

No. 34854-7-III

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

STATE OF WASHINGTON,

Respondent,

v.

DONNY JAMES ST. PETER,

Appellant.

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

The Honorable Christopher E. Culp

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY 1

REVERSAL IS REQUIRED BECAUSE ST. PETER WAS DENIED HIS CONSTITUTIONAL RIGHT TO A UNANIMOUS VERDICT WHERE THE TRIAL COURT FAILED TO INSTRUCT THE JURY THAT IT MUST DELIBERATE ONLY WHEN ALL TWELVE JURORS ARE ASSEMBLED TOGETHER IN THE JURY ROOM AND THE FAILURE TO REQUIRE A UNANIMOUS VERDICT IS A STRUCTURAL ERROR PRESUMED TO BE PREJUDICIAL. 1

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The State argues that “any claimed error by appellant is invited error and cannot be raised on appeal,” mistakenly relying on *State v. Henderson*, 114 Wn.2d 867 (1990), which cites *State v. Boyer*, 91 Wn.2d 342, 588 P.2d 1151 (1979). Brief of Respondent at 1-3. The Washington Supreme Court has established that “[a] party may not request an instruction and later complain on appeal that the requested instruction was given.” *Henderson*, 114 Wn.2d at 879 quoting *Boyer*, 91 Wn.2d at 344-45. The State’s reliance on *Henderson* and *Boyer* is misplaced because appellant is not complaining that the trial court erred in giving the jury instructions proposed by defense counsel. The trial court did not err in giving Jury Instructions 2 and 28 based on WPIC 1.04 and WPIC 151.00. CP 46, 72-73. Appellant is arguing that the trial court erred in failing to give an instruction that further instructs the jury to deliberate only when all twelve of them are assembled together in the jury room. *See* Brief of Appellant at 4-9. Contrary to the State’s argument, the combination of the jury instructions given by the trial court

failed to require a unanimous verdict and consequently denied appellant his constitutional right to jury unanimity.

The State argues further that this Court should decline to address the issue because appellant has failed to show actual prejudice that makes the error manifest under RAP 2.5(a)(3). Brief of Respondent at 3-6. The State's argument fails because it completely ignores appellant's analysis that the failure to require a unanimous verdict is a structural error presumed to be prejudicial. See Brief of Appellant at 8-9. *State v. O'Hara*, 167 Wn.2d 91, 217 P.3d 756 (2009) and *State v. Tucker*, 196 Wn. App. 1041 (2016), cited by the State, are distinguishable because the petitioner/appellant did not raise the argument of structural error. Unlike in *O'Hara* and *Tucker*, the issue may be raised for the first time on appeal under RAP 2.5(a)(3) where the failure to require a unanimous verdict constitutes a manifest error affecting a constitutional right.

The State's arguments are misguided and should be rejected by this Court.

B. CONCLUSION

“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.” *State v. Lamar*, 180 Wn.2d 576, 585, 327 P.3d 46 (2014)(emphasis added).

For the reasons stated here, and in appellant's opening brief, this Court should hold that failure to require a unanimous verdict constitutes structural error and reverse Mr. St. Peter's convictions.

DATED this 27th day of July, 2017.

Respectfully submitted,

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DECLARATION OF SERVICE

On this day, the undersigned sent by email, a copy of the document to which this declaration is attached to the Okanogan County Prosecutor's Office at sfield@co.okanogan.wa.us and bplatter@co.okanogan.wa.us per agreement between the parties and by U.S. Mail to Donny James St. Peter, DOC # 394526, Airway Heights Corrections Center, P.O. Box 2049, Airway Heights, Washington 99001-2049.

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

DATED this 27th day of July, 2017

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