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SUPREME COURT
STATE OF WASHINGTON

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No. 89060-9

BY RONALD R. CARPENTER

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

LONNIE CURTIS LAMAR, JR.,

Respondent.

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

The Honorable Ronald L. Castleberry

SUPPLEMENTAL BRIEF OF RESPONDENT LONNIE LAMAR

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 ORIGINAL

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A. SUMMARY OF ARGUMENT

The trial court instructed the jury and it retired to deliberate. The next day, one of the jurors could not continue due to illness and, after consulting the parties, the juror was replaced with an alternate juror. The court failed to instruct the jury to disregard its prior deliberations and begin deliberations anew, affirmatively telling the jury to rely on the prior deliberations in which the alternate juror did not participate. Mr. Lamar did not object to the court's failure to instruct the jury. The Court of Appeals concluded the error was a manifest constitutional error under RAP 2.5(a)(3), which allowed Mr. Lamar to obtain relief after raising it for the first time on appeal. In addition, the Court of Appeals concluded the trial court's failure to properly instruct the jury violated Mr. Lamar's right to an impartial jury which required reversal and remand for a new trial. Mr. Lamar urges this Court to affirm the decision of the Court of Appeals and conclude this is a manifest constitutional error that violated his right to an impartial and unanimous jury.

B. ISSUES ON REVIEW

1. Did the Court of Appeals correctly conclude that the failure to instruct the jury to disregard the prior deliberations after the substitution of a juror with an alternate was a manifest error affecting a constitutional right because it infringed on Mr. Lamar's constitutionally protected right to an impartial and unanimous jury?

2. Did the trial court's failure to instruct the jury to disregard its prior deliberations violate Mr. Lamar's right to an impartial and unanimous jury requiring reversal of his conviction and remand for a new trial?

B. STATEMENT OF THE CASE

1. Facts from trial. Lonnie Lamar was originally charged with first degree rape of a child and first degree child molestation. CP 72-73. At the conclusion of the trial, the court instructed the jury, the jury heard closing arguments, and the jury began its deliberations. CP 46-67; RP 250. The court released Juror 3, the alternate juror, and ordered the jury to begin its deliberations. RP 298-301.

At the beginning of the following day, the court indicated that Juror 4 called stating that he was 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 the 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). Neither party objected to the court's failure to instruct the jury to ignore the previous deliberations involving the ill juror, and to begin deliberations anew with the alternate juror.

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

2. Court of Appeals Decision. In an unpublished decision, the Court of Appeals ruled that the failure to inform the jury they must begin deliberations anew constituted a denial of the right to an impartial jury under the Sixth Amendment and article 1, section 22. The Court of Appeals held the issue can be addressed on appeal without an objection below. Slip op. at 3.¹

The State contends this claim is not a “manifest error affecting a constitutional right” under RAP 2.5(a)(3) that can be raised for the first time on appeal. Its waiver argument is not well taken. We have held that a trial court’s failure to instruct a reconstituted jury on the record to disregard previous deliberations and begin deliberations anew is a manifest constitutional error that can be raised for the first time on appeal. *State v. Ashcraft*, 71 Wn.App. 444, 463 n. 7, 859 P.2d 60 (1993).

Slip op. at 3 fn. 1.

The Court went on to find that the failure of the trial court to reinstruct the jury was error in that it failed to assure jury unanimity. Decision 4-5. Finally, the Court ruled the State failed to prove the error was harmless beyond a reasonable doubt. Decision at 5-7. The Court

¹ A copy of the Court of Appeals decision is attached in the Appendix.

reversed Mr. Lamar's conviction and remanded for new trial. Decision at 7.

C. ARGUMENT

APPLYING RAP 2.5(a)(3), THE ERROR IN FAILING TO INSTRUCT THE RECONSTITUTED JURY TO BEGIN DELIBERATIONS ANEW IS A MANIFEST CONSTITUTIONAL ERROR REQUIRING REVERSAL OF MR. LAMAR'S CONVICTION

1. The drafters of RAP 2.5(a)(3) rejected the federal "plain error" standard for the "manifest error" standard popular in Washington going back to the days before statehood.

RAP 2.5(a)(3) states in relevant part:

The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court ... manifest error affecting a constitutional right.

The rule is discretionary rather than absolute. *See* RAP 2.5(a)(an "appellate court may refuse to review any claim of error which was not raised in the trial court"). As a consequence, RAP 2.5(a)(3) never operates as an absolute bar to review. *State v. Ford*, 137 Wn.2d 472, 477, 973 P.2d 452 (1999).

The construction of a court rule is reviewed *de novo* as a question of law. *State v. Robinson*, 153 Wn.2d 689, 693, 107 P.3d 90 (2005). When interpreting court rules, this Court approaches the rules

“as though they had been drafted by the Legislature.” *State v. Greenwood*, 120 Wn.2d 585, 592, 845 P.2d 971 (1993).

As Judge Quinn-Brintnall noted in her concurring opinion in 2011:

Approximately 50 published appellate court opinions have been released in the last two years (and over 100 unpublished opinions) addressing, or touching upon, RAP 2.5(a)(3). These numerous opinions attempt to amend by interpretation a standard clearly understood and justly applied for over 125 years.

State v. Bertrand, 165 Wn.App. 393, 413, 267 P.3d 511 (2011) (Quinn-Brintnall, J., concurring), *review denied*, 175 Wn.2d 1014 (2012) (footnote omitted).²

This Court adopted RAP 2.5 in 1976. 86 Wn.2d 1151-52 (1976). *See also* 2A Tegland, *Washington Practice* at 282-83 (7th ed. 2011). As adopted, it stated the general rule that the appellate courts would review only issues argued and decided before the trial court. RAP 2.5 cmt. at 86 Wn.2d at 1152. Among the listed exceptions to this rule was that “certain constitutional questions can be raised for the first time on review.” *Id.* This exception to the general rule had been in existence in Washington prior to it becoming a state. *See Bertrand*,

² For an excellent historical analysis of the underpinnings of RAP 2.5(a)(3), see Judge Quinn-Brintnall’s concurring opinion in *Bertrand*, 165 Wn.App. at 406-14 (Quinn-Brintnall, J., concurring).

165 Wn.App. at 407 (Brintnall, J., concurring), *citing Williams v. Ninemire*, 23 Wash. 393, 63 P. 534 (1900) (this Court reviewed erroneous jury instruction, not objected to at trial that directed a verdict against appellant). *See e.g. State v. Crotts*, 22 Wash. 245, 249, 60 P. 403 (1900) (“where the constitutional right has been invaded, it has been held by this court that no failure of objection or exception should stand in the way of considering errors based on the violation of such provisions.”); *Linbeck v. State*, 1 Wash. 336, 338, 25 P. 452 (1890) (“The statute in question makes it the duty of the court to give such instruction irrespective of the action of the defendant in relation thereto; and while we do not now hold that the right to have this instruction given may not be waived by some express act of the defendant to that end, we do hold that the simple fact that he remained silent did not amount to such waiver.”).

RAP 2.5 as adopted in 1976 was initially based upon New Jersey Rule 2:10-2, which stated:

Any error or omission shall be disregarded by the appellate court unless it is of such a nature as to have been clearly capable of producing an unjust result, but the appellate court may, in the interests of justice, notice plain error not brought to the attention of the trial or appellate court.

Bertrand, 165 Wn.App. at 412 fn.18 (Brintnall, J., concurring).
See also RAP 2.5 cmt. at 86 Wn.2d at 1152. When drafting RAP 2.5, this Court however, adopted the “manifest error” standard, specifically rejecting the federal “plain error” standard. *Id.* at 409, 412 (Brintnall, J., concurring). In so doing, this Court expressed a clear intent to reach errors such as those that occurred here.

2. Under the “manifest constitutional error” test applied by this Court in *State v. Scott*, the error in Mr. Lamar’s trial was a manifest constitutional error.

In the first decision of this Court’s post-adoption of RAP 2.5, *State v. Scott*, this Court clarified the test to be applied in determining whether the issue may be heard for the first time on appeal:

The proper way to approach claims of constitutional error asserted for the first time on appeal is as follows. *First, the appellate court should satisfy itself that the error is truly of constitutional magnitude—that is what is meant by “manifest”.* If the asserted error is not a constitutional error, the court may refuse review on that ground. If the claim is constitutional, then the court should examine the effect the error had on the defendant’s trial according to the harmless error standard set forth in *Chapman v. California, supra*.

110 Wn.2d 682, 688, 757 P.2d 492 (1988) (footnote omitted)(emphasis added).³

The Court of Appeals has applied *Scott* and developed a test for a “manifest error” under RAP 2.5(a)(3) that many conclude is the definitive analytical framework:

In reviewing RAP 2.5 and *Scott*, we conclude that the proper approach in analyzing alleged constitutional error raised for the first time on appeal involves four steps. First, the reviewing court must make a cursory determination as to whether the alleged error in fact suggests a constitutional issue. Second, the court must determine whether the alleged error is manifest. Essential to this determination is a plausible showing by the defendant that the asserted error had practical and identifiable consequences in the trial of the case. Third, if the court finds the alleged error to be manifest, then the court must address the merits of the constitutional issue. Finally, if the court determines that an error of constitutional import was committed, then, and only then, the court undertakes a harmless error analysis.

State v. Lynn, 67 Wn.App. 339, 345, 835 P.2d 251 (1992). *See also* Tegland, *Washington Practice* at 238-39.

³ The Court of Appeals had determined that the error, even if constitutional was not “obvious or manifest.” *Scott*, 110 Wn.2d at 684. The issue in *Scott* involved the trial court’s instruction on accomplice liability where the court described the term “knowledge” as an element of the offense but did not define this term further. The defendant did not object to the trial court’s failure to further define “knowledge,” but subsequently raised it for the first time on appeal. The *Scott* Court determined that “knowingly” was not a term that was required to be defined by the trial court and as a result, was not a manifest constitutional error. *Id.* at 690.

If the defendant shows the error to be a manifest constitutional error, the appellate court must review the merits of the claim. *Scott*, 110 Wn.2d at 688.

Here, the Court of Appeals properly applied the test from *Scott* and determined the error was a manifest constitutional error. Slip op. at 3 fn.1, citing *State v. Ashcraft*, 71 Wn.App. 444, 859 P.2d 60 (1993). The error here infringed Mr. Lamar's constitutional right to an impartial and unanimous jury. The trial court's failure to assure that the verdict was the result of an impartial jury has long been recognized by this Court to affect a constitutional right. *State v. Badda*, 63 Wn.2d 176, 385 P.2d 859 (1963); *State v. Mickens*, 61 Wn.2d 83, 377 P.2d 240 (1962).

In *State v. Kirkham*, this Court further clarified the test for determining whether an error is a "manifest constitutional error." 159 Wn.2d 918, 155 P.3d 125 (2007). The *Kirkham* Court held that in order to establish a manifest constitutional error under RAP 2.5(a)(3), the appellant must identify a constitutional error and show actual prejudice from that error; i.e. *show how the error affected the constitutional right*. *Id.* at 926-27, citing *State v. McFarland*, 127 Wn.2d 322, 332-33, 899 P.2d 1251 (1995).

In *Kirkham*, the error was in admitting two witnesses' opinion of the child victim's credibility in a case involving a charge of sexual abuse. The Court found the error was not a manifest constitutional error because the witnesses did not make explicit statements on an ultimate issue of fact. *Kirkham*, 159 Wn.2d at 936-38. The Court ruled the alleged error was not an *explicit* statement on an ultimate issue and therefore was not manifest. *Id.* at 936.

Cited with approval in *Kirkham* was the Court's decision in *State v. WWJ Corporation*, 138 Wn.2d 595, 980 P.2d 1257 (1999). In *WWJ*, a mortgage broker and his business were fined \$500,000 as a civil penalty of for 250 violations of the Mortgage Broker Practices Act and Consumer Protection Act. For the first time on appeal, the broker argued the the fine was an "excessive fine," which violated the Eighth Amendment and the Fourteenth Amendments. Applying RAP 2.5(a)(3), the Court noted that "[t]o determine whether a newly claimed constitutional error is supported by a plausible argument (of whether the error is manifest), the court must preview the merits of the claimed constitutional error to see if the argument has a likelihood of succeeding." *WWJ*, 138 Wn.2d at 603. The Court found that, although the potential error involved a "genuine constitutional issue" under the

Eighth Amendment, the record had not been sufficiently developed in the trial court, thus the error was not manifest. *Id.* at 603, 605-06.⁴

The rule that flows from *Scott* to *WWJ* to *Kirkham* is that the appellant must show the error affects a constitutional right, and that the error was manifest, i.e. showing a plausible basis to believe that the error had consequences in the trial of the case. *Kirkham*, 159 Wn.2d at 935. Applying the test here, the error that occurred at Mr. Lamar's trial was certainly a manifest error which affected a constitutional right under RAP 2.5(a)(3).

Several Court of Appeals decisions identified the failure to instruct a newly constituted jury that all jurors must begin deliberations anew is a manifest constitutional issue.⁵ Here, the jury started deliberations before the alternate was added and the trial court affirmatively told the jurors to rely on those prior deliberations in which Juror 3 had not participated. Following *WWJ*, which was cited with approval in *Kirkham*, if the error had "practical and identifiable consequences." In light of the Court of Appeals' decision, it is also

⁴ Under the Fourteenth Amendment, the Court found there was no error. *Id.* at 607.

⁵ *State v. Stanley*, 120 Wn.App. 312, 314, 85 P.3d 395 (2004); *State v. Johnson*, 90 Wn.App. 54, 72, 950 P.2d 981 (1998); *Ashcraft*, *supra*.

clear that Mr. Lamar had a substantial likelihood of succeeding on appeal. *WWJ*, 138 Wn.2d at 603; *Ashcraft*, 71 Wn.App. at 464. As a consequence, the trial court's error in failing to reinstruct the jury was a manifest error which affected Mr. Lamar's constitutional right to an impartial and unanimous jury. Mr. Lamar may raise this issue for the first time on appeal.

3. The trial court's failure to reinstruct violated Mr. Lamar's right to an impartial jury.

The trial court erred when it not only failed to instruct the jury to begin deliberations anew after the insertion of the alternate juror for the ill juror, but it directed Juror 3 to rely on the deliberations of the other jurors in which he did not participate. RP 432-33.

The right to an impartial and unanimous 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.

(Emphasis added).

The Court of Appeals reversed Mr. Lamar’s conviction based upon its decisions in *Stanley, supra*, and *Ashcraft, supra*. 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 verdicts of guilty. On appeal, the Court of Appeals 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, the 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 the 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. *Id.* The reviewing court must be able to determine *from the record* that jury unanimity was preserved. *Stanley*, 120 Wn.App. at 316. Further, the *Stanley* Court distinguished this Court's decision in *Mickens*, noting that in *Mickens* all 12 jurors were present for the decision on the defendant's guilt while in *Stanley*, the alternate juror was only present for one day of the two days of deliberations. *Id.* at

317-18.⁶ In addition, the Court noted the *Mickens* Court addressed only the lack of a unanimity instruction, not the lack of an instruction to begin deliberations anew. *Id.*

Here, following the decisions in *Ashcraft* and *Stanley*, it cannot be disputed that the trial court failed to instruct the reconstituted jury to begin their deliberations anew. In fact, the trial court's statements to the jury expressly told the jury not to begin deliberations anew but to merely begin where the 11 remaining jurors left off before the twelfth juror became ill. The trial court told the jurors to bring the replacement "up to speed" without disturbing the "deliberative process" that had already been completed with the other juror. Slip op. at 5. Thus, on this record, the State cannot meet its burden to show that jury unanimity was preserved.

⁶ In *Mickens*, the court failed to instruct the jury that its verdict must be unanimous. 61 Wn.2d at 87. In light of the fact the jury was polled in a single defendant, single charge case, the record indicated the verdict was unanimous and the product of each juror's individual determination. *Id.*

In a different circumstance involving multiple defendants and multiple counts, the failure to instruct the jury that its verdict must be unanimous was not rendered harmless by polling the jury. *Badda*, 63 Wn.2d at 182-83.

4. The error was not harmless and Mr. Lamar is entitled to reversal of his conviction and remand for a new trial.

The failure to order all of the jurors to begin deliberations anew when replacing a juror in the middle of deliberations is an error of constitutional magnitude for which the defendant may obtain relief unless the State proves 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); *Scott*, 110 Wn.2d at 688. This requires that 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), *citing State v. Kitchen*, 110 Wn.2d 403, 411-12, 756 P.2d 105 (1988).

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).

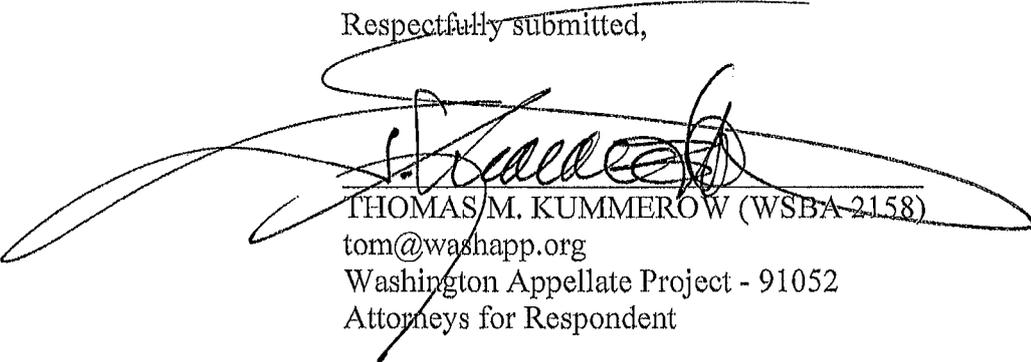
Here, the trial court committed reversible error by failing to instruct the reconstituted jury to begin deliberations anew. The record here does not assure one of jury unanimity, rather the record establishes jury unanimity was compromised based upon the trial court's instruction to the reconstituted jury to tell the new juror of deliberations which had already occurred rather than beginning anew. Furthermore, the fact the jury was polled and was found to be unanimous is of no moment in light of the several counts and mixed verdicts. The jury in *Stanley* was polled and deemed unanimous yet the appellate court reversed the conviction because of the trial court's failure to reinstruct the jury. 120 Wn.App. at 316-18. Mr. Lamar requests that this Court reverse his conviction for the same constitutional violation and remand for retrial. *Id.* at 318.

D. CONCLUSION

For the reasons stated, Mr. Lamar asks this Court to find the error by the trial court here was a manifest error affecting his constitutional right to an impartial and unanimous jury allowing him to raise the issue for the first time on appeal. Further, Mr. Lamar asks this Court to affirm the Court of Appeals conclusion that the error was not harmless, thus requiring reversal of his conviction and remand for a new trial.

DATED this 30th day of December 2013.

Respectfully submitted,



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APPENDIX A

2013 JUN 10 AM 11:45

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	No. 68148-6-I
Respondent,)	
)	DIVISION ONE
v.)	
)	
LONNIE CURTIS LAMAR, JR.,)	UNPUBLISHED OPINION
)	
Appellant.)	FILED: <u>June 10, 2013</u>

SPEARMAN, A.C.J. — Lonnie Lamar, Jr. was convicted of child molestation in the first degree. On appeal, he claims the trial court violated his constitutional right to an impartial jury and committed reversible error by failing to instruct the reconstituted jury, after deliberations had begun and an alternate juror had replaced an original juror, to disregard previous deliberations and begin deliberations anew. We agree with Lamar. We reverse his conviction and remand for retrial.

FACTS

The State charged Lamar with rape of a child in the first degree and child molestation in the first degree. The State alleged that on or about January 13, 1998 through July 1, 2000 Lamar had sexual contact and sexual intercourse with his daughter, a minor during that period.

No. 68148-6-1/2

The case went to trial and closing arguments were heard on Friday, October 14, 2011. Before the jury retired, the court excused the alternate juror, Juror 3, directing him to remain available and not talk about the case. The jury deliberated for 45 minutes to one hour that day. On Monday morning, Juror 4 called in sick. The trial court held a hearing with all parties present. The parties agreed to replace Juror 4 with Juror 3. The court told the parties it would "tell the other members of the jury that they should provide [the replacement juror] with a recap of what their deliberations had been on Friday." Report of Proceedings (RP) (10/17/11) at 429. The parties did not object. The jury was brought into the courtroom and the court 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.

RP (10/17/11) at 430. No objection was made and the jury was excused to begin deliberations.

The jury deliberated for approximately four hours that day. The jury delivered its verdict that afternoon, acquitting Lamar of rape of a child and convicting him of child molestation. The court informed the jury that it was "going to ask you is this how you voted on both of these counts." Each juror, including Juror 3, answered "yes." RP at 432-33.

Lamar appeals.

DISCUSSION

Lamar claims the trial court violated his constitutional right to an impartial jury through its instruction to the reconstituted jury.¹ He contends the court failed to instruct the reconstituted jury to disregard all previous deliberations and begin deliberations anew as required by CrR 6.5.

A defendant's right to an impartial jury is guaranteed by article I, section 22 of the Washington State Constitution and the Sixth Amendment to the United States Constitution. State v. Latham, 100 Wn.2d 59, 62-63, 667 P.2d 56 (1983). Claims of constitutional error are reviewed de novo. State v. Stanley, 120 Wn. App. 312, 314, 85 P.3d 395 (2004).

CrR 6.5, governing the use of alternate jurors, relates to a defendant's constitutional rights 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 provides, "If the jury has commenced deliberations prior to replacement of an

¹ The State contends this claim is not a "manifest error affecting a constitutional right" under RAP 2.5(a)(3) that can be raised for the first time on appeal. Its waiver argument is not well taken. We have held that a trial court's failure to instruct a reconstituted jury on the record to disregard previous deliberations and begin deliberations anew is a manifest constitutional error that can be raised for the first time on appeal. State v. Ashcraft, 71 Wn. App. 444, 463 n.7, 859 P.2d 60 (1993).

initial juror with an alternate juror, the jury shall be instructed to disregard all previous deliberations and begin deliberations anew." CrR 6.5. The purpose of such an instruction "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 (quoting State v. Fisch, 22 Wn. App. 381, 381, 588 P.2d 1389 (1979)). It is "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.

Ashcraft and Stanley are instructive. In Ashcraft, the jury had begun deliberations when the trial court replaced one juror with an alternate juror without consulting the defense or instructing the reconstituted jury to begin deliberations anew. Id. at 450. The jury returned a verdict of guilty for two counts of second degree assault and guilty of one count of the lesser included offense of simple assault. Id. at 448, 450. We reversed and remanded for retrial on the basis of the trial courts' failure to instruct the reconstituted jury on the record to disregard all previous deliberations and begin deliberations anew. Id. at 467.

Similarly, in Stanley, after the original jury had deliberated for approximately one hour, the trial court replaced a juror with an alternate juror, and the record did not show what instruction, if any, was given to the reconstituted jury. Stanley, 120 Wn. App. at 313. Furthermore, the record did not show whether Stanley or his counsel was present when the alternate juror was seated. Id. at 313. The State conceded error under the circumstances, but argued it was harmless. Id. at 316.

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We disagreed and reversed the defendant's conviction for felony harassment, noting that as in Ashcraft "[i]t 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."² Id. at 317.

Here, we find nothing in the trial court's statements to the reconstituted jury that instructed it to disregard all previous deliberations and begin anew. In fact, the court told the reconstituted jury that the members of the original jury should review their previous deliberations with the replacement juror and bring that juror "up to speed" as to what the original jurors had discussed. The court's remarks suggested that the reconstituted jury should pick up where the previous jury had left off instead of beginning deliberations anew. The instruction was error.

Because the failure to reinstruct the jury raises an error of constitutional magnitude, it is initially presumed prejudicial and the State bears the burden of proving beyond a reasonable doubt that the error is harmless. Ashcraft, 71 Wn. App. at 465-66.

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

² The State seeks to distinguish Ashcraft and Stanley by pointing out that in those cases neither the defendant nor defense counsel were present when the jury was re-impaneled, so there was no opportunity to object. Its argument appears to be that a trial court's failure to properly instruct a reconstituted jury is not alone a sufficient basis for reversal. But in Ashcraft, while we held the trial court's failure to provide defense counsel the opportunity to object was error, we did not decide whether it was reversible error. We reversed solely on the basis of the trial court's failure to reinstruct the jury. Ashcraft, 71 Wn. App. at 464.

influenced the jury adversely to the defendant and did not contribute to the verdict obtained.

Id. at 465.

The State contends any error was harmless, first arguing that the record reflects jury unanimity because each juror was polled. This argument was rejected in Stanley, where the jury was polled and deemed unanimous. Stanley, 120 Wn. App. at 316-18. We stated that “[p]olling the jury cannot substitute for the procedural omissions in this record.” Id. at 318. The State also attempts to distinguish the form of polling in this case by pointing out that the jury in Stanley was asked whether “the verdict was both his or her individual verdict as well as the verdict of the jury as a whole,” id. at 317, whereas the jurors here were asked if “this is how you voted on both of these counts, . . .” RP 432-33. We see no meaningful distinction, and the State does not explain why the form of questioning in this case more clearly illustrates the unanimity of the jury than in Stanley. The State also notes that the original jury deliberated for only 45 minutes to one hour before the alternate juror replaced the juror who was sick. But the reconstituted jury’s entire deliberations took place over a period of only about four or fewer hours.³ The time the original jury spent deliberating was not insignificant in comparison to the time the reconstituted jury spent deliberating. We are not persuaded that the original jury did not reach agreement on any issues determinative to the two charged counts during the 45 minutes to one

³ The reconstituted jury was excused from the courtroom to begin deliberations at 9:24 a.m. and was back in the courtroom to announce its verdict by 1:34 p.m. The record does not indicate whether the jury deliberated for four hours and ten minutes or for a lesser period (if it took one or more breaks for lunch or another purpose).

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hour in which it deliberated. Nor are we persuaded that the reconstituted jury concluded it needed to begin deliberations anew as to any such issues.

We are unable to express an abiding conviction, based on the record, that the error in the trial court's instruction was harmless. Accordingly, we reverse Lamar's conviction and remand for retrial.

Reversed.

Spearman, A.C.J.

WE CONCUR:

Vanderhoff

COX, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original of the document to which this declaration is affixed/attached, was filed in the **Washington State Supreme Court** under **Case No. 89060-9**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

- petitioner Seth Fine, DPA
[sfine@snoco.org]
Pierce County Prosecutor's Office
- respondent
- Attorney for other party


MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: December 30, 2013

OFFICE RECEPTIONIST, CLERK

To: Maria Riley
Subject: RE: 890609-LAMAR-SUPPLEMENTAL BRIEF

Rec'd 12/30/13

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Please accept the attached document for filing in the above-subject case:

Supplemental Brief of Respondent

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