

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

STATE OF WASHINGTON) NO. 41689-1-II
Respondent,)
) STATEMENT OF ADDITIONAL
v.) GROUNDS (Pursuant to RAP
) 10.10)
DOUGLAS DAVIS,)
Appellant.)

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STATE OF WASHINGTON
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DIVISION II

Comes now, Douglas Davis, pro se, currently confined at Stafford Creek Corrections Center (SCCC), 191 Constantine Way, Aberdeen, Wa, 98520. And now presents this "Statement of Additional Grounds" for additional review along with his attorney's argument in the original "Brief of Appellant".

I. ADDITIONAL GROUND ONE

Under State v. Bashaw, 169 Wn.2d 133, 146, 234 P.3d 195 (2010) and State v. Campbell, NO.66732-7-I, the above appellant's special verdict instructions were erroneous, and trial counsel was ineffective for failing to object to these instructions at trial. See Ex-A (Instructions 34 & 35).

ARGUMENT

The jury was instructed that it must be unanimous in order to acquit or convict the defendant of the underlying crimes. See Ex-A (No.34). The jury also received special verdict forms for each charge. The trial court instructed the jury to return the special verdicts only if the jury determined that 'Davis' was guilty of the underlying crimes. Jury Instruction 35, which instructed the jury with regard to the special verdict forms,

stated:

You will be given special verdict forms. If you find a defendant not guilty of any charge, do not use the special verdict forms for that charge. If you find a defendant guilty of a charge, you will then use the special verdict forms for that defendant as to that charge. In order to answer a question on a special verdict form "yes", all twelve of you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you are not unanimously satisfied beyond a reasonable doubt that "yes" is the correct answer, then fill in the blank on the special verdict form with the word "no".

Then what is immediately followed after this instruction is:

Because this is a criminal case, each of you must agree for you to return a verdict. When all of you have so agreed, fill in the "verdict forms" to express your decision.

Taken as a whole these instructions were both misleading and a misstatement of law. In order for jury instructions to be sufficient, they must be "readily understood and not misleading to the ordinary mind." State v. Dana, 73 Wn.2d 533, 537, 439 P.2d 403 (1968). Thus, the appropriate inquiry is whether the challenged instructions, when read as a whole, led the jurors to a mistaken belief that a unanimous decision was required in order to collectively answer "no" on the special verdicts.

The jury received instructions applicable to the underlying crimes as well as instructions specific to the special verdicts. The instructions applicable to the substantive crimes correctly informed the the jurors of the process by which each juror could arrive at a individual conclusion that the defendant was guilty or not guilty. Proper jury instructions for the

special verdicts must similarly inform the jurors how to answer "yes" or "no" both individually and collectively. The instruction applicable to the special verdicts, Instruction No.35, properly informed the jurors that they must be unanimous in order to answer "yes". However, by failing to distinguish between the deliberative process required for a collective "no" and an individual "no" response, the instruction failed to inform the jury how to collectively answer "no" to the special verdicts. Because Instruction 35 did not inform the jury that anything short of a unanimous "yes" decision mandated a collective special verdict answer of "no", the instruction did not accurately inform the jurors of the law and, thus was erroneous. Moreover, reading the instructions as a whole does not cure the deficiency in Instruction 35. The other instructions simply add to the uncertainty as to that which the law requires for a "no" answer to the special verdict forms by stressing that unanimity is required for either a "guilty" or "not guilty" response with regard to the underlying crimes. Instruction 34 informed the jurors of their "duty to discuss the case with one another and to deliberate in an effort to reach a unanimous verdict. Special verdict Instruction 35 instructed the jurors that "because this is a criminal case, each of you must agree for you to return a verdict", thus misleading the jurors that they had to be unanimous in order to answer "no" to the special verdict.

Also Mr. Davis' trial attorney provided ineffective

assistance of counsel by failing to object to the special verdict Instruction 35. See State v. Wilson, 117 Wn.App 1,15-16, 75 P.3d 573 (2003)(Defense Counsel's failure to object to an erroneous jury instruction may show ineffective assistance of counsel if the jury instruction prejudiced the defendant.) Wilson 177Wn.App at 17.

Mr. Davis' trial attorney was ineffective in failing to challenge the defective instructions under State v. Bashaw, 169 Wn.2d 133,146, 234 P.3d 195 (2010). The failure to object to these erroneous jury instructions constituted an objectively unreasonable performance. This was not a trial strategy or within the realm of reasonable assistance, due to the fact petitioner Davis is serving an exceptional sentence outside his standard range deriving from this erroneous jury instruction that his trial attorney failed to object to, thus satisfying both prongs of Strickland.

CONCLUSION

Davis' exceptional sentence should be vacated due to improper jury instructions concerning the special verdict.

I Douglas E. Davis, Appellant, declare under the penalty of perjury that the foregoing is true and correct to the best of my knowlegde.

Dated this 13 day of December 2011.

Douglas Davis
Appellant

INSTRUCTION NO

34

As jurors, you have a duty to discuss the case with one another and to deliberate in an effort to reach a unanimous verdict. Each of you must decide the case for yourself, but only after you consider the evidence impartially with your fellow jurors. During your deliberations, you should not hesitate to re-examine your own views and to change your opinion based upon further review of the evidence and these instructions. You should not, however, surrender your honest belief about the value or significance of evidence solely because of the opinions of your fellow jurors. Nor should you change your mind just for the purpose of reaching a verdict.

INSTRUCTION NO. 35

When you begin deliberating, you should first select a presiding juror. The presiding juror's duty is to see that you discuss the issues in this case in an orderly and reasonable manner, that you discuss each issue submitted for your decision fully and fairly, and that each one of you has a chance to be heard on every question before you.

During your deliberations, you may discuss any notes that you have taken during the trial, if you wish. You have been allowed to take notes to assist you in remembering clearly, not to substitute for your memory or the memories or notes of other jurors. Do not assume, however, that your notes are more or less accurate than your memory.

You will need to rely on your notes and memory as to the testimony presented in this case. Testimony will rarely, if ever, be repeated for you during your deliberations.

If, after carefully reviewing the evidence and instructions, you feel a need to ask the court a legal or procedural question that you have been unable to answer, write the question out simply and clearly. In your question, do not state how the jury has voted. The presiding juror should sign and date the question and give it to the judicial assistant. I will confer with the lawyers to determine what response, if any, can be given.

You will be given the exhibits admitted in evidence, these instructions, and verdict forms for recording your verdict. Some exhibits and visual aids may have been used in court but will not go with you to the jury room. The exhibits that have been admitted into evidence will be available to you in the jury room.

You must fill in the blank provided in each verdict form the words "not guilty" or the word "guilty", according to the decision you reach.

You will also be given special verdict forms. If you find a defendant not guilty of any charge, do not use the special verdict forms for that charge. If you find a defendant guilty of a charge, you will then use the special verdict forms for that defendant as to that charge. In order to

answer a question on a special verdict form "yes," all twelve of you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you are not unanimously satisfied beyond a reasonable doubt that "yes" is the correct answer, then fill in the blank on the special verdict form with the word "no."

Because this is a criminal case, each of you must agree for you to return a verdict. When all of you have so agreed, fill in the verdict form(s) to express your decision. The presiding juror must sign the verdict form(s) and notify the judicial assistant. The judicial assistant will bring you into court to declare your verdict.

DECLARATION OF SERVICE BY MAIL

GR 3.1

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I, DOUGLAS DAVIS, declare and say: 11 DEC 15 PM 12:28

That on the 13th day of December, 2011, I deposited the following STATE OF WASHINGTON
DEPT OF CORRECTIONS
documents in the Stafford Creek Correction Center Legal Mail system, with First Class Mail pre-paid postage, under cause No. 41689-1:

STATEMENT OF ADDITIONAL Grounds and
Jury instruction 34 & 35

and these were addressed to the Respondent (or other involved parties) at:

COURT OF APPEALS
Div. II, 950 Broadw-
ay, Suite 300
Tac, wa 98402

Prosecutor's Attorney's
office 930 TACOMA AVE
SO., TACOMA, WA
98402-2171

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DONE THIS 13th day of December, 2011, at Aberdeen, Washington.

Douglas Davis
DAVIS, Douglas

DOC 326926 Unit 113
STAFFORD CREEK CORRECTIONS CENTER
191 CONSTANTINE WAY
ABERDEEN WA 98520-9504