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NO. 69451-1-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

JEFFREY KINZLE,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR SNOHOMISH COUNTY

APPELLANT'S OPENING BRIEF

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A. INTRODUCTION.

At Jeffrey Kinzle's trial, the prosecution called the complaining witness for one of two charged offenses to the stand, but did not ask her questions about the charged incident or about her out-of-court interviews that were arranged by the police. Under State v. Rohrich,[1] the prosecution violates the confrontation clause when it introduces the complainant's out-of-court statements without asking her about the incident or the prior statements. Based on the importance of the unconfronted out-of-court statements to the offense charged in count two, this confrontation clause violation requires reversal of the conviction.

Additionally, over Mr. Kinzle's express objection, the court instructed the jury that its role involves a search for the truth and that it has a duty to convict Mr. Kinzle upon finding the elements adequately proven. These instructions misinformed the jury of its role in reaching a verdict. Furthermore, the court imposed several unauthorized and overbroad conditions of community custody.

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[1] 132 Wn.2d 472, 939 P.3d 697 (1997).

B. ASSIGNMENTS OF ERROR.

1. The admission of N.R.'s testimonial statements elicited in the course of police-initiated interviews violated Mr. Kinzle's right of confrontation under the Sixth Amendment and article I, section 22.

2. Instruction 2 misinformed the jury that its role required it to find the "truth" of the charges, undermining Mr. Kinzle's right to a fair trial by jury under the Sixth and Fourteenth Amendments as well as article I, sections 21 and 22.

3. Instructions 8 and 9 directed the jury that it had a duty to convict Mr. Kinzle, which misinformed the jury of its role in weighing the evidence and violated the Sixth and Fourteenth Amendments as well as the more protective guarantees of article I, sections 21 and 22.

4. The court imposed several conditions of community custody that were not authorized by statute and that violated Mr. Kinzle's rights under the First and Fourteenth Amendments.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. The right to confront one's accuser face-to-face prohibits the prosecution from calling the complaining witness to the stand but declining to ask questions about the charged incident, and instead relying on unconfronted out-of-court statements by the complainant.

The State did not ask N.R. questions about the incident or her statements to others made in the course of formal interviews arranged by law enforcement. Did it violate Mr. Kinzle's right of confrontation to introduce testimonial statements when the declarant was never asked about the incident or those statements at trial?

2. Although the role of the jury is to decide whether the prosecution met its burden of proof, it misleads the jury to encourage it to search for the truth and instruct it that there is a duty to return a verdict of guilty if it finds the elements have been proved beyond a reasonable doubt, because there is no such duty under the state and federal constitutions. Over Mr. Kinzle's objection, the court instructed the jury that it could find the State met its burden of proof if it had an abiding "belief in the truth of the charge" and that it has a duty to convict. When it is not the jury's job to determine the truth, and there is no constitutional provision requiring a guilty verdict under any circumstances, did the court misinform the jury of its deliberative role?

3. Under the Sentencing Reform Act (SRA), the trial court may impose prohibitions on an offender as discretionary conditions of community custody only if the prohibitions are crime-related. In the absence of evidence of the crime-related nature of these conditions, the

court entered broadly worded orders prohibiting Mr. Kinzle from possessing sexually explicit materials, barring him from dating women, requiring constant supervision in any workplace, and requiring a chemical dependency evaluation. Are these conditions insufficiently crime-related and written in such overbroad and ambiguous language to deny Mr. Kinzle his right to fair notice of prohibited conduct and subject him to unduly arbitrary enforcement?

D. STATEMENT OF THE CASE.

On March 16, 2011, Jeffrey Kinzle was visiting his friend Isaiah Ristine. 9/12/12RP 142-43. Mr. Ristine and Mr. Kinzle had some drinks at the apartment of neighbor Ashley Doughty, with whom Mr. Ristine was having an affair. Id. at 144, 147, 187; 9/13/12RP 62 (prosecution adopts Ms. Doughty as most credible adult witness).

Close to midnight, Mr. Ristine returned home and fell asleep. 9/12/12RP 190. Mr. Kinzle stayed longer at Ms. Doughty's home, then returned to the apartment to go to sleep. Id. at 106, 191. Mr. Ristine lived with his long-term girlfriend, Erin Shuck, who returned to the apartment shortly afterward. Id. at 109, 141. Ms. Shuck saw Mr. Kinzle asleep on the couch and found her daughter R.R., then nine years old,

under a table in her bedroom looking upset, along with three year-old N.R. Id. at 109, 111.

R.R. told Ms. Shuck that Mr. Kinzle put stuff on her private part. 9/12/12RP 113. Ms. Shuck found eye cream in the bedroom the girls shared. Id. at 121, 197. After arguing with Mr. Ristine and speaking with Ms. Doughty, Ms. Shuck called the police. Id. at 135-36, 193-94. A police officer directed Ms. Shuck to take the children to the hospital. 9/12/12RP 118.

Forensic nurse examiner Paula Newman Skomski from Providence Intervention Center for Assault and Abuse interviewed and examined R.R. and N.R. 9/10/12RP 57, 63. Ms. Skomski's job includes evaluating anyone who comes to a hospital complaining of child abuse. Id. at 57-58; 9/13/10RP 25. She interviews children under a structured protocol then examines them and collects evidentiary swabs for the police. 9/10/12RP 59, 61, 70-71. R.R. and N.R. told Ms. Skomski that their father's friend put eye cream on their butts and crotch areas with his hand. 9/13/12RP 38, 43.

Detective Chuck Smith later arranged for R.R. and N.R. to speak to a child interview specialist. 9/10/12RP 86. Detective Smith watched the interviews from outside the room, which were audio and video-

recorded. Id. at 86. N.R.'s video was played for the jury; Detective Smith and the prosecutor read R.R.'s interview for the jury due to redactions that made playing the videotape too difficult.9/13/12RP 88; 95-104.

The police sent swabs Skomski collected from R.R. and N.R. along with clothing they wore to the FBI for testing. 9/13/12RP 111. Chemist Jason Brewer found traces of the eye cream on N.R.'s pajamas but not her underwear, and on R.R.'s clothing as well as on both girl's swabs from their perineal areas. 9/13/12RP 39, 46, 156.

Mr. Kinzle was convicted of the two charged counts of child molestation in the first degree. He was sentenced to a minimum term of 198 months and a maximum term of life under RCW 9.94A.507.

E. ARGUMENT.

1. **Where the complaining witness is not asked about the charged incident or her statements to others, her out-of-court testimonial allegations violate the confrontation clauses of the state and federal constitutions.**

a. The right to confrontation bars reliance on out-of-court statements when the accuser is not asked about the incident.

If an out-of-court statement is testimonial in nature, it may not be introduced against the accused at trial unless the person who made

the statement is unavailable and the accused has had a prior opportunity to confront that witness. Crawford v. Washington, 541 U.S. 36, 68, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004); State v. Rohrich, 132 Wn.2d 472, 939 P.3d 697 (1997); U.S. Const. amend. 6; Wash. Const. art. I, § 22.

This Court has recognized that article I, section 22 protects an accused person's explicitly guaranteed right to face-to-face confrontation more strictly than the Sixth Amendment. "[A] Gunwall[2] analysis is no longer necessary" to demonstrate that the confrontation clause in article I, section 22 is broader than the Sixth Amendment and thus "an independent analysis applies" to article I, section 22. State v. Pugh, 167 Wn.2d 825, 835, 225 P.3d 892 (2009); State v. Shafer, 156 Wn.2d 381, 391, 128 P.3d 87 (2006); see also State v. Martin, 171 Wn.2d 521, 548, 252 P.3d 872 (2011).

In Rohrich, this court held that the right of confrontation requires more than hailing the witness to the courtroom. "It requires the State to elicit the damaging testimony from the witness so the defendant may cross-examine if he so chooses." 132 Wn.2d at 478. The prosecutor in Rohrich called the named accuser to the stand and asked her questions about where she went to school, what she got for her

birthday, and what her cat's name was. Id. at 474. She was not asked about the alleged abuse. Id. Then the prosecution used adult witnesses, testifying under the child hearsay statute, to report what the accuser had said on other occasions about the alleged abuse. Id. at 474-75.

The Supreme Court held that the prosecutor's failure to ask the complaining witness about the hearsay statements and the acts on which they were based was inadequate to meet the requirements of the confrontation clause and did not permit the court to introduce child hearsay statements through other adult witnesses. Under Rohrich, the prosecution satisfies the confrontation clause only when it asks the witness directly about the occurrence underlying the charges. 132 Wn.2d at 161. When the prosecution relies on out-of-court statements, it must ask the witness about those statements in order to introduce them into evidence without violating to right of confrontation. Id; see generally State v. Clark, 139 Wn.2d 152, 159, 985 P.2d 377 (1999) (confrontation clause satisfied when child testified about alleged incident and acknowledged hearsay statements, even though child said she lied about incident); State v. Price, 158 Wn.2d 630, 146 P.3d 1183 (2006) (confrontation clause satisfied where child testified about

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

incident and admitted speaking to detective but said she did not remember specific act that constituted crime).

b. The complainant's testimonial statements were inadmissible at trial when she did not testify about the incident or her statements.

N.R. came to court to testify, but the prosecution did not ask her about the alleged incident or her out-of-court statements. 9/12/12RP 72-88. Similarly to Rohrich, the prosecutor asked N.R. general questions about her friends, her family, her schooling, and her home. Id. The prosecutor never questioned her about the incident and did not ask her about the statements she purportedly made to a forensic nurse or child interview specialist. Id.

The prosecution relied on N.R.'s out-of-court statements to a forensic nurse examiner and child interview specialist as the basis of N.R.'s allegations against Mr. Kinzle for count two. 9/13/12RP 25, 38, 75, 88; Ex. 8. N.R.'s statements to the forensic nurse and child interview specialist were testimonial and inadmissible absent efforts to question N.R. about the alleged occurrence and the hearsay statements.

Testimonial statements include formal interviews conducted in a manner that a reasonable person would believe the purpose was to gather evidence available for use at a subsequent prosecution. State v.

Hopkins, 134 Wn.App. 780, 791, 142 P.3d 1104 (2006). In Hopkins, the court held that a child's statements to a nurse practitioner about allegations of abuse were testimonial when an objective person would be "aware that her report was relevant to the ongoing legal investigation and could be used prosecutorially, falling under at least one Crawford definition." Id. at 784, 791 (citing Crawford, 541 U.S. at 52); see also State v. Hurtado, _ Wn.App. _, 294 P.3d 838, 845 (2013) (statements to nurse testimonial where police officer arranged and present for hospital interview).

The child interview specialist questioned N.R. at the behest of the investigating detective, while the detective observed and directed the interview. 9/10/12RP 86-87. The child interview specialist videotaped the interview so that it would be available to use in the case. Id.; Ex. 8. Statements to a child interview specialist arranged by the police in the course of an on-going criminal prosecution are testimonial. See State v. Mason, 160 Wn.2d 910, 923, 162 P.3d 396 (2007) (statement to victim's advocate several days after incident testimonial); see also United States v. Bordeaux, 400 F.3d 548, 556 (8th Cir. 2005) (government involvement in arranging child interview demonstrates its testimonial nature); Hatley v. State, 722 S.E.2d 67, 71-72 (Ga. 2012)

("C.C.'s statement to the forensic interviewer, made several weeks after the crimes, was testimonial").

Similarly, the forensic nurse questioned N.R. pursuant to a structured protocol after the police officer who responded to the report of the incident directed that N.R. be examined by such a specialist. 9/10/12RP 57-58, 80. She nurse took copious notes and memorialized those notes immediately after the interview so they would be preserved. Id. at 61. She collected evidence swabs and preserved them for the police under police-created protocols. Id. at 70-71, 80. The interview was conducted under formal protocol for the purpose of gathering evidence available to law enforcement in a criminal investigation which is the functional equivalent of police questioning. James v. Com., 360 S.W.3d 189, 203 (Ky. 2012) (statements taken by sexual abuse nurses "testimonial in nature" because they cooperate with police, follow protocol for interview, gather evidence, "act to supplement law enforcement by eliciting evidence of past offenses with an eye toward future criminal prosecution, and are active participant[s] in the formal criminal investigation." (internal citation omitted)).

N.R. was unavailable for confrontation purposes, even though she came to court, when she was never asked about the incident or her

out-of-court statements to the forensic nurse and child interview specialist. Rohrich, 132 Wn.2d at 161. The prosecution elicited general background information without asking about the allegation about Mr. Kinzle. 9/12/12RP 72-88. This testimony does not satisfy the confrontation clause and therefore, her unconfronted hearsay statements were inadmissible under the Sixth Amendment and article I, section 22.

c. The prosecution's reliance on N.R.'s uncross-examined allegations requires reversal of count two.

A violation of the right of confrontation requires reversal unless the prosecution "conclusively show[s] that the tainted evidence did not contribute to the conviction." United States v. Alvarado-Valdez, 521 F.3d 337, 342 (5th Cir. 2008); see also Fields v. United States, 952 A.2d 859, 864 (D.C. 2008) (finding improperly admitted document of analysis not harmless when government could not prove it did not "contribute to the verdict obtained"); State v. Jasper, 174 Wn.2d 96, 117, 271 P.3d 876 (2012) (confrontation clause violation requires State to prove "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (citing Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)).

N.R. did not testify about any act of abuse. She did not remember Mr. Kinzle or believe that anyone had harmed her. 9/12/12RP 75, 78, 85. She was not upset about testifying, was able to answer the prosecution's questions about her home, friends, and school. Id. at 72-74, 76, 81. She remembered meeting the prosecutor and the victim's advocate but was not asked about any acts or statements pertinent to the prosecution. Id. at 78. The testimony of the forensic nurse and the videotape of N.R.'s statements to the child interview specialist constituted the bulk of the evidence against Mr. Kinzle.

Although N.R.'s sister R.R. was present at the time, and claimed Mr. Kinzle did something similar to N.R., R.R. was inconsistent about when that occurred, did not see what happened, and the jury may not have credited her testimony. 9/12/12RP 52, 65, 68-69. N.R.'s underwear did not have reside of the eye cream on them, where R.R.'s did, so the jury may have questioned whether N.R. had the same thing happen to her as happened to R.R. 9/13/12RP 175. The hearsay statements were the only explicit statements by N.R. about the incident and they should not have been admitted at trial absent N.R's testimony about the incident or her statements. Consequently, the confrontation clause violation requires reversal of this count.

2. **Despite Mr. Kinzle's objection, the court erroneously instructed the jury about its deliberative role when rendering a verdict**

a. The court misstated the definition of the State's burden of proving the elements of the offense beyond a reasonable doubt.

A jury's role is not to search for the truth. State v. Emery, 174 Wn.2d 741, 760, 278 P.3d 653 (2012); see also State v. Berube, 171 Wn.App. 103, 120, 286 P.3d 402 (2012) ("truth is not the jury's job. And arguing that the jury should search for truth and not for reasonable doubt both misstates the jury's duty and sweeps aside the State's burden"). Instead, the job of the jury "is to determine whether the State has proved the charged offenses beyond a reasonable doubt." Emery, 174 Wn.2d at 760.

"[A] jury instruction misstating the reasonable doubt standard is subject to automatic reversal without any showing of prejudice. Id. at 757 (quoting Sullivan v. Louisiana, 508 U.S. 275, 281–82, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993)).

Over Mr. Kinzle's objection, the court instructed the jury that proof beyond a reasonable doubt means that, after considering the evidence, the jurors had "an abiding belief in the truth of the charge." CP 280 (Instruction 2); 9/14/12RP 11.

By equating proof beyond a reasonable doubt with a "belief in the truth" of the charge, the court confused the critical role of the jury. The "belief in the truth" language encourages the jury to undertake an impermissible search for the truth and invites the error identified in Emery**Error! Bookmark not defined.**.

The presumption of innocence may be diluted or even "washed away" by confusing jury instructions. State v. Bennett, 161 Wn.2d 303, 315-16, 165 P.3d 1241 (2007). It is the court's obligation to vigilantly protect the presumption of innocence. Id.

In Bennett, the Supreme Court found the reasonable doubt instruction derived from State v. Castle, 86 Wn.App. 48, 53, 935 P.2d 656 (1997), was "problematic" as it was inaccurate and misleading. 161 Wn.2d at 317-18. Exercising its "inherent supervisory powers," the Supreme Court directed trial courts to use WPIC 4.01 in all future cases. Id. at 318.

The pattern instruction reads:

> The defendant has entered a plea of not guilty. That plea puts in issue every element of the crime charged. The State is the plaintiff and has the burden of proving each element of the crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists.

> A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.
>
> A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. [If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt].

11 Washington Practice: Washington Pattern Jury Instructions: Criminal 4.01, at 85 (3rd ed. 2008) ("WPIC").

The Bennett Court did not comment on the bracketed "belief in the truth" language. However, recent cases show the problematic nature of such language. In Emery, the prosecution told the jury that "your verdict should speak the truth," and "the truth of the matter is, the truth of these charges, are that" the defendants are guilty. 174 Wn.2d at 751. These remarks misstated the jury's role, but because they were not part of the court's instructions, and the evidence was overwhelming, the error was harmless. Id. at 764 n.14.

In Pirtle, the court held that the "abiding belief" language did not "diminish" the pattern instruction defining reasonable doubt. 127 Wn.2d at 657-58. The court ruled that "[a]ddition of the last sentence [regarding having an abiding belief in the truth] was unnecessary but

was not an error." Id. at 658. The Pirtle Court did not focus its attention on whether this language encouraged the jury to view its role as a search for the truth aspect. Id. at 657-58. Instead, it was addressing whether the phrase abiding belief was different from proof beyond a reasonable doubt. Id.

Pirtle concluded that this language was unnecessary but not erroneous, which is far from an endorsement of the language. Yet Emery**Error! Bookmark not defined.** demonstrates the danger of injecting a search for the truth into the definition of the State's burden of proof. This language invites the jury to be confused about its role and serves as a platform for improper arguments about the jury's role in looking for the truth, as explained in Emery. 174 Wn.2d at 760.

Mr. Kinzle objected to the addition of this last sentence in the court's instruction defining the prosecution's burden of proof and sought an instruction without this improper language. 9/14/12RP 11.

Improperly instructing the jury on the meaning of proof beyond a reasonable doubt is structural error. Sullivan, 508 U.S. at 281-82. Furthermore, this Court has a supervisory role in ensuring the jury's instructions fairly and accurately convey the law. Bennett, 161 Wn.2d at 318. This Court should find that directing the jury to treat proof

beyond a reasonable doubt as the equivalent of having an "abiding belief in the truth of the charge," misstates the prosecution's burden of proof, confuses the jury's role, and denies an accused person his right to a fair trial by jury as protected by the state and federal constitutions. U.S. amends. 6, 14; Const. art. I, §§ 21, 22.

b. The court misled and confused the jury about its ability to reach a not-guilty verdict.

Mr. Kinzle objected to the portion of the to-convict instructions that directed the jury that it must find Mr. Kinzle guilty. 9/14/12RP 11-12. The instructions stated, "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 286, 287 (Instructions 8, 9). Mr. Kinzle explained that the jury has no constitutional "duty to convict" and the instruction misstates the law, in violation of Mr. Kinzle's right to a fair trial by jury. 9/14/12RP 12.

i. Washington's constitution more strongly protects the province of a jury to decide the case than the federal constitution.

In Washington, citizens enjoy an even stronger guarantee to a jury trial than under the federal constitution. State v. Williams-Walker, 167 Wn.2d 889, 896, 225 P.3d 913 (2010); Const. art. I, §§ 21, 22; U.S.

Const. amend. 6. Article I, section 21 provides, "The right of trial by jury shall remain inviolate." Article I, section 22 provides, "[i]n criminal prosecutions, the accused shall have the right to . . . trial by an impartial jury."

The "inviolate" jury trial right means it must receive "the highest protection." Sofie v. Fibreboard Corp., 112 Wn.2d 636, 656, 771 P.2d 711 (1989); see also State v. Strasburg, 60 Wash. 106, 110 P. 1020 (1910). "[F]ew states have found within their constitutional provisions a right to jury trial as liberal as that which the constitution of this state discloses." City of Pasco v. Mace, 98 Wn.2d 87, 101 n.6, 653 P.2d 618, 626 (1982).

The role of the jury in this state exceeds the federal standard, even though the federal constitution treats the jury trial right as fundamental, premised on "a reluctance to entrust plenary powers over life and liberty of the citizen to one judge or to a group of judges. Fear of unchecked power" resulted in the criminal law's "insistence upon community participation in the determination of guilt or innocence. . ." Duncan v. Louisiana, 391 U.S. 145, 156, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968).

This inviolate right is further enforced by other constitutional protections. 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**Error! Bookmark not defined.** ("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, rev. denied, 136 Wn.2d 1028 (1998), abrogated on other grounds by State v. Recuenco, 154 Wn.2d 156, 110 P.3d 188 (2005), the court rejected a challenge to a similar instruction. However, Meggyesy is premised on an inadequate analysis of the state constitutional principles at issue and unreasonably disregarded law demonstrating the intent of the framers as discussed below.

Because the Washington Supreme Court has already determined that the state constitution provides greater protection for jury trials than the federal constitution in some circumstances, a full Gunwall 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 that 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.

ii. Washington's common law at the time of the framing shows the jury has discretion when determining whether to convict an accused person.

Contrary to the minimal Gunwall analysis conducted in Meggyesy, state common law history also supports the conclusion that the jury instruction in this case 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; see also State v. Hobble, 126 Wn.2d 283, 299, 892 P.2d 85 (1995). Under the common law, juries were instructed in such a way as to allow them to acquit even where the prosecution proved guilt beyond a reasonable doubt. Leonard v. Territory, 2 Wash. Terr. 381, 7 P. 872 (Wash. Terr. 1885). In Leonard, the trial 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, 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, _ Wn.App. _, 298 P.3d 785, 790 (2013). 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.

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, either directly or indirectly, direct a verdict of guilty in a criminal case). This rule applies even where the jury ignores applicable law. See, e.g., Hartigan v. Washington Territory, 1 Wash. Terr. 447, 449 (1874) (holding "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.").[3]

The jury's power to acquit is substantial and the jury has no duty to return a verdict of guilty. The court has 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."

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[3] 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.").

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).

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. 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, 1 Wash. Terr. at 449. 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). The "duty" to return a verdict of not guilty, therefore, is genuine and enforceable by law.

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.

iii. The to convict instruction must reflect the legal role of the jury.

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. That is, 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, and no authority to 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 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.

iv. *Meggyesy* does not govern.

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. Kinzle's request that the court strike the "duty to convict" language in the instructions.

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, 508 U.S. at 277 (judge may not direct a verdict for the State, no matter how overwhelming the evidence).

Unlike the appellant in Meggyesy**Error! Bookmark not defined.**, Mr. Kinzle 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.

v. The court erroneously instructed the jury on its duty when reaching a verdict.

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 286, 287. The court's use of the word "duty" in the "to-convict" instruction conveyed to the jury that it could not acquit if the elements had been established. Smith, 298 P.3d at 790 ("'duty' conveys to the jury what it *must* do rather than what it may or should do"). 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. Kinzle's state and federal constitutional right to a jury trial.

Accordingly, his conviction must be reversed and the case remanded for a new trial with proper instructions.

c. The court's misinstruction of the jury about its role in deciding the case requires reversal.

The court told the jury that it could convict Mr. Kinzle if it believed the "truth" of the charges, which misstates the jury's role. CP 280. It also required the jury to convict Mr. Kinzle as an absolute proposition if it found proof of the elements even though the jury is not mandated to find a person guilty. CP 286, 287.

Erroneously instructing the jury about its role in reaching a guilty verdict is structural error. See Smith, 298 P.3d 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**Error! Bookmark not defined.**, 508 U.S. at 277. Likewise, improperly instructing the jury on the meaning of proof beyond a reasonable doubt is structural error. Sullivan, 508 U.S. at 281-82. Furthermore, this Court has a supervisory role in ensuring the jury's instructions fairly and accurately convey the law. Bennett, 161 Wn.2d at 318.

This Court should find that directing the jury to treat proof beyond a reasonable doubt as the equivalent of having an "abiding belief in the truth of the charge" and mandating a "duty" to convict a person misstates the prosecution's burden of proof, confuses the jury's role, and denies an accused person his right to a fair trial by jury as protected by the state and federal constitutions. U.S. amends. 6, 14; Const. art. I, §§ 21, 22.

3. Unduly vague or impermissible community custody conditions must be stricken

a. Community custody conditions must be both constitutionally legitimate and authorized by statute.

Limitations on fundamental constitutional rights during community custody must be "reasonably necessary to accomplish the essential needs of the state and the public order." State v. Riles, 135 Wn.2d 326, 350, 957 P.2d 655 (1998). Additionally, a condition of community custody must be sufficiently definite that ordinary people understand what conduct is illegal and the condition must provide ascertainable standards to protect against arbitrary enforcement. U.S. Const. amend. 14; Const. art. I, § 3; State v. Bahl, 164 Wn.2d 739, 752-53, 193 P.3d 678 (2008). Offenders on community custody retain their rights to free expression and association, even though some limitations

b. The court imposed unauthorized conditions of community custody.

Several of the conditions of community custody imposed by the sentencing court are not crime-related and should be stricken. Erroneous sentences may be challenged for the first time on appeal, so Mr. Kinzle may challenge conditions of community custody even if he did not pose an objection in the trial court. Bahl, 164 Wn.2d at 744-45; Ford, 137 Wn.2d at 477.

i. Condition 7

Mr. Kinzle was ordered to refrain from possessing sexually explicit materials or frequenting establishments selling sexually explicit or erotic materials. CP 19 (condition 7). Yet Mr. Kinzle was not accused of possessing sexually explicit materials and there was no finding that this is a crime-related prohibition. The court lacks authority to order non-crime-related prohibitions. RCW 9.94A.703(3)(f). A crime-related prohibition must directly relate to the circumstances of the crime for which the offender has been convicted. RCW 9.94A.030(10). There must be substantial evidence providing factual support for the prohibition. State v. Motter, 139 Wn.App. 797, 801, 162 P.3d 1190 (2007), rev. denied, 163 Wn.2d 1025 (2008); State v.

O'Cain, 144 Wn.App. 772, 184 P.3d 1262 (2008) (striking prohibition on internet access in rape case because it was not crime related). In Mr. Kinzle's case, there was no allegation of any pornographic materials. Similarly, adult bookstores, peep shows, or X-rated movies were not involved in the allegations against Mr. Kinzle, but the court ordered that he may not enter any such establishments. CP 19. The sentencing court erred when it imposed these conditions and they should be stricken.

ii. Condition 10

In condition 10, Mr. Kinzle was ordered not to "date women nor form relationships with families who have minor children, as directed by the supervising Community Corrections Officer." CP 19.Error! Bookmark not defined.

This condition appears to separately restrict Mr. Kinzle from either dating women or forming relationships with families who have minor children. Other restrictions, that are not challenged, limit Mr. Kinzle's contact with children: he was ordered not to have direct contact with R.R. or N.R.; not to "initiate or prolong contact with minor children without the presence of an adult who is knowledgeable about the offense" and approved by the supervising DOC officer; and

not to "frequent areas where minor children are known to congregate." CP 19.

These other conditions bar Mr. Kinzle from contact with minors without the presence of an appropriate adult. Condition 10, prohibiting Mr. Kinzle from dating women and forming relationships with families with minor children serves no additional legitimate purpose. When the court places limits upon a person's fundamental constitutional right to raise children without interference by the state, the restriction must be reasonably necessary to further the government's compelling interest in protecting children. State v. Letourneau, 100 Wn.App. 424, 438, 997 P.2d 436 (2000).

Mr. Kinzle was not dating any women during this incident and the children in the family he was visiting barely knew him. The ambiguous language of condition 10 intrudes upon his right to associate with others in permissible circumstances and it should be stricken as overbroad, vague, and unnecessary in light of the remaining conditions.

iii. Condition 13

Condition 13 mandates that Mr. Kinzle must "[h]old employment only in a position where you always receive direct supervision." CP 20.

A broadly stated condition prohibiting permissible conduct or subject to arbitrary enforcement is unconstitutionally vague. State v. Valencia, 169 Wn.2d 782, 791, 239 P.3d 1059 (2010). As a matter of due process, a person sentenced to community custody must be given fair warning of proscribed conduct and must be reasonably limited to impermissible conduct. Id. at 794.

Requiring that any employment "always" involves "direct supervision," this condition mandates around-the-clock monitoring during work. CP 20. A supervisor would not be permitted to take his eyes off of Mr. Kinzle for a moment, which is impossible. Other conditions already provide DOC with authority to approve any employment and bar employment where contact with minors would occur. CP 19 (conditions 4, 5, 12). But condition 19 requires Mr. Kinzle to "[f]ind and maintain fulltime employment." CP 20.

Consequently, condition 13 sets up an impossible scenario, where Mr. Kinzle cannot take a job without constant supervision at all

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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 69451-1-I
	)	
	)	
JEFFREY KINZLE,	)	
	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 23RD DAY OF MAY, 2013, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X]	SETH FINE, DPA SNOHOMISH COUNTY PROSECUTOR'S OFFICE 3000 ROCKEFELLER EVERETT, WA 98201	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
[X]	JEFFREY KINZLE 350557 COYOTE RIDGE CORRECTIONS CENTER PO BOX 769 CONNELL, WA 99326	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON, THIS 23RD DAY OF MAY, 2013.

X_____

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