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Dec 03, 2014
Court of Appeals
Division III
State of Washington

Supreme Court No. _____
Court of Appeals No. 30734-4-III

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

GREGORIO LUNA LUNA,

Defendant/Petitioner.

FILED
DEC 11 2014
CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER.

Petitioner, Gegorio Luna Luna, asks this Court to accept review of the Court of Appeals decision terminating review, designated in Part II of this petition.

II. COURT OF APPEALS DECISION.

Petitioner seeks review of the Court of Appeals Opinion filed September 9, 2014, affirming his conviction. A copy of the Court's unpublished opinion is attached as Appendix A. A copy of the Court's Order Denying Motion for reconsideration filed November 4, 2014, is attached as Appendix B. This petition for review is timely.

III. ISSUES PRESENTED FOR REVIEW.

1. Did the State violate the Fourth Amendment and/or article I, section 7 when it procured a sample of Mr. Luna Luna's DNA pursuant to a court order without having a clear indication that the desired evidence would be found?

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

IV. STATEMENT OF THE CASE.

Gregorio Luna Luna was convicted by a jury of first degree aggravated murder for the death of his girlfriend who died from a stab wound. 2/22/12 RP 713-26; CP 24, 34-37. At his arraignment, Mr. Luna Luna objected to the State's request for a court order to take DNA bucal swabs from his person. 6/17/10 RP 6. The Court requested testimony before making its ruling. 6/17/10 RP 7. Detective Scott Warren testified the police had obtained what appeared to be blood samples from the crime scene and had evidence that Mr. Luna Luna had been injured from a fight and bled. 6/17/10 RP 8-9. No presumptive testing had been done on these samples to determine if the substance was in fact blood or if there were any usable DNA profiles. 6/17/10 RP 10.

The Court signed the order allowing the DNA bucal swabs to be taken from Mr. Luna Luna. Id. Prior to trial, Mr. Luna Luna moved to suppress the bucal swab DNA results. The Court denied the motion. 12/22/11 RP 6-14. Testimony during the trial revealed that DNA samples extracted from the handle of a knife found by the victim's body matched Mr. Luna Luna's DNA extracted from the bucal swabs. 2/22/12 RP 752-53.

The jury was given a "to convict" instruction for first degree murder 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. 51. This appeal followed. CP 11-12.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED.

The considerations which govern the decision to grant review are set forth in RAP 13.4(b). Petitioner believes that this court should accept review of these issues because the decision of the Court of Appeals is in conflict with other decisions of this court and the Court of Appeals (RAP 13.4(b)(1) and (2)), and/or involves a significant question 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)).

1. The State violated the Fourth Amendment and/or article I, section 7 when it procured a sample of Luna Luna's DNA pursuant to a court order without having a clear indication that the desired evidence would be found.

By court rule, a trial court may order a criminal defendant to permit the State to take samples from the defendant's body. CrR 4.7(b)(2)(vi). However, the court's power is explicitly "subject to constitutional limitations." CrR 4.7(b)(2). Mr. Luna Luna asserts that the cheek swab in this case violated the Fourth Amendment and article I, section 7 because the court's order that he submit to the cheek swab was made without having a clear indication that the desired evidence would be found.

"Generally, a trial court's decisions regarding discovery under CrR 4.7 will not be disturbed absent manifest abuse of discretion." State v. Gregory, 158 Wn.2d 759, 822, 147 P.3d 1201 (2006) (citing State v. Yates, 111 Wn.2d 793, 797, 765 P.2d 291 (1988)). However, "while the determination of historical facts relevant to the establishment of probable cause is subject to the abuse of discretion standard, the legal determination of whether qualifying information as a whole amounts to probable cause is subject to de novo review." Id. (citing In re Det. of Petersen v. State, 145 Wn.2d 789, 799–801, 42 P.3d 952 (2002)).

The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." Similarly, article I, section 7 provides that "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law." While the protections guaranteed by the Fourth Amendment and article I, section 7 are qualitatively different, the provisions protect similar interests. State v. Eisfeldt, 163 Wn.2d 628, 634, 185 P.3d 580 (2008). In some cases, article I, section 7 may provide greater protection than the Fourth Amendment; however, article I, section 7 "necessarily encompasses those legitimate expectations of privacy protected by the Fourth Amendment." State v. Parker, 139 Wn.2d 486, 493–94, 987 P.2d 73 (1999).

Generally, warrantless searches are per se unreasonable under both the Fourth Amendment and article I, section 7. State v. Garvin, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009) (citing State v. Duncan, 146 Wn.2d 166, 171, 43 P.3d 513 (2002)). There are limited exceptions to the warrant requirement, and the State bears the burden of establishing that one of these narrowly drawn exceptions applies. *Id.* at 249–50, 207 P.3d 1266.

Swabbing a cheek to procure a DNA sample constitutes a search under the Fourth Amendment and article I, section 7 of the Washington Constitution. The United States Supreme Court has recognized "that a 'compelled intrusio[n] into the body for blood to be analyzed for alcohol content' " is a search. State v. Garcia-Salgado, 170 Wn.2d 176, 184, 240 P.3d 153, (2010) (citing Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 616, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989) (alteration in original) (quoting Schmerber v. California, 384 U.S. 757, 768, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966)). Similarly, the Court found Breathalyzer tests to "implicate[ ] similar concerns about bodily integrity" and constitute searches as well. Skinner at 617, 109 S.Ct. 1402.

The Garcia-Salgado Court found that the swabbing of a person's cheek for the purposes of collecting DNA evidence is a similar intrusion into the body and constitutes a search for the purposes of the Fourth Amendment and article I, section 7. Garcia-Salgado, 170 Wn.2d at 184, 240 P.3d 153.

Because a cheek swab to procure a DNA sample is a search, the search must be supported by a warrant unless the search meets one of the " 'jealously and carefully drawn' " exceptions to the warrant requirement. Id. (citing State v. Winterstein, 167 Wn.2d 620, 628, 220 P.3d 1226 (2009) (internal quotations omitted) (quoting State v. Hendrickson, 129 Wn.2d 61, 70, 917 P.2d 563 (1996)); Schmerber, 384 U.S. at 770, 86 S.Ct. 1826 ("Search warrants are ordinarily required for searches of dwellings, and absent an emergency, no less could be required where intrusions into the human body are concerned.")). A warrant may issue only where (1) a neutral and detached magistrate (2) makes a determination of probable cause based on oath or affirmation and (3) the warrant particularly describes the place to be searched and the items to be seized. State v. Maddox, 152 Wn.2d 499, 505, 98 P.3d 1199 (2004) (citing U.S. Const. amend. IV).

When adjudging the validity of a search warrant, courts consider *only* the information that was brought to the attention of the issuing judge or magistrate at the time the warrant was requested. State v. Murray, 110 Wn.2d 706, 709–10, 757 P.2d 487 (1988) (citing Whiteley v. Warden, Wyo. State Penitentiary, 401 U.S. 560, 565 n. 8, 91 S.Ct. 1031, 28 L.Ed.2d 306 (1971)).

In the context of searches that intrude into the body, the United States Supreme Court has held that the "interests in human dignity and privacy which the Fourth Amendment protects" require three showings in addition to a warrant.

Schmerber, 384 U.S. at 769–70, 86 S.Ct. 1826. First, there must be a "clear indication" that the desired evidence will be found if the search is performed. Id. at 770, 86 S.Ct. 1826. Second, the method of searching must be reasonable. Id. at 771, 86 S.Ct. 1826. Third, the search must be performed in a reasonable manner. Id. at 772, 86 S.Ct. 1826.

While a cheek swab for DNA is a search and requires a warrant absent the existence of an exception, the warrant requirement of the Fourth Amendment and article I, section 7 may be satisfied by a court order. Garcia-Salgado, 170 Wn.2d at 186, 240 P.3d 153. Normally, a warrant in Washington State is issued under CrR 2.3, but neither the state constitution nor federal constitution limits warrants to only those issued under CrR 2.3. A court order may function as a warrant as long as it meets constitutional requirements. Id. In the case of a search that intrudes into the body, such an order must meet both the requirements of a warrant and the additional requirements announced in Schmerber. Id. Therefore, to support a search that intrudes into the body, a CrR 4.7(b)(2)(vi) order must be entered by a neutral and detached magistrate, must describe the place to be searched and items to be seized, must be supported by probable cause based on oath or affirmation, and there must be a clear indication that the desired evidence will be found, the method of intrusion must be reasonable, and the intrusion must be performed in a reasonable manner. Id.

At issue, herein, is the "clear indication that the desired evidence will be found." The other required conditions were met.

In Gregory, the Washington Supreme Court upheld a search that intruded into the body made pursuant to a CrR 4.7 order. Gregory was convicted of three counts of first degree rape and, in a separate trial, one count of aggravated first degree murder. Gregory, 158 Wn.2d at 777, 147 P.3d 1201. Prior to his conviction on the rape charges, the trial court ordered Gregory to permit the State to take blood samples for the purpose of comparing Gregory's DNA with the DNA evidence discovered in a rape kit examination of the victim. Id. at 820, 147 P.3d 1201. On appeal, Gregory challenged the collection of his DNA. Id. at 821–22, 147 P.3d 1201.

The Court upheld the search as valid because the order met the requirements of a search warrant. Of significance herein, was the Court's finding that the evidence established a clear indication that Gregory's DNA *would match the DNA recovered in the rape kit*. *Id.* at 822–825, 147 P.3d 1201 (emphasis added). The likelihood of a match between a defendant's DNA and DNA recovered from the crime is what our Courts mean by "a clear indication that the desired evidence will be found." See Garcia-Salgado, 170 Wn.2d at 187, 240 P.3d 153.

By contrast, in the present case there was no clear indication that Mr. Luna Luna's DNA would match DNA recovered at the murder scene *because no DNA was recovered at the murder scene*. Detective Scott Warren testified the police had obtained what appeared to be blood samples from the crime scene, but no presumptive testing had been done on these samples to determine if the substance was in fact blood or if there were any usable DNA profiles. 6/17/10 RP 10. Therefore, since no DNA was recovered from the murder scene, there was no "clear indication that the desired evidence would be found" by procuring Mr. Luna Luna's DNA.

Accordingly, this condition of the warrant requirement was not satisfied. It is the State's burden to establish that an exception to the warrant requirement has been met. Garvin, 166 Wn.2d at 250, 207 P.3d 1266. The State has not established an exception in this case. Therefore, evidence that Mr. Luna Luna's DNA matched certain DNA recovered from the crime scene was improperly admitted. For these reasons the conviction must be reversed.

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

As part of the "to-convict" instructions used to convict Mr. Luna Luna, the trial court instructed the jury as follows: "If you find from the evidence that each

of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty." CP 51. This is standard language from the pattern instructions. *See* WPIC 28.02, WPIC 35.23.02. Mr. Luna Luna contends there is no constitutional "duty to convict" and that the instruction accordingly misstates the law. The instruction violated Mr. Luna Luna's right to a properly instructed jury. [1]

a. Standard of review. Constitutional violations are reviewed *de novo*. Bellevue School Dist. v. E.S., 171 Wn.2d 695, 702, 257 P.3d 570 (2011). Jury instructions are reviewed *de novo*. State v. Bennett, 161 Wn.2d 303, 307, 165 P.3d 1241 (2007). Instructions must make the relevant legal standard manifestly apparent to the average juror. State v. Kyllo, 166 Wn.2d 856, 864, 215 P.3d 177 (2009).

b. The United States Constitution. 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).

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[1] The Court of Appeals rejected the arguments raised here in its decision in State v. Meggyesy, 90 Wn. App. 693, 958 P.2d 319, *rev denied*, 136 Wn.2d 1028 (1998), *abrogated on other grounds by* State v. Recuenco, 154 Wn.2d 156, 110 P.3d 188 (2005); *accord* State v. Brown, 130 Wn. App. 767, 124 P.3d 663 (2005); State v. Wilson, 176 Wn. App. 147, 151,307 P.3d 823 (2013), *review denied*, 179 Wn.2d 1012 (2014). Counsel respectfully contends Meggyesy and progeny were incorrectly decided.

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

i. The textual language of the state constitution.

The drafters of our state constitution not only granted the right to a jury trial, Const. art. 1, § 22, they expressly declared it "shall remain inviolate." Const. art. 1, § 21. Article 1, section 21 "preserves the right [to jury trial] as it existed in the territory at the time of its adoption." Pasco v. Mace, 98 Wn.2d at 96; State v. Strasburg, 60 Wash. 106, 115, 110 P. 1020 (1910). The right to trial by jury "should be continued unimpaired and inviolate." Strasburg, 60 Wash. at 115.

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

While the Court in State v. Meggyesy may have been correct when it found there is no specific constitutional language that addresses this precise issue, the language that *is* there indicates the right to a jury trial is so fundamental that any infringement violates the constitution.

ii. An independent analysis is warranted.

All six Gunwall factors favor an independent application of Article I, Sections 21 and 22 of the Washington Constitution in this case. The state constitution provides greater protection than the federal constitution, and prohibits a trial court from affirmatively misleading a jury about its power to acquit. State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986).

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).

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).

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

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

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

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

of the law to the facts." Gaudin, 515 U.S. at 514. *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, it may return a verdict of guilty if, and only if, it finds every element proven beyond a reasonable doubt.

f. Contrary case law is based on a poor analysis; this Court should decide the issue differently.[2] 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

[2] 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).

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.

Divisions Two and Three have followed the Meggyesy holding. State v. Bonisisio, 92 Wn. App. 783, 964 P.2d 1222 (1998), *rev. denied*, 137 Wn.2d 1024 (1999); State v. Brown, 130 Wn. App. 767, 124 P.3d 663 (2005); State v. Wilson, 176 Wn. App. 147, 151, 307 P.3d 823 (2013), *review denied,* 179 Wn.2d 1012 (2014).

Appellant 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 the Supreme Court has never considered this issue. 90 Wn. App. at 698. It recognized that the jury has the power to acquit against the evidence: "This is an inherent feature of the use of general verdict. But the power to acquit does not require any instruction telling the jury that it may do so." Id. at 700 (foot notes omitted). The court also relied in part upon federal cases in which the approved "to-convict" instructions did *not* instruct the jury it had a "duty to return a verdict of guilty" if it found every element proven. *See,* Meggyesy, 90 Wn. App. at 698 fn. 5.[3, 4] These concepts support Mr. Luna Luna'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

[3] 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.").

[4] 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: ..."

impermissibly directs a verdict. Sullivan v. Louisiana, 508 U.S. 275, 124 L.Ed.2d 182, 113 S.Ct. 2078 (1993).

Unlike the appellant in Meggyesy,[5] Mr. Luna Luna does not ask the court to approve an instruction that affirmatively notifies the jury of its power to acquit. Instead, he argues that jurors should not be affirmatively misled. This question was not addressed in either Meggyesy or Bonisisio; thus the holding of Meggyesy should not govern here. The Brown court erroneously found that there was "no meaningful difference" between the two arguments. Brown, 130 Wn. App. at 771. Meggyesy and its progeny should be reconsidered, and the issue should be analyzed on its merits.

g. The court's instructions in this case affirmatively misled the jury about its power to acquit even if the prosecution proved its case beyond a reasonable doubt. The instruction given in Mr. Luna Luna's case did not contain a correct statement of the law. The court instructed the jurors that it was their "duty" to accept the law, and that it was their "duty" to convict the defendant if the elements were proved beyond a reasonable doubt. CP 51. A duty is "[a]n act or a course of action that is required of one by... law." *The American Heritage Dictionary* (Fourth Ed., 2000, Houghton Mifflin Company). The court's use of the word "duty" in the "to-convict" instruction conveyed to the jury that it *could not* acquit

[5] And the appellant in Bonisisio.

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. 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. Luna Luna'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.*

VI. CONCLUSION.

For the reasons stated herein, and for the reasons set forth in his Statement of Additional Grounds for Review contained in Appendix 'C', Defendant/Petitioner respectfully asks this Court to grant the petition for review and reverse the decision of the Court of Appeals.

Respectfully submitted December 3, 2014,

s/David N. Gasch
Attorney for Petitioner
WSBA #18270

PROOF OF SERVICE (RAP 18.5(b))

I, David N. Gasch, do hereby certify under penalty of perjury that on December 3, 2014, 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 Appellant's Petition for Review:

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September 9, 2014

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CASE # 307344
State of Washington v. Gregorio Luna Luna
FRANKLIN COUNTY SUPERIOR COURT No. 101501648

Dear Counsel:

Enclosed please find a copy of the opinion filed by the Court today.

A party need not file a motion for reconsideration as a prerequisite to discretionary review by the Supreme Court. RAP 13.3(b); 13.4(a). If a motion for reconsideration is filed, it should state with particularity the points of law or fact which the moving party contends the court has overlooked or misapprehended, together with a brief argument on the points raised. RAP 12.4(c). Motions for reconsideration which merely reargue the case should not be filed.

Motions for reconsideration, if any, must be filed within twenty (20) days after the filing of the opinion. Please file an original and two copies of the motion. If no motion for reconsideration is filed, any petition for review to the Supreme Court must be filed in this court within thirty (30) days after the filing of this opinion (may be filed by electronic facsimile transmission). The motion for reconsideration and petition for review must be received (not mailed) on or before the dates they are due. RAP 18.5(c).

Sincerely,

Renee S. Townsley

Renée S. Townsley
Clerk/Administrator

RST:ko
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FILED

SEPT 9, 2014

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. 30734-4-III
Respondent,	)	
	)	
v.	)	
	)	UNPUBLISHED OPINION
GREGORIO LUNA LUNA,	)	
	)	
Appellant.	)	

KORSMO, J. — Gregorio Luna Luna challenges his conviction for first degree aggravated murder in the stabbing death of his ex-wife, primarily challenging the trial court's decision requiring him to provide a deoxyribonucleic acid (DNA) swab. We affirm.

FACTS

At arraignment on the original charge of first degree murder, the State sought a DNA swab in accordance with CrR 4.7(b)(2)(vi).[1] Defense counsel objected to the request, and the prosecutor supplemented the affidavit of probable cause with the testimony of Detective Scott Warren.

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[1] The rule provides in part that the court may require the defendant to "permit the taking of samples of or from the defendant's blood, hair, or other materials of the defendant's body."

Detective Warren testified that police had recovered blood samples belonging to the suspect from two locations. The affidavit of probable cause established that Mr. Luna Luna had been involved in altercations with first the victim and then, as he tried to flee, a man at the scene. The altercations resulted in injuries that bled. The only question asked by defense counsel was whether the blood samples had been tested to see if they contained "usable DNA." They had not been tested.

The court granted the motion and a swab was eventually collected. Mr. Luna Luna's DNA matched the DNA obtained from the two locations, including DNA found on the handle of the knife used to kill the victim. The charge ultimately was amended to a single count of first degree murder with aggravating circumstances and an included offense of second degree murder.

After lengthy delay, the matter was tried to a jury. The jury found Mr. Luna Luna guilty of aggravated first degree murder. The trial court subsequently imposed the mandatory sentence of life imprisonment. Mr. Luna Luna then timely filed a notice of appeal to this court.

ANALYSIS

The sole issue[2] we will address in this opinion is the contention that the trial court erred in authorizing the DNA swab. The issue as argued to the trial court was whether or not the blood samples recovered at the scene contained DNA. On appeal, Mr. Luna Luna also argues that the State failed to show that the samples were blood. Both claims are without merit.

Cheek swabs are searches and therefore implicate attendant state and federal constitutional protections. *State v. Garcia-Salgado*, 170 Wn.2d 176, 184, 240 P.3d 153 (2010). Consequently, warrantless cheek swabs are per se unreasonable under both constitutions. *Id.*

Criminal Rule 4.7(b)(2)(vi) creates a limited exception to this warrant requirement by permitting the State to take bodily material where the following requirements are met:

> A CrR 4.7(b)(2)(vi) order must be entered by a neutral and detached magistrate; must describe the place to be searched and items to be seized; and must be supported by probable cause based on oath or affirmation; and

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[2] Counsel presents a second issue concerning the "duty to convict" language of the defense-proposed elements instruction. Subsequent to the filing of appellant's brief, this court rejected this argument, concluding that the failure to challenge the instruction precludes consideration of the issue on appeal. *State v. Wilson*, 176 Wn. App. 147, 307 P.3d 823 (2013). We thus will not further address that claim. Mr. Luna Luna also filed a Statement of Additional Grounds that raises an argument that the charging document needed to define the word "premeditation." He presents no relevant authority in support of that argument and we will not consider it.

> there must be a *clear indication* that the desired evidence will be found, the method of intrusion must be reasonable, and the intrusion must be performed in a reasonable manner.

Garcia-Salgado, 170 Wn.2d at 186 (emphasis added). This court reviews legal determinations of whether qualifying information as a whole amounts to probable cause de novo. *State v. Gregory*, 158 Wn.2d 759, 822, 147 P.3d 1201 (2006).

Here the State was granted permission to obtain a DNA sample from Mr. Luna Luna's cheek under the authority of CrR 4.7(b)(2)(vi). Mr. Luna Luna concedes that all required conditions are met except that there was no clear indication that the desired evidence would be found. He bases this contention on the fact that the State did no presumptive testing on any substances found at the scene in order to ensure a DNA match could be made. He relies on factual distinctions between the case at bar and *Gregory* to support his argument. *Gregory*, 158 Wn.2d at 777.

In *Gregory*, the court upheld a CrR 4.7 search that intruded into the body. The State requested the order to obtain the defendant's DNA so that it could be compared to DNA discovered in a rape kit examination of the victim. *Id.* at 820.

Mr. Luna Luna assigns significance to the fact that in *Gregory* the State had an existing DNA profile from the victim prior to its application for a CrR 4.7 order. Accordingly, he argues that the court in *Gregory* determined that such evidence is necessary to fulfill the "clear indication" requirement.

Gregory does not support that argument. There the court merely found that the evidence available to the trial court was sufficient to fulfill the "clear indication" requirement; the court did not articulate a minimum standard for CrR 4.7 applications. *Id.* at 825. Thus, no authority requires presumptive testing of evidence to ensure that a DNA profile exists[3] prior to issuing a CrR 4.7(2)(b)(vi) order.

Notwithstanding the lack of presumptive testing, the trial court did have evidence to support a clear indication that a DNA match could be made. The motion was supported by a qualified officer who testified that the police had obtained samples of what appeared to be blood from the crime scene and that witnesses saw Mr. Luna Luna bleeding from an injury in the same location. Thus, the court reasonably believed that a DNA swab would yield evidence linking Mr. Luna Luna to the crime.

Accordingly, the trial court did not err in directing the defendant to provide the DNA swab. The conviction is affirmed.

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[3] To the extent that Mr. Luna Luna argues that there also needed to be a showing that the samples were blood, we reject the argument. The officer reported that Mr. Luna Luna was bleeding at the scene and there is no evidence that human blood exists that does not contain DNA. Whether or not a sample is of sufficient quality to yield DNA results is a separate question apart from the issue of whether probable cause exists to believe that Mr. Luna Luna was the source of the blood samples.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Korsmo, J.

WE CONCUR:

Fearing, J.

Lawrence-Berrey, J.

Renee S. Townsley
Clerk/Administrator

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The Court of Appeals
of the
State of Washington
Division III

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Spokane, WA 99201-1905

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November 4, 2014

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CASE # 307344
State of Washington v. Gregorio Luna Luna
FRANKLIN COUNTY SUPERIOR COURT No. 101501648

Dear Counsel:

Enclosed is a copy of the Order Denying Motion for Reconsideration.

A party may seek discretionary review by the Supreme Court of the Court of Appeals' decision. RAP 13.3(a). A party seeking discretionary review must file a Petition for Review, an original and a copy of the Petition for Review in this Court within 30 days after the Order Denying Motion for Reconsideration is filed (may be filed by electronic facsimile transmission). RAP 13.4(a). The Petition for Review will then be forwarded to the Supreme Court.

If the party opposing the petition wishes to file an answer, that answer should be filed in the Supreme Court within 30 days of the service.

Sincerely,

Renee S. Townsley

Renee S. Townsley
Clerk/Administrator

RST:ko
Attachment

FILED
NOV 4, 2014
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, Respondent, v. GREGORIO LUNA LUNA, Appellant.	)	No. 30734-4-III ORDER DENYING MOTION FOR RECONSIDERATION

THE COURT has considered respondent's motion for reconsideration and is of the opinion the motion should be denied. Therefore,

IT IS ORDERED, the motion for reconsideration of this court's decision of September 9, 2014 is hereby denied.

DATED: November 4, 2014

PANEL: Judges Korsmo, Fearing, Lawrence-Berrey

FOR THE COURT:

Laurel H Siddoway, CJ

LAUREL SIDDOWAY
Chief Judge

APPENDIX C

III. RELEVANT FACTS AND GROUNDS FOR RELIEF

[illegible] THE [illegible] THE [illegible] WITH INTENTIONAL PREMEDITATED [illegible] IS FATALLY DEFECTIVE [illegible] IT OMITS THE NECESSARY [illegible] ELEMENT OF [illegible].

Language is the vital [illegible] of communication in a [illegible], and [illegible] appellant's ability to understand the [illegible] elements of premeditation in his language is critical to [illegible] fairness. Thongvanh v. State, [illegible] (Iowa 19[illegible]). Furthermore adequate translation requires continuous word for word translation of everything [illegible] to the trial [illegible] defendant conversing in English would be privy to hear. U.S. v. Joshi, [illegible] F.2d 1[illegible] (11th Cir.19[illegible]).

The information charging appellant with premeditated murder is fatally defective because it omits a necessary element of the crime, [illegible] the murder involved more than a moment in point of time in which a notion to kill was deliberately [illegible] for [illegible]. See [illegible], and [illegible] at [illegible].

This court [illegible] the merits of appellant's [illegible] inadvertently [illegible] appellant argued in his [illegible] defining the term premeditation, [illegible] relevant authority in support of [illegible] ruling at [illegible].

In State v. McCarty, McCarty [illegible] the charging document failed to allege [illegible] McCarty argued the information omitted the necessary elements of the crime, but the McCarty court [illegible] the information was sufficient [illegible] it did not allege the elements of knowledge. McCarty, [illegible] (citing).

In McCarty the charging information in Count III stated that [illegible], but failed to allege the two elements of knowledge, that a child pornography involved material that [illegible]. McCarty, [illegible].

Like the error in McCarty, appellants charging information in Count I stated the [illegible] but failed to allege the elements of presentation, that the material [illegible] depict a point of time in which a person is still [illegible].

The [illegible] error in McCarty is similar to the error appellant raises here, in both [illegible] the charging information omitted [illegible] knowledge and [illegible] (knowledge in McCarty).

In McCarty, [illegible] in accordance with [illegible], as has [illegible] the Washington Supreme Court held McCarty was prejudiced by the [illegible] elements of knowledge, and this court should not [illegible] that [illegible] error in McCarty. McCarty, [illegible].

[illegible]

[illegible] Johnson, [illegible] Cal. v. Klopsch, [illegible]

[illegible] a new trial must make that right of [illegible] criminal trial is [illegible] in person, the right to [illegible] to [illegible] Thompson v. Louisiana, 91 U.S. [illegible] (1984). This right stems from the Sixth Amendment's [illegible] confrontation clause, the purpose of a criminal [illegible] to produce [illegible] "meaningful opportunity to present a complete defense." Crane v. Kentucky, 476 U.S. 683, [illegible] (1986). In specific terms, this [illegible] criminal defendant must have sufficient [illegible] to present [illegible] a personal [illegible] of a well-considered decision, the operation [illegible] rule [illegible] arbitrary impediment to an important adjunct." U.S. ex.rel. Washington v. Texas, 388 U.S. 14, 19 (1967);(Petitioner contends that [illegible] trial [illegible] the trial court's [illegible] was sufficient only for [illegible] to satisfy the strictures of the Sixth Amendment, Id.; see, 476 F.2d at 377).

[illegible] that the trial court's [illegible] violation in accordance with Holmes v. Kaemer, [illegible] (1st Cir. 1973);(The [illegible] to [illegible] a [illegible] [illegible] by [illegible]).

[illegible]

[illegible] the [illegible] of this court rule on the [illegible] presents the relief requested in [illegible].

Dated this 10th day of September 2014.

G L L

[illegible]

MOTION FOR RECONSIDERATION -5-END

GASCH LAW OFFICE

December 03, 2014 - 4:10 PM

Transmittal Letter

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State of Washington

Document Uploaded:	307344-Luna Luna, Gregorio Petition4Review 12-3
Case Name:	State v. Luna Luna
Court of Appeals Case Number:	30734-4
Party Respresented:	appellant
Is This a Personal Restraint Petition?	☐ Yes ☑ No
	Trial Court County: ____ - Superior Court # ____

Type of Document being Filed:

- ☐ Designation of Clerk's Papers
- ☐ Statement of Arrangements
- ☐ Motion: ____
- ☐ Response/Reply to Motion: ____
- ☐ Brief
- ☐ Statement of Additional Authorities
- ☐ Affidavit of Attorney Fees
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- ☐ Objection to Cost Bill
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Case Name:	State v. Luna Luna
Court of Appeals Case Number:	30734-4
Party Respresented:	appellant
Is This a Personal Restraint Petition?	☐ Yes ☑ No

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Court of Appeals Case Number:	30734-4
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Case Name: State v. Luna Luna

Court of Appeals Case Number: 30734-4

90847-8

Party Respresented: appellant

Is This a Personal Restraint Petition? ☐ Yes ☑ No

Trial Court County: ____ - Superior Court # ____

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- ☐ Designation of Clerk's Papers
- ☐ Statement of Arrangements
- ☐ Motion: ____
- ☐ Response/Reply to Motion: ____
- ☐ Brief
- ☐ Statement of Additional Authorities
- ☐ Affidavit of Attorney Fees
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- ☐ Personal Restraint Petition (PRP)
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