IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	NO. 63835-1-I
	)	
Respondent,	)	DIVISION ONE
	)	
v.	)	
	)	
JESSE LEE HARKCOM,	)	Unpublished Opinion
	)	
Appellant.	)	FILED: November 2, 2009
	)	

Lau, J. — A jury convicted Jesse Harkcom of first degree robbery while armed with a firearm, second degree assault while armed with a firearm, drive-by shooting, and first degree unlawful possession of a firearm. Harkcom appeals, contending that (1) convictions for first degree robbery with a firearm enhancement and drive-by shooting violate double jeopardy, (2) the sentencing court abused its discretion by finding that first degree robbery and drive-by shooting do not constitute the same criminal conduct, (3) defense counsel was ineffective for failing to object to inadmissible evidence and to raise same criminal conduct at sentencing, and (4) the trial court violated his constitutional right to a unanimous jury when it failed to properly

instruct the reconstituted jury. He also raises other issues in a pro se statement of additional grounds. Because the trial court erred in failing to properly instruct the jury on the record when an alternate juror was seated after deliberations had begun, we reverse and remand for a new trial.

FACTS

At trial, witnesses testified to the following events. On January 22, 2008, Gene Blaney was at the West Side Tavern in Olympia because he had received a call from Kalin Hollingberry, a friend of Blaney's former girl friend, who wanted to meet to resolve past differences. Hollingberry and two other men met Blaney at the West Side Tavern and the four left in Hollingberry's car. Blaney sat on the passenger side in the rear with Hollingberry next to him. Jesse Harkcom was in the front passenger seat and an unidentified man drove. The four men drove to a nearby bowling alley, the West Side Lanes, to "have a couple beers." 1 Report of Proceedings (RP) (June 3, 2008) at 41.

After parking at the bowling alley, Harkcom got out of the car and pulled a gun from his pants. Blaney attempted to open the car door, but Harkcom slammed it shut and forced him back inside. After a brief struggle, Blaney forced his way out of the car.

Harkcom pointed the gun at Blaney and demanded that Blaney empty his pockets. Blaney refused and Harkcom threatened to shoot Blaney if he did not comply. Harkcom then pointed the gun at Blaney's knees and threatened to shoot him in the knees if he did not empty his pockets. Blaney again refused and Harkcom "aimed the gun towards an aside and gave [Blaney] a warning shot." 1 RP (June 3, 2008) at 47. He described the shot as "just missing" and as "a warning shot, and [Harkcom] didn't just miss the knee. He did aim towards

the knee." 1 RP (June 3, 2008) at 56.

Harkcom aimed the gun at Blaney's head and threatened to kill Blaney if he did not empty his pockets. When Blaney did not comply, Harkcom "shot to the side of [Blaney's] head." 1 RP (June 3, 2008) at 47. Blaney said Harkcom fired both shots in an attempt to scare him. Blaney eventually gave Harkcom his jacket, and Harkcom left when another car arrived. Shortly after, two employees of the West Side Lanes came out to investigate the gunshots.

At trial, in its first amended information, the State charged Harkcom with first degree kidnapping while armed with a deadly weapon (firearm), first degree robbery while armed with a deadly weapon (firearm), first degree extortion while armed with a deadly weapon (firearm), second degree assault while armed with a deadly weapon (firearm), drive-by shooting, and unlawful possession of a firearm.[1] Trial commenced on June 3, 2008, and jury deliberations began on June 4, 2008. On the second day of deliberations, June 5, juror 12 informed the court bailiff that she recognized Harkcom from her prior jury duty service. After questioning the juror and discussion with counsel, on the record, the court and counsel agreed that the juror was mistaken, but that she should be excused and replaced by the alternate juror. With counsel's agreement, the court directed the bailiff to instruct the reconstituted jury to begin deliberating anew.

[1] At the conclusion of the State's case, the trial court dismissed the first degree extortion charge on motion by defense counsel.

On June 5, the reconstituted jury convicted Harkcom of first degree robbery, second degree assault, drive-by shooting, and first degree unlawful possession of a firearm. It acquitted Harkcom of first degree kidnapping and found that Harkcom committed the robbery and assault while armed with a firearm. After hearing argument, the court found that the convictions for first degree robbery and second degree assault merged, but that the robbery and drive-by shooting convictions did not.

The trial court then sentenced Harkcom to 150 months for first degree robbery, with a firearm enhancement of 60 months, for a total of 210 months. The court imposed a sentence of 116 months for drive-by shooting, and 89 months for first degree unlawful possession of a firearm, each to be served concurrently to the first degree robbery sentence. This appeal followed.

ANALYSIS

I. Double Jeopardy

A. Robbery and Drive-by Shooting Convictions

Harkcom first contends that his convictions for first degree robbery and drive-by shooting violate double jeopardy. The State counters that since both offenses contain an element that the other does not, there is no double jeopardy violation.

The Fifth Amendment to the United States Constitution and article I, section 9 of the Washington Constitution provide protections against double jeopardy. Washington's constitutional protections are coextensive with those provided by the federal constitution. State v. Womac, 160 Wn.2d 643, 650, 160 P.3d 40 (2007). Double jeopardy is a question of law reviewed de novo. Womac, 160 Wn. 2d at 649. Double jeopardy protections preclude "'(1)

a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense imposed in the same proceeding.'" Womac, 160 Wn. 2d at 650 (quoting In re Pers. Restraint of Percer, 150 Wn.2d 41, 48–49, 75 P.3d 488 (2003)). Under the third prong, conviction alone constitutes punishment. Womac, 160 Wn. 2d at 656–57. The legislature may, commensurate with constitutional restraints, allow for multiple punishments for a single course of conduct. State v. Calle, 125 Wn.2d 769, 776, 888 P.2d 155 (1995). As such, we first ask whether the legislature has expressly authorized multiple punishments. Calle, 125 Wn.2d at 776; State v. Freeman, 153 Wn.2d 765, 771, 108 P.2d 753 (2005). If the answer is no, we then engage in statutory construction to determine whether the defendant can be convicted of two offenses. See Calle, 125 Wn.2d at 776 (examining whether violations of the rape and incest statutes can be punished cumulatively). Since the State here concedes that the legislature has not clearly authorized multiple punishments, we proceed directly to statutory construction.

Washington uses the "same evidence" test of statutory construction to determine if multiple punishments are authorized. Womac, 160 Wn.2d at 652; Calle, 125 Wn.2d at 777. This test is similar to the federal test established in Blockburger v. United States, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932). Womac, 160 Wn.2d at 652. The "same evidence" test provides that if each offense contains an element that the other does not, the offenses are different and multiple punishments and convictions are permitted. Womac, 160 Wn.2d at 652; Calle, 125 Wn.2d at 777. Courts examine the elements as defined by statute. State v.

Vladovic, 99 Wn.2d 413, 423, 662 P.2d 853 (1983).

Harkcom was convicted of first degree robbery in violation of RCW 9A.56.200(1). That section defines the offense by reference to the underlying crime of robbery. RCW 9A.56.190 defines robbery.

> A person commits robbery when he unlawfully takes personal property from the person of another or in his presence against his will by the use or threatened use of immediate force, violence, or fear of injury to that person or his property or the person or property of anyone.

Harkcom was also convicted of violating RCW 9A.36.045(1), which provides,

> A person is guilty of drive-by shooting when he or she recklessly discharges a firearm as defined in RCW 9.41.010 in a manner which creates a substantial risk of death or serious physical injury to another person and the discharge is either from a motor vehicle or from the immediate area of a motor vehicle that was used to transport the shooter or the firearm, or both, to the scene of the discharge.

Both offenses contain an element that the other does not. Robbery requires the unlawful taking of personal property. Drive-by shooting does not. Drive-by shooting requires the reckless discharge of a firearm that creates a risk of death or serious physical injury where the discharge is from or in the immediate area of a motor vehicle used to transport the defendant. State v. Pastrana, 94 Wn. App. 463, 477, 972 P.2d 557 (1999); State v. Rivera, 85 Wn. App. 296, 300, 932 P.2d 701 (1997). Robbery does not. The offenses, as defined in the statute, each plainly require proof of elements that the other does not. Under the same evidence test, the offenses are thus not the same and Harkcom's convictions for both do not violate double jeopardy.

B. First Degree Robbery with a Firearm Enhancement

Harkcom next asserts that

enhancing a sentence based on a fact that is also an element of the underlying offense violates double jeopardy. Specifically, he argues that his conviction for first degree robbery based on committing that offense with a firearm and imposing a firearm enhancement for the same offense violates his double jeopardy rights.

But we addressed Harkcom's contention in State v. Tessema, 139 Wn. App. 483, 162 P. 3d 420 (2007) and State v. Nguyen, 134 Wn. App. 863, 142 P.3d 1117 (2006). In those cases, Tessema and Nguyen argued, as Harkcom does now, that in light of Blakely v. Washington, 542 U.S. 296, 301, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004) and State v. Recuenco, 163 Wn.2d 428, 180 P.3d 1276 (2008), the court should reconsider the rule that firearm enhancements for offenses committed with weapons do not implicate double jeopardy. Tessema, 139 Wn. App. at 493; Nguyen; 134 Wn. App. at 866. Both defendants, like Harkcom, then argued that the voters who approved the precursor initiative to the sentence enhancement statute either did not consider the issue of or did not intend a redundant punishment. Tessema, 139 Wn. App. at 493; Nguyen, 134 Wn. App. at 866–67. Finally, we noted that double jeopardy is an inquiry into legislative intent unless the question involves the consequences of a prior trial. Tessema, 139 Wn. App. at 493; Nguyen, 134 Wn. App. at 867. If the legislature intends multiple punishments, double jeopardy is not implicated. See Freeman, 153 Wn.2d at 771.

The firearm enhancement in RCW 9.94A.533 provides for imposing sentences above the standard range where the offense was committed with a firearm. The statute recognizes several exceptions for

"[p]ossession of a machine gun, possessing a stolen firearm, drive-by shooting, theft of a firearm, unlawful possession of a firearm in the first and second degree, and use of a machine gun in a felony." RCW 9.94A.533. In Nguyen and Tessema, we held that the legislative intent was "unmistakable: the use of firearms to commit crimes shall result in longer sentences unless an exemption applies." Tessema, 139 Wn. App. at 493; Nguyen, 134 Wn. App. at 868. We also determined
that any apparent redundancy in imposing higher sentences for offenses committed with a firearm was intentional. Tessema, 139 Wn. App. 493–94; Nguyen, 134 Wn. App. at 868. Here, no exception applies and double jeopardy is not implicated. Tessema, 139 Wn. App. at 493.

Furthermore, Harkcom's argument regarding the effect of Blakely and Recuenco is inaccurate. Blakely involved the Sixth Amendment requirement for finding facts authorizing a sentence, not double jeopardy. Nguyen, 134 Wn. App. at 868 (citing Blakely, 542 U.S. at 301). Recuenco also did not implicate double jeopardy. That case held that harmless error was inapplicable where a court imposes a sentence for "a crime not charged, not sought at trial, and not found by a jury." Recuenco, 163 Wn.2d at 442. Here, the firearm enhancement was charged and found by the jury through a special verdict form. This procedure satisfies Blakely and Recuenco. See Nguyen, 134 Wn. App. at 868. Accordingly, Harkcom's contention that the sentence enhancement for first degree robbery violates double jeopardy is without merit.

II. Same Criminal Conduct

Harkcom next contends that the sentencing court abused its discretion in failing to count his convictions for drive-by

shooting and first degree robbery as the same criminal conduct. Specifically, he argues that these offenses involved the same intent, the same victim, and occurred at the same time and place. The State responds that the two offenses comprise different criminal intents and involved different victims.

RCW 9.94A.589(1)(a)[2] treats all "current and prior convictions as if they were prior convictions for the purpose of the offender score." That section, however, recognizes an exception "if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime." "Same criminal conduct," as used in that subsection, means two or more crimes that require the same criminal intent, involve the same victim, and are committed at the same time and place. RCW 9.94A.589(1)(a). If any of these elements are lacking, a finding of same criminal conduct is inappropriate. State v. Haddock, 141 Wn.2d 103, 110, 3 P.3d 733 (2000); State v. Porter, 133 Wn.2d 177, 181, 942 P.2d 974 (1997); State v. Vike, 125 Wn.2d 407, 410, 885 P.2d 824 (1994). Courts narrowly construe the same criminal conduct analysis. Porter, 133 Wn.2d at 181 (1997); State v. Saunders, 120 Wn. App. 800, 824, 86 P.3d 232 (2004). A trial court's determination on the issue of same criminal conduct is reviewed for abuse of discretion or misapplication of the law. Haddock, 141 Wn.2d at 110; State v. Tili, 139 Wn.2d 107, 122–23, 985 P.23d 365 (1999).

[2] Formerly RCW 9.94A.400(1)(a) (2000). State v. Soper, 135 Wn. App. 89, 104 n.12, 143 P.3d 335 (2006) (citing Laws of 2001, ch. 10, § 6).

The State maintains that Blaney was the victim of the robbery but that "everybody in the area except Blaney was the victim of the drive-by shooting." Br. of Respondent at 11. We agree. The victim of the robbery was Gene Blaney and the victim of the drive-by shooting was the public at large. Our conclusion is supported by State v. Rodgers, 146 Wn.2d 55, 62, 43 P.3d 1 (2002). There, the Supreme Court reasoned, "In our view, the legislature aimed this relatively new [drive-by shooting] statute at individuals who discharge firearms from or within close proximity of a vehicle. Undoubtedly, it was concerned that reckless discharge of a firearm from a vehicle or in close proximity to it presents a threat to the safety of the public that is not adequately addressed by other statutes." (Footnote omitted.) Moreover, the facts here support our conclusion that the victim of the drive-by shooting was the public. Harkcom twice fired the gun while standing in a public parking lot located in a commercial district. Patrons of the West Side Lanes or the parking lot could easily have been in the line of fire—indeed both West Side Lanes' employees and parking lot patrons arrived shortly after Harkcom fired the gun. We hold that the robbery and the drive-by shooting involved different victims and, thus, do not encompass the same criminal conduct.

Having held that the two offenses do not involve the same victims, we need not examine the remaining requirements because all three requirements must be satisfied for a finding of same criminal conduct.

III. Ineffective Assistance of Counsel

Harkcom next contends that defense counsel's conduct amounts to ineffective assistance and requires reversal. Specifically, he argues that counsel's failure to object to inadmissible ER 404(b)

evidence and to argue that the first degree robbery and drive-by shooting convictions constituted the same criminal conduct deprived him of effective assistance and adversely affected the trial's outcome.

To demonstrate ineffective assistance of counsel, Harkcom must satisfy both prongs of a two-prong test. See State v. McFarland, 127 Wn.2d 322, 334–35, 899 P.2d 1251 (1995). We need not address both prongs if the defendant makes an insufficient showing on one prong. State v. Fredrick, 45 Wn. App. 916, 923, 729 P.2d 56 (1986). First, Harkcom must establish that his counsel's representation was deficient. State v. Hendrickson, 129 Wn.2d 61, 77, 917 P.2d 563 (1996). To show deficient performance, he has the "heavy burden of showing that his attorneys 'made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment . . . .'" State v. Howland, 66 Wn. App. 586, 594, 832 P.2d 1339 (1992) (quoting Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). His attorney's conduct must have fallen below an objective standard of reasonableness considering all the circumstances. State v. Meckelson, 133 Wn. App. 431, 436, 135 P.3d 991 (2006). Matters that go to trial strategy or tactics do not show deficient performance, and Harkcom bears the burden of establishing there were no legitimate strategic or tactical reasons behind his attorney's choices. State v. Rainey, 107 Wn. App. 129, 135–36, 28 P.3d 10 (2001).

Second, Harkcom must show that his attorney's deficient performance resulted in prejudice such that "there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different." Hendrickson, 129 Wn.2d at 78. Courts employ a strong presumption that

counsel's representation was effective. McFarland, 127 Wn.2d at 335.

Harkcom's first ineffective assistance claim is meritless because he fails to show deficient performance. ER 404(b) bars evidence of a defendant's prior crimes, wrongs, or acts to prove conformity therewith. The rule also recognizes certain exceptions not applicable here. ER 404(b). Harkcom asserts that at trial the detective's testimony that he found Harkcom's name "in a police database" was improper evidence of prior bad acts. But Harkcom takes this statement out of context. In describing a database that tracks all registered vehicles by the name of the registrant, the detective noted that he could enter his own name and find the cars registered to himself. 1 RP (June 3, 2008) at 113. The detective also testified that he ran a search on Harkcom's name and eventually discovered a link to the car in which Harkcom and Blaney rode to the West Side Lanes. 1 RP (June 3, 2008) at 114. Thus, all that the reference to the "police database" revealed was that Harkcom's—and the detective's—name was in a database of all registered vehicle owners. When taken in context, the detective's reference to the police database is not evidence of a prior bad act. Defense counsel's failure to object to this testimony was therefore not deficient attorney performance. See State v. Stevens, 69 Wn.2d 906, 908, 421 P.2d 360 (1966) ("An attorney has no duty to argue frivolous or groundless matters before a court.").

Harkcom also claims that defense counsel's failure to argue same criminal conduct at sentencing constituted ineffective assistance. However, he cannot establish deficient performance and prejudice because, as discussed above, first degree robbery and drive-by shooting do not constitute the same criminal conduct. Thus, defense counsel's decision to forego a same

criminal conduct argument was objectively reasonable. See State v. Walker, 143 Wn. App. 880, 892–93, 181 P.3d 31 (2008) (holding that because appellate court determined that convictions did not constitute the same criminal conduct, defense counsel had "no need" to raise the argument at sentencing). Finally, Harkcom fails to establish that arguing same criminal conduct would have yielded a different sentence.

IV. Seating of the Alternate Juror

Harkcom also contends that the trial court's failure to properly instruct the jury on the record to begin deliberations anew after replacing juror 12 with the alternate juror violates his constitutional right to a fair trial and a unanimous jury. Relying on CrR 6.5 and our decisions in State v. Ashcraft, 71 Wn. App. 444, 466, 859 P.2d 60 (1993) and State v. Stanley, 120 Wn. App. 312, 314, 85 P.3d 395 (2004), he argues that this violation constitutes reversible error entitling him to a new trial. But the State maintains that even if the trial court erred, defense counsel invited it and, moreover, no error occurred because the court and counsel agreed to permit the court bailiff to instruct the reconstituted jury. For support, the State points to the colloquy between the court and counsel.

> 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 begin deliberating from scratch.
> THE BAILIFF: Okay. Very Good.
> THE COURT: Anything else, counsel?
> [THE STATE]: No, your Honor. I think that is the proper route.
> [DEFENSE COUNSEL]: I guess I just wonder if the jury should be instructed, and, frankly, in all the jury trials I have 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 begin anew or not.

THE COURT: I have 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.

[THE STATE]: If that is Mr. Harkcom and [defense counsel's] request, I have no objection. I don't know that it's necessary, but it certainly couldn't hurt anything.

I think the one thing that is required by the law and that is that they be instructed that they are to start their deliberations again from the start, so that the alternate can be included, and that's what you asked the bailiff to direct them to do.

[DEFENSE COUNSEL]: Your Honor, I would just leave it at your discretion as to how you want to restart it.

THE COURT: I have had previous alternates come in, and I have not given special instructions to the jury, maybe in part not to make the event assume greater significance than it does.

And as long as I think the bailiff knows to instruct them to begin from the beginning, I'm comfortable with that, but if counsel are concerned that the bailiff might not adequately instruct the jury in that way, as I say, I'm willing to bring them into the courtroom.

[DEFENSE COUNSEL]: That's fine. You can go ahead and do it.

THE COURT: I will just ensure the bailiff, I have already told him that, but I will tell him again outside the courtroom to make sure to tell the jury that once the alternate gets here that the jury is to begin deliberations again anew. Anything further?

[DEFENSE COUNSEL]: No. your Honor.

[THE STATE]: No, your Honor.

2 RP (June 5, 2008) at 222–24.

We first consider the State's "invited error" contention. The State argues that defense counsel's acquiescence to allow the bailiff to instruct the reconstituted jury establishes that defense counsel invited the error. The invited error doctrine "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), overruled on other grounds by State v. Olson, 126 Wn.2d 315, 893 P.2d 629 (1995). To be invited, the error must be the

result of an affirmative, knowing, and voluntary act. In Re Pers. Restraint of Call, 144 Wn.2d 315, 328, 28 P.3d 709 (2001). The doctrine prevents counsel from "setting up" the trial court by seeking specific action of the court and then requesting reversal on the basis of that same action. State v. Meggyesy, 90 Wn. App. 693, 707, 958 P.2d 319 (1998) (finding no invited error where defendant did not invite the particular error he raised on appeal). And in In Re Pers. Restraint of Thompson, 141 Wn.2d 712, 724, 10 P.3d 380 (2000), the court refused to apply the doctrine where it appeared that neither of the parties or the trial court was aware of the error. Here, the record shows that defense counsel and the State expressed uncertainty about the procedure necessary to properly seat the alternate juror. Moreover, the record also shows the trial court's erroneous understanding of this procedure. When discussing with counsel the procedure to instruct the reconstituted jury, the court stated, "I have had previous alternates come in, and I have not given special instructions to the jury . . . ." 2 RP (June 5, 2008) at 224. And when the court proposed that it or the bailiff instruct the jury, defense counsel responded, "I would just leave it at [the court's] discretion as to how you want to restart it." 2 RP (June 5, 2008) at 223. Under the circumstances present here, we conclude the State failed to establish that defense counsel "set up" the trial court by inducing the alleged error. The invited error doctrine does not apply in this case.

We next address Harkcom's contention that the trial court failed to properly instruct the reconstituted jury on the record. CrR 6.5 governs instructions to a reconstituted jury. It provides that once "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." Ashcraft, 71 Wn. App. at 466. "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. Claims of constitutional error are reviewed de novo. Stanley, 120 Wn. App. at 314.

The State acknowledges that this rule requires the jury to be instructed whenever a deliberating juror is replaced with an alternate juror. But the State argues that "it does not require that the judge be the one to do the instructing." Br. of Respondent at 24. Relying on Ashcraft and Stanley, Harkcom maintains that the trial court's failure to instruct the jury on the record constituted reversible error. In Ashcraft, the trial court replaced a deliberating juror with an alternate juror due to the juror's unavailability without giving the parties an opportunity to be heard and without a record of reinstruction. Ashcraft, 71 Wn. App. at 460. There, we held that "the trial court's failure to reinstruct the reconstituted jury on the record that it must disregard the previous deliberations and begin deliberations anew was manifest constitutional error." Ashcraft, 71 Wn. App. at 467. We made clear that a reviewing court must be able to tell from the record that the reconstituted jury was properly instructed. Ashcraft, 71 Wn. App. at 466.

In reaching that conclusion, we 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 we could not determine from the record whether the jury had been instructed to begin deliberations anew, we 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." Ashcraft, 71 Wn. App at 465.

And, like Ashcraft, 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. In addition, 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. Stanley, 120 Wn. App. at 313. 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, we 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, the record shows that following discussions with counsel, the trial court told the court bailiff to instruct the reconstituted jury "to begin deliberat[ions] from scratch" and told counsel that he would instruct the bailiff, "to make sure to tell the jury that once the alternate gets here that the

jury is to begin deliberations again anew." 2 RP (June 5, 2008) at 222, 224. Like the Ashcraft and Stanley courts, we are troubled by the trial court's seating of an alternate juror without a record of reinstruction.[3] And it is undisputed that the trial court gave no instructions to the reconstituted jury. Under these circumstances, we cannot determine what was said or assess its impact on Harkcom's constitutional right to a unanimous jury.[4] Thus, the State has failed to carry its burden that jury unanimity was preserved.

Relying on CrR 6.5, the State next argues that the rule "does not require that the judge be the one to do the instructing." Br. of Respondent at 24. We disagree. In Ashcraft, we held that the trial court's failure to instruct the reconstituted jury on the record constitutes manifest constitutional error. And WPIC 4.69.02[5] provides an

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[3] And the record is silent on what, if any, instructions the bailiff gave to the reconstituted jury.

[4] As we observed in Stanley, consideration of the multiple counts in Ashcraft was a complex undertaking for the jury and "'not beyond the realm of reasonable possibility that . . . the alternate and the remaining 11 initial jurors could have concluded . . . that they need not deliberate anew as to any counts or issues upon which the initial 12 jurors may have reached agreement.'" Stanley, 120 Wn. App at 316 (quoting Ashcraft, 71 Wn. App. at 466–67).

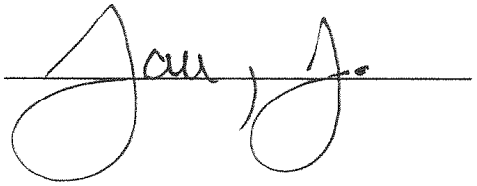
We note here that the reconstituted jury considered multiple counts, deliberated, and rendered its verdict all in one day. Therefore, a reasonable possibility exists that the alternate juror and the remaining 11 jurors could have concluded that they need not deliberate anew on the counts or issues upon which the original 12 jurors may have reached agreement.

[5] 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 4.69.02, at 141 (3d ed. 2008) (WPIC) relating to the trial court's instructions to be given to a reconstituted jury after beginning of deliberations states,

"During this trial (fill in name) was an alternate. (Fill in name) has now been seated as a juror in this case. You must disregard all previous deliberations and begin deliberations anew."

instruction to be given by the trial judge "whenever it is necessary to seat an alternate juror during the course of deliberations." WPIC note on use at 141. While we recognize the vital role of the court bailiff during trial, we reasoned in Ashcraft that instructions to the reconstituted jury are matters that related directly to a defendant's constitutional right to a fair trial and to a unanimous jury. Accordingly, we hold that the obligation to instruct the reconstituted jury rests solely with the trial judge.

For the foregoing reasons, we reverse and remand for a new trial.[6]



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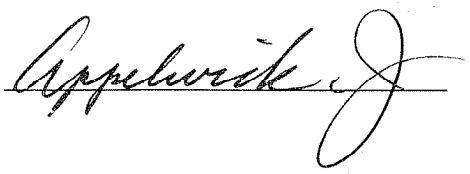

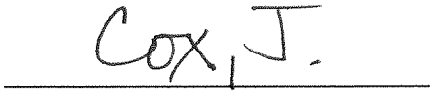

[6] Harkcom raises several additional arguments in his statement of additional grounds for review. But given our decision here, it is unnecessary to address these arguments.