SUPREME COURT NO. 99937-6

NO. 80917-2-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

CHARLES MARTIN,

Appellant.

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

The Honorable David Steiner, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER/DECISION BELOW

Charles Martin, appellant below, asks this Court to grant review, pursuant to RAP 13.4, of the unpublished decision of the Court of Appeals in State v. Martin, no. 80917-2-I, entered on June 1, 2021. A copy of the opinion is attached as an appendix.

B. ISSUE PRESENTED FOR REVIEW

State and federal courts uniformly recognize juries have the power to nullify, to ignore the law in reaching a verdict. Instructing jurors that nullification violates the law can be coercive and infringe the accused's constitutional right to have a jury decide guilt or innocence on every issue. At Martin's trial, the court told the jury, "nullification . . . is not allowed." Is reversal required?

C. STATEMENT OF THE CASE

The King County Prosecutor's Office charged Charles Martin with first degree robbery, alleging he injured Chuck Quartarolo while attempting to steal Quartarolo's car. CP 1. Martin pleaded not guilty and raised the defenses of general denial, diminished capacity, and not guilty by reason of insanity. RP 39.

1. Facts pertaining to jury nullification instruction

During voir dire, the trial court gave the following unprompted instruction on jury nullification:

> And I'm about to wind up here, and then we'll hear from the attorneys one at a time. We'll probably only get one in before we take our noon recess. So there's a thing known as the doctrine of jury nullification. The idea of jury nullification is that jurors ought to be able to come in and say, you know, we're just going to do what we think is right. And that's not allowed because I don't get to do what I think is right. I mean I do in the sense that as long as I'm following the law, that's okay. That is the idea of justice. But I have to be following the law. I can't go out on my own and just say, you know, I think this is the way the law ought to be and I'm going to make it that way. So jurors are required to follow the instructions that you are given.
>
> Hence, my next question: Would any of you be unable to assure the Court that you will follow the instructions on the law regardless of what you think the law is or what you think it ought to be? Getting no positive responses there.
>
> Do any of you have any reason that has not already been noted why you think you might not be able to be impartial in this case? Getting no positive responses. So does anyone have any reason whatsoever why you think you should not be selected as a juror to sit on this case? Other than something that you've -- might have already noted? Okay, thank you very much.

RP 334-35 (emphasis added).

Immediately after these remarks, defense counsel requested a sidebar and objected. RP 334-35, 362-63. Counsel explained he did not object in front of the jury because he understood the law prohibited discussing jury nullification in front of the jury. RP 363. Counsel argued the court had misstated the law because "Jurors have an absolute right to veto," or reach a verdict of not guilty despite concluding that the state had proved its case. RP 363-64.

The trial court disagreed, stating that, under the law, "jury nullification is not allowed." RP 364. The court acknowledged only, "a poor choice of words when I used the word you can't go off and do what you think is right," but deemed its instruction proper because, "I did correct myself on in front of the jury and indicate well, actually you can as long as it's within the instructions." RP 364.

Defense counsel argued that, while it was appropriate for the court to instruct jurors they must follow the instructions, the court erred "when the Court said specifically jury nullification is something you can't do." RP 364.

The trial court, however, continued to equate an instruction to follow the instructions with an instruction against jury nullification. The court stated, "I didn't define jury nullification other than saying that you must follow the law. That was what I said. Jury nullification is not following the law." RP 365.

2. Substantive facts

Around 4:00 A.M. in the spring of 2016, Martin walked into the street barefoot wearing nothing but underwear. RP 494. He approached Quartarolo, a stranger, who was sitting in his car, an older Chevy Blazer. RP 495. Through the window, Martin told Quartarolo he was not on drugs. RP 495. Martin then pulled the car door open, told Quartarolo to "Get the fuck out of the car," repeatedly punched him in the head, and pulled him from the car. RP 495, 506. Quartarolo left and called 911. RP 514.

Martin did not get far. RP 499. The car stalled at a nearby stop sign. RP 499. Martin got out of the car, ran across the road, and hid in a tangle of blackberry bushes. RP 608, 685. After a canine search, police found Martin, pulled him out of the sticker bushes and arrested him. RP 568, 659, 685.

It was undisputed Martin had a history of mental illness dating back at least six years. RP 800, 905, 1090-91. He also had a prior drug charge around the same time as the incident. RP 801, 906. Defense witness Dr. Paul Spizman, a clinical psychologist, opined Martin was "psychotic" at the time of the incident. RP 794, 803.

Dr. Spizman summarized what he believed to be the most relevant information as follows:

> So we have an individual who, in the middle of the night, runs from his home wearing only his underwear, he runs down several flights of stairs, he runs out past several nice, to my understanding, expensive automobiles, he runs down the street, again, only in his underwear in the middle of the night, he then attempts to steal an automobile of, we'll say, significantly lesser value than the ones that he already had, that he certainly had no need for. ... He has no need to steal a car, quite literally running past several of his own expensive automobiles. ... it seems rather odd, but when you get into his psychosis, when you get into his delusional belief system, that's when all the pieces come together.

RP 804-05. Dr. Spizman testified that although he did not know whether medication, drug use, or mental illness was the underlying cause of Martin's delusional beliefs, the source was irrelevant. RP 808. He opined Martin certainly had delusional

beliefs and they were "by far and away" ... "the best explanation" of his behavior during that incident. RP 808. Martin's delusion centered on his belief that he was a character playing a video game called Grand Theft Auto, the object of the game being to steal vehicles. RP 809.

Dr. Spizman opined that, due to this delusional belief, Martin did not form the required intent to commit the crime, and his ability to conform his behavior to the requirements of the law were significantly affected by his mental illness at the time of the incident. RP 811.

Dr. Lauren Smith, the State's medical expert, disagreed, opining that Martin was not credible, that he was attempting to minimize his substance abuse, and that any impairment caused by voluntary intoxication or drug use was excluded from her analysis. RP 1087, 1091. Smith evaluated Martin and diagnosed him with "unspecified mood disorder" which she believed was in remission at the time she observed him. RP 1093. She also diagnosed him with substance use disorder. RP 1094. Smith noted various discrepancies between details Martin told her and what he told the police immediately after the incident. RP 1100-01.

Based on these factors, Smith opined it was "very unlikely" Martin was suffering from a mental disease or defect at the time of the incident, and there was "no indication" Martin was unaware of his own actions during the incident. RP 1101, 1103.

Martin testified he did not recall the events of the incident before being sniffed by the police dog. RP 912. He had been playing Grand Theft Auto and other video games in his home non-stop for the past several days. RP 911. He also testified that he had a history of mental illness, and at the time of the incident, he and his wife owned multiple expensive vehicles, including a Porsche, a brand new Acura, and a Maybach. RP 905, 909. He also testified that after he bailed out of jail on the present incident, within days he was re-arrested on federal charges, and was booked into a mental hospital. RP 915.

Martin testified he did not make a conscious decision to strike anyone or steal a vehicle, and after the incident he felt as though he had woken up. RP 924. He testified he had believed he was in the video game Grand Theft Auto, and was simply playing out the game, attempting to go from one car to another, snatching people out of their vehicles and stealing their cars. RP 924-25. He

did not intend to steal a real car or hit a real human being; he thought it was part of the game. RP 925-26.

The jury convicted Martin as charged. CP 72. The trial court noted Martin's mental health issues, but also noted the jury had rejected his defenses, and so sentenced him to 57 months of imprisonment and 18 months of community custody. CP 216-17; RP 1333-31.

On appeal, Martin argued the conviction should be reversed because the trial court erred when it instructed jurors that jury nullification was not allowed. The Court of Appeals rejected Martin's arguments and affirmed his conviction. Martin now seeks this Court's review.

D. REASONS WHY REVIEW SHOULD BE GRANTED AND ARGUMENT

THE COURT ERRED IN SUA SPONTE INSTRUCTING THE JURY THAT JURY NULLIFICATION IS NOT ALLOWED.

"Jury nullification occurs in a trial when a jury acquits a defendant, even though the members of the jury believe the defendant to be guilty of the charges." State v. Nicholas, 185 Wn. App. 298, 301, 341 P.3d 1013 (2014) (citing State v. Elmore, 155 Wn.2d 758, 761 n. 1, 123 P.3d 72 (2005)). State and federal

courts uniformly recognize the power of juries to ignore the law in reaching a verdict. State v. Meggyesy, 90 Wn. App. 693, 699, 958 P.2d 319 (1998) (citing United States v. Edwards, 101 F.3d 17, 19 (2nd Cir. 1996)). Jurors may exercise this power either because they disagree with the law or because they believe it should not be applied in a particular case. Nicholas, 185 Wn. App. 298, 301. "Nullification is a juror's knowing and deliberate rejection of the evidence or refusal to apply the law because the result dictated by law is contrary to the juror's sense of justice, morality, or fairness." Id. The power of nullification "is protected by 'freedom from recrimination or sanction' after an acquittal." United States v. Kleinman, 880 F.3d 1020, 1031 (9th Cir. 2017) (quoting Merced v. McGrath, 426 F.3d 1076, 1079 (9th Cir. 2005)).

While "courts recognize that jury nullification occurs in practice, ... [they] will not promote it or educate jurors about nullification." Nicholas, 185 Wn. App. at 301. Thus, for example, it is inappropriate to instruct jurors on their power to nullify. Kleinman, 880 F.3d at 1031. It is also inappropriate to instruct jurors they "may" convict the defendant as a substitute for the

standard instructional language indicating a "duty" to convict where the State has proved its case. Meggyesy, 90 Wn. App. at 697-705.

Conversely, however, "courts should 'generally avoid[ ] such interference as would divest juries of their power to acquit an accused even though the evidence of his guilt may be clear.'" Kleinman, 880 F.3d at 1033 (quoting United States v. Simpson, 460 F.2d 515, 520 (9th Cir. 1972)). While there is no legal right to nullification, courts must be careful not to suggest a penalty for a particular verdict. Kleinman, 880 F.3d at 1032-33. To do so is coercive of the verdict, in violation of the accused's constitutional rights under the Fifth and Sixth Amendments to have the jury decide guilt or innocence on every issue. Id. at 1036. Courts also may not suggest to the jury that the result of an act of nullification would be legally invalid. Id. at 1032-33.

As the Court of Appeals recognized, "Nullification is in the unique province of the jury and is not to be promoted or discouraged." App. at 12 (citing Nicholas, 185 Wn. App. at 301. Therefore, the best practice is for courts to avoid mention of the topic altogether. Id.

Unfortunately, the trial judge chose not to follow this best practice, instead sua sponte instructing the jury that "jury nullification . . . is not allowed." RP 334. This instruction effectively divested the jury of its power to nullify. The Ninth Circuit has expressly disapproved of such an instruction.

In Kleinman, the Ninth Circuit addressed the impropriety of telling jurors they may not use nullification. In that case, the judge instructed the jury:

> You cannot substitute your sense of justice, whatever that means, for your duty to follow the law, whether you agree with it or not. It is not for you to determine whether the law is just or whether the law is unjust. That cannot be your task. There is no such thing as valid jury nullification[.] You would violate your oath and the law if you willfully brought a verdict contrary to the law given to you in this case.

Kleinman, 880 F.3d at 1031. The Ninth Circuit found nothing improper in the instruction's first three sentences, which essentially told jurors to do their job by following the court's instructions on the law. Id. at 1032. But the Kleinman court found the last two sentences to be error because they suggested that nullification could be punished and that an acquittal resulting from nullification would be invalid. Id. at 1032-1033.

> Although a court has "the duty to forestall or prevent [nullification]," including by firm instruction or admonition, Merced, 426 F.3d at 1080, a court should not state or imply that (1) jurors could be punished for jury nullification, or that (2) an acquittal resulting from jury nullification is invalid. More specifically, the court's statement that the jury "would violate [its] oath and the law if [it] willfully brought a verdict contrary to the law given to [it] in its case," could be construed to imply that nullification could be punished, particularly since the instruction came in the midst of a criminal trial. Moreover, the statement that "[t]here's no such thing as valid jury nullification" could be understood as telling jurors they do not have the power to nullify, and so it would be a useless exercise.

Id.

Similarly, when instructing the jury in Martin's case, the court depicted jury nullification as unlawful and useless. After informing jurors that jury nullification, "that's not allowed," the court immediately explained that this meant, "I have to be following the law. I can't go out on my own and just say, you know, I think this is the way the law ought to be and I'm going to make it that way." RP 334.

In Kleinman, after having found the trial judge's instruction on was in error, the court then turned to the standard of review for assessing prejudice. 880 F.3d at 1033.

The court did so with reference to the constitutional provisions at issue. The Fifth Amendment to the United States Constitution guarantees no one will be deprived of liberty without "due process of law." U.S. Const., amend. V. The Sixth Amendment promises that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury." U.S. Const., amend. VI.

The Kleinman court decided, "to the extent the district court's erroneous instruction improperly infringed on 'the historical and constitutionally guaranteed right of criminal defendants to demand that the jury decide guilt or innocence on every issue, which includes application of the law to the facts,' implying that a particular decision might result in some sort of punishment, . . . the error took on a constitutional dimension." Kleinman, 880 F.3d at 1036 (citing United States v. Gaudin, 515 U.S. 506, 513, 115 S. Ct. 2310, 132 L. Ed. 2d 444 (1995); Merced, 426 F.3d at 1079). The court explained that, although a firm admonition to follow the law was permissible, it was not proper to do so "in a way that might be perceived as coercive with regard to the jury's ultimate verdict." Kleinman, 880 F.3d at

1036. Therefore, the court applied the harmless error standard for constitutional error, requiring the prosecution to prove beyond a reasonable doubt that the instruction did not contribute to the guilty verdict. Id. (citing Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)).

In Kleinman, the court found the error harmless because jurors were otherwise properly instructed, "[t]he erroneous two-sentence nullification instruction was a small part of the court's final instructions to the jury, and [it] was delivered without specific emphasis." Id. at 1035.

In contrast, at Martin's trial, the court's prohibition on nullification was not similarly buried within other instructions. Rather, the court emphasized it by discussing it separately from other instructions, by addressing it last and in a colloquial manner (rather than reading from a dry script). RP 334-35.

In the absence of this improper instruction, conviction was far from assured. The medical experts disagreed regarding whether Martin was sane or capable of forming intent during the incident. RP 803, 811, 1101, 1103. Jurors may have

disagreed about whether Martin's delusional behavior was caused by long-term drug use, unrelated mental health issues, or a combination of the two, but jurors were also provided with conflicting opinions about whether that mattered. RP 808, 1087, 1091. It was undisputed Martin was behaving oddly by running into the street in his underwear, that he owned several expensive vehicles and had no need to steal an old car from a stranger, and that he had a lengthy history of mental health issues. RP 494-95, 800, 804-05, 905, 909, 1090-91. Under these facts, it cannot be said that fear of being seen as engaging in jury nullification did not contribute to the verdict.

The trial court's anti-nullification instructions interfered with Martin's rights, under the Fifth and Sixth Amendments, to demand that the jury decide his guilt or innocence on every issue. They improperly removed an opportunity – available to defendants in every other Washington case – for jurors to acquit. Because the State cannot show this error was harmless beyond a reasonable doubt, reversal is required.

The Court of Appeals rejected these arguments, relying instead on a more recent Ninth Circuit case, United States v.

Lynch, 903 F.3d 1061 (9th Cir. 2018). But the Court of Appeals failed to note three critical ways in which this case is not on all fours with Lynch.

First, the decision in Lynch arose because the trial judge could not avoid the topic of nullification. Defense counsel and a juror had repeatedly made it the subject of voir dire, necessitating the court's intervention. Lynch, 903 F.3d. at 1078. In short, Lynch was essentially a case of invited error. Id. The court noted the instruction was "particularly justified" in light of defense counsel's conduct. Id. at 1080. Here, by contrast, there was no invited error. The trial judge chose to bring up the subject of nullification, sua sponte. RP 334.

Second, before giving the instruction, the court in Lynch consulted with the attorneys for both sides. 903 F.3d at 1078-79. Here, again, because the court brought up the topic unexpectedly, there was no opportunity for defense counsel to have input or consider how it should be addressed with the jury.

Finally, the Lynch court did not reject Kleinman's holding or reasoning that an instruction was improper if it suggested nullification would be penalized or invalid. Lynch, 903 F.3d at

1079. Instead, the Lynch court clearly distinguished Kleinman. The instruction in Lynch read,

> Nullification is by definition a violation of the juror's oath which, if you are a juror in this case, you will take to apply the law as instructed by the court. As a ... juror, you cannot substitute your sense of justice, whatever it may be, for your duty to follow the law, whether you agree with the law or not. It is not your determination whether the law is just or when a law is unjust. That cannot be and is not your task.

903 F.3d at 1078. As the Lynch court noted, most of the instruction's language was directly quoted from the case law. Id. at 1079. The court explained, "In this case, in contrast, [to Kleinman] there was no indication that nullification would place jurors at risk of legal sanction or otherwise be invalid." Id. (emphasis added).

Here, the judge did not limit the remarks to the nature of the juror's oath, as in Lynch. RP 334. Instead, the judge told the jurors point blank that nullification was "not allowed." RP 334. This instruction, more than a mere admonition to follow the law, suggested nullification would be invalid and/or unlawful, in contravention of the warnings in Kleinman.

This case puts before this Court the question of whether a trial judge may, sua sponte, instruct the jury that jury nullification is not allowed. The issue has ramifications for the constitutional right to have the jury as the sole arbiter of guilt or innocence. Kleinman, 880 F.3d at 1036 (citing Gaudin, 515 U.S. at 513; Merced, 426 F.3d at 1079). This Court should grant review under RAP 13.4(b)(3) and (4) and reverse.

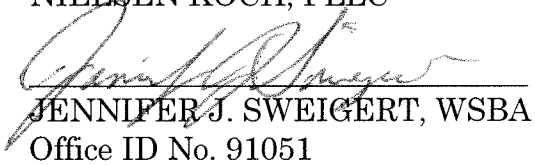
E. CONCLUSION

For the foregoing reasons, Martin respectfully requests this Court grant review and reverse.

DATED this 30th day of June, 2021.

Respectfully submitted,

NIELSEN KOCH, PLLC



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Appendix

FILED
6/1/2021
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON Respondent, v. CHARLES ALEXANDER MARTIN, aka CHARLES ALEXANDER TRAYLOR, Appellant.	)	No. 80917-2-I DIVISION ONE UNPUBLISHED OPINION

HAZELRIGG, J. — Charles A. Martin was convicted of robbery in the first degree following a jury trial. At trial, Martin asserted that he was not guilty by reason of insanity based on his belief that he was in a video game at the time of the robbery. The jury convicted Martin as charged. Martin now appeals, arguing an instruction by the court referencing jury nullification that was given at the beginning of voir dire was reversible error. He further challenges the imposition of discretionary community custody supervision fees after the trial court found him indigent, which the State concedes was improper. Finding no error as to the instruction, we affirm, but remand to strike the supervision fees from Martin's judgment and sentence.

FACTS

Charles A. Martin was charged with robbery in the first degree arising from events which occurred on May 2, 2016. Chuck Quartarolo was in his 1999 Chevrolet Blazer outside of his son's home around 5 a.m., waiting to drive him to work. A man wearing only his underwear suddenly appeared at the side of the Blazer, shouting and knocking on the car. The man was later identified as Martin, who did not know Quartarolo. Martin then yanked open the car door, punched Quartarolo twice in the jaw, and said "Get the fuck out of the truck." Martin then pulled Quartarolo out of the vehicle and punched him again.

Martin got into the Blazer and drove away. However, he did not get very far as the vehicle stalled at a nearby stop sign. Martin then abandoned the vehicle and ran across the street. Quartarolo ran into his son's house and the police were called. Law enforcement arrived within minutes and attempted to locate Martin with a K-9 unit. The K-9's perimeter search led to an area of thick brush. While the K-9 was tracking the scent, its handler kicked aside a real estate sign on the ground and discovered Martin hiding there. Martin was taken into custody and asked the deputy, "Did I steal a car? I don't remember." Responding law enforcement officers had not mentioned anything about a stolen vehicle to him. Martin made several unsolicited statements to the deputy, describing what happened. He initially stated that he did not remember what had occurred, but then said it was "coming back" to him. Martin elaborated that he approached Quartarolo and asked Quartarolo if he thought Martin was high. Martin admitted to punching Quartarolo and trying to steal his car before going into the bushes.

Over two years later, in August of 2018, Martin spoke with a forensic psychologist, Dr. Paul Spizman, in preparation for trial. He told Spizman that he believed he was playing a video game, Grant Theft Auto, which dictated that he steal a car. Martin told Spizman what he was thinking during the incident. As a result, Spizman concluded that because Martin believed he was in the video game, he did not form the intent to steal the vehicle from a real human being or to assault a real person. Testifying as an expert for the defense, Spizman opined that Martin's ability to conform his behavior to the requirement of the law was affected to a significant degree due to psychosis on the morning in question. Spizman believed the psychosis could have been drug-induced. This theory was the basis for Martin's not guilty by reason of insanity defense.

During voir dire, the trial court asked several general questions of jurors. Following the initial inquiry, the court stated:

> So there's a thing known as the doctrine of jury nullification. The idea of jury nullification is that jurors ought to be able to come in and say, you know, we're just going to do what we think is right. And that's not allowed because I don't get to do what I think is right. I mean I do in the sense that as long as I'm following the law, that's okay. That is the idea of justice. But I have to be following the law, that's okay. That is the idea of justice. But I have to be following the law. I can't go out on my own and just say, you know, I think this is the way the law ought to be and I'm going to make it that way. So jurors are required to follow the instructions that you are given.
>
> Hence, my next question: Would any of you be unable to assure the Court that you will follow the instructions on the law regardless of what you think the law is or what you think it ought to be? Getting no positive responses there.
>
> . . .
>
> So does anyone have any reason whatsoever why you think you should not be selected as a juror to sit on this case? Other than something that you've—might have already noted? Okay, thank you very much.

Immediately after the court's remarks, defense counsel requested a side bar and objected to the court's instruction on jury nullification. Martin's attorney explained he did not object immediately following the statement because his understanding was that the law expressly prohibited him from discussing nullification in the presence of the jury. He further asserted that nullification could not be discussed with jurors by anyone involved in the proceedings. The judge disagreed, stating "I had a poor choice of words when I used the word you can't go off and do what you think is right," but indicated that ultimately his instruction was proper because "I did correct myself on [sic] in front of the jury and indicate well, actually you can as long as it's within the instructions."

At trial, the State presented testimony from Dr. Lauren Smith, a forensic psychologist from Western State Hospital, who had evaluated Martin. Smith concluded Martin had the capacity to form the requisite intent at the time of the offense. Martin had told Smith that he did not remember anything from the incident except waking up in the bushes. Smith's opinion was based on Martin's goal-directed behavior and his unprompted statements to police upon arrest. She further noted there was absolutely no indication that Martin was not aware of what he was doing.

Martin testified at trial and indicated that he had been staying inside since he learned, after police seized one of his cars, that he had an outstanding warrant and law enforcement were looking for him and his vehicles. He admitted that he lied to mental health professionals when necessary to "get[] out of consequences." Martin indicated on cross examination that he was "not so much" thinking he was

in a video game, but instead "reacting accordingly." His testimony provided a contradictory story of the events at issue, alternating between claiming that he did not remember and offering details or explanations about his actions.

The jury convicted Martin as charged. The trial court sentenced him to 57 months of incarceration, followed by 18 months of community custody. The court found Martin indigent and only imposed mandatory fees and costs, but the preprinted language in the judgment and sentence required Martin to "[p]ay supervision fees as determined by the Department of Corrections." Martin now appeals.

ANALYSIS

Martin argues that the trial court improperly instructed the venire as to jury nullification at the start of voir dire. "The adequacy of jury instructions is reviewed de novo." State v. Espinosa, 8 Wn. App. 2d 353, 361, 438 P.3d 582 (2019). "Jury nullification occurs in a trial when a jury acquits a defendant, even though the members of the jury believe the defendant to be guilty of the charges." State v. Nicholas, 185 Wn. App. 298, 301, 341 P.3d 1013 (2014). "[T]he power of nullification is rooted in courts' unwillingness to inquire into deliberations because jurors can agree to acquit on virtually any basis without court knowledge." State v. Ward, 8 Wn. App. 2d 365, 376, 438 P.3d 588 (2019). Our courts do not inquire into the jury's verdict out of respect for our judicial system. State v. Moore, 179 Wn. App. 464, 468, 318 P.3d 296 (2014). The power of a jury to nullify does not stem from any legal right. Id. To reinforce this, neither our state nor federal

constitution provide a right to nullification. Nicholas, 185 Wn. App. at 303; United States v. Kleinman, 880 F.3d 1020, 1035 (9th Cir. 2017).

The jury's power to nullify is in stark contrast with its duty to uphold the law. "The jury's duty to uphold the law has existed in Washington since the state was a territory." Moore, 179 Wn. App. at 467. There is, however, no remedy where a jury nullifies, but this is not because the jury is without a duty to uphold the law. Id. at 468. For well over a century, our state has acknowledged a juror is "just as much bound by the laws of this territory as any other citizen. [They] acquire[] no right to disregard that law simply because [they have] taken an oath as [juror] to aid in its administration." Hartigan v. Territory, 1 Wash. Terr. 447, 451 (1874) (alterations in original).

Judges are to declare the law, while jurors must swear to faithfully apply the law. Nicholas, 185 Wn. App. at 304. "The judge must be permitted to instruct the jury on the law and to insist that the jury follow his or her instructions." Id. "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." WASH CONST. art. IV, § 16.

Here, Martin focuses on a statement by the judge during voir dire, prior to empaneling the jury, which was:

> So there's a thing known as the doctrine of jury nullification. The idea of jury nullification is that jurors ought to be able to come in and say, you know, we're just going to do what we think is right. And that's not allowed because I don't get to do what I think is right. I mean I do in the sense that as long as I'm following the law, that's okay. That is the idea of justice. But I have to be following the law. I can't go out on my own and just say, you know, I think this is the way the law ought to be and I'm going to make it that way. So jurors are required to follow the instructions that you are given.

> Hence, my next question: Would any of you be unable to assure the Court that you will follow the instructions on the law regardless of what you think the law is or what you think it ought to be? Getting no positive responses there.
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> . . .
>
> So does anyone have any reason whatsoever why you think you should not be selected as a juror to sit on this case? Other than something that you've—might have already noted? Okay, thank you very much.

Following these remarks by the court, Martin requested a sidebar and objected to the court's statements regarding nullification. After the discussion at sidebar, the objection was taken up on the record outside of the presence of the jurors. Martin reinforced his position that the court improperly discussed nullification with the jury. The judge acknowledged, "I think my wording—I had a poor choice of words when I used the word you can't go off and do what you think is right, which I did correct myself on [sic] in front of the jury and indicate well, actually you can as long as it's within the instructions." The judge reinforced that this correction was in line with the Washington Pattern Jury Instruction (WPIC)[1] "that indicate[s] that you must follow the law regardless of what you personally believe the law is or ought to be." Martin made clear that his objection was not to the court instructing the jury that they must follow the law, but specifically "tying that to jury nullification."

In his briefing on appeal, Martin primarily relies on Kleinman for the proposition that the court should avoid language or inferences that would indicate the jury may not acquit if the evidence of guilt is clear. 880 F.3d 1020. One of the written jury instructions provided by the trial court in Kleinman stated:

> "You cannot substitute your sense of justice, whatever that means, for your duty to follow the law, whether you agree with it or not. It is

[1] 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 1.02 (2d ed. 1994)

> not for you to determine whether the law is just or whether the law is unjust. That cannot be your task. There is no such thing as valid jury nullification[.] You would violate your oath and the law if you willfully brought a verdict contrary to the law given to you in this case."

Id. at 1031.

Kleinman was on trial for numerous federal crimes based on the operation of his medical marijuana collective storefronts which he alleged complied with state law. Id. at 1025–26. The court decided to give this instruction because protestors gathered in front of the courthouse were urging the jury to disregard the federal law. Id. at 1031 n.3. The court had inquired with each juror individually if the protestors' signs had influenced them and reinforced that they were to only focus on what occurred in the courtroom. Id. No jurors were dismissed following the court's individualized inquiries, however Kleinman asserted on appeal that this individualized inquiry by the court furthered the coercive effect of the anti-nullification instruction. Id. Kleinman's primary argument was that the "instructions implied that jurors would break the law, and possibly be punished, if they did not convict, and thus divested the jury of its power to nullify." Id. at 1031.

The Ninth Circuit acknowledged the instruction had been crafted based on language from two cases wherein federal courts had reviewed questions regarding jury nullification. Id. at 1031–32. The court determined the first three sentences of the instruction were appropriate as they directed the jury to follow the trial court's instructions and apply the law to the facts. Id. at 1032. However, the Ninth Circuit went on to find the last two sentences erroneous as they provided an inference that would divest the jury of its power to acquit, even though guilt may be clear. Id. at 1033. The Kleinman court went on to determine the error was subject to

harmless error review and found the instructional error as to those two sentences to be harmless. Id. at 1035–36.

Kleinman reinforces the notion that courts should limit their instruction as to nullification, such that it is not wise to mention the concept to a jury at all unless necessitated by the circumstances. However, Kleinman's finding of error is distinct from the case before us for a number of reasons. First, the case in Kleinman was controversial, because protestors had rallied outside the courthouse and expressly urged the jury to acquit via nullification. Id. at 1031 n.3. This pressure reached a degree that the court determined it was appropriate to inquire individually with each juror regarding any influence they may have felt from the demonstration. Id. This fact alone is quite distinct from Martin's circumstances where there was no indication of influence on the jury outside of the courtroom and there was no individualized inquiry such that it would inferentially influence the jury to avoid nullification. Second, and most critically, the instruction by the court in Kleinman was formal in that it was included amongst other written instructions provided to the jury by the judge and presumably taken with the jurors into deliberation. Id. at 1031.

In the case at hand, the challenged statement occurred when the court was working through its general instructions and questions with the venire at the start of voir dire. The instruction by the court was not written, repeated, or given once the jury was sworn. At the close of the case, the jury was properly instructed on its duty as finder of fact, without any reference to nullification. Instruction 1 contained the pattern language from WPIC 1.02 and directed, in relevant part:

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

The other jury instructions that were provided prior to deliberation, including the to-convict instruction and those explaining the burden of proof and elements of the charged crime, contained standard definitions and directions to the jurors. The jury is presumed to follow the court's instruction absent any evidence to the contrary. State v. Martinez, 2 Wn. App. 2d 55, 77, 408 P.3d 721 (2018). Finally, the language at issue in this case was not as strong as the statement by the court in Kleinman which "implied that jurors could face legal consequences for nullification." 880 F.3d at 1035. As such, we do not find that Kleinman, or any other authority offered by Martin, supports a finding of error here.

The analysis in United States v. Lynch, a Ninth Circuit opinion issued not long after Kleinman, is much more instructive to the case at hand. 903 F.3d 1061 (9th Cir. 2018). In Lynch, defense counsel made numerous comments and asked questions during voir dire that appeared to broach the topic of jury nullification. Id. at 1078–79. A juror eventually responded, "I understand that completely. I believe there is something called jury nullification, that if you believe the law is wrong, you don't have to convict a person." Id. at 1078. As a result of this exchange, the district court halted voir dire to instruct:

> Nullification is by definition a violation of the juror's oath which, if you are a juror in this case, you will take to apply the law as instructed by the court. As a . . . juror, you cannot substitute your sense of justice, whatever it may be, for your duty to follow the law, whether you agree

> with the law or not. It is not your determination whether the law is just or when a law is unjust. That cannot be and is not your task.

Id. at 1079.

Following this instruction, the court inquired individually of each prospective juror if they could follow the instruction and each agreed. Id. The Ninth Circuit found the instruction by the court was proper. Id. Lynch makes clear that no juror has a right to engage in nullification and that doing so is a violation to their sworn duty to follow the law as instructed by the court. Id. The court reiterated that the Ninth Circuit has held that "a court can seek to prevent nullification 'by firm instruction or admonition.'" Id. at 1088 (quoting Kleinman, 880 F.3d at 1032). It was then reinforced that there is no right to nullification and that "[t]he district court's admonition that nullification was a violation of a jury's duty to follow the law did not deprive the jurors of their ability to nullify, since nullification is by its nature the rejection of such duty." Id. at 1080.

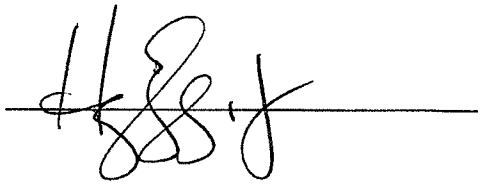
Here we have nothing in the record to indicate the attorneys attempted to discuss nullification with the jury, particularly before the comment by the judge because voir dire had just begun with the court's initial inquiry to prospective jurors. The fact that this instruction was conveyed during voir dire, as opposed to later in the case as part of the formal written jury instructions, makes Lynch more analogous to the comments by the court in the case before us. The language in Lynch is also similar to the language used here in that both were more duty focused, informing the jury of their obligation, as opposed to the judge's discussion of violating the oath and directive that "'there is no such thing as valid jury nullification'" in Kleinman. 800 F.3d at 1031. Most critically, Martin's challenge is

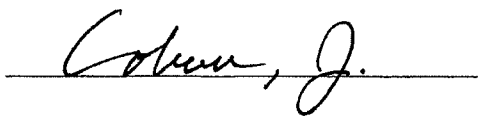
identical to that of Lynch's: "that the [trial] court's instruction inhibited the jurors from being willing to nullify the charges against him." 903 F.3d at 1080. Importantly, Lynch continues, "but this was also not a violation of any legal right." Id. The logic of Lynch applies equally here; the "court's admonition that nullification was a violation of a jury's duty to follow the law did not deprive the jurors of their ability to nullify, since nullification is by its nature the rejection of such duty." Id.

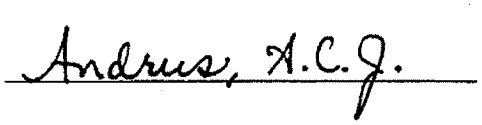
We do not find error here. We do, however, question the need for the trial court to have commented on jury nullification at all and note that such a statement under another set of facts or circumstances could have easily resulted in a different outcome on review. Here, it appears the judge did recognize his poor choice of wording after the fact. However, he also clearly indicated his belief that the content of his comment on nullification was not improper in and of itself. Nullification is in the unique province of the jury and is not to be promoted or discouraged. Nicholas, 185 Wn. App. at 301. It is for this reason that we caution judges and practitioners alike as to any discussion of nullification. See Kleinman, 880 F.2d at 1031–33; Lynch, 903 F.3d at 1080; Nicholas, 185 Wn. App. at 301. Let the jury deliberate as they do; the power to nullify is uniquely within the province of the jury.

Finally, we accept the State's concession as to Martin's remaining assignment of error that the trial court, after finding Martin indigent, improperly imposed Department of Correction supervision fees pursuant to his community custody. The parties are correct that this was error under the plain language of RCW 9.94A.703(2)(d). Therefore, we affirm Martin's conviction, but remand for correction of the error as to the imposition of the community custody fees.

WE CONCUR:







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