

62061-4

62061-4

NO. 62061-4-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

BRIAN WIEST,

Appellant.

---

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

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APPELLANT'S OPENING BRIEF

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FILED  
COURT OF APPEALS DIV. #1  
STATE OF WASHINGTON  
2010 JAN 14 PM 4:21

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A. SUMMARY OF ARGUMENT.

During jury deliberations, the court replaced a deliberating juror with an alternate without instructing all jurors that they must begin deliberations anew or assessing the impartiality of the alternate juror, who had been discharged at the close of the case. The court's failure to insure the jury's impartiality and unanimity deprived Brian Wiest of his right to a fair trial by jury.

Additionally, the court improperly imposed a condition of community custody without statutory authorization, and in the event Wiest's conviction remains, the order of substance abuse evaluation and treatment must be stricken.

B. ASSIGNMENTS OF ERROR.

1. In substituting an alternate juror during deliberations without instructing the jury it must begin deliberations anew and assuring the alternate was not biased, the trial court violated Wiest's constitutionally protected rights to an impartial and unanimous jury.

2. The court lacked statutory authority to order Wiest to complete a substance abuse evaluation and comply with treatment when it did not find Wiest's use of any substance contributed to his commission of the crime charged.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Because of the danger of violating a defendant's rights to a unanimous and impartial jury, before excusing a deliberating juror, the court must first reinstruct the jury as a whole to begin deliberations anew. In the present case, the trial court substituted an alternate juror for a sitting juror during deliberations but did not reinstruct the jury to begin deliberations anew. Is Wiest entitled to reversal of his conviction and remand for a new trial?

2. Did the court lack authority to order that Wiest must submit to a substance abuse evaluation and comply with treatment when it did not find, and no evidence suggested, that his use of any substances contributed to the crime?

D. STATEMENT OF THE CASE.

On May 9, 2007, a man entered a Washington Mutual bank and presented a teller with a note announcing it was a robbery and requesting money. 5/12/08RP 105.<sup>1</sup> The man left the bank with several hundred dollars and was not apprehended. 5/12/08RP 106-07, 111. The bank's video cameras captured pictures of the robbery. 5/12/08RP 23-24.

Several months later, the prosecution charged Brian Wiest with robbing the bank based on his physical compatibility with the robber. CP 1. Wiest wore certain rings on his fingers similar to those shown in the video camera footage, and was identified by the bank teller. 5/12/08RP 31.

The prosecution charged Wiest with one count of first degree robbery, and he was convicted following a jury trial before Judge Dean Lum. CP 1; CP 31. The jury began its deliberations on May 10, 2008. 5/13/08RP 95. On May 11, 2008, one impaneled juror reported he was unable to continue due to a health problem. Supp. CP\_\_, sub. no. 68A, p. 8.<sup>2</sup> The court contacted the alternate juror, who had been dismissed after closing arguments. The alternate promptly arrived at the courthouse and immediately began deliberating in the case alongside the rest of the jury. Id. Before the newly constituted jury began deliberations, the court did not provide any additional legal instruction.

Several hours later, the jury reached a verdict finding Wiest guilty of the charged offense. Id. The court imposed a standard range sentence, and ordered Wiest to obtain a substance abuse

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<sup>1</sup> The verbatim report of proceedings (RP) will be referred to herein by the date of the proceeding.

evaluation and follow all treatment recommendations even though the conviction was not based on drug use and the court made no finding that substance abuse contributed to the offense. CP 51-61. Wiest timely appeals. CP 36.

E. ARGUMENT.

1. BY SUBSTITUTING AN ALTERNATE JUROR WITHOUT REINSTRUCTING THE JURY, THE COURT VIOLATED WIEST'S RIGHT TO AN IMPARTIAL AND UNANIMOUS JURY

While the jury was deliberating, one juror became ill and failed to appear in court. A previously dismissed alternate juror returned to court, participated in deliberations, and voted to convict Wiest of the charged offense. Before the deliberations resumed with the reconstituted jury, the court did not instruct the jurors that they must begin deliberations anew and disregard their prior deliberations. The court did not speak with the alternate juror to verify that she remained impartial and unbiased. The court's failure to reinstruct the jury or assess the partiality of the alternate juror deprives Wiest of his right to an impartial and unanimous trial by jury.

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<sup>2</sup> Wiest has filed a supplemental designation for this page of the clerk's minutes.

a. Wiest had a constitutionally protected right to a unanimous and impartial jury. The Sixth and Fourteenth Amendments to the United States Constitution and Article I, sections 3, 22 of the Washington Constitution guarantee a defendant the right to an impartial jury. Wainwright v. Witt, 469 U.S. 412, 429-30, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985); Irvin v. Dowd, 366 U.S. 717, 722, 81 S.Ct. 1639, 1642, 6 L.Ed.2d 751 (1961); State v. Davis, 141 Wn.2d 798, 824-25, 10 P.3d 977 (2000). Moreover, Article I, section 21 of the Washington Constitution requires a unanimous verdict in criminal cases. State v. Ortega-Martinez, 124 Wn.2d 702, 707, 881 P.2d 231 (1994).

To ensure that the right to a unanimous and impartial jury is adequately protected, when a juror is discharged during deliberations and replaced with an alternate, the court must instruct the reconstituted jury to disregard all previous deliberations and begin deliberations anew. CrR 6.5; State v. Johnson, 90 Wn.App. 54, 72-73, 950 P.2d 981 (1998). CrR 6.5 governs the use of alternate jurors and provides that:

[an] alternate juror may be recalled at any time that a regular juror is unable to serve.... If the jury has commenced deliberations prior to replacement of an initial juror with an alternate juror, the jury shall be

instructed to disregard all previous deliberations and begin deliberations anew.

The purpose of the rule is to “assure jury unanimity--to assure the parties, the public and any reviewing court that the verdict rendered has been based upon the consensus of the 12 jurors who rendered the final verdict, based upon the common experience of all of them.” State v. Ashcraft, 71 Wn.App. 444, 466, 859 P.2d 60 (1993). “These are matters which relate directly to a defendant's constitutional right to a fair trial before an impartial jury and to a unanimous verdict.” Id. at 463. This Court reviews a claim of constitutional error *de novo*. State v. Stanley, 120 Wn.App. 312, 314, 85 P.3d 395 (2004). The failure to reinstruct the jury after replacing a juror is a manifest constitutional error which may be raised for the first time on appeal. Stanley, 120 Wn.App. at 314.

b. The trial court's failure to instruct the jury to begin deliberations anew violated Wiest's rights to a unanimous and impartial jury. A trial court commits reversible error when the record fails to establish it reinstructed the jury following the replacement of a juror with an alternate juror. Ashcraft, 71

Wn.App. at 467. The record must provide the reviewing court with “assurance” that “the mandatory instruction was given.” Id. at 466.

In Ashcraft, the trial court replaced a deliberating juror with an alternate juror due to the juror's unavailability without discussing the matter and without any record it reinstructed the jury. Id. This Court held that “it was reversible error of constitutional magnitude to fail to instruct the reconstituted jury *on the record* that it must disregard all prior deliberations and begin deliberations anew.” Id. at 464 (emphasis in original). This Court made clear that a reviewing court must be able to tell “*from the record*” that the reconstituted jury was properly instructed. Id. at 464, 466 (emphasis in original).

In reaching its conclusion in Ashcraft, this Court noted, “It is not beyond the realm of reasonable possibility that . . . the alternate and the remaining initial 11 jurors could have concluded, in all good faith but erroneously, that they need not deliberate anew as to any counts or issues upon which the initial 12 jurors may have reached agreement.” Ashcraft, 71 Wn.App at 466-67. Because this Court could not determine from the record whether the jury had been instructed to begin deliberations anew, the court reversed and remanded for a new trial reasoning, “An appellate court must be

able to determine *from the record* that jury unanimity has been preserved.” Id. at 465 (emphasis added).

Subsequently, in Stanley, the trial court replaced a deliberating juror with an alternate juror without instructing the reconstituted jury on the record to begin deliberations anew. Stanley, 120 Wn.App. at 313. In addition, the record failed to show whether Stanley or his counsel was present when the alternate juror was seated or whether the court conducted a hearing to assess the alternate juror's continued impartiality. Id. While the State conceded the trial court committed error, it argued that the error was harmless. Stanley, 120 Wn.App. at 316. Relying on Ashcraft, this Court held that the State bore the burden of proving beyond a reasonable doubt the harmlessness of the error, and the reviewing court must be able to determine *from the record* that jury unanimity was preserved. Id.

Here, the record is devoid of evidence showing that the jury was instructed it was required to begin deliberations anew. The jury began deliberating on May 13, 2008. 5/13/08RP 94-95. At that time, the court excused the alternate juror, telling her there is “an astronomically small chance – it’s never actually happened to me, but there is an astronomically small chance that you might be

asked to deliberate” if another juror becomes unavailable.

5/13/08RP 95.

On the following morning, the clerk’s minutes show that one juror did not appear and informed the court he was sick. Supp. CP \_\_\_, sub. no. 68A, p. 8 (copy attached as Appendix A). The bailiff contacted the alternate juror, and excused the remaining jurors until 10 a.m. Id. The alternate juror arrived in court, and after the jurors’ recess ended, “[a]t 10:01 a.m., the Jury retired to begin deliberations.” Id. The jury reached a verdict several hours later. Id. at 9.

No court reporter recorded the events of May 14, 2008, when the jury waited for the alternate juror and then resumed deliberations. Id. The minutes show that that the jury began their deliberations as soon as the alternate arrived and the jurors returned from their recess, at 10:01 a.m., and does not indicate that the court provided any further legal instruction. Id. The minutes are otherwise quite detailed about the proceedings.

Under these circumstances, the record does not provide assurance that the jury was reinstructed as required. CrR 6.5 expressly requires reinstruction to a reconstituted jury before beginning deliberations. The jury must be told to disregard prior

deliberations and begin deliberations anew. CrR 6.5. The instructions are necessary both to explain the process of deliberations and ensure that the alternate juror retains her impartiality. Stanley, 120 Wn.App. at 315; Ashcraft, 71 Wn.App. at 462. The process of recalling an alternate juror “clearly contemplates” a proceeding such as a “brief voir dire” of the recalled alternate to verify her impartiality. Stanley, 120 Wn.App. at 315; Ashcraft, 71 Wn.App. at 462.

This Court must be able to “determine from the record that jury unanimity has been preserved.” Ashcraft, 71 Wn.App. at 466. Here, the record is silent that jury unanimity was preserved by the trial court. The jury did not receive any instructions to begin deliberations anew or disregard prior deliberations. The prosecution cannot meet its heavy burden of showing the error was harmless beyond a reasonable doubt, and Wiest is entitled to reversal of his conviction and remand for a new trial.

2. THE COURT LACKED AUTHORITY TO ORDER  
WIEST TO COMPLETE SUBSTANCE ABUSE  
COUNSELING

a. The sentencing court lacks authority to demand a person complete non-crime related behavioral programs. A trial court’s sentencing authority derives solely from statute. State v.

Ammons, 105 Wn.2d 175, 180-81, 713 P.2d 719 (1986). As this Court said in Ammons, “the fixing of legal punishments for criminal offenses is a legislative function.” Id. at 180. The constitutional separation of powers doctrine both precludes the judiciary and executive branch from asserting sentencing powers not expressly granted by the Legislature. Id. at 180.

The court’s authority to impose community placement derives solely from the language of the sentencing statute. State v. Barnett, 139 Wn.2d 462, 464, 987 P.2d 626 (1999); State v. Broadaway, 133 Wn.2d 118, 135, 942 P.2d 363 (1997); see also State v. Armendariz, 160 Wn.2d 106, 110, 156 P.3d 201 (2007) (court’s authority to impose conditions of community custody governed by statute).

Under former RCW 9.94A.700 (2007), the court must impose certain conditions of community custody and may impose other conditions, when community custody is required under former RCW 9.94A.715 (2007). Effective August 1, 2009, the Legislature recodified this statute as RCW 9.94B.050(4). Laws 2008, ch. 231, § 56. RCW 9.94A.607(1) authorizes a judge to require an offender to participate in rehabilitative programs for chemical dependency as a condition of the sentence where “the court finds that the

offender has a chemical dependency that has contributed to his or her offense.”

A trial court may not order substance abuse counseling as a condition of community custody where the record does not show that the abuse of a substance contributed to the defendant’s offense. State v. Jones, 118 Wn.App. 199, 208, 76 P.3d 258 (2003). In Jones, the court lacked authority to order alcohol counseling because the court did not find that counseling or treatment was necessary to address a deficiency that contributed to the commission of the crime. On the other hand, if the record shows the defendant consumed methamphetamine before committing the offense and he asked the court for substance abuse treatment at sentencing, the court may impose substance abuse treatment as a condition of community custody. State v. Powell, 139 Wn.App. 808, 819-20, 162 P.3d 1180 (2007), rev’d on other grounds, 166 Wn.2d 73, 206 P.3d 231 (2009).

b. The court never found that Wiest’s substance abuse contributed to the bank robbery for which he was convicted. Here, the court ordered Wiest to complete a substance abuse evaluation and treatment as recommended during his community custody. Yet the court did not enter any finding that his use of illicit

substances contributed to the offense. See RCW 9.94A.607(1) (court must “find” chemical dependency contributed to offense). Wiest did not ask to receive substance abuse counseling as a sentencing condition and there was no evidence that his use of any substances contributed to the crime. The court apparently ordered this condition because the prosecution asked for it, but without any discussion or analysis of its applicability to the case or its legal authorization. 7/18/2008RP 4-5.

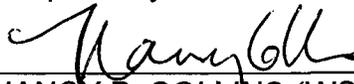
Consequently, this condition of community custody must be stricken. Jones, 118 Wn.App. at 212.

F. CONCLUSION.

For the reasons stated above, Brian Wiest respectfully asks this Court to reverse his conviction based on the improper jury deliberations. Alternatively, he asks this Court to reverse his sentence and remand this case to strike the improperly imposed condition of community custody.

DATED this 14th day of January 2010.

Respectfully submitted,



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NANCY P. COLLINS (WSBA 28806)  
Washington Appellate Project (91052)  
Attorneys for Appellant

## **APPENDIX A**

State of Washington vs. Brian Wiest  
King County Cause No. 06-1-06165-5 SEA

Date: 5-14-08

Judge: Dean S. Lum  
Bailliff: Helen Woodke  
Clerk: David Witten  
Reporter: Mike O'Brien

Continued from: 5-13-08

MINUTE ENTRY

-----> NOT REPORTED:

At @ 9:00 a.m., the Jury returns to resume deliberations.

At 9:08 a.m., the Bailiff informs the Jury and respective counsel that Juror Chong Lee has called in sick, and the Alternate Juror has been recalled.

At 9:24 a.m., the Alternate Juror, Patricia Hostetter, arrives, and the Bailiff excuses the Jury until 10:00 a.m.

At 10:01 a.m., the Jury retires to begin deliberations.

On 5/13/2008, at 15:39 p.m., the Jury had presented the following written question to the Court, the response to which had been postponed until today:

"The Jury would request to review the compact disk containing the surveillance <sic> videos".

The Jury, having begun deliberations anew with the re-impanelled Alternate Juror, again presents the same written request.

The Court, subsequent to consultation with respective counsel, at 10:25 a.m. replies in writing as follows:

"You will be allowed to review in open court."

Counsel for the defendant and Kristy Johnson, Paralegal for DPA Carin Bohn, present.

**State of Washington vs. Brian Wiest  
King County Cause No. 06-1-06165-5 SEA**

**Counsel for the defendant waives the defendant's presence.**

**DPA Bohn waives presence.**

**At 10:32 a.m., the Jury returns to Open Court, and is instructed and admonished by the Court.**

**Paralegal Johnson plays the DVD, State's Ex. 1, for the Jury one time, in its entirety.**

**DPA Bohn present.**

**At 10:58 a.m., the Jury retires, to resume deliberations.**

**At 11:44 a.m., the Jury informs the Bailiff that they have reached a verdict.**

**Subsequent to consultation with the Court, the Bailiff informs the Jury that the verdict will be taken at 1:30 p.m., and releases them for Lunch Recess.**

**At 1:30 p.m., the Jury returns.**

**-----> REPORTED:**

**Defendant, respective counsel present.**

**DPA Emily Petersen present for the State.**

**At 1:52 p.m., the Jury returns to Open Court with the following verdict, which is read by the Court:**

**Count I - Robbery, First Degree: Guilty.**

**At the Court's direction, the Jury is polled by the clerk. Twelve Jurors reply that this is their individual verdict, and the verdict of the Jury.**

**The verdict is received and filed.**

**The Jury is thanked and discharged, and advised that they may speak with counsel if they wish.**

**Jury absent.**

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
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BRIAN WIEST, )

Appellant. )

NO. 62061-4-I

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STATE OF WASHINGTON  
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#1

**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 14<sup>TH</sup> DAY OF JANUARY, 2010, I CAUSED THE ORIGINAL **OPENING 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:

<input checked="" type="checkbox"/> KING COUNTY PROSECUTING ATTORNEY	(X)	U.S. MAIL
APPELLATE UNIT	( )	HAND DELIVERY
KING COUNTY COURTHOUSE	( )	_____
516 THIRD AVENUE, W-554		
SEATTLE, WA 98104		

<input checked="" type="checkbox"/> BRIAN WIEST	(X)	U.S. MAIL
868653	( )	HAND DELIVERY
WASHINGTON STATE PENITENTIARY	( )	_____
1313 N 13 <sup>TH</sup> AVE		
WALLA WALLA, WA 99362		

**SIGNED** IN SEATTLE, WASHINGTON THIS 14<sup>TH</sup> DAY OF JANUARY, 2010.

X \_\_\_\_\_ 

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