

NO. 67059-0-1

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

STATE OF WASHINGTON,
Respondent,
v.
CHARLES WEBB,
Appellant.

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

APPELLANT'S REPLY BRIEF

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A. ARGUMENT IN REPLY

THE TRIAL COURT VIOLATED MR. WEBB'S
CONSTITUTIONAL RIGHT TO A UNANIMOUS
JURY AND COMMENTED ON THE EVIDENCE.

Charles Webb's conviction should be reversed because the trial court disregarded its own instruction that deliberations must begin anew and provided the reconstituted jury with evidence requested by the original jury.

After jury deliberations commenced in Mr. Webb's trial, the jury requested to rehear and review certain recorded evidence. The trial court informed this original jury that the court would provide the 911 tape and the surveillance video to the jury for it to review the next morning. The following morning, before the court had the opportunity to provide the evidence, a juror was dismissed and an alternate called back in her place. As required to preserve a criminal defendant's right to a unanimous verdict, the court instructed the reconstituted jury panel to begin deliberations anew. However, the court then immediately informed the new jury it would shortly receive the evidence requested by the prior jury. The court thus signaled to the reconstituted jury that it was free to disregard the court's instruction to begin deliberations anew and commented

on the importance of these two pieces of evidence. As a result, Mr. Webb was denied his constitutional right to a unanimous verdict.

In its response brief, the State argues that because no cases address the precise factual scenario presented here, Mr. Webb's claim cannot succeed. Resp. Br. at 6. However, in his opening brief, Mr. Webb detailed the constitutional basis for the rule that reconstituted juries must begin deliberations anew. Criminal Rule 6.5 requires trial court's to honor a criminal defendant's constitutional right to a unanimous verdict by instructing a reconstituted jury that it must begin deliberations anew. Mr. Webb also pointed to extensive case law enforcing this right and requiring a showing from the record that the reconstituted jury was indeed instructed to begin deliberations anew. Mr. Webb's argument logically follows that where a reconstituted jury is instructed by letter to begin deliberations anew but the spirit of the court's communication directs the exact opposite—that it can start its deliberations where the dismantled jury had left off—a criminal defendant's constitutional right to a unanimous verdict is implicated. The State points to no authority supporting its illogical argument that because the trial court provided the instruction required by CrR 6.5, the court's subsequent actions negating that instruction are

irrelevant. Resp. Br. at 5-7. Because it is illogical and unsupported, the Court should disregard the State's argument.

The State also seeks to shift the burden to Mr. Webb to show that the reconstituted jury in his case did *not* begin deliberations anew. Resp. Br. at 7. However, well-settled authority demonstrates that this Court will reverse the conviction unless the record plainly shows that the reconstituted jury *did* in fact begin deliberations anew. State v. Ashcraft, 71 Wn. App. 444, 464-66, 859 P.2d 60 (1993) ("An appellate court must be able to determine *from the record* that jury unanimity has been preserved."); State v. Stanley, 120 Wn. App. 312, 316, 85 P.3d 395 (2004) (reviewing court must be able to determine *from the record* that jury unanimity was preserved and the State bears the burden of proving harmlessness beyond a reasonable doubt).

Finally, the State argues that the court's provision of evidence requested by the prior jury did not intentionally or impliedly convey the court's regard for the evidence. Resp. Br. at 7-8. But the State cannot fairly argue what the court intended when it told the reconstituted jury that it would promptly provide it with two pieces of evidence that the dismantled jury had asked to review. The record shows only that the court told the new jury that the bailiff

would promptly provide it with the appropriate equipment to view the surveillance video and hear the 911 call again. 3/17/11RP 9-10.

While the record does not indicate what the court intended, it is clear what its actions and words implied. By immediately providing a reconstituted jury with copies of two pieces of evidence—the 911 call and the surveillance video—the court implied that it found this evidence to be so important that even where the prior jury had to request such evidence to receive it, the reconstituted jury would be provided with it outright. Though the court told the jury it should begin deliberations anew, the court also implied to this new jury that it would find these two pieces of evidence necessary to its new deliberations. Especially if the jurors did not take the court's provision of the evidence as a rebuke of its instruction to begin deliberations anew, as the State argues, then it must have understood the provision of the evidence to indicate the court's sentiment that this evidence would be critical to any jury deliberating on this case.

Such a comment on the evidence violates our constitution. Const. art. IV, § 16; State v. Levy, 156 Wn.2d 709, 132 P.3d 1076 (2006); State v. Hansen, 46 Wn. App. 292, 300, 730 P.2d 670

(1986). Article IV, Section 16 prevents the “jury from being influenced by knowledge conveyed to it by the trial judge as to his opinion of the evidence submitted” and “forbids only those words or actions which have the effect of conveying to the jury a personal opinion of the trial judge regarding the credibility, weight or sufficiency of some evidence introduced at the trial.” State v. Jacobsen, 78 Wn.2d 491, 495, 477 P.2d 1 (1970). The court’s indication that the 911 call and the surveillance video would be provided to the reconstituted jury while it was supposed to begin deliberations anew implies the court’s personal opinion that those two pieces of evidence were important. Accordingly, regardless whether the court intended to, the court impermissibly commented on the evidence.

This Court should reverse Mr. Webb’s conviction because the court violated Mr. Webb’s constitutional right to a unanimous verdict and commented on the evidence during its proceedings to reconstitute the jury.

B. CONCLUSION

Mr. Webb's conviction should be reversed and remanded for a new trial because the court failed to ensure that the verdict was unanimous and commented on the evidence.

DATED this 23rd day of December, 2011.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'M. Zirk', is written over a horizontal line.

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Washington Appellate Project
Attorney for Appellant

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CHARLES WEBB,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 23RD DAY OF DECEMBER, 2011, 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 23RD DAY OF DECEMBER, 2011.

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