No. 30378-1-III

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,
Plaintiff/Respondent,

vs.

PATRICK GALE WILSON,
Defendant/Appellant.

APPEAL FROM THE BENTON COUNTY SUPERIOR COURT
Honorable Bruce Spanner, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The "to-convict" instruction erroneously stated the jury had a "duty to return a verdict of guilty" if it found each element proven beyond a reasonable doubt. CP 299.[1]

2. The record does not support the implied finding that Mr. Wilson has the current or future ability to pay Legal Financial Obligations.

3. The trial court erred in imposing a sentencing condition prohibiting possessing or viewing pornographic materials.

4. The trial court erred in imposing certain conditions of community custody as part of the sentence.

Issues Pertaining to Assignments of Error

1. In a criminal trial, does a "to-convict" instruction, which informs the jury it has a duty to return a verdict of guilty if it finds the elements have been proven beyond a reasonable doubt, violate a defendant's right to a jury trial, when there is no such duty under the state and federal Constitutions?

[1] Division One of the Court of Appeals rejected the arguments raised here in its decision in State v. Meggyesy, 90 Wn. App. 693, 958 P.2d 319, *rev denied*, 136 Wn.2d 1028 (1998), *abrogated on other grounds by* State v. Recuenco, 154 Wn.2d 156, 110 P.3d 188 (2005). Counsel respectfully contends Meggyesy was incorrectly decided.

2. Must the implied finding that Mr. Wilson has the current or future ability to pay Legal Financial Obligations be stricken from the Judgment and Sentence as clearly erroneous where it is not supported in the record?

3. The word "pornography" does not provide adequate notice of what conduct is prohibited or an ascertainable standard to prevent arbitrary enforcement. Possession of pornography is protected by the First Amendment and article I, section 3. Is the condition of community custody prohibiting Mr. Wilson from possessing or viewing "pornographic materials, including those found on the internet" unconstitutionally vague?

4. Does a sentencing court exceed its statutory authority by imposing certain conditions of community custody that are not crime-related?

B. STATEMENT OF THE CASE

A jury convicted Patrick Gale Wilson as charged of first degree rape of a child. IV RP[2] 720; CP 1, 307. Wilson was the biological father of the victim, D.S., and did not live with the mother. II RP 288–94; III RP 509–12. A mistrial was declared in the first trial due to a sudden illness of

[2] The transcripts of the trial and sentencing proceedings are contained in five volumes, labeled I through V, by court reporter Renee Munoz. References to those volumes will be

the defense attorney. McLaughlin RP 2. Attorney Sylvia Cornish was then appointed to represent Wilson. Lang RP 6.

The "to convict" instruction given to the jury at the second trial provided as follows:

> Instruction No. 10. To convict the defendant of the crime of rape of a child in the first degree, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or between January 1, 2007 and September 21, 2009, the defendant had sexual intercourse with [D.S.];
>
> (2) That [D.S.] was less than twelve years old at the time of the sexual intercourse and was not married to the defendant;
>
> (3) That [D.S.] was at least twenty-four months younger that the defendant; and
>
> (4) That this act occurred in the State of Washington.
>
> If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.
>
> On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

CP 299; *see* WPIC 44.11.

Prior to trial, defense counsel submitted her proposed "to-convict" instruction, which eliminated the language "it will be your duty to return a

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by volume number, e.g. "IV RP 720". References to volumes reported by the other court reporters will be by name, e.g. "McLaughlin RP ___".

verdict of guilty" and instead included language tracking the special verdict form in WPIC 160.00. Thus, instead of:

> ~~If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty~~.

the paragraph reads:

> In order to return a verdict of guilty, you must unanimously find from the evidence that each of these elements has been proved beyond a reasonable doubt.

I RP 19–20; CP 284; *see* WPIC 160.00.

In discussion, counsel maintained that instructing the jury they had a "duty to return a verdict of guilty" was unsupported in the state and federal constitutions and violated a defendant's due process rights. The court disagreed and ruled that it would instruct the jury with the standard WPIC language as proposed by the State. Defense counsel took exception and objected to the decision. III RP 469–75; IV RP 621–22.

The court sentenced Wilson to a minimum term sentence of 136 months confinement. CP 327. The court also imposed a total amount of Legal Financial Obligations ("LFOs") of $15,548.50. V RP 751; CP 325–26, 335. The court made no express finding that Wilson had the present or future ability to pay the LFOs. V RP 750–54; s*ee* CP 325 at ¶ 2.5.

However, the Judgment and Sentence contained the following pertinent language:

> **¶ 2.5 Ability To Pay Legal Financial Obligations.** The court has considered the total amount owing, the defendant's past, present, and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change.

CP 325. The court ordered that all payments on the LFOs be paid "commencing immediately", and at the rate of "up to $50.00 per month". CP 326 at ¶ 4.1. The court made no inquiry into Wilson's financial resources and the nature of the burden that payment of LFOs would impose. V RP 750–54.

In part, the court imposed the following conditions of sentence:

> (8) Do not possess or peruse pornographic materials, including those found on the internet.
> …
> (14) Do not purchase, possess or use alcohol (beverage or medicinal) and submit to testing and searches of your person, residence and vehicle by the Community Corrections Officer to monitor compliance.
>
> (15) Do not enter any business where alcohol is the primary commodity for sale.
>
> (16) Undergo alcohol evaluation and follow all recommended treatment.

CP 334.

This appeal followed. CP 339.

C. ARGUMENT

1. Mr. Wilson's constitutional right to a jury trial was violated by the court's instructions, which affirmatively misled the jury about its power to acquit.

As part of the "to-convict" instruction used to convict Wilson, the trial court instructed the jury as follows:

> If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.
>
> On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to anyone of these elements, then it will be your duty to return a verdict of not guilty.

Instruction No. 10 at CP 299. This is standard language from the pattern instructions. *See* WPIC 44.11. Wilson contends there is no constitutional "duty to convict" and that the instruction accordingly misstates the law. The instruction violated Wilson's right to a properly instructed jury.

a. Standard of review. Constitutional violations are reviewed *de novo*. Bellevue School Dist. v. E.S., 171 Wn.2d 695, 702, 257 P.3d 570 (2011). Jury instructions are reviewed *de novo*. State v. Bashaw, 169 Wn.2d 133, 140, 234 P.3d 195 (2010). Instructions must make the relevant legal standard manifestly apparent to the average juror. State v. Kyllo, 166 Wn.2d 856, 864, 215 P.3d 177 (2009).

b. The United States Constitution. The right to jury trial in a criminal case was one of the few guarantees of individual rights enumerated in the United States Constitution of 1789. It was the only guarantee to appear in both the original document and the Bill of Rights. U.S. Const. art. 3, § 2, ¶ 3; U. S. Const. amend. 6; U.S. Const. amend. 7. Thomas Jefferson wrote of the importance of this right in a letter to Thomas Paine in 1789: "I consider trial by jury as the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution." The Papers of Thomas Jefferson, Vol. 15, p. 269 (Princeton Univ. Press, 1958).

In criminal trials, the right to jury trial is fundamental to the American scheme of justice. It is thus further guaranteed by the due process clauses of the Fifth and Fourteenth Amendments. Duncan v. Louisiana, 391 U.S. 145, 156, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968); Pasco v. Mace, 98 Wn.2d 87, 94, 653 P.2d 618 (1982).

Trial by jury was not only a valued right of persons accused of crime, but was also an allocation of political power to the citizenry.

> [T]he jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power -- a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges. Fear of unchecked power, so typical of our State and Federal Governments in other respects, found expression in the criminal law in this insistence

> upon community participation in the determination of guilt or innocence.

Duncan v. Louisiana, 391 U.S. at 156.[3]

c. Washington Constitution. The Washington Constitution provides greater protection to its citizens in some areas than does the United States Constitution. State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986). Under the Gunwall analysis, it is clear that the right to jury trial is such an area. Pasco v. Mace, *supra*; Sofie v. Fiberboard Corp., 112 Wn.2d 636, 656,771 P.2d 711, 780 P.2d 260 (1989).

i. The textual language of the state constitution.

The drafters of our state constitution not only granted the right to a jury trial, Const. art. 1, § 22,[4] they expressly declared it "shall remain inviolate." Const. art. 1, § 21.[5]

> The term "inviolate" connotes deserving of the highest protection . . . Applied to the right to trial by jury, this language indicates that the right must remain the essential component of our legal system that it has always been. For such a right to remain inviolate, it must not diminish over time and must be protected from all assault to its essential guarantees.

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[3] In Sofie v. Fibreboard Corp., the majority saw this allocation of political power to the citizens as a limit on the power of the legislature. 112 Wn.2d 636, 650-53,771 P.2d 711, 780 P.2d 260 (1989). Two of the dissenting members of the court acknowledged the allocation of power, but interpreted it rather as a limit on the power of the judiciary. Sofie, 112 Wn.2d at 676 (Callow, C.J., joined by Dolliver, J., dissenting).

[4] **Rights of Accused Persons.** In criminal prosecutions, the accused shall have the right … to have a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed … .

[5] "The right of trial by jury shall remain inviolate … ."

Sofie, 112 Wn.2d at 656. Article 1, section 21 "preserves the right [to jury trial] as it existed in the territory at the time of its adoption." Pasco v. Mace, 98 Wn.2d at 96; State v. Strasburg, 60 Wash. 106, 115, 110 P. 1020 (1910). The right to trial by jury "should be continued unimpaired and inviolate." Strasburg, 60 Wash. at 115.

The difference in language suggests the drafters meant something different from the federal Bill of Rights. See Hon. Robert F. Utter, Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights, 7 U. Puget Sound L. Rev. 491, 515 (1984) (Utter).

The framers added other constitutional protections to this right. A court is not permitted to convey to the jury its own impression of the evidence. Const. art. 4, § 16.[6] Even a witness may not invade the province of the jury. State v. Black, 109 Wn.2d 336, 350, 745 P.2d 12 (1987). The right to jury trial also is protected by the due process clause of article I, section 3.

While the Court in State v. Meggyesy[7] may have been correct when it found there is no specific constitutional language that addresses

[6] "Judges shall not charge juries with respect to matters of fact, not comment thereon, but shall declare the law."

[7] 90 Wn. App. 693, 701, 958 P.2d 319, *rev denied*, 136 Wn.2d 1028 (1998), *abrogated on other grounds by* State v. Recuenco, 154 Wn.2d 156, 110 P.3d 188 (2005).

this precise issue, the language that *is* there indicates the right to a jury trial is so fundamental that any infringement violates the constitution.

ii. State constitutional and common law history.

State constitutional history favors an independent application of Article I, Sections 21 and 22. In 1889 (when the constitution was adopted), the Sixth Amendment did not apply to the states. Furthermore, Washington based its Declaration of Rights on the Bills of Rights of other states, which relied on common law and not the federal constitution. State v. Silva, 107 Wn. App. 605, 619, 27 P.3d 663 (2001), *citing* Utter, 7 U. Puget Sound Law Review at 497. This difference supports an independent reading of the Washington Constitution.

State common law history also favors an independent application. Article I, Section 21 "preserves the right as it existed at common law in the territory at the time of its adoption." Sofie, 112 Wn.2d at 645; Pasco v. Mace, 98 Wn.2d at 96; *see also* State v. Hobble, 126 Wn.2d 283, 299, 892 P.2d 85 (1995). Under the common law, juries were instructed in such a way as to allow them to acquit even where the prosecution proved guilt beyond a reasonable doubt. Leonard v. Territory, 2 Wash.Terr. 381, 7 Pac. 872 (Wash.Terr.1885). In Leonard, the Supreme Court reversed a murder conviction and set out in some detail the jury instructions given in

the case. The court instructed the jurors that they "should" convict and "may find [the defendant] guilty" if the prosecution proved its case, but that they "must" acquit in the absence of such proof.[8] Leonard, at 398-399. Thus the common law practice *required* the jury to acquit upon a failure of proof, and *allowed* the jury to acquit even if the proof was sufficient.[9] Id.

The Court of Appeals in Meggyesy attempted to distinguish Leonard on the basis that the Leonard court "simply quoted the relevant instruction. . . ." Meggyesy, 90 Wn. App. at 703. But the Meggyesy court missed the point—at the time the Constitution was adopted, courts instructed juries using the permissive "may" as opposed to the current practice of requiring the jury to make a finding of guilt. The current practice does not comport with the scope of the right to jury trial existing at that time, and should now be re-examined.

iii. Preexisting state law.

In criminal cases, an accused person's guilt has always been the sole province of the jury. State v.Kitchen, 46 Wn. App. 232, 238, 730 P.2d 103

[8] The trial court's instructions were found erroneous on other grounds.

[9] Furthermore, the territorial court reversed all criminal convictions that resulted from erroneous jury instructions (unless the instructions favored the defense). *See, e.g.,* Miller v. Territory, 3 Wash.Terr. 554, 19 P. 50 (Wash.Terr.1888); White v. Territory, 3 Wash.Terr. 397, 19 P. 37 (Wash.Terr.1888); Leonard, *supra.*

(1986); *see also* State v. Holmes, 68 Wash. 7, 122 P. 345 (1912); State v. Christiansen, 161 Wash. 530, 297 P. 151 (1931). This rule applies even where the jury ignores applicable law. *See, e.g.*, Hartigan v. Washington Territory, 1 Wash.Terr. 447, 449 (1874) ("[T]he jury may find a general verdict compounded of law and fact, and if it is for the defendant, and is plainly contrary to the law, either from mistake or a willful disregard of the law, there is no remedy.")[10]

iv. Differences in federal and state constitutions' structures.

State constitutions were originally intended to be the primary devices to protect individual rights, with the United States Constitution a secondary layer of protection. Utter, 7 U. Puget Sound L. Rev. at 497; Utter & Pitler, "Presenting a State Constitutional Argument: Comment on Theory and Technique," 20 Ind. L. Rev. 637, 636 (1987). Accordingly, state constitutions were intended to give broader protection than the federal constitution. An independent interpretation is necessary to accomplish this end. Gunwall indicates that this factor will always support an independent interpretation of the state constitution because the

[10] This is likewise true in the federal system. *See, e.g.*, United States v. Moylan, 417 F.2d 1002, 1006 (4th Cir. 1969).

difference in structure is a constant. Id., 106 Wn.2d at 62, 66; *see also* State v. Ortiz, 119 Wn.2d 294, 303, 831 P.2d 1060 (1992).

v. Matters of particular state interest or local concern.

The manner of conducting criminal trials in state court is of particular local concern, and does not require adherence to a national standard. *See, e.g.*, State v. Smith, 150 Wn.2d 135, 152, 75 P.3d 934 (2003); State v. Russell, 125 Wn.2d 24, 61, 882 P.2d 747 (1994), *cert. denied*, 514 U.S. 1129 (1995). Gunwall factor number six thus also requires an independent application of the state constitutional provision in this case.

vi. An independent analysis is warranted.

All six Gunwall factors favor an independent application of Article I, Sections 21 and 22 of the Washington Constitution in this case. The state constitution provides greater protection than the federal constitution, and prohibits a trial court from affirmatively misleading a jury about its power to acquit.

d. Jury's power to acquit. A court may never direct a verdict of guilty in a criminal case. United States v. Garaway, 425 F.2d 185 (9th Cir. 1970) (directed verdict of guilty improper even where no issues of fact are in dispute); Holmes, 68 Wash. at 12-13. If a court improperly withdraws a

particular issue from the jury's consideration, it may deny the defendant the right to jury trial. United States v. Gaudin, 515 U.S. 506, 115 S. Ct. 2310, 132 L. Ed. 2d 444 (1995) (improper to withdraw issue of "materiality" of false statement from jury's consideration); *see* Neder v. United States, 527 U.S. 1, 8, 15-16, 119 S. Ct. 1827, 144 L.Ed.2d 35 (1999) (omission of element in jury instruction subject to harmless error analysis).

The constitutional protections against double jeopardy also protect the right to a jury trial by prohibiting a retrial after a verdict of acquittal. U.S. Const. amend. 5; Const. art. I, § 9.[11] A jury verdict of not guilty is thus non-reviewable.

Also well-established is "the principle of noncoercion of jurors," established in Bushell's Case, Vaughan 135, 124 Eng. Rep. 1006 (1671). Edward Bushell was a juror in the prosecution of William Penn for unlawful assembly and disturbing the peace. When the jury refused to convict, the court fined the jurors for disregarding the evidence and the court's instructions. Bushell was imprisoned for refusing to pay the fine. In issuing a writ of habeas corpus for his release, Chief Justice Vaughan declared that judges could neither punish nor threaten to punish jurors for

[11] "No person shall be … twice put in jeopardy for the same offense."

their verdicts. *See generally* Alschuler & Deiss, A Brief History of the Criminal Jury in the United States, 61 U. Chi. L. Rev. 867, 912-13 (1994).

If there is no ability to review a jury verdict of acquittal, no authority to direct a guilty verdict, and no authority to coerce a jury in its decision, there can be no "duty to return a verdict of guilty." Indeed, there is no authority in law that suggests such a duty.

> We recognize, as appellants urge, the undisputed power of the jury to acquit, even if its verdict is contrary to the law as given by the judge and contrary to the evidence. . .. If the jury feels that the law under which the defendant is accused is unjust, or that exigent circumstances justified the actions of the accused, or for any reason which appeals to their logic or passion, the jury has the power to acquit, and the courts must abide by that decision.

United States v. Moylan, 417 F.2d 1002, 1006 (4th Cir. 1969), *cert. denied*, 397 U.S. 910 (1970).

Under Washington law, juries have always had the ability to deliver a verdict of acquittal that is against the evidence. Hartigan, *supra.* A judge cannot direct a verdict for the state because this would ignore "the jury's prerogative to acquit against the evidence, sometimes referred to as the jury's pardon or veto power." State v. Primrose, 32 Wn. App. 1, 4, 645 P.2d 714 (1982). *See also* State v. Salazar, 59 Wn. App. 202, 211, 796 P .2d 773 (1990) (relying on jury's "constitutional prerogative to acquit" as basis for upholding admission of evidence). An instruction telling jurors

that they *may not* acquit if the elements have been established affirmatively misstates the law, and deceives the jury as to its own power. Such an instruction fails to make the correct legal standard manifestly apparent to the average juror. Kyllo, 166 Wn.2d at 864.

This is not to say there is a right to instruct a jury that it may disregard the law in reaching its verdict. *See, e.g.*, United States v. Powell, 955 F.2d 1206, 1213 (9th Cir. 1991) (reversing conviction on other grounds). However, if the court may not tell the jury it may disregard the law, it is at least equally wrong for the court to direct the jury that it has a duty to return a verdict of guilty if it finds certain facts to be proved.

e. Scope of jury's role re: fact and law. Although a jury may not strictly determine what the law is, it does have a role in applying the law of the case that goes beyond mere fact-finding. In Gaudin, the Court rejected limiting the jury's role to merely finding facts. Gaudin, 515 U.S. at 514-15. Historically the jury's role has never been so limited: "[O]ur decision in no way undermine[s] the historical and constitutionally guaranteed right of a criminal defendant to demand that the jury decide guilt or innocence on every issue, which includes application of the law to the facts." Gaudin, 515 U.S. at 514.

Prof. Wigmore described the roles of the law and the jury in our system:

> Law and Justice are from time to time inevitably in conflict. That is because law is a general rule (even the stated exceptions to the rules are general exceptions); while justice is the fairness of this precise case under all its circumstances. And as a rule of law only takes account of broadly typical conditions, and is aimed at average results, law and justice every so often do not coincide. ... We want justice, and we think we are going to get it through 'the law' and when we do not, we blame the law. Now this is where the jury comes in. The jury, in the privacy of its retirement, adjusts the general rule of law to the justice of the particular case. Thus the odium of inflexible rules of law is avoided, and popular satisfaction is preserved. ... That is what a jury trial does. It supplies that flexibility of legal rules which is essential to justice and popular contentment. ... The jury, and the secrecy of the jury room, are the indispensable elements in popular justice.

John H. Wigmore, "A Program for the Trial of a Jury", 12 Am. Jud. Soc. 166 (1929).

Furthermore, if such a "duty" to convict existed, the law lacks any method of enforcing it. If a jury acquits, the case is over, the charge dismissed, and there is no further review. In contrast, if a jury convicts when the evidence is insufficient, the court has a legally enforceable duty to reverse the conviction or enter a judgment of acquittal notwithstanding the verdict. Jackson v. Virginia, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980); State

v. Carlson, 65 Wn. App. 153, 828 P.2d 30, *rev. denied*, 119 Wn.2d 1022 (1992).

Thus, a legal "threshold" exists before a jury may convict. A guilty verdict in a case that does not meet this evidentiary threshold is contrary to law and will be reversed. The "duty" to return a verdict of not guilty, therefore, is genuine and enforceable by law. A jury must return a verdict of not guilty if there is a reasonable doubt; however, it may return a verdict of guilty if, and only if, it finds every element proven beyond a reasonable doubt.

f. Current example of correct legal standard in instructions. The duty to acquit and permission to convict is well-reflected in the instruction in Leonard:

> If you find the facts necessary to establish the guilt of defendant proven to the certainty above stated, then you **may** find him guilty of such a degree of the crime as the facts so found show him to have committed; but if you do not find such facts so proven, then you **must** acquit.

Leonard, 2 Wash.Terr. at 399 (emphasis added). This was the law as given to the jury in murder trials in 1885, just four years before the adoption of the Washington Constitution. This allocation of the power of the jury "shall remain inviolate."

The Washington Pattern Jury Instruction Committee has adopted accurate language consistent with Leonard for considering a special verdict. *See* WPIC 160.00, the concluding instruction for a special verdict, in which the burden of proof is precisely the same:

> … In order to answer the special verdict form "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".

The due process requirements to return a special verdict—that the jury must find each element of the special verdict proven beyond a reasonable doubt—are exactly the same as for the elements of the general verdict. This language in no way instructs the jury on "jury nullification." But it at no time imposes a "duty to return a verdict of guilty."

In contrast, the "to convict" instruction at issue here does not reflect this legal asymmetry. It is not a correct statement of the law. As such, it provides a level of coercion, not supported by law, for the jury to return a guilty verdict. Such coercion is prohibited by the right to a jury trial. Leonard, *supra*; State v. Boogaard, 90 Wn.2d 733, 585 P.2d 789 (1978).

g. Contrary case law is based on a poor analysis; this Court should decide the issue differently.[12] In State v. Meggyesy, the appellant challenged the WPIC's "duty to return a verdict of guilty" language. The court held the federal and state constitutions did not "preclude" this language, and so affirmed. Meggyesy, 90 Wn. App. at 696.

In its analysis, Division One of the Court of Appeals characterized the alternative language proposed by the appellants—"you **may** return a verdict of guilty"—as "an instruction notifying the jury of its power to acquit against the evidence." 90 Wn. App. at 699. The court spent much of its opinion concluding there was no legal authority requiring it to instruct a jury it had the power to acquit against the evidence.

Division Two has followed the Meggyesy holding. State v. Bonisisio, 92 Wn. App. 783, 964 P.2d 1222 (1998), *rev. denied*, 137 Wn.2d 1024 (1999); State v. Brown, 130 Wn. App. 767, 124 P.3d 663 (2005). Without much further analysis, Division Two echoed Division One's concerns that instructing with the language 'may" was tantamount to instructing on jury nullification.

Appellant respectfully submits the Meggyesy analysis addressed a different issue. "Duty" is the challenged language herein. By focusing on

[12] A decision is incorrect if the authority on which it relies does not support it. State v. Nunez, --- Wn.2d ___, ___ P.3d ___ , 2012 WL 2044377 *6 (June 7, 2012 Wash).

the proposed remedy, the Meggyesy court side-stepped the underlying issue raised by its appellants: the instructions violated their right to trial by jury because the "duty to return a verdict of guilty" language required the juries to convict if they found that the State proved all of the elements of the charged crimes.

However, portions of the Meggyesy decision are relevant. The court acknowledged the Supreme Court has never considered this issue. 90 Wn. App. at 698. It recognized that the jury has the power to acquit against the evidence: "This is an inherent feature of the use of general verdict. But the power to acquit does not require any instruction telling the jury that it may do so." Id. at 700 (foot notes omitted). The court also relied in part upon federal cases in which the approved "to-convict" instructions did *not* instruct the jury it had a "duty to return a verdict of guilty" if it found every element proven. *See,* Meggyesy, 90 Wn. App. at 698 fn. 5.[13, 14] These concepts support Wilson's position and do not contradict the arguments set forth herein.

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[13] E.g., United States v. Powell, 955 F.2d 1206, 1209 (9th Cir.1991) ("In order for the Powells to be convicted, the government must have proved, beyond a reasonable doubt, that the Powells had failed to file their returns.").

[14] Indeed, the federal courts do not instruct the jury it "has a duty to return a verdict of guilty" if it finds each element proven beyond a reasonable doubt. *See* Ninth Circuit Model Criminal Jury Instructions:

> In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt: …

The Meggyesy court incorrectly stated the issue. The question is not whether the court is required to tell the jury it can acquit despite finding each element has been proven beyond a reasonable doubt. The question is whether **the law** ever requires the jury to return a verdict of guilty. If the law never requires the jury to return a verdict of guilty, it is an incorrect statement of the law to instruct the jury it does. And an instruction that says it has such a duty impermissibly directs a verdict. Sullivan v. Louisiana, 508 U.S. 275, 124 L.Ed.2d 182, 113 S.Ct. 2078 (1993).

Unlike the appellant in Meggyesy,[15] Wilson does not ask the court to approve an instruction that affirmatively notifies the jury of its power to acquit. Instead, he argues that jurors should not be affirmatively misled. This question was not addressed in either Meggyesy or Bonisisio*;* thus the holding of Meggyesy should not govern here. The Brown court erroneously found that there was "no meaningful difference" between the two arguments. Brown, 130 Wn. App. at 771. Meggyesy and its progeny should be reconsidered, and the issue should be analyzed on its merits.

[15] And the appellant in Bonisisio.

h. The court's instructions in this case affirmatively misled the jury about its power to acquit even if the prosecution proved its case beyond a reasonable doubt. The instruction given in Wilson's case did not contain a correct statement of the law. The court instructed the jurors that it was their "duty" to accept the law, and that it was their "duty" to convict the defendant if the elements were proved beyond a reasonable doubt. Instructions No. 1 and 10 at CP 289, 299. A duty is "[a]n act or a course of action that is required of one by… law." *The American Heritage Dictionary* (Fourth Ed., 2000, Houghton Mifflin Company). The court's use of the word "duty" in the "to-convict" instruction conveyed to the jury that it *could not* acquit if the elements had been established. This misstatement of the law provided a level of coercion for the jury to return a guilty verdict, deceived the jurors about their power to acquit in the face of sufficient evidence, Leonard, *supra*, and failed to make the correct legal standard manifestly apparent to the average juror. Kyllo, 166 Wn.2d at 864. By instructing the jury it had a duty to return a verdict of guilty based merely on finding certain facts, the court took away from the jury its constitutional authority to apply the law to the facts to reach its general verdict.

The instruction creating a "duty" to return a verdict of guilty was an incorrect statement of law. The trial court's error violated Wilson's state and federal constitutional right to a jury trial. Accordingly, his conviction must be reversed and the case remanded for a new trial. Hartigan, *supra;* Leonard, *supra.*

2. The implied finding that Mr. Wilson has the current or future ability to pay Legal Financial Obligations is not supported in the record and must be stricken from the Judgment and Sentence.

Courts may require an indigent defendant to reimburse the state for the costs only if the defendant has the financial ability to do so. Fuller v. Oregon, 417 U.S. 40, 47-48, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974); State v. Curry, 118 Wn.2d 911, 915-16, 829 P.2d 166 (1992); RCW 10.01.160(3); RCW 9.94A.760(2). To do otherwise would violate equal protection by imposing extra punishment on a defendant due to his or her poverty.

a. Relevant statutory authority. RCW 9.94A.760(1) provides that upon a criminal conviction, a superior court "may order the payment of a legal financial obligation." RCW 10.01.160(1) authorizes a superior court to "require a defendant to pay costs." These costs "shall be limited to expenses specially incurred by the state in prosecuting the defendant."

RCW 10.01.160(2). In addition, "[t]he court shall not order a defendant to pay costs unless the defendant is or will be able to pay them." RCW 10.01.160(3). "In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose." RCW 10.01.160(3).

b. There is insufficient evidence to support the trial court's implied finding that Mr. Wilson has the present or future ability to pay legal financial obligations. Curry concluded that while the ability to pay was a necessary threshold to the imposition of costs, a court need not make a specific finding of ability to pay: "[n]either the statute nor the constitution requires a trial court to enter formal, specific findings regarding a defendant's ability to pay court costs." 118 Wn.2d at 916. Curry recognized, however, that both RCW 10.01.160 and the federal constitution "direct [a court] to consider ability to pay." Id. at 915-16.

Here, the court considered Wilson's "past, present, and future ability to pay legal financial obligations" but made no express finding that Wilson had the present or likely future aiblity to pay those LFOs. However, the finding is implied because the court ordered that all payments on the LFOs be paid "commencing immediately" and at the rate

of up to $50.00 per month *after* it considered "the total amount owing, the defendant's past, present, and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change." CP 325 at ¶ 2.5, CP 326 at ¶ 4.1.

Whether a finding is expressed or implied, it must have support in the record. A trial court's findings of fact must be supported by substantial evidence. State v. Brockob, 159 Wn.2d 311, 343, 150 P.3d 59 (2006) (citing Nordstrom Credit, Inc. v. Dep't of Revenue, 120 Wn.2d 935, 939, 845 P.2d 1331 (1993)). The trial court's determination "as to the defendant's resources and ability to pay is essentially factual and should be reviewed under the clearly erroneous standard." State v. Bertrand, 165 Wn. App. 393, 267 P.3d 511, 517 fn.13 (2011), citing State v. Baldwin, 63 Wn. App. 303, 312, 818 P.2d 1116, 837 P.2d 646 (1991).

"Although Baldwin does not require formal findings of fact about a defendant's present or future ability to pay LFOs, the record must be sufficient for [the appellate court] to review whether 'the trial court judge took into account the financial resources of the defendant and the nature of the burden imposed by LFOs under the clearly erroneous standard.' " Bertrand, 165 Wn. App. 393, 267 P.3d at 517, citing Baldwin, 63 Wn.

App. at 312 (bracketed material added) (internal citation omitted). A finding that is unsupported in the record must be stricken. Bertrand, 165 Wn. App. 393, 267 P.3d at 517.

Here, the record does not show that the trial court took into account Wilson's financial resources and the nature of the burden of imposing LFOs on him. In fact, the record contains no evidence to support the trial court's implied finding in ¶ 2.5 that Wilson has the present or future ability to pay LFOs. The record instead supports the opposite conclusion. Wilson agreed his attorney's representation to the court that he lacked any funds or means to pay for either an attorney or other costs on appeal was correct, and when asked by the court whether he had any assets that could be sold in order to finance an appeal, Wilson said he "had nothing". V RP 753. Thus, the court was aware when signing paperwork for processing the Notice of Appeal that Wilson was indigent. The implied finding is therefore clearly erroneous and must be stricken from the Judgment and Sentence. Bertrand, 165 Wn. App. 393, 267 P.3d at 517.

c. The remedy is to strike the unsupported finding. Bertrand is clear: where there is no evidence to support the trial court's finding regarding ability and means to pay, the finding must be stricken. Bertrand, 165 Wn. App. 393, 267 P.3d at 517. Similarly, any implied findings of the

present or future ability to pay LFOS of any nature must be stricken where the court made no inquiry and there is no evidence in the record to support such findings.

The reversal of the trial court's implied finding of present and future ability to pay LFOs simply forecloses the ability of the Department of Corrections to begin collecting LFOs from Wilson until after a future determination of his ability to pay. It is at a future time when the government seeks to collect the obligation that " '[t]he defendant may petition the court at any time for remission or modification of the payments on [the basis of manifest hardship]. Through this procedure the defendant is entitled to *judicial scrutiny* of his obligation and *his present ability to pay at the relevant time.*' " Bertrand, 165 Wn. App. at 405, citing Baldwin, 63 Wn. App. at 310–11, 818 P.2d 1116, 837 P.2d 646 (citing court adding emphasis and omitting footnote).

Since the record does not support the trial court's finding that Wilson has or will have the ability to pay these LFOs when and if the State attempts to collect them, the implied finding is clearly erroneous and must therefore be stricken from the record. Bertrand, 165 Wn. App. 393, 267 P.3d at 517.

3. The sentencing condition prohibiting possessing or viewing "any pornographic materials, including those found on the internet" is unconstitutionally vague.

The due process clauses of the federal and state constitutions require that citizens be provided with fair warning of what conduct is illegal. U.S. Const. amend. 14, Const. art. I, § 3; City of Spokane v. Douglass, 115 Wn.2d 171, 178, 795 P.2d 693 (1990). As a result, a condition of community custody must be sufficiently definite that ordinary people understand what conduct is illegal and the condition must provide ascertainable standards to protect against arbitrary enforcement. State v. Bahl, 164 Wn.2d 739, 753, 193 P.3d 678 (2008).

Additionally, even offenders on community custody retain a constitutional right to free expression. *See* Procunier v. Martinez, 416 U.S. 396, 408-09, 94 S.Ct. 1800, 40 L.Ed.2d 224 (1974) (inmates retain First Amendment right of free expression through use of the mail). When a condition of community custody addresses material protected by the First Amendment, a vague standard may have a chilling effect on the exercise of First Amendment rights. Bahl, 164 Wn.2d at 752. An even stricter standard of definiteness therefore applies when community custody condition prohibits access to material protected by the First Amendment.

Vagueness challenges are sufficiently ripe for review even if the conditions of community custody do not yet apply because the defendant is still in prison, since upon his release the conditions will immediately restrict him. Bahl, 164 Wn.2d at 751-52. The challenge is also ripe because it is purely legal, i.e., whether the condition violates due process vagueness standards. Bahl, 164 Wn.2d at 752.

Imposing conditions of community custody is within the discretion of the sentencing court and will be reversed if manifestly unreasonable. Bahl, 164 Wn.2d at 753, 193 P.3d 678. Imposition of an unconstitutional condition would, of course, be manifestly unreasonable. Id.

Here, the trial court ordered Wilson not to "possess or peruse pornographic materials, including those found on the internet." CP 334 at (8). Adult pornography is constitutionally protected speech. Bahl, 164 Wn.2d at 757. And the term "pornography" is unconstitutionally vague. Id. at 757-58; State v. Sansone, 127 Wn. App. 630, 639,111 P.3d 1251 (2005). Thus, a condition of community custody prohibiting an offender from "possess[ing] or access[ing] pornographic materials, as directed by the supervising Community Corrections Officer" is unconstitutionally vague. Bahl, 164 Wn.2d at 754, 758; *accord* Sansone, 127 Wn. App. at 634, 639-41. Here, too, the condition prohibiting Mr. Wilson from

possessing or viewing pornography is unconstitutionally vague and must be stricken.

4. The sentencing court violated due process and exceeded its statutory authority by imposing certain conditions of community custody that are not crime-related.

a. Applicable law. A trial court's sentencing authority is limited to that granted by statute. State v. Moen, 129 Wn.2d 535, 544-48, 919 P.2d 69 (1996) (citing State v. Paine, 69 Wn. App. 873, 850 P.2d 1369, *rev. denied*, 122 Wn.2d 1024 (1993)). If a trial court exceeds that authority, its order may be corrected at any time. Paine, 69 Wn. App. at 883. Where conditions of community custody are not directly related to the circumstances of the crime and are not otherwise authorized by statute, a trial court lacks authority to impose such conditions. *See* State v. Bird, 95 Wn.2d 83, 85, 622 P.2d 1262 (1980) (court may only suspend sentence if authorized by Legislature); In re Pers. Restraint of Carle, 93 Wn.2d 31, 604 P.2d 1293 (1980).

Whether a trial court has statutory authority to impose a challenged community custody condition is reviewed *de novo*. State v. Armendariz, 160 Wn.2d 106, 110, 156 P.3d 201 (2007). If a statute authorizes the condition, the sentencing court's decision to impose the condition is

reviewed for an abuse of discretion. State v. Autrey, 136 Wn. App. 460, 466–67, 150 P.3d 580 (2006).

b. Except for consumption, the alcohol prohibitions are not crime-related and must be stricken. RCW 9.94A.703 sets out mandatory, waivable, and discretionary community custody conditions that the court may impose. Any conditions not expressly authorized by statute must be crime-related. RCW 9.94A.703(3)(f). RCW 9.94A.030(10) defines a "crime-related prohibition" as "an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted."

Herein, as conditions of sentence, the court ordered Wilson to comply with "all conditions in Appendix F"—incorrectly stating they were all crime-related treatment. CP 328. Appendix F contained the following offending conditions:

> (14) Do not purchase, possess or use alcohol (beverage or medicinal) and submit to testing and searches of your person, residence and vehicle by the Community Corrections Officer to monitor compliance.
>
> (15) Do not enter any business where alcohol is the primary commodity for sale.
>
> (16) Undergo alcohol evaluation and follow all recommended treatment.

CP 334. However, there was no evidence that alcohol was involved in the commission of the crime. Since these alcohol-related conditions are unrelated to the crime for which Wilson was convicted, the court exceeded its statutory authority in imposing them and the offending conditions should be stricken.

Wilson additionally challenges the condition that he not *purchase or possess* alcohol. He acknowledges that RCW 9.94A.703(3)(e) allows the trial court to prohibit the consumption of alcohol. Thus, the trial court had authority to prohibit him from consuming alcohol regardless of whether alcohol was related to the crime. Id.; *see also* State v. Jones, 118 Wn. App. 199, 207, 76 P.3d 258 (2003) (holding that a trial court can order that a defendant sentenced to community custody not consume alcohol despite the lack of evidence that alcohol had contributed to his offense). However, because there is no evidence that alcohol played a role in Mr. Wilson's crime, the trial court could not go beyond the statutory authority, which allows only prohibition of the consumption of alcohol. The requirement that Wilson not purchase or possess alcohol was improperly imposed and should be stricken.

It should also be noted that, because the court was without authority to prohibit the purchase and possession of alcohol, the related

order that Wilson submit to searches of his person, residence and vehicle to monitor compliance with that prohibition is similarly unauthorized. Although a probationer has diminished privacy protections and may be subject to searches based on less than probable cause, Article 1, section 7, of the Washington Constitution requires the search to be based on a well-founded suspicion of a violation. State v. Lucas, 56 Wn. App. 236, 244, 783 P.2d 121 (1989); State v. Lampman, 45 Wn. App. 228, 235, 724 P.2d 1092 (1986). Here, the purchase and possession of alcohol is not crime-related or otherwise authorized by statute, and is therefore invalid. As such, it would not support a probation violation in the present case because there would be no "well-founded suspicion" to justify a search of Wilson's person, residence or vehicle. The requirement that Wilson submit to searches intended to monitor the purchase and possession of alcohol must be stricken.

The State may argue that the challenged conditions, including undergoing an alcohol evaluation, were not imposed as crime-related conditions but as part of a rehabilitation program or other "affirmative conduct" permitted by RCW 9.94A.704(4). However, while the Department of Corrections may impose additional conditions, these conditions must still be based upon an offender's risk of reoffense and the

risk to community safety. RCW 9.94A.704(2). There was no discussion of these provisions at sentencing. It appears simply that these community custody conditions are included as "boilerplate", where the record does not justify alcohol-related provisions.[16] Other than the statutorily authorized prohibition of consumption, the remaining alcohol-related conditions should be stricken from the terms of community custody.

D. CONCLUSION

For the reasons stated, the conviction should be reversed and remanded for a new trial. Alternatively, the matter should be remanded for resentencing.

Respectfully submitted on August 10, 2012.

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[16] *Cf*., State v. Jones, 118 Wn. App. at 208 (if evidence shows that alcohol contributed to the offense, an alcohol evaluation and treatment may be ordered).

PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on August 10, 2012, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of brief of appellant:

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