

NO. 44403-8-II

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

STATE OF WASHINGTON,

Respondent,

v.

GARY HAMMELL,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR GRAYS HARBOR COUNTY

The Honorable F. Mark McCauley, Judge

BRIEF OF APPELLANT

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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 third-degree assault beyond a reasonable doubt.¹ CP 11 (Instruction 3).

Issue Pertaining to Assignment of Error

In a criminal trial, does a “to-convict” instruction violate a defendant’s 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 were proved beyond a reasonable doubt?

B. STATEMENT OF THE CASE

1. Procedural Facts

The Grays Harbor County prosecutor charged appellant Gary Hammell with one count of third-degree assault of a law enforcement officer. CP 1. The jury found Hammell guilty, and the court imposed a standard range sentence. CP 14, 18-19. Notice of appeal was timely filed. CP 29.

¹ This Court rejected the argument raised here in State v. Meggyesy, 90 Wn. App. 693, 958 P. 2d 319, rev. 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 Hammell must include a Gunwall analysis or risk waiver of the issue, the Meggyesy argument is included in its entirety.

2. Substantive Facts

Hammell was parked, partially off the road, talking to his girlfriend on the phone when an Aberdeen police officer approached him. RP 13, 49. He initially declined to end his conversation to deal with the officer. RP 15, 50. He also declined the officer's request for his identification. RP 16.

Hammell testified he simply declined to get out of his truck and told her he wanted to call his attorney, whereupon she threatened to tase him. RP 50-51. He testified that, when she opened the door, he shut it again and locked it by resting his arm on the knob. RP 51. Hammell testified that, while his arm was still on the outside of the door, the officer tried to pull on the door and his arm simultaneously, using the leverage of the door to try to pry him out of the car. RP 51. Hammell testified he grabbed the steering wheel and pulled his arm back inside the truck, whereupon the door flew open. RP 51. The officer fell to the ground. Hammell testified she then threatened to shoot him, holding what at the time he believed to be a firearm. RP 52, 66.

He testified he put his phone down and got out of the car slowly. RP 52. When he put his hands on the truck bed to turn around, he was tased in the back. RP 52. He fell to the ground, and as he was slowly getting up, he was tased again only seconds later. RP 53. He put his hands behind his head and started walking backwards towards her. RP 53. She demanded that he

get on the ground. RP 53. He refused because it was wet and oily. RP 53. So she tased him a third time, and he fell to his hands and knees. RP 53-54. He then felt someone grab the back of his head and he was grabbed, kicked, and slammed to the ground. RP 54.

The officer testified she responded to a report that a truck similar to Hammell's was driving recklessly in the area. RP 11. After Hammell ignored and refused her initial attempts at contact, she ordered him to turn off his truck and provide identification. RP 16. She threatened to physically remove him from the truck if he did not do so. RP 16.

According to the officer, Hammell said she should try, whereupon she noted slurring in his voice, and, combined with the odor of alcohol, she determined she had probable cause to arrest him for being in physical control of a vehicle while intoxicated. RP 16-17. She told Hammell he was under arrest and opened the door of his truck. RP 17. The officer testified he shoved the door into her chest and locked the door when she moved out of the way. RP 17.

The officer then reached through the open window and unlocked the door, opened the door, and attempted to drag Hammell out of his truck by the arm and hair. RP 17. She testified he grabbed the steering wheel, and, while still partially in the truck, hit her in the sternum with his shoulder,

knocking her to the ground where she hit her head on the pavement. RP 18. Before she got back up, the officer drew her taser. RP 19.

The officer claimed Hammell was still partially in the truck when she tased him the first time. RP 18-19. She testified he kept saying, "OK," so she believed he was trying to comply. RP 19. When the five-second charge ended, she tried again to remove him from the car. RP 19-20. But he began to pull away, trying to push her and batting at her arms. RP 19-20. So she tased him again. RP 20. Again, Hammell continued to resist her efforts to get him out of the truck, so she tased him a third time. RP 20. This time, she testified, the pair moved away from the car, and, in his struggles, Hammell was successful in knocking the taser out of her hand. RP 20. But she put her foot in the back of his knee and forced him to the ground. RP 20. She testified he kept trying to get up and did not stop resisting until a Hoquiam officer arrived to assist. RP 20-21.

The Hoquiam officer testified that, when he arrived, Hammell was on all fours, but looked like he was a wrestler in position waiting to make a move. RP 42. He testified the Aberdeen officer was on her feet, but did not appear to have control. RP 42-43. The newly arrived officer put his hand on the back of Hammell's head and pushed his forehead into the pavement. RP 42. He then ordered Hammell to give the other officer his hands to be cuffed, and Hammell complied. RP 42.

After first aid was administered at the scene, the officer brought Hammell back to the station. RP 21. As she filled out the paperwork, she mentioned to Hammell that her head hurt. RP 21. She testified he cried and said several times he was sorry and hoped he had not hurt her. RP 21-22. Other than a headache, the officer sustained no injuries. RP 22. Hammell explained, he apologized for not simply getting on the ground like she said. RP 58. He denied ever striking the officer or trying to knock the taser out of her hand. RP 57.

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 the third-degree assault in this case stated: “If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, it will be your duty to return a verdict of guilty.” CP 11. 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 this instruction 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.

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). The “to-convict” instruction in this case violated Hammell’s right to a jury that has been properly instructed on the law.²

a. The “Duty to Convict” Language 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).

² Hammell 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).

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)).

- b. 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 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.

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 “inviolate” 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.

c. 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 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 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), cert. denied, 397 U.S. 910 (1970).

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 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 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 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. 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.

d. 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 does not mean the problem does not exist. The jury has no “duty” to convict, and, therefore, it is misleading to say that it does. There are ways to remedy this problem without implicitly informing the jury of its power to nullify by using 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 to-convict instruction given in Hammell’s case provided a level of coercion for the jury to return a guilty verdict. Just as the court cannot direct a verdict for the state, no matter how compelling the evidence, likewise it may not instruct the jury it has a duty to convict under any circumstances. When the trial court told the jury it had a duty to return a guilty verdict if it found certain facts, the court took from the jury its constitutional authority to apply the law to the facts to reach its general verdict. This instruction was an incorrect statement of law and violated Hammell’s right to a jury trial.

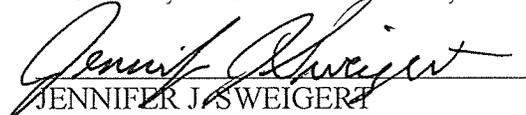
D. CONCLUSION

The trial court's "to-convict" instruction, which created a "duty" to return a verdict of guilty, incorrectly stated the law and violated Hammell's right to a jury trial.

DATED this 25th day of July, 2013.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



JENNIFER J. SWEIGERT

WSBA No. 38068

Office ID No. 91051

Attorney for Appellant

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

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
vs.)	COA NO. 44403-8-II
)	
GARY HAMMELL,)	
)	
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 25TH DAY OF JULY, 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] GARY HAMMELL
DOC NO. 770090
MONROE CORRECTIONS CENTER
P.O. BOX 777
MONROE, WA 98272

SIGNED IN SEATTLE WASHINGTON, THIS 25TH DAY OF JULY, 2013.

X *Patrick Mayovsky*

NIELSEN, BROMAN & KOCH, PLLC

July 25, 2013 - 3:06 PM

Transmittal Letter

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Court of Appeals Case Number: 44403-8

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