No. 43995-6-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

RONALD HODGE HOLTZ,

Appellant.

On Appeal from the Pierce County Superior Court
Cause No. 11-1-03845-1
The Honorable Kathryn Nelson, Judge

OPENING BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

The "to-convict" instructions erroneously stated that the jury had a "duty to return a verdict of guilty" if it found each element proved beyond a reasonable doubt.

II. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

In a criminal trial, does a "to-convict" instruction, which informs the jury that 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?

III. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

The State charged Ronald Hodge Holtz by Amended Information with one count of violation of a protective order (RCW 26.50.110), and one count of fourth degree assault (RCW 9A.36.041). (CP 124-25)

Holtz moved several times to suppress evidence gathered following his arrest (namely his identity and the existence of a protective order issued against him) and to dismiss the charges, arguing that his arrest for assault was not supported by probable

cause. (06/04/12 RP 57-59, TRP2 129; TRP3 233-35; CP 18-22)[1] The trial court denied the motions. (06/04/12 RP 62, TRP2 129; TRP3 233-35; CP 261-65)

The jury found Holtz not guilty of fourth degree assault but guilty of violation of a protective order. (TRP4 362; CP 126-31) Holtz requested an exceptional sentence downward based on his poor health and Strain's consent to having contact, but the court denied the request and instead imposed a standard range sentence totaling 60 months of confinement. (09/21/12 RP 4-11, 23; CP 146-50, 161, 165) This appeal timely follows. (CP 267)

B. SUBSTANTIVE FACTS

Connie Elliott works at the Sunshine Motel in Fife, and was on duty the night of September 19, 2011. (TRP3 1367, 257) She heard two people yelling, and saw a woman she recognized as Clare Strain arguing with a man in the doorway of room 116. (TRP3 258, 259, 260) When the couple saw Elliot watching them, they went inside room 116 and closed the door. (TRP3 260)

Ten to 15 minutes later, Elliott heard yelling again. (TRP3 She looked across the parking lot towards room 116, and saw

[1] The trial transcripts, labeled Volumes I through IV, will be referred to as "TRP" followed by the volume number. The remaining transcripts will be referred to by the date of the proceeding contained therein.

Strain backing out of the doorway. (TRP3 260-61, 263) She then saw the man step towards Strain and shove her in the chest. (TRP3 263, 282) Elliott went to the motel office and called 9-1-1. (TRP3 265)

Fife Police Officer Allen Morales and Milton Police Officer Kevin Peterson responded to the 9-1-1 call. (TRP3 137-138, 238) The Officers went directly to room 116, and contacted Strain and the man, later identified as Ronald Holtz. (TRP3 140-41, 238, 239) Both Holtz and Strain confirmed that they had argued earlier, but denied that the argument had become physical. (TRP 3 142, 143-44, 240, 241)

Officer Morales then contacted Elliott to confirm what she had seen. (TRP3 144, 270) Officer Morales then returned to Holtz and placed him under arrest for assault. (TRP3 145) The Officers requested Holtz's identification, and Holtz provided his Washington State identification card.[2] (TRP3 145, 242) The Officers ran a records check, and found that the name of Ronald Holtz was associated with a protective order prohibiting a person named Ronald Holtz Keal from contacting Strain. (TRP3 146, 242, 243).

[2] Officer Morales testified that the identification occurred after he placed Holtz under arrest, while Officer Peterson testified that he obtained Holtz's identification while Officer Morales was speaking to Elliott. (TRP3 145, 242-43)

Strain testified at trial that she and Holtz had argued, but that Holtz did not push her. (TRP3 187-88, 190-91, 203) She also testified that Holtz sometimes uses the name Ron Keal, and that she was aware of the protective order. (TRP3 186, 187)

Fingerprint expert Kim Howard testified that she compared the prints taken from Holtz when he was booked in the present case with prints taken from a protective order entered against Ronald Keal, and with other booking and court documents pertaining to Ronald Holtz and Ronald Keal. (TRP2 75, 83-86) The prints all matched. (TRP2 83-84) The documents also showed that Holtz (or Keal) has two prior convictions for violating a protective order. (TRP2 88-90, 91-96; Exhs. 11-15)

IV. ARGUMENT & AUTHORITIES

The trial court included the following language in the "to-convict" instruction for violating a protective order:

> If you find from the evidence [that each element has] been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty. . . .
>
> On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

(CP 109) These instructions misstated the law and violated Holtz's

right to a properly instructed jury because there is no "duty to convict under either the federal or state constitutions."[3]

A. STANDARD OF REVIEW

Generally, a criminal defendant may not raise an objection to a jury instruction for the first time on appeal unless it relates to a "manifest error affecting a constitutional right." RAP 2.5(a)(3); *see* State v. Kronich, 160 Wn.2d 893, 899, 161 P.3d 982 (2007). When a constitutional error is asserted for the first time on appeal, the reviewing court must first determine whether the "error is truly of constitutional magnitude." State v. Scott, 110 Wn.2d 682, 688, 757 P.2d 492 (1988). Once the claim is found to be constitutional, the court examines the effect of the error on the defendant's trial under a harmless error standard. Scott, 110 Wn.2d at 688.

Constitutional violations are reviewed *do novo*. Bellevue School Dist. v. E.S., 171 Wn.2d 695, 702, 257 P.3d 570 (2011). Jury instructions are also 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

[3] Division One of the Court of Appeals rejected the arguments raised here in its decision in State v. Meggyesy, 90 Wn. App. 693, 958 P.2d 319 (1998). Holtz respectfully contends that Meggyesy was incorrectly decided and should not be followed by this Court.

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 a jury trial is fundamental to the American system of justice. It is guaranteed by the Sixth Amendment and the due process clauses of both the Fifth and Fourteenth Amendments.[4] Duncan v. Louisiana, 391 U.S. 145, 156, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968); Pasco v. Mace, 98 Wn.2d 87, 94, 653 P.2d 618 (1982).

Trial by jury is not only a valued right of persons accused of a crime, but also an allocation of political power to the citizenry.

> [T]he jury trial provisions in the Federal and State constitutions reflect a fundamental decision about the exercise of official power – a reluctance to entrust plenary powers of the life and liberty of the citizen to one judge or to a group of judges. Fear of unchecked power, so typical of our State and Federal Governments in other respects, found expression in the criminal law in this instance upon community participation in the determination of guilt or innocence.

Duncan, 391 U.S. at 156.

[4] "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury[.]" U.S. Const. Amend. VI. "No person shall be . . . deprived of life, liberty, or property, without due process of law[.]" U.S. Const Amend. V. "[N]or shall any State deprive any person of life, liberty, or property, without due process of law[.]" U.S. Const Amend. XIV.

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 Gunwall, the decision whether to conduct an independent analysis under the state constitution must be based on six factors: (1) the language of the Washington Constitution, (2) differences between the state and federal language; (3) constitutional history; (4) preexisting state law; (5) structural differences; and (6) matters of particular state or local concern. Under the Gunwall analysis, it is clear that the right to a jury trial is such an area, requiring an independent analysis under the Washington State constitution.

1. *The Textual Language of the State Constitution*

The drafters of our state constitution not only guaranteed the right to a jury trial,[5] they expressly declared that "[t]he right of trial by jury shall remain inviolate[.]" Wash. Const. art. I, § 21.

> The term "inviolate" connotes deserving of the highest protection . . . Applied to the right to trial by jury, this language indicates that the right must remain the essential component of our legal system that it has always been. For such a right to remain inviolate, it

[5] "In criminal prosecutions the accused shall have the right . . . to have a speedy public trial by an impartial jury[.]" Wash Const. art. I, § 22. No person "shall be deprived of life, liberty, or property, without due process of law." Wash. Const. art. I, § 3.

> must not diminish over time and must be protected from all assault to its essential guarantees.

Sofie v. Fiberboard Corp., 112 Wn.2d 636, 656, 771 P.2d 711, 780 P.2d 260 (1989). Article I, section 21 "preserves the right [to a jury trial] as it existed in the territory at the time of its adoption." Mace, 98 Wn.2d 96; State v. Strasburg, 60 Wn. 106, 115, 110 P.2d 1020 (1910). And the right to a trial by jury "should be continued unimpaired and inviolate" Strasburg, 60 Wn. at 115.

Other constitutional protections exist in the Washington constitution to further safeguard this right. For example, a court is not permitted to convey to the jury its own impression of the evidence. Wash. Const. art. IV, § 16.[6] Even a witness may not invade the province of the jury by giving an opinion on the guilt of the accused. State v. Black, 109 Wn.2d 336, 350, 745 P.2d 12 (1987).

The different and more specific language in the Washington constitution suggests the drafters intended different and more expansive protections than those provided by the federal constitution. See Hon. Robert F. Utter, FREEDOM AND DIVERSITY IN A FEDERAL SYSTEM: PERSPECTIVES ON STATE CONSTITUTIONS AND THE

[6] "Judges shall not charge juries with respect to matters of fact, not comment thereon, but shall declare the law."

WASHINGTON DECLARATION OF RIGHTS, 7 U. Puget Sound L. Rev. 491, 515 (1984). Thus, while the Court in State v. Meggyesy, 90 Wn. App. 693, 958 P.2d 319 (1998), may have been correct when it found there is no specific constitutional language that addresses this precise issue, the existing language indicates that the right to a jury trial is so fundamental that *any* infringement violates the constitution.

2. *State Constitutional and Common Law History*

State constitutional history favors an independent application of Article I, sections 21 and 22. In 1889 (when the Washington constitution was adopted), the Sixth Amendment did not apply to the states. Instead, Washington based its Declaration of Rights on the Bill of Rights of other states, which relied on common law and not the federal constitution. State v. Silva, 107 Wn. App. 605, 619, 27 P.3d 663 (2001) (citing Utter, 7 U. Puget Sound Law Review at 497). This difference supports an independent reading of the Washington Constitution.

State common law history also favors an independent application. 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; Mace, 98 Wn.2d 96; *see also* State v. Hobble, 126

Wn.2d 283, 299, 892 P.2d 85 (1995). Under 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.

For example, in Leonard v. Territory, 2 Wash. Terr. 381, 7 Pac. 872 (1885), the Supreme Court reversed a murder conviction and set out in some detail the jury instructions given in the case. The court instructed 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. Thus, common law *required* the jury to acquit upon a failure of proof, and *allowed* the jury to acquit even if the proof was sufficient. Leonard, 2 Wash. Terr. at 398-99.

The Court of Appeals in Meggyesy attempted to distinguish Leonard on the basis that the Leonard court was not specifically approving or adopting this specific language, but was "simply quoting the relevant instruction," Meggyesy, 90 Wn. App. at 703. But the Meggyesy court missed the point—at the time the Washington Constitution was adopted, courts instructed juries using the permissive "may" as opposed to the current practice of instructing a jury on its "duty" to convict. Thus, the current instructional practice does not comport with the scope of the right to

a jury trial existing at the time of adoption, and should now be re-examined.

3. *Preexisting State Law*

In criminal cases, 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); see also State v. Holmes, 68 Wn. 7, 122 P. 345 (1912). This rule even applies where the jury ignores applicable law. *See e.g.*, Hartigan v. Washington Territory, 1 Wash. Terr. 447, 449 (1874) ("[T]he 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.")[7]

4. *Difference in Federal and State Constitutional Structures*

State constitutions were originally intended to be the primary instruments for protecting individual rights, with the United States Constitution serving as a secondary layer of protection. Utter, 7 U. Puget Sound L. Rev. at 497; Utter & Pitler, PRESENTING A STATE AND CONSTITUTIONAL ARGUMENT: COMMENT ON THEORY AND TECHNIQUE, 20 Ind. L. Rev. 637, 636 (1987). Accordingly, state constitutions

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

were intended to give broader protection than the federal constitution. An independent interpretation under Washington's Constitution is necessary to accomplish this end. This factor will nearly always support an independent interpretation of the state constitution because the difference in structure is a constant. Gunwall, 106 Wn.2d at 62, 66; *see also* State v. Ortiz, 119 Wn.2d 294, 303, 831 P.2d 1060 (1992).

5. *Matters of Particular State Interest or Local Concern*

The manner of conducting criminal trials in state court is of particular local concern, and does not require adherence to a national standard. *See e.g.,* State v. Smith, 150 Wn.2d 135, 152, 75 P.3d 934 (2003); State v. Russell, 125 Wn.2d 24, 61, 882 P.2d 747 (1994). Gunwall factor number six thus also requires an independent application of the state constitutional provision in this case.

6. *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.

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 1979) (directed verdict of guilty improper even where no issues of fact are in dispute); Holmes, 68 Wn. 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 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 also 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. amd V; Wash. Const. art I. § 9.[8] 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.

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

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 his 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* Alschuler & Deiss, A BRIEF HISTORY OF THE CRIMINAL JURY IN THE UNITED STATES, 61 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 court's must abide by that decision.

United States v. Moylan, 417 F.2d 1002, 1006 (4th Cir. 1969).

This is not to say there is a right to instruct the 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). But under Washington law, juries have always had the ability to deliver a verdict of acquittal that seems to defy the evidence. 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 and prerogative. Such an instruction fails to make the correct legal standard manifestly apparent to the average juror. Kyllo, 166 Wn.2d at 864.

E. EXAMPLES OF CORRECT LEGAL STANDARD INSTRUCTIONS

Permission to convict as opposed to a duty to convict is well-illustrated in the instruction quoted 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 (emphasis added). This was the law as given to the jury in murder trials in 1885, just four years before the adoption of the Washington Constitution.

The Washington Pattern Jury Instruction Committee has adopted accurate language consistent with Leonard for considering a special verdict. WPIC 160.00, the concluding instruction for a special verdict, in which the burden of proof is precisely the same, reads:

> . . . In order to answer the special verdict form "yes", you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. . . . If you unanimously have a reasonable doubt as to this question, you must answer "no."

The due process requirements to return a special verdict—that the jury must find each element of the special verdict proved 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 it at no time imposes a "duty" to answer "yes."

In contrast, the "to-convict" instructions in this case shift power away from the jury and contravene "the undisputed power of the jury to acquit." Moylan, 417 F.2d at 1006. They misstate the role of the jury and provide a level of coercion for the jury to return

a guilty verdict. Such coercion is prohibited. Leonard, supra; State v. Boogaard, 90 Wn.2d 733, 585 P.2d 789 (1978).

F. THE COURT SHOULD NOT FOLLOW THE MEGGYESSY COURT'S OPINION BECAUSE ITS ANALYSIS WAS FLAWED

In Meggyesy, the appellant challenged WPIC's "duty to return a verdict of guilty" language. The court held the federal and state constitutions did not "preclude" this language, and so affirmed. Meggyesy, 90 Wn. App. at 696.

In its analysis, Division One characterized the alternative language proposed by the defendants—"you *may* return a verdict of guilty"—as "an instruction notifying the jury of its power to acquit against the evidence." Meggyesy, 90 Wn. App. at 699. The court spent much of its opinion concluding there was no legal authority requiring the court to instruct a jury that it had the power to acquit against the evidence.

This Court has followed the Meggyesy holding. In State v. Bonisisio, 92 Wn. App. 783, 964 P.2d 1222 (1998), this Court echoed Division One's concerns that instructing with the language "may" was tantamount to instructing on jury nullification.

Appellant respectfully submits that the Meggyesy analysis addressed a different issue than the one argued in this case.

"Duty" is the challenged language herein. By focusing on the proposed remedy, the Meggyesy court (and subsequently the Bonisisio court) side-stepped the underlying issue: the instructions given violated the defendants' 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.

Furthermore, unlike the appellants in Meggyesy and Bonisisio, Holtz is not asking the court to use an instruction that affirmatively notifies the jury of its power to acquit. Instead, he simply argues that jurors should not be affirmatively misled. Such language was not addressed in either Meggyesy or Bonisisio; thus the holdings should not govern here.

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 Holtz's case did not contain a correct statement of the law. The court instructed the jurors that it was their "duty" to convict Holtz if the elements were proved beyond a reasonable doubt. (CP 368, 371-73) The court's use of the word "duty" in the "to-convict" instructions commanded the jury that it

could not acquit if the elements had been established. This coercive misstatement of the law 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. By instructing the jury that 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 in reaching its general verdict.

V. CONCLUSION

The instruction commanding a duty to return a verdict of guilty was an incorrect statement of the law and undermined the jury's inherent power to acquit, which violated Holtz's state and federal constitutional right to a jury trial. Accordingly, Holtz's conviction must be reversed and the case remanded for a new trial.

DATED: March 22, 2013

STEPHANIE C. CUNNINGHAM, WSB #26436
Attorney for Ronald H. Holtz

CERTIFICATE OF MAILING

I certify that on 03/22/2013, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Ronald H. Holtz, DOC# 945319, Coyote Ridge Corrections Center, P.O. Box 769 , Connell, WA 99326-0769.

STEPHANIE C. CUNNINGHAM, WSBA #26436

CUNNINGHAM LAW OFFICE

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