

FILED  
Court of Appeals  
Division II  
State of Washington  
2/27/2018 3:22 PM  
No. 50712-9-II

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

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STATE OF WASHINGTON

V.

YELENA SHUBOCHKINA

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REPLY BRIEF OF APPELLANT

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**TABLE OF CONTENTS**

A. Argument in Reply.....1  
B. Conclusion.....3

**TABLE OF AUTHORITIES**

**Cases**

*State v. Ashcraft*, 71 Wn.App. 444, 859 P.2d 60 (1993)..... 1, 2, 3

A. Argument in Reply

In her Brief of Appellant, Dr. Shubochkina argued that the procedure used to replace a disabled juror with an alternate juror after deliberations have commenced was not followed and requires reversal of her conviction. In doing so, Dr. Shubochkina relied on *State v. Ashcraft*, 71 Wn.App. 444, 859 P.2d 60 (1993). *Ashcraft* requires three things be clear in the trial record. First, there must be a colloquy on the record regarding the reasons for the replacement and an opportunity for the parties to object. (Dr. Shubochkina concedes this properly occurred.) Second, the trial court must instruct the jury on the record that they must recommence deliberations. Third, the trial court must voir dire the replacement juror to ensure she was not tainted.

In its Brief of Respondent, the State concedes that the seminal case is *Ashcraft*. But the State's brief grossly misrepresents the holding of *Ashcraft*. According to the State's Brief, " 'An appellate court must be able to determine *from the record* that jury unanimity has been preserved.' [*Ashcraft*] at 465 (emphasis in original). Thus, no error occurs if a reviewing court can ascertain from the record that the reconstituted jury was instructed to begin deliberations anew. *See Id.*" Brief of Respondent, 6. Thus, according to the State, if the record reflects that the jury was instructed to begin deliberations anew, there is no error. While the State's

Brief does quote a sentence from *Ashcraft*, the sentence is taken out of context. The full paragraph is as follows:

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. We reject the State's contention that because the record does not affirmatively reflect that the jury was *not* so reinstructed, appellant has failed to demonstrate a reasonable possibility of prejudice. Such is not the proper test. An appellate court must be able to determine *from the record* that jury unanimity has been preserved.

*Ashcraft* at 464-65 (emphasis in original *all three times*). Thus, in order to avoid error, the trial court must instruct the jury *on the record* to begin deliberations anew.

In this case, the trial court held a colloquy with counsel while waiting for the alternate juror to arrive. At the end of the colloquy, in a statement the State relies heavily on, the trial court said, “Ms. Bartelson will again remind them that they must start anew with Juror No. 5 because they did have about an hour and a half of deliberations yesterday.” RP, 341-42. But this statement was made outside the presence of the jurors while they were still awaiting the arrival of the alternate juror. There were no further instructions to the jury by the judge. There wasn’t even a statement by the Clerk that, when the alternate juror arrived, she complied

with the judge's instructions to her. In short, the record is devoid of any instructions by the court to the jury, as required by *Ashcraft*.

In addition to the sin of misrepresentation, the State's Brief also commits the sin of omission. *Ashcraft* also requires that trial court ascertain that an alternate juror who has been temporarily excused and recalled has remained protected from influence, interference or publicity. The preferred method of doing this is *voir dire* of the juror. The record in this case is devoid of any attempt to ascertain whether the alternate remained protected from improper influence. The State's Brief makes no attempt to justify this omission, probably because there is no justification.

In summary, the procedure used by the trial court falls short of the procedure required by Washington case law in two ways: the jury was not instructed on the record to recommence deliberations and no attempt was made to ensure the replacement jury had been free from improper influence. Reversal is required.

B. Conclusion

This Court should reverse Dr. Shubochkina's conviction and remand for a new trial.

DATED this 27<sup>th</sup> day of February, 2018.



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

STATE OF WASHINGTON, ) Court of Appeals No.: 50712-9-II  
 )  
Plaintiff/Respondent, ) DECLARATION OF SERVICE OF REPLY  
 ) BRIEF OF APPELLANT  
vs. )  
 )  
YELENA SHUBOCHKINA, )  
 )  
Defendant/Appellant. )

STATE OF WASHINGTON )  
 )  
COUNTY OF KITSAP )

I, Alisha Freeman, declare that I am at least 18 years of age and not a party to this action.

On February 27, 2018, I e-filed the Reply Brief of Appellant with the Washington State Court of Appeals, Division Two; and also designated said document to be sent to the Pierce County Prosecutor via email to: [PCpatcecf@co.pierce.wa.us](mailto:PCpatcecf@co.pierce.wa.us) through the Court of Appeals transmittal system.

On February 27, 2018, I deposited into the U.S. Mail, first class, postage prepaid, a true and correct copy of the Reply Brief of Appellant to the defendant:

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**THE LAW OFFICE OF THOMAS E. WEAVER**

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**Transmittal Information**

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