

No. 43981-6-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

KIM BERNARD WHITE,

Appellant.

On Appeal from the Pierce County Superior Court
Cause No. 12-1-01377-4
The Honorable Frederick Fleming, Judge

OPENING BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

1. Kim Bernard White was denied his right to a unanimous jury verdict on the charge of robbery when the State failed to elect which “use of force” supported the robbery charge, and when the trial court failed to instruct the jury that it must be unanimous as to which “use of force” was proved beyond a reasonable doubt.
2. The “to-convict” instructions erroneously stated that the jury had a “duty to return a verdict of guilty” if it found each element proved beyond a reasonable doubt.

II. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Was Kim Bernard White denied his right to a unanimous jury verdict on the charge of robbery when the State told the jury that White used force against two different Walgreens employees when he tried to take property from that store, and the trial court failed to instruct the jury that it must be unanimous as to which use of force was proved beyond a reasonable doubt? (Assignment of Error 1)
2. In a criminal trial, does a “to-convict” instruction, which informs the jury that it has a duty to return a verdict of guilty if it finds the elements have been proven beyond a

reasonable doubt, violate a defendant's right to a jury trial, when there is no such duty under the state and federal Constitutions? (Assignments of Error 2)

III. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

The State charged Kim Bernard White with one count of first degree robbery (RCW 9A.56.190, .200) by Information filed in Pierce County Superior Court. (CP 1-2) At the close of trial, White requested and received jury instructions on the lesser included offenses of second degree robbery and third degree theft. (IV RP 5, 15; CP 71, 73)¹ The jury convicted White of second degree robbery. (CP 80; IV RP 68) The trial court sentenced White within his standard range, to 63 months of confinement. (SRP 17; CP 116) This appeal timely follows. (CP 127)

B. SUBSTANTIVE FACTS

In April of 2012, Deanna Teague and Kersten Gouveia both worked graveyard shifts at the Spanaway Walgreens store. (III RP 9, 34-35, 82, 84) Around 3:00 on the morning of April 18, 2012, Teague and Gouveia were restocking shelves at the store, when

¹ The trial transcripts, labeled Volumes I through IV, will be referred to by volume number. The sentencing transcript will be referred to as "SRP." The remaining transcript will be referred to by the date of the proceeding contained therein.

they saw two men come in together. (III RP 11, 35, 37 84, 85) The larger of the two men, Kim Bernard White, picked up a blue shopping basket, and began walking around the store and picking out items. (III RP 38, 39, 42, 85, 91) The men asked Teague and Gouveia for assistance several times, and were directed to the items that they requested. (III RP 39, 85) Teague and Gouveia both thought the men were acting suspiciously. (III RP 41, 84, 86, 87)

Gouveia noticed the smaller of the two men walk outside, and because it was nearly time for her to take her break, she decided to go outside and watch the man so that she could identify him or his car if necessary. (III RP 43, 87-88) On her way out, she disabled the store's sliding glass doors so that they would not open automatically. (III RP 89) Gouveia did this, even though such action is against Walgreens store policy, because she believed that the larger man might be planning to rob the store and she did not want any customers to enter. (III RP 64-65, 90)

Teague testified that she saw White walking towards the front of the store, and asked him whether he was ready to make his purchases. (III RP 44) White said yes, so Teague walked behind the checkout counter. (III RP 44) Then White said, "thank you,"

and began a “light jog” towards the door, still carrying a blue basket full of merchandise. (III RP 44) When White reached the door, however, it did not open. (III RP 45)

Walgreens store policy directs employees not to confront suspected shoplifters, but Teague nevertheless approached White and demanded that he give the merchandise back. (III RP 45, 61-62, 97) She then grabbed the basket and tried to pull it away, but White did not let go.² (III RP 45) They engaged in a “tug of war” over the basket. (III RP 45) White bumped against the door, which caused it to come off its hinges. (III RP 46) Still holding the basket, White backed out of the store, pulling Teague along with him. (III RP 46) Teague tripped over a display and fell to the ground, releasing the basket at the same time. (III RP 46, 47)

Gouveia heard this commotion while she was outside watching the smaller man. (III RP 89) When she came around the corner of the building, she saw Teague and White struggling over the basket and saw Teague fall to the ground. (III RP 90, 91) She thought that White might be hurting Teague, so she began pushing and hitting him. (III RP 92, 92, 107-08) When Teague let go of the

² The confrontation was captured by the store security camera, and the recording was played for the jury during trial. (Exh. P5; III RP 57)

basket, Gouveia grabbed it and tried to pull it away from White. (III RP 93)

White still did not let go of the basket, and Gouveia was dragged into the parking lot as she held on to the basket. (III RP 93, 94) According to Gouveia, White eventually pushed her away and twisted the basket, which caused her to lose her grip and fall to the ground. (III RP 94, 95)

Darryl Herbison was driving past the Walgreens and saw the commotion by the front door. (III RP 123) He testified that it looked like there was a struggle between a man and two women, and that the man threw one of the women to the ground. (III RP 123, 124, 125) Herbison called 911 and followed the man as he walked away from the Walgreens. (III RP 126, 127) When responding officers arrived, he directed them to where he had last seen the man. (III RP 127)

Sheriff's deputies contacted White in a parked car at a nearby gas station. (III RP 13-14, 114) White told the officers that he went shopping with a friend but the friend, who was supposed to pay for the merchandise, left the store. (III RP 27, 118) White said he tried to walk out of the store to find his friend, when he was tackled by two store employees. (III RP 27, 118) The officers did

not observe any injuries to White, but did notice that he seemed to be under the influence of some sort of intoxicant or drug. (III RP 28, 118, 119-20)

As a result of the confrontation, Teague sustained a bruise on the right side of her abdomen, and Gouveia sustained scrapes on her wrist and knee. (III RP 78, 95, 108-09) Neither woman requested or received medical attention. (III RP 78, 108-09)

IV. ARGUMENT & AUTHORITIES

- A. WHITE'S CONSTITUTIONAL RIGHT TO A UNANIMOUS JURY VERDICT WAS VIOLATED WHEN THE STATE FAILED TO ELECT WHETHER THE "FORCE" USED AGAINST TEAGUE OR THE "FORCE" USED AGAINST GOUVEIA WAS THE BASIS FOR THE ROBBERY CHARGE, AND WHEN THE TRIAL COURT FAILED TO GIVE THE JURY A UNANIMITY INSTRUCTION

A criminal defendant may be convicted only if a unanimous jury concludes he or she committed the criminal act charged in the information. State v. Petrich, 101 Wn.2d 566, 569, 683 P.2d 173 (1984) (citing State v. Stephens, 93 Wn.2d 186, 190, 607 P.2d 304 (1980)). And if the State presents evidence of multiple acts that could form the basis of a particular charged count, the State must elect which of the acts it is relying on, or the court must instruct the jury to agree on a specific act. State v. Crane, 116 Wn.2d 315, 325, 804 P.2d 10 (1991) (citing State v. Kitchen, 110 Wn.2d 403,

409, 756 P.2d 105 (1988)).

As instructed in this case, to prove that White committed second degree robbery, the State had to prove that he took personal property from another person “by use or threatened use of immediate force . . . to that person.” (CP 71, emphasis added) During closing statements, the prosecutor argued that White used force against both Teague and Gouveia, and inflicted injury on both Teague and Gouveia. (IV RP 24-25, 27, 30, 31) By making this argument, the prosecutor allowed the jury to convict White if they found he used force against either Teague or Gouveia. But the jury instructions require the jury to find that the defendant used force against “that person.” The prosecutor did not elect who “that person” was, and the trial court did not give the jury a unanimity instruction.³

If there is no election and no instruction, the resulting constitutional error is harmless only if no rational trier of fact could have had a reasonable doubt that each incident established the crime beyond a reasonable doubt. Crane, 116 Wn.2d at 325. The

³ This issue may be raised for the first time on appeal because failure to provide a unanimity instruction in a multiple acts case amounts to manifest constitutional error. RAP 2.5(a); State v. Kiser, 87 Wn. App. 126, 129, 940 P.2d 308 (1997); State v. Holland, 77 Wn. App. 420, 424, 891 P.2d 49 (1995).

rationale for this protection in multiple acts cases stems from possible confusion as to which of the acts a jury has used to determine a defendant's guilt. State v. King, 75 Wn. App. 899, 902, 878 P.2d 466 (1994). In this case, a rational juror could have had a reasonable doubt as to either act.

By rejecting the first degree robbery charge, the jury rejected the State's contention that White "inflicted bodily injury" upon Teague and Gouveia. (CP 62, 79) And a reasonable juror could have also doubted that the State's evidence proved beyond a reasonable doubt that White "used force" against Teague or Gouveia. A reasonable juror could have found that refusing to let go of the basket and continuing to walk away was not "force." While there was some evidence that White pushed Gouveia (III RP 94, 124), there was no evidence that White did anything other than walk away from Teague while she held onto the basket.

Because any rational trier of fact could have had a reasonable doubt that White used force against either Teague or Gouveia, or both, the lack of either prosecutorial election or a unanimity instruction was not harmless. White's conviction for second degree robbery should be reversed.

- B. WHITE'S CONSTITUTIONAL RIGHT TO A JURY TRIAL WAS VIOLATED BY THE COURT'S "TO-CONVICT" INSTRUCTIONS, WHICH AFFIRMATIVELY MISLED THE JURY ABOUT ITS POWER TO ACQUIT.

The trial court included the following language in all of the "to-convict" instructions:

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.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

(CP 62, 71, 73) These instructions misstated the law and violated White's right to a properly instructed jury because there is no "duty to convict under either the federal or state constitutions."⁴

1. Standard of Review

Generally, a criminal defendant may not raise an objection to a jury instruction for the first time on appeal unless it relates to a "manifest error affecting a constitutional right." RAP 2.5(a)(3); see State v. Kronich, 160 Wn.2d 893, 899, 161 P.3d 982 (2007). When a constitutional error is asserted for the first time on appeal, the

⁴ Division One of the Court of Appeals rejected the arguments raised here in its decision in State v. Meggyesy, 90 Wn. App. 693, 958 P.2d 319 (1998). White respectfully contends that Meggyesy was incorrectly decided and should not be followed by this Court.

reviewing court must first determine whether the “error is truly of constitutional magnitude.” State v. Scott, 110 Wn.2d 682, 688, 757 P.2d 492 (1988). Once the claim is found to be constitutional, the court examines the effect of the error on the defendant's trial under a harmless error standard. Scott, 110 Wn.2d at 688.

Constitutional violations are reviewed *do novo*. Bellevue School Dist. v. E.S., 171 Wn.2d 695, 702, 257 P.3d 570 (2011). Jury instructions are also reviewed *de novo*. State v. Bennett, 161 Wn.2d 303, 307, 165 P.3d 1241 (2007). Instructions must make the relevant legal standard manifestly apparent to the average juror. State v. Kylo, 166 Wn.2d 856, 864, 215 P.3d 177 (2009).

2. The United States Constitution

In criminal trials, the right to a jury trial is fundamental to the American system of justice. It is guaranteed by the Sixth Amendment and the due process clauses of both the Fifth and Fourteenth Amendments.⁵ 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).

⁵ “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury[.]” U.S. Const. Amend. VI. “No person shall be . . . deprived of life, liberty, or property, without due process of law[.]” U.S. Const. Amend. V. “[N]or shall any State deprive any person of life, liberty, or property, without due process of law[.]” U.S. Const. Amend. XIV.

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

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

Duncan, 391 U.S. at 156.

3. Washington Constitution

The Washington Constitution provides greater protection to its citizens in some areas than does the United States Constitution. State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986). Under Gunwall, the decision whether to conduct an independent analysis under the state constitution must be based on six factors: (1) the language of the Washington Constitution, (2) differences between the state and federal language; (3) constitutional history; (4) preexisting state law; (5) structural differences; and (6) matters of particular state or local concern. Under the Gunwall analysis, it is clear that the right to a jury trial is such an area, requiring an independent analysis under the Washington State constitution.

a. *The Textual Language of the State Constitution*

The drafters of our state constitution not only guaranteed the right to a jury trial,⁶ they expressly declared that “[t]he right of trial by jury shall remain inviolate[.]” Wash. Const. art. I, § 21.

The term “inviolate” connotes deserving of the highest protection . . . Applied to the right to trial by jury, this language indicates that the right must remain the essential component of our legal system that it has always been. For such a right to remain inviolate, it must not diminish over time and must be protected from all assault to its essential guarantees.

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

Other constitutional protections exist in the Washington constitution to further safeguard this right. For example, a court is not permitted to convey to the jury its own impression of the

⁶ “In criminal prosecutions the accused shall have the right . . . to have a speedy public trial by an impartial jury[.]” Wash Const. art. I, § 22. No person “shall be deprived of life, liberty, or property, without due process of law.” Wash. Const. art. I, § 3.

evidence. Wash. Const. art. IV, § 16.⁷ Even a witness may not invade the province of the jury by giving an opinion on the guilt of the accused. State v. Black, 109 Wn.2d 336, 350, 745 P.2d 12 (1987).

The different and more specific language in the Washington constitution suggests the drafters intended different and more expansive protections than those provided by the federal constitution. See Hon. Robert F. Utter, FREEDOM AND DIVERSITY IN A FEDERAL SYSTEM: PERSPECTIVES ON STATE CONSTITUTIONS AND THE WASHINGTON DECLARATION OF RIGHTS, 7 U. Puget Sound L. Rev. 491, 515 (1984). Thus, while the Court in State v. Meggyesy, 90 Wn. App. 693, 958 P.2d 319 (1998), may have been correct when it found there is no specific constitutional language that addresses this precise issue, the existing language indicates that the right to a jury trial is so fundamental that *any* infringement violates the constitution.

b. *State Constitutional and Common Law History*

State constitutional history favors an independent application of Article I, sections 21 and 22. In 1889 (when the Washington

⁷ “Judges shall not charge juries with respect to matters of fact, not comment thereon, but shall declare the law.”

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

State common law history also favors an independent application. Article I, section 21 “preserves the right as it existed at common law in the territory at the time of its adoption.” Sofie, 112 Wn.2d at 645; Mace, 98 Wn.2d 96; *see also* State v. Hobbie, 126 Wn.2d 283, 299, 892 P.2d 85 (1995). Under common law, juries were instructed in such a way as to allow them to acquit even where the prosecution proved guilt beyond a reasonable doubt.

For example, in Leonard v. Territory, 2 Wash. Terr. 381, 7 Pac. 872 (1885), the Supreme Court reversed a murder conviction and set out in some detail the jury instructions given in the case. The court instructed jurors that they “should” convict and “may” find the defendant guilty if the prosecution proved its case, but that they “must” acquit in the absence of such proof. Leonard, 2 Wash. Terr. at 398-99. Thus, common law *required* the jury to acquit upon a

failure of proof, and *allowed* the jury to acquit even if the proof was sufficient. Leonard, 2 Wash. Terr. at 398-99.

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

c. *Preexisting State Law*

In criminal cases, an accused person’s guilt has always been the sole province of the jury. State v. Kitchen, 46 Wn. App. 232, 238, 730 P.2d 103 (1986); see also State v. Holmes, 68 Wn. 7, 122 P. 345 (1912). This rule even applies where the jury ignores applicable law. See *e.g.*, Hartigan v. Washington Territory, 1 Wash. Terr. 447, 449 (1874) (“[T]he jury may find a general verdict compounded of law and fact, and if it is for the defendant, and is

plainly contrary to the law, either from mistake or a willful disregard of the law, there is no remedy.”⁸

d. *Difference in Federal and State Constitutional Structures*

State constitutions were originally intended to be the primary instruments for protecting individual rights, with the United States Constitution serving as a secondary layer of protection. Utter, 7 U. Puget Sound L. Rev. at 497; Utter & Pitler, PRESENTING A STATE AND CONSTITUTIONAL ARGUMENT: COMMENT ON THEORY AND TECHNIQUE, 20 Ind. L. Rev. 637, 636 (1987). Accordingly, state constitutions were intended to give broader protection than the federal constitution. An independent interpretation under Washington’s Constitution is necessary to accomplish this end. This factor will nearly always support an independent interpretation of the state constitution because the difference in structure is a constant. Gunwall, 106 Wn.2d at 62, 66; see also State v. Ortiz, 119 Wn.2d 294, 303, 831 P.2d 1060 (1992).

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

The manner of conducting criminal trials in state court is of

⁸ This is likewise true in the federal system. See e.g., United States v. Moylan, 417 F.2d 1002, 1006 (4th Cir. 1969).

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

f. *An Independent Analysis is Warranted*

All six Gunwall factors favor an independent application of Article I, sections 21 and 22 of the Washington Constitution in this case. The state constitution provides greater protection than the federal constitution, and prohibits a trial court from affirmatively misleading a jury about its power to acquit.

4. Jury's Power to Acquit

A court may never direct a verdict of guilty in a criminal case. United States v. Garaway, 425 F.2d 185 (9th Cir 1979) (directed verdict of guilty improper even where no issues of fact are in dispute); Holmes, 68 Wn. at 12-13. If a court improperly withdraws a particular issue from the jury's consideration, it may deny the defendant the right to a jury trial. United States v. Gaudin, 515 U.S. 506, 115 S. Ct. 2310, 132 L. Ed. 2d 444 (1995) (improper to withdraw issue of "materiality" of false statement from jury's

consideration); see also Neder v. United States, 527 U.S. 1, 8, 15-16, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999) (omission of element in jury instruction subject to harmless error analysis).

The constitutional protections against double jeopardy also protect the right to a jury trial by prohibiting a retrial after a verdict of acquittal. U.S. Const. amd V; Wash. Const. art I. § 9.⁹ 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. 1006 (1671). Edward Bushell was a juror in the prosecution of William Penn for unlawful assembly and disturbing the peace. When the jury refused to convict, the court fined the jurors for disregarding the evidence and the court’s instructions. Bushell was imprisoned for refusing to pay his fine. In issuing a writ of habeas corpus for his release, Chief Justice Vaughan declared that judges could neither punish nor threaten to punish jurors for their verdicts. See Alschuler & Deiss, A BRIEF HISTORY OF THE CRIMINAL JURY IN THE UNITED STATES, 61 Chi. L. Rev. 867, 912-13 (1994).

If there is no ability to review a jury verdict of acquittal, no

⁹ “No person shall be . . . twice put in jeopardy for the same offense.”

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

We recognize, as appellants urge, the undisputed power of the jury to acquit, even if its verdict is contrary to the law as given by the judge and contrary to the evidence. . . . If the jury feels that the law under which the defendant is accused is unjust, or that exigent circumstances justified the actions of the accused, or for any reason which appeals to their logic or passion, the jury has the power to acquit, and the court’s must abide by that decision.

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

This is not to say there is a right to instruct the jury that it may disregard the law in reaching its verdict. See *e.g.*, United States v. Powell, 955 F.2d 1206, 1213 (9th Cir. 1991) (reversing conviction on other grounds). But under Washington law, juries have always had the ability to deliver a verdict of acquittal that seems to defy the evidence. A judge cannot direct a verdict for the state because this would ignore “the jury’s prerogative to acquit against the evidence, sometimes referred to as the jury’s pardon or veto power.” State v. Primrose, 32 Wn. App. 1, 4, 645 P.2d 714 (1982); see also State v. Salazar, 59 Wn. App. 202, 211, 796 P.2d 773 (1990) (relying on jury’s “constitutional prerogative to acquit” as basis for upholding admission of evidence). An instruction telling

jurors that they *may not* acquit if the elements have been established affirmatively misstates the law, and deceives the jury as to its own power and prerogative. Such an instruction fails to make the correct legal standard manifestly apparent to the average juror. Kyllo, 166 Wn.2d at 864.

5. Examples of Correct Legal Standard Instructions

Permission to convict as opposed to a duty to convict is well-illustrated in the instruction quoted in Leonard:

If you find the facts necessary to establish the guilt of defendant proven to the certainty above stated, then you *may* find him guilty of such a degree of the crime as the facts so found show him to have committed; but if you do not find such facts so proven, then you *must* acquit.

Leonard, 2 Wash. Terr. At 399 (emphasis added). This was the law as given to the jury in murder trials in 1885, just four years before the adoption of the Washington Constitution.

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

. . . In order to answer the special verdict form “yes”, you must unanimously be satisfied beyond a

reasonable doubt that “yes” is the correct answer. . . .
If you unanimously have a reasonable doubt as to this
question, you must answer “no.”

The due process requirements to return a special verdict—that the jury must find each element of the special verdict proved beyond a reasonable doubt—are exactly the same as for the elements of the general verdict. This language in no way instructs the jury on “jury nullification.” But it at no time imposes a “duty” to answer “yes.”

In contrast, the “to-convict” instructions in this case shift power away from the jury and contravene “the undisputed power of the jury to acquit.” Moylan, 417 F.2d at 1006. They misstate the role of the jury and provide a level of coercion for the jury to return a guilty verdict. Such coercion is prohibited. Leonard, *supra*; State v. Boogaard, 90 Wn.2d 733, 585 P.2d 789 (1978).

6. The Court Should Not Follow the Meggyesy Court’s Opinion Because Its Analysis Was Flawed

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

In its analysis, Division One characterized the alternative language proposed by the defendants—“you *may* return a verdict of

guilty”—as “an instruction notifying the jury of its power to acquit against the evidence.” Meggyesy, 90 Wn. App. at 699. The court spent much of its opinion concluding there was no legal authority requiring the court to instruct a jury that it had the power to acquit against the evidence.

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

Appellant respectfully submits that the Meggyesy analysis addressed a different issue than the one argued in this case. “Duty” is the challenged language herein. By focusing on the proposed remedy, the Meggyesy court (and subsequently the Bonisisio court) side-stepped the underlying issue: the instructions given violated the defendants’ right to trial by jury because the “duty to return a verdict of guilty” language required the juries to convict if they found that the State proved all of the elements of the charged crimes.

Furthermore, unlike the appellants in Meggyesy and Bonisisio, White is not asking the court to use an instruction that affirmatively notifies the jury of its power to acquit. Instead, he

simply argues that jurors should not be affirmatively misled. Such language was not addressed in either Meggyesy or Bonisisio; thus the holdings should not govern here.

7. The Court's Instructions in this Case Affirmatively Misled the Jury About its Power to Acquit Even if the Prosecution Proved its Case Beyond a Reasonable Doubt

The instruction given in White's case did not contain a correct statement of the law. The court instructed the jurors that it was their "duty" to convict White if the elements were proved beyond a reasonable doubt. (CP 368, 371-73) The court's use of the word "duty" in the "to-convict" instructions commanded the jury that it *could not* acquit if the elements had been established. This coercive misstatement of the law deceived the jurors about their power to acquit in the face of sufficient evidence, and failed to make the correct legal standard manifestly apparent to the average juror. By instructing the jury that it had a duty to return a verdict of guilty based merely on finding certain facts, the court took away from the jury its constitutional authority to apply the law to the facts in reaching its general verdict.

V. CONCLUSION

The absence of a unanimity instruction deprived White of his

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

DATED: February 11, 2013



STEPHANIE C. CUNNINGHAM

WSB #26436

Attorney for Kim Bernard White

CERTIFICATE OF MAILING

I certify that on 02/11/2013, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Kim Bernard White, DOC# 973876, Coyote Ridge Corrections Center, P.O. Box 769, Connell, WA 99326-076.



STEPHANIE C. CUNNINGHAM, WSBA #26436

CUNNINGHAM LAW OFFICE

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