 P.3d 395 (2004).

Finally, the State argues that the error did not violate Mr. Lamar's constitutional right to a unanimous jury because the court's instruction was sufficient. Brief of Respondent at 7-8. The State

attempts to put a positive spin on the court's instruction, but the plain words of the court specifically tell the jury they do *not* have to start anew but merely have to bring the alternate "up to speed:"

What I will advise you to do is this: When you go back to the jury room and begin your deliberations, you should spend some time reviewing, recapping with Juror No. 3 any discussion that you may have already had Friday in terms of the case so that he's first brought up to speed in terms of whatever the deliberative process was.

Then once that's been done, resume your deliberations without any other hitches or anything else.

RP 432-33. The court plainly did not instruct the jury to begin deliberations anew but merely recap for the alternate juror what the jury had already done. The State's argument to the contrary ignores the plain language of the trial court.

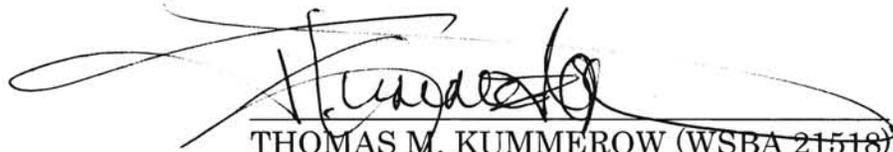
The trial court erred in failing to reinstruct the jury when it replaced a sitting juror with an alternate. Mr. Lamar is entitled to reversal of his conviction.

B. CONCLUSION

For the reasons stated, Mr. Lamar requests this Court reverse his conviction and remand for a new trial.

DATED this 10th day of December 2012.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Tom Kummerow', is written over a horizontal line. The signature is stylized and cursive.

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Respondent,)	
)	NO. 68148-6-I
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LONNIE LAMAR,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 10TH DAY OF DECEMBER, 2012, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON, THIS 10TH DAY OF DECEMBER, 2012.

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