App. Supp. Brief

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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

IN RE THE DETENTION OF

Johnny Davis,

Appellant.

Thurston County Superior Court Cause No. 04-2-00645-4

The Honorable Judge Christine Pomeroy

Appellant's Supplemental Brief

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ASSIGNMENTS OF ERROR

1. The court's instructions violated Mr. Davis's Fourteenth Amendment right to due process.

2. The court erred by failing to define the phrase "personality disorder" for the jury.

3. Mr. Davis was denied his Fourteenth Amendment right to the effective assistance of counsel.

4. Defense counsel was ineffective for failing to propose an instruction defining "personality disorder."

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The phrase "personality disorder" is a technical term that must be defined for the jury. Here, the court's instructions did not define the phrase "personality disorder," leaving the jury to come up with its own definition. Did the court's failure to define "personality disorder" violate Mr. Davis's Fourteenth Amendment right to due process?

2. A person facing civil commitment is entitled to the effective assistance of counsel. Here, defense counsel failed to propose an instruction defining "personality disorder," despite expert testimony providing an inaccurate and misleading definition of the phrase. Did counsel's failure to propose an instruction deprive Mr. Davis of his Fourteenth Amendment right to counsel?

SUPPLEMENTAL STATEMENT OF FACTS

The Department petitioned for civil commitment of Johnny Davis, alleging that he had a "mental abnormality." CP 4. It did not allege he had a "personality disorder." CP 4. At trial, Dr. Hoberman defined "personality disorder" as "a type of mental disorder that involves persistent or enduring patterns of behavior or experience such as thoughts or feelings, and this persistent pattern of behavior and experience creates problems for the individual in everyday life or conflicts with society." RP (1/6/09) 280. Hoberman testified that Mr. Davis suffered from antisocial personality disorder, but did not indicate that this diagnosis qualified as a "personality disorder" within the meaning of RCW 71.09.020. RP (1/6/09) 276; RP (1/7/09) 313-321.

The court instructed the jury that Mr. Davis could be committed based on either a "mental abnormality" or a "personality disorder." Instruction No. 3, Court's Instructions to the Jury, CP 26. The court did not define the phrase "personality disorder" for the jury. Court's Instructions to the Jury, CP 21-47. Following trial, Mr. Davis was found to meet the criteria for commitment, and the court entered an Order of Commitment. CP 20, 48-49. This timely appeal followed. CP 19.

SUPPLEMENTAL ARGUMENT

I. THE COURT'S FAILURE TO DEFINE THE PHRASE "PERSONALITY DISORDER" VIOLATED MR. DAVIS'S FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS.

A. Standard of Review

A manifest error affecting a constitutional right may be raised for the first time on review. RAP 2.5(a)(3); *State v. Kirwin*, 165 Wn.2d 818, 823, 203 P.3d 1044 (2009). To meet this standard, "[t]he defendant must identify a constitutional error and show how, in the context of the trial, the alleged error actually affected the defendant's rights; it is this showing of actual prejudice that makes the error 'manifest,' allowing appellate review." *State v. McFarland*, 127 Wn.2d 322, 334, 899 P.2d 1251 (1995); *see also State v. Contreras*, 92 Wn. App. 307, 313-314, 966 P.2d 915 (1998). A reviewing court "previews the merits of the claimed constitutional error to determine whether the argument is likely to succeed." *State v. Walsh,* 143 Wn.2d 1, 8, 17 P.3d 591 (2001).[1]

Jury instructions are reviewed *de novo*. *State v. Hayward*, 152 Wn.App. 632, 641, 217 P.3d 354 (2009). Instructions must be manifestly

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[1] The policy is designed to prevent appellate courts from wasting "judicial resources to render definitive rulings on newly raised constitutional claims when those claims have no chance of succeeding on the merits." *State v. WWJ Corp.,* 138 Wn.2d 595, 603, 980 P.2d 1257 (1999).

clear because juries lack tools of statutory construction. *See, e.g., State v. Kyllo*, 166 Wn.2d 856, 864, 215 P.3d 177 (2009); *State v. Berg*, 147 Wn.App. 923, 931, 198 P.3d 529 (2008); *State v. Harris*, 122 Wn.App. 547, 554, 90 P.3d 1133 (2004). Where erroneous instructions relieve the Department of its burden of proof, they may be challenged for the first time on review under RAP 2.5(a)(3). *See State v. Chino*, 117 Wn.App. 531, 538, 72 P.3d 256 (2003). Instructions that misstate an element are not harmless unless (beyond a reasonable doubt) the error did not contribute to the verdict. *State v. Brown*, 147 Wn.2d 330, 341, 58 P.3d 889 (2002) ("Brown II").

B. A court's instructions must define technical terms and phrases.

Juries must not be allowed to deliberate in ignorance of the law: litigants have the right "to have a jury base its decision on an accurate statement of the law applied to the facts in the case." *State v. Miller*, 131 Wn.2d 78, 90-91, 929 P.2d 372 (1997). Because the role of the trial court is to explain the law through jury instructions, "[t]he trial court may not delegate to the jury the task of determining the law." *State v. Huckins*, 66 Wn. App. 213, 217, 836 P.2d 230 (1992). Trial courts must therefore define technical words and expressions used in jury instructions. *State v. Brown*, 132 Wn.2d 529, 611-12, 940 P.2d 546 (1997) ("Brown I"). The rule is designed to assure that jury verdicts are based on a correct

understanding of the applicable law. *State v. Scott*, 110 Wn.2d 682, 690, 757 P.2d 492 (1988).

Where the Supreme Court has defined an element in a manner that is "not concomitant with either a statutory definition or a commonsense meaning," failure to instruct on the definition violates due process, and may be raised for the first time on appeal. *State v. Gordon*, 153 Wn.App. 516, ___, 223 P.3d 519, 530 (2009). In *Gordon,* the Court of Appeals allowed the appellant to argue (for the first time on appeal) that the trial court's failure to define "deliberate cruelty" and "particularly vulnerable" violated his right to due process. *Gordon*, at ___ (citing RAP 2.5(a)(3)). The Court held that the missing instructions raised a manifest constitutional error, in light of the Supreme Court's earlier cases defining those terms.[2] *Gordon,* 223 P.3d, at 527-531 (citing *State v. Tili,* 148 Wn.2d 350, 60 P.3d 1192 (2003) and *State v. Suleiman,* 158 Wn.2d 280, 143 P.3d 795 (2006)).

To prevail on its Petition in this case, the Department was required to prove that Mr. Davis "suffers from a... personality disorder which makes [him] likely to engage in predatory acts of sexual violence if not

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[2] The *Gordon* Court noted in passing that the omission of a simple definitional instruction does not raise a constitutional issue; however, due process is violated when the omission relieves the state of its burden to prove an element. *Gordon,* 223 P.3d, at528.

confined in a secure facility." RCW 71.09.020(18). At the time of trial, the phrase "personality disorder" was not defined by statute.[3] This phrase "is not one in common usage and is beyond the experience of the average juror." *In re Detention of Pouncy*, ___ Wn.2d ___, ___, ___ P.3d ___ (2010). It "is a term of art... that requires definition to ensure jurors are not 'forced to find a common denominator among each member's individual understanding' of the term." *Id.*, at ___ (quoting *State v. Allen,* 101 Wn.2d 355, 362, 678 P.2d 798 (1984)).

"Personality disorder" does have "a well-accepted psychological meaning." *In re Pers. Restraint of Young,* 122 Wn.2d 1, 50, 857 P.2d 989 (1993). The Supreme Court has made clear that the phrase is to be given the meaning set forth in the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders,* also known as the "DSM."[4] *Young*, at 50 (citing the DSM-III[5]); *see also Pouncy*, at ___, n. 7 (citing the DSM-IV[6]).

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[3] RCW 71.09 has since been amended. The phrase "personality disorder" means "an enduring pattern of inner experience and behavior that deviates markedly from the expectations of the individual's culture, is pervasive and inflexible, has onset in adolescence or early adulthood, is stable over time and leads to distress or impairment." RCW 71.09.020(9).

[4] Rejecting a vagueness challenge to RCW 71.09, the *Young* Court noted that "[t]he application of these standards [contained in the DSM] to a particular set of facts is, of course, a determination for the factfinder, but the definitions provide sufficient guidance to do so properly." *Young*, at 50. Implicit in this reasoning is the requirement that the factfinder be provided the appropriate definition.

Here, the trial court failed to define the phrase "personality disorder" for the jury.[7] CP 21-47. In the absence of a proper definition, the jury was left to decide for itself what the phrase meant. It therefore reached its verdict without a proper understanding of the elements required for civil commitment under the statute. *Allen, supra.*

Although Mr. Davis did not propose an instruction defining "personality disorder," he may raise the issue for the first time on review as a manifest error affecting a constitutional right.[8] RAP 2.5(a)(3). First, the error is of constitutional magnitude: due process requires the trial court to instruct on all elements required for civil commitment, including "personality disorder." *See Gordon, supra.* As in *Gordon,* the court's failure violated Mr. Davis's constitutional right to due process. *Id,* 223 P.3d, at 530.

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[5] American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders,* 3rd Edition (1987).

[6] American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders,* 4th Edition (1994).

[7] By contrast, the trial court did define the phrase "mental abnormality." Instruction No. 5, Court's Instructions to the Jury, CP 28.

[8] In *Pouncy,* trial counsel proposed an instruction based on the DSM-IV; thus, the Supreme Court was not required to address whether or not the issue could be raised for the first time on appeal. However, the Court did note that "the term in question implicated an element of the State's case." *Pouncy*, at ___.

Second, the error is manifest: in the context of trial, the court's failure actually affected Mr. Davis's rights. The Department pursued commitment under the theory that Mr. Davis suffered from a personality disorder, yet the jury was not instructed on the meaning of that phrase. The problem was compounded when the Department's expert provided a definition that differed from the definition set forth in the DSM-IV. RP (1/6/09) 280. Dr. Hoberman's definition[9] omitted the central features of personality disorders: he neglected to tell the jury that the pattern of thoughts and behaviors characteristic of a personality disorder "deviates markedly from the expectations of the individual's culture, is pervasive and inflexible, has an onset in adolescence or early adulthood, [and] is stable over time..." *Compare* RP (1/6/09) 280 *with* RCW 71.09.020(9) *and Pouncy*, at ___.

The error was not harmless because Mr. Davis's theory of the case was that he has neither a mental abnormality nor a personality disorder making him likely to commit predatory acts of sexual violence. Given the jury's general verdict, there is no way of knowing whether or not the jury

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[9] A "persistent or enduring pattern[] of behavior or experience such as thoughts or feelings [that] creates problems for the individual in everyday life or conflicts with society." RP (1/6/09) 280.

based its decision solely on Mr. Davis's personality disorder. Verdict Form, CP 20.

Because the trial judge failed to define "personality disorder" for the jury, the commitment order must be reversed and the case remanded for a new trial, with instructions to properly define all necessary terms and phrases for the jury. *Pouncy, supra.*

II. MR. DAVIS WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL.

A. Standard of Review

Constitutional violations are reviewed *de novo*. *In re Detention of Martin*, 163 Wn.2d 501, 506, 182 P.3d 951 (2008). An ineffective assistance claim presents a mixed question of law and fact, requiring *de novo* review. *In re Fleming*, 142 Wn.2d 853, 865, 16 P.3d 610 (2001); *State v. Horton*, 136 Wn. App. 29, 146 P.3d 1227 (2006).

B. Defense counsel was ineffective for failing to propose an instruction defining "personality disorder" for the jury.

A detainee facing civil commitment under RCW 71.09 is entitled to the effective assistance of counsel.[10] *See, e.g., In re Detention of*

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[10] The right to counsel in proceedings under RCW 71.09 stems from the statute itself, as well as the due process clause of the Fourteenth Amendment. RCW 71.09.050; *In re Gault*, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967).

Moore, 167 Wn.2d 113, 216 P.3d 1015 (2009). Counsel is ineffective whenever deficient performance causes prejudice. *Id., see also State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). The presumption of adequate performance is overcome whenever there is no conceivable legitimate tactic explaining counsel's performance. *Id.*, at 130.

Here, counsel should have proposed an instruction defining "personality disorder" for the jury. A reasonable attorney would have been familiar with the Supreme Court's 1993 decision in *Young*, in which the Court held that the proper definition of the phrase "personality disorder" was contained in the DSM. Since diagnosis with a personality disorder is an element required for civil commitment, counsel should have been familiar with the definition, and should have known that Dr. Hoberman provided an incorrect definition in his testimony. Furthermore, a reasonable attorney would have known that the Supreme Court had accepted review of the *Pouncy* case a month before trial commenced in Mr. Davis's case, and thus would have been alerted to the necessity of requesting an instruction defining "personality disorder," in order to ensure the issue was preserved for review.

Furthermore, counsel's failure prejudiced Mr. Davis. The outcome of the case hinged on whether or not he had a "personality disorder," and the jury had been provided an incorrect and misleading definition by Dr.

Hoberman. Without an instruction defining "personality disorder," jurors did not know they were required to find that Mr. Davis suffered from "an enduring pattern of inner experience and behavior that deviates markedly from the expectations of [his] culture, is pervasive and inflexible, has an onset in adolescence or early adulthood, is stable over time, and leads to distress or impairment." *Pouncy*, at ___.

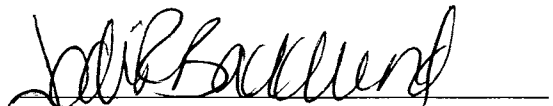
Because Mr. Davis was denied the effective assistance of counsel, the commitment order must be reversed. *Reichenbach, supra.* The case must be remanded to the superior court for a new trial. *Id.*

CONCLUSION

For the foregoing reasons, Mr. Davis's commitment order must be reversed and the case remanded to the trial court for a new trial.

Respectfully submitted on March 18, 2010.

BACKLUND AND MISTRY



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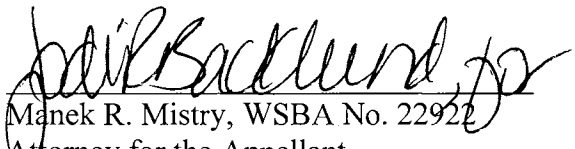

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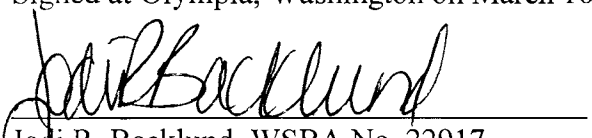

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