

NO. 67059-0-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

CHARLES WEBB,

Appellant.

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

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT

After jury deliberations commenced in Charles Webb's trial, the jury requested to rehear and review certain recorded evidence. The trial court responded that it would provide the evidence 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. The court instructed the reconstituted jury panel to begin deliberations anew. However, the court immediately followed its instruction by informing the new jury it would shortly receive the evidence requested by the prior jury. Because this error signaled to the reconstituted jury that it was free to disregard the court's instruction to begin deliberations anew and constituted a comment on the evidence, Mr. Webb was denied his right to a unanimous verdict.

B. ASSIGNMENT OF ERROR

The trial court erred when it instructed the reconstituted jury panel to begin deliberations anew but then provided the new jury with copies of exhibits requested during deliberations by the prior panel.

C. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

An accused has a constitutional right to a unanimous verdict. 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. A reviewing court must be able to determine from the record that jury unanimity was preserved. Here, an alternate juror replaced a dismissed juror after deliberations began. The court instructed the reconstituted jury to begin deliberations anew but then proceeded to treat the reconstituted jury like a continuation of the previous panel by immediately providing exhibits requested by the original panel. Was Mr. Webb's right to a unanimous verdict violated?

D. STATEMENT OF THE CASE

Mr. Webb was charged with one count of malicious harassment, RCW 9A.36.080, following an incident at a grocery store. CP 1. The State alleged Mr. Webb threatened an Iraqi store clerk based on her race, color, ancestry or national origin and put her in reasonable fear of personal harm while he was purchasing a bag of chips. The clerk testified Mr. Webb told her, "If you don't like

working, why don't you go back to your country." 3/15/11RP 35.

The testimony indicated Mr. Webb made several references to returning "to your country." 3/15/11RP 37, 41. The clerk testified that these comments did not frighten her. 3/15/11RP 42. However, she was made afraid when Mr. Webb angrily told her "I will get you after work." 3/15/11RP 42-43. A fellow employee corroborated the statements about returning "to your country" but did not hear the threat, "I will get you after work." 3/15/11RP 49, 3/16/11RP 25, 34.

A jury convicted Mr .Webb as charged. CP 49. Additional relevant facts are incorporated into the argument section below.

E. ARGUMENT

**BY NOT ENSURING THAT DELIBERATIONS
BEGAN ANEW WHEN SUBSTITUTING AN
ALTERNATE JUROR, THE COURT VIOLATED MR.
WEBB'S RIGHT TO A UNANIMOUS JURY.**

At the conclusion of closing argument, at 2:50 p.m. on March 16, 2011, the court designated juror number 8 as the alternate and excused her. 3/16/11RP 108-09; CP __ (Sub # 30B, Minutes at 6).¹ The jury retired to deliberate on the verdict. 3/16/11RP 109-10. At 3:23 p.m., the jury submitted a written inquiry to the court: "Can the 911 tape and the store [surveillance] video be made available to us

¹ A supplemental designation of clerk's papers has been filed requesting the trial court transmit the Jury Trial Minutes at Sub # 30B to the Court.

in the jury room? And written transcript of the 911 call at least?”

CP 54. The court responded, after hearing from the parties, that “A playback machine and the tape/video will be made available

tomorrow morning for jurors to view each tape and video once.” CP

55. The transcript of the 911 call would not be provided.

3/16/11RP 115-16. The jury continued deliberating until 4:05 p.m.

CP __ (Sub # 30B, Minutes at 6).

The next morning, before the 911 tape and surveillance video were played, the jury submitted another question to the court.

One of the jurors, juror number 12, recalled encountering Mr. Webb on a prior occasion. CP 52. The court convened the parties and

determined to voir dire juror number 12. 3/17/11RP 2-3. The court

noted, “The jurors have not, as I think you know, have not watched the tape, either of the tapes yet. So I don’t think we’ve gotten –

well, if we have to start jury deliberations anew, obviously they

haven’t been deliberating for very long.” 3/17/11RP 2-3. After the

voir dire, the parties agreed juror number 12 should be excused

and the alternate seated; the court concurred. 3/17/11RP 6-7. The

alternate juror was called back. 3/17/11RP 7.

The court verified that the alternate juror had “not been exposed to any improper influences since being temporarily

excused.” 3/17/11RP 8-9. The juror confirmed she had not.

3/17/11RP 9. The remaining 11 members of the jury were called into the courtroom and instructed:

As you can tell, we found it necessary to excuse juror number 12 and to now bring back in the juror who was selected as the alternate, juror number 8, to serve on your jury panel. Because she has – we have now brought in an alternate, you are – you must disregard all previous deliberations. So any deliberations, any discussions you’ve had as a jury with regard to this case, you must disregard all those discussions and start over again so that juror number 8 will of course have a chance to participate fully in those deliberations. I hope that’s clear.

I thank you very much for your attention. We’re going to take you now back to the jury room so you can start your deliberations anew, and John, who is filling in as our bailiff today, is getting – has set up or will get set up in a moment the equipment so to play the recordings for you. All right. Thank you very much.

3/17/11 9-10. The jury was excused. 3/17/11RP 10. Four minutes later, the bailiff entered the jury room and played the 911 tape and the store surveillance video. CP __ (Sub # 30B, Minutes 8-9). The reconstituted jury found Mr. Webb guilty as charged later that afternoon. CP 49.

1. Mr. Webb has 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 and 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 “provides greater protection for jury trials than the federal constitution.” State v. Williams-Walker, 167 Wn.2d 889, 896, 225 P.2d 913, 918 (2010). Article I, Section 21 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). Criminal Rule 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.

CrR 6.5.

The rule is intended to ensure jury unanimity and to prescribe a procedure that establishes the verdict is the consensus of the jurors who rendered the final verdict. State v. Ashcraft, 71 Wn. App. 444, 466, 859 P.2d 60 (1993); State v. Fisch, 22 Wn. App. 381, 383, 588 P.2d 1389 (1979) (the twelve jurors “must reach their consensus through deliberations which are the common experience of all of them”). “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.” Ashcraft, 71 Wn. App. 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 right to an impartial, 12-person jury is of constitutional magnitude, and thus is not waived by any failure to object at trial. Id.; State v. Cuzick, 85 Wn.2d 146, 530 P.2d 288 (1975); RAP 2.5.

2. The trial court's failure to ensure the jury began deliberations anew violated Mr. Webb's rights to a unanimous and impartial jury.

The trial court committed reversible error when it continued the publication of exhibits requested by the original jury to a reconstituted jury. The trial court failed to ensure the jurors disregarded all prior deliberations and began deliberations anew as a reconstituted jury with a new member.

Trial courts have a mandatory obligation to instruct the jury to begin deliberations anew when an alternate is seated after deliberations have begun. State v. Chirinos, 161 Wn. App. 844, 845, 850, 255 P.3d 809 (2011). The use of the different terms “may” and “shall” in CrR 6.5 indicates a legislative intent that the words be given different meanings, “may” being discretionary and “shall” being mandatory. State v. Krall, 125 Wn.2d 146, 148-49, 881 P.2d 1040 (1994). Criminal Rule 6.5 mandates that the court instruct a jury “to disregard all previous deliberations and begin deliberations anew” when an alternate juror replaces a removed juror. CrR 6.5. Thus, a trial court is *required* to instruct the reconstituted jury to disregard all previous deliberations and to start deliberations anew. E.g., Stanley, 120 Wn. App. at 397; Chirinos, 161 Wn. App. at 845.

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. 71 Wn. App. at 464-65. 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." 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. 120 Wn. App. at 313. In addition, the record failed to show whether Stanley or his counsel were 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. Id. 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 shows that the trial court instructed the jury that it must begin deliberations anew, and then immediately provided the jury with exhibits that the prior jury had requested. 3/17/11 9-10. Though the court *told* the jury to disregard prior deliberations, its *actions* demonstrated to the jury that it need not actually start anew. By providing the new jury with copies of materials requested by the original jury, the court signaled to the jury that it was free to disregard its instruction to begin deliberations anew. Just four minutes later, the bailiff played the reconstituted

jury the two exhibits requested by the *previously constituted* jury.

CP __ (Sub # 30B, Minutes 8-9).

The court's indication to the new jury also signaled that the court deemed this evidence important. Article IV, Section 16 of the Washington Constitution provides, "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." This provision prohibits a court from "conveying to the jury his or her personal attitudes toward the merits of the case" expressly or impliedly. State v. Levy, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006) (quoting State v. Becker, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997)); accord State v. Hansen, 46 Wn. App. 292, 300, 730 P.2d 670 (1986) (improper judicial comment on the evidence occurs when a reasonable juror hearing the statement in the context of the case would see it as creating an inference of the court's evaluation of a disputed issue). By immediately providing the newly-constituted jury with an additional opportunity to view the surveillance video and listen to the 911 call, without any request from the panel, the court imbued those exhibits with importance. In effect, those pieces of evidence received the imprimatur of the court. See State v. Crotts, 22 Wash. 245, 250-51, 60 P. 403 (1900) ("it is a fact well and universally known by courts and practitioners

that the ordinary juror is always anxious to obtain the opinion of the court on matters which are submitted to his discretion, and that such opinion, if known to the juror, has a great influence upon the final determination of the issues"). This is particularly true for juror number 8, who was an alternate and did not participate in the prior panel's deliberations whereby a viewing of the exhibits was requested. To this juror, the court's immediate insistence that the reconstituted jury take a second look at this particular evidence must have born significance. See id.

Thus, from the record, the reconstituted jury did not begin deliberations anew but instead resumed deliberations where the prior jury had left off.

In the alternative, the record at least exposes ambiguity as to whether the jury indeed began deliberations anew. The record shows the jury was instructed to begin deliberations anew. 3/17/11 9-10. The record then shows the court contradictorily instructed the new jury that the court would continue exactly where it had left off with the dismantled jury by providing the new jury with the 911 and video surveillance recordings. 3/17/11 10. The court did not wait for the new jury to request those exhibits. The record, of course, does not show what discussions took place in the jury room

following the court's instructions. Accordingly, this Court cannot determine conclusively whether the reconstituted jury indeed began deliberations anew or whether it simply picked up where the prior jury had left off. Like in Stanley, if this Court cannot determine from the record that the jury began deliberations anew, an error occurred. 120 Wn. App. at 316.

3. The error requires reversal.

A reviewing court must be able to determine from the record that jury unanimity was preserved. State v. Badda, 63 Wn.2d 176, 182-83, 385 P.2d 859 (1963); Stanley, 120 Wn. App. at 316. The absence of a record to affirmatively establish the reconstituted jury was properly instructed is an error of constitutional magnitude and is presumed prejudicial. Ashcraft, 71 Wn. App. at 464-65. "Before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). The burden of proving harmlessness lies with the State, and the presumption of prejudice may be overcome:

if and only if the reviewing court is able to express an abiding conviction, based on its independent review of the record, that the error was harmless beyond a

reasonable doubt, that is, that it cannot possibly have influenced the jury adversely to the defendant and did not contribute to the verdict obtained.

Ashcraft, 71 Wn. App. at 465; accord, State v. Rice, 120 Wn.2d 549, 569, 844 P.2d 416 (1993); State v. Kitchen, 110 Wn.2d 403, 409-12, 756 P.2d 105 (1988).

In Stanley, the State conceded error, but argued that such error was harmless. Based on the facts that there was only one count charged, the original jury deliberated for just over an hour, and the reconstituted jury sent a question to the judge, the State argued that it was likely the reconstituted jury deliberated anew. 120 Wn. App. at 316-17. This Court held, however, that the State did not meet its heavy burden of proving beyond a reasonable doubt that the error was harmless: "It is not beyond the realm of reasonable possibility that the reconstituted jury could have concluded that it need not begin deliberations anew as to any issues already considered by the original 12 jurors." Id. at 317. The State also argued that the polling of the jurors after the verdict established their unanimity. Id. This Court rejected this argument as well:

Polling the jury cannot substitute for the procedural omissions in this record. The State cannot show on the record beyond a reasonable doubt that the jury

began deliberations anew. The error was not harmless.

Id. at 318. Finally, the State argued that “overwhelming evidence against Stanley” rendered the error harmless. Id. This Court also rejected that argument, finding that while the evidence supporting the verdict was substantial, it was not so overwhelming as to necessarily lead 12 fair-minded individuals to only one conclusion. Id. (citing Ashcraft, 71 Wn. App. at 467). The case was reversed and remanded for a new trial Id.

The State cannot meet its heavy burden in the present case, where the jury deliberations were very similar to those in Stanley. Here, like in Stanley, Mr. Webb was charged with one count. Jury deliberations lasted for approximately an hour when the alternate replaced a removed juror. Though the reconstituted jury was instructed to begin deliberations anew, the court itself treated the new jury as a mere continuation of the prior panel by presenting the new jury with its response to the prior jury’s request. The reconstituted jury entered a verdict only hours later. The record does not show clearly that the jury disregarded all prior deliberations and began deliberations anew. Like in Stanley, the evidence against Mr. Webb was not “so overwhelming as to

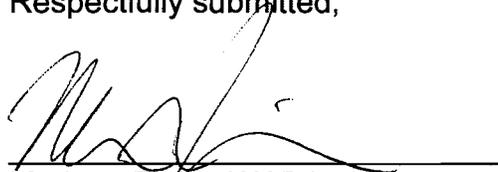
necessarily lead 12 fair-minded individuals to only one conclusion.”
For example, only one witness actually heard the threatening words; the two other witnesses merely witnessed Mr. Webb acting upset. Based on this record, including the court’s conflicting statements to the reconstituted jury, the State cannot establish the trial court scrupulously protected Mr. Webb’s constitutional right to a unanimous verdict. Reversal is required.

F. CONCLUSION

Because the reconstituted jury’s instruction to begin deliberations anew was immediately contradicted by the court, the record does not show the reconstituted jury in fact began deliberations anew. Mr. Webb’s conviction must be reversed and remanded for a new trial.

DATED this 16th day of September, 2011.

Respectfully submitted,



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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	NO. 67059-0-I
)	
CHARLES WEBB,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 16TH DAY OF SEPTEMBER, 2011, 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:

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