

No. 44626-0-II

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

STATE OF WASHINGTON,

Respondent,

v.

ERIC BOWMAN,

Appellant.

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

The Honorable Carol Murphy, Judge
Cause No. 12-1-00579-0

BRIEF OF RESPONDENT

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A. ISSUE PERTAINING TO ASSIGNMENT OF ERROR.

Whether under the state and federal constitutions Bowman's right to a jury trial was violated when the judge instructed the jury that it had a duty to find Bowman guilty if the State proved every element of Bowman's charge beyond a reasonable doubt.

B. STATEMENT OF THE CASE.

The State accepts Bowman's statement of the substantive and procedural facts of the case.

C. ARGUMENT.

Under the federal and state constitutions, the trial court did not violate Bowman's right to a jury trial when it instructed the jury that if the State proved all the elements of the crime beyond a reasonable doubt then it would be the jury's duty to return a verdict of guilty.

The right to a public trial is guaranteed by both the state and federal constitutions. Wash. Const. Art. 1, § 22; U.S. Const. Amend. VI. As an essential part of a jury trial, jury instructions must "properly inform the jury of the applicable law, not mislead the jury, and permit each party to argue its theory of the case." State v. Bennett, 161 Wn.2d 303, 307, 165 P.3d 1241, 1243 (2007) (citing State v. LeFaber, 128 Wn.2d 896, 913 P.2d 369 (1996)). Jury instructions that misstate the law are grounds for reversal on

appeal. State v. Wanrow, 88 Wn.2d 221, 237, 559 P.2d 548, 556-557 (1977). A challenged jury instruction is reviewed *de novo*. Bennett, 161 Wn.2d at 307.

Bowman argues that his right to a jury trial was violated when the trial court instructed the jury that it had a “duty to return a verdict of guilty” if it found beyond a reasonable doubt that the State proved every element of the crimes as charged. Appellant’s Opening Brief at 1; CP 68. He argues that this instruction (1) violated his right to a jury trial under the federal constitution, (2) violated his right to a jury trial under the state constitution, and (3) that the “duty to return a verdict of guilty” instruction is “wrong” because such a duty does not exist.

The instruction given at trial was drawn from 11 *Washington Practice: Washington Pattern Jury Instructions: Criminal* 44.21 (3d ed. 2005). The Court of Appeals has already ruled on the constitutionality of this instruction. In State v. Meggyesy, the Court of Appeals, Division I, considered an appeal in which the appellants challenged the federal and state constitutionality of an instruction requiring the jury to find the defendant guilty. State v. Meggyesy, 90

Wn. App. 593, 958 P.2d 319 (1998), overruled on other grounds. It found that the standard instructions did not violate the constitution, and that the appellants were not entitled to a different instruction. 90 Wn. App. 593. Division II and Division III considered similar arguments and ruled the same way on those issues in State v. Brown, 130 Wn. App. 767, 124 P.3d 663 (2005), and State v. Wilson, No. 30378-1-III, Court of Appeals Division III, WL 4176077 (Aug. 15, 2013) respectively.

Bowman does not add anything new to the analysis, and there is no reason to overrule the Court of Appeals' decisions now. The "duty to return a verdict of guilty" instruction does not misstate the law, and Bowman's right to a jury trial was not violated.

1. The standard instruction does not violate the right to a jury trial under the federal constitution.

Bowman argues that, under the federal constitution, the trial court violated his right to a jury trial when it instructed the jury that it had a duty to convict if the prosecution proved all the elements of the charged crime beyond a reasonable doubt. Appellant's Opening Brief 5-6.

The Court of Appeals, Division I, analyzed the same issue in State v. Meggyesy. Meggyesy, 90 Wn. App. at 698-701. The court found that use of the standard language does not create an instance of the court directing a verdict and that an accused is not entitled to a jury nullification instruction. 90 Wn. App. at 701. The court recognized that, indeed, features of the criminal justice system allow the jury to acquit despite the evidence, but it found that this fact does not require that the instructions be changed to include a “may convict” statement. Id.

The Court of Appeals, Division II, addressed another version of the same argument in Brown. 130 Wn. App. 767. Unlike the appellants in Meggyesy but similar to Bowman in this case, the appellant in Brown did not request a “may convict” instruction. Id. Instead, the appellant limited his claim to arguing that the instruction misled the jury into believing that that it lacked the power to nullify. Id. at 770. The court rejected this argument, finding “no meaningful difference between [the appellant’s] argument and the issues raised in... Meggyesy. The Meggyesy court, although addressing a slightly different argument, held that instructing

the jury it had a ‘duty’ to convict if it found the elements were proven beyond a reasonable doubt did not misstate the law.” Brown, 130 Wn. App. at 771.

So too, most recently, the Court of Appeals, Division III, addressed this issue in State v. Wilson to similar result. Wilson, No. 30378-1-III, (Aug. 15, 2013).

The standard instruction requiring a jury to reach a verdict of guilty if the State meets its burden does not violate the federal constitution. Bowman’s federal right to a jury trial was not violated.

2. The standard instruction does not violate the right to a jury trial under the state constitution.

Bowman contends that, under a Gunwall¹ analysis, the “duty to return a verdict of guilty” instruction violates the greater protections available under the state constitution. Appellant’s Opening Brief at 6-10. All three divisions of the Court of Appeals, with Division I leading the analysis with its opinion in Meggyesy, have ruled to the contrary. Brown, 130 Wn. App. at 771; Wilson, No. 30378-1-III at 2-3.

¹ This six-part test is derived from State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986).

- i. Gunwall's first and second criteria: the language of the state and federal constitutions.

Bowman argues that there are significant differences between the language of the state and federal constitutions regarding jury trial. Appellant's Opening Brief at 6-7. He argues that these differences show that the state constitution offers greater protection than the federal constitution. He argues that the standard instructions violate these heightened protections. Id.

The Court of Appeals has already rejected this argument. In Meggyesy the court concluded that the differences in the state and federal constitutions' language were neutral and ultimately irrelevant to the challenges brought by the appellants: "Nothing in the language of these constitutional provisions addresses the questions presented." Meggyesy, 90 Wn. App. at 701.

Bowman's argument regarding the first and second Gunwall factors has already been rejected by the Court of Appeals. He provides nothing new to the analysis now.

ii. Gunwall's third criteria: state constitutional history

Bowman argues, under the third Gunwall criterion, that the fact that the founders framed the constitution on other state constitutions recommends a separate analysis under the state constitution. Appellant's Opening Brief at 8.

The Meggyesy court addressed this issue: "The appellants note that Washington's constitution is based on other state constitutions, not the federal Bill of Rights. But they make no argument regarding the specific issues before the court." Meggyesy 90 Wn. App. at 702.

So too, Bowman fails to argue why the fact that Washington based its constitution on other states' constitutions is relevant to his argument besides stating that the right to a jury trial under state law should be considered separately from the right under federal law. This bit of history, alone, does not suggest that the state constitution prohibits the contested instruction.

iii. Gunwall's fourth criteria: Preexisting state law.

Bowman argues that an instruction allowing the jury to acquit was incorporated into the state constitution at the time

of its construction by pointing to a pre-constitution case—Leanord v. Territory, 2 Wash. Terr. 381, 7 P. 872 (1885)—in which the trial court told the jury that it “may find” the defendant guilty of a specific degree of crime. Appellant’s Opening Brief at 8. He then argues that a “duty to return a verdict of guilty” instruction violates the state constitution. Appellant’s Opening Brief at 8-9.

In fact, Leonard v. Territory is a weak case from which to launch a major shift in Washington’s standard jury instructions. In Leonard, the jury was required to select from one of three verdicts, each with a different intent: intent for manslaughter, intent for second degree murder, or intent for first degree murder. The “may find him guilty” language used by the trial court may very well have been meant to reflect an emphasis on the jury’s ability to find one of three types of intent, not the jury’s ability to find the defendant “not guilty” in the face of contrary evidence and law:

‘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. The facts which you must find to be established to the degree above stated, are: That Ambrose Patton, named in the indictment, is dead; that he came to his death by reason of a gunshot wound or wounds, and that said wound or wounds were purposely inflicted by the defendant. These facts being so proven, the defendant should be convicted of manslaughter; and if you find in addition to these facts, the further fact that the said wound or wounds were so inflicted with an intent to kill the deceased, then you may convict defendant of murder in the second degree; and if you further find the additional fact that such intention to kill was deliberated upon and premeditated by the defendant, then you may find him guilty of murder in the first degree, as charged in the indictment. In determining the question of intention, you have a right to assume that the defendant intended the usual and probable effect of the acts which you find that he has committed.'

Leonard, 2 Wash. Terr. at 399-400.

The Meggyesy court also rejected the reasoning Bowman advocates here. It did so because it could find no pre-constitution authority that actively prohibited an instruction imposing a duty to convict: "The appellants cite

no preconstitutional case that establishes a prohibition against the challenged instructional language.” Meggysey, 90 Wn. App. at 702.

Preexisting state law does not show that the challenged instruction violates the state constitution.

- iv. Gunwall’s fifth criteria: differences in the structures of the state and federal constitutions.

Bowman argues that the differences in structure between the state and federal constitutions recommends a different analysis for jury instructions under the two systems. Appellant’s Opening Brief at 9-10. The State concedes, as it did in Meggyesy, that “the differences in the structures of the federal and state constitutions, always supports independent analysis.” Meggyesy, 90 Wn. App. at 703.

- v. Gunwall’s sixth criteria: matters of state or local concern.

Bowman argues, generally, that there is no need for national uniformity in criminal law and restates his argument that an instruction allowing the jury to acquit is consistent with the state’s allegedly heightened deference to jury autonomy. Appellant’s Opening Brief at 10. There may be

no need for national conformity in criminal law, but, like the appellants in Meggyesy, Bowman “point[s] to no particular local or state concern regarding the propriety of an instruction to the jury to find the defendant guilty.” 90 Wn. App. at 703.

Bowman fails to show that there are any local concerns that will be met by an instruction allowing the jury to acquit.

Bowman’s arguments mirror those presented to and addressed by the Court of Appeals, Division I in Meggyesy. This opinion has been followed by Division II and III in Brown and Wilson respectively. Bowman adds no substantive consideration to the analysis and a “duty to return a verdict of guilty” instruction does not violate the state constitution.

3. The jury should be instructed it has a duty to convict when the State proves every element of the crime charged.

Bowman identifies, correctly, that the court may not direct the jury to reach a specific verdict, coerce the jury towards a finding of guilt, or review the jury’s acquittal of an accused. Appellant’s Opening Brief at 11-13. From here he argues that, because the jury always in fact has the power to

acquit contrary to the evidence, it is error to instruct the jury that it has the duty to find a defendant guilty if the State meets its burden. Id. at 11-15. While conceding that it would be excessive for the court to instruct the jury that it may disregard the law, Bowman argues that Meggyesy was wrongly decided because a “duty to convict” instruction informs the jury of a duty which is unenforceable, and an unenforceable duty does not exist. Id. at 12-16.

It’s unclear why an unenforceable duty is any less a duty than an enforceable one. The word “duty” has many definitions: “conduct due....; obligatory tasks, conduct, service, or functions that arise from one’s position....; a moral or legal obligation; the force of moral obligation...” MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY (10th ed. 1998). This definition is apt. The jury has a very real obligation to convict when the State proves all the elements of the charged crime beyond a reasonable doubt:

In a very real sense, a jury does have the “duty” to convict the accused of the offense charged in the indictment. . .”A jury is not empowered to waive the law or any of its rules—its only power is to take the law of the case as given by the trial judge and apply it to the facts as developed in the trial.

Kuenzel v. State, 577 So.2d 474, 517 (Ala. Crim. App. 1990), *aff'd*, *sub nom Ex Parte Kuenzel*, 577 So. 2d 531 (Ala. 1991) (citing Patterson v. State, 45 Ala. App. 229, 236, 228 So.2d 843, 849 (1969)). While it is true that the jury is able and sometimes willing, for compassion or because it disagrees with the legislature or for some other reason, to acquit an accused in spite of the facts and in the face of the law, the reality that it can do so does not alter the fact that the jury has a duty to do otherwise. A duty is no less of one after it has been disregarded.

Telling the jury that it has a “duty to return a verdict of guilty” if the State proves every element of the crime charged beyond a reasonable doubt is a correct statement of the law because the jury does, in fact, have a duty to return a verdict of guilty when the State proves all the elements of the crime charged beyond a reasonable doubt.

D. CONCLUSION.

Under the state and federal constitutions, Bowman’s right to a jury trial was not violated when the judge instructed the jury that it must find Bowman guilty if the State proved every element of Bowman’s charged crime beyond a reasonable doubt. The

standard instruction violates neither the federal nor state constitutions, and the jury does, in fact, have a duty to return a verdict of guilty when the prosecution meets its burden. There was no error, and Bowman's conviction should be affirmed.

Respectfully submitted this 29th day of August, 2013.



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THURSTON COUNTY PROSECUTOR

August 29, 2013 - 10:45 AM

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