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King County Prosecutor
Appellate Unit

NO. 70458-3-1

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

STATE OF WASHINGTON,

Respondent,

v.

RICHARD TRAINER,

Appellant.

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

The Honorable Patrick Oishi, 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>	2
1. <u>Suhstantive facts</u>	2
2. <u>Procedural Facts</u>	5
C. <u>ARGUMENT</u>	5
I. INTRODUCTION.....	5
II. THE TRIAL COURT ERRED BY INSTRUCTING THE JURY THAT IT HAD A "DUTY TO RETURN A VERDICT OF GUILTY.....	6
a. <u>The United States Constitution</u>	7
b. <u>Washington Constitution</u>	9
1. <u>Textual language</u>	9
2. <u>State Constitutional and Common Law History</u> .	11
3. <u>Preexisting state law</u>	11
4. <u>Differences in Federal and State Constitutions'</u> <u>Structure</u>	13

TABLE OF CONTENTS (CONT'D)

	Page
5. <u>Matters of Particular State Interest or Local Concern</u>	13
6. <u>Jury's Power to Acquit</u>	14
7. <u>Scope of Jury's Role re: Fact and Law</u>	16
D. <u>CONCLUSION</u>	19

TABLE OF AUTHORITIES

	Page
<u>WASHINGTON CASES</u>	
<u>Leonard v. Territory</u> 2 Wash. Terr. 381, 7 Pac. 872 (1885)	12
<u>Pasco v. Mace</u> 98 Wn.2d 87, 653 P.2d 618 (1982)	8, 10, 12, 13
<u>Sofie v. Fibreboard Corp.</u> 112 Wn.2d 636, 771 P.2d 711, 780 P.2d 260 (1989)	10, 11, 12
<u>State v. Black</u> 109 Wn.2d 336, 745 P.2d 12 (1987)	11
<u>State v. Byrd</u> 72 Wn. App. 774, 868 P.2d 158 (1994) <u>affirmed</u> , 125 Wn. 2d 707, 887 P.2d 396 (1995)	6
<u>State v. Carlson</u> 65 Wn. App. 153, 828 P.2d 30 <u>review denied</u> , 119 Wn.2d 1022 (1992).....	18
<u>State v. Gibbons</u> 118 Wash. 171, 203 P. 390 (1922)	14
<u>State v. Green</u> 94 Wn.2d 216, 616 P.2d 628 (1980)	18
<u>State v. Gunwall</u> 106 Wn.2d 54, 720 P.2d 808 (1986)	9
<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).....	11, 12

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>State v. Primrose</u> 32 Wn. App. 1, 645 P.2d 714 (1982)	5
<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)	6
<u>State v. Scott</u> 110 Wn.2d 682, 757 P.2d 492 (1988)	6
<u>State v. Strasburg</u> 60 Wash. 106, 110 P. 1020 (1910)	10
 <u>FEDERAL CASES</u>	
<u>Duncan v. Louisiana</u> 391 U.S. 145, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968)	8
<u>Gideon v. Wainwright</u> 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963)	14
<u>Jackson v. Virginia</u> 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)	18
<u>United States v. Garaway</u> 425 F.2d 185 (9th Cir. 1970)	14
<u>United States v. Gaudin</u> 515 U.S. 506, 115 S. Ct. 2310, 132 L. Ed. 2d 444 (1995)	14, 16

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>United States v. Moylan</u> 417 F.2d 1002 (4th Cir. 1969) <u>cert. denied</u> , 397 U.S. 910 (1970)	5
<u>United States v. Powell</u> 955 F.2d 1206 (9th Cir. 1991)	16

RULES, STATUTES AND OTHER AUTHORITIES

<u>Bushell's Case</u> Vaughan 135, 124 Eng. Rep. 1006 (1671).....	15
Alschuler & Deiss <u>A Brief History of the Criminal Jury in the United States</u> 61 U. Chi. L.Rev. 867 (1994).....	15
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)	10, 13
<u>The Papers of Thomas Jefferson</u> Vol. 15 (Princeton Univ. Press, 1958)	8
Utter & Pitler <u>"Presenting a State Constitutional Argument: Comment on Theory and Technique,</u> 20 Ind. L. Rev. 637 (1987).....	13
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. Art. 3 § 2	7
U.S. Const. Amend. V	8, 14

TABLE OF AUTHORITIES (CONT'D)

	Page
U. S. Const. Amend. VI	7
U.S. Const. Amend. VII	7
U.S. Const. Amend. XIV	8, 13
Wash. Const. Art. I, § 9	14
Wash. Const. Art. I, § 21	10, 11, 12
Wash. Const. Art. I, § 22	9
Wash. Const. art. IV § 16	11
WPIC 26.02	6
WPIC 27.02	6

A. ASSIGNMENT OF ERROR

The “to convict” jury instruction for the crime of attempted first degree theft erroneously stated that the jury had a “duty to return a verdict of guilty” if it found that all of the elements of the crime had been proven beyond a reasonable doubt.¹ CP 48.

Issue Pertaining to Assignment of Error

In a criminal trial, is a defendant’s right to a jury trial violated where the “to convict” instruction 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, when such a duty does not exist under the state or federal Constitutions, and in fact such a statement contradicts the jury’s right under any circumstances to return a verdict of not guilty?

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

B. STATEMENT OF THE CASE

1. Substantive Facts

On February 29, 2012, Vicki McCoskey and her husband Steve lived in the Cedar Ridge apartments in Auburn. 4RP 13-14. Vicki was awakened about 1:30 a.m. by a metallic scraping sound. She looked out her window and saw a man by the nearby school zone camera on 124th Street; it appeared he was trying to saw the pole on which the camera was mounted. 4RP 14-15.²

After a minute the man was successful in cutting the pole and the camera, with a portion of the pole still attached, fell to the ground. The man then tried to lift it, but it appeared to Vicki that it was too heavy, and he ran off. 4RP 16.

The man came back shortly afterward with a white van and he tried to lift the camera into the van but was unsuccessful. He drove away and came back on foot, tried to lift it again, and again failed. He then ran away again. Vicki estimated the incident took about 40 minutes. 4RP 17-19.

During this time Vicki had called 911 and described the person she saw as a white male wearing a brown jacket, blue

² This brief cites the report of proceedings as follows: 1RP – April 15, 2013; 2RP – April 16, 2013; 3RP – April 17, 2013; 4RP – April 18, 2013; 5RP – April 19, 2013.

jeans, and a "ball cap." She also described him as a "little guy."
4RP 44.

In response to her 911 call a police officer came to their apartment and then took them to a nearby street where another officer had stopped a man who was driving a white van. The officer told them he thought they had located a suspect and wanted to see if they could identify him. When they arrived they saw the officer with Richard Trainer, who was in a white van. Vicki and Steve both said he was the man who tried to take the camera. 4RP 26-28. They identified Trainer as the same person they saw outside their apartment with the camera even though Trainer was not wearing a ball cap (3RP 48, 4RP 50) and Vicki admitted Trainer was "fairly tall" (4RP 52). When Trainer was arrested, he denied he was the person who had tried to take the camera. 3RP 52.

At trial, instruction 12 instructed the jury in pertinent part as follows with respect to the crime of attempted first degree theft:

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 as to Count I.

CP 48 (emphasis added).

2. Procedural Facts

Trainer was arraigned on April 24, 2012 and originally charged with one count of attempted first degree theft. CP 1-5. The state later amended the information to add a count of first degree malicious mischief. CP 7-8.

Trial took place from April 15-19, 2013, the Honorable Patrick Oishi presiding. On April 19th the jury found Trainer guilty of attempted first degree theft and not guilty of malicious mischief. CP 64-65.

C. ARGUMENT

I. INTRODUCTION

We recognize . . . 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), cert. denied, 397 U.S. 910 (1970). See also, State v. Primrose, 32 Wn. App. 1, 4, 645 P.2d 714 (1982) (court recognizes “the jury’s prerogative to acquit against the evidence, sometimes referred to as the jury’s pardon or veto power”); 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).

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

As part of the "to convict" instructions used to convict Trainer of the attempted first degree theft, the trial court instructed the jury as follows:

If you find from the evidence that each of these elements have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty as to Count I.

CP 48. This is standard language from the pattern instructions. WPIC 26.02, 27.02. Trainer contends there is no constitutional "duty to convict" and that the instruction accordingly misstates the law. The instruction violated Trainer's right to a properly instructed jury.³

³ Trainer 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), affirmed, 125 Wn. 2d 707, 887 P.2d 396 (1995).

a. The United States Constitution

The right to jury trial in a criminal case was one of the few guarantees of individual rights enumerated in the United States Constitution in 1789. U.S. Const. Art. 3 § 2. It was the only guarantee to appear in both the original document and the Bill of Rights:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

U. S. Const. Amend. 6.

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law

U.S. Const. Amend. 7.

Thomas Jefferson wrote of the importance of the right to jury trial 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, p. 269 (Princeton Univ. Press, 1958).

In criminal trials, the right to jury trial is fundamental to the American system of justice. It is thus 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); Pasco v. Mace, 98 Wn.2d 87, 94, 653 P.2d 618 (1982).

Trial by jury was not only a valued right of persons accused of crime, but was 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 v. Louisiana, 391 U.S. at 156.⁴ Informing the jury that it has a **duty** under any circumstances to find a criminal defendant

⁴ In Sofie v. Fibreboard Corp., the majority saw this allocation of political power to the citizens as a limit on the power of the legislature. 112 Wn.2d 636, 650-53, 771 P.2d 711, 780 P.2d 260 (1989). Two of the dissenting members of the court acknowledged the allocation of power, but interpreted it rather as a limit on the power of the judiciary. Sofie, 112 Wn.2d at 676 (Callow, C.J.,

guilty is a substantial interference in a defendant's right to have a jury trial free of any coercion. There is no support for such a duty in the United States Constitution and this court should accordingly hold that the "to convict" jury instructions given in this case violated Trainer's right to a jury trial.

b. Washington Constitution

In State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986), the Washington Supreme Court identified the following nonexclusive neutral factors as being relevant in determining whether the Washington State Constitution should be considered as extending broader rights to its citizens than the United States Constitution: "(1) the textual language; (2) differences in the texts; (3) constitutional history; (4) preexisting state law; (5) structural differences; and (6) matters of particular state or local concern." 106 Wn.2d at 58. Analyzing those factors and others, it is apparent that the Washington Constitution provides even more protection of the right to jury trial than does the Federal Constitution.

1. Textual language.

The drafters of our state constitution not only granted the right to a jury trial, Wash. Const. Art. 1, § 22; they expressly stated

joined by Dolliver, J., dissenting).

"The right of trial by jury shall remain *inviolable* . . ." Wash. Const. Art. 1, § 21 (emphasis added).

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). Article 1, section 21 "preserves the right [to jury trial] as it existed in the territory at the time of its adoption." Pasco v. Mace, 98 Wn.2d at 96; State v. Strasburg, 60 Wash. 106, 115, 110 P. 1020 (1910). The right to trial by jury "should be continued unimpaired and inviolable." Strasburg, 60 Wash. at 115.

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) (referred to below as "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. Wash. Const. Art. 4, § 16.⁵ 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 is also protected by the due process clause of Article I, Section 3.

Although 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 state constitution.

2. 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. This difference supports an independent reading of the Washington Constitution.

3. Preexisting state law.

Because 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

⁵ “Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law.”

645; Pasco, 98 Wn.2d at 96. In Leonard v. Territory, the Supreme Court reversed a murder conviction and set out in some detail the jury instructions given in the case. 2 Wash. Terr. 381, 7 Pac. 872 (1885). The language of those 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.

Leonard, 2 Wash. Terr. at 399 (emphasis added).

The courts 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 that any reasonable doubt required an 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.

In Meggyesy this court attempted to distinguish Leonard on the basis that the Leonard court "simply quoted the relevant instruction. . . ." Meggyesy, 90 Wn. App. at 703. However, at the time the Constitution was adopted, courts properly instructed juries

using the permissive “may” as opposed to the current practice of requiring the jury to make a finding of guilt.

4. 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, supra, 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. It is evident, therefore, that the “inviolable” Washington right to trial by jury was more extensive than that which was protected by the federal constitution when it was adopted in 1789. Pasco, 98 Wn.2d at 99.

5. 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 U.S. 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).

6. Jury's Power to Acquit.

A court may never direct a verdict of guilty in a criminal case. United States v. Garaway, 425 F.2d 185 (9th Cir. 1970) (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, such can result in the defendant being denied the right to a jury trial. United States v. Gaudin, 515 U.S. 506, 115 S. Ct. 2310, 132 L. Ed. 2d 444 (1995) (improper to withdraw issue of "materiality" of false statement from jury's consideration).

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; Wash. Const. Art. I, § 9.⁶ A jury verdict of not guilty is thus non-reviewable.

Also well established is "the principle of noncoercion of jurors," established in Bushell's Case, Vaughan 135, 124 Eng. Rep.

⁶ "No person shall be . . . twice put in jeopardy for the same offense."

1006 (1671). Edward Bushell was a juror in the prosecution of William Penn for unlawful assembly and disturbing the peace. When the jury refused to convict, the court fined the jurors for disregarding the evidence and the court's instructions. Bushell was imprisoned for refusing to pay 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." There is no authority in law that suggests such a duty, and in fact the authority is to the contrary:

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.

Moylan, 417 F.2d at 1006. See also, Primrose, 32 Wn. App. 1at 4; Salazar, 59 Wn. App. at 211.

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

7. Scope of Jury's Role re: Fact and Law.

Although a jury may not strictly 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 merely finding facts. Gaudin, 515 U.S. at 514-15. It did so because 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." Gaudin, 515 U.S. 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.

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

Furthermore, if such a "duty" to convict existed, the law lacks any method of enforcing it. If a jury acquits, the case is over, the charge dismissed, and there is no further review – even if the facts objectively viewed establish guilt beyond a reasonable doubt. 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, review denied, 119 Wn.2d 1022 (1992).

Thus, a legal “threshold” exists before a jury may convict. A guilty verdict in a case that does not meet this evidentiary threshold is contrary to law and will be reversed. The “duty” to return a verdict of not guilty, therefore, is genuine and enforceable by law. 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.

Instruction 12 (CP 48) in Trainer’s case did not contain a correct statement of the law under the Washington Constitution. It provided a level of coercion for the jury to return a guilty verdict. When the trial court instructed the jury it had a duty to return a verdict of guilty based merely on finding certain facts, the court took away from the jury its constitutional authority to apply the law to the facts to reach its verdict. The instructions creating a “duty” to return a verdict of guilty were an incorrect statement of law and violated Trainer’s right to a jury trial.

D. CONCLUSION

The trial court's "to convict" instructions, which created a "duty" to return a verdict of guilty, incorrectly stated the law and violated Trainer's right to a jury trial. This Court should reverse his conviction.

DATED this 12th day of February, 2013.

Respectfully submitted,

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	COA NO. 70458-3-1
)	
RICHARD TRAINER,)	
)	
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 12TH DAY OF FEBRUARY, 2014, 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] RICHARD TRAINER
10812 2ND AVENUE S.
SEATTLE, WA 98168

SIGNED IN SEATTLE WASHINGTON, THIS 12TH DAY OF FEBRUARY, 2014.

X *Patrick Mayovsky*

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