

NO. 93865-2

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

---

---

STATE OF WASHINGTON,

Respondent,

v.

DALE TUCKER JR.,

Petitioner.

---

ANSWER TO PETITION FOR REVIEW

---

ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR PEND OREILLE COUNTY

The Honorable Patrick Monasmith, Judge

---

---

DOLLY N. HUNT  
PROSECUTING ATTORNEY

By: 

Lori Smith, Deputy Prosecutor  
Pend Oreille County Prosecutor's Office  
P.O. Box 5070  
Newport, Washington 99156-5070  
509-447-1946

 ORIGINAL

TABLE OF CONTENTS

A. IDENTITY OF RESPONDENT.....1

B. COURT OF APPEALS OPINION.....1

C. STATEMENT OF THE CASE.....1

D. ARGUMENT.....3

THE COURT OF APPEALS' DECISION IS NOT IN  
CONFLICT WITH THIS COURT'S *LAMAR* DECISION  
BECAUSE *LAMAR* DOES NOT APPLY HERE AND THERE IS  
NO REMAINING SIGNIFICANT QUESTION OF  
CONSTITUTIONAL LAW.....3

1. *The Lamar Decision Does Not Apply Here*.....4

2. *This Case Does Not Involve a Significant Question of  
Constitutional Law as Contemplated by RAP 13.4(b) (3)*.....8

E. CONCLUSION.....9

**TABLE OF AUTHORITIES**

**Washington Cases**

State v. Ashcraft, 71 Wn.App. 444, 859 P.2d 60(1993).....6

State v. Blancafor, 183 Wn.App. 215, 334 P.3d 46(2014).....6

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

State v. McFarland, 127 Wn.2d 322, 899 P.2d 1251(1995).....4

State v. O'Hara, 167 Wn.2d 91, 217 P.3d 756 (2009).....3,4

State v. Dale Tucker, Jr., No. 33714-6-III (Slip Op. filed October 25,  
2016)(Unpublished).....1,3

**Other Jurisdictions**

People v. Collins, 17 Cal. 3d. 687, 552 P.2d 742 (1976).....6

**RULES, STATUTES AND OTHER AUTHORITIES**

RAP 2.5(a)(3).....1,3

RAP 13.4.....4,8,9

WPIC 1.01.....2

A. IDENTITY OF RESPONDENT.

Respondent State of Washington, through Deputy Prosecuting Attorney Lori Smith, submits this answer to the petition for review.

B. COURT OF APPEALS OPINION

The Court of Appeals affirmed Dale Tucker's convictions, holding that Tucker's claim of instructional error is barred by RAP 2.5(a), stating, "[Tucker] shows no manifest error affecting a constitutional right and we decline to address the merits of his nonpreserved claim of error." State v. Dale Tucker, Jr., No. 33714-6-III (Slip. Op. filed October 25, 2016)(Unpublished opinion).

C. STATEMENT OF THE CASE

Dale Tucker was prohibited by court order from entering his Grandmother Betty Durfee's property. RP 71-72; Ex. 1. In May of 2015, Tucker unlawfully entered Betty Durfee's residence and was recorded on video entering the house and stealing items from a freezer in Durfee's kitchen. RP 142. The video also shows Tucker pulling his shirt up over his face when he realized he was being recorded. RP 142, 182, 183. At trial, two cousins of Tucker's identified Tucker as the person in the video. RP 142. Sheriff's Deputy Travis Stigall, who had known Tucker since grade school, also identified Tucker as the person in the video. RP 220,

221, 246. The jury convicted Tucker of residential burglary and the lesser-degree crime of third degree theft. CP 46-48; RP 303.

Tucker did not propose any jury instructions on juror unanimity or jury deliberations, nor did he object to the jury instructions. RP 153, 154, 258, 259. At the beginning of the trial, the Court read the standard opening instruction to the jury (from WPIC 1.01)--which included the admonishment not to discuss the case with each other until they were in the jury room for deliberations. Supp. RP 7. At the end of the first day of trial, the court admonished the jurors again not to discuss the case with each other or anyone else, and admonished them again at the lunch break on the second and final day of trial. RP 149-50, 253-54. There were just two recesses in this trial. RP 132, 249.

The court also informed the jury they must consider the instructions as a whole during their deliberations and that they "have a duty to discuss the case with one another and to deliberate in an effort to reach a unanimous verdict." CP 21, 22; RP 265. Other written instructions explained the deliberation process and the need to reach unanimous verdicts. CP 17-45. Another instruction covered directions for completing the verdict forms, including express language that jurors must be unanimous and that "each of you must agree for you to return a verdict." CP 41; RP 272, 273.

Tucker was convicted and appealed, claiming for the first time on appeal that his right to a unanimous verdict was violated because the trial court failed to expressly instruct the jury that deliberations must only occur when all twelve jurors are present and only as a collective. Brief of Appellant at 5-14. The Court of Appeals affirmed in an unpublished opinion, holding that RAP 2.5(a) bars Tucker's claim of instructional error. State v. Dale Tucker Jr., No. 33714-6-III (Slip Op. filed October 25, 2016)(Unpublished). Tucker petitioned this Court for review.

ARGUMENT WHY REVIEW SHOULD BE DENIED

D. THE COURT OF APPEALS' DECISION DOES NOT CONFLICT WITH THIS COURT'S *LAMAR* DECISION BECAUSE *LAMAR* DOES NOT APPLY HERE AND BECAUSE THERE IS NO REMAINING SIGNIFICANT QUESTION OF CONSTITUTIONAL LAW.

The Court of Appeals held that Tucker could not raise the alleged instructional error for the first time on appeal because he had not shown that the error was a manifest error affecting a constitutional right. Tucker, No. 33714-6-III , at 3, citing RAP 2.5(a)(3) and State v. O'Hara, 167 Wn.2d 91, 98, 217 P.3d 756 (2009).

In comparing the facts of Lamar to the instant case, it is important to remember that when determining whether a claimed error is "manifest," the trial record must be complete enough for the reviewing court to determine whether the claimed error actually prejudiced the appellant by

having "practical and identifiable consequences [at] trial." O'Hara, 167 Wn.2d at 98-99. This an important principle because, "[i]f the facts necessary to adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown and the error is not manifest." State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). The record in Lamar contained such facts; the record in the present case does not.

Tucker argues that the Court of Appeals' decision conflicts with this Court's decision in State v. Lamar, 180 Wn.2d 576, 327 P.3d 46 (2014) and that this case involves a significant question of constitutional law. Petition at 1 (citing RAP 13.4(b)(1) & 3.) Tucker is mistaken.

1. ***The Lamar Decision Does Not Apply Here.***

The Court of Appeals' decision does not conflict with this Court's Lamar opinion because the facts and record in Lamar are significantly different than the facts presented in the instant case. As such, Lamar is distinguishable and its ruling does not apply here. State v. Lamar, 180 Wn.2d 576, 582, 327 P.3d 46 (2014).

First of all, the Lamar case involves the trial court's express erroneous instructional error in the context of seating an alternate juror. Lamar, 180 Wn.2d at 582. Specifically, after the alternate juror was seated, the trial court instructed the jurors to bring the alternate juror "up

to speed" on the deliberations that had already occurred and to go from there. Id. This was error, because the reconstituted jury should have been instructed to start deliberations all over again. Id. This Court said that the erroneous instruction in Lamar "affirmatively told the reconstituted jury not to deliberate together as is constitutionally required." Id.

The second distinguishing factor in Lamar is that in Lamar it was readily apparent *from the record* that deliberations were flawed and could not have included "all twelve jurors at all times" because *the record* showed that the alternate juror was not present at the beginning of deliberations. Lamar, 180 Wn.2d at 587, 588. Additionally, in Lamar, the *record* showed that the trial court failed to instruct that deliberations must start anew. Id. In this way, it was obvious from the *record* in Lamar that the jury could not possibly have deliberated "as a collective" due to the erroneous instruction. Id. It was under these specific facts and record that this Court in Lamar held that the erroneous instruction constituted manifest constitutional error which violated Lamar's right to a unanimous verdict. Lamar 180 Wn.2d at 586, 587.

No such facts in the record exist in the present case, nor does this case involve an alternate juror and as such, the Lamar ruling does not apply here. The Court of Appeals noted this factual distinction in a footnote stating, "[w]e do observe that Mr. Tucker's cited cases involving manifest



constitutional error for unanimity violations when the court failed to instruct the jury to start deliberations anew upon seating of an alternate juror are inapposite because no alternate juror was seated here. . . . Mr. Tucker cites no other authority that manifest constitutional error occurred here." State v. Dale Tucker, *supra* at 5 n. 5 (citing Lamar, 180 Wn.2d at 586; State v. Blancafor, 183 Wn.App. 215, 224-25, 334 P.3d 46 (2014); State v. Ashcraft, 71 Wn.App. 444, 462-64, 859 P.2d 60(1993)). Indeed, even the California case Tucker cites and quotes from involved an alternate juror scenario. People v. Collins, 17 Cal. 3d. 687, 552 P.2d 742 (1976). Petition at 7 (*quoting Lamar quoting Collins*, 17 Cal. 3d at 693).

Not only is the Lamar case factually distinct from the present case, it is also worth noting that there is nothing in the Lamar opinion stating it is manifest constitutional error for a trial court to fail to *instruct* the jury explicitly that "deliberation may only occur when all twelve jurors are present and only as a collective." Petition at 13. Lamar does not say there is a constitutional requirement that a trial court must give the instruction Tucker advocates for in his Petition—yet Tucker cites to Lamar as if it does. *See* Petition for Review at 13 where Tucker states, "[t]he court's failure to instruct the jury that deliberations may only occur when all twelve jurors are present and only as a collective constituted manifest constitutional error. Lamar, 180 Wn.2d at 588." But Lamar says no such thing. No such

instruction was before the Court in Lamar, and its ruling cannot be stretched so far as to cover Tucker's claim of instructional error here.

In sum, there is simply nothing in the record of Tucker's case to bring it within the ambit of this Court's manifest error analysis in Lamar. In Lamar, there were facts *in the record* showing that deliberations were flawed because the jury had been expressly and wrongly instructed about the deliberation process involving the alternate juror. Lamar 180 Wn.2d at 586, 587("This record shows that the asserted constitutional error occurred.") In stark contrast is the lack of facts in this record to support Tucker's alleged claim of instructional error. Tucker's allegation of error is based upon nothing but pure speculation about what "might have" or "could have" occurred in deliberations. Petition at 14, 15, 17. Tucker speculates that there is a "reasonable probability" that the quick verdict in this case indicated the jury may have split into two groups with half deciding one count and the other half deciding the second count so the jury could get out of court on a warm summer day, and he further speculates about juror bathroom breaks and imagines pre-deliberation discussions by jurors at lunch, during recesses, or in the hallway. Petition at 14, 15, 17. Yet there are no citations to the record in support of such allegations. And that is because such facts do not exist. As the Court of Appeals in this case correctly observed, "Mr. Tucker's arguments are

based on pure speculation about juror conduct or what might have occurred during deliberations. No Facts in the record support his . . . allegations that any juror failed to follow the court's instructions or otherwise acted improperly . . . or that the verdicts were not the unanimous consensus of all twelve jurors." Tucker, supra. at 5.

The factual differences between this case and Lamar are so significant that the reasoning of Lamar simply does not apply here. Because Lamar is not controlling, the Court of Appeals' decision is not in conflict with Lamar and the petition should be denied. RAP 13.4(b) (1).

**2. This Case Does Not Involve a Significant Question of Constitutional Law as Contemplated by RAP 13.4(b) (3).**

Tucker also makes the bare assertion that the alleged instructional error "involves a significant constitutional question regarding jury deliberations." Petition 17, 18. Tucker cites no authority for this assertion. Id. "[N]aked castings into the constitutional sea are not sufficient to command judicial consideration and discussion." State v. Johnson, 119 Wn.2d 167, 171, 829 P.2d 1082 (1992)(citations omitted).

Tucker's assertion has also been reduced to "naked castings into the constitutional sea" because Tucker relies entirely upon the Lamar decision for his claim of manifest constitutional error—but Lamar does not apply here, as previously discussed. Because Lamar does not support

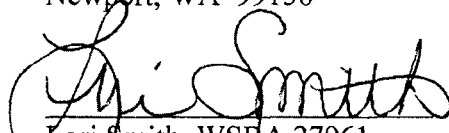
Tucker's claim of constitutional error, and Tucker cites no other authority in support of his assertion that this case involves a "significant question of constitutional law," Tucker does not meet the requirement in RAP 13.4(b) (3), and the petition should be denied.

E. CONCLUSION

The Court of Appeals' decision is not in conflict with this Court's Lamar decision because Lamar is distinguishable and does not apply here. Consequently, because Tucker relies entirely on the inapplicable Lamar case for his claim of manifest constitutional error, Tucker has not shown that his claim of error involves a "significant" question of constitutional law. As such, Tucker cannot meet the requirements for discretionary review under either RAP 13.4(b) (1) or (3). Accordingly, the petition for review should be denied.

Respectfully submitted this <sup>th</sup>20 day of December, 2016.

DOLLY N. HUNT  
PEND OREILLE COUNTY PROSECUTING ATTORNEY  
P.O. Box 5070  
Newport, WA 99156

  
Lori Smith, WSBA 27961  
Deputy Prosecuting Attorney

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
Respondent,	)	No. 93865-2
vs.	)	
	)	DECLARATION OF SERVICE
DALE TUCKER JR.	)	
Petitioner.	)	


---

The undersigned declares under penalty of perjury under the laws of the state of Washington that the following is true and correct:

That on the 20<sup>th</sup> day of December 2016, I caused a true and correct copy of the **Answer to Petition for Review** to be served upon Christopher Gibson, counsel for the Petitioner, *via electronic mail*, at the email address listed below.

Christopher Gibson  
[GibsonC@nwattorney.net](mailto:GibsonC@nwattorney.net)

Signed in Newport, Washington, this 20<sup>th</sup> day of December, 2016.

  
\_\_\_\_\_  
Lori Smith, WSBA 27961  
Attorney for Respondent