

68147-8

68147-8

COA No. 68147-8-I

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

---

IN RE DETENTION OF DILLINGHAM,

STATE OF WASHINGTON,

Respondent,

v.

DARIN DILLINGHAM,

Appellant.

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

The Honorable Ronald Castleberry

---

REPLY BRIEF

---

FILED  
COURT OF APPEALS DIV 1  
STATE OF WASHINGTON  
2013 FEB -5 PM 4:53

OLIVER R. DAVIS  
Attorney for Appellant

WASHINGTON APPELLATE PROJECT  
1511 Third Avenue, Suite 701  
Seattle, Washington 98101  
(206) 587-2711

**TABLE OF CONTENTS**

A. REPLY ARGUMENT ..... 1

    1. THE STATE’S ARGUMENTS ARE BASED ON A MISCONSTRUAL OF THE ALTERNATIVE MEANS DOCTRINE. .... 1

    2. REVERSAL IS ALSO REQUIRED UNDER STATE V. PETRICH ..... 8

B. CONCLUSION ..... 9

**TABLE OF AUTHORITIES**

**WASHINGTON CASES**

State v. Coleman, 159 Wn.2d 509, 150 P.3d 1126 (2007). . . . . 9

State v. Lobe, 140 Wn. App. 897, 167 P.3d 627 (2007) . . . . . 5,6

State v. Petrich, 101 Wn.2d 566, 683 P.2d 173 (1984) . . . . . 9

In Detention of Ticeson, 159 Wn. App. 374, 246 P.3d 550 (2011) . . . . . 7

State v. Witherspoon, 171 Wn. App. 271, 286 P.3d 996 (2012) . . . . . 4

## A. REPLY ARGUMENT

### 1. THE STATE'S RESPONSE ARGUMENTS ARE BASED ON A MISCONSTRUAL OF THE ALTERNATIVE MEANS DOCTRINE

The State failed to present substantial evidence of both SVP alternative means (mental abnormality, and personality disorder), because the State's evidence as to personality disorder (a) failed to show the disorder caused difficulty of control and predisposition, as is required; and (b) failed to show that the disorder met the basic definition of personality disorder in the jury instructions. If the defense prevails on either argument (a) or (b), the State's case fails the substantial evidence test, and the absence of a unanimity instruction requires reversal.<sup>1</sup>

The State in response *concedes* that the Assistant Attorney General at trial obtained jury instructions on both of the alternative means of SVP definition, but on appeal, contends that the plaintiff's argument below was solely that Mr. Dillingham suffered from the mental abnormality means (of pedophilia), and the evidence and argument cited in the Appellant's Brief regarding the

---

<sup>1</sup> Mr. Dillingham has also argued a third deficiency in the State's proof of a personality disorder, that a person's classification as "anti-social" is inadequate as a matter of law and Due Process for SVP commitment.

other abnormality (substance abuse) and the personality disorder were merely offered to the jury as “risk factors” that affected his volitional control of his pedophilia. BOR, at pp. 6-7. Therefore, the State apparently contends, the State was proceeding below solely on the “abnormality” means of SVP determination.

First, of course, the AAG obtained jury instructions on both of the alternative means of SVP definition. The State cannot now claim that it only offered the jury solely the theory of mental abnormality, and not the personality disorder means.

Second, and more significantly, the Respondent fundamentally misunderstands the nature of alternative means unanimity error. The doctrine asks whether, given the evidence, argument, and jury instructions below, there was a danger of jury confusion as to the means being argued, and therefore the risk that some jurors chose to rely on one means for guilt, while others chose to rely on the other alternative means. (The jury may do so – but only if there was substantial evidence on both means. If there was not, the absence of a unanimity instruction or a special verdict requires reversal).

In order to avoid the fact that there was not substantial evidence on the personality disorder means (as argued by

appellant), the State, after chiding the appellant for not knowing the law, constructs a relatively sophisticated, after-the fact theory of the case – i.e., that the State’s theory was abnormality (pedophilia), with “risk factors.” Indeed, this may well have been the theory that the State was pursuing below.

However, it does not matter. That is not the test. The test is what the jury heard. The jury in this case was presented with instructions on both means - -abnormality, and personality disorder. And in the State’s closing argument, as it would be understood by a lay jury, the AAG offered up both as rendering Mr. Dillingham an SVP.

The AAG’s closing argument in this respect was brief, but apparent. The State described the second element of SVP as being “mental abnormality or personality disorder.” 12/6/11RP at 680.

On the next page, the State then applies that definition for the jury:

The second element, does he suffer from a mental abnormality or personality disorder? For that, we rely on experts in this area. And Dr. Hupka testified, he is an expert, that in the evaluation of sex offenders, he has evaluated over 800 sex offenders throughout his career. As part of Dr. Hupka’s evaluation, he examined approximately 8,000 pages of materials relating to Mr. Dillingham. He interviewed him two times. He relied on the DSM, the Diagnostic and Statistical Manual, to come up with this diagnosis.

Dr. Hupka diagnosed Mr. Dillingham is [sic] suffering from three conditions. First, the mental abnormality of pedophilia, nonexclusive type; and alcohol and cannabis abuse; and the personality disorder or antisocial personality disorder.

12/6/11RP at 681. The Respondent cannot believably contend that this language was not a presentation to the jury of argument offering up all three conditions as proof of the element. In a recent case, Division Two stated the following:

In order to safeguard the defendant's constitutional right to a unanimous verdict as to the alleged crime, substantial evidence of each of the relied-on alternative means must be presented.

(Emphasis added.) State v. Witherspoon, 171 Wn. App. 271, \_\_\_, 286 P.3d 996, 1003 (October 16, 2012) (“substantial evidence must support each alternative means on which evidence or argument was presented”) (Emphasis added.)

Plainly, here, the State presented to the jury: pedophilia; substance abuse abnormality; and antisocial personality disorder, and made apparent to the jury by its closing argument language that the State was relying on any of these three conditions as a sufficient basis for SVP commitment.

The Respondent points out that the AAG focused much of his argument on the abnormality of pedophilia. BOR, at 5-6. That

does not erase the fact that, for a lay jury, the AAG's language, cited above, apparently offered up all three conditions. The issue is *danger of jury confusion*, and in this case confusion was created by the State's proof, as characterized for the jury by the AAG in closing argument, and as confirmed by the jury instructions which set forth *both* alternative means.

For example, in State v. Lobe, 140 Wn. App. 897, 905, 167 P.3d 627 (2007), the State charged the defendant with tampering with a witness, and obtained a jury instruction which included all the alternative means of committing the crime -- attempting to induce a person to (1) testify falsely or withhold testimony, (2) absent himself or herself from an official proceeding, or (3) withhold information from a law enforcement agency. State v. Lobe, 140 Wn. App. at 902-03. The Court of Appeals reversed, *inter alia*, tampering count IV, because although adequate substantial evidence was presented on one means (withholding information), the prosecutor referred to another alternative means in closing argument (absenting herself from the proceeding) for which there was not substantial evidence. The Court stated:

Similarly, the probability of jury confusion and lack of unanimity is too great to permit us to affirm Lobe's conviction on count IV (witness tampering

against Attouf). The evidence was only sufficient to support a conclusion that Lobe attempted to persuade Attouf to withhold information (Pappas's contact information). However, the prosecutor also stated that Lobe “repeat[ed] over and over and over again to Ericka [Attouf], [y]ou don't show up in court. You don't show up in court.” RP at 193–94. To be fair, this appeared to be unintentional—a few sentences later, he refers to “Tara” (Pappas) as the person Lobe ordered to stay away from court. RP at 194. He did not, at any other time, make a statement indicating that Lobe had ordered Attouf to absent herself from the proceedings, but instead repeatedly argued that Lobe ordered Attouf to withhold information from the prosecution. Nevertheless, this brief argument advancing a second alternative means may have been what some jurors relied on when convicting Lobe on count IV. Without a limiting instruction, we cannot be sure of jury unanimity, and we must reverse.

(Emphasis added.) Lobe, at 906-07. As can be seen, what matters is not the trial theory as characterized by the Respondent on appeal, or even what the precise legal theory indeed was at trial.

Rather, it matters what language the State employs in closing argument. Lobe, at 906-07. Mr. Dillingham requested a special verdict form, which was denied. 1/612/6/11RP at 670-71. The State opposed the special verdict form, and obtained jury instructions that included both alternative SVP means. Yet the State now claims that the theory below was the “abnormality” means only. But the State did not seek to remove the other means

from the jury instructions. As was said in Lobe, the alternative means unanimity doctrine places no unreasonable constrictions on the State, “where simple changes in the jury instructions could have avoided the error.” Lobe, at 906 (reversing count III for same error as count IV).

Importantly, the plaintiff in a civil or criminal case assuredly benefits from the presentation to the lay jury of *multiple* options for finding liability or guilt. In an SVP case, which involves complex issues and evidence, the State increases its chances of obtaining a “yes” answer where it can present both SVP alternatives to the jury. Thus, in this case, if there was a risk that some jurors might have had difficulty believing the claims of pedophilia abnormality (because Mr. Dillingham offended against persons of other ages), presenting “personality disorder” as an alternative option is a viable strategy to obtain those jurors’ votes.

Where the language of closing argument reasonably presents this multiple choice option to the lay jury, but, however, the evidence on one option was not substantial, the verdict must be vacated.<sup>2</sup>

---

<sup>2</sup> Finally, the Respondent cites In re Ticeson, 159 Wn. App. 374, 246 P.2d 550 (2011). Ticeson is a case in which both alternative means of

2. **REVERSAL IS ALSO REQUIRED  
UNDER STATE V. PETRICH**

For similar reasons, the State, by its jury instructions and its own closing argument, presented the jury with two factual options to satisfy the “mental abnormality” element – pedophilia abnormality, and substance abuse abnormality. Dr. Hupka testified that he diagnosed Mr. Dillingham with the mental abnormality of pedophilia nonexclusive. 12/1/11RP at 263, 267, 272. But this diagnosis was highly controverted. The defense expert, Dr. Luis Rosel, testified extensively that Mr. Dillingham did *not* suffer from pedophilia. See, e.g., 12/5/11RP at 514-29. Therefore, the proof of one of the multiple factual options offered to satisfy the “mental abnormality” element was highly controverted.

This decides the issue of the harmfulness of the Petrich error (no unanimity instruction or election in a multiple acts case). Jurors could have entertained a reasonable doubt as to whether the fact of pedophilia, one of the two factual claims proffered by the State in satisfaction of the “abnormality” means of being an SVP, was proved.

---

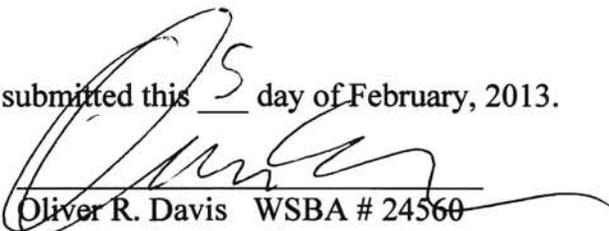
SVP commitment were offered to the jury, but unlike the instant case, there was substantial evidence on both “mental abnormality” and “personality disorder.” In re Ticeson, at 389.

Reversal is required. State v. Petrich, 101 Wn.2d 566, 572, 683 P.2d 173 (1984); State v. Coleman, 159 Wn.2d 509, 511, 150 P.3d 1126 (2007) (where State offered multiple distinguishable facts to prove the charge of molestation, and one witness contradicted another's that touching occurred during one incident, Petrich required reversal).

## **B. CONCLUSION**

Based on the foregoing and on his Appellant's Opening Brief, Darin Dillingham respectfully requests that this Court reverse the judgment and order of continued commitment issued by the trial court, as argued herein.

Respectfully submitted this 5 day of February, 2013.

  
Oliver R. Davis WSBA # 24560  
Attorney for Appellant  
Washington Appellate Project - 91052

**DECLARATION OF FILING AND MAILING OR DELIVERY**

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original of the document to which this declaration is affixed/attached, was filed in the **Court of Appeals – Division One** under **Case No. 68147-8-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered by other court-approved means to the following attorney(s) or party/parties of record at their regular office / residence / e-mail address as listed on ACORDS / WSBA website:

- respondent Sarah Sappington, AAG  
Office of the Attorney General - Criminal Justice Division
- appellant
- Attorneys for other party

  
MARIA ANA ARRANZA RILEY, Legal Assistant  
Washington Appellate Project

Date: February 5, 2013

FILED  
COURT OF APPEALS DIV 1  
STATE OF WASHINGTON  
2013 FEB -5 PM 4:53