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COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

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STATE OF WASHINGTON

V.

LYNN LEWIS

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BRIEF OF APPELLANT

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A. Assignments of Error

Assignments of Error

1. The trial court erred by denying the motion to suppress the contents of Mr. Lewis' cell phone.
2. The trial court erred by not instructing the jury that they must not deliberate unless all twelve jurors are present.

Issues Pertaining to Assignments of Error

1. Without probable cause or even knowing who he was, police seized from his lap and analyzed Mr. Lewis' personal cell phone when he was detained in the parking lot of Bi-mart along with another individual who was wanted by law enforcement. Did this search exceed the permissible scope of the search warrant, which was limited to vehicles and cell phones at a residence over a mile away? And if so, should the contents of the cell phone have been suppressed when law enforcement obtained a second search warrant almost two months later relying heavily on the initial illegality?
2. Should the jury have been instructed not to deliberate unless all jurors were present?

## B. Statement of Facts

### Trial Testimony

On October 17, 2017, Washougal Police Officer Casey Handley contacted Stacey Kinley to tell her she had been identified as an identity theft victim and he wished to speak with her at the Bi-mart parking lot. RP, 113-14. This was actually a ruse as Ms. Kinley had not been the victim of identity theft. RP, 114. Ms. Kinley was well known to law enforcement having been the recent target of a “controlled buy”<sup>1</sup> for methamphetamine at her residence at 4501 Addy Street in Washougal. RP, 360. Based upon their investigation, law enforcement had procured a search warrant for the residence and wanted to lure her away to a public place. RP, 114. The ruse worked.

When Ms. Kinley arrived at the Bi-mart parking lot, she was the passenger in a pickup being driven by an unknown male. The vehicle, a white Toyota Tacoma pickup, is registered to Ms. Kinley. RP, 202. A search of Ms. Kinley revealed a small baggie of methamphetamine, weighing less than 0.1 grams. RP, 269.

The male driver was completely unknown to law enforcement and his presence in the pickup surprised the officers. RP, 202, 295. The driver

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<sup>1</sup> A “controlled buy” was described to the jury as a purchase of controlled substances using an informant under surveillance by law enforcement, with the informant being searched before and after the purchase, and the use of money with recorded serial numbers. RP, 360-61.

was contacted and identified as Lynn Lewis, the appellant in this case. On Mr. Lewis' lap was a cell phone, which Detective Sofianos immediately seized. RP, 297. Officer Handley conducted a pat down search of Mr. Lewis and found a small bag of suspected methamphetamine. RP, 116. Mr. Lewis said, "I guess I have dope on me." RP, 296. Deputy Zimmerman conducted a brief interview of him. Mr. Lewis said he was in a dating relationship with Ms. Kinley and had been spending about four nights a week at her house. RP, 204. When asked, he claimed to have no knowledge of drug use or sales in the residence. RP, 207.

Inside Ms. Kinley's bedroom, identified as Room 2 in the record, where Mr. Lewis also stayed when he spent the night, police located methamphetamine, drug paraphernalia, pseudoephedrine, and other products necessary to manufacture methamphetamine. RP, 101; RP, 207-17.

There was a second bedroom, identified in the record as Room 3, with a closet identified as Room 5, and a bathroom, identified as Room 4. RP, 103-04; 161-63. The second bedroom was locked when the police arrived. Inside the second bedroom was a safe. The safe combination was provided to law enforcement by Ms. Kinley. RP, 199-200. Inside the safe, law enforcement found two firearms. RP, 193. There was a rifle leaning on the wall near the safe. RP, 186. A reusable lined bag was located with

two firearms. RP, 186, 190. Inside the bedroom's closet was a rifle and an AR15. RP, 195-96. Each of the seven firearms was tested by Sgt. Schmidt and found to be an operational firearm. RP, 141.

After the firearms were located, Detective Sofianos asked Mr. Lewis about them. RP, 303. Mr. Lewis said he used to own two black powder handguns but had given them to his wife. RP, 302. He had also given some guns to Ms. Kinley and did not know what the status was of them. RP, 303. He explained he knew he was a convicted felon and could not lawfully possess firearms, although his understanding was that black powder handguns are exempt under the statute. RP, 303.

Mr. Lewis told Officer Zimmerman that Ms. Kinley was involved in frequent methamphetamine sales, two to four sales per day. RP, 219. He demonstrated some knowledge of her business, including the fact she had nine regular buyers and the street value of an ounce of methamphetamine, but never admitted personally assisting her in the drug sales. RP, 223.

After obtaining the second search warrant, law enforcement conducted a search of Mr. Lewis' cell phone. The phone contains scores of text messages between him and Ms. Kinley, as well as others, that closely tied him to Ms. Kinley's drug dealing and the firearms found at the residence. The prosecutor did not understate the importance of the text messages in his closing argument when he told the jury that it was the text

messages that “tie Mr. Lewis to all this.” RP, 436. A representative sample of the text messages include the following (all texts are from Mr. Lewis unless otherwise indicated).

From Ms. Kinley: “Give her a quarter and get a hundred and twenty bucks from her.” RP, 322.

From Ms. Kinley: “Hey babe. Mike’s number is 360-xxx-xxxx. Beep him right before you get there. Ball is eighty dollars.” RP, 309.<sup>2</sup>  
“Hey sweetheart I just got done with Mike. He paid me the full eighty all right.” RP, 323.

From Ms. Kinley: “You can just put everything in the safe and I’ll deal with it tomorrow if you want.” RP, 332.

“What are you talking about love? You want me to put everything in the safe and leave?” RP, 332.

“I have a .38 that’s a 1914 model but I want four hundred bucks for it.” RP, 352.

“I’ve been waiting for a guy to buy this pistol but he’s already at three days. He’s trying to get the money up for it. Eight hundred and fifty bucks – that’s how much that pistol he wants.” RP, 352.

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<sup>2</sup> According to Detective Sofianos, a “ball” is a common slang term for 3.5 grams of methamphetamine, which has a street value of eighty dollars. RP, 309.

“I have a .40 caliber – has to go for four hundred – no less.” RP, 354

Mr. Lewis was convicted by a jury of Possession of a Controlled Substance – Methamphetamine within a school zone, Possession of Pseudoephedrine with Intent to Manufacture, and seven counts of Unlawful Possession of a Firearm in the First Degree. RP, 523-25.

Mr. Lewis requested language in the jury instructions advising the jury to deliberate only when they were all together. CP, 66-67; RP, 371-72. The Court declined to give the instruction. RP, 385,

Mr. Lewis was sentenced to 120 months in prison and has to register as a firearm offender. RP, 549. A notice of appeal was filed February 7, 2018. CP, 235.

#### Suppression Motion

Prior to trial, Mr. Lewis filed a motion to suppress the contents of his cell phone. CP, 21. Two search warrants were issued in this case. The first search warrant authorized a search of the “residence, curtilage, and outbuildings located at 4501 Addy Street #36 Washougal.” CP, 38. The scope of the search warrant included a search for methamphetamine, a “physical search of clothing, bags, vehicles, or other items found on or in the possession of Stacy Jo Kinley,” and “cellular telephones and their

electronically stored memory, which may be examined and copied.” CP, 39.

As detailed above, law enforcement decided, rather than immediately commence the search, it would first conduct a ruse to lure Ms. Kinley out of the home. When Ms. Kinley arrived, she was a passenger in a vehicle owned by her and driven by Mr. Lewis. The second search warrant affidavit provides more detail of what happened next.

Kinley informed me she had a purse in the truck, which also held her cellular phone. The warrant covered a search of any vehicle Kinley was found in possession of at the time of service. I was aware the truck she arrived in is owned by her. . . LEWIS had a cellular phone on his lap, which I asked him to set down, to ensure he did not call anyone back at the residence. (I subsequently seized this cellular phone, which is the property being sought for further search.) Pursuant to the authority granted in the search warrant, I viewed text messages in both cellular phones. I observed text messages in both phones, which supported the suspicion that both Kinley and Lewis are selling methamphetamine.

CP, 46. The second search warrant affidavit also details extensively the conversations law enforcement had with Ms. Kinley and Mr. Lewis, the drugs that were found on their person when they arrived at the parking lot, and the drugs later located in the residence. CP, 46-48. The second search warrant was authorized on December 13, 2017, nearly two months after the cell phone was seized. CP, 51. As detailed above, the contents of the

cell phone were used extensively by the State at trial as evidence of drug trafficking and firearm possession.

At the suppression motion, Mr. Lewis argued the second search warrant affidavit materially misrepresented the first search warrant. CP, 27-28. Specifically, the second search warrant affidavit misrepresented what law enforcement was allowed to search, i.e. vehicles found in Ms. Kinley's possession and cellular phones. Defense counsel argued this issue as a *Franks*<sup>3</sup> issue, and asked the trial court to excise the offending portions of the second warrant and suppress the contents of the cell phone.

The trial court denied the motion to suppress. RP, 46. In its ruling, the trial court appears agree with defense counsel without deciding that some information from the second search warrant should be excised. CP, 44-45. But the trial court, invoking the independent source doctrine, found sufficient untainted information in the remainder of the second search warrant affidavit to survive a probable cause challenge. RP, 45.

On April 24, 2018, two-and-a-half months after the notice of appeal was filed, the trial court entered findings of fact and conclusions of law from the suppression motion. Supplemental CP. In the court's conclusions of law, the court states at paragraph 5, "The face of the October 13, 2017 search warrant document gives authority to search cell

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<sup>3</sup> *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978).

phones in the residence or in the possession of Ms. Kinley. But even if the Court were to excise the two sections challenged by the defendant in the December 13, 2017 search warrant affidavit, there is still sufficient information contained within for the reviewing magistrate to find Probable Cause for the warrant to search defendant's phone." Supplemental CP, page 4-5.

### C. Argument

1. The trial court erred by denying the motion to suppress the contents of Mr. Lewis' cell phone.

The United States Supreme Court has characterized the modern cell phone as a "pervasive and insistent part of daily life." *Riley v. California*, 134 S.Ct. 2473, 2484, 189 L.Ed.2d 430 (2014). The Court said, "[It] is no exaggeration to say that many of the more than 90% of American adults who own a cell phone keep on their person a digital record of nearly every aspect of their lives—from the mundane to the intimate." *Riley* at 2490. Recognizing the unique role modern cell phones play in American society, the Court has held that many warrant exceptions, such as the search incident to arrest or the search of evidence possessed by third parties, are insufficient to authorize a cell phone search. See *Riley* at 2495 (search incident to arrest); *Carpenter v. United States*,

\_\_ S.Ct. \_\_, \_\_ (decided June 22, 2018) (third parties). The search of a cell phone requires a warrant.

In addition, because cell phones implicate First Amendment concerns, courts apply a heightened level of scrutiny to cell phone searches. *State v. McKee*, 3 Wn.App.2d 11, 413 P.3d 1049 (2018); *State v. Perrone*, 119 Wn.2d 538, 834 P.2d 611 (1992). It is against the backdrop of this case law that Mr. Lewis assigns error to the search of his cell phone.

The first issue is whether the search of Mr. Lewis' cell phone was authorized by the first search warrant. The trial court presumed without deciding that it was not. But because conclusions of law from the suppression motion are reviewed de novo by this court, this Court needs to make that determination independently. *State v. Meckelson*, 133 Wn.App. 431, 135 P.3d 991 (2006). This Court should conclude the search of the cell phone was not authorized by the first search warrant.

There are two possible clauses in the first search warrant that arguably authorize the search of Mr. Lewis' cell phone. The first clause authorized the "physical search of clothing, bags, vehicles, or other items found on or in the possession of Stacy Jo Kinley." CP, 39. The second clause authorized the search of "cellular telephones and their

electronically stored memory, which may be examined and copied.” CP, 39. Neither clause authorizes the search of Mr. Lewis’ cell phone.

Although the first search warrant authorized a “physical search of clothing, bags, vehicles, or other items found on or in the possession of Stacy Jo Kinley” and “cellular telephones,” it limited the “Location to be Searched” to the “residence, curtilage, and outbuildings located at 4501 Addy Street #36 Washougal.” CP, 38-39. The vehicle Mr. Lewis was driving and the cell phone he was carrying were nowhere near 4501 Addy Street in Washougal at the time of the search.<sup>4</sup>

The Fourth Amendment’s particularity requirement requires that a search warrant state with particularity that probable cause exists for the search and the warrant must particularly describe the place to be searched and the persons or things to be seized. *State v. Rivera*, 76 Wn.App. 519, 888 P.2d 740 (1995). The Fourth Amendment’s requirements of probable cause and particularity in describing places to be searched and persons or things to be seized are inextricably interwoven. The particularity requirement of the Fourth Amendment has as one of its purposes the avoidance of warrants issued on loose, vague or doubtful bases of fact. *Rivera* at 523 (citations omitted). In *Rivera*, the search warrant authorized

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<sup>4</sup> The record does not contain the location of the Bi-mart, but a simple Google search shows there is a Bi-mart at 3003 Addy Street in Washougal, which is approximately 1.1 miles away from 4501 Addy Street.

the search of a residence and all persons and vehicles present at the residence or its curtilage at the time of the search. When law enforcement arrived to execute the warrant, Mr. Rivera tried to leave in his vehicle but was blocked in by law enforcement, detained, and searched. Neither Mr. Rivera nor his vehicle were mentioned in the warrant.

The Court of Appeals held that the search violated the particularity requirement. In doing so, the Court relied heavily of *Ybarra v. Illinois*, 444 U.S. 85, 100 S.Ct. 338, 62 L.Ed.2d 238 (1979). In *Ybarra*, the United States Supreme court held that a general search warrant may not be used to justify the search a of a person present on the premises for whom probable cause does not exist. The Court in *Rivera* extended that logic to vehicles and suppressed the evidence.

Washington Courts have applied the particularity requirement more strictly when the subject of the search raises First Amendment concerns, including cell phones. *State v. McKee*, 3 Wn.App.2d 11, 413 P.3d 1049 (2018); *State v. Perrone*, 119 Wn.2d 538, 834 P.2d 611 (1992).

In Mr. Lewis' case, the warrant is very specific as to the location to be searched: 4501 Addy Street. Although Ms. Kinley's name appears throughout the search warrant affidavit, Mr. Lewis' name does not ever appear. Police searched Mr. Lewis person and cell phone over a mile away from 4501 Addy Street without any particularized probable cause.

The search of his cell phone cannot be justified pursuant to the first search warrant.

Even assuming *arguendo* the first search warrant can be read broadly enough to authorize a search of Mr. Lewis' cell phone, either as a vehicle search or a cellular telephone search, the search was still illegal under the Fourth Amendment and article 1, section 7 of the Washington Constitution.

Authority to search a vehicle does not extend to personal effects that are clearly recognizable as belonging to another occupant of the vehicle. *State v. Hamilton*, 179 Wn.App. 870, 886-87, 320 P.3d 142 (2014); *State v. Parker*, 139 Wn.2d 486, 987 P.2d 73 (1999). In *Parker*, the police were authorized to search the vehicle as a search incident to arrest after the male driver was arrested for driving while license suspended. There was a female passenger who was not under arrest. A woman's purse was discovered and searched. The Supreme Court held that the search of the purse was unlawful, saying, "[W]e have recognized that readily recognizable personal effects are protected from search to the same extent as the person to whom they belong. Personal items may be so intimately connected with an individual that a search of the items constitutes a search of the person." *Parker* at 498 (citations omitted).

In *Hamilton*, the owner of a residence consented to the search of his house. Inside the house was his wife's purse. The owner specifically consented to the search of the purse. The Court of Appeals held that the husband did not have authority to authorize the search of his wife's purse because she had a separate and easily identifiable privacy interest in the contents of the purse.

See also the unpublished case of *State v. James*, 198 Wn.App. 1020 (2017) (unpublished)<sup>5</sup>. In *James*, the police searched a vehicle with the consent of the driver. There was a jacket in the vehicle that was ultimately tied to the passenger, Mr. James, but whose ownership was unclear at the time of the search. Although the Court of Appeals ultimately concluded the search was legal, it did so on the basis that the jacket was not "clearly and closely associated with the nonarrested passenger." Had the jacket been more clearly associated with Mr. James, the consent of the driver would have been insufficient to search the jacket.

In this case, law enforcement had a general warrant authorizing the search of the person of Ms. Kinley, her clothes, bags, vehicles, and cell phones. But there was no warrant authorizing the search of Mr. Lewis, his personal effects, or his cell phone. The cell phone on his lap at the time of the traffic stop was "clearly and closely associated" with him. The search

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<sup>5</sup> Unpublished decisions after March 1, 2013 may be cited as persuasive, but not binding, authority. GR 14.1.

of Mr. Lewis' cell phone fell outside the lawful scope the first search warrant and was not authorized.

Although the trial court declined to specifically so conclude, it recognized that the search of the cell phone probably exceeded the permissible scope of the first search warrant, so the trial court went on to decide whether other facts contained in the second search warrant affidavit established probable cause to search the cell phone. The trial court cited the numerous incriminating statements of both Mr. Lewis and Ms. Kinley, as well as the extensive evidence of drug trafficking found at the residence, and concluded there was probable cause for the second warrant.

But the trial court's analysis ignores one overwhelming fact: *the cell phone had already been illegally searched*. While the scope of the cell phone search was more extensive after the procurement of the second search warrant, Detective Sofianos had already seized the cell phone, analyzed it, and read the text messages contained in it sufficient to know the cell phone contained evidence of drug trafficking. The procurement of a second search warrant nearly two months after Detective Sofianos' initial search of the cell phone cannot cure that illegality.

The trial court cited the independent source doctrine to justify the cell phone search. This doctrine is analyzed in *State v. Benancouth*, 190 Wn.2d 357, 413 P.3d 566 (2018), *State v. Gaines*, 154 Wn.2d 711, 116

P.3d 993 (2015), and *State v. Smith*, 113 Wn.App. 846, 55 P.3d 686 (2002). To determine whether challenged evidence truly has an independent source, courts ask whether illegally obtained information affected (1) the magistrate's decision to issue the warrant or (2) the decision of the state agents to seek the warrant. *Benancouth* at 365.

The facts of *Gaines* and *Smith* merit close attention. In *Gaines*, police, having probable cause to arrest the defendants for kidnapping, robbery, and firearm violations, spotted the defendants' vehicle and executed a felony traffic stop. During the stop, police lawfully seized a firearm and ammunition incident to arrest. One of the officers opened the locked trunk and briefly observed another firearm. The officer immediately closed the trunk and left the firearm undisturbed. The vehicle was impounded and a search warrant was obtained the next day. The search warrant affidavit contained one sentence mentioning the open trunk.

The Court first ruled that the search of the locked trunk was unlawful. The Court, nevertheless, ruled that the evidence recovered from the trunk need not be suppressed because the independent source doctrine applied. The Court noted the firearm was briefly observed but not seized. To the extent that the defendant was entitled to a remedy, the Court ruled that the one sentence mentioning the illegal search should be

excised. But suppression was not required, “provided that the affidavit contains facts independent of the illegally obtained information sufficient to give rise to probable cause.” The Court also held that the State bears the burden of proving the officers “would have sought a search warrant for [the] trunk based on facts gathered independently.” *Gaines* at 721.

In *Smith*, police developed probable cause to search a residence for drugs and some officers left to contact a magistrate about a search warrant. While waiting for the warrant, the remaining officers continued to search the property, although nothing was seized. None of the information learned during this intervening period was included in the search warrant affidavit. After the search warrant was authorized, the illegal contraband previously observed was seized. The Court concluded the intervening search was illegal, but, applying the independent source doctrine, concluded “evidence need not be suppressed if it would have been acquired even without the lawful activity, or if the causal connection between its acquisition and the unlawful activity is attenuated.” *Smith* at 856 (citation omitted).

The *Smith* Court distinguished an earlier case, *State v. Bean*, 89 Wn.2d 467, 572 P.2d 1102 (1978). In *Bean*, the Washington Supreme Court held that the unlawful entry was illegal and the “subsequently obtained search warrant was not curative of the original illegal entry.”

*Bean* at 473. The *Smith* case concluded the *Bean* case was distinguishable because information learned during the original illegal search was included in the search warrant affidavit. In Mr. Lewis' case, evidence obtained during the illegal search was included in the subsequent search warrant affidavit, so the case is more analogous to *Bean* than to *Smith*.

Applying *Gaines* and *Smith* to the facts of Mr. Lewis' case, this Court should conclude the independent source doctrine does not apply. First, unlike in *Gaines* and *Smith*, the second search warrant affidavit relies heavily on illegally obtained information. In *Gaines*, there was a single sentence and in *Smith* there was no reference to the illegally obtained information. In Mr. Lewis' case, there was significant discussion of the seizure and inspection of the cell phone. CP, 46.

Second, unlike in *Gaines* and *Smith*, the evidence was actually seized. In *Gaines*, although the officer saw the firearm, he did not seize it, choosing instead to wait for a search warrant. In *Smith*, the officers conducted the illegal search literally while waiting for the search warrant. Nothing was seized until the search warrant was procured. Conversely, Mr. Lewis' cell phone was immediately seized and placed into evidence without a warrant.

Third, unlike in *Gaines* and *Smith*, law enforcement waited a significant period of time before obtaining a search warrant. In *Gaines*,

the search warrant was obtained the next day after the illegality. In *Smith*, law enforcement was literally applying for the search warrant when the illegality occurred. In Mr. Lewis' case, the search warrant was not obtained for almost two months – 57 days to be exact.

Fourth, unlike in *Gaines* and *Smith*, law enforcement had sufficient information to obtain a search warrant based upon probable cause prior to the illegality. In *Gaines*, police had probable cause to believe that the defendant had kidnapped and robbed a victim at gun point. At the time of the illegality, they also had already lawfully seized one firearm incident to arrest. There can be little doubt the officers would have obtained a search warrant for the trunk in due course, with or without the illegality. In *Smith*, the officers developed probable cause and some of the officers had already left to get a warrant. The illegality occurred while the officers sought a warrant and nothing learned in the interviewing period was used. Conversely, at the time Detective Sofianos seized and examined the cell phone, he knew nothing of Mr. Lewis. Officers did not know who he was and were surprised when he drove up. At the time of the illegality, there was not sufficient probable cause to obtain a search warrant for Mr. Lewis or his cell phone.

This Court should conclude the independent source doctrine does not apply. Mr. Lewis' cell phone was illegally seized and searched

without a warrant and the procurement of a subsequent search warrant does not cure the illegality.

Finally, there is the issue whether the introduction of the cell phone contents was prejudicial error at Mr. Lewis' trial. The error was clearly not harmless. The text messages were powerful evidence of Mr. Lewis' drug trafficking and firearm possession. The prosecutor argued as much when he told the jury it was, "the text messages that tie Mr. Lewis to all this." RP, 436. The error was not harmless and reversal is required.

2. The trial court erred by not instructing the jury that they must not deliberate unless all twelve jurors are present.

Mr. Lewis proposed a modified jury instruction, based upon WPIC 151, that included the language, "You may only deliberate when all twelve jurors are present." CP, 66. Mr. Lewis cited *State v. St. Peter*, 1 Wn.App.2d 961, 408 P.3d 361 (2018) in support of this modification. CP, 67. The Court erroneously overruled this instruction.

In *St. Peter*, as well as a subsequent case, *State v. Sullivan*, 3 Wn.App.2d 376, 415 P.3d 1261 (2018), the Court rejected similar challenges because the issue was being raised for the first time on appeal. Mr. Lewis made a timely request for the jury instruction, so the issue is properly before this Court.

Under our state constitution, criminal defendants have a right to a unanimous jury verdict. Wash. Const. art. I, sections 21 and 221; *State v. Ortega-Martinez*, 124 Wn.2d 702, 707, 81 P.2d 231 (1994), *State v. Stephens*, 93 Wn.2d 186, 190, 607 P.2d 304 (1980). Our state approach “is in accord with the American experience of jury unanimity.” *State v. Lamar*, 180 Wn.2d 576, 584, 327 P.3d 46 (2014). Our Supreme Court concurred with an often-cited passage from the California State Supreme Court:

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 *People v. Collins*, 17 Cal.3d 687, 693, 552 P.2d 742, 131 Cal.Rptr. 782 (1976).

This Court also cited *People v. Collins*, in establishing that, “One of the essential elements of the right to trial by jury is that a jury in a felony prosecution consist of 12 persons and that its verdict be unanimous. Those 12 jurors must reach their consensus through deliberations which are the common experience of *all* of them.” *State v. Fisch*, 22 Wn. App.

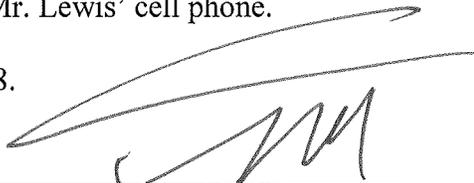
381, 383, 588 P.2d 1389 (1979) (emphasis added). To ensure that deliberations do not occur outside the presence of the whole jury, it was proper in one case to instruct the jury they “must not discuss with anyone any subject connected with this trial,” and “must not deliberate further upon the case until all 12 of you are together and reassembled in the jury room.” *Bormann v. Chevron USA, Inc.*, 56 Cal. App. 4th 260, 262-63, 65 Cal. Rptr. 2d 321, 323 (1997).

The court’s instructions in Mr. Lewis’ case failed to require a unanimous verdict because the jurors were not instructed that they must deliberate only when all twelve of them are assembled together in the jury room. Without a jury instruction which explicitly instructs the jurors to deliberate only when all twelve of them are together in the jury room, the constitutional requirement of a unanimous verdict is not met. It was error for the trial court to deny Mr. Lewis’ timely request for a jury instruction advising them of the same.

#### D. Conclusion

This Court should reverse and remand for a new trial, with instructions to suppress the contents of Mr. Lewis’ cell phone.

DATED this 6<sup>th</sup> day of July, 2018.



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Court of Appeals  
Division II  
State of Washington  
7/6/2018 4:43 PM

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

STATE OF WASHINGTON, ) Court of Appeals No.: 51473-7-II  
 )  
Plaintiff/Respondent, ) DECLARATION OF SERVICE OF MOTION  
 ) FOR EXTENSION TO DATE OF FILING  
vs. ) AND BRIEF OF APPELLANT AND  
 ) SUPPLEMENTAL DESIGNATION OF  
LYNN LEWIS, ) CLERK’S PAPERS  
 )  
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 July 6, 2018, I e-filed the Motion for Extension to Date of Filing, Brief of Appellant, and Supplemental Designation of Clerk’s Papers in the above-captioned case with the Washington State Court of Appeals, Division Two; and designated copies of said document to be sent to Clark County Prosecuting Attorney Rachael Rogers via email to: [rachael.rogers@clark.wa.gov](mailto:rachael.rogers@clark.wa.gov) through the Court of Appeals transmittal system.

On July 6, 2018, I deposited into the U.S. Mail, first class, postage prepaid, true and correct copies of the Motion for Extension to Date of Filing, Brief of Appellant, and Supplemental Designation of Clerk’s Papers to the defendant:

Lynn M. Lewis, DOC #405614  
Coyote Ridge Corrections Center  
PO Box 769  
Connell, WA 99326

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1 On July 6, 2018, I deposited into the U.S. Mail, first class, postage prepaid, the original  
2 Supplemental Designation of Clerk's Papers, for filing with Clark County Superior Court, to:

3 Clark County Clerk  
4 1200 Franklin Street • PO Box 5000  
Vancouver, WA 98666-5000

5 I declare under penalty of perjury under the laws of the State of Washington that the foregoing is  
6 true and correct.

7 DATED: July 6, 2018, at Bremerton, Washington.

8   
9 \_\_\_\_\_  
Alisha Freeman

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

**July 06, 2018 - 4:43 PM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division II  
**Appellate Court Case Number:** 51473-7  
**Appellate Court Case Title:** State of Washington, Respondent v. Lynn M. Lewis, Appellant  
**Superior Court Case Number:** 17-1-02268-3

**The following documents have been uploaded:**

- 514737\_Affidavit\_Declaration\_20180706163823D2170793\_3833.pdf  
This File Contains:  
Affidavit/Declaration - Service  
*The Original File Name was Lewis Declaration of Service of Brief.pdf*
- 514737\_Briefs\_20180706163823D2170793\_2662.pdf  
This File Contains:  
Briefs - Appellants  
*The Original File Name was Lewis Brief of Appellant.pdf*
- 514737\_Designation\_of\_Clerks\_Papers\_20180706163823D2170793\_4570.pdf  
This File Contains:  
Designation of Clerks Papers - Modifier: Supplemental  
*The Original File Name was Lewis Supplemental DCP.pdf*
- 514737\_Motion\_20180706163823D2170793\_8366.pdf  
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Motion 1 - Extend Time to File  
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**A copy of the uploaded files will be sent to:**

- cntypa.generaldelivery@clark.wa.gov
- rachael.rogers@clark.wa.gov

**Comments:**

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Sender Name: Alisha Freeman - Email: admin@tomweaverlaw.com

**Filing on Behalf of:** Thomas E. WeaverJr. - Email: tweaver@tomweaverlaw.com (Alternate Email: )

Address:  
PO Box 1056  
Bremerton, WA, 98337  
Phone: (360) 792-9345

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