Supreme Court No. 90051-5
COA No. 69766-8-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

RYAN PATRICK MOORE,

Petitioner.

PETITION FOR REVIEW

MAUREEN M. CYR
Attorney for Petitioner

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

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A. IDENTITY OF PETITIONER/DECISION BELOW

Ryan Patrick Moore requests this Court grant review pursuant to RAP 13.4 of the published-in-part decision of the Court of Appeals in State v. Moore, No. 69766-8-I, filed February 18, 2014. A copy of the opinion is attached as an appendix.

B. ISSUE PRESENTED FOR REVIEW

In a criminal trial, does a "to-convict" instruction that informs the jury that it has a duty to return a verdict of guilty if it finds the elements have been proved 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? Does the case present a significant question of constitutional law?

C. STATEMENT OF THE CASE

Mr. Moore was charged with one count of bail jumping, RCW 9A.76.170(1). CP 36; 12/07/12RP 2.

At trial, the jury was instructed:

> It is your duty to decide the facts of this case based upon the evidence presented to you during this trial. It also is your duty to accept the law from my instructions, regardless of what you personally believe the law is or what you personally think it should be. You must apply the law from my instructions to the facts that you decide have been proved, and in this way decide the case.

CP 26. In addition, the "to-convict" jury instruction stated:

> To convict the defendant of the crime of bail jumping, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about the 10th day of August, 2012, the defendant failed to appear before a court;
>
> (2) That at that time and in that court, the defendant was charged with Possession of a Stolen Vehicle;
>
> (3) That the defendant had been released on that charge by court order with knowledge of the requirement of the subsequent personal appearance before that court; and
>
> (4) That these acts 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 of 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 32 (emphasis added).

The jury found Mr. Moore guilty of bail jumping as charged. CP 3, 24.

On appeal, Mr. Moore argued the jury instruction violated his constitutional right to a jury trial because it erroneously informed the jury it had a "duty" to convict if it found the elements of the crime had been proved. The Court of Appeals affirmed. Slip Op.

D. ARGUMENT WHY REVIEW SHOULD BE GRANTED

WHETHER MR. MOORE WAS DENIED HIS CONSTITUTIONAL RIGHT TO A JURY TRIAL BECAUSE THE "TO-CONVICT" INSTRUCTION TOLD THE JURY THAT IT HAD A "DUTY TO RETURN A VERDICT OF GUILTY" IF IT FOUND EACH ELEMENT PROVED BEYOND A REASONABLE DOUBT PRESENTS A SIGNIFICANT QUESTION OF CONSTITUTIONAL LAW

The right to a jury trial in a criminal case is one of the few guarantees of individual rights enumerated in the United States Constitution of 1789. It is the only guarantee to appear in both the original document and the Bill of Rights. U.S. Const. art. 3, ¶ 3; U.S. Const. amends. VI, VII.

In criminal trials, the right to a 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 a crime, but was also an allocation of political power to the citizenry:

> the 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, 391 U.S. at 156.

In Washington, citizens enjoy an even stronger guarantee to a jury trial. State v. Williams-Walker, 167 Wn.2d 889, 896, 225 P.3d 913 (2010). Because this Court has already determined that the state constitution provides greater protection for jury trials than the federal constitution in some circumstances, a full Gunwall[1] analysis is no longer necessary to determine whether a claim under article I, section 21 warrants an inquiry on independent state grounds. Id. at 896 n.2. The question instead is "whether the unique characteristics of the state constitutional provision and its prior interpretations actually compel a particular result" under the circumstances of the case. State v. Pugh, 167 Wn.2d 825, 835, 225 P.3d 892 (2009). To answer the question, the Court "examine[s] the constitutional text, the historical treatment of the interest at stake as disclosed by relevant case law and statutes, and the current implications of recognizing or not recognizing an interest." Id.

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[1] State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986).

The text of Washington's constitution is different from the federal constitution, suggesting the drafters meant something different from the 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). 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).

The Sixth Amendment to the United States Constitution provides that "[i]n 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." In comparison, the drafters of our state constitution not only granted the right to a jury trial, in article I, section 22 ("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 . . . "), they expressly declared it "shall remain inviolate." Const. art. I, § 21. The term "inviolate" has been interpreted to mean:

> 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 assaults to its essential guarantees.

Sofie v. Fibreboard Corp., 112 Wn.2d 636, 656, 771 P.2d 711 (1989).

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

Additionally, the framers added other constitutional protections to this right. The right to jury trial is protected by the Due Process Clause of article I, section 3. Also, a court is not permitted to convey to the jury its own impressions of the evidence. Const. art. IV, § 16 ("Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law."). Even a witness may not invade the province of the jury. State v. Black, 109 Wn.2d 336, 350, 745 P.2d 12 (1987).

In State v. Meggyesy, 90 Wn. App. 693, 701, 958 P.2d 319, review denied, 136 Wn.2d 1028 (1998), abrogated on other grounds by State v. Recuenco, 154 Wn.2d 156, 110 P.3d 188 (2005), Division One concluded there is no constitutional language that specifically addresses

how the jury must be instructed. But the language that is present indicates the right to a jury trial is so fundamental that any infringement violates the constitution.

State common law history also supports the conclusion that the jury instruction was unconstitutional. 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, 98 Wn.2d at 96. 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 P. 872 (Wash. Terr. 1885). In Leonard, the trial court had 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, 2 Wash. Terr. at 398-99. The word "should" in jury instructions is permissive, while the word "must" indicates a mandatory duty. State v. Smith, 174 Wn. App. 359, 366-67, 298 P.3d 785 (2013). Thus, the common law practice was to instruct the jury that they were *required* to acquit upon a failure of proof, and were *permitted* to acquit even if the proof was sufficient. Leonard, 2 Wash. Terr. at 398-99.

Meggyesy attempted to distinguish Leonard on the basis that the Leonard court "simply quoted the relevant instruction." Meggyesy, 90 Wn. App. at 703. But Leonard shows that, 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.

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 (1986), aff'd, 110 Wn.2d 403, 736 P.2d 105 (1988) ("In a jury trial the determination of guilt or innocence is solely within the province of the jury under proper instructions."); see also State v. Christiansen, 161 Wash. 530, 534, 297 P. 151 (1931) ("In our opinion the denial to a jury of the right and power to bring in a verdict of acquittal in a criminal case is to effectually deny to the one being tried the right of trial by jury."); State v. Holmes, 68 Wash. 7, 13, 122 P. 345 (1912) (trial court may not, directly or indirectly, direct verdict of guilty in criminal case). This rule applies even if the jury ignores applicable law. See, e.g., Hartigan v. Washington Territory, 1 Wash. Terr. 447, 449 (1874) ("the 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").[2]

The jury's power to acquit is substantial and the jury has no duty to return a verdict of guilty. As shown below, 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, so there can be no "duty to return a verdict of guilty."

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 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 a fair 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); 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).

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

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. V; Const. art. I, § 9. 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 their verdicts. See generally, Albert W. Alschuler & Andrew G. Deiss, A Brief History of the Criminal Jury in the United States, 61 U. Chi. L. Rev. 867, 912-13 (1994).

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, 449 (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 and is therefore erroneous. State v. Kyllo, 166 Wn.2d 856, 864, 215 P.3d 177 (2009).

This is not to say there is a right to instruct the jury that it may disregard the law in reaching its verdict. That was the concern of this Court in affirming the jury instructions at issue in State v. Brown, 130 Wn. App. 767, 771, 124 P.3d 663 (2005) ("The power of jury nullification is not an applicable law to be applied in a second degree burglary case."). But although a court may not affirmatively tell a jury that it may disregard the law, it also may not instruct the jury that it *must* return a verdict of guilty if it finds certain facts to be proved.

Moreover, if such a "duty" to convict exists, the law lacks any method of enforcing it. If a jury acquits, the case is over, the charge is dismissed, and there is no further review. In contrast, if a jury convicts

when the evidence is insufficient, the court has a legally enforceable obligation 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). 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; but it *may* return a verdict of guilty even if it finds every element proven beyond a reasonable doubt.

The duty to acquit and permission to convict is well-reflected in the instruction given to the jury 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 (emphases added). This was the law as given to the jury in this murder trial in 1885, just four years before the adoption of the Washington Constitution. This practice of allocating power to the jury "shall remain inviolate." Const. art. I, § 21.

The Washington Pattern Jury Instruction Committee has adopted accurate language consistent with Leonard for considering a special verdict:

> In order to answer the special verdict form[s] "yes," you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you unanimously agree that the answer to the question is "no," or if after full and fair consideration of the evidence you are not in agreement as to the answer, you must fill in the blank with the answer "no."

WPIC 160.00. 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 at the same time, it does not impose 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. 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, 2 Wash. Terr. at 398-99; State v. Boogard, 90 Wn.2d 733, 737-38, 585 P.2d 789 (1978) (holding questioning of individual jurors in presence of other jurors, with respect to each juror's opinion

regarding jury's ability to reach verdict within a half hour, unavoidably tended to suggest to minority jurors that they should "give in" for sake of goal of reaching verdict within a half hour, thus depriving defendant of his constitutional right to fair and impartial jury trial).

"The right to a fair and impartial jury trial demands that a judge not bring to bear coercive pressure upon the deliberations of a criminal jury." Boogard, 90 Wn.2d at 736-37. The judge may not pressure the jury into making a decision. If there is no ability to review a verdict of acquittal, no authority to direct a verdict of guilty or coerce a jury in its decision, there can be no "duty to return a verdict of guilty."

Although the jury may not strictly determine what the law is, nonetheless it has a role in applying the law of the case that goes beyond mere fact-finding. In United States v. Gaudin, the Court rejected limiting the jury's role to merely finding facts. Historically, the jury's role has never been so limited.

> Juries at the time of the framing [of the Constitution] could not be forced to produce mere "factual findings," but were entitled to deliver a general verdict pronouncing the defendant's guilt or innocence.

515 U.S. at 513. "[T]he jury's constitutional responsibility is not merely to determine the facts, but to apply the law to those facts and draw the ultimate conclusion of guilt or innocence." Id. at 514.

Meggyesy does not analyze the issue presented here. In Meggyesy, Division One held the federal and state constitutions did not "preclude" this language and so it affirmed. Meggyesy, 90 Wn. App. at 696. In its analysis, the court 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 concluded there was no legal authority requiring the trial court to instruct a jury that it had the power to acquit against the evidence.

Meggyesy's analysis addressed a different aspect of the issue than is presented here. "Duty" is the challenged language here. By focusing on the proposed remedy, Meggyesy side-stepped the underlying issue raised by the 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.

Portions of the Meggyesy decision are relevant, however. The opinion 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 verdicts. But the power to acquit does not require any instruction telling the jury that it may do so." Id. at 700 (citations 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. Id. at 698-99 nn. 5, 6, 7. These concepts support Mr. Moore's position and do not contradict the arguments set forth here.

But Meggyesy ultimately looked at the issue through the wrong lens. The question is not whether the court is required to tell the jury it may acquit despite finding each element has been proved 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 that it does. An instruction that says the jury has such a duty impermissibly directs a verdict. See Sullivan v. Louisiana, 508 U.S. 275, 277, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993) (judge may not direct verdict for State, no matter how overwhelming the evidence).

Unlike the appellant in Meggyesy, Mr. Moore 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 Meggyesy; thus the holding of Meggyesy should not govern here.

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 instructions 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 return a verdict of guilty if they found the elements were proved beyond a reasonable doubt. CP 32. The court's use of the word "duty" in the "to-convict" instruction conveyed to the jury it could not acquit if the elements had been established. Smith, 174 Wn. App. at 366-67. 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. Kyllo, 166 Wn.2d at 864.

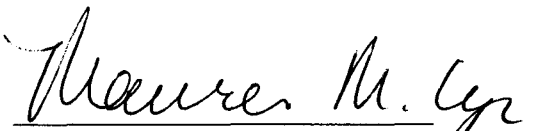
By instructing the jury it had a duty to return a verdict of guilty based merely on finding certain facts, the court took away from the jury its constitutional authority to apply the law to the facts to reach its general verdict. The instruction creating a "duty" to return a verdict of guilty was an incorrect statement of law. The error violated Mr.

Moore's state and federal constitutional right to a jury trial.[3] Accordingly, his conviction must be reversed and the case remanded for a new trial with proper instructions.[4]

E. CONCLUSION

Because Mr. Moore was denied his constitutional right to a jury trial when the jury was instructed it must convict if it found the elements beyond a reasonable doubt, this Court should grant review, reverse the conviction and remand for a new trial with proper instructions.

Respectfully submitted this 19th day of March, 2014.



MAUREEN M. CYR (WSBA 28724)
Washington Appellate Project - 91052
Attorneys for Appellant

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[3] Mr. Moore may challenge this manifest constitutional error in the jury instructions for the first time on appeal. See State v. O'Hara, 167 Wn.2d 91, 100-01, 217 P.3d 756 (2009); RAP 2.5(a).

[4] Erroneously instructing the jury that it must convict if it finds the elements beyond a reasonable doubt is structural error. See Smith, 174 Wn. App. at 790-91; United States v. Gonzalez-Lopez, 548 U.S. 140, 149, 126 S. Ct. 2557, 165 L. Ed. 2d 409 (2006) (denial of right to trial by jury by giving defective reasonable doubt instruction is structural error); Sullivan, 508 U.S. at 277.

APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. RYAN PATRICK MOORE, Appellant.	)	No. 69766-8-I DIVISION ONE PUBLISHED IN PART OPINION FILED: February 18, 2014

APPELWICK, J. — The "to convict" instruction informed the jury that, if it found each element proved beyond a reasonable doubt, it had the duty to convict. This instruction does not violate a defendant's constitutional right to jury trial. It neither misstates the law nor invades the province of the jury. We affirm.

DISCUSSION

At Ryan Moore's trial,[1] the to convict instruction informed the jury that:

> 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 of 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.

(Emphasis added.) Moore argues that the instruction violated his constitutional right to a jury trial.

We thought that this issue was resolved.[2] Each division of this court has addressed similar challenges to the same instruction Moore contests here. And, in

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[1] Moore was convicted of bail jumping. The facts are not significant to this issue and are set out in the unpublished section of this opinion.

[2] In fact, this case is only one of many recent appeals making this challenge to the same jury instruction.

each case, the court upheld the instruction. See State v. Meggyesy, 90 Wn. App. 693, 706, 958 P.2d 319 (1998)[3] (Division One); State v. Brown, 130 Wn. App. 767, 771, 124 P.3d 663 (2005) (Division Two); State v. Wilson, 176 Wn. App. 147, 151, 307 P.3d 823 (2013) (Division Three), review denied, ___ Wn.2d ___, 316 P.3d 495 (2014).

In Meggyesy, the appellants argued that a proper instruction informing the jury that it may convict if the State proved all elements of the crime. 90 Wn. App. at 697. We rejected their argument, holding that the trial court is not required to instruct the jury that it may acquit.[4] Id. at 700. Though much of our analysis focused on the impropriety of such an instruction, we explicitly approved the "duty to convict" language and found that it did not misstate the law or invade the province of the jury. Id. at 700-01. We held that neither the federal nor the state constitution prohibits instructing the jury on its duty to convict. Id. at 698.

Brown and Wilson subsequently agreed with Meggyesy, despite the appellants' attempts to distinguish their challenges. Brown argued that he raised a different issue, because he directly challenged the "duty" language, rather than ask the court to instruct the jury that it "may" convict. 130 Wn. App. at 770-71. The Brown court did not find this distinction meaningful: "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

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[3] abrogated on other grounds by State v. Recuenco, 154 Wn.2d 156, 110 P.3d 188 (2005), reversed by Washington v. Recuenco, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006)

[4] This instruction is also referred to as a jury nullification instruction. See Meggyesy, 90 Wn. App. at 699-700. Jury nullification "occurs when the defendant's guilt is clear beyond a reasonable doubt, but the jury, based on its own sense of justice or fairness, decides to acquit." Andrew D. Leipold, Rethinking Jury Nullification, 82 VA. L. REV. 253 (1996).

were proven beyond a reasonable doubt did not misstate the law." Id. at 771. Wilson argued that, under Washington law, juries never have a duty to convict and that the instruction violated the Washington Constitution. 176 Wn. App. at 150. The court declined to reconsider the issue, noting that the appellant "raises the same challenge as in Brown and uses the same constitutional arguments set forth in Meggyesy." Id. at 151. On January 7, our Supreme Court denied review in Wilson.

Moore does not contest Meggyesy's holding that an instruction on the jury's power to acquit would be improper. Instead, he argues—much like Brown and Wilson—that he raises a distinct issue, because he directly challenges the "duty to convict" language. Moore maintains that the law never requires the jury to find a defendant guilty. Accordingly, he contends that the instruction misstated the law and misled the jury about its power to acquit against the evidence.

By statute, every juror must swear or affirm to uphold and follow the law:

> When the jury has been selected, an oath or affirmation shall be administered to the jurors [that they] will well, and truly try, the matter in issue between the plaintiff and defendant, and a true verdict give, according to the law and evidence as given them on the trial.

RCW 4.44.260.[5] Far from misleading the jury, the challenged instruction tracks the juror's oath. The jury's duty to uphold the law has existed in Washington since the state was a territory. See Hartigan v. Territory, 1 Wash. Terr. 447, 451 (1874). In Hartigan, the court approved the juror's oath, stating that it is the jury's duty to accept the law "as given them by the court." Id. at 449, 451. The court recognized that, if the jury returned

[5] "The jury shall be sworn or affirmed well and truly to try the issue between the Sate and the defendant, according to the evidence and instructions by the court." CrR 6.6.

a verdict contrary to law, there was no remedy. Id. at 449. However, it concluded that a juror is "just as much bound by the laws of this territory as any other citizen. He acquires no right to disregard that law simply because he has taken an oath as juryman to aid in its administration." Id. at 451 (emphasis added).

In Leonard v. Territory, 2 Wash. Terr. 381, 399, 7 P. 872 (1885), the territorial court also considered a challenge to a to convict instruction that, in part, told the jury it "may" return a guilty verdict if the prosecution proved its case, but "must" acquit in the absence of such proof. However, this particular language was not the subject of the appellant's challenge and the court did not analyze or endorse this language. See id. at 399-401. The language demonstrates that, in prestatehood, the jury may have been instructed without the duty to convict. See id. at 399. But, this does not mean that the jury lacks a duty to uphold the law. The same opinion affirmed the decision in Hartigan that the jurors have a duty to follow the law as given them in the instructions. Id. at 395. In light of that duty, the language that the jury "may" convict merely parallels its true converse: that the jury may not convict without every element proved beyond a reasonable doubt. This does not erase the jury's duty to follow the law.

The jury has the ability to acquit against the evidence. But, it does not have the right to do so. See Meggyesy, 90 Wn. App. at 700. The court is not obligated to instruct the jury about that ability. Id. And, the court's lack of remedy against nullification is not because the jury lacks a duty to uphold the law. See Hartigan, 1 Wash. Terr. at 451. The court does not inquire into the jury's verdict out of respect for our judicial system. See State v. Balisok, 123 Wn.2d 114, 117-18, 866 P.2d 631 (1994)

(noting that the policy behind not inquiring is to promote stable and certain verdicts and allow the jury to freely discuss the evidence). This deference does not relieve the jury of its duty to obey the law as given to it and apply that law to the facts before it.

Here, the challenged instruction leaves for the jurors the role of evaluating the facts and applying the law as given to them, consistent with their oath. Thus, the instruction permits the jury to draw the ultimate conclusion of guilt or innocence, as the jury is required to do. See United States v. Gaudin, 515 U.S. 506, 514, 115 S. Ct. 2310, 132 L. Ed. 2d 444 (1995).

This issue was settled by Meggyesy, and affirmed in Brown and Wilson. We reaffirm and uphold the to convict instruction given here: "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." (Emphasis added.)

This is a correct statement of the law. Jurors have a duty to apply the law given to them. This instruction does not invade the province of the jury nor otherwise violate a defendant's right to a jury trial. The trial court does not err in giving the instruction when requested.

The remainder of this opinion has no precedential value. Therefore, it will be filed for public record in accordance with the rules governing unpublished opinions.

FACTS

Moore was charged with possession of a stolen vehicle. At his arraignment, Moore pleaded not guilty. Moore subsequently failed to appear at a pretrial hearing,

because he was at his attorney's office for an unrelated matter. As a result, the State charged Moore with bail jumping.

Ultimately, the State dismissed the charge for possession of a stolen vehicle, but continued to pursue the bail jumping case. Before trial, the State moved to exclude evidence about why Moore's underlying charge was dismissed. The prosecutor argued that the evidence was irrelevant to the bail jumping charge and thus would go to only jury nullification. Moore's counsel agreed that he would not comment on the underlying charge.

During direct examination, Moore's counsel asked him why he chose to go to trial, when bail jumping is a simple case for the State to prove. Moore answered that he agreed to go to trial because he did not "think it's right to go to court [or] have a court date for something that I know I'm not guilty of." The prosecutor objected to this testimony, and the court sustained the objection.

The jury found Moore guilty as charged. Moore appeals.

DISCUSSION

I. Evidence of Underlying Charge

Moore argues that the trial court improperly prevented him from presenting evidence about the dismissal of his underlying charge. He also maintains that the court misled Moore about his ability to present his evidence to the jury.

At a pretrial motion hearing, Moore protested that his bail jumping charge should be dismissed after the underlying charges were dropped. The court responded that, "[b]ecause you have a due process right to a jury trial, you'll have an opportunity to

present your defense. . . . Your constitutional rights are all preserved. And the concerns that you have sounds like are concerns you are going to present to a jury next week." The State later filed a motion in limine seeking to exclude evidence of Moore's underlying charge, which the court granted on the basis of relevance.

A criminal defendant has the constitutional right to present evidence in his or her defense. U.S. CONST. amend VI; WASH. CONST. art. I, § 22; State v. Weaville, 162 Wn. App. 801, 818, 256 P.3d 426 (2011). However, only relevant evidence is admissible. ER 402. To be relevant, evidence must have a tendency to prove or disprove the existence of a fact that is material to the outcome of the case. ER 401. There is no right to have irrelevant evidence admitted in one's defense. State v. Darden, 145 Wn.2d 612, 624, 41 P.3d 1189 (2002).

Moore was charged with bail jumping under RCW 9A.76.170(1). The elements of bail jumping are: (1) that the defendant was held for, charged with, or convicted of a certain crime; (2) that the defendant had knowledge of the requirement to appear at a subsequent court date; and (3) that the defendant failed to appear. State v. Downing, 122 Wn. App. 185, 192, 93 P.3d 900 (2004).

The evidence that Moore wished to present does not affect the jury's consideration of the elements of bail jumping. Nor did it pertain to a valid defense. The court acknowledged this, stating that the State's decision not to pursue the underlying charges "doesn't have a bearing on whether or not [Moore] still had an obligation to appear." The existence of Moore's underlying charge is relevant to prove the first element of bail jumping, but the fact that the charge was dropped—and the

circumstances thereof—has no bearing on the outcome of the case. The trial court properly excluded the evidence of the underlying charge's dismissal.

Furthermore, the court did not misinform Moore during the motion hearing. The court properly told him that he had a right to present a defense and merely said that it "sounds like" Moore will present evidence of his underlying charge at trial.

II. Ineffective Assistance of Counsel

Moore argues that he was denied effective assistance of counsel. This is so, he contends, because his attorney failed to object to the State's motion in limine seeking to exclude evidence of his underlying charge's dismissal.

To prevail on a claim of ineffective assistance of counsel based on a failure to object, the defendant must show: (1) the absence of a legitimate strategic or tactical reason for not objecting; (2) that the trial court would have sustained the objection if made; and (3) the result of the trial would have differed if the evidence had not been admitted. State v. Saunders, 91 Wn. App. 575, 578, 958 P.2d 364 (1998).

When the prosecutor made her motion in limine, she noted that the evidence was irrelevant and that it was inappropriate to elicit testimony that would go to only jury nullification. Moore's counsel declined to object, stating, "I have no intention of trying to cause a mistrial, so I will not be commenting on the underlying charge." This was a tactical decision not to fight for evidence that could potentially result in an error at trial, especially where the evidence is irrelevant. Moreover, counsel is not ineffective for refusing to advocate for a position that is unsupported by the law. Indeed, the refusal to do so is consistent with a lawyer's ethical obligations. See RPC 3.1.

Furthermore, the fact that the evidence was irrelevant indicates that the trial court would not have sustained the objection had counsel made one. The court's recognition that the evidence had no bearing on the bail jumping charges suggests this as well. Moore was not deprived his right to effective assistance of counsel.

III. Prosecutorial Vindictiveness

Moore contends that the prosecutor improperly charged him with bail jumping after realizing that there was insufficient evidence for the underlying crime of possession of a stolen vehicle. Moore argues that this constituted prosecutorial vindictiveness.

Prosecutorial vindictiveness is the intentional filing of a more serious crime in retaliation for a defendant's lawful exercise of a procedural right. State v. Lee, 69 Wn. App. 31, 35, 847 P.2d 25 (1993). Admittedly, bail jumping with a class B or C felony is a more serious crime than possession of a stolen vehicle. See RCW 9.94A.515. But, the prosecution did not file the bail jumping charge as a result of Moore's lawful exercise of a procedural right. Rather, the prosecution filed the bail jumping charge after Moore failed to appear at his hearing. This did not constitute prosecutorial vindictiveness.

IV. Sentencing

Moore argues that he was unfairly sentenced. The general rule in Washington is that a trial court must impose a sentence within the standard range unless it finds substantial and compelling reasons to justify a departure. State v. Smith, 82 Wn. App. 153, 160-61, 916 P.2d 960 (1996). Moore was convicted of bail jumping under RCW 9A.76.170 with a class C felony. His offender score is nine. The standard sentencing range under these circumstances is 51-68 months. RCW 9.94A.510; RCW 9.94A.515.

At sentencing, Moore requested an exceptional sentence downward, arguing that it was unjust to impose a five year sentence for missing a court date. The court considered Moore's request for an exceptionally low sentence, but did not find a sufficient basis to impose it. Instead, it imposed a sentence of 51 months, the lowest sentence in the standard range.

A sentence within the standard range shall not be appealed. RCW 9.94A.585(1). There are exceptions to this rule. For example, a defendant whose sentence is within the standard range may appeal upon showing that the sentencing court failed to follow some specific procedure required by the Sentencing Reform Act of 1981, ch. 9.94A RCW. State v. Mail, 121 Wn.2d 707, 712, 854 P.2d 1042 (1993). Alternatively, a defendant may make a constitutional challenge to a standard range sentence. Id. Moore makes neither argument here. Moore may not appeal his sentence.

V. Absence From Previous Hearing

Moore's final statement of additional grounds addresses his absence from a hearing on June 22, 2012. The essence of Moore's argument seems to be that, because he was not punished for that absence, he should not have been punished for the absence that ultimately led to his conviction. The record does not contain evidence pertaining to the June 22 hearing. Because his argument is not supported by evidence in the record, we cannot review it. State v. Alvarado, 164 Wn.2d 556, 569, 192 P.3d 345 (2008); see also RAP 10.10(c).

The to convict instruction at Moore's trial was proper. Moore does not demonstrate evidentiary error, ineffective assistance of counsel, or prosecutorial vindictiveness, and he may not appeal his sentence. We affirm.

Appelwick, J.

WE CONCUR:

Spearman, J.

Leach, C. J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 69766-8-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

☒ respondent Seth Fine, DPA
Snohomish County Prosecutor's Office

☒ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: March 19, 2014