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NO. 69801-0-1

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

STATE OF WASHINGTON,

Respondent,

v.

CORY HUBBARD,

Appellant.

~~FILED~~
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
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ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SNOHOMISH COUNTY

The Honorable Ellen Fair, Judge

BRIEF OF APPELLANT

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TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENT OF ERROR</u>	1
<u>Issue Pertaining to Assignment of Error</u>	1
B. <u>STATEMENT OF THE CASE</u>	1
1. <u>Procedural Facts</u>	1
2. <u>Substantive Facts</u>	2
C. <u>ARGUMENT</u>	6
THE TRIAL COURT ERRED IN INSTRUCTING THE JURY IT HAD A "DUTY TO RETURN A VERDICT OF GUILTY." ...	6
1. <u>The "Duty to Convict" Instruction Violates the Right to a Jury Trial Under the United States Constitution</u>	7
2. <u>Under a Gunwall Analysis, the Duty to Convict Instruction Violates the Greater Protection Afforded the Jury Trial Right by the Washington Constitution</u>	8
i. <u>Textual Language and Differences from Federal Constitutional Provisions</u>	9
ii. <u>State Constitutional and Common Law History</u>	10
iii. <u>Preexisting State Law</u>	10
iv. <u>Differences in Federal and State Constitutions' Structure</u>	12
v. <u>Matters of Particular State Interest or Local Concern</u>	12
3. <u>A Jury Should Not Be Instructed It Has a Duty to Convict Because No Such Duty Exists</u>	13

TABLE OF CONTENTS (CONT'D)

	Page
4. <u>Meggyesy Was Wrongly Decided Because It Focused on the Proposed Remedy Rather than the Error.</u>	18
D. <u>CONCLUSION</u>	19

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

<u>City of Pasco v. Mace</u> 98 Wn.2d 87, 653 P.2d 618 (1982).	7, 10, 11, 13
<u>City of Redmond v. Moore</u> 151 Wn.2d 664, 91 P.3d 875 (2004)	7
<u>Hartigan v. Territory</u> 1 Wash. Terr. 447 (1874).	11
<u>Leonard v. Territory</u> 2 Wash. Terr. 381, 7 Pac. 872 (1885).	10
<u>Sofie v. Fibreboard Corp.</u> 112 Wn.2d 636, 771 P.2d 711 (1989).	9, 10, 11
<u>State v. Bennett</u> 161 Wn.2d 303, 165 P.3d 1241 (2007)	6
<u>State v. Black</u> 109 Wn.2d 336, 745 P.2d 12 (1987).	9
<u>State v. Byrd</u> 72 Wn. App. 774, 868 P.2d 158 (1994) <u>aff'd</u> , 125 Wn. 2d 707, 887 P.2d 396 (1995).....	6
<u>State v. Carlson</u> 65 Wn. App. 153, 828 P.2d 30 (1992)	17
<u>State v. Gibbons</u> 118 Wash. 171, 203 P. 390 (1922).....	13
<u>State v. Green</u> 94 Wn.2d 216, 616 P.2d 628 (1980)	17
<u>State v. Gunwall</u> 106 Wn.2d 54, 720 P.2d 808 (1986)	1, 8, 13

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>State v. Holmes</u> 68 Wash. 7, 122 Pac. 345 (1912).....	13
<u>State v. Meggyesy</u> 90 Wn. App. 693, 958 P. 2d 319 <u>rev. denied</u> , 136 Wn.2d 1028 (1998), <u>abrogated on other grounds by State v. Recuenco</u> 154 Wn.2d 156, 110 P.3d 188 (2005)	1, 10, 11, 12, 18
<u>State v. Primrose</u> 32 Wn. App. 1, 645 P.2d 714 (1982)	15
<u>State v. Russell</u> 125 Wn.2d 24, 882 P.2d 747 (1994) <u>cert. denied</u> , 514 U.S. 1129 (1995)	12
<u>State v. Salazar</u> 59 Wn. App. 202, 796 P.2d 773 (1990)	15
<u>State v. Scott</u> 110 Wn.2d 682, 757 P.2d 492 (1988)	6
 <u>FEDERAL CASES</u>	
<u>Duncan v. Louisiana</u> 391 U.S. 145, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968).....	7, 8
<u>Gideon v. Wainwright</u> 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963).....	13
<u>Jackson v. Virginia</u> 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979).....	17
<u>Neder v. United States</u> 527 U.S. 1, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999).....	13
<u>United States v. Atkinson</u> 512 F.2d 1235 (4th Cir. 1975)	8

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>United States v. Bejar-Matrecios</u> 618 F.2d 81 (9th Cir. 1980)	8
<u>United States v. Garaway</u> 425 F.2d 185 (9th Cir. 1970)	8, 13
<u>United States v. Gaudin</u> 515 U.S. 506, 115 S. Ct. 2310, 132 L. Ed. 2d 444 (1995)	13, 16
<u>United States v. Moylan</u> 417 F.2d 1002 (4th Cir. 1969)	15
<u>United States v. Powell</u> 955 F.2d 1206 (9th Cir. 1991)	15

RULES, STATUTES AND OTHER AUTHORITIES

<u>11A Washington Practice: Pattern Jury Instructions: Criminal</u> WPIC 300.17 (3d Ed. 2011)	6
<u>11A Washington Practice: Pattern Jury Instructions: Criminal</u> WPIC 35.13 (3d Ed. 2011)	6
<u>11A Washington Practice: Pattern Jury Instructions: Criminal</u> WPIC 36.51 (3d Ed. 2011)	6
<u>11A Washington Practice: Pattern Jury Instructions: Criminal</u> WPIC 60.02 (3d Ed. 2011)	6
<u>Alschuler & Deiss</u> <u>A Brief History of the Criminal Jury in the United States</u> 61 U. Chi. L. Rev. 867 (1994)	14
<u>Bushell's Case</u> Vaughan 135, 124 Eng. Rep. 1006 (1671)	14

TABLE OF AUTHORITIES (CONT'D)

	Page
Robert F. Utter <u>Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights</u> (1984).....	9, 10, 12
Robert Utter & Pitler <u>Presenting a State Constitutional Argument: Comment on Theory and Technique</u> (1987)	12
The Papers of Thomas Jefferson Vol. 15, 269 (Princeton Univ. Press, 1958).....	7
Wigmore <u>A Program for the Trial of a Jury</u> , 12 Am. Jud. Soc. 166 (1929)	17
RAP 2.5	6
U.S. Const. amend. 5	7, 14
U. S. Const. amend. 6	7
U.S. Const. amend. 7	7
U.S. Const. amend. XIV	7, 12
U.S. Const. art. 3, § 2	7
U.S. Const. art. 3, § 3	7
Wash. Const. art. I, § 9.....	14
Wash. Const. art. 1, § 21.....	9, 11
Wash. Const. art. 4, § 16.....	9

A. ASSIGNMENT OF ERROR

The trial court erred in instructing the jury it had a “duty to convict” if it found all the elements of the offense beyond a reasonable doubt.¹ CP 54 (Instruction 6).

Issue Pertaining to Assignment of Error

In a criminal trial, does a “to-convict” instruction violate the right to a jury trial under the state and federal Constitutions when it informs the jury it has a duty to return a verdict of guilty if it finds the elements have been proven beyond a reasonable doubt?

B. STATEMENT OF THE CASE

1. Procedural Facts

The Snohomish County Prosecutor’s Office charged Corey Hubbard with one count of Residential Burglary. CP 78-79. A jury found him guilty and found the presence of an aggravating factor: the presence of a victim during the crime. CP 44-45. The trial court imposed an exceptional 14-month sentence, and Hubbard timely filed his Notice of Appeal. CP 3-14, 17-18.

¹ This Court rejected the argument raised here in State v. Meggyesy, 90 Wn. App. 693, 958 P. 2d 319, review denied, 136 Wn.2d 1028 (1998), abrogated on other grounds by State v. Recuenco, 154 Wn.2d 156, 110 P.3d 188 (2005). Counsel respectfully contends Meggyesy was incorrectly decided. Because Hubbard must include a Gunwall analysis or risk waiver of the issue, the Meggyesy argument is included in its entirety.

2. Substantive Facts

On the morning of July 27, 2012, 18-year-old Kimberly Davis was home alone, and in the bathroom, when she heard the doorbell and the sound of someone knocking on the window adjacent to the home's front door. RP 29-30. Davis peeked out the window and saw a short, heavysset Hispanic man drinking a soda. Because neither of her parents was home, Davis became nervous and did not open the door. RP 30. She could see a white car parked in front of her home. RP 32.

Davis contacted her boyfriend by phone and, on his advice, attempted to lock all doors and windows. RP 32-33. By now, the Hispanic man and the white car had disappeared, but as Davis continued to look out the window, she saw the car return. RP 33. Davis went to her bedroom and heard the doorbell again. RP 33-34. The ringing stopped, but Davis believed she heard the sound of footsteps on gravel coming from the yard. RP 34. She also heard the rustling of blinds coming from a garage window that had been left partially open. RP 34, 36-37.

Davis returned to the bathroom, locked the door, and called 911. RP 38. While speaking with the dispatcher, she heard the door

from the garage to the interior of the home open and then footsteps in the home. RP 38-39. Davis heard two, and perhaps three, male voices outside the bathroom door. RP 39. Someone knocked on the bathroom door, and Davis put her weight against it. RP 41. She could tell someone was pushing from the other side because the top of the door was flexing. RP 41. Someone then attempted to open the door using a tool. RP 42. Davis screamed and she could hear the men running away. RP 43.

Marysville Police spotted the white car, which was speeding, and pulled it over. RP 81, 86-87. There were three occupants. The driver was Alfred Moreno, the individual Davis had seen at her front door. RP 45, 88-89, 122-123. The front passenger was Taliford Brown. RP 174. Cory Hubbard, who initially identified himself to police as "John Moon" and gave a false date of birth, was in the rear seat of the car. RP 89, 98, 172.

Before the white car had been stopped, Les Liner and his wife saw the car go by with police cars in pursuit and watched as someone inside the car threw items – a sock, a stocking cap, and gloves – out the passenger side window. RP 17-20. The Liners called 911 and stood by the discarded items until police returned to the area. RP 18, 20, 91. In addition to these items, by the roadway

police found a discarded green pillowcase containing jewelry and coins. RP 92. Both the pillowcase and its contents had been taken from Davis' parents' bedroom. RP 61-62. Police also located a second pillowcase – which had been on a pillow in Davis' bedroom – discarded on the front porch of Davis' home. RP 44-45.

All three occupants of the white car were arrested without incident. RP 89-90. Moreno was in possession of marijuana. RP 99. Hubbard was in possession of a watch that had been taken from Davis' parent's bedroom. RP 63, 66-67, 100, 123-124. He was also carrying \$608.00 in cash. RP 101. In the back seat, where Hubbard had been sitting, police found a marijuana joint and Hubbard's California driver's license. RP 133-134.

Hubbard testified in his own defense. RP 146. He explained that he, Moreno, and Brown were visiting Seattle from California. RP 146-148. They rented a 2012 white Chevy Impala for the trip. RP 149-150. While in Seattle, Hubbard hoped to buy a birthday present for his girlfriend. On the morning of July 27, the three men met "Frank," who not only sold them marijuana, but offered to sell Hubbard a watch he could give his girlfriend. RP 150-153.

Frank told them the watch was at his home and he needed a ride to retrieve it. The four men got in to the white Chevy Impala and,

with Frank giving directions, ended up at Davis' house in Marysville. RP 153-155. Frank exited the car and entered the back yard through the gate while the others remained in the car. RP 155. After five to ten minutes of waiting, Moreno became agitated, got out of the car, and knocked on the front door to the home. When no one answered, he returned to the car. RP 156.

Frank eventually returned and sat in the back seat with Hubbard. RP 156. As Moreno began driving away, Hubbard examined the watch and paid Frank \$40.00 for it. RP 157-158, 162-163, 181. When Frank noticed a police car behind the Impala, he panicked, threw items out of the car, and jumped out after the car turned a corner. RP 159-161. Moreno continued to drive until the pursuing police cars turned on their overhead lights. RP 163-164.

Hubbard testified that he had no idea the watch he purchased from Frank was stolen until police told him. RP 167. He used the name John Moon and provided the fake date of birth because he had an outstanding California warrant. RP 169, 186. He denied entering Davis' home and denied knowing Frank had burglarized the home. RP 170. The cash he was carrying was his own. RP 175-176.

C. ARGUMENT

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY IT HAD A "DUTY TO RETURN A VERDICT OF GUILTY."

The "to-convict" instruction listing the elements of Residential Burglary states: "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 54. This is standard language from the pattern instructions. 11A Washington Practice: Pattern Jury Instructions: Criminal, WPIC 35.13, 36.51, 60.02, 300.17 (3d Ed. 2011). But it misstates the law. A jury always has the power to acquit, and the court never has the power to direct or coerce a verdict. While the jury need not be notified of its power to acquit despite the evidence, it is a misstatement of the law to instruct the jury this power does not exist.²

Jury instructions must clearly communicate the relevant law to the jury and must not be misleading. State v. Bennett, 161 Wn.2d 303, 307, 165 P.3d 1241 (2007). Constitutional violations and jury

² Hubbard did not make this argument to the trial court. He may nevertheless raise it for the first time on appeal as an issue of constitutional magnitude. RAP 2.5(a)(3); State v. Scott, 110 Wn.2d 682, 688, 757 P.2d 492 (1988); State v. Byrd, 72 Wn. App. 774, 782, 868 P.2d 158 (1994), aff'd, 125 Wn. 2d 707, 887 P.2d 396 (1995).

instructions are reviewed de novo. Id. at 307; City of Redmond v. Moore, 151 Wn.2d 664, 668, 91 P.3d 875 (2004).

1. The “Duty to Convict” Instruction Violates the Right to a Jury Trial Under the United States Constitution.

The right to a jury trial is fundamental in our criminal justice system. Indeed, this is the only right enumerated in both the original United States Constitution of 1789 and in the Bill of Rights. U.S. Const. art. 3, § 2, 3; U. S. Const. amend. 6; U.S. Const. amend. 7. It is further guaranteed by the due process clauses of the Fifth and Fourteenth Amendments. Duncan v. Louisiana, 391 U.S. 145, 156, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968); City of Pasco v. Mace, 98 Wn.2d 87, 94, 653 P.2d 618 (1982). Thomas Jefferson wrote of the importance of this right in a letter to Thomas Paine in 1789: “I consider trial by jury as the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution.” The Papers of Thomas Jefferson, Vol. 15, 269 (Princeton Univ. Press, 1958).

In addition to being a valued right afforded criminal defendants, the jury trial is 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 over the life and liberty of the citizen to one judge or to a group of judges. Fear of unchecked power, so typical of our State and Federal Governments in other respects, found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence.

Duncan, 391 U.S. at 156.

While some federal courts have concluded an instruction on the duty to convict “probably” does not divest the jury entirely of its power to acquit, the courts have also warned against “language that suggests to the jury that it is obliged to return a guilty verdict.” United States v. Bejar-Matrecios, 618 F.2d 81, 85 (9th Cir. 1980) (citing United States v. Atkinson, 512 F.2d 1235 (4th Cir. 1975) and United States v. Garaway, 425 F.2d 185 (9th Cir. 1970)).

2. Under a Gunwall Analysis, the Duty to Convict Instruction Violates the Greater Protection Afforded the Jury Trial Right by the Washington Constitution.

Washington’s constitution provides greater protection than the federal constitution in some areas. State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986). Analysis of the six Gunwall factors demonstrates Washington’s constitution is substantially more protective of the jury trial right than the federal constitution.

i. Textual Language and Differences from Federal Constitutional Provisions

The Washington State Constitution goes further than the federal constitution, declaring the right to a trial by jury shall be held “inviolable.” Const. art. 1, § 21.

The term “inviolable” 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 inviolable, it must not diminish over time and must be protected from all assault to its essential guarantees.

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

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

The framers added other constitutional protections to this right. A court is not permitted to convey to the jury its own impression of the evidence. Const. art. 4, § 16. (“Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law.”). Even a witness may not invade the province of the jury. State v. Black, 109 Wn.2d 336, 350, 745 P.2d 12 (1987). The right to jury trial also is protected by the due process clause of article I, section 3.

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

ii. State Constitutional and Common Law History

Washington based its Declaration of Rights on the Bills of Rights of other states, which relied on common law and not the federal constitution. Utter, 7 U. Puget Sound L. Rev. at 497. This difference supports an independent reading of the Washington Constitution.

iii. Preexisting State Law

Since article I, section 21 “preserves the right [to jury trial] as it existed in the territory at the time of its adoption,” it is helpful to look at the preexisting state law. Sofie, 112 Wn.2d at 645; Pasco, 98 Wn. 2d at 96. In Leonard v. Territory, the Supreme Court reversed a murder conviction and set out the jury instructions given in the case. Leonard v. Territory, 2 Wash. Terr. 381, 7 Pac. 872 (1885). These instructions provide a view of the law before the adoption of the Constitution:

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 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.

Id. at 399.

The court thus acknowledged, and incorporated into the jury instructions, the threshold requirement that each element be proved beyond a reasonable doubt to permit a conviction; but any reasonable doubt required acquittal. Because this was the law regarding the scope of the jury's authority at the time of the adoption of the Constitution, it was incorporated into Const. art. 1, § 21, and remains inviolate. Sofie, 112 Wn.2d at 656; Pasco, 98 Wn.2d at 93, 96.

Pre-existing state law also recognized a jury's unrestricted power to acquit: "[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 law, either from mistake or a willful disregard of the law, there is no remedy." Hartigan v. Territory, 1 Wash. Terr. 447, 449 (1874).

The Meggyesy court disregarded Leonard on the basis that Leonard "simply quoted the relevant instruction. . . ." Meggyesy, 90 Wn. App. at 703. But the Meggyesy court missed the point; at the time the Constitution was adopted, courts instructed juries using the permissive "may" as opposed to the current practice of requiring the

jury to make a finding of guilt. The instructions from Leonard demonstrate the pre-existing law at the time of the adoption of the Washington Constitution did not require a finding of guilt.

iv. Differences in Federal and State Constitutions' Structure

State constitutions were originally intended to be the primary devices to protect individual rights, with the United States Constitution a secondary layer of protection. Utter, 7 U. Puget Sound L. Rev. at 497; Utter & Pitler, Presenting a State Constitutional Argument: Comment on Theory and Technique, 20 Ind. L. Rev. 637, 636 (1987). Accordingly, state constitutions were intended to give broader protection than the federal constitution. An independent interpretation is necessary to accomplish this end. The Meggyesy court acknowledged this factor nearly always weighs in favor of independent interpretation of the state constitution. 90 Wn. App. at 703.

v. Matters of Particular State Interest or Local Concern

Criminal law is a local matter. State v. Russell, 125 Wn.2d 24, 61, 882 P.2d 747 (1994), cert. denied, 514 U.S. 1129 (1995). There is no need for national uniformity in criminal law. Until the Fourteenth Amendment was interpreted to apply the United States Bill of Rights

in state court proceedings, all matters of criminal procedure were considered a matter of state law. See, e.g., Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963); State v. Gibbons, 118 Wash. 171, 203 P. 390 (1922). This factor also weighs in favor of an independent state constitutional analysis. The Gunwall factors show the “inviolable” Washington right to jury trial was more extensive than the jury trial right protected by the federal constitution when it was adopted in 1789. Pasco, 98 Wn.2d at 99.

3. A Jury Should Not Be Instructed It Has a Duty to Convict Because No Such Duty Exists.

The court has no power to compel or direct a jury to return a specific verdict. Garaway, 425 F.2d 185 (directed verdict of guilty improper even where no issues of fact are in dispute); State v. Holmes, 68 Wash. 7, 12-13, 122 Pac. 345 (1912). If a court improperly withdraws a particular issue from the jury’s consideration, it may deny the defendant the right to jury trial. United States v. Gaudin, 515 U.S. 506, 115 S. Ct. 2310, 132 L. Ed. 2d 444 (1995) (improper to withdraw issue of “materiality” of false statement from jury’s consideration); see Neder v. United States, 527 U.S. 1, 8, 15-16, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999) (omission of element in jury instruction subject to harmless error analysis).

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 not 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 Alschuler & Deiss, A Brief History of the Criminal Jury in the United States, 61 U. Chi. L. Rev. 867, 912-13 (1994).

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

We recognize, as appellants urge, the undisputed power of the jury to acquit, even if its verdict is contrary to the law as given by the judge and contrary to the

evidence. . . . If the jury feels that the law under which the defendant is accused is unjust, or that exigent circumstances justified the actions of the accused, or for any reason which appeals to their logic or passion, the jury has the power to acquit, and the courts must abide by that decision.

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

Washington courts have also recognized that a jury may always vote to acquit. 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).

This is not to say there is a right to instruct a jury it may disregard the law in reaching its verdict. See, e.g., United States v. Powell, 955 F.2d 1206, 1213 (9th Cir. 1991) (reversing conviction on other grounds). However, if the court may not tell the jury it may disregard the law, it is at least equally wrong for the court to direct the jury it has a duty to return a verdict of guilty if it finds certain facts to be proved.

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

Prof. Wigmore described the roles of the law and the jury in our system:

Law and Justice are from time to time inevitably in conflict. That is because law is a general rule (even the stated exceptions to the rules are general exceptions); while justice is the fairness of this precise case under all its circumstances. And as a rule of law only takes account of broadly typical conditions, and is aimed at average results, law and justice every so often do not coincide We want justice, and we think we are going to get it through "the law" and when we do not, we blame the law. Now this is where the jury comes in. The jury, in the privacy of its retirement, adjusts the general rule of law to the justice of the particular case. Thus the odium of inflexible rules of law is avoided, and popular satisfaction is preserved. . . . That is what a jury trial does. It supplies that flexibility of legal rules which is essential to justice and popular contentment. . . . The jury, and the secrecy of the jury room, are the indispensable elements in popular justice.

Wigmore, A Program for the Trial of a Jury, 12 Am. Jud. Soc. 166 (1929).

Furthermore, if such a “duty” to convict exists, it cannot be enforced. If a jury acquits, the case is over, the charge dismissed, and there is no further review. In contrast, if a jury convicts when the evidence is insufficient, the court has a legally enforceable duty to reverse the conviction or enter a judgment of acquittal notwithstanding the verdict. Jackson v. Virginia, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980); State v. Carlson, 65 Wn. App. 153, 828 P.2d 30 (1992). The “duty” to return a verdict of not guilty is genuine and enforceable by law.

But a more accurate description of the jury’s role in a guilty verdict is to say that a legal “threshold” exists before a jury may convict, not that a jury has a duty to convict. A guilty verdict in a case that does not meet this evidentiary threshold is contrary to law and will be reversed. A jury must return a verdict of not guilty if there is a reasonable doubt; however, it may return a verdict of guilty if, and only if, it finds every element proven beyond a reasonable doubt.

4. Meggyesy Was Wrongly Decided Because It Focused on the Proposed Remedy Rather than the Error.

The Meggyesy court did not dispute that the court has no power to direct a guilty verdict in a criminal trial. 90 Wn. App. at 699. Instead it focused on the remedy proposed by the appellant in that case, namely, an instruction that the jury “may” convict if it finds all the elements of the charged offense beyond a reasonable doubt. The Meggyesy court rejected this remedy, interpreting it as informing the jury of its power to nullify or acquit despite the evidence. Id. The Court concluded there was no right to have the jury so instructed. Id. at 699-700.

But a deficiency in the proposed remedy neither resolves nor eliminates the problem. The jury has no “duty” to convict, and, therefore, it is misleading to say that it does. This problem can be remedied without implicitly informing the jury of its power to nullify with the permissive “may.” For example, the jury could be accurately instructed regarding the threshold necessary to return a guilty verdict: “In order to return a verdict of guilty, you must unanimously find from the evidence that each of these elements has been proved beyond a reasonable doubt.” CP 71. This puts the duty in its proper place.

The instruction given in Hubbard's case provided a measure of coercion for the jury to return a guilty verdict. When the trial court told the jury it had a duty to return a guilty verdict based merely on finding certain facts, the court took from the jury its constitutional authority to apply the law to the facts to reach a general verdict. This instruction was an incorrect statement of law and violated Hubbard's right to a jury trial.

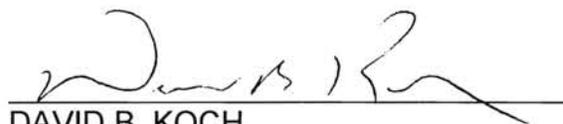
D. CONCLUSION

Hubbard's conviction for Residential Burglary should be reversed because of the erroneous instruction that the jury had a "duty to convict."

DATED this 30th day of May, 2013.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



DAVID B. KOCH
WSBA No. 23789
Office ID No. 91051

Attorney for Appellant

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

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 69801-0-1
)	
CORY HUBBARD,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 30TH DAY OF MAY 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] SNOHOMISH COUNTY PROSECUTOR'S OFFICE
3000 ROCKEFELLER AVENUE
EVERETT, WA 98201
Diane.Kremenich@co.snohomish.wa.us

SIGNED IN SEATTLE WASHINGTON, THIS 30TH DAY OF MAY 2013.

X *Patrick Mayovsky*