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FILED
August 31, 2016
Court of Appeals
Division III
State of Washington
NO. 33714-6-III

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

STATE OF WASHINGTON,

Respondent,

v.

DALE TUCKER, JR.,

Appellant.

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

The Honorable Patrick Monasmith, Judge

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

	Page
A. <u>ARGUMENTS IN REPLY</u>	1
1. TUCKER'S CLAIM HIS JURY WAS NOT PROPERLY INSTRUCTED IMPLICATES A FUNDAMENTAL CONSTITUTIONAL RIGHT AND THEREFORE MAY BE RAISED FOR THE FIRST TIME ON APPEAL.	1
2. THE STATE MISCONSTRUES TUCKER'S REFERENCES TO PRE-DELIBERATIVE JURY ADMONISHMENTS IN HIS BRIEF.	3
B. <u>CONCLUSION</u>	4

TABLE OF AUTHORITES

Page

WASHINGTON CASES

State v. Lamar
180 Wn.2d 576, 327 P.3d 46 (2014)..... 1, 2

OTHER AUTHORITIES

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

RULES, STATUTES AND OTHER AUTHORITIES

RAP 2.5..... 2
WPIC 1.01 3
WPIC 4.61 3

A. ARGUMENTS IN REPLY

1. TUCKER'S CLAIM HIS JURY WAS NOT PROPERLY INSTRUCTED IMPLICATES A FUNDAMENTAL CONSTITUTIONAL RIGHT AND THEREFORE MAY BE RAISED FOR THE FIRST TIME ON APPEAL.

On appeal, Tucker seeks reversal of his convictions based on the trial court's failure to properly instructed his jury on how to reach constitutionally valid unanimity. Brief of Appellant at 5-14. In response, the State urges this Court to refuse to consider the issue because it does not involve manifest constitutional error. Brief of Respondent (BOR) at 2-3. The State is wrong, and the position it takes is in direct conflict with the Washington Supreme Court's decision in State v. Lamar, 180 Wn.2d 576, 327 P.3d 46 (2014). Lamar controls and this Court should therefore reject the State's argument and reverse and remand for a new trial.

The State correctly notes that Lamar involved the trial court's failure to instruct the jury to begin deliberations anew when an alternate juror replaced one of the sitting jurors during deliberations. BOR at 6. But the State then makes the error of limiting the legal rule expressed in Lamar to that specific factual scenario. Nothing in Lamar warrants such a limitation. The decision provides insightful discussion about the general concept of constitutional jury unanimity, and, like many other courts, recites the following as a proper rule of law:

"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 People v. Collins, 17 Cal.3d 687, 693, 552 P.2d 742 (1976)) (emphasis added).

And although this particular issue has historically been raised in the context of reconstituted juries, as in Lamar, such juries are not the only ones that must be informed how to properly deliberate, instead all juries do. The State's attempt to limit Lamar to its particular facts should be rejected.

In the same vein, the State claims Tucker has failed to show he was prejudiced by the failure to properly instruct the jury and therefore this Court should refuse to consider the issue. BOR at 4-6. But the burden is not on Tucker to prove actual prejudice. Instead, he need only show "[t]he asserted error had practical and identifiable consequences" in order to satisfy RAP 2.5(a)(3). Lamar at 585. He has done so by noting his jury's numerous opportunities for deliberation that complied with the instructions received from the court, but which do not comply with the

constitutional requirement for the deliberations to be the "common experience" of all the deliberating jurors. Collins, 17 Cal.3d at 693. Thereafter, the burden shifts to the State to prove the constitutional error was harmless beyond a reasonable doubt. Id. at 588. The State has failed to meet its burden in this regard. Remand for a new trial is warranted.

2. THE STATE MISCONSTRUES TUCKER'S REFERENCES TO PRE-DELIBERATIVE JURY ADMONISHMENTS IN HIS BRIEF.

The State commits the last 5+ of the last 6 pages of its 12-page response brief responding to an issue not raised by Tucker. BOR at 7-12. The State asserts there is no affirmative evidence that the jury ever ignored any of the instructions provided by the trial court, whether during trial or during the deliberative process. But Tucker never claimed there was, nor is his challenge based on any instructions that were given.

Rather, Tucker's challenge is to the trial court's omission of an instruction that would have properly informed the jury that deliberation may only occur when all 12 jurors are present and only as a collective. The references in Tucker's opening brief to WPIC 1.01 and WPIC 4.61 were included to both point out the WPIC committee's attempts at ensuring a jury only deliberates when it is appropriate and to note that even those attempts fail to make clear it may only be done as a 12-person collective. That these instructions were not provided at every recess as

suggested by the WPIC committee merely highlights the somewhat cavalier approach to instructions engaged in by the trial court in this case.

B. CONCLUSION

For the reason stated here and in the opening brief, Tucker requests this Court to reverse and remand for a new, fair trial.

Dated this 30th day of August, 2016

Respectfully submitted

NIELSEN, BROMAN & KOCH

A handwritten signature in black ink, appearing to be 'C. Gibson', written over a horizontal line.

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State vs. Dale Tucker

No. 33714-6-III

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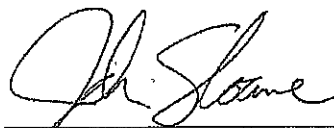
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Re: Dale Tucker
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I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



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08-31-2016
Date
Done in Seattle, Washington