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FILED
Oct 23, 2013
Court of Appeals
Division III
State of Washington

Supreme Court No. _____
Court of Appeals No. 30750-6-III

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Plaintiff/Respondent,

vs.

PATRICK ROY TABLER,
Defendant/Petitioner.

FILED
OCT 30 2013
CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

APPEAL FROM THE YAKIMA COUNTY SUPERIOR COURT
Honorable Robert Lawrence-Berrey, Judge

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER.

Petitioner, Patrick Roy Tabler, the defendant/appellant below, asks this Court to accept review of the following Court of Appeals' decision terminating review.

II. COURT OF APPEALS DECISION.

Mr. Tabler seeks review of the Division Three, Court of Appeals' Commissioner's Ruling filed July 2, 2013, which affirmed his convictions. A copy of the Commissioner's Ruling is attached hereto as **Appendix A**. A copy of the Order Denying Motion to Modify the Commissioner's Ruling filed September 23, 2013, is attached as **Appendix B.** This petition for review is timely.

III. ISSUE PRESENTED FOR REVIEW.

As a matter of first impression, in a criminal trial does a "to-convict" instruction, which affirmatively 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?

IV. STATEMENT OF THE CASE.

A jury found the defendant, Patrick Roy Tabler, guilty of attempted first degree assault, possession of a stolen motor vehicle and second degree unlawful possession of a firearm. CP 172; 3/27/12 RP 643–44. The jury was given "to convict" instructions containing the language, "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." CP 104, 116, 121; *see* WPICs 35.02, 77.21, 100.02, 133.02.02. The instructional language is taken from the criminal WA pattern jury instructions. 11 Washington Practice: Washington Pattern Jury Instruction: Criminal (3d ed. 2008).

On appeal, the Commissioner found the analysis of Divisions One and Two of the Court of Appeals in Meggyesy[1] and Brown[2] "persuasive", and granted the State's motion on the merits to affirm. *Slip Opinion* at 2, 4. The Commissioner agreed with the Meggyesy Court that the alternative language proposed by Mr. Meggyesy—"you **may** return a verdict of guilty"—was an impermissible instruction notifying the jury of its power to acquit against the evidence. *Slip Opinion* at 2–3. The Commissioner

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[1] 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).

[2] State v. Brown, 130 Wn.App. 767, 124 P.3d 663 (2005).

assumed without analysis that Mr. Tabler's challenge to the instruction is was the "same" as that in Meggyesy. Id.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. This Court should accept review to determine whether a constitutional infirmity exists.

Petitioner believes this court should accept review of this issue because, as a matter of first impression, the decision of the Court of Appeals involves significant questions of law under the Constitution of the United States and state constitution (RAP 13.4(b)(3)), and/or involves issues of substantial public interest that should be determined by the Supreme Court (RAP 13.4(b)(4)).

This appeal challenges the constitutionality of a criminal jury instruction. The standard language of the "to convict" instruction, "[i]f 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", is found in 11 Washington Practice: Washington Pattern Jury Instruction: Criminal ("WPIC") (3d ed. 2008), and is used in virtually every criminal "to convict" jury instruction. However, WPICs are not the law; they are merely persuasive authority. State v. Mills, 116 Wn. App. 106,

116 n. 24, 64 P.3d 1253 (2003), *rev'd on other grounds by* 154 Wn.2d 1, 109 P.3d 415 (2005).

As argued below, telling jurors they have a *duty* to return a verdict of guilty if the state proves its case beyond a reasonable doubt is an incorrect statement of the law. Instructions must properly inform the jury of the applicable law and not mislead the jury. State v. Bennett, 161 Wn. 2d 303, 307, 165 P.3d 1241, 1243 (2007), *citing* State v. LeFaber, 128 Wn.2d 896, 903, 913 P.2d 369 (1996). This Court has not previously addressed whether the challenged language correctly states the law. This Court also has a supervisory role to ensure uniform and constitutionally valid "to convict" instructions in all criminal trials in Washington. If, as in this case, a party challenges constitutionality of the directive of the instruction but is turned away without addressing the merits, this Court's powers to determine constitutional infirmity and/or exercise inherent supervision are unavailable and illusory. Furthermore, as this Court noted in State v. Scott, 110 Wn.2d 682, 757 P.2d 492 (1988), "Constitutional errors are treated specially because they often result in serious injustice to the accused. Such errors also require appellate court attention because they may adversely affect the public's perception of the fairness and

integrity of judicial proceedings." Scott, 110 Wn.2d at 686–87 (citations omitted).

For all these reasons, this Court should accept review of the issue, and reverse Mr. Tabler's convictions.

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

The "to-convict" instructions in this case contained the directive, "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." This is standard language from the pattern instructions. Mr. Tabler contends there is no constitutional "duty to convict" and that the instruction accordingly misstates the law. The instruction violated Mr. Tabler's' right to a properly instructed jury.[3]

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

[3] Division One of the Court of Appeals peripherally 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). As discussed *infra* counsel respectfully contends Meggyesy did not address the precise issue and/or was incorrectly decided.

(2011). Jury instructions are reviewed *de novo*. State v. Bennett, 161 Wn.2d at 307. 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). The elements instruction given in this case affirmatively misled the jury to conclude it was without power to nullify, therefore, it was improper. *E.g.*, State v. Vander Houwen, 163 Wn.2d 25, 29, 177 P.3d 93 (2008) (explaining that jury instructions are improper if they mislead the jury). Moreover, because this error occurred in the elements instruction, which is the "yardstick" by which the Jury measures a defendant's guilt or innocence, the error directly prejudiced Mr. Tabler's right to a fair trial and, thus, constituted a manifest constitutional error.

b. The United States Constitution. 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).

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).

All six Gunwall factors favor an independent application of Article I, Sections 21 and 22 of the Washington Constitution in this case. Petitioner hereby incorporates his analysis of all Gunwall factors, Brief of Appellant at 8–14. 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); State v. Holmes, 68 Wash. 7, 12-13, 122 Pac. 345 (1912). 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).

And, a jury verdict of not guilty is non-reviewable because 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.[4]

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 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).

Thus, 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

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

> 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 v. Washington Territory, 1 Wash.Terr. 447 (1874). 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 regarding 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. *See also* 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, there is no corresponding constitutional "duty" requiring a jury to return a verdict of guilty if it finds every element proven beyond a reasonable doubt. In such a case, the law is that the jury should find the defendant guilty or may exercise its prerogative to acquit against the evidence. To tell a jury instead that it has a "duty" to return a verdict of guilty if it finds every element of a crime proven beyond a reasonable doubt is a misstatement of the applicable law.

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 v. Territory:

> 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 v. Territory, 2 Wash.Terr. 381,399, 7 Pac. 872 (Wash.Terr.1885) (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. The language of the special verdict instruction 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" instructions at issue here do not reflect this legal asymmetry. The instructions are not a correct statement of the

law. As such, they provide 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.[5] 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

[5] A decision is incorrect if the authority on which it relies does not support it. State v. Nunez, 174 Wn.2d 707, 719, 285 P.3d 21 (2012).

(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.

Petitioner respectfully submits the Meggyesy analysis addressed a different issue. "Duty" is the challenged language herein. By focusing on 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 that this 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.[6, 7] These concepts support Mr. Tabler's position and do not contradict the arguments set forth herein.

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).

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[6] 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.").

[7] 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: ..."

Unlike the appellant in Meggyesy,[8] Mr. Tabler 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 concluded there was "no meaningful difference" between the two arguments. State v. Brown, 130 Wn. App. 767, 771, 124 P.3d 663 (2005). Meggyesy and its progeny should be reconsidered, and the issue should be analyzed on its merits.

h. The court's instruction in this case affirmatively misled the jury about its power to acquit even if the prosecution proved its case beyond a reasonable doubt. The instructions given in Mr. Tabler'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 as instructed, and that it was their "duty" to convict the defendant if the elements were proved beyond a reasonable doubt. Instruction Nos. 1, 14, 26 and 31 at CP 89, 104, 116 121. 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"

[8] And the appellant in Bonisisio.

instructions 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, and failed to make the correct legal standard manifestly apparent to the average juror. Leonard, *supra*[9]; 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 instructions creating a "duty" to return a verdict of guilty was an incorrect statement of law. The error violated Mr. Tabler's state and federal constitutional right to a jury trial. Accordingly, his convictions must be reversed and the case remanded for a new trial. Hartigan, *supra.*

[9] 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. 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. 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. Id.

VI. CONCLUSION.

For the reasons stated, Petitioner asks this Court to reverse and remand the matter for a new trial.

Respectfully submitted on October 23, 2013.

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PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on October 23, 2013, 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 Mr. Tabler's petition for review and Appendices A and B:

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CASE # 307506
State of Washington v. Patrick Roy Tabler
YAKIMA COUNTY SUPERIOR COURT No. 101018943

Counsel:

Enclosed is your copy of the Commissioner's Ruling, which was filed by this Court today.

If objections to the ruling are to be considered (RAP 17.7), they must be made by way of a Motion to Modify filed in this Court within 30 days from the date of this ruling (**August 1, 2013**). Please file the original with one copy; serve a copy upon the opposing attorney and file proof of such service with this office.

If a motion to modify is not timely filed, appellate review is terminated.

Sincerely,

Renee S. Townsley

Renee S. Townsley
Clerk/Administrator

RST:jcs
Encl.

E-Mail
c: Honorable Robert E. Lawrence-Berrey, Superior Court Judge

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The Court of Appeals

of the

State of Washington

Division III

FILED

JUL -2 2013

COURT OF APPEALS
DIVISION III

STATE OF WASHINGTON,	)	No. 30750-6-III
	)	
Respondent,	)	
	)	
v.	)	COMMISSIONER'S RULING
	)	
PATRICK ROY TABLER,	)	
	)	
Appellant.	)	
	)	

Patrick Roy Tabler appeals the Yakima County Superior Court's March 27, 2012 judgment and sentence, which the court entered on a jury verdict that found that he had committed attempted first degree assault, possession of a stolen motor vehicle, and second degree unlawful possession of a firearm.

Mr. Tabler contends that the court's instruction that advised the jury that it had a "duty to return a verdict of guilty" if it found the State had proved the elements of the

offenses beyond a reasonable doubt, violated his State and federal constitutional rights to trial by jury. Specifically, Mr. Tabler asserts that the instruction is contrary to the jury's prerogative to acquit against the evidence.

The State moves on the merits to affirm Mr. Tabler's convictions. It points out that Divisions One and Two of the Court of Appeals have rejected the argument that Mr. Tabler makes here. *See State v. Brown*, 130 Wn. App. 767, 124 P.3d 663 (2005); *State v. Bonissio*, 92 Wn. App. 783, 964 P.2d 1222 (1998); and *State v. Meggyesy*, 90 Wn. App. 693, 958 P.2d 319 (1998), *overruled on other grounds in State v. Recuenco*, 154 Wn.2d 156, 110 P.3d 188 (2005).

The analysis of the foregoing cases is persuasive. As set forth most recently in *Brown,* 130 Wn. App. at 771, "the purpose of a jury instruction is to provide the jury with the applicable law to be applied in the case. The power of jury nullification is not an applicable law to be applied in a second degree burglary case." (Citation omitted.)[1]

Indeed, to instruct the jury that it "may" convict if it finds the State proved its case beyond a reasonable doubt is equivalent to an instruction to the jury that it has the power to acquit against the evidence, something no other court has permitted. As stated in

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[1] Mr. Tabler's reliance on *State v. Smith*, - Wn.3d -, 298 P.3d 785, 790-91, is not well-founded. The question there – whether an instruction that advised the jury that it "should" acquit, rather than "must" acquit, if it finds that the State has not proved the elements of the charged offense beyond a reasonable doubt – is entirely different from the question here. A jury has no other option *under the law* than to acquit if the State fails in its burden of proof. But, as the court in *Brown*, 130 Wn. App. at 771, held, "[t]he power of jury nullification is not an *applicable law*." (Emphasis added.)

Meggyesy, 90 Wn. App. at 699-700, "the law among the [federal] circuit courts is clear that an accused is not entitled to a jury nullification instruction. This is so notwithstanding the courts' recognition that juries have the power to ignore the law in reaching their verdicts." *See United States v. Edwards*, 101 F.3d 17, 19 (2d Cir.1996) ("While juries have the power to ignore the law in their verdicts, courts have no obligation to tell them they may do so. It appears that every circuit that has considered this issue agrees."); *United States v. Powell*, 955 F.2d 1206, 1212 (9th Cir.1991); and *United States v. Krzyske*, 836 F.2d 1013 (6th Cir.), cert. denied, 488 U.S. 832, 109 S.Ct. 89, 102 L.Ed.2d 65 (1988).

Therefore, the *Meggyesy* court at 700 rejected the appellants' argument that "a request for an instruction that the jury 'may' convict on the evidence (but need not do so) should be distinguished from a request for an instruction on jury nullification." The court discerned "no difference in practical effect between the instruction appellants requested and one expressly permitting 'jury nullification,' as those words are generally understood." *Id.*

The State concedes the remaining two issues that Mr. Tabler raises. I.e, Mr. Tabler challenges, as unsupported, the superior court's finding that he has the current or future ability to pay legal financial obligations, which include costs of incarceration and medical care. And, the sentence does not clearly state that Mr. Tabler's term of community custody, when added to the portion of his sentence that he serves in

confinement, cannot exceed the statutory maximum for attempted first degree assault.

Therefore, this Court remands Mr. Tabler's judgment and sentence to the superior court to (1) strike its findings set forth at 2.7 and 4.D.5 of the judgment, and (2) clarify that the combined sentence of confinement and community custody shall not exceed the statutory maximum. Accordingly,

IT IS ORDERED, the State's motion on the merits is granted to the extent that Mr. Tabler's convictions are affirmed. The case is remanded to the superior court for action as set forth in the preceding paragraph of this ruling.

July 2, 2013

Monica Wasson
Commissioner

Renee S. Townsley
Clerk/Administrator

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Court of Appeals
Division III
State of Washington

September 23, 2013

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CASE # 307506
State of Washington v. Patrick Roy Tabler
YAKIMA COUNTY SUPERIOR COURT No. 101018943

Counsel:

Enclosed is a copy of the Order Denying Motion to Modify the Commissioner's Ruling of

A party may seek discretionary review by the Supreme Court of the Court of Appeals' decision. RAP 13.4(a). A party seeking discretionary review must file a Petition for Review in the Court of Appeals within 30 days after this Court's Order Denying Motion to Modify (may be filed by electronic facsimile transmission). Please serve a copy upon the opposing party and provide proof of such service.

Sincerely,

Renee S Townsley

Renee S. Townsley
Clerk/Administrator

RST:sh

c: Patrick Roy Tabler
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FILED
SEPTEMBER 23, 2013
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON,	)	
	)	No. 30750-6-III
Respondent,	)	
	)	
v.	)	
	)	ORDER DENYING
PATRICK ROY TABLER,	)	MOTION TO MODIFY
	)	COMMISSIONER'S RULING
Appellant.	)	

Having considered appellant's motion to modify the commissioner's ruling of July 2, 2013, and the record and file herein;

IT IS ORDERED the motion to modify the commissioner's ruling is denied.

PANEL: Judges Korsmo, Brown, Siddoway

DATED: September 23, 2013

FOR THE COURT:

KEVIN M. KORSMO
Chief Judge