

COURT OF APPEALS
DIVISION TWO
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON)
)
Respondent,)
)
v.)
)
DOMINIQUE SHAVIES,)
(your name))
)
Appellant.)

No. # 39062-1-II.

STATEMENT OF ADDITIONAL
GROUND FOR REVIEW

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STATE OF WASHINGTON
BY DEPUTY CLERK

COURT OF APPEALS
DIVISION II

I, Dominique Shavies, have received and reviewed the opening brief prepared by my attorney. Summarized below are the additional grounds for review that are not addressed in that brief. I understand the Court will review this Statement of Additional Grounds for Review when my appeal is considered on the merits.

Additional Ground 1

INSUFFICIENCY OF EVIDENCE

Additional Ground 2

INCONSISTENT VERDICT

See The Attached Exhibits

If there are additional grounds, a brief summary is attached to this statement.

Date: 11-1-09

Signature: Dominique Shavies
DOMINIQUE SHAVIES #709312

STATEMENT OF ADDITIONAL GROUNDS

GROUND 1:

INSUFFICIENT:

There was insufficient evidence to support defendant's robbery conviction, because the state failed to introduce evidence to prove defendant took personal property from his girlfriend. The girlfriend testified that she had her purse sitting next to her on the passenger seat, after the defendant assaulted her, he reached behind her and took something, and no evidence suggests that the purse was attached to the girlfriend at anytime during the incident. His robbery case was dismissed with prejudice. *State vs. Chamroeum Nam*, 136 WN, App. 698, 150 P. 3d 617 (2007). Division II court of appeals.

IN STATE vs. ████████: SHAVIES

State vs. Shavies superiors # 08-1-02897-8 / appeals # 39062-1-II. In Mr. Shavies case the victim testified that Mr. Shavies never threatened her verbally nor physically, and that Mr. Shavies never took anything from her person. That wallet / purse was on the ground beside her. Mr. Shavies never had nor used a weapon. Mr. Shavies was unarmed when he was arrested, and there was never a weapon presented as evidence during the trial. RP. 56, 58, 9-30-08

Jackson V. Virginia, 443 U.S. 307, 316, 99 S. CT. 2781, 61 L. Ed. 2d 560 (1979). (The Constitution requires that a Criminal Conviction be supported by "Sufficient proof defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense").

In robbery prosecution against several defendant's, charge should be dismissed as to one where evidence is not sufficient to sustain conviction. *State vs. Garrison*, 34 WN. 2d 654, 209 P. 2d 454 (1949).

Misidentification of the criminal statute of the law U.S. 4th Amendment and U.S. 6th Amendment, ineffective assistance of counsel. Statement of the case: U.S. 14th Amendment

violation of the right to a fair trial. Mr. Shavies was convicted of a crime Mr. Shavies did not commit. ^{MR. SHAVIES} did not commit robbery in the first degree.

GROUND 2:

How can a \$20.00 dollar wallet with no use or threatened use of force, fear, violence, or bodily injury turn into an enhanced crime of robbery in the first degree. Mr. Shavies should have been charged with lesser inclusive of the value of the wallet, which was valued at \$20.00 dollars, on page 4 of 6 in the Tacoma Police Departments Supplemental Report Incident No. 081701389.4 printed on June 19th 2008 at 9:04 am.

Also in the Tacoma Police Departments Supplemental Report Incident No. 0817001389.4 on page 2 of 6 it has all Mr. Shavies booking information as well it states he was unarmed at the time of arrest, and it also was printed on June 19th 2008 at 9:04 am.

The lesser inclusive of this would have been theft in the third degree, a gross misdemeanor that carries a sentence of 0-12 months in the county jail.

In State vs. Roche 75 WN. App. 500, 878 P. 2d 497 Page # 510, it states first degree robbery occurs when the defendant is armed with a deadly weapon, appears to be armed with a deadly weapon or inflicts bodily injury. RCW 9A.56.200

Mr. Shavies attorney Dave Shaw's professional performance fell, below an abjective standard of reasonableness and that the deficiency resulted in prejudice. He also failed to request a bill of particulars or instructions of the crime of theft in the third degree.

In the Washington practice criminal law book with the sentencing forms fine and end 13B section edition chapters 23 to end tables-index sub section 2305. Included offenses page 6.

Second degree robbery is a lesser-included offense of first degree robbery. First degree theft can be a lesser-included offense when the charge of robbery is based on taking property from the person of another. Since robbery included the elements of larceny. Third degree theft is always an included offense.

GROUND 3:

9A.56.200 (1)(A)(II) Robbery in the First Degree

- 1) A person is guilty of robbery in the first degree if:
- A) in the commission of a robbery or of immediate flight there from he or she:
 - (I) is armed with a deadly weapon
 - (II) displays what appears to be a firearm or a deadly weapon
 - (III) inflicts bodily injury or
 - B) He or she commits a robbery within and against a financial institution as defined a RCW 7.88.010 or 35.38.060

In Nam the state failed to introduce sufficient evidence to prove that Nam took personal property from Harris's person. Harris testified that she had her purse sitting next to her in the passenger seat. No evidence suggests that the purse be attached to Harris at any point during the encounter. She did not testify that she was holding the purse or that the strap was over her shoulder. Accordingly the state did not prove that Nam took the purse from Harris's person.

The appellate court rejected the states contention and held that there was insufficient evidence to support Nams robbery conviction where the state assumes the burden of proof on an element and they find that there is insufficient on that element, they must reverse the conviction and dismiss with prejudice. Hickman, 135 WN. 2d at 103. Therefor they reversed the robbery conviction and the trial court made an order dismissing with prejudice. Now Mr. Shavies case cause No. 08-1-02897-8, Appeals cause No. 39062-1-II, the state did not show or present sufficient evidence or prove its case. The victim Ms. Nix testified that the item (purse or wallet) was on the ground beside her, and that she was not threatened in any way verbally nor physically. RP. 56, 58, 9-30-08

The state failed to introduce sufficient evidence to prove that Mr. Shavies took anything from M's Nix person. In electing to omit an alternative means of committing an offense in the charging document or instructions. The state assumes the burden of proving all elements of the offense as charged or instructed.

The victim Ms. Nix was never overcome with fear, force, or violence and there was no weapon involved in the offense nor used as evidence in trial. Thus the verdict should be reversed and charge of robbery in the first degree dismissed with prejudice.

GROUND 4:

THE INCONSISTENT VERDICT:

The jury's verdict was not guilty of using or possessing a weapon during the commission of the crime, but also guilty of robbery in the first degree. RP. 145, 10-7-08. CP 89, 94. If there is no weapon, no use, no threatened use, force, fear, or violence then there is no robbery in the first degree.

The trial court erroneously refused to instruct the jury on theft in the third degree, which is a lesser inclusive to the charge of robbery. The question is whether that state has met its burden of producing sufficient evidence to support an instruction on first degree robbery. State vs. Fernandez-Medina, 141 WN. 2d 448, 455-56, 6 P. 3d 1150 (200).

A defendant's right to a lesser-included offense instruction is derived from statute. RCW 10.61.006. State vs. Davis, 121 WN. 2d 1, 4, 846 P. 2d 527 (1993). Such an instruction is required when: (1) Each of the elements of the lesser offense are necessary elements of the charged offense and (2) The evidence in the case supports an inference that the defendant committed the lesser offense. See E.G. Davis, 121 WN. 2d at 4. State vs. Workman, 90 WN. 2d 443, 447-48, 584 P. 2d 382 (1978). These requirements have been denominated as the "Legal" and "Factual" prongs of the lesser-included offense test. State vs. Walden, 67 WN. App. 891, 893, 841 P. 2d 81 (1992). The State/Government must prove beyond a reasonable doubt every element of a charged offense. In Re Winship, 397 U.S. 358, (1970).

At the heart of an effective defense is an adequate investigation. Without sufficient investigation, a defense attorney, no matter how intelligent or persuasive in court, renders deficient performance and jeopardizes his client's defense.

Courts appointed attorney Dave Shaw failed to undertake the most elementary task that a responsible defense attorney would perform in a case of this nature, and consequently

provided representation that fell well below a reasonable standard of professional competence.

Counsel failed to conduct the rudimentary investigation necessary in order to

- (1) Decide upon the nature of the defense to be presented,
- (2) Determine before trial what evidence he should offer,
- (3) Effectively cross-examine and rebut the prosecution expert witnesses once they did testify during the course of the trial. There was in fact no strategic reason for counsel's failure to do so. As it turned out, these repeated failures to investigate were prejudicial, which is a violation under the 6th Amendment.

Both the United States and Washington constitutions require that the jury be instructed on all essential elements of the crime charged. *State vs. Van Tuyl*, 132 WN. App. 750, 758, 133 P. 3d 955 (2006). (Citing U.S. Const. Amend. VI; Const. ART. I, sub. Section 22). A jury instruction, which omits an essential element of a crime, relieves the state of its burden of proving each element of the crime charged beyond a reasonable doubt and is a violation of due process. *State vs. Davis*, 27 WN. App. 498, 506, 618 P. 2d 1034 (1980). Therefor, the "issue of omission of an element from that instruction is of sufficient constitutional magnitude to warrant review when raised for the first time on appeal." *State vs. Mills*, 154 WN. 2d 1, 6, 109 P. 3d 415 (2005).

Furthermore, where a jury instruction purports to be a complete statement of the crime, it must in fact contain every element of the crime charged. *State vs. Emmanuel*, 42 WN. 2d 799, 819, 259 P. 2d 845 (1953). The jury is not required to supply the omitted elements by searching the other instructions "to see if another element alleged in the information should have been added to those specified in the instruction." In addition, a defendant is denied a fair trial if "the jury must guess at the meaning of an essential element of the crime with which the defendant is charged, or if the jury might assume that an essential element need not be proven." *Davis*, 27 WN. App. AT 506.

The courts must declare the sense of the law and if they should be disposed to exercise will instead of judgement; the consequence would equally be the substitution of their pleasure to that of the legislature body.

THE CONCLUSION:

Mr. Shavies was unarmed at the time of arrest, and no weapon was found in the vehicle. There was no weapon presented nor used as evidence in nor during trial.

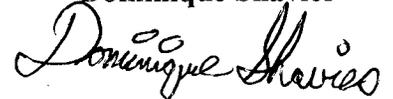
The victim Ms. Nix testified that the defendant Mr. Shiavies took the item purse/wallet off the ground beside her, and that Mr. Shavies never exchanged words with her nor threatened her verbally or physically.

Mr. Shavies was not using nor threatening to use force, fear, violence, or bodily injury is bolstered by the fact that the jury found Mr. Shavies not guilty of using or possessing a weapon during the commission of the crime, and nothing was taken from Ms. Nix's person.

Therefor Mr. Shavies robbery conviction should be reversed and dismissed with prejudice.

Dated This 3rd Day of November 2009.

Dominique Shavies



CC:D.S.