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King County Prosecutor
Appellate Unit

COURT OF APPEALS NO. 65246-0-1

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

STATE OF WASHINGTON

v.

REY DAVIS-BELL,

Appellant.

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

The Honorable Laura Inveen, Judge

OPENING BRIEF OF APPELLANT

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A. INTRODUCTION

The main issue in the state's case against Rey Davis-Bell for three counts of attempted murder and one count of murder was identity. 9RP 93. On the morning of January 30, 2008, two shootings occurred – one at the West Seattle apartment complex of Claressa Scott, a former girlfriend of Davis-Bell's – and one about 45 minutes later, at the Philadelphia Cheese Steak restaurant in Seattle's Central neighborhood. RP 471-74, 491-92, 799, 868. While the state's evidence suggested Scott and Davis-Bell had argued shortly before the shooting at Scott's apartment (RP 492), the state offered no potential motive or reason Davis-Bell would have for the shooting at the Philadelphia Cheese Steak. BRP 90-91; RP 858; 9RP 33-34, 69.

Moreover, several witnesses to the restaurant shooting described the shooter as approximately 6'0" tall and slim. RP 990, 1005, 1020, 1080. Davis-Bell is only 5'4" tall, and at the time of the shootings, weighed over 180 pounds. BRP 88; RP 545.

The defense obtained a grainy video taken from the gas station across the street from the Philadelphia Cheese Steak restaurant depicting the suspect walking into the restaurant. RP 1000. By conducting a reenactment with persons of known height

and applying the science of comparative measurement, a defense expert in video technology determined the height of the suspect as 5'9" tall.

On cross-examination, the prosecutor elicited the fact the defense expert's work is not peer-reviewed. Although identity, including the height of the shooter, was the most important issue in the case, the trial court did not allow Davis-Bell to elicit evidence on redirect that the defense expert's similar work in other cases had led to the state's dismissal of criminal charges.

Davis-Bell will argue the trial court deprived him of his right to present a defense in prohibiting him from eliciting this critical information. He will also argue the error was highly prejudicial in light of the state's expert's testimony disparaging the defense expert's methods of enhancing the grainy video, as well as his application of comparative measurement and conclusions.

Davis-Bell will also challenge the trial court's denial of a motion to suppress incriminating statements he made while being recorded by police, on grounds the officers violated Washington's Privacy Act. Finally, Davis-Bell will challenge the procedure by which the sentencing enhancements in his case were obtained.

B. ASSIGNMENTS OF ERROR

1. The trial court erred in denying the motion to suppress illegally obtained evidence.

2. The trial court deprived appellant of his right to present a defense in precluding him from rehabilitating his expert witness with evidence analogous to peer review.

3. Appellant's constitutional due process rights were violated by an instruction requiring the jury to be unanimous in order to answer he was not armed at the time of the offenses.

4. To the extent defense counsel contributed to the error by agreeing to the faulty sentencing enhancement instruction, appellant received ineffective assistance of counsel.

Issues Pertaining to Assignments of Error

1. Whether the trial court erred in denying the motion to suppress audio and video recordings of appellant talking on the telephone in an interview room at the police station, where the officers recording appellant failed to inform him of his constitutional rights at the beginning of the recording, as well as the fact he was still being recorded when officers brought him back to the interview room after moving him to a non-recorded interview room so that he could speak to his attorney?

2. As indicated in the Introduction, the defense obtained a video taken from the gas station across the street from the Philadelphia Cheese Steak restaurant depicting the suspect walking into the restaurant. By conducting a reenactment with persons of known height and applying the science of comparative measurement, a defense expert determined the height of the suspect as 5'9" tall. On cross-examination, the prosecutor elicited the fact the defense expert's work in this case was not peer-reviewed. Did the trial court err in ruling the prosecutor's line of inquiry did not open the door to rebuttal evidence that the defense expert's work in other cases had led to the state's dismissal of criminal charges?

3. The jury in appellant's case was instructed it must be unanimous in order to answer "no" to the Special Verdicts asking whether appellant was armed at the time of the charged offenses. This is an incorrect statement of the law under State v. Bashaw, 169 Wn.2d 133, 234 P.3d 195 (2010), and amounts to an error of constitutional magnitude under the due process clause, as held by this Court in State v. Ryan, 160 Wn. App. 944, 252 P.3d 895 (2011). Did the instructional error violate appellant's constitutional due process rights?

4. To the extent defense counsel contributed to the error by concurring the faulty instruction should be given, did appellant receive ineffective assistance of counsel?

B. STATEMENT OF THE CASE¹

1. Sentencing Enhancements

Following a jury trial in King County Superior Court, appellant Rey Davis-Bell was convicted of: (1) attempted first degree murder of Claressa Scott; (2) first degree murder of Degene Deshasa; (3) attempted first degree murder of Yoseb Lee; (4) attempted first degree murder of Habiba Golicah; and (5) felony violation of the uniform firearms act (VUFA).² CP 38-41, 130-139. The first count involving Scott was based on a shooting incident at her apartment in West Seattle on the morning of January 30, 2008. The other counts were based on a shooting incident at the Philadelphia Cheese Steak restaurant in the Central Area of Seattle about 45 minutes later. CP 5.

With the exception of the VUFA, each count carried a firearm enhancement. CP 38-41. Because Davis-Bell had a prior firearm

¹ This brief refers to the transcripts as follows: ARP – 12/17/09; BRP – 1/5/10; CRP – 1/6/10; DRP – 2/24/10; RP – 14 bound volumes (I-XIV), consecutively paginated, commencing January 7, 2010, and concluding April 16, 2010; 1RP – 2/2/10; 2RP – 2/8/10; 3RP – 2/9/10; 4RP – 2/10/10; 5RP – 2/11/10; 6RP – 2/11/10 (afternoon); 7RP – 2/16/10; 8RP – 2/17/10; 9RP – 2/18/10 and 2/22/10.

enhancement, each was doubled to 120 months, resulting in 480 months of hard time on top of his base sentences. CP 31; RCW 9.94A.533(3)(a), (d).

Regarding the firearm enhancement, the court instructed the jury – as proposed by the state – the jury must be unanimous to find Davis-Bell was not armed with a firearm at the time of the offenses:

You will also be given special verdict forms for the crimes charged in Count I-IV. If you find the defendant not guilty of these crimes, do not use the special verdict forms. If you find the defendant guilty of these crimes, you will then use the special verdict forms and fill in the blank with the answer “yes” or “no” according to the decision you reach. Because this is a criminal case, all twelve of you must agree in order to answer the special verdict forms. In order to answer the special verdict forms “yes,” you must unanimously be satisfied beyond a reasonable doubt that “yes” is the correct answer. If you unanimously have a reasonable doubt as to this question, you must answer “no.”

CP 37; (No. 30); Supp. CP __ (sub. no. 131, State’s Instructions to the Jury, 2/16/2010) (WPIC 160.00).

In its proposed instructions, defense counsel asserted: “The defendant does not object to, and concurs with the request of, the

² For purposes of the VUFA, Davis-Bell stipulated that on January 30, 2008, he had been convicted of a prior serious offense. 6RP 97.

State's following submitted instructions: . . . 160.00 Concluding Instruction – Special Verdict – Penalty Enhancement.” CP 44.

2. Denial of Motion to Suppress Video

In advance of trial, the defense moved to suppress a video taken of Davis-Bell in an interview room following his arrest, on grounds the police failed to strictly comply with Washington's Privacy Act. Supp. CP __ (sub. no. 115, Defendant's Trial Memorandum, 12/30/09). RCW 9.73.090(1) provides:

b) Video and/or sound recordings may be made of arrested persons by police officers responsible for making arrests or holding persons in custody before their first appearance in court. Such video and/or sound recordings shall conform strictly to the following:

(i) The arrested person shall be informed that such recording is being made and the statement so informing him shall be included in the recording;

(ii) The recording shall commence with an indication of the time of the beginning thereof and terminate with an indication of the time thereof;

(iii) At the commencement of the recording the arrested person shall be fully informed of his constitutional rights, and such statements informing him shall be included in the recording;

(iv) The recordings shall only be used for valid police or court activities[.]

In support of suppression, the defense alleged the following facts and violations of the statute:

On January 31, 2008, Mr. Davis-Bell was arrested and transported to SPD Homicide headquarters. He was placed in an interrogation room at 11:48 a.m. Inside that room was a telephone on the table. The telephone was deliberately placed in that room to elicit incriminating statements from the defendant in the most hostile of all environments: the interrogation room. Thirty-five seconds after being placed in the interrogation room, Detective Dave Duty only partially complies with RCW 9.73.090(1)(b). On the recording, Duty did advise the defendant that 1) he is being recorded; 2) that the time is 11:48 and the date is January 31st. Duty fails to advise Mr. Davis-Bell of his full constitutional rights on the recording. Mr. Davis-Bell does not verbally consent to the recording. Detective Duty encouraged Mr. Davis-Bell to use the telephone multiple times. He is advised that he must dial "9" before placing a call. Moreover, he is requested to limit his long distance calls. Approximately one and one-half hours into sitting in the interrogation room, Det. Dana Duffy enters the room and states the time is 1320 (1:20 pm) hours. She then removes Davis-Bell from that interrogation room into another that is not recorded so he may speak with his attorney. Duffy brings Davis-Bell back to the recorded interrogation room with the telephone five minutes later. She advises Davis-Bell of his Miranda rights. Duffy failed on the recording 1) to mention the date and time, 2) to mention that Davis-Bell is still being recorded, and 3) to obtain his consent. It should be noted that Mr. Davis-Bell invoked his right to counsel immediately after the advisement.

At three hours and eight minutes into the recording, Detective Duty returns to the room. Duty engages in conversation with Davis-Bell which subtly turns into an interrogation; notwithstanding Davis-

Bell's prior invocation of his right to counsel. During the course of that interrogation, Duty elicits information about Davis-Bell's criminal history, about previous incarcerations, and general familiarity with the court system for in-custody defendants.

Throughout the recording in the interrogation room, Davis-Bell fell victim to the police department's entrapment by constantly using the telephone. All recordings of Mr. Davis-Bell in the interrogation room should therefore be excluded for failure to strictly comply with Washington State's Privacy Act – RCW 9.73.090.

Supp. CP __ (sub. no. 115, Defendant's Trial Memorandum, 12/30/09), pp. 4-6 (footnotes omitted).

For purposes of the motion, the parties agreed Davis-Bell was informed of his Miranda rights upon arrest in the field and invoked his right to counsel at that time. CP 28; BRP 18. The parties also agreed Davis-Bell was "in custody" while in the interrogation room with the telephone. CP 28; BRP 12. The state did not dispute the defense's rendition of the facts and conceded Davis-Bell was not advised of his Miranda rights at the beginning of the recording. Supp. CP __ (sub. no. 121, State's Trial Memorandum, 1/5/10), pp. 22-23; BRP 10, 13. The state also conceded that when detective Duffy brought Davis-Bell back to the interview, she did not advise him he was still being recorded. BRP 15-16.

Nonetheless, the state argued against suppression on grounds the statute applies only to statements that are the result of custodial *interrogation*. BRP at 14, 17. The state also argued substantial compliance.³ BRP 14.

The court agreed with state that the rules regarding the recording of a suspect's statements only apply to statements that are the result of custodial interrogation:

Next issue, and this is related – is regarding the state law on privacy and recorded conversations. And as pointed out by counsel there are some clear requirements under the statute which are required to be followed. First that the defendant or suspect was informed of the recording on tape, which was done. There must be a commencement – at the time there must be an indication of the time the hour of the day, which was done. And it must be done only for valid police activities. That's not being disputed.

What is being disputed – well, what is also being disputed but was not done was that requirement under the statute that he be fully advised on his constitutional rights and that was not done on the tape. But I would agree with the State that the statute is designed for the advisement of the Miranda rights to be on the tape when there is a requirement that Miranda rights be given and that is the case of interrogation. Because Miranda rights are not required to be given on the tape for purposes of admissibility.

So I am going to find that any conversations with – of Mr. Davis-Bell on the phone, other than conversations to his lawyer, are admissible.

³ The state did not intend to offer Davis-Bell's recorded statements to Detective Duty. BRP 23.

BRP 44-45.

The video was admitted and played for the jury during trial. Ex 148. The jury was also provided a transcript of the recording while it was played. Ex 149. In his first call, Davis-Bell stated: "I'm downtown. I got, no they got me. I was going to my DOC's office. They got me coming out of the house." Ex 149, page 1. He reiterated, "Hey. They got me, brother. Yeah, they got me. They did." Id.

During deliberations, per its request, the jury was provided a laptop and monitor to review the video. CP 110-111.

3. Underlying Facts

The morning of the shooting, Claressa Scott was at her West Seattle apartment smoking pot with her friend, Rasheena Thomas; Scott was on house arrest at the time for a forgery conviction. RP 471, 474, 484, 504-505, 519. She testified that around 10:00 a.m., she received a phone call from Davis-Bell, who was reportedly upset Scott had spoken to Davis-Bell's current girlfriend, Satrinna Thomas, about needing Davis-Bell's help to get her car out of impound. RP 472, 509-516; 3RP 37, 39. The car had been purchased when Scott and Davis-Bell were a couple, but was still in Davis-Bell's name, apparently. RP 509, 543.

According to Scott, 10-15 minutes after she and Davis-Bell hung up, she heard gunshots and dropped to the ground. Thomas grabbed her daughter and ducked. RP 475, 527. No one was hit. RP 477, 518. Scott did not see a car or suspect before, during or after the shooting. RP 530, 534.

Nervous because she had been smoking pot while on house arrest, Scott did not telephone police for 10-15 minutes. RP 477-78, 532. Police arrived at 10:50 a.m. and recovered 9 Remington-Peter .40 Smith and Wesson shell casings from the parking lot in front of Scott's apartment and several bullet fragments from inside her apartment. RP 609, 624, 655, 657-61, 664; 5RP 28. Scott testified her blinds were drawn in a way that would have made it difficult for the shooter to see inside her apartment. RP 569-571.

Phone records suggested that Scott and Davis-Bell last spoke at 10:12 a.m. that morning. 5RP 13; 2RP 170-172. Records also suggested Davis-Bell spoke to his grandmother Janiece Jackson between 10:18 a.m. and 10:31 a.m. RP 513, 677, 678; 6RP 31. When Jackson and Davis-Bell hung up, the cell phone tower last accessed by Davis-Bell's phone was one that serviced West Seattle. 6RP 25, 31.

Nonetheless, Bryan Cordes, who was working at the apartment complex that morning and called 911, described the suspect as between 5'8" and 6'0" tall with a slight build. RP 587-601-602, 626-27. As indicated in the Introduction, Davis-Bell is only 5'4" tall. BRP 88. Cordes testified the suspect was wearing a dark hooded sweatshirt and baggy pants.⁴ RP 587.

Cordes testified he heard 8-12 "pops," which he thought to be gunshots. RP 582-84. He was sitting in his truck at the time, looked up and saw a person walk across the parking lot, 100 yards away. RP 586. Cordes was pretty sure it was "the person" because "just the timing, they were so close together." RP 587.

Janiece Jackson testified she received a phone call from Davis-Bell that morning between 10:00 and 10:30 a.m. RP 678. According to Jackson, Davis-Bell was upset because a friend had not paid his bills, and because of friction between his former and current girlfriends. RP 679. According to Jackson, Davis-Bell said he was going to West Seattle to take care of business. RP 680.

Concerned, Jackson called back about 10-15 minutes later in an effort to dissuade him from going. Jackson testified Davis-Bell said he had already been there and was leaving. According to

⁴ Satrinna Thomas, Davis-Bell's girlfriend at the time, testified Davis-Bell always

Jackson, Davis-Bell “said he saw her in the window.” RP 683. Jackson thought he “said something about shooting at the window.” RP 683. According to Jackson, Davis-Bell also said “anybody that has hurt me, I have enough ammunition to take care of them.” RP 691. Jackson suddenly experienced trouble breathing and chest pain. A family member called 911. RP 685.

Michael Mann was one of the paramedics who responded. RP 786. As it turned out, Jackson was having an anxiety attack. RP 698. Jackson reportedly disclosed her conversation with Davis-Bell to Mann. RP 685-687, 791, 808. While Mann was treating Jackson, he heard a police dispatch about a shooting at 23rd Avenue and East Union Street. RP 687, 789. He wondered if the West Seattle and Central area shootings could be related, based on Jackson statements. RP 791. He relayed what Jackson told him to police dispatch. RP 794, 796.

In the meantime, police had responded to reports of a shooting at the Philadelphia Cheese Steak restaurant at 11:15 a.m. RP 799, 1158, 1181. The restaurant’s owner, Degene Deshasa (nicknamed “Safie”), had been shot dead and was lying in the kitchen. RP 837-838, 1122, 1134-1135, 1162, 1346. A restaurant

wore his pants snug with a belt. 4RP 33.

patron, Yoseb Lee, had also been shot and was still alive, but laying in the parking lot. RP 1117, 1120. Habiba Golicha, who was a family friend of Deshasa working at the restaurant that morning, had run out of the restaurant during the shooting and escaped physical harm. RP 837, 890.

Golicha testified that around 11:00 a.m., a man came in and asked for Deshasa. RP 838, 844. While she was ringing up an order for an Asian man (Yoseb Lee (RP 893)), a man came in and asked for Safie. RP 845. According to Golicha, he was a light-skinned, short and stocky African-American man wearing a black sweatshirt, "a sock like hat and jeans," which Golicha described as baggy. RP 847, 930-933, 936.

Golicha told the man to "give [her] a second" and called Deshasa. RP 848. When Deshasa came downstairs, the man yelled, "Safie, come here." RP 848. After Deshasa approached the man, Golicha heard two gunshots fired in Deshasa's direction. RP 838, 848, 851.

Golicha claimed she saw the man turn toward Yoseb Lee and shoot him. RP 851-53, 916. She thought she heard about two shots. RP 853. When Golicha reportedly saw the man aiming at

her, she ran out the back door. RP 853. She testified she heard two more shots as she was running. RP 855, 882, 963.

At trial, Golicha claimed the shooter was Davis-Bell. RP 839. However, her identification had not been so certain when she picked Davis-Bell's picture from a police montage. RP 862, 1371-1373. At that time, she was only 75% certain it was Davis-Bell. RP 862, 951, 1373. She also said "he kind of looked different from what I saw that day as the real him and the picture." RP 862. For instance, his face was wider in the picture and his nose looked bigger in person. RP 862, 950, 1373.

Golicha testified she had seen Davis-Bell at the restaurant 3-4 times before. RP 848, 954-955. Golicha described a group of people who dressed similarly and would come into the restaurant, not order anything, but just hang out and ask for water. RP 946-47, 954-55. She counted Davis-Bell as one among this annoying group. RP 954-955.

Psychologist Geoffrey Loftus testified about several problems inherent in witness identifications. 2RP 57-106. One such problem is called "unconscious transference." 2RP 78. This refers to a situation where the suspect or person identified is not actually the person the witness saw commit the crime but

somebody the witness has seen before in other circumstances.
2RP 78.

He also stated that persons facing a high stress situation, such as a shooting, are more apt to focus on the gun, as opposed to the shooter's face. 2RP 92-94, 146. Indeed, Golicha testified she looked at the shooter's face, but paid more attention to his gun. RP 859; see also 1266.

Ryan Yearout was at the 76 Station across the street from the Philadelphia Cheese Steak at the time of the shooting. RP 981, 993. After hearing gunshots, he saw a man stagger out the front door of the restaurant and collapse on the ground. RP 982, 997. Yearout ran to help the man, who was Yoseb Lee. RP 983.

A woman called 911 and Yearout spoke briefly with the operator about what he had seen. RP 983. Yearout had seen a man pull up in a black Lincoln with chrome factory rims and park in the middle of the restaurant's parking lot, facing 23rd. RP 985-86, 998. The man got out and walked into the restaurant. About 30 seconds later, the man walked back out, got in his car and drove north on 23rd. RP 982-84, 999, 1000. Shortly after, Lee stumbled out of the restaurant. RP 1000.

To Yearout, the man who drove away appeared to be around 6'0" tall with a slim build, 150-160 pounds, and wearing a black hooded sweatshirt. RP 990, 1005. Yearout testified he is 6'3" tall and a good judge of what constitutes 6 feet. RP 1006.

Loftus testified height and build are details people have the ability to perceive well. 2RP 95. In that vein, a person's unusually short stature is something an individual would memorize about that person's appearance. 2RP 98-99.

Leonard Smith and Richard Walker were eating lunch in the restaurant at the time of the shooting. RP 1012, 1014, 1058. Smith knew Deshasa from high school. RP 1013. Smith described the shooter as his height, 5'9", wearing a big puffy jacket, baggy pants and a black beanie or wool hat. RP 1020, 1022. Smith thought he might be of African descent, because he pronounced "Safie" as "Saf-ee-ay." RP 1024. Smith thought maybe he had been mispronouncing Safie's name all these years. RP 1024.

Upon hearing something that sounded like fire crackers, Smith and Walker took cover. RP 1025, 1060. Walker had been facing the other direction and did not see the shooter. RP 1059-1060.

Smith testified he saw a picture of Davis-Bell on the news that night. Accordingly, when he picked Davis-Bell from a police montage, he could not be certain it was because Davis-Bell was the actual shooter, as opposed to Smith simply recognizing Davis-Bell from the news. RP 1030-1032, 1041, 1051-1052. Significantly, Loftus testified the possibility of unconscious transference is increased when the witness has already seen the suspect in suspicious circumstances, i.e. on the news identified as the suspect. 2RP 82.

Krissant Vagata was walking by the restaurant at the time of the shooting. RP 1073-1075. As he crossed the street by the Philadelphia Cheese Steak, he heard a loud pop. He looked inside the restaurant and saw a man pointing a gun toward the kitchen. RP 1076. Another man was laying on the ground to the left of the gunman, in front of the counter. RP 1077-1078. Scared for his life, Vagata ran to a nearby bank, where Golicha had also run. RP 1077, 1083.

Vagata described the gunman as having black hair, sideburns and wearing a $\frac{3}{4}$ length black jacket. RP 1080. Vagata, who is 6'2" tall, thought the man was about 6'0" tall and 165

pounds.⁵ RP 1080, 1103, 1112. When Vagata saw Davis-Bell's picture on the news, he was not sure if police had the right suspect. RP 1089. He contacted police to relay his concerns, but no one returned his call. RP 1089-1091, 1106-07, 1278.

Yearout testified police and aid arrived within moments of his description to 911. RP 985. Aid stabilized Lee and transported him to Harborview, where he eventually recovered.⁶ RP 1121, 1408, 1414-1415, 1648.

Police, who had been informed of Janiece Jackson's statements to paramedic Mann, obtained a picture and description of Davis-Bell shortly after the shooting and circulated it widely to the media, together with a description of the black Lincoln described by Yearout. PP 1232, 1238, 1366-67, 1369, 1390-91; 4RP 95, 150-51; 5RP 56.

⁵ Vagata initially told a responding officer at the bank the shooter was short with a medium build. RP 1086, 1187. At the police station shortly thereafter, however, Vagata described the shooter as 6'0" tall and 165 pounds. RP 1087, 1103, 1194, 1274.

⁶ Because of his health, Lee did not speak to police until February 12, 2008. RP 1896, 1442, 1630-1645. At that time, he told police the shooter's face was "a blank to him." RP 1897. He described the shooter as between 5'7" and 5'8" tall. RP 1482. When he picked Davis-Bell's picture from the montage, he said, "maybe that guy." RP 1899. The detective did not consider it to be a solid identification. RP 1901. Yet, at trial, Lee testified he was certain it was Davis-Bell who shot him. RP 1434, 1455.

Loftus testified that when one thinks about an event frequently, the person has more opportunity to supplement his or her memory of the event with post-event information gained after-the-fact. 2RP 74. A problem results when the post-event information that is added is itself inaccurate. 2RP 74, 103.

Police obtained 6 shell casings from the restaurant scene. RP 1138-39, 1161, 1576. Based on bullet strikes observed, however, police opined 7 bullets were fired. RP 1576-77. The casings were Winchester .40 caliber Smith and Wesson. RP 1821; 5RP 28. A civilian cleaning the restaurant later discovered an additional casing, which he turned over to police. RP 1978-81.

At around noon the same day as the shooting, Seattle police officer Christopher Caron was driving north on Martin Luther King Way on his way home from the south precinct. RP 1619-1620, 1657, 1659. As he approached the intersection at South Walden Street, he observed a black Lincoln heading west, enter the intersection, make a quick U-turn, and return east on South Walden. RP 1657, 1661.

A few seconds later, Caron heard several pops that he believed to be gunshots and pulled over at the next intersection. RP 1658. According to Caron, in another few seconds, the same black Lincoln passed him. RP 1662. He wrote down the license plate: 210 XMJ. RP 1663.

Caron drove to the area where he thought he heard the shots, but observed nothing out of the ordinary. RP 1664. Caron though maybe he didn't actually hear any gunshots. RP 1702,

1708. There was a lot of construction and jack hammering in the area. RP 1694-1695.

When Caron returned home, he read the news about the shooting at the Philadelphia Cheese Steak restaurant. The article described the suspect vehicle and gave a license plate number.⁷ It was the same number Caron had written down.⁸ RP 1667.

The next day, Caron returned to where he thought he had heard the gunshots. RP 1668. He recovered two shell casings and turned them into evidence. RP 1672-74.

Meanwhile, the day of the shooting, between 12:30 and 1:00 p.m., Davis-Bell's other grandmother, Gloria Taylor, was preparing to go "door-belling" in her Beacon Hill neighborhood for the upcoming caucuses. RP 1719, 1761-62. When she left the house, Davis-Bell was parked in a small black car in the driveway. RP

⁷ Police had become aware Davis-Bell was pulled over for a traffic infraction in a black Lincoln in November 2007. RP 1795, 1879, 1882; 4RP 152-53, 156. In January, Davis-Bell told his community corrections officer he bought the car from his cousin, Demar Nelson. RP 1797. At the time Davis-Bell was pulled over in November 2007, the car had a license plate of 071 UAA. RP 1847, 1878, 1885, 1888. However, in January 2008, the department of licensing issued a new number for the same car (same vehicle identification number): 210 XMJ. RP 1847, 1886, 1871.

⁸ Phone records indicated Davis-Bell's phone utilized a cell phone tower covering the intersection of Martin Luther King Way and South Walden Street at 12:20 p.m. 6RP 27, 41. Phone records also indicated Davis-Bell's phone utilized a cell phone tower covering the intersection of 23rd Avenue and East Union Street around the same time as the shooting at the Philadelphia Cheese Steak. 6RP 28, 36. That cell tower covers a fairly large area, however, as testified to by the radio frequency engineer for Ericsson. 6RP 4, 75.

1763-1764. Taylor testified Davis-Bell did not seem himself. RP 1764-65. Nevertheless, she told him it was not a good time to visit and continued on her way. RP 1764-65.

A short while later, while out canvassing, Taylor received a call from her daughter, Davis-Bell's mother, Debra.⁹ RP 1732, 1767. Debra picked up Taylor and they exchanged concerns about Davis-Bell,¹⁰ before going to another family member's home. RP 1733-34, 1770. By this time, it was all over the news that Davis-Bell was a suspect in the shootings. RP 1735, 1771-72.

When Debra brought Taylor home that evening, they noticed the car described in the news as associated with Davis-Bell parked across the street.¹¹ RP 1737, 1774. They noticed it had the same license plate that had been broadcast. RP 1737, 1740, 1774. They called police. RP 1737.

Police impounded the car and later searched it. RP 1837-1838. On the floor beneath the front passenger seat, police found a box of ammunition. RP 1859. The packaging indicated it was 100 rounds of Winchester .40 caliber Smith and Wesson. RP 1861.

⁹ Debra Davis-Bell's first name is used to avoid confusion. No disrespect is intended.

¹⁰ Debra spoke to Davis-Bell at 10:50 a.m. that day, after receiving a distressed call from Janiece Jackson. RP 1726-28. Debra testified she asked Davis-Bell if he would pray with her, but he reportedly said he was done praying. RP 1728.

Significantly, however, Paris Johnson, a bartender at the Seattle Tennis Club and friend of Davis-Bell's, testified the ammunition was his. 7RP 150-54, 156-158. He had run into Davis-Bell a day or so before shooting and accidentally left the box in Davis-Bell's car. 7RP 158.

Police arrested Davis-Bell on January 31, the morning after the shootings. RP 1992-98. He had been staying with his girlfriend Satrinna Thomas at her house on South Cloverdale Street.¹² RP 1914. Police observed Davis-Bell leaving the home and surreptitiously followed. RP 1915. Davis-Bell walked north on Martin Luther King Way but reportedly then ran westbound between some houses up into a greenbelt. RP 1920, 2026-27; 2RP 17. According to one surveilling officer, Davis-Bell took off his hat and hoodie and threw them on a blackberry bush. RP 1921. Just then, another officer ordered Davis-Bell to the ground and he was peaceably taken into custody. RP 1921-22, 2028; 1RP 19.

Thomas testified Davis-Bell had called the previous night and asked her to pick him up in West Seattle. RP 49-50. Thomas testified that when they returned to Thomas' house, Davis-Bell said

¹¹ Taylor described it as a little black car. RP 1780. Debra said it was a black Lincoln. RP 1740.

he and Demar Nelson had argued. 3RP 50. Although Davis-Bell was making payments to Nelson for the car, see note 7, supra, Nelson was not making the payments to the bank. 3RP 55, 106-107. Reportedly, Davis-Bell also said he had argued with Scott. 3RP 53.

Right before trial, in January 2010, for the first time – after three investigative interviews in which she made no such allegation – Thomas claimed Davis-Bell also said he shot a man and did not know if he was dead. 3RP 53-54, 62, 66-70, 108, 110, 112. Yet, despite her claimed knowledge of this alleged confession, Thomas told Davis-Bell – during a recorded jail call in 2008 – she did not understand why he was in jail. 3RP 116.

As part of the investigation, police sent the 9 casings from the West Seattle shooting and the 6 casings initially recovered from the Cheese Steak shooting to the crime laboratory for testing. 4RP 112-113. Forensic scientist Rick Wyant compared the groups of casings and concluded they were fired from the same gun, most likely a Kahr or baby Desert Eagle.¹³ 5RP 23-27, 31.

¹² Police later searched the home with the aid of Freddy, the bomb dog. 1RP 37, 47, 59. Freddy found no evidence of firearms or explosives. 1RP 52; 2RP 50.

¹³ Scott claimed she previously had seen Davis-Bell with a gun at her apartment. RP 538. She described it as a medium-sized, black gun. RP 539-40. At trial, Scott claimed it had an inscription, “Desert Eagle” or “Military Issue,” on it. RP

Next, Wyant was asked to compare the two casings collected by Caron near Martin Luther King Way and South Walden Street with the two previously examined groups of casings. RP 1672, 1711; 5RP 42-44. Wyant concluded that the two Winchester .40 caliber casings were fired from the same gun as the two prior groups of casings. 5RP 44.

Finally, Wyant was given the 50 unfired cartridges inside the 100 round box of Winchester .40 caliber Smith and Wesson ammunition police found inside the Lincoln. 5RP 45. He was asked to compare the bunter marks¹⁴ on the fired Winchester casings to those in the box of ammunition. 5RP 45. Wyant concluded the bunter marks on the fired casings were represented in the box of unfired rounds. 5RP 46-49. While he could not say definitively, a logical conclusion would be that the fired and unfired rounds came from the same factory. 5RP 49-50.

The defense eventually retrieved a surveillance video taken from the 76 Station across the street from the Philadelphia Cheese

541. But she previously told a detective that it had "Baby" written on it, which, Wyant testified, would not be the case. 5RP 82; 6RP 84, 97.

¹⁴ These are marks left by the tool that imprints the head stamp on the bottom of the cartridge. 5RP 44-45.

Steak restaurant.¹⁵ 4RP 92-93; 7RP 40. The defense hired forensic video expert Thomas Sandor to see if he could determine the height of the suspect shown in the video.¹⁶

When first provided to Sandor, the video was in a format known as Mpeg 4. 7RP 71. Sandor converted it to an AVI file so he could download it onto his computer and examine it frame by frame for stills to select with the highest contrast ratio between the suspect and the background. 7RP 80-81.

Using the same camera from the 76 Station, Sandor recorded (also in AVI format) a reenactment of the original recording (showing the suspect exiting the car and going into the restaurant (7RP 73)) using three persons of known height.¹⁷ 7RP 87. From that recording, he also selected stills with the highest contrast ratio between each person of known height and the background. 7RP 91, 116. In each still, as well as the still of the

¹⁵ The day of the shooting, police had attempted to retrieve a copy of the video. Upon viewing it, however, officers discovered it was blank. 4RP 93. One of the detectives was going to follow up, but never did. 4RP 143.

¹⁶ Yearout confirmed the video showed what he saw that day. RP 1000.

¹⁷ Although the original video had been recorded onto a computer hard drive, when recording the reenactment, Sandor took the cable from the gas station camera and connected it to his Sony DSR-25, which converted it into an AVI file, the output of which was recorded onto Sandor's notebook. 7RP 81; 8RP 25-26. This way, Sandor avoided using the gas station's formats and interrupting its business. 7RP 82; 8RP 28.

suspect, there was also a common reference point – a door frame. 7RP 117-118.

Sandor calculated the percentage of the door frame each person of known height represented. 7RP 113-114. Comparing that percentage to the percentage of the door frame of the unknown suspect, Sandor was able to deduce the suspect's height as between 5'8" and 5'9" tall. 7RP 119, 129, 138. Sandor performed the equation numerous times -- using each person of known height as well as a second reference point. 7RP 120, 130-32. Always, Sandor equated results of between 5'8" and 5'9" tall. 7RP 122, 127, 129, 135-38.

On cross-examination, the state asked about Sandor's credentials and whether Sandor's work was peer reviewed. 8RP 77. Defense counsel objected, and at sidebar, noted that there were dismissals in some of the cases he worked on where he performed anatomical comparisons. RP 78. Counsel asserted this touched on peer review. 8RP 78. Counsel urged Sandor should be permitted to explain:

He's done some work and that obviously there has been experts that have viewed his work on those other cases. And whether or not they reached the same conclusion, I don't know. Maybe they can be called as a rebuttal witness or something.

8RP 79. As argued by defense counsel, “probing him about that – about his expertise and his peer review has sort of opened the door to that.”¹⁸ 8RP 79.

The court disagreed, however:

I don't find that simply by inquiring as to whether or not the work has been peer reviewed that that somehow opens the door to analogizing that it is peer reviewed by having someone make a decision on a legal case to find that a defendant is exonerated. And I'm not going to allow questions about individual case results.

8RP 80.

When cross examination resumed, Sandor was required to answer that he does not submit his work for peer review. 8RP 81.

The state's expert, Grant Fredericks, was highly critical of Sandor's comparative measurements, on grounds Sandor used enhanced photographs.¹⁹ 7RP 116; 8RP 149. According to

¹⁸ Before Sandor's testimony, the state moved to preclude the defense from eliciting evidence that as a result of Sandor's work, a prior homicide case was dismissed. 7RP 4. The prosecutor asserted more was involved than Sandor's work. 447RP 4. At the time, defense counsel indicated he did not intend to inquire about that, because the expertise Sandors used in the other case was different from that in the current case. 7RP 5-6.

¹⁹ Sandor testified that he input the video clips from the original and reenactment recordings into an editing program called Premiere Pro. 8RP 36. The program allowed him to critically identify the best frames to use for the comparative measurements. 8RP 37. Once the frames were selected, he exported them into a non-compressed, high-quality video format. 8RP 37. He then converted them into photographs using Photoshop. 8RP 38-39. To do so, he had to designate a physical size for the frame and resolution, or pixel per inch specification. 8RP 38-39, 46-47. Sandor also testified he enhanced the contrast by 12-15%.

Fredericks, Sandor used several different processes with the images, and with each process, he changed the pixels, changed the values of the pixels, and added pixels, propagating errors as he went. 8RP 143-149, 161. Moreover, in Fredericks' opinion, comparative measurement was not even possible in this instance, because it was impossible to determine where the individuals' feet in the images were located. 8RP 155-56. Finally, Fredericks criticized Sandor's work because he selected a predictive frame, rather than a real image, for his still of the suspect. 8RP 158-160.

Fredericks testified his work on this case was peer reviewed, as it almost always is. 8RP 133-34, 182.

D. ARGUMENT

1. THE TRIAL COURT ERRED IN DENYING THE MOTION TO SUPPRESS THE ILLEGALLY OBTAINED INTERVIEW ROOM RECORDINGS OF DAVIS-BELL.

The trial court erred in denying the motion to suppress the audio and video recording of Davis-Bell in the police station interview room, as the officers recording him failed to strictly comply with Washington's Privacy Act. Under the Act:

- b) Video and/or sound recordings may be made of arrested persons by police officers responsible for making arrests or holding persons in custody before their first appearance in court. Such

video and/or sound recordings shall conform strictly to the following:

(i) The arrested person shall be informed that such recording is being made and the statement so informing him shall be included in the recording;

(ii) The recording shall commence with an indication of the time of the beginning thereof and terminate with an indication of the time thereof;

(iii) At the commencement of the recording the arrested person shall be fully informed of his constitutional rights, and such statements informing him shall be included in the recording;

(iv) The recordings shall only be used for valid police or court activities[.]

RCW 9.73.090(1).

Generally, recordings that fail to comply strictly with statutory requirements are inadmissible. State v. Cunningham, 93 Wn.2d 823, 830-31, 613 P.2d 1139 (1980). In order to satisfy subsection (iii), a recorded statement must contain a full statement of the defendant's Miranda rights. Cunningham, 93 Wn.2d at 830. "Substantial compliance with requirements (i) and (ii) may be permitted in limited circumstances. State v. Rupe, 101 Wn.2d 664, 685, 683 P.2d 571 (1984). However, no case has permitted only substantial compliance with (iii), requiring full advisement of

constitutional rights on the recording. State v. Mazzante, 86 Wn. App. 425, 428, 936 P.2d 1206 (1997).

The circumstances of the recording in this case are analogous to those in Mazzante. There, six-week old infant "C." was brought to the hospital suffering from a concussion, retinal hemorrhaging and two fractured legs. A doctor concluded these injuries were not accidental. Mazzante, 86 Wn. App. at 426.

Officer Goetz interviewed hospital staff and the infant's family. Following advisement of his Miranda warnings, Officer Goetz interviewed the infant's father, Mazzante. Mazzante stated C. was probably injured when he and his wife attempted to remove him from his car seat or when Mazzante dropped him earlier. Mazzante denied abusing C. Mazzante, 86 Wn. App. at 426.

Goetz placed Mazzante under arrest and transported him to the police station. At the station, Mazzante requested to talk further. On tape, Goetz obtained Mazzante's permission to record their conversation and noted the beginning and ending time. Goetz did not re-advise Mazzante of his rights on tape. During the recorded conversation, Mazzante stated that he had been rough with C. and stepped on C.'s legs while trying to pick him up, and heard a "crushing sound." Mazzante, 86 Wn. App. at 426-27.

Despite Goetz's failure to advise Mazzante of his rights on the tape, the trial court did not suppress the recording, on grounds the tape "substantially complied" with RCW 9.73.090(1)(b). The Court of Appeals held otherwise, however: "The Legislature has provided no exceptions for advisement of constitutional rights prior to the recording, not even where, as here, there may be independent evidence of a knowing, intelligent, and voluntary written waiver of those rights." Mazzante, at 430.

Like Mazzante, Davis-Bell was advised of his rights in the field but not at the commencement of the recording. There is no substantial compliance exception for failing to comply with this portion of the statute. The first portion of the recording therefore should have been suppressed.

But the second portion should have been addressed as well. At 1:20 p.m., approximately 1.5 hours into the recording, detective Duffy removed Davis-Bell from the interview room to one that was not recorded so that he could speak to his attorney. When Duffy brought Davis-Bell back, however, she failed to indicate the date and time and failed to inform Davis-Bell he was still being recorded. Granted, case law recognizes circumstances where substantial compliance with these requirements may be permitted. See

Mazzante, 86 Wn. App. at 429. This is not one of those circumstances.

It would be reasonable for an individual in Davis-Bell's shoes to believe the recording had stopped when he was taken to another room. Significantly, Duffy noted the time on the recording when she removed Davis-Bell, which suggests the recording was being stopped. And because detective Duty had noted the time when the recording initially started and informed Davis-Bell he was being recorded, it would be reasonable for a person in Davis-Bell's shoes to believe the recording had not been re-started when he re-entered the room. Accordingly, Duffy's failure to strictly comply with the statute's directives when she brought Davis back requires suppression of the second portion of the recording.

In response, the state may argue – as it did below – that the statute's requirements weren't triggered, because there was no custodial *interrogation*. Any such argument should be rejected. The plain language of the statute does not limit its application in this manner. It refers to video and sound recordings of arrested persons before their first appearance in court. If the Legislature had wanted to limit the statute's scope, it easily could have indicated it meant video and sound recordings of arrested persons

during custodial interrogation. Instead, the plain language of the statute indicates it applies to any and all video and sound recordings of arrested persons, whether they are being interrogated or not. “Where the meaning of the statute is clear from the language of the statute alone, there is no room for judicial interpretation.” Kadoranian v. Bellingham Police Department, 119 Wn.2d 178, 185, 829 P.2d 1061 (1992).

There can be no argument the error in admitting the recording was harmless in this case. Under a harmless error analysis, an appellate court must review the record to determine whether the trial court’s error potentially affected the trial’s outcome. See e.g. Cunningham, 93 Wn.2d at 831. Davis-Bell made a number of incriminating statements on the recording. Considering the incriminating statements Davis-Bell made on the recording, i.e. “They got me, brother. Yeah, they got me” (Ex 149), and the fact the jury asked to listen to it again, the trial court’s error more than likely affected the trial’s outcome. This Court should reverse Davis-Bell’s convictions.

2. THE TRIAL COURT'S RULING PROHIBITING APPELLANT FROM REHABILITATING HIS WITNESS WITH EVIDENCE ANALOGOUS TO PEER REVIEW DEPIVED APPELLANT OF HIS RIGHT TO PRESENT A DEFENSE.

Davis-Bell was denied his right to present a defense by the trial court's ruling prohibiting him from eliciting evidence Sandor's work was scrutinized in a manner analogous to peer review. The Sixth Amendment²⁰ to the United States Constitution and Const. art. 1, § 22²¹ grant criminal defendants two rights: (1) the right to present evidence in one's defense and (2) the right to confront witnesses. State v. Hudlow, 99 Wn.2d 1, 14-15, 659 P.2d 514 (1983).

²⁰ The Sixth Amendment provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

²¹ Const. art. 1, § 22 provides in relevant part:

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases[.]

Although these rights are of constitutional magnitude, they are subject to the following limits: (1) the evidence sought to be admitted must be relevant; and (2) the defendant's right to introduce relevant evidence must be balanced against the state's interest in precluding evidence so prejudicial as to disrupt the fairness of the fact-finding process. See Washington v. Texas, 388 U.S. 14, 16, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967); State v. Darden, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002); State v. Hudlow, 99 Wn.2d 1, 15, 659 P.2d 514 (1983); State v. Reed, 101 Wn. App. 704, 709, 6 P.3d 43 (2000).

The evidence sought to be admitted here was undeniably relevant. The main issue in the case was identity. The gist of Sandor's testimony was to prove – based on scientific methods – that Davis-Bell could not have been the shooter because the suspect in the video was much taller than he. Clearly, Sandor's credentials and expertise were relevant subject matters, as evidenced by the prosecutor's question about peer review in the first place. See e.g. State v. Lord, 117 Wn.2d 829, 870, 822 P.2d 177 (1991) (cross examination should be limited to the subject matter of the direct examination *and matters affecting the credibility of the witness*).

And since the state brought up the subject itself, and subsequently asked its own expert about peer review, the defense should have been allowed, as counsel urged, to elicit the fact that Sandor's work in other cases had resulted in the dismissal of criminal charges. If, as the prosecutor asserted, more was involved than Sandor's work in those decisions, the "more" went to the weight of the evidence, not its admissibility.

And significantly, under the open door doctrine, when a party opens up a subject of inquiry on direct, cross examination on the same subject is permitted. State v. Gefeller, 76 Wn.2d 449, 455, 458 P.2d 17 (1969). The same should be true of cross-examination and redirect. Evidence rules do not supersede the open door doctrine. State v. Brush, 32 Wn.App. 445, 451, 648 P.2d 897 (1982), review denied, 98 Wn.2d 1017 (1983).

Accordingly, admission of Sandor's credentials, vis-à-vis, scrutiny of his work in other cases, would not disrupt the fairness of the fact-finding process, as it was the state that brought it up. Indeed, the state's expert was allowed to testify his work is almost always peer reviewed. Thus, it was the exclusion of the evidence that disrupted the fairness of the fact-finding process. The trial court's ruling deprived Davis-Bell of his right to present a defense.

Constitutional error is presumed to be prejudicial and the state has the burden of proving the error was harmless. State v. Guloy, 104 Wash.2d 412, 425, 705 P.2d 1182 (1985). Constitutional error is only harmless if the untainted evidence is so overwhelming that it necessarily leads to a verdict of guilt. Id. at 426.

Considering the importance of Sandor's testimony to Davis-Bell's defense, and the state expert's highly critical testimony about Sandor's methods, as well as the state expert's testimony about his own credentials and peer review, the state cannot show the error in depriving Davis-Bell of this important evidence relating to Sandor's credibility was harmless.

3. APPELLANT'S DUE PROCESS RIGHTS WERE VIOLATED WHEN JURORS WERE INSTRUCTED THEY MUST BE UNANIMOUS TO ANSWER "NO" TO THE SPECIAL VERDICT.

A unanimous jury decision is not required to find the state has failed to prove the presence of a special finding increasing the defendant's maximum allowable sentence. A nonunanimous jury decision is a final determination that the state has not proved the special verdict finding beyond a reasonable doubt. State v. Goldberg, 149 Wn.2d 888, 72 P.3d 1083 (2003). In keeping with

this rule, it is manifest constitutional error to instruct the jury it must be unanimous in order to find the *absence* of such a special finding. State v. Bashaw, 169 Wn.2d 133, 234 P.3d 195 (2010); State v. Ryan, 160 Wn. App. 944, 252 P.3d 895 (2001).

In Bashaw, Bertha Bashaw was convicted of three drug deliveries. Because the jury determined that each delivery took place within 1,000 feet of a school bus route stop, her maximum sentence was doubled by statute. Bashaw, 169 Wn.2d at 137. In the jury instruction explaining the special verdict forms, the jury was instructed: “Since this is a criminal case, all twelve of you must agree on the answer to the special verdict.” Bashaw, 169 Wn.2d at 139 (citation to record omitted). On appeal, Bashaw argued that the jury instruction incorrectly required unanimity for finding that her actions did not take place within 1,000 feet of the school bus route stop. Bashaw, at 137.

The Supreme Court agreed:

Though unanimity is required to find the *presence* of a special finding increasing the maximum penalty, see Goldberg, 149 Wn.2d at 893, 72 P.3d 1083, it is not required to find the *absence* of such a special verdict finding. The jury instruction here stated that unanimity was required for either determination. That was error.

Bashaw, 169 Wn.2d at 147 (emphasis in original).

The state argued the error was harmless, but the court disagreed:

In order to hold that a jury instruction error was harmless, “we must ‘conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error.’” State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002) (quoting Neder v. United States, 527 U.S. 1, 19, 119 S. Ct. 1827, 144 L. Ed.2d 35 (1999)). The State argues, and the Court of Appeals agreed, that any error in the instruction was harmless because the trial court polled the jury and the jurors affirmed the verdict, demonstrating it was unanimous. This argument misses the point. The error here was the procedure by which unanimity would be inappropriately achieved. In Goldberg, the error reversed by this court was the trial court’s instruction to a nonunanimous jury to reach unanimity. 149 Wn.2d at 893, 72 P.3d 1083. The error here is identical except for the fact that that direction to reach unanimity was given preemptively.

The result of the flawed deliberative process tells us little about what result the jury would have reached had it been given a correct instruction. Goldberg is illustrative. There, the jury initially answered “no” to the special verdict, based on a lack of unanimity, until told it must reach a unanimous verdict, at which point it answered “yes.” Id. at 891-93, 72 P.3d 1083. Given different instructions, the jury returned different verdicts. We can only speculate as to why this might be so. For instance, when unanimity is required, jurors with reservations might not hold to their positions or may not raise additional questions that would lead to a different result. We cannot say with any confidence what might have occurred had the jury been properly instructed. We therefore cannot conclude beyond a reasonable doubt that the jury instruction error was harmless. As such, we vacate the remaining

sentence enhancements and remand for further proceedings consistent with this opinion.

Bashaw, 169 Wn.2d at 147-48.

In Ryan, this Court held the nature of the error addressed in Bashaw was a constitutional due process violation. As this Court explained:

The Bashaw court strongly suggests its decision is grounded in due process. The court identified the error as “the procedure by which unanimity would be inappropriately achieved,” and referred to “the flawed deliberative process” resulting from the erroneous instruction. The court then concluded the error could not be deemed harmless beyond a reasonable doubt, which is the constitutional harmless error standard. The court refused to find the error harmless even where the jury expressed no confusion and returned a unanimous verdict in the affirmative. We are constrained to conclude that under Bashaw, the error must be treated as one of constitutional magnitude and is not harmless.

Ryan, 252 P.3d at 897 (footnotes omitted).²²

Accordingly, where Ryan’s jury was instructed it must unanimously have a reasonable doubt to answer “no” to the special verdict, it was an error Ryan could raise for the first time on appeal and entitled him to vacation of the deadly weapon enhancement.

Ryan, 252 P.3d at 897-898.

The jury in Davis-Bell’s case was instructed it must be

unanimous in answering the special verdict forms. Number 30, the instruction regarding special verdict forms, provided in relevant part:

You will also be given special verdict forms for the crimes charged in Count I-IV. If you find the defendant not guilty of these crimes, do not use the special verdict forms. If you find the defendant guilty of these crimes, you will then use the special verdict forms and fill in the blank with the answer "yes" or "no" according to the decision you reach. Because this is a criminal case, all twelve of you must agree in order to answer the special verdict forms. In order to answer the special verdict forms "yes," you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you unanimously have a reasonable doubt as to this question, you must answer "no."

CP 37.

Accordingly, the error here is no different than that in Bashaw and Ryan. It was an error of constitutional magnitude that may be raised for the first time on appeal and is not harmless, as it resulted in a flawed deliberative process.

In response, the state may argue that since defense counsel agreed the flawed instruction should be given, any error was invited. Davis-Bell had the right to effective assistance of counsel at trial. U. S. Const. amend. 6; Const. art. 1, § 22. The invited error doctrine does not bar review of a claim of ineffective assistance of counsel. State v. Studd, 137 Wn.2d 533, 551, 973

²² Cf. State v. Nunez, 160 Wn. App. 150, 163, 248 P.3d 103 (2011).

P.2d 1049 (1999); State v. Gentry, 125 Wn.2d 570, 646-47, 888 P.2d 1105 (1995); State v. Doogan, 82 Wn. App. 185, 188, 917 P.2d 155 (1996).

To prevail on an ineffective assistance claim, trial counsel's conduct must have been deficient in some respect, and that deficiency must have prejudiced the defense. Doogan, 82 Wn. App. at 188 (citing Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)).

Reasonable attorney conduct includes a duty to investigate the facts and the relevant law. State v. Jury, 19 Wn. App. 256, 263, 576 P.2d 1302 (1978); Strickland, 466 U.S. at 690-91. Proposing a detrimental instruction, even when it is a WPIC, may constitute ineffective assistance of counsel. See State v. Aho, 137 Wn.2d 736, 745-46, 975 P.2d 512 (1999) (counsel ineffective for offering instruction that allowed client to be convicted under a statute that did not apply to his conduct).

Defense counsel provided ineffective assistance to Davis-Bell by agreeing to the special verdict form instruction. It improperly told jurors it must be unanimous in order to find Davis-Bell was not armed at the time of the offenses, which is an incorrect statement of the law under Golberg, which has been on the books

since 2003, and made it more difficult for jurors to find Davis-Bell not guilty of the firearm enhancements. Davis-Bell was prejudiced because it resulted in a flawed deliberative process that tells us little about what result the jury would have reached had it been given a correct instruction. This Court should therefore reverse the firearm enhancements.

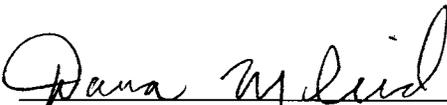
E. CONCLUSION

This Court should reverse Davis-Bell's convictions because they were based on illegally obtained evidence, and because he was denied his right to present a defense. Alternatively, this Court should reverse his sentencing enhancements, as they were obtained in violation of his due process rights.

Dated this 1st day of August, 2011

Respectfully submitted

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