

70042-1

70042-1

NO. 70042-1-1

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

STATE OF WASHINGTON,

Respondent,

v.

COLSON MILTON,

Appellant.

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

The Honorable David A. Kurtz, Judge

BRIEF OF APPELLANT

DAVID B. KOCH
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

19-4-11 9:15 AM
19-4-11 11:4:31
[Handwritten signature]

TABLE OF CONTENTS

	<u>Page</u>
A. <u>ASSIGNMENT OF ERROR</u>	1
Issue Pertaining to Assignment of Error	1
B. <u>STATEMENT OF THE CASE</u>	1
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. The “Duty to Convict” Instruction Violates the Right to a Jury Trial Under the United States Constitution.	7
2. Under a <i>Gunwall</i> Analysis, the Duty to Convict Instruction Violates the Greater Protection Afforded the Jury Trial Right by the Washington Constitution. .	9
a. Textual Language and Differences from Federal Constitutional Provisions.....	9
b. State Constitutional and Common Law History	10
c. Preexisting State Law	11
d. Differences in Federal and State Constitutions’ Structure	12
e. Matters of Particular State Interest or Local Concern	13
3. A Jury Should Not Be Instructed It Has a Duty to Convict Because No Such Duty Exists.	14
4. <i>Meggyesy</i> Was Wrongly Decided Because It Focused on the Proposed Remedy Rather than the Error.....	18
D. <u>CONCLUSION</u>	20

TABLE OF AUTHORITIES

	<u>Page</u>
 <u>WASHINGTON CASES</u>	
<u>City of Pasco v. Mace</u> , 98 Wn.2d 87, 653 P.2d 618 (1982)	7, 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)	12
<u>Leonard v. Territory</u> , 2 Wash. Terr. 381, 7 Pac. 872 (1885)	11, 12
<u>Sofie v. Fibreboard Corp.</u> , 112 Wn.2d 636, 771 P.2d 711 (1989)	9, 11
<u>State v. Bennett</u> , 161 Wn.2d 303, 165 P.3d 1241 (2007)	7
<u>State v. Black</u> , 109 Wn.2d 336, 745 P.2d 12 (1987)	10
<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).....	7
<u>State v. Carlson</u> , 65 Wn. App. 153, 828 P.2d 30 (1992)	18
<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

TABLE OF AUTHORITIES (CONT'D)

	<u>Page</u>
<u>WASHINGTON CASES (Cont'd)</u>	
<u>State v. Gunwall</u> , 106 Wn.2d 54, 720 P.2d 808 (1986)	9, 13
<u>State v. Holmes</u> , 68 Wash. 7, 122 Pac. 345 (1912).....	14
<u>State v. Meggyesy</u> , 90 Wn. App. 693, 958 P. 2d 319, <u>review denied</u> , 136 Wn.2d 1028 (1998), <u>abrogated on other grounds by</u> <u>State v. Recuenco</u> , 154 Wn.2d 156, 110 P.3d 188 (2005)	i, 1, 10, 12, 13, 18
<u>State v. Primrose</u> , 32 Wn. App. 1, 645 P.2d 714 (1982)	16
<u>State v. Recuenco</u> , 154 Wn.2d 156, 110 P.3d 188 (2005)	1
<u>State v. Russell</u> , 125 Wn.2d 24, 882 P.2d 747 (1994), <u>cert. denied</u> , 514 U.S. 1129 (1995)	13
<u>State v. Salazar</u> , 59 Wn. App. 202, 796 P.2d 773 (1990)	16
<u>State v. Scott</u> , 110 Wn.2d 682, 757 P.2d 492 (1988)	7

TABLE OF AUTHORITIES (CONT'D)

	<u>Page</u>
<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)	14
<u>United States v. Atkinson</u> , 512 F.2d 1235 (4th Cir. 1975)	8
<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, 14
<u>United States v. Gaudin</u> , 515 U.S. 506, 115 S. Ct. 2310, 132 L. Ed. 2d 444 (1995)	14, 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)	16

TABLE OF AUTHORITIES (CONT'D)

	<u>Page</u>
<u>RULES, STATUTES AND OTHER</u>	
11A Washington Practice: Pattern Jury Instructions: Criminal, WPIC 35.13, 36.51, 60.02, 300.17 (3d Ed. 2011)	6
Alschuler & Deiss, <u>A Brief History of the Criminal Jury in the United States</u> , 61 U. Chi. L. Rev. 867 (1994).....	15
<u>Bushell's Case</u> , Vaughan 135, 124 Eng. Rep. 1006 (1671)	14
Const. art. I, § 3.....	10
Const. art. 1, § 21.....	9, 11
Const. art. 4, § 16.....	10
Const. art. I, § 9.....	14
Hon. Robert F. Utter, <u>Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights</u> , 7 U. Puget Sound L. Rev. 491 (1984) (Utter)	9, 10, 12
RAP 2.5(a)(3)	6
The Papers of Thomas Jefferson, Vol. 15 (Princeton Univ. Press, 1958).....	8
U. S. Const. amend. 6	7
U.S. Const. amend. 5	7, 14
U.S. Const. amend. 7	7
U.S. Const. amend. 14.....	7, 13
U.S. Const. art. 3, § 2.....	7

TABLE OF AUTHORITIES (CONT'D)

	<u>Page</u>
<u>RULES, STATUTES AND OTHER (Cont'd)</u>	
U.S. Cosnt. art. 3, § 3.....	7
Utter & Pitler, <u>Presenting a State Constitutional Argument: Comment on Theory and Technique</u> , 20 Ind. L. Rev. 637 (1987).....	12
Wigmore, <u>A Program for the Trial of a Jury</u> , 12 Am. Jud. Soc. 166 (1929).....	16, 17

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 41 (Instruction 5).

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

The Snohomish County Prosecutor’s Office charged Colson Milton with one count of Assault in the Second Degree. CP 70-71. Evidence at trial revealed that in April 2011, Jody Hall and her 15-year-old daughter Chase lived in Hall’s Edmonds home. 2RP² 61-62. Although there is one address for the home, it is divided into

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.

² This brief refers to the verbatim report of proceedings as follows: 1RP – November 1, 2012; 2RP – February 11, 2013; 3RP – February 12, 2013; 4RP – February 13-14, 2013; 5RP – February 27, 2013.

two separate residences (one for Hall and one for Chase) connected by a deck. 2RP 62.

Chase was rebellious and would sometimes sneak out, leading Hall to confiscate her cell phone at night. 2RP 62-63. On the evening of April 10, Hall intercepted a text message on Chase's cell phone from Colson Milton, which said, "we're almost there." 2RP 63-64. Believing Chase was up to something, Hall walked over to her residence, but she was not there. Hall locked the door to Chase's residence and returned to her own. 2RP 64.

Now locked out of her own residence, Chase went to her mother's and knocked. 2RP 64-65. Hall suspected Chase had been sneaking out. She was not happy and had Chase speak with her dad on the phone. 2RP 65. Hall then intercepted another text from Milton's phone to Chase's phone. This one said, "we're here." 2RP 65-66.

While Chase continued to speak with her father, Hall walked down the driveway and spotted a parked SUV. 2RP 66. One of Chase's friends from school – Adelisa Husovic – was driving. Milton, whom Hall did not previously know, was in the front passenger seat. 2RP 64, 67-68. As Hall approached the SUV,

Milton opened the passenger side door. 2RP 67. Portions of what happened next were disputed at trial.

Hall was upset to see that Husovic was there to help Chase sneak out. As Hall stood near the open passenger door, she and Husovic began yelling and swearing at each other. 2RP 68-70. According to Hall, Milton eventually stood up and pushed Hall to the ground, where she fell on her behind. 2RP 71. When she got up, Milton grabbed her around the ankles, lifted her in the air, and launched her over his shoulder. 2RP 72-74. She landed in the street, suffering fractures in her wrist and face. 2RP 74, 77. Milton and Husovic drove away, returned briefly so that Milton could retrieve his cell phone from the street, and left again. 2RP 75-76. A passing motorist spotted Hall and called 911. 3RP 40-41. Once Hall made it back to her residence, Chase also called 911. 2RP 76.

Husovic agreed that she and Hall had exchanged words. 3RP 53. But she claimed Hall was the first to become physically aggressive. According to Husovic, as the verbal exchange heated up, Hall eventually jumped inside the car, reached across Milton – who was still seated – and hit her in the face. 3RP 54. Only at that point did Milton remove Hall from the car. 3RP 55. As Milton turned back toward the SUV, Hall jumped on his back and hit him in

the face. 3RP 56. Milton then pulled Hall off of him and to the ground. 3RP 63-64.

Consistent with Husovic's testimony, Milton testified that after Hall and Husovic exchanged insults, Hall entered the car through the passenger door, placed her body across Milton's lap, and attacked Husovic. 3RP 74-75. Milton was able to physically remove Hall from the vehicle, but each time he pushed her away, she persisted in trying to get back in, grabbing Milton's jacket. 3RP 75-76. On the third such attempt, Hall punched Milton in the face. 3RP 76. Milton grabbed her around the waist, but she put him in a headlock. At that point, Milton "dump[ed] her to the side," she landed on the ground, and Milton got back in the SUV. 3RP 76. Milton denied lifting Hall by her ankles or launching her over his head as she claimed. 3RP 81-82.

At trial, evidence was presented establishing that Milton lifts weights and participates in "Scottish Highland Games." 2RP 85-86, 88-89; 3RP 20-21, 78-81. Some activities involve lifting and throwing heavy objects. 2RP 85; 3RP 21, 79-81, 93-96. The State theorized that Milton had used his training and techniques when throwing Hall to the ground. 3RP 21, 96.

Dr. Jeffrey Friedrich, who treated Hall at the hospital, testified that Hall had suffered a left wrist fracture and a fractured left cheekbone, both of which required surgery. She also suffered a “subarachnoid hemorrhage,” which is akin to a bruise on the brain. 4RP 9-11. In Dr. Friedrich’s opinion, Hall’s injuries were most consistent with falling from a significant height, although he could not rule out the possibility her injuries were from a non-elevated “ground-level fall.” 4RP 12-14.

Edmonds Police Detective Stacie Trykar testified to her conversations with Hall, Husovic, and Milton after the fray. 3RP 8-20 According to Trykar, Hall admitted she may have tried to pull Husovic’s hair, she may have grabbed Milton’s jacket, and she may have hit Milton. 3RP 19-20, 32-34. At trial, Hall denied that she ever pulled Husovic’s hair and attributed her contrary statement to the effects of morphine, which she had been given for her injuries. 2RP 79. Detective Trykar, however, testified that Hall seemed coherent at the time. 3RP 27-28.

Jurors were instructed on self-defense and defense of another. CP 46-49. The defense argued that Milton had used lawful force in defending himself and Husovic from Hall’s physical attacks. 4RP 28-40. The prosecution argued that Milton had used

excessive force in dealing with the situation and was, therefore, guilty of assault. 4RP 23-28, 40-43.

A jury found Milton guilty, the court imposed a standard-range sentence of 200 days' confinement, and Milton timely filed his Notice of Appeal. CP 1-12, 16, 33.

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 Assault in the Second Degree 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 41. 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.³

³ Milton 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

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 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.”

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).

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.

a. 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.

b. 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.

c. 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.

d. 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.

e. 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 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. 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.

Professor 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.” This puts the duty in its proper place.

The instruction given in Milton’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 Milton’s right to a jury trial.

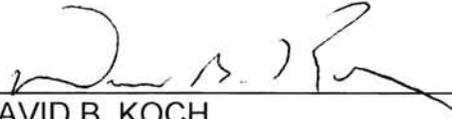
D. CONCLUSION

Milton's conviction for Assault in the Second Degree should be reversed because of the erroneous instruction that the jury had a "duty to convict."

DATED this 15th day of August, 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. 70042-1-1
)	
COLSON MILTON,)	
)	
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 16TH DAY OF AUGUST 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

- [X] COLSON MILTON
NO. 655597
SNOHOMISH COUNTY JAIL
3025 OAKES AVENUE
EVERETT, WA 98201

SIGNED IN SEATTLE WASHINGTON, THIS 16TH DAY OF AUGUST 2013.

X *Patrick Mayovsky*

STATE OF WASHINGTON
COURT OF APPEALS
DIVISION ONE
AUG 16 10 41 AM '13