

FILED
COURT OF APPEALS
DIVISION II

NO. 37996-1-II

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IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON
BY cm
DEPUTY

STATE OF WASHINGTON,

Respondent,

v.

JESSE LEE HARKCOM,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF THURSTON COUNTY

Before the Honorable Chris Wickham, Judge

REPLY BRIEF OF APPELLANT

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A. ISSUES IN REPLY

1. Is the doctrine of invited error applicable where the court itself was mistaken about the law?

2. Do the offenses of first degree robbery and drive by shooting constitute the same criminal conduct?

B. ARGUMENTS IN REPLY

1. **THE STATE'S RELIANCE ON THE DOCTRINE OF INVITED ERROR IS MISPLACED.**

a. **The trial court failed to instruct the reconstituted jury on the record that it must disregard its previous deliberations and begin anew.**

On June 5, 2008, after the case went to the jury, Juror No. 12 informed a bailiff that she believed that she recognized Jesse Harkcom from a previous jury panel that she was on, although she was not selected for the jury. Report of Proceedings [RP] at 215. After she was questioned, she was excused from the jury. RP at 222.

The following exchange took place:

THE COURT: I'm going to excuse this juror, and I would ask that you call in the alternate, and then when the alternate comes in, ask the jury to being deliberating from scratch.

THE BAILFF: Okay. Very good.

THE COURT: Anything else, counsel?

MR. JONES: No, your Honor. I think that is the proper route.

Mr. MEYER: I guess I just wonder if the jury should be instructed, and, frankly, in all the jury trials I've had, I've never had an alternate called in. I don't know if there is a procedure to have to instruct the jury not to speculate and being anew or not.

RP at 222-223.

The trial court judge said that he had "no problem once the alternate is here calling the entire jury into the courtroom and instructing them to begin deliberations anew, if counsel are wanting me to do that." RP at 223. Defense counsel stated that he would "just leave it at your discretion as to how you want to restart it." RP at 223. The State argues that Harkcom's counsel invited error and waived the right to challenge the error on appeal. Brief of Respondent at 21-27.

When a juror is excused and an alternate juror is seated after jury deliberations have begun, the reconstituted jury must be instructed to disregard all previous deliberations and to begin deliberations anew. A criminal defendant has a constitutional right to trial by an impartial jury. U.S. Const. amends. 6, 14; Wash. Const. art 1, § 22. In Washington, a criminal defendant also has a constitutional right to a unanimous jury verdict. Wash. Const. art. 1, § 21; *State v. Stephens*, 93 Wn.2d 186, 190, 607 P.2d 304 (1980). To protect these constitutional rights, CrR 6.5

provides that when an alternate juror replaces a juror after deliberations have begun, the jury must be instructed to disregard all previous deliberations and begin deliberations anew. CrR 6.5 is designed to protect 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). 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. *Id.* at 466; *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").

Failing to require a unanimous verdict is a manifest constitutional error. *State v. Scott*, 110 Wn.2d 682, 688 n. 5, 757 P.2d 492 (1988). As such, the failure of the trial court to instruct the reconstituted jury, on the record, that it must disregard all previous deliberations and begin anew is an error of constitutional magnitude that can be raised for the first time on appeal. *Ashcraft*, 71 Wn.App. at 463 n.7; RAP 2.5(a).

The use of the different terms "may" and "shall" indicates a legislative intent that the words be given different meanings, "may" being directory and "shall" being mandatory. *State v. Krall*, 125 Wn.2d 146, 148-49, 881 P.2d 1040 (1994). Thus, a trial court is required to instruct the reconstituted jury to disregard all previous deliberations and to start

deliberations anew. *State v. Stanley*, 120 Wn.App. 312, 85 P.3d 395 (2004); accord, *State v. Johnson*, 90 Wn.App. 54, 72-73, 950 P.2d 981 (1998); *Ashcraft*, 71 Wn.App. at 462-63.

Contrary to the ruling of *Ashcraft*, the court failed to instruct the reconstituted jury on the record to begin anew. *See Ashcraft*, 71 Wn.App. at 464.

In the Brief of Respondent, the State argues that the defendant "invited" this error and is thus precluded from asserting it on appeal. This not only mischaracterizes the record, but also misapprehends the purpose of the "invited error" doctrine and the circumstances under which it is applied. The doctrine of invited error "prohibits a party from setting up an error at trial and then complaining of it on appeal." *State v. Pam*, 101 Wn.2d 507, 511, 680 P.2d 762 (1984), quoted in *State v. Wakefield*, 130 Wn.2d 464, 475, 925 P.2d 183 (1996). The doctrine is based on the disinclination to allow a defendant to both have his cake in the trial court and then try to eat it on appeal: "[t]he adversary system cannot countenance such maneuvers." *Pam, supra*, 101 Wn.2d at 511. As former Justice Utter noted, the Supreme Court had early "denounced the use of strategic tactics to induce reversible error and hereby allow a defendant to pursue one theory at trial and, if unsuccessful there, another on appeal." *State v. Henderson*, 114 Wn.2d 867, 873, 792 P.2d 514 (1990) (Utter, J.,

dissenting) (citing *State v. Miller*, 168 Wash. 687, 689, 13 P.2d 52 (1932)). "These decisions rest on a desire to prevent a party from strategically trapping a court, and thus leave room for applying the doctrine more flexibly when the error is unintentional." *Id.*

In this case, the defense did not instigate or create the error; counsel displayed misapprehension of the applicable law by wondering whether the jury should be instructed. RP at 223. Not only was defense counsel obviously unaware of the *Ashcraft* decision, but, more importantly, so was the court.

The State asserts that the court gave the defense the opportunity to have the jury brought into the courtroom and instructed, but that counsel left it to the court's discretion. A fair reading of the court's comments, however, clearly shows the court too was unaware of the rule. This, then, was not a circumstance in which a defendant, for strategic reasons deliberately took an erroneous trial position, or proposed an erroneous instruction, that might benefit him in the short run so that, if convicted, he could assert the error on appeal—the classic instance which the "invited error" doctrine was designed to combat. *See, e.g., Pam, supra* (prosecutor asked court to sustain defendant's objections, despite ruling favorable to prosecution); *see also Miller, supra* (defendant in second-degree murder prosecution who requested instructions on manslaughter could not claim

those instructions should not have been given on appeal from manslaughter conviction).

The doctrine has no application to these facts. Moreover, it is inescapable that the defense acted out of error rather than a calculated and strategic intent to deceive the court. Harkcom had nothing to gain from failing to ask that deliberations begin anew, and thereby sowing some sort of error that might be successfully raised on appeal. Counsel's and the court's misunderstanding of the law cannot be deemed "invited error." Because the rationale behind the invited error doctrine is inapplicable under the facts in this case, this Court should reject the State's argument to the contrary.

The State also argues that *Ashcraft* and *Stanley* are not applicable to the facts of Harkcom's case. Brief of Respondent at 22.

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, 17

L.Ed.2d 705, 87 S.Ct. 824 (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. *Id.* 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).

The State argues that in *Ashcraft* and *Stanley*, the trial court did not ensure, or did not make a record that the parties were present when the alternate juror was seated. Brief of Respondent at 22. The fact that counsel was present in the courtroom when the alternate was seated has no bearing on the issue of whether the reconstituted jury was properly instructed on the record.

In the present case, as in *Ashcraft*, the record does not establish that the trial court instructed the reconstituted jury to disregard all previous deliberations and to begin deliberations anew. In *Ashcraft*, an alternate juror was seated after the original jury had begun deliberations. The 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); accord, *Stanley*, 120 Wn.App. at 315-16. In *Ashcraft*, although the Court found there was “substantial evidence to support the verdict reached,” the evidence “was not so overwhelming as to necessarily lead 12 fair-minded jurors to only one conclusion.” *Ashcraft*, 71 Wn.App. at 467. As a result, the error was not harmless beyond a reasonable doubt, and the convictions were reversed and the case remanded for a new trial. *Id.*

Similarly, in *Stanley* an alternate juror was substituted for an ill juror on the second day of deliberations. *Stanley*, 120 Wn.App. at 313. The record did not indicate whether the reconstituted jury was instructed to disregard all previous deliberations and begin deliberations anew. *Id.* The State in *Stanley* conceded error, but argued that such error was harmless. Based on the fact that there was only one count charged, the fact that the original jury deliberated for just over an hour, and the fact that the reconstituted jury sent a question to the judge, the State argued that it was likely the reconstituted jury deliberated anew. *Id.* at 316-17. The 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.* The Court rejected this argument as well and found that polling the jury cannot substitute for the procedural omissions in the record and that the State could not show on the record beyond a reasonable doubt that the jury began deliberations anew and determined that the error was not harmless. *Id.* at 318. In addition, the State also argued that “overwhelming evidence against Stanley” rendered the error harmless. *Id.* The Court 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 State cannot meet its heavy burden in the present case, in which the jury was asked to consider a broad array of charges. Given the complexity of the charges the jury was asked to consider, the error cannot be said to be harmless, as was argued in *Stanley*. Based on this record, the State cannot establish the trial court scrupulously protected Harkcom’s constitutional right to a unanimous verdict and reversal is required.

2. **THE OFFENSES OF FIRST DEGREE ROBBERY AND DRIVE BY SHOOTING CONSTITUTE THE SAME CRIMINAL CONDUCT.**

a. The crimes meet the “same time and place” requirement, required the same intent, and involved the same victim.

The State asserts that the court did not abuse its discretion in finding that first degree robbery and drive by shooting do not constitute the same criminal conduct. Brief of Respondent at 7-12.

According to statute, “Same criminal conduct” . . . means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim.” RCW 9.94A.589(1)(a). The State disputes whether the “same victim, intent, time, and place” requirements of the “same criminal conduct” provision are satisfied.

The Washington Supreme Court has flatly rejected the notion that the “same time” component of the “same criminal conduct” rule requires that crimes be committed simultaneously. *State v. Porter*, 133 Wn.2d 177, 182-83, 942 P.2d 974 (1997). Instead, where crimes are committed sequentially as part of a “continuous, uninterrupted sequence of conduct,” the crimes satisfy the “same time” element of the “same criminal conduct” rule. *Id.* at 183.

In its brief, the State argues that the offenses were not sequential, but occurred simultaneously. Brief of Respondent at 10. The State argues

that “Harkcom at most interrupted the robbery on two occasions to fire the two shots.” Brief of Respondent at 10.

The State’s assertion is not supported by the record. It defies logic that Harkcom, while committing robbery, decided to interrupt the robbery in order to commit the separate offense of a drive by shooting, and then resume the robbery. Here, the record is clear that the purpose of firing the gun was done solely in furtherance of the robbery.

Similarly, the State claims that the intent of the robbery was to acquire property while the drive by shooting required recklessness. Brief of Respondent at 12. The State also argues the crimes did not have the same victim. Brief of Respondent at 10.

Harkcom disagrees and submits that a proper application of the “same criminal conduct” provision regarding intent and identity of victim does not depend on an evaluation of statutory intent, but rather depends on the manner in which the crimes were committed. The reviewing court focuses on the extent to which a defendant’s criminal intent, as objectively viewed, changed from one crime to the next. Under that test, if one crime furthered another, and if the time and place of the crimes remained the same, then the defendant’s criminal purpose or intent did not change and the offenses encompass the same criminal conduct. *State v. Lessley*, 118 Wn.2d 773, 777, 827 P.2d 996 (1992) (emphasis in original). *Cf., e.g.,*

State v. Garza-Villareal, 123 Wn.2d 42, 49, 864 P.2d 1378 (1993) (separate convictions for possession of cocaine and heroin were the same criminal conduct because both were committed in furtherance of the same intent of delivering controlled substances in the future).

As the crimes were charged and proved by the State here, the charged drive by shooting was committed in furtherance of the robbery. The objective intent behind both crimes was to obtain property from Gene Blaney. There was no testimony that Harkcom fired the gun out of recklessness, or as a spontaneous crime that happened to occur while robbing Blaney. Instead, the only reasonable view of the evidence is that he fired the gun to achieve a purpose in furtherance of the robbery. Such reasons could include the intent to show Blaney that he was armed, that the weapon was real, that he was serious, or to express dissatisfaction that Blaney was not moving fast enough, that Blaney was not cooperating, or that he was talking back. In this case, Blaney supplied the court with the reason: he stated that Harkcom pointed the gun at Blaney's knees and told him to empty his pockets, and that if he did not do so, he would shoot his knees. RP at 47. Blaney said that he "didn't thought [sic] he was serious, so I denied it." RP at 47. At that point Harkcom "aimed the gun towards an aside and gave me a warning shot." RP at 47. The record clearly

shows that the shooting was done in furtherance of the robbery and for no other purpose.

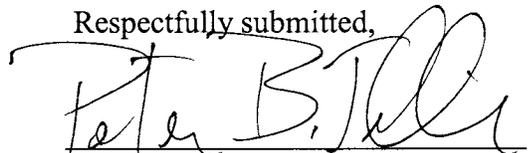
Similarly, the record supports the conclusion that Blaney was the victim of the drive by shooting. The State argued that “Blaney was never in any danger of being shot at the time those two bullets were fired.” Brief at 10. The record is clear that the gun was pointed at Blaney, at one point at his head, and that Harkcom moved the gun when he fired it. Blaney testified that it was “a warning shot.” RP at 47. Moreover, the record is clear that there were no other people in the area at the time of the shots other than the people who arrived in the car and Blaney.

B. CONCLUSION

This Court should find the same time and same place, same intent, and same victim elements of the “same criminal conduct” test has been satisfied. This Court should find the drive by shooting was committed in furtherance of the robbery. This Court should conclude all of the components of the “same criminal conduct” rule have been satisfied.

DATED this 22nd day of April, 2009.

Respectfully submitted,



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CERTIFICATE OF MAILING

The undersigned attorney for the Appellant hereby certifies that one original and one copy of the Reply Brief of Appellant were mailed by first class mail to the Court of Appeals, Division 2, and copies were mailed to Jesse Harkcom, Appellant, and Carol La Verne, Thurston County Deputy Prosecuting Attorney, by first class mail, postage pre-paid on April 22, 2009, at the Centralia, Washington post office addressed as follows:

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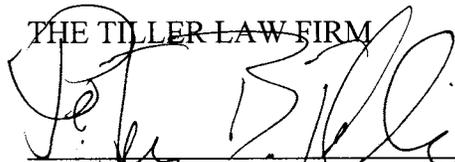
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