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Court of Appeals  
Division III  
State of Washington

No. 31316-6-III  
IN THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

NEIL MCGINNIS,

Defendant/Appellant.

APPEAL FROM THE SPOKANE COUNTY SUPERIOR COURT  
Honorable Gregory D. Sypolt, Judge

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BRIEF OF APPELLANT

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**A. ASSIGNMENTS OF ERROR**

1. The “to-convict” instruction erroneously stated the jury had a “duty to return a verdict of guilty” if it found each element proven beyond a reasonable doubt.

2. The record does not support the implied finding that Mr. McGinnis has the current or future ability to pay Legal Financial Obligations.

3. The Judgment and Sentence contains a scrivener’s error that should be corrected.

*Issues Pertaining to Assignments of Error*

1. In a criminal trial, does a “to-convict” instruction, which 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, violate a defendant’s right to a jury trial, when there is no such duty under the state and federal Constitutions?

2. Should the Implied finding that Mr. McGinnis has the current or future ability to pay Legal Financial Obligations be stricken from the Judgment and Sentence as clearly erroneous, where it is not supported in the record?

3. The Judgment and Sentence states the date of the current offense was June 26, 2012. The evidence establishes that the date of the offense was June 24, 2012. Should this scrivener's error be corrected?

**B. STATEMENT OF THE CASE**

A jury found the defendant, Neil McGinnis, guilty of second degree burglary. CP 59. At trial, the jury was given "to convict" instructions regarding second degree burglary and first degree criminal trespass. The "to convict" instructions contained *Washington Pattern Jury Instructions: Criminal* language as follows:

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.

Instruction No. 9 at CP 52 (WPIC 60.04); Instruction No. 13 at CP 56 (WPIC 60.16).

In a separate proceeding immediately following trial, the jury considered the aggravating circumstance of whether Mr. McGinnis had committed the crime shortly after being released from incarceration. *See* RCW 9.94A.535(3)(t); RCW 9.94A.537. By special verdict, the jury answered "yes". CP 67.

At sentencing, the court imposed a term of confinement of 68 months, the high end of the standard range of 51 – 68 months based on an

offender score of 9+. CP 268, 270. The court also ordered a total amount of Legal Financial Obligations (“LFOs”) of \$800. CP 271–72. The court made no express finding that Mr. McGinnis had the present or future ability to pay the LFOs. 12/4/12 RP 144–59; *see* CP 269 at ¶ 2.5.

However, the Judgment and Sentence contained the following pertinent language by the court:

**¶ 2.5 Legal Financial Obligations/Restitution.** The court has considered the total amount owing, the defendant's present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. ...

CP 169 (bolding in original). The court made no inquiry into Mr. McGinnis’ financial resources and the nature of the burden that payment of LFOs would impose. 12/4/12 RP 144–59. The court ordered Mr. McGinnis to begin making monthly payments of not less than \$25.00 on the LFOs commencing December 7, 2015. CP 272 at ¶ 4.3.

This appeal followed. CP 284–85.

## C. ARGUMENT

**1. Mr. McGinnis’ constitutional right to a jury trial was violated by the court’s instructions, which affirmatively misled the jury about its power to acquit.**

As part of the “to-convict” instructions used in this case, the trial court instructed the jury as follows, using standard language from the pattern 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.

Instruction No. 9 at CP 52 (WPIC 60.04); Instruction No. 13 at CP 56 (WPIC 60.16). Mr. McGinnis contends there is no constitutional “duty to convict” and that the instruction accordingly misstates the law. The instruction violated Mr. McGinnis’ right to a properly instructed jury.<sup>1</sup>

a. Standard of review. Constitutional violations are reviewed *de novo*. Bellevue School Dist. v. E.S., 171 Wn.2d 695, 702, 257 P.3d 570 (2011). Jury instructions are reviewed *de novo*. State v. Bashaw, 169 Wn.2d 133, 140, 234 P.3d 195 (2010) , *overruled in part on other*

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<sup>1</sup> 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, *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.

*grounds*, 174 Wn.2d 707, \_\_\_ P.3d \_\_\_ (June 7, 2012). 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). The elements instruction given in this case affirmatively misled the jury to conclude it was without power to nullify, therefore, it was improper. *E.g.*, State v. Vander Houwen, 163 Wn.2d 25, 29, 177 P.3d 93 (2008) (explaining that jury instructions are improper if they mislead the jury). Moreover, because this error occurred in the elements instruction, which is the “yardstick” by which the Jury measures a defendant’s guilt or innocence, the error directly prejudiced Mr. McGinnis’ right to a fair trial and, thus, constituted a manifest constitutional error.

b. 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 of 1789. It was the only guarantee to appear in both the original document and the Bill of Rights. U.S. Const. art. 3, § 2, ¶ 3; U. S. Const. amend. 6; U.S. Const. amend. 7. 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, p. 269 (Princeton Univ. Press, 1958).

In criminal trials, the right to jury trial is fundamental to the American scheme 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.<sup>2</sup>

c. 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

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<sup>2</sup> 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., joined by Dolliver, J., dissenting).

808 (1986). Under the Gunwall analysis, it is clear that the right to jury trial is such an area. Pasco v. Mace, *supra*; Sofie v. Fiberboard Corp., 112 Wn.2d 636, 656, 771 P.2d 711, 780 P.2d 260 (1989).

i. The textual language of the state constitution.

The drafters of our state constitution not only granted the right to a jury trial, Const. art. 1, § 22,<sup>3</sup> they expressly declared it “shall remain inviolate.” Const. art. 1, § 21.<sup>4</sup>

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, 112 Wn.2d at 656. 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 inviolate.” 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

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<sup>3</sup> **Rights of Accused Persons.** In criminal prosecutions, the accused shall have the right . . . to have a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed . . . .

<sup>4</sup> “The right of trial by jury shall remain inviolable . . . .”

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.<sup>5</sup> 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 the Court in State v. Meggyesy<sup>6</sup> may have been correct when it found there is no specific constitutional language that addresses this precise issue, the language that *is* there indicates the right to a jury trial is so fundamental that any infringement violates the constitution.

ii. State constitutional and common law history.

State constitutional history favors an independent application of Article I, Sections 21 and 22. In 1889 (when the constitution was adopted), the Sixth Amendment did not apply to the states. Furthermore, Washington based its Declaration of Rights on the Bills of Rights of other states, which relied on common law and not the federal constitution. State

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<sup>5</sup> “Judges shall not charge juries with respect to matters of fact, not comment thereon, but shall declare the law.”

<sup>6</sup> 90 Wn. App. 693, 701, 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).

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; Pasco v. Mace, 98 Wn.2d at 96; *see also* State v. Hobble, 126 Wn.2d 283, 299, 892 P.2d 85 (1995). Under the 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. Leonard v. Territory, 2 Wash.Terr. 381, 7 Pac. 872 (Wash.Terr.1885). In Leonard, the Supreme Court reversed a murder conviction and set out in some detail the jury instructions given in the case. The court instructed the 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.<sup>7</sup> Leonard, at 398-399. Thus the common law practice *required* the jury to acquit upon a failure of proof, and *allowed* the jury to acquit even if the proof was

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<sup>7</sup> The trial court’s instructions were found erroneous on other grounds.

sufficient.<sup>8</sup> Id.

The Court of Appeals in Meggyesy attempted to distinguish Leonard on the basis that the Leonard court "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 current practice does not comport with the scope of the right to jury trial existing at that time, and should now be re-examined.

iii. 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 Wash. 7, 122 P. 345 (1912); State v. Christiansen, 161 Wash. 530, 297 P. 151 (1931). This rule applies even 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

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<sup>8</sup> Furthermore, the territorial court reversed all criminal convictions that resulted from erroneous jury instructions (unless the instructions favored the defense). *See, e.g.,* Miller v. Territory, 3 Wash.Terr. 554, 19 P. 50 (Wash.Terr.1888); White v. Territory, 3 Wash.Terr. 397, 19 P. 37 (Wash.Terr.1888); Leonard, *supra*.

plainly contrary to the law, either from mistake or a willful disregard of the law, there is no remedy.”<sup>9</sup>

iv. Differences in federal and state constitutions' structures.

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. Gunwall indicates that this factor will always support an independent interpretation of the state constitution because the difference in structure is a constant. Id., 106 Wn.2d at 62, 66; *see also* State v. Ortiz, 119 Wn.2d 294, 303, 831 P.2d 1060 (1992).

v. Matters of particular state interest or local concern.

The manner of conducting criminal trials in state court is of 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

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<sup>9</sup> This is likewise true in the federal system. *See, e.g.*, United States v. Moylan, 417 F.2d 1002, 1006 (4<sup>th</sup> Cir. 1969).

(2003); State v. Russell, 125 Wn.2d 24, 61, 882 P.2d 747 (1994), *cert. denied*, 514 U.S. 1129 (1995). Gunwall factor number six thus also requires an independent application of the state constitutional provision in this case.

vi. 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.

d. 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); Holmes, 68 Wash. at 12-13. 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.<sup>10</sup> 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

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<sup>10</sup> "No person shall be ... twice put in jeopardy for the same offense."

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).

History shows jurors are endowed with the power to nullify. The power of a jury to acquit even in the face of overwhelming evidence of guilt, (i.e. jury nullification) long has been recognized and accepted as an integral and essential aspect of the criminal justice system. E.g., Bushell's Case, 6 Howell's State Trials 999 (1670); *see also* United States v. Polouizzi, 687 F.Supp.2d 133, 184–98 (E.D.N.Y. 2010)<sup>11</sup> (providing a thorough historical survey of this right). As one commentator has observed: "The only real issue concerning jury nullification is whether or not the jury should be honestly instructed as to its authority. The value of nullification to the legal system no longer appears to be a matter of

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<sup>11</sup> Reversed on others ground in an unpublished case.

dispute.” Schelin & Van Dyke, Jury Nullification: The Contours of a Controversy, 43 L. & Contemp.Probs. 51, 113 n.55 (1980).

Despite this recognized power, nullification instructions—once historically common—are no longer given. Wrongly relying on Sparf v. United States, 156 U.S. 51, 102, 15 S.Ct. 273, 39 L.Ed. 343 (1895), judges often refuse to inform juries of their full powers. Yet, Sparf—supposedly the bedrock case against jury nullification—adopted no such holding. As one commentator explains:

[Sparf] did not preclude judges from rendering nullification instructions or allowing nullification arguments in proper circumstances, it did not require judges to mislead jurors about their power to judge the law, and it did not sanction a judicial denial of the jury’s nullification power, either by instruction or interference. Sparf only held that it was not reversible error to instruct the jury that it would be wrong to disregard the court’s instruction as to the law. In fact, the trial judge in Sparf informed the jury that it had the ‘physical power’ to render a verdict contrary to his instructions.

Andrew J. Parmenter, Nullifying the Jury, The Judicial Oligarchy Declares War on Jury Nullification, 46 Washburn L.J. 379, 388 (2007) (footnotes omitted).

Under Washington law, juries have always had the ability to deliver a verdict of acquittal that is against the evidence. Hartigan, *supra*. 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. Such an instruction fails to make the correct legal standard manifestly apparent to the average juror. Kyllo, 166 Wn.2d at 864.

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 may 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.

e. 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. Historically the jury's role has never been so limited: "[O]ur decision in no way undermine[s] 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. 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, P.2d 628 (1980); State v. Carlson, 65 Wn. App. 153, 828 P.2d 30, *rev. 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.

f. Current example of correct legal standard in instructions. The duty to acquit and permission to convict is well-reflected in the instruction 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. This allocation of the power of the jury “shall remain inviolate.”

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

... 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 proven 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 return a verdict of guilty.”

In contrast, the “to convict” instruction at issue here does not reflect this legal asymmetry. It is not a correct statement of the law. As such, it provides a level of coercion, not supported by law, for the jury to return a guilty verdict. Such coercion is prohibited by the right to a jury trial. Leonard, *supra*; State v. Boogaard, 90 Wn.2d 733, 585 P.2d 789 (1978).

g. Contrary case law is based on a poor analysis; this Court should decide the issue differently.<sup>12</sup> In State v. Meggyesy, the appellant challenged the 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 of the Court of Appeals characterized the alternative language proposed by the appellants—“you **may** return a verdict of guilty”—as “an instruction notifying the jury of its power to acquit against the evidence.” 90 Wn. App. at 699. The court spent much of its opinion concluding there was no legal authority requiring it to instruct a jury it had the power to acquit against the evidence.

Division Two has followed the Meggyesy holding. State v. Bonisio, 92 Wn. App. 783, 964 P.2d 1222 (1998), *rev. denied*, 137 Wn.2d 1024 (1999); State v. Brown, 130 Wn. App. 767, 124 P.3d 663 (2005). Without much further analysis, Division Two echoed Division One’s concerns that instructing with the language ‘may’ was tantamount to instructing on jury nullification.

Appellant respectfully submits the Meggyesy analysis addressed a different issue. “Duty” is the challenged language herein. By focusing on

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<sup>12</sup> A decision is incorrect if the authority on which it relies does not support it. State v. Nunez, 174 Wn.2d 707, 713, 285 P.3d 21 (2012).

the proposed remedy, the Meggyesy court side-stepped the underlying issue raised by its appellants: the instructions violated their 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.

However, portions of the Meggyesy decision are relevant. The court acknowledged the Supreme Court has never considered this issue. 90 Wn. App. at 698. It recognized that the jury has the power to acquit against the evidence: “This is an inherent feature of the use of general verdict. But the power to acquit does not require any instruction telling the jury that it may do so.” Id. at 700 (foot notes omitted). The court also relied in part upon federal cases in which the approved “to-convict” instructions did *not* instruct the jury it had a “duty to return a verdict of guilty” if it found every element proven. *See, Meggyesy*, 90 Wn. App. at 698 fn. 5.<sup>13, 14</sup> These concepts support Mr. McGinnis’s position and do not contradict the arguments set forth herein.

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<sup>13</sup> E.g., United States v. Powell, 955 F.2d 1206, 1209 (9th Cir.1991) (“In order for the Powells to be convicted, the government must have proved, beyond a reasonable doubt, that the Powells had failed to file their returns.”).

<sup>14</sup> Indeed, the federal courts do not instruct the jury it “has a duty to return a verdict of guilty” if it finds each element proven beyond a reasonable doubt. *See* Ninth Circuit Model Criminal Jury Instructions:

In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt: ...

The Meggyesy court incorrectly stated the issue. The question is not whether the court is required to tell the jury it can acquit despite finding each element has been proven beyond a reasonable doubt. The question is whether **the law** ever requires the jury to return a verdict of guilty. If the law never requires the jury to return a verdict of guilty, it is an incorrect statement of the law to instruct the jury it does. And an instruction that says it has such a duty impermissibly directs a verdict. Sullivan v. Louisiana, 508 U.S. 275, 124 L.Ed.2d 182, 113 S.Ct. 2078 (1993).

Unlike the appellant in Meggyesy,<sup>15</sup> Mr. McGinnis does not ask the court to approve an instruction that affirmatively notifies the jury of its power to acquit. Instead, he argues that jurors should not be affirmatively misled. This question was not addressed in either Meggyesy or Bonisisio; thus the holding of Meggyesy should not govern here. The Brown court erroneously found that there was “no meaningful difference” between the two arguments. Brown, 130 Wn. App. at 771. Meggyesy and its progeny should be reconsidered, and the issue should be analyzed on its merits.

h. The court’s instructions in this case affirmatively misled the jury about its power to acquit even if the prosecution proved its case

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<sup>15</sup> And the appellant in Bonisisio.

beyond a reasonable doubt. The instructions given in Mr. McGinnis' case did not contain a correct statement of the law. The court instructed the jurors that it was their "duty" to accept the law as instructed, and that it was their "duty" to convict the defendant if the elements were proved beyond a reasonable doubt. Instruction No. 1 at CP 42; Instruction No. 9 at CP 52; Instruction No. 13 at CP 56.

A duty is "[a]n act or a course of action that is required of one by... law." *The American Heritage Dictionary* (Fourth Ed., 2000, Houghton Mifflin Company). *Sparf, supra*, does not provide any reasonable basis for instructing the jury that it has a "duty" to return a guilty verdict when all of the elements of the alleged crime have been proven. Although a survey of the states' and federal circuits' corresponding jury instruction language revealed that 24 (almost 40 percent) of the state courts and federal circuits use the command "must" or its equivalent ("shall" or "duty") to point juries to verdicts of guilty<sup>16</sup>, such instructions affirmatively mislead the jury to conclude they are without power to nullify. As such, these instructions are disingenuous by omission and, therefore, have no place in any justice system.

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<sup>16</sup> See B. Michael Dorn, "Must Find the Defendant Guilty" Jury Instructions Violate the Sixth Amendment, 91 *Judicature* 12, 12 (2007).

As this Court's very recent decision in State v. Smith, \_\_\_ Wn. App. \_\_\_, 298 P.3d 785 (2013) suggests, a more accurate and complete elements instruction would substitute the word "should" for "duty." For as this Court has recognized, the term "duty" is equivalent to the obligatory or mandatory terms "ought", "shall" or "must", while the term "should" strongly encourages a particular course of action but is still the "weaker companion" to the obligatory "ought". Smith, \_\_\_ Wn.2d \_\_\_, 298 P.3d at 790 (citations omitted). By substituting "should" for "duty", a trial court would be able to strongly suggest that the jury convict if it has found all the elements proved beyond a reasonable doubt. Indeed, as this Court recognizes, the language might even be considered to be nearly mandatory. Id. Yet, by using the term "should", the trial court would no longer be affirmatively misleading jurors about their power to nullify.<sup>17</sup>

Here, the court's use of the word "duty" in the "to-convict" instruction conveyed to the jury that it *could not* acquit if the elements had been established. This misstatement of the law provided a level of coercion for the jury to return a guilty verdict, deceived the jurors about their power to acquit in the face of sufficient evidence, Leonard, *supra*,

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<sup>17</sup> For example, a constitutionally proper instruction would read as follows:  
If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then you should return a verdict of guilty.

and failed to make the correct legal standard manifestly apparent to the average juror. Kyllo, 166 Wn.2d at 864. By instructing 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 general verdict.

The instruction creating a "duty" to return a verdict of guilty was an incorrect statement of law. The trial court's error violated Mr. McGinnis' state and federal constitutional right to a jury trial. Accordingly, his convictions must be reversed and the case remanded for a new trial. Hartigan, *supra*; Leonard, *supra*.

**2. The implied finding that Mr. McGinnis has the current or future ability to pay Legal Financial Obligations is not supported in the record and must be stricken from the Judgment and Sentence.**

Courts may require an indigent defendant to reimburse the state for the costs only if the defendant has the financial ability to do so. Fuller v. Oregon, 417 U.S. 40, 47-48, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974); State v. Curry, 118 Wn.2d 911, 915-16, 829 P.2d 166 (1992); RCW 10.01.160(3); RCW 9.94A.760(2). To do otherwise would violate equal protection by imposing extra punishment on a defendant due to his or her poverty.

a. Relevant statutory authority. RCW 9.94A.760(1) provides that upon a criminal conviction, a superior court “may order the payment of a legal financial obligation.”<sup>18</sup> RCW 10.01.160(1) authorizes a superior court to “require a defendant to pay costs.” These costs “shall be limited to expenses specially incurred by the state in prosecuting the defendant.” RCW 10.01.160(2). In addition, “[t]he court shall not order a defendant to pay costs unless the defendant is or will be able to pay them.” RCW 10.01.160(3). “In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.” RCW 10.01.160(3).

b. There is insufficient evidence to support the trial court's implied finding that Mr. McGinnis has the present and future ability to pay legal financial obligations. Curry concluded that while the ability to pay was a necessary threshold to the imposition of costs, a court need not make a specific finding of ability to pay: “[n]either the statute nor the constitution requires a trial court to enter formal, specific findings regarding a defendant's ability to pay court costs.” 118 Wn.2d at 916.

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<sup>18</sup> It appears that imposition of legal financial obligations is also contemplated by the Juvenile Justice Act. See RCW 13.40.192.

Curry recognized, however, that both RCW 10.01.160 and the federal constitution "direct [a court] to consider ability to pay." Id. at 915-16.

Here, the court considered Mr. McGinnis' "present and future ability to pay legal financial obligations" but made no express finding that he had the present or likely future ability to pay those LFOs. However, the finding is implied because the court ordered that monthly payments of \$25.00 on the LFOs be paid beginning on a date certain *after* it considered "the total amount owing, the defendant's present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change." CP 269 at ¶ 2.5; CP 272 at ¶ 4.3.

Whether a finding is expressed or implied, it must have support in the record. A trial court's findings of fact must be supported by substantial evidence. State v. Brockob, 159 Wn.2d 311, 343, 150 P.3d 59 (2006) (citing Nordstrom Credit, Inc. v. Dep't of Revenue, 120 Wn.2d 935, 939, 845 P.2d 1331 (1993)). The trial court's determination "as to the defendant's resources and ability to pay is essentially factual and should be reviewed under the clearly erroneous standard." State v. Bertrand, 165 Wn. App. 393, 267 P.3d 511, 517 fn.13 (2011), citing State v. Baldwin, 63 Wn. App. 303, 312, 818 P.2d 1116, 837 P.2d 646 (1991).

“Although Baldwin does not require formal findings of fact about a defendant's present or future ability to pay LFOs, the record must be sufficient for [the appellate court] to review whether ‘the trial court judge took into account the financial resources of the defendant and the nature of the burden imposed by LFOs under the clearly erroneous standard.’ ” Bertrand, 165 Wn. App. 393, 267 P.3d at 517, citing Baldwin, 63 Wn. App. at 312 (bracketed material added) (internal citation omitted). A finding that is unsupported in the record must be stricken. Bertrand, 165 Wn. App. 393, 267 P.3d at 517.

Here, the record does not show that the trial court took into account Mr. McGinnis’ financial resources and the nature of the burden of imposing LFOs on him. The record contains no evidence to support the trial court's implied finding in ¶¶ 2.5 and 4.3 that Mr. McGinnis has the present or future ability to pay LFOs. The record instead supports the opposite conclusion: the trial court found Mr. McGinnis indigent for purposes of pursuing this appeal.<sup>19</sup> The implied finding that he has the present or future ability to pay LFOs that is implicit in the directive to make monthly payments of \$25.00 commencing on a date certain is simply not supported in the record. It is clearly erroneous and the directive must

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<sup>19</sup> Order of Indigency, filed December 10, 2012, ACORDS sub-# 65.

be stricken from the Judgment and Sentence. Bertrand, 165 Wn. App. 393, 267 P.3d at 517.

c. The remedy is to strike the unsupported finding. Bertrand is clear: where there is no evidence to support the trial court's finding regarding ability and means to pay, the finding must be stricken. Bertrand, 165 Wn. App. 393, 267 P.3d at 517. Similarly, any implied findings of the present or future ability to pay LFOS of any nature must be stricken where the court made no inquiry and there is no evidence in the record to support such findings.

This remedy is supported by case law. Findings of fact that are unsupported by substantial evidence, or findings that are insufficient to support imposition of a sentence are stricken and the underlying conclusion or sentence is reversed. State v. Lohr, 164 Wn. App. 414, 263 P.3d 1287, 1289-92 (2011); State v. Schelin, 147 Wn.2d 562, 584, 55 P.3d 632 (2002) (Sanders, J. dissenting). There appears to be no controlling contrary authority holding that it is appropriate to send a factual finding without support in the record back to a trial court for purposes of "fixing" it with the taking of new evidence. *Cf.* State v. Souza (vacation and remand to permit entry of further findings was proper where evidence was sufficient to permit finding that was omitted, the State was not relieved of

the burden of proving each element of charged offense beyond reasonable doubt, and insufficiency of findings could be cured without introduction of new evidence), 60 Wn. App. 534, 541, 805 P.2d 237, *recon. denied, rev. denied*, 116 Wn.2d 1026 (1991); Lohr (where evidence is insufficient to support suppression findings, the State does not have a second opportunity to meet its burden of proof), 164 Wn. App. 414, 263 P.3d at 1289–92.

Mr. McGinnis is not challenging *imposition* of the LFOs; rather, the trial court made the implied finding that he has the present and future ability to pay them and, and since there is no evidence in the record to support the finding, the finding must be stricken as clearly erroneous. The reversal of the trial court's implied finding of present and future ability to pay LFOs simply forecloses the ability of the Department of Corrections to begin collecting LFOs from Mr. McGinnis until after a future determination of his ability to pay. It is at a future time when the government seeks to collect the obligation that “ ‘[t]he defendant may petition the court at any time for remission or modification of the payments on [the basis of manifest hardship]. Through this procedure the defendant is entitled to *judicial scrutiny* of his obligation and *his present ability to pay at the relevant time.*’ ” Bertrand, 165 Wn. App. at 405,

citing Baldwin, 63 Wn. App. at 310–11, 818 P.2d 1116, 837 P.2d 646 (citing court adding emphasis and omitting footnote).

**3. The Judgment and Sentence contains a scrivener’s error that should be corrected.**

The Judgment and Sentence states that the date of the current offense was June 26, 2012. CP 266. However, the evidence established that the date of the offense was June 24, 2012. 10/9/12 RP 50–51, 58. The Second Amended Information charged, and the jury was instructed, that the offense took place June 24, 2012. CP 26; Instruction No. 9 at CP 52. Therefore, this court should remand the case for correction of the Judgment and Sentence to accurately reflect the date of the offense. *See, e.g., State v. Nallieux*, 158 Wn. App. 630, 647, 241 P.2d 1280 (2010) (remand appropriate to correct scrivener’s error in judgment and sentence, erroneously stating the defendant stipulated to an exceptional sentence); State v. Healy, 157 Wn. App. 502, 516, 237 P.3d 360 (2010) (remand appropriate to correct scrivener’s error in judgment and sentence, incorrectly stating the terms of confinement imposed).

**D. CONCLUSION**

For the reasons stated, this Court should find the to-convict instructions constituted manifest constitutional error and reverse the conviction and remand for a new trial. Alternatively, the matter should be remanded to correct the scrivener's error and to strike the implied finding of present and future ability to pay legal financial obligations from the Judgment and Sentence.

Respectfully submitted on May 10, 2013.

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PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on May 10, 2013, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of brief of appellant:

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