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

STATE OF WASHINGTON, Respondent, vs. PATRICK ROY TABLER, Appellant.	NO. 30750-6-III MOTION ON THE MERITS

I. IDENTITY OF MOVING PARTY.

The respondent, State of Washington, asks for the relief designated in Paragraph II.

II. STATEMENT OF RELIEF SOUGHT.

The respondent requests that the Court of Appeals, Division III, grant the respondent's request as set forth in this Motion on the Merits affirming the actions of the Superior Court of the State of Washington in and for the County of Yakima pursuant to RAP 18.14(e)(1) and dismiss this appeal.

III. FACTS RELEVANT TO THE MOTION.

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The substantive and procedural facts have been adequately set forth in appellants brief therefore, pursuant to RAP 10.3(b); the State shall not set forth an additional facts section. If needed the State shall refer to specific areas of the record.

A. ASSIGNMENT OF ERROR

1. The court improperly charged the jury.
2. The court improperly imposed legal financial obligations
3. The imposed and invalid sentence.

B. RESPONSE TO ASSIGNMENT OF ERROR

1. The trial court properly instructed the jury.
2. The record does not support the legal financial costs ordered.
3. The sentence presently set forth in the Judgment and Sentence is invalid.

IV. ARGUMENT.

The actions of the trial court were based on the facts presented by both parties. The actions were well grounded in well settled case law and were discretionary in nature. Those acts should not be overturned by this court unless this court determines the trial court acted arbitrarily.

This record in this case exceeds the recommended record size for a motion on the merits to affirm. The General rule states "The parties are discouraged from filing a motion on the merits to affirm in any case with a record exceeding 500 pages of combined clerk's papers and report of proceedings unless issues on appeal are limited to a narrow portion of the record and are dispositive of the case."

However, as stated below the issues raised and the record that supports those issues does allow the filing of a motion on the merits.

Appellant raises three issues, the State will concede issues 2 and 3. Those two issues are as follows;

2) There was no record made to confirm the appellant's future ability to pay his legal financial obligations. In several recent cases this court has ordered, in factually similar cases from Yakima County that this portion of the judgment and sentence should be stricken where there is no record to support the finding set forth in this section of the Judgment and Sentence.

The State does not agree with this "remedy" however it is a waste of resources to challenge this issue again. Therefore the State shall concede that the case must be remanded to the Superior Court with an order from this court to strike the offending sections, 2.7, 4.D.5. The court of the Department of Corrections will need to determine the ability of Appellant to pay these obligations prior to collecting the assessed monies.

3) The third allegation is that the Judgment and Sentence does not clearly address the fact that the court imposed a combined sentence; incarceration and community custody that exceeds the 120 month statutory maximum which may be imposed for the crime for which Appellant was convicted. The State must also concede this issue.

This Court will need to remand this issue to the trial court with an order

that the court determine both on the record and in the Judgment and Sentence the exact combined sentence such that the combined sentence does not exceed the statutory maximum of 120 months.

The one issue raised in Appellant's brief, that shall be addressed by the State, Appellant only refers to the verbatim report of proceedings in footnote "1", referencing pages 692-94. This allegation regarding the "to convict" instructions relies, in Appellant's brief, solely on the Clerk's papers which contain 189 pages of documents pertaining to this case.

Therefore the true record on appeal consists of the Clerk's papers and an extremely small portion of the verbatim report of proceedings both of which based on size alone fit within the general rule governing motions on the merit.

The issues raised are clearly controlled by well settled case law; the actions objected to were discretionary on the part of the trial court and were of a factual nature. The State shall answer one remaining allegation in this motion.

The Court of Appeals should grant the State's Motion on the Merits.

State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971):

> Judicial discretion is a composite of many things, among which are conclusions drawn from objective criteria; it means a sound judgment exercised with regard to what is right under the circumstances and without doing so arbitrarily or capriciously. ....Where the decision or order of the trial court is a matter of discretion, it will not be disturbed on review except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. (Citations omitted.)

RESPONSE TO ASSIGNMENTS OF ERROR ONE

It must be noted that counsel for Appellant used the converse section of this instruction in his closing; "Ladies and gentlemen, the instructions are clear. If you have one reasonable doubt, **it is your duty to vote not guilty**." (RP 621) (Emphasis mine.) This court should not allow the use of the exact same wording as a sword when appellant is attempting to use the same wording as a shield. See for example State v. Contreras, 57 Wn. App. 471, 788 P.2d 1114 (1990).

> Even where a defendant's constitutional right is involved, the Washington courts have ensured that the shield of the Fifth Amendment does not become a sword against reasonable prosecutorial argument. In State v. Ashby, 77 Wn.2d 33, 38, 459 P.2d 403 (1969) (quoting State v. Litzenberger, 140 Wash. 308, 311, 248 P. 799 (1926)), the court stated:
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> > "Surely the prosecutor may comment upon the fact that certain testimony is undenied, without reference to who may or may not be in a position to deny it; and, if that results in an inference unfavorable to the accused, he must accept the burden, because the choice to testify or not was wholly his" . . ..
>
> (Footnotes omitted.)

There is no doubt that Appellant has a right to a trial by jury, this right is a fundamental right afforded to the citizens of this country and this State. State v. Strasburg, 60 Wash. 106, 115, 110 P. 1020 (Wash. 1910); Referring to the declaration of our Constitution that the right of trial by jury shall remain inviolate, this court in State ex rel. Mullen v. Doherty, 16 Wash. 382, 384, 47 P. 958, 959 (58 Am. St. Rep. 391), said: 'The effect of the declaration of the Constitution above set out is to provide that the right of trial by jury as it existed in the territory

at the time when the Constitution was adopted should be continued unimpaired and inviolate. Whallon v. Bancroft, 4 Minn. 109 [Gil. 70]: State ex rel. Clapp v. Minn. Thresher Mfg. Co., 40 Minn. 213, 41 N.W. 1020 [3 L. R. A. 510]; Taliaferro v. Lee, 97 Ala. 92, 13 So. 125.' This appears to be the rule generally recognized by the authorities. 24 Cyc. 102. See also, Scavenius v. Manchester Port Dist., 2 Wn. App. 126, 128, 467 P.2d 372 (1970) "The right to trial by jury has been held to be the right which existed at the time of the adoption of the constitution. State ex rel. Mullen v. Doherty, 16 Wash. 382, 47 P. 958 (1897); State v. Strasburg, 60 Wash. 106, 110 P. 1020 (1910); Garey v. Pasco, 89 Wash. 382, 154 P. 433 (1916); Theodore v. Washington Nat'l Inv. Co., 164 Wash. 243, 2 P.2d 649 (1931); Watkins v. Siler Logging Co., 9 Wn.2d 703, 116 P.2d 315 (1941)." See also The Bill of Rights, Amendment VI;

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence. (ratified December 15, 1791)

While the historical discussion of the right to a trial by jury is interesting the question is not whether this or any defendant has the right to a trial by jury, That is inviolate, rather the simple question posed by appellant Table is; Did the

court impermissibly interfere with that right when it charged the jury with an instruction, commonly known as the "to convict" instruction, which stated in part;

> 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.

The simple answer is NO. The court did not interfere with the appellant's right to a fair trial by jury. The law in this area is well settled. Jury instructions are sufficient if they correctly state the law, are not misleading, and allow the parties to argue their respective theories of the case. State v. Dana, 73 Wn.2d 533, 536-537, 439 P.2d 403 (1968). The trial court is granted broad discretion in determining the wording and number of jury instructions. Petersen v. State, 100 Wn.2d 421, 440, 671 P.2d 230 (1983). Discretion is abused when it is exercised on untenable grounds or for untenable reasons. State ex rel. Carroll v. Junker, supra. Appellant is entitled to an instruction on the defendant's theory of the case if the evidence supports the instruction. State v. Werner, 170 Wn.2d 333, 336, 241 P.3d 410 (2010). Failure to provide such an instruction is reversible error. See State v. Redmond, 150 Wn.2d 489, 495, 78 P.3d 1001 (2003). Generally, this court will review the adequacy of jury instructions de novo as a question of law. State v. Cross, 156 Wn.2d 580, 617, 132 P.3d 80 (2006).

Appellant argues that the "to convict" instructions were erroneous because the court informed the jury that it had a **duty** to convict if it found all of the elements of the crime beyond a reasonable doubt. Appellant cites State v. Meggyesy, 90 Wash.App. 693,958 P.2d 319, review denied, 136 Wash.2d 1028, 972 P.2d 465 (1998), overruled on other grounds by State v. Recuenco, 154 Wash.2d 156, 110 P.3d 188 (2005), in which Division One upheld an instruction similar to the one here. This court will review jury instructions de novo, and an instruction that contains an erroneous statement of the applicable law is reversible error when it prejudices a party. Cox v. Spangler, 141 Wash.2d 431, 442, 5 P.3d 1265, 22 P.3d 791 (2000). Jury instructions are sufficient when they allow counsel to argue their theories of the case, do not mislead the jury, and when taken as a whole, properly inform the jury of the law to be applied. Cox, 141 Wash.2d at 442, 5 P.3d 1265.

Appellant did not object to the instructions given. This portion of the challenged instruction was actually set forth in each of the instructions given including the lesser included instructions which include the fourth degree assault instruction which was proposed by the defendant him self. (Fourth degree assault RP 549, see also RP 546, 547, 548-9, 549, 551, 552)

The only objection to a "to convict" instruction was by the State regarding this same Fourth Degree Assault instruction based on the State's belief that this crime was not a lesser included instruction. (RP 549)

Tabler argues this is an issue of constitutional magnitude and yet he does not argue that this instruction error was a manifest constitutional error that can be raised for the first time on appeal under RAP 2.5(a). He does not address this problem at all in his brief. An instructional error not objected to below may be raised for the first time on appeal only if it is "manifest error affecting a constitutional right." RAP 2.5(a)(3); State v. Scott, 110 Wn.2d 682, 686-87, 757 P.2d 492 (1988). An error is manifest if it resulted in actual prejudice. State v. O'Hara, 167 Wn.2d 91, 98-99, 217 P.3d 756 (2009). To demonstrate actual prejudice, there must be a "'plausible showing by the [appellant] that the asserted error had practical and identifiable consequences in the trial of the case.'" Id. (quoting State v. Kirkman, 159 Wn.2d 918, 935, 155 P.3d 125 (2007)) (alteration in original).

Even assuming Appellant could invoke RAP 2.5(a), his argument has no merit. This case is controlled by State v. Brown, 130 Wash.App. 767, 124 P.3d 663 (2005), in which this court rejected that argument that it was an error to instruct the jury that it has a duty to convict if it found all elements beyond a reasonable doubt. Brown, 130 Wash.App. at 770-771, 124 P.3d 663,. Following Brown, this court should hold the instruction in this case was not an error.

Appellant argues that juries have the power to acquit, even if the not-guilty verdict is contrary to the law and the evidence. He acknowledges that a court need not inform jurors of this power. However, he argues that an instruction

telling the jurors that they *could not* acquit if the elements have been established affirmatively. He then states "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." Appellant's Br. at 19-20. He argues that the factors identified in State v. Gunwall, 106 Wash.2d 54, 61-62, 720 P.2d 808 (1986), demonstrate that article I, sections 21 and 22 of the Washington Constitution prohibit a trial court from affirmatively misleading a jury about its power to acquit.

Appellant objects to the trial court's instruction to the jurors that it was their "duty" to accept the law and that it was their "duty" to convict if the elements were proved beyond a reasonable doubt. He claims that using the word "duty" meant that the jury could not acquit if the elements had been established.

Both Division One and Division Two have rejected this argument. *See* State v. Meggyesy, 90 Wash.App. 693, 699-700, 958 P.2d 319 (1998), *overruled on other grounds*, State v. Recuenco, 154 Wash.2d 156, 110 P.3d 188 (2005) *overruled by* Wash. v. Recuenco, --- U.S. ----, 126 S.Ct. 2546, 165 L.Ed. 2d 466 (2006); State v. Bonisisio, 92 Wash.App. 783, 794, 964 P.2d 1222 (1998). Meggyesy and Bonisisio both held that altering the instructions to tell the jury it "may" convict is equivalent to notifying the jury of its power to acquit against the evidence. Meggyesy, 90 Wash.App. at 699-700, 958 P.2d 319; Bonisisio, 92 Wash.App. at 794, 964 P.2d 1222.

There is no meaningful difference between Appellant's arguments nor those raised in Brown and issues raised in Bonisisio and Meggyesy. The Meggyesy court, although addressing a slightly different argument, held that instructing the jury it had a "duty" to convict if it found the elements were proved beyond a reasonable doubt did not misstate the law. Meggyesy, 90 Wash.App. at 700-01, 958 P.2d 319. Further, in Bonisisio, 92 Wash.App. at 794, 964 P.2d 1222, the court held that the trial court did not err in instructing the jury that it had a duty to convict if it found that the State had proved all the elements beyond a reasonable doubt. Further, the purpose of a jury instruction is to provide the jury with the applicable law to be applied in the case. State v. Borrero, 147 Wash.2d 353, 362, 58 P.3d 245 (2002). The power of jury nullification is not an applicable law to be applied in a second degree burglary case. The court stated "We reject Brown's argument that the court erred in giving the "duty" instruction." Brown, 130 Wash.App. at 771, 124 P.3d 663.

This court should reject Appellant's constitutional arguments. The court in Meggyesy applied the six-step analysis set forth in *Gunwall* and found no independent state constitutional basis to invalidate the challenged instructions. Meggyesy, 90 Wash.App. at 703-04, 958 P.2d 319.

There is no difference between the instruction offered in this case and that addressed in the cases cited above. There is no factual basis presented by Appellant which would or should cause this Court to reconsider the findings of

Meggyesy and those cases which came after. The reasoning of Meggyesy is sound and should not be changed, especially based on the facts of this case.

V. CONCLUSION

The State concedes the issues regarding the imposition of legal financial obligations as well as the sentencing issue. The remaining assignment of error raised in this appeal is factual in nature, well within the trial courts discretion, or clearly controlled by settled law. The actions of the trial court should be upheld, the State's Motion on the Merits should be granted, and this appeal should be dismissed with regard to the one remaining issue.

Respectfully submitted this 18th day of May 2013

s/ David B. Trefry

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DECLARATION OF SERVICE

I, David B. Trefry, state that on May 18, 2013, be agreement of the parties, I emailed a copy of the State Motion on the Merits and Extension of time to: Susan Gasch at gaschlaw@msn.com and by United States mail to, Patrick Roy Tabler DOC #888912, Coyote Ridge Corrections Center, P.O. Box 769, Connell, WA 99362-0769

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 18th day of May, 2013 at Spokane, Washington.

s/ David B. Trefry
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