

**FILED**

**NOV 26 2012**

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

NO. 30873-1-III

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

---

STATE OF WASHINGTON,

RESPONDENT,

vs.

ERIC CHRISTOPHER TRUITT,

APPELLANT.

---

RESPONDENT'S BRIEF

---

Kenneth Tyndal, WSBA#44031  
Attorney for Respondent  
215 S. Oak, Room #114  
Colville, WA 99114  
(509) 684-7500

**FILED**

**NOV 26 2012**

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

NO. 30873-1-III

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

---

STATE OF WASHINGTON,

RESPONDENT,

vs.

ERIC CHRISTOPHER TRUITT,

APPELLANT.

---

RESPONDENT'S BRIEF

---

Kenneth Tyndal, WSBA#44031  
Attorney for Respondent  
215 S. Oak, Room #114  
Colville, WA 99114  
(509) 684-7500

TABLE OF CONTENTS

I. STATEMENT OF THE CASE .....3

II. ISSUE ..... 3

III. ANALYSIS CONCLUSION .....3

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<u>Brown v. Spokane County Fire Protection Dist. 1</u> , 100 Wash.2d, 188, 194, 668 P.2d 571 (1983).....	3
<u>Merced v. McGrath</u> , 426 F.3d 1076 (9th Cir. 2005).....	4
<u>Sparf v. United States</u> , 156 U.S. 51 S.Ct. 273 (1895).....	5
<u>State v. Bonisisio</u> , 92 Wash.App. 783, 964 P.2d 1222 (1998), <i>Rev. denied</i> , 137 Wn.2d 1024 (1999).....	4, 5, 6
<u>State v. Brown</u> , 130 Wash.App. 767, 124 P.3d 663 (2005).....	4, 5, 6
<u>State v. Meggyesy</u> , 90 Wn.App. 693, 958 P.2d 319, <i>rev denied</i> , 136, Wn2d. 1028 (1998).....	4, 5, 6
<u>State v. Wilson</u> , 9 Wash. 16, 36 P. 967 (1894).....	4, 5
<u>United States v. Dougherty</u> , 473 F.2d 1113, 1136-37 (D.C. Cir. 1972)..	5
<u>United States v. Powell</u> , 955 F.2d 1206, 1213 (9th Cir. 1992).....	4

**I. STATEMENT OF THE CASE**

The State herein adopts the statement of the case as set forth in Mr. Truitt's brief.

**II. ISSUE**

Does the "to convict" instruction affirmatively mislead the jury about its power to acquit and thereby violate Mr. Truitt's constitutional right to a jury trial?

**III. ANALYSIS AND CONCLUSION**

Truitt's right to a jury trial was not violated by the court's instructions. The appeal should be denied and the jury's decision to convict upheld.

Jury instructions are sufficient if they are not misleading, permit the parties to argue their cases, and properly inform the jury of the applicable law when read as a whole. *Brown v. Spokane County Fire Protection Dist. 1*, 100 Wash.2d 188, 194, 668 P.2d 571 (1983). Appellant, Eric Truitt, argues that the "to convict" instruction is both misleading and an incorrect statement of the law. As a result, Truitt argues the instruction violates both the state and federal constitutional right to a jury trial. Appellant's Brief (AB) at 21.

The "to convict" jury instruction, which advised a jury that it had a duty to convict upon a finding of proof beyond a reasonable doubt did not mislead the jury into believing that it lacked the power to nullify.

This question has been considered by Divisions One and Two and we urge the court to follow the holdings in State v. Meggyesy, 90 Wn.App. 693, State v. Bonisisio, 92 Wash.App. 783 and State v. Brown, 130 Wash.App. 767.

In Meggyesy, the appellant challenged the “to convict” language of the instruction. Division One found that the instruction did not misstate the law and that the federal constitutional right to trial by jury was not implicated by the instruction. Meggyesy at 701. The court also conducted an analysis under the state constitution and found no independent state constitutional basis to invalidate the challenged instruction. Id at 704.

As part of its analysis in Meggyesy, Division One cited the State Supreme Court in State v. Wilson which was decided shortly after the adoption of the state constitution and supports the concept of a jury’s duty to convict. In Wilson, the State Supreme Court considered a case where the instruction failed to list all required elements. In its opinion the Court said, “it clearly appears that all the court intended to say was that if they found from the evidence that all the acts necessary to constitute the crime had been committed by the defendant, the law made it their duty to find him guilty.” State v. Wilson, 9 Wash. 16 (1894).

The federal courts have recognized that while a jury can nullify, courts do not have to provide support. In Merced v. McGrath, 426 F.3d 1076, the United States Court of Appeals, Ninth Circuit noted, “If jurors had a right to nullify, then a court would have a correlative duty to safeguard their ability to exercise this right. But courts manifestly do not have a duty to ensure a jury’s free exercise of this power”. See, e.g. United States v. Powell, 955 F.2d 1206, 1213 (9th

Cir. 1992); United States v. Dougherty, 473 F.2d 1113, 1136-37 (D.C. Cir. 1972). “In fact, it is the duty of juries in criminal cases to take the law from the court, and apply that law to the facts as they find them to be from the evidence.” Sparf v. United States, 156 U.S. 51 S.Ct. 273 (1895).

Truitt’s argument is based on the idea that the “to convict” instruction is an incorrect statement of the law. As found by the State Supreme Court in Wilson and the U.S. Supreme Court in Sparf, it is the duty of a jury to follow the law. It is a duty of a jury to convict if the elements of a criminal offense have been proven beyond a reasonable doubt. The instruction clearly directs the jury to consider the evidence and to determine whether the State has proven, beyond a reasonable doubt, each element of the charged crime. The instruction does not invade the province of the jury and as the court found in Meggyesy is not an incorrect statement of the law. Meggyesy at 701.

Division Two has followed the decision in Meggyesy. In State v. Bonisisio, the appellant challenged the “to convict” instruction by arguing that it violated the defendant’s right to a jury trial and to due process. Following the reasoning outlined in Meggyesy, the court held that the defendant is not entitled to a jury nullification instruction and the trial court did not err in instructing the jury as it did. Bonisisio at 794.

In State v. Brown, Division Two considered the same question facing the court in the case at hand. Does the “to convict” instruction mislead a jury into believing that it lacked power

to nullify? Division Two again held that the instruction did not violate the law and did not mislead the jury.

In rejecting Brown's argument, Division Two found:

"We find no meaningful difference between Brown's argument and the issues raised in Bonisisio and Meggyesy. The Meggyesy court, although addressing a slightly different argument held that instructing a jury it had a duty to convict if it found the elements were proven beyond a reasonable doubt did not misstate the law. Meggyesy, 90 Wash.App. at 700-01, 958 P.2d 319. And in Bonisisio, 92 Wash.App. at 794, 964 P.2d 1222, we held that the trial court did not err in instructing the jury that it had a duty to convict if it found that the State had proven all elements beyond a reasonable doubt. Further, the purpose of a jury instruction is to provide the jury with the applicable law to be applied in the case. State v. Borrero, 147 Wash2d 353, 362, 58 P.3d 245 (2002). The power of jury nullification is not an applicable law to be applied in a second degree burglary case. We reject Brown's argument that the court erred in giving the "duty" instruction." Brown at 771.

Here, Truitt makes the same argument as Brown in arguing that the "to convict" instruction affirmatively misleads the jury. For the reasons stated in Meggyesy, Bonisisio and Brown, this argument has been made and rejected. We urge the court to follow the reasoning of these cases and deny Mr. Truitt's appeal.

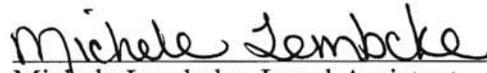
Dated this 21<sup>st</sup> day of November, 2012.

Respectfully Submitted,

  
Kenneth Tyndal, WSBA#44031  
Deputy Prosecuting Attorney

CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that I mailed a true and correct copy of the foregoing Brief of Respondent to the Court of Appeals, Division III, N. 500 Cedar, Spokane, WA 99201, to Susan Marie Gasch, P.O. Box 30339 Spokane, WA 99223-3005; and to Eric C. Truitt, lka: 2423 Quinns Meadow Rd.; H, Colville, WA 99114 on November 21, 2012.

  
Michele Lembcke, Legal Assistant