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68148-6

No. 68148-6-I

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

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STATE OF WASHINGTON,

Respondent,

v.

LONNIE CURTIS LAMAR, JR.,

Appellant.

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

The Honorable Ronald L. Castleberry

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BRIEF OF APPELLANT

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2012 JUL -9 PM 4: 17  
COURT OF APPEALS DIV 1  
STATE OF WASHINGTON

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**A. SUMMARY OF ARGUMENT**

Following the replacement of a juror with an alternate during deliberations, instead of instructing the jury to begin deliberations anew, the trial court instructed the alternate juror to consult the other jurors about deliberations that had already occurred. Mr. Lamar submits the trial court violated his right to an impartial jury and he is entitled to reversal of his conviction and remand for a new trial.

**B. ASSIGNMENT OF ERROR**

The trial court violated Mr. Lamar's right to an impartial jury when it failed to instruct the reconstituted jury to begin deliberations anew.

**C. ISSUE PERTAINING TO ASSIGNMENT OF ERROR**

A defendant has the constitutionally protected right to an impartial jury. In order to protect that right, when a juror is replaced during deliberations, the trial court must instruct the jury to begin deliberations anew. The trial court here failed to so instruct the jury, instead instructing the new juror to consult with the other jurors regarding deliberations already completed. Is Mr. Lamar entitled to reversal of his conviction?

D. STATEMENT OF THE CASE

Lonnie Lamar was originally charged with first degree rape of a child and first degree child molestation. CP 72-73.

During jury deliberations, Juror 4 called in ill and made clear he would not be able to go forward. RP 428. After consulting with the parties, the court replaced juror 4 with an alternate juror, juror 3. RP 432. The court then told the jury:

Well, ladies and gentlemen, as you can see, Juror No. 4 has not been able to join us this morning. He called in early, I think about 6:00 o'clock, and then called a second time about 7:00 o'clock, indicated that he was ill and that he would not be able to come in. And as I explained to you Friday, that's the whole reason I didn't excuse Juror No. 3.

And so now Juror No. 3 is going to take Juror No. 4's spot so that all 12 -- we have 12 jurors again.

*What I will advise you to do is this: When you go back to the jury room and begin your deliberations, you should spend some time reviewing, recapping with Juror No. 3 any discussion that you may have already had Friday in terms of the case so that he's first brought up to speed in terms of whatever the deliberative process was.*

*Then once that's been done, resume your deliberations without any other hitches or anything else.*

So with that, I assume Juror No. 4's notebook has been -- 3's notebook has been located and you'll give

that to him and Juror No. 4's notebook has been taken out of the jury room, and all the other exhibits have been delivered to the jury room.

So with that, the court will be in recess and you can begin your deliberations.

RP 432-33 (emphasis added).

The jury subsequently acquitted Mr. Lamar of the rape of a child count, but convicted him of child molestation. CP 74-75.

E. ARGUMENT

THE COURT'S FAILURE TO INSTRUCT THE JURY IT HAD TO BEGIN DELIBERATIONS ANEW VIOLATED MR. LAMAR'S RIGHT TO AN IMPARTIAL JURY

1. A defendant has a constitutionally protected right to an impartial jury. The right to an impartial jury is guaranteed by article I, section 22 of the Washington State Constitution and by the Sixth Amendment to the United States Constitution. *State v. Johnson*, 90 Wn.App. 54, 72, 950 P.2d 981 (1998).

Criminal Rule 6.5, which governs the use of alternate jurors, provides:

[s]uch 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. Juror replacement implicates “a defendant's constitutional right to a fair trial before an impartial jury and to a unanimous verdict.

*State v. Ashcraft*, 71 Wn.App. 444, 463, 859 P.2d 60 (1993).

Manifest constitutional error occurs where a trial court fails to instruct a reconstituted jury on the record to disregard previous deliberations and begin deliberations anew, thus allowing the issue to be raised for the first time on appeal. RAP 2.5(a)(3); *Ashcraft*, 71 Wn.App. at 465-67. Claims of constitutional error are reviewed *de novo*. *State v. Stanley*, 120 Wn.App. 312, 314, 85 P.3d 395 (2004).

To ensure that the right to an 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. *Johnson*, 90 Wn.App. at 72-73. The purpose of this requirement “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.” *Ashcraft*, 71 Wn.App. at 466.

2. The trial court failed to instruct the jury to begin deliberations anew. The trial court erred when it failed to instruct the jury to begin deliberations anew after the insertion of the alternate juror for the ill juror.

In *Ashcraft*, the jury had already begun deliberations when the trial court replaced one juror with an alternate juror without a record of reinstruction. The reconstituted jury returned a verdict of guilty for two counts of second degree assault and guilty of the lesser included offense of simple assault. On appeal, this Court agreed with the defendant 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.” *Ashcraft*, 71 Wn.App. at 464 (emphasis in original). In reaching that conclusion, this Court noted that “[i]t is not beyond the realm of reasonable possibility that . . . the alternate and the remaining 11 initial 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.” *Id.* at 466-67. Since this Court could not determine from the record whether the jury had been instructed to begin deliberations anew, the defendant’s conviction was reversed and remanded for a new trial. *Id.*

Similarly, 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. 313. Further, the record did not 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.* at 313. While the State conceded the trial court committed error, it argued that the error was harmless. *Id.* at 316. Relying on *Ashcraft*, the appellate court held that the State bears the heavy burden to prove 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. *Stanley*, 120 Wn.App. at 316.

Here it cannot be disputed that the trial court failed to instruct the reconstituted jury to begin their deliberations anew. In fact, the court's statements to the jury implied the jury need not begin deliberations anew but could just begin where they left off before the sitting juror became ill. Thus, on this record, the State cannot meet its burden to show that jury unanimity was preserved.

3. The error was not harmless and Mr. Lamar is entitled to reversal of his conviction and remand for a new trial. Since the failure to reinstruct the jury raises an error of constitutional magnitude, the State bears the burden of proving beyond a reasonable doubt that the error is harmless. *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); *Ashcraft*, 71 Wn.App. at 466. Further the "reviewing court must be able to determine *from the record* that jury unanimity" was preserved. *Ashcraft*, 71 Wn.App. at 466 (emphasis in original).

It is clear from subsequent case law that the failure to give a specific unanimity instruction when such an instruction is otherwise required may constitute *harmless* constitutional error, but since such is error of constitutional magnitude, it will *initially* be presumed to be prejudicial. The presumption 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.

*Id.* at 465 (emphasis in original).

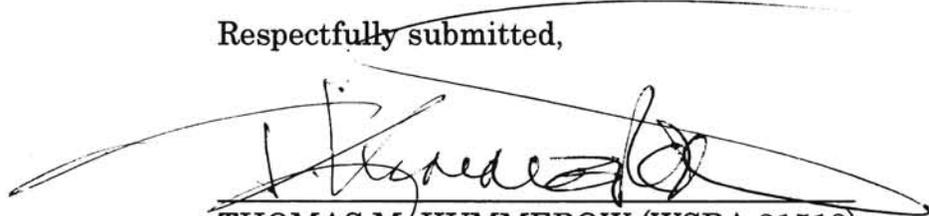
Here, the trial court committed reversible error by failing to instruct the reconstituted jury to begin deliberations anew. The record here does not assure one of jury unanimity, rather the record raises questions about jury unanimity based upon the trial court's instruction to the reconstituted jury to discuss deliberations which had already occurred rather than beginning anew. Mr. Lamar requests that this Court reverse his conviction and remand for retrial. *Stanley*, 120 Wn.App. at 318.

F. CONCLUSION

For the reasons stated, Mr. Lamar requests this Court reverse his conviction and remand for a new trial.

DATED this 9<sup>th</sup> day of July 2012.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Tom Kummerow', is written over a horizontal line. The signature is fluid and cursive.

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

STATE OF WASHINGTON, )  
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 Respondent/Cross-appellant, )  
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 )  
 LONNIE LAMAR, )  
 )  
 Appellant-Cross-respondent. )

NO. 68148-6-I

2012 JUL -9 PM 4:17  
COURT OF APPEALS DIV 1  
STATE OF WASHINGTON

**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 9<sup>TH</sup> DAY OF JULY, 2012, 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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| [X] SETH FINE, DPA<br>SNOHOMISH COUNTY PROSECUTOR'S OFFICE<br>3000 ROCKEFELLER<br>EVERETT, WA 98201 | (X) U.S. MAIL<br>( ) HAND DELIVERY<br>( ) _____ |
| [X] LONNIE LAMAR<br>925413<br>MCC-TRU<br>PO BOX 888<br>MONROE, WA 98272-0888                        | (X) U.S. MAIL<br>( ) HAND DELIVERY<br>( ) _____ |

**SIGNED** IN SEATTLE, WASHINGTON, THIS 9<sup>TH</sup> DAY OF JULY, 2012.

x \_\_\_\_\_ 

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