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Nov 18, 2016
Court of Appeals
Division III
State of Washington

NO. 34396-1-III

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

STATE OF WASHINGTON,

Respondent,

v.

HAYDEN WALSH,

Appellant.

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

The Honorable Vic L. Vanderschoor, Judge

CORRECTED BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Appellant was denied effective assistance of counsel.
2. The trial court erred in admitting prejudicial hearsay testimony against appellant.
3. Appellant was denied a fair trial and unanimous verdicts.
4. Cumulative error deprived Appellant of a fair trial.

Issues Pertaining to Assignments of Error

Appellant was accused of unlawfully imprisoning and assaulting his girlfriend. The girlfriend initially gave statements supporting the accusations, but later recanted, stating she made up the claims in hopes Appellant would get the mental health evaluation she believed he needed.

1. Did defense counsel's repeated failure to object to the admission of hearsay evidence that supported the girlfriend's recanted claims against Appellant, when there was no strategic reason not to object, counsel successfully objected to similar testimony by a subsequent witness, and when the central issue at trial was whether to believe the girlfriend's trial testimony or her prior recanted statements?

2. Did the trial court commit reversible error when, over defense objection, it admitted hearsay testimony that the girlfriend told a police officer Appellant had assaulted her, when no exception to the hearsay exclusionary rule applied?

3. Was Appellant deprived of a fair trial and unanimous verdicts where the court failed to instruct that deliberations must include all jurors at all times?

4. Even if none of the above errors on their own warrant reversal, did their cumulative effect so deprive Appellant of a fair trial such that reversal and remand for a new trial is warranted?

Potential Issue Presented

In the event Appellant does not substantially prevail on appeal, should this Court exercise its discretion to deny a State's motion for costs?

B. STATEMENT OF THE CASE

1. Procedural Facts

The Benton County prosecutor charged appellant Hayden Walsh with second degree assault and unlawful imprisonment, and asserted both offenses constituted acts of domestic violence. CP 1-3. The prosecution alleged that on January 19, 2016, Walsh refused to let his girlfriend, Angela Saenz, leave their apartment, and that he held a screwdriver to her throat and threatened to stab her with it. CP 67-68.

A trial was held April 11-12, 2016, before the Honorable Vic L. Vanderschoor. 1RP¹ 2-177. A jury found Walsh guilty as charged.² CP

¹ There are two volumes of verbatim report of proceedings referenced as follows: 1RP - April 11-12, 2016; and 2RP - April 28, 2016 (sentencing).

46, 48-49; 1RP 173-77. Following imposition of a standard range sentence, Walsh appeals. CP 51-63; 2RP 6.

2. Substantive Facts

On the evening of January 19, 2016, police were dispatched to investigate a "domestic disturbance" report at an apartment complex in West Richland, Washington. 1RP 117-18. When they arrived they contacted the reporting party, Chris Schuler, the apartment complex manager. 1RP 93, 97, 118. While speaking with Schuler the police were approached by Walsh, to whom they explained why they had come and that they were waiting for Officer Steven Heid to arrive before proceeding with their investigation. 1RP 120-21.

When Officer Heid arrived, Walsh told him "nothing physical" had happened, but admitted he and his girlfriend, Saenz, had been arguing. 1RP 104. Heid then interviewed Saenz, after which he placed Walsh under arrest. 1RP 105, 110.

At trial, Saenz, the first trial witness, testified she lied to police when she claimed Walsh had assaulted and imprisoned her. 1RP 37-38, 41-44, 51-52, 59, 65, 71. She said she did so in a misguided attempt to get Walsh a mental health evaluation, which she believed he needed in light of

² The jury also found Walsh guilty of fourth degree assault as a lesser included offense to the second degree assault charge, but that verdict was disregarded. CP 47; 1RP 173-74, 176-77.

his odd behavior in the preceding months. 1RP 34-35, 63. When Walsh refused to get the evaluation and his family refused to help, Saenz decided to accuse him of a crime on the assumption an evaluation would be available through the criminal justice system. 1RP 37, 41, 43, 52, 71, 80-81. Similarly, Saenz said she lied in her written statement to police,³ and again when she met for an interview with both defense counsel and the prosecutor on February 19, 2016, in which she repeated the lies she had told the police on January 19th. 1RP 38-44, 55-56, 68-69, 85-86.

The second witness to testify was Schuler, the apartment manager. 1RP 93-100. According to Schuler, after working late on the evening of January 19, 2016, he was in his truck dropping off his uncle, who lived in the apartment above Saenz and Walsh, when he saw Saenz come outside and gesture towards him that she wanted to talk. 1RP 94. Without defense objection, Schuler testified Saenz told him Walsh would not let her leave, had taken her keys and held a screwdriver to her throat. 1RP 94-95.

When asked if Schuler could remember anything else Saenz told him, he initially said he could not. 1RP 96. When prompted by the prosecutor to review the written statement he had prepared for police on the night of the incident, however, Schuler then testified without objection

³ Saenz written statement, Exhibit 2, which indicates it was signed under "penalty of perjury," was admitted as substantive evidence of defense hearsay objection. 1RP 40.

by defense counsel, that he recalled Saenz also saying, "He's going to bash my head in." 1RP 97.

Schuler also testified that as he and Saenz were talking, Walsh came up stating he could hear everything they were saying and belligerently told Saenz to get back inside their apartment. 1RP 95. According to Schuler, Saenz complied. Id. Concerned for Saenz's wellbeing, Schuler called 911. 1RP 97. When police arrived, Schuler told them what he had witnessed. 1RP 98.

On cross examination, Schuler admitted he failed to include any mention of a screwdriver being held to Saenz's neck in his written statement prepared the day of the incident. 1RP 100.

The remaining three witnesses were all members of law enforcement; Officer Jared Kelly, Officer Steven Heid, and Sergeant Duane Olsen. 1RP 101-130.

According to Officer Kelly, he spoke casually with Walsh at the scene while others interviewed Saenz. 1RP 129. Kelly claimed Walsh said he and Saenz had been wrestling when all of a sudden she hit him in the face and gave him a karate chop to the throat, which prompted Walsh to put his finger into Saenz's throat and say, "I can choke you with one finger." Id. Kelly had no contact with Saenz. 1RP 130.

According to Officer Heid, when he arrived at the scene Walsh was outside the apartment, and seemed surprised police had been called. 1RP 104. Walsh denied there had been any physical confrontation, but agreed he and Saenz had been arguing. Id.

After speaking with Walsh, Heid interviewed Saenz. 1RP 105. According to Heid, when they met Saenz "wasn't extremely distraught, but she was definitely concerned." 1RP 106. She did not appear to have been crying. 1RP 107. Heid agreed Saenz appeared to understand the questions being asked and gave coherent responses. Id.

Unlike with Schuler, when the prosecution asked Heid what Saenz told him during the interview, defense counsel objected, noting the question called for a hearsay response. 1RP 108-09. Those objections were sustained, for the most part. Id. The court did overrule one such objection, however, when defense counsel objected to the prosecutor's question, "Did [Saenz] indicate that an assault had taken place?[,]" to which Heid replied, "Yes." 1RP 108-09.

Similar to the direct examination of Heid, when the prosecution asked Sergeant Duane Olsen, who had also responded to Schuler's 911 call, what Schuler told him at the scene, defense counsel's hearsay objection was sustained. 1RP 118. And when Olsen was asked to testify

about what Saenz told him, defense counsel's hearsay objection was once again sustained. 1RP 122.

C. ARGUMENTS

1. DEFENSE COUNSEL'S FAILURE TO OBJECT TO PREJUDICIAL HEARSAY TESTIMONY DEPRIVED WALSH OF HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

There was no reasonable strategic basis for defense counsel's failure to object to hearsay testimony tending to corroborate Saenz's recanted claims against Walsh. Moreover, counsel successfully objections to similar subsequent testimony shows the failure to object previously was not strategic, but instead deficient performance on counsel's part. Because any evidence tending to corroborate Saenz's since-recanted claims made a conviction more likely, counsel's deficient performance so prejudiced Walsh that reversal is warranted.

“A claim of ineffective assistance of counsel may be considered for the first time on appeal as an issue of constitutional magnitude.” State v. Nichols, 161 Wn.2d 1, 9, 162 P.3d 1122 (2007). The right to effective assistance of counsel under the Sixth Amendment of the United States Constitution and Article I, Section 22 of the Washington State Constitution is violated when the attorney's deficient performance prejudices the defendant such that confidence in the outcome is undermined. Strickland v.

Washington, 466 U.S. 668, 685-87, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 225-26, 229, 743 P.2d 816 (1987).

Counsel's performance is deficient when it falls below an objective standard of reasonableness and is not undertaken for legitimate reasons of trial strategy or tactics. State v. Saunders, 91 Wn. App. 575, 958 P.2d 364 (1998); State v. McFarland, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995). The deficient performance is prejudicial where there is a reasonable probability that, but for counsel's unprofessional error, the result of the proceeding would have been different. Strickland, 466 U.S. at 687-88; Saunders, 91 Wn. App. at 578. It is well settled that failure to object to inadmissible testimony constitutes deficient performance. See e.g., State v. Leavitt, 49 Wn. App. 348, 359, 743 P.2d 270 (1987) affd, 111 Wn.2d 66, 72, 758 P.2d 982 (1988) (lack of timely objection to admission of child hearsay statements constitutes deficient performance); State v. Hendrickson, 129 Wn.2d 61, 79, 917 P.2d 563 (1995), overruled on other grounds by Carey v. Musladin, 549 U.S. 70, 127 S. Ct. 649, 166 L. Ed. 2d 482 (2006).

Because Walsh bases his ineffective assistance claim on counsel's failure to challenge the admission of evidence, he must also show that an objection to the evidence likely would have been sustained. Saunders, 91 Wn. App. at 578 (citing McFarland, 127 Wn.2d at 337, n.4).

Witnesses generally must testify only from their personal knowledge of events or circumstances. ER 602. Testimony based on out-of-court statements offered to prove the truth of the matter asserted is inadmissible hearsay. ER 801, 802.

Here, apartment manager Chris Schuler testified about Saenz unsworn, out-of-court statements. 1RP 94-95, 97. This hearsay testimony was offered to prove Walsh had assaulted and imprisoned Saenz, despite her subsequent recantations. This was hearsay, for which no exception applies. See ER 803 & 804 (setting out exceptions to the hearsay rule under ER 802).

There was no possible reasonable strategic basis for Walsh's counsel not to object to Schuler's hearsay testimony. To the contrary, the defense was general denial/fabrication, so any evidence tending to confirm Saenz's original allegations was harmful to Walsh. Schuler's hearsay testimony did just that because by testifying Saenz made the same claims to Schuler that she later made to police lent an aura of credibility to those claims that was otherwise absent. The offending testimony was inadmissible hearsay that would have been excluded with a timely objection by counsel, just as most of defense counsel objections to similar testimony were. 1RP 108-09, 118, 122. Therefore, Walsh's trial counsel's performance was deficient.

Counsel's deficient performance prejudiced Walsh. As the prosecution's closing remarks reveal, Schuler's hearsay testimony was

helpful to its effort to convict Walsh, as the prosecutor reiterated his testimony that Saenz told him Walsh held a screwdriver to her throat and was going to "bash" her head in. 1RP 148, 168-69. In fact, the prosecution identified that improper testimony to the jury as a key to assessing Saenz's credibility:

And her spontaneous statements to Mr. Schuler were made before she told you she started coming up with the lies, right? She said she didn't start concocting her lies until she got back in the house. Well, I guess that means that you're free to believe that what she told Mr. Schuler about. "He's going to bash my head in; he held the screwdriver to my neck, and please help me," I guess that means she hadn't lied about that yet, because by her testimony she hadn't come up with that lie yet, right? So you guys get to assess that. Is her first statement to Mr. Schuler, the officers, the truth? Or the second one in her affidavit with the same story? Or her third one recorded in my office, the same story? Or are you going to believe the fourth story, the one she told you on the stand? You guys get to decide that.

1RP 152-53.

Moreover, the prosecution specifically acknowledged that Walsh's guilt or innocence turned on the jury's determination of which version of events to believe. 1RP 171. Therefore, any evidence tending to corroborate what Saenz initially told police increased the likelihood that version would be believed and therefore increased significantly the likelihood of conviction and decreased the likelihood of an acquittal or hung jury. See State v. Petrich, 101 Wn.2d 566, 575, 683 P.2d 173 (1984) (corroboration increases

credibility) (overruled on other grounds by State v. Kitchen, 110 Wn.2d 403, 756 P.2d 105 (1988)).

The repeated failure to object and to move to strike the offending hearsay testimony undermines confidence in the outcome and requires reversal under the Strickland standard. 466 U.S. at 685-87. There is a reasonable probability that had defense counsel properly objected and moved to strike the testimony, the trial court would have sustained the objection and granted the request to strike, and as such, the outcome would likely have been different. A jury that was properly precluded from considering the hearsay testimony may have found the prosecution failed to meet its burden to prove Walsh guilty beyond a reasonable doubt because there was insufficient corroboration for Saenz's original accusation to police.

In addition, the offending testimony struck a direct blow to the defense theory, which was that Saenz lied when she told police Walsh had assaulted and imprisoned her, and that her trial testimony told the true story. Schuler's hearsay testimony corroborating Saenz's initial claims cut directly against the defense theory and supported the prosecution theory. This unfairly prejudiced Walsh and therefore his judgment and sentence should be reversed and the matter remanded for a new, fair trial.

2. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY ADMITTING PREJUDICIAL HEARSAY TESTIMONY OVER DEFENSE OBJECTION.

Defense counsel's failure to object was not the only reason improper hearsay evidence was admitted at Walsh's trial. The trial court also let it in despite a timely and appropriate objection by Walsh's counsel, when it allowed Officer Heid to confirm that Saenz told him an assault had taken place. 1RP 108-09.

Like Schuler's hearsay testimony, Officer Heid's hearsay testimony was offered to corroborate Saenz's initial accusations that Walsh had assaulted and imprisoned her, and to rebut her claim at trial that she made it up in a misguided attempt to get Walsh help. This was hearsay, for which no exception applies. See ER 803 & 804 (setting out exceptions to the hearsay rule under ER 802).

And as discussed above, any evidence tending to corroborate what Saenz initially told police increased the likelihood that version would be believed and therefore increased the likelihood of conviction and decreased the likelihood of an acquittal or hung jury. Petrich, 101 Wn.2d at 575. Moreover, as this testimony was introduced through Officer Heid, it likely carried a special aura of credibility with the jury. See State v. Demery, 144 Wn.2d 753, 765, 30 P.3d 1278, 1285 (2001) ("testimony from a law

enforcement officer may be especially prejudicial because the officer's testimony often carries a special aura of reliability.").

Evidentiary error requires reversal "if the error, within reasonable probability, materially affected the outcome of the trial." State v. Halstien, 122 Wn.2d 109, 127, 857 P.2d 270 (1993). This means the error is deemed harmless only "if the evidence is of minor significance in reference to the overall, overwhelming evidence as a whole." State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). Because the outcome of trial turned on which version of events provided by Saenz was believed, and because any evidence tending to corroborate her initial versions would weigh in favor of conviction, there is a reasonable probability the trial court's admission of Officer Heid's hearsay testimony that Saenz claimed Walsh assaulted her affected the outcome of Walsh's trial, and therefore this Court should reverse and remand for a new trial.

3. WALSH WAS DEPRIVED OF HIS RIGHT TO A FAIR TRIAL AND UNANIMOUS JURY BECAUSE THE TRIAL COURT FAILED TO PROPERLY INSTRUCT THE JURY HOW TO REACH CONSTITUTIONALLY ADEQUATE UNANIMITY.

By failing to instruct that deliberations must involve all twelve jurors collectively at all times, the trial court violated Walsh's right to a fair trial and unanimous verdicts. Because the State cannot show this error

was harmless beyond a reasonable doubt, this Court should reverse and remand for a new trial.

In Washington, criminal defendants have a constitutional right to trial by jury and unanimous verdicts. Wash. Const. art. I, §§ 21 & 22⁴; State v. Ortega-Martinez, 124 Wn.2d 702, 707, 881 P.2d 231 (1994). One essential element 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 742 (1976)). Thus, constitutional "unanimity" is not just all twelve jurors

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

coming to agreement. It requires they reach that agreement through a completely shared deliberative process. Anything less is insufficient.

The Washington Supreme Court recently 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."

State v. Lamar, 180 Wn.2d 576, 585, 327 P.3d 46 (2014) (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.

Sometimes jurors receive instruction that at least touches on the need for this heightened degree of unanimity, 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 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, the Washington Supreme Court Committee (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 jurors, "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 two-count criminal trial like here, the pattern instructions do not prohibit the presiding juror from assigning half the jurors to decide each count, with the understanding that the other half of the jurors will adopt the conclusion of the other half on that count for purposes of the unanimous verdict requirement. Such a process violates the constitutional requirement that deliberations leading to verdicts be "the common experience of all of [the jurors]." State v. Fisch, 22 Wn. App. at 383.

Here, what instructions the court did provide to Walsh'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 trial court's first admonishment of Walsh's jurors occurred following their swearing in. That admonishment included the follow:

You may take notes during the trial. When we recess and at the end of the day you need to leave your notepads on your chairs. You must not discuss your notes with anyone or share your notes with anyone until you deliberate on your verdict. During your deliberations you may discuss your notes with other jurors or show them to them. You are not to assume that your notes [are]

necessarily more accurate than your memory. I'm allowing you to take notes to assist you in remembering more clearly, not to substitute for your memory. You are also not to assume that your notes are more accurate than the memories or notes of the other jurors. After you have reached a verdict, your notes will be collected and destroyed by the bailiff. No one will be allowed to read them.

IRP 28-29. Notably, this admonishment only precludes showing or discussing "notes" with other jurors, and says nothing to preclude jurors from discussing the case generally with other jurors, or anyone else for that matter.

Thereafter, following opening statement the matter recessed for lunch and the court admonished the jury, "do not discuss this case or any issue in this case among yourselves or with anyone else until you start deliberating." IRP 30.

Despite the Committee's recommendation to give the full WPIC 4.61 before every recess, it was never provided at Walsh's trial. In fact, the court did not provide any admonishment to the jury during the afternoon recess following Saenz's direct examination, but did admonish the jury at the end of the first day of evidence presentation "not to discuss this case or any issue with this case with anyone or among yourselves." IRP 72, 125. Similarly, on the second and last day the evidence was

presented to the jury, the court recessed when the State rested, but failed to admonish the jury not to discuss the before sending it out. 1RP 130.

The written instructions the court read the jurors prior to closing arguments stated, "During your deliberations, you must consider the instructions as a whole." CP 20 (Instruction 1); 1RP 135. And the following instruction informed jurors they "have a duty to discuss the case with one another and to deliberate in an effort to reach a unanimous verdict." CP 21 (Instruction 2); RP 135.

Instruction 19 told the jury on how to initiate and carry out the deliberative process. CP 38-39; 1RP 141-43. Like the first two instructions, Instruction 19 also reminds jurors they each have the right to be heard during deliberations. CP 38; RP 141.

The court gave no further instruction on how to deliberate. Missing are any written or oral instructions informing the jury of its constitutional duty to deliberate only when all 12 jurors are present, and only as a collective. This 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 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 Walsh's jurors had opportunities for improper deliberations is not just theoretical. For example, the court's minutes provide; "**10:49 A.M.** Jurors retire to begin deliberations." CP 73. They also show the jury returned with a verdict at 2:20 pm. Id.

What is not clear from the record is whether the jurors deliberated the entire three-plus hours, or instead broke for lunch or breaks. If they did take breaks, there is a reasonable probability that some jurors took those breaks with only some other jurors and that they discussed the case apart from other jurors. Such deliberations would clearly violate the "common experience" requirement for constitutionally valid unanimity,

but not the instructions provided by the court. Lamar, 180 Wn.2d at 585.

No instruction told the jury such deliberations were not allowed.

There is also the very likely scenario of one or more jurors simply leaving the jury room briefly to use the bathroom while the remaining jurors continued with deliberations. Once again, this would clearly violate the "common experience" requirement, but not the court's instructions. Lamar, 180 Wn.2d at 585. The jury was never instructed not to engage in such improper deliberations. As such, the jury was left ignorant about 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, whether over lunch, simply walking to and from the jury room, or even in the jury room itself. Nothing informed them such discussions were not allowed. There was nothing provided telling them their 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 constitutionally "unanimous." Lamar, 180 Wn.2d at 585; Collins, 17 Cal.3d at 693. This Court should reverse and remand for a new trial. Lamar, 180 Wn.2d at 588.

4. CUMULATIVE ERROR DEPRIVED WALSH OF A FAIR TRIAL.

Cumulative trial error may deprive a defendant of his constitutional right to a fair trial. State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); State v. Badda, 63 Wn.2d 176, 183, 385 P.2d 859 (1963). Assuming this Court concludes Walsh's claims of ineffective assistance of counsel, improper admission of hearsay testimony, and an improperly instructed jury fail to warrant a new trial on their own, then the combined effect of them certainly does.

The prejudice to Walsh's fair trial right arising from defense counsel's failure to object to Schuler's hearsay testimony, was exacerbated by the trial court's erroneous admission of even more prejudicial hearsay through Officer Heid. And when the prejudice from those two errors is coupled with the jury's ignorance about how to properly deliberate to reach constitutional unanimity, the only reasonable conclusion is that Walsh was denied a fair trial because they eliminate any confidence in the validity of the verdicts rendered. They worked hand-in-hand to deny Walsh his constitutional right to a fair trial.

5. APPEALS COSTS SHOULD NOT BE IMPOSED.

The trial court found Walsh "lacks sufficient funds to prosecute an appeal" and was therefore indigent and entitled to appointment of appellate

counsel and production of an appellate record at public expense. CP 64-65. If Walsh does not prevail on appeal, he asks that no costs of appeal be authorized under title 14 RAP. RCW 10.73.160(1) states the “court of appeals . . . may require an adult . . . to pay appellate costs.” (Emphasis added.) “[T]he word ‘may’ has a permissive or discretionary meaning.” Staats v. Brown, 139 Wn.2d 757, 789, 991 P.2d 615 (2000). Thus, this Court has ample discretion to deny the State’s request for costs.

Trial courts must make individualized findings of current and future ability to pay before they impose legal financial obligations (LFOs). State v. Blazina, 182 Wn.2d 827, 834, 344 P.3d 680 (2015). Only by conducting such a “case-by-case analysis” may courts “arrive at an LFO order appropriate to the individual defendant’s circumstances.” Id. Accordingly, Walsh's ability to pay must be determined before discretionary costs are imposed.⁵ Without a basis to rebut the trial court's determination that Walsh is indigent, this Court should not assess appellate costs against him in the event he does not substantially prevail on appeal.

⁵ Counsel has provided Mr. Walsh with a copy of the "REPORT AS TO CONTINUED INDIGENCY" associated with this Court's General Order re: "REQUEST TO DENY COST AWARD." It will be provided to this Court when completed.

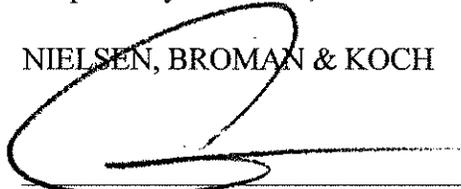
D. CONCLUSION

For the reason stated, this Court should reverse Walsh's judgment and sentence and remand for a new trial.

DATED this 18th day of November 2016.

Respectfully submitted,

NIELSEN, BROMAN & KOCH

A handwritten signature in black ink, appearing to read "C. Gibson", is written over a horizontal line. The signature is stylized and somewhat cursive.

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State V. Hayden Walsh

No. 34396-1-III

Certificate of Service

On November 18, 2016, I e-served and or mailed the corrected brief of appellant directed to:

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Re: Walsh

Cause No. 34396-1-III, in the Court of Appeals, Division III, for the state of Washington.

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



John Sloane
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11-18-2016

Date

Done in Seattle, Washington