Supreme Court No. 89303-2
Court of Appeals No. 30378-1-III

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Plaintiff/Respondent,

vs.

PATRICK GALE WILSON,
Defendant/Petitioner.

APPEAL FROM THE BENTON COUNTY SUPERIOR COURT
Honorable Bruce Spanner, Judge

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER.

Petitioner, Patrick Gale Wilson, the defendant/appellant below, asks this Court to accept review of the following Court of Appeals' decision terminating review.

II. COURT OF APPEALS DECISION.

Mr. Wilson seeks review of the opinion of the Court of Appeals, Division Three, published in part as to this issue, filed August15, 2013, which affirmed his conviction and remanded for the trial court to address certain sentencing conditions. A copy of the opinion is attached hereto as **Appendix A**. This petition for review is timely.

III. ISSUE PRESENTED FOR REVIEW.

As a matter of first impression, in a criminal trial does a "to-convict" instruction, which affirmatively 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?

IV. STATEMENT OF THE CASE.

A jury found Mr. Wilson guilty of first degree rape of a child. IV RP[1] 720; CP 1, 307. The jury was given a "to convict" instruction containing the language, "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." CP 299; *see* WPIC 44.11.

Prior to trial, defense counsel submitted her proposed "to-convict" instruction, which eliminated the language "it will be your duty to return a verdict of guilty" and instead included language tracking the special verdict form in WPIC 160.00. Thus, instead of:

> ~~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~~.

the proposed alternative language reads:

> 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.

I RP 19–20; CP 284; *see* WPIC 160.00.

In discussion, counsel maintained that instructing the jury they had a "duty to return a verdict of guilty" was unsupported in the state and

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[1] The transcripts of the trial and sentencing proceedings are contained in five volumes, labeled I through V, by court reporter Renee Munoz. References to those volumes will be by volume number, e.g. "IV RP 720". References to volumes reported by the other court reporters will be by name, e.g. "McLaughlin RP ___".

federal constitutions and violated a defendant's due process rights. Counsel instead proposed language that would not affirmatively mislead the jury as to its inherent power to acquit even where the State had proved its case. The court disagreed and ruled that it would simply instruct the jury with the standard WPIC language as proposed by the State. Defense counsel took exception and objected to the decision. III RP 469–75; IV RP 621–22.

On appeal, Division Three agreed with the Meggyesy[2] and Bonisisio[3] courts that the alternative language proposed by those appellants—"you **may** return a verdict of guilty"—was an impermissible "instruction notifying the jury of its power to acquit against the evidence". *Slip Opinion* at 4–5, *citing* Meggyesy, 90 Wn. App. [693,] 697[, 699. 958 P.2d 319, *rev denied*, 136 Wn.2d 1028 (1998)]. It further agreed with the Brown[4] court in concluding without analysis that Mr. Wilson's challenge to the instruction is the "same" as that in Meggyesy. *Slip Opinion* at 5–6. Division Three held "such an instruction is equivalent to notifying the jury of its power to acquit against the evidence and that a defendant is

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[2] 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).

[3] State v. Bonisisio, 92 Wn. App. 783, 964 P.2d 1222 (1998), *rev. denied*, 137 Wn.2d 1024 (1999).

[4] State v. Brown, 130 Wn. App. 767, 124 P.3d 663 (2005).

not entitled to a jury nullification instruction." *Slip Opinion* at 6, *citing* State v. Bonisisio, 92 Wn. App. 783, 794, 964 P.2d 1222 (1998) (*citing* Meggyesy, 90 Wn. App. at 700).

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. This Court should accept review to determine whether a constitutional infirmity exists.

Petitioner believes this court should accept review of this issue because, as a matter of first impression, the decision of the Court of Appeals involves significant questions of law under the Constitution of the United States and state constitution (RAP 13.4(b)(3)), and/or involves issues of substantial public interest that should be determined by the Supreme Court (RAP 13.4(b)(4)).

This appeal challenges the constitutionality of a criminal jury instruction. The standard language of the "to convict" instruction, "[i]f 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", is found in 11 Washington Practice: Washington Pattern Jury Instruction: Criminal ("WPIC") 44.11 (3d ed. 2008), and is used in virtually every criminal "to convict" jury instruction. However, WPICs are not the law; they are merely persuasive authority. State v. Mills, 116

Wn.App. 106, 116 n. 24, 64 P.3d 1253 (2003), *rev'd on other grounds by* 154 Wn.2d 1, 109 P.3d 415 (2005).

As argued below, telling jurors they have a *duty* to return a verdict of guilty if the state proves its case beyond a reasonable doubt is an incorrect statement of the law. Instructions must properly inform the jury of the applicable law and not mislead the jury. State v. Bennett, 161 Wn. 2d 303, 307, 165 P.3d 1241, 1243 (2007), *citing* State v. LeFaber, 128 Wn.2d 896, 903, 913 P.2d 369 (1996). This Court has not previously addressed whether the challenged language correctly states the law. This Court also has a supervisory role to ensure uniform and constitutionally valid "to convict" instructions in all criminal trials in Washington. If, as in this case, a party challenges constitutionality of the directive of the instruction but is turned away without addressing the merits, this Court's powers to determine constitutional infirmity and/or exercise inherent supervision are unavailable and illusory. Furthermore, as this Court noted in State v. Scott, 110 Wn.2d 682, 757 P.2d 492 (1988), "Constitutional errors are treated specially because they often result in serious injustice to the accused. Such errors also require appellate court attention because they may adversely affect the public's perception of the fairness and

integrity of judicial proceedings." Scott, 110 Wn.2d at 686–87 (citations omitted).

For all these reasons, this Court should accept review of the issue, and reverse Mr. Wilson's conviction.

2. Petitioner's constitutional right to a jury trial was violated by the court's instructions, which affirmatively misled the jury about its power to acquit.

The "to-convict" instruction in this case contained the directive, "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." CP 299. This is standard language from the pattern instructions. Mr. Wilson contends there is no constitutional "duty to convict" and that the instruction accordingly misstates the law. The instruction violated Mr. Wilson's' right to a properly instructed jury.[5]

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

[5] Division One of the Court of Appeals peripherally 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). As discussed *infra* counsel respectfully contends Meggyesy did not address the precise issue and/or was incorrectly decided.

(2011). Jury instructions are reviewed *de novo*. State v. Bennett, 161 Wn.2d at. Instructions must make the relevant legal standard manifestly apparent to the average juror. State v. Kyllo, 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. Wilson's right to a fair trial and, thus, constituted a manifest constitutional error.

b. The United States Constitution. 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).

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

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).

All six Gunwall factors favor an independent application of Article I, Sections 21 and 22 of the Washington Constitution in this case. Petitioner hereby incorporates his analysis of all Gunwall factors, Brief of Appellant at 8–13. 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); 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).

And, a jury verdict of not guilty is non-reviewable because 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.[6]

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).

Thus, 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

[6] "No person shall be ... twice put in jeopardy for the same offense."

> 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).

Under Washington law, juries have always had the ability to deliver a verdict of acquittal that is against the evidence. Hartigan v. Washington Territory, 1 Wash.Terr. 447 (1874). 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 regarding 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. *See also* 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, 616 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, there is no corresponding constitutional "duty" requiring a jury to return a verdict of guilty if it finds every element proven beyond a reasonable doubt. In such a case, the law is that the jury should find the defendant guilty or may exercise its prerogative to acquit against the evidence. To tell a jury instead that it has a "duty" to return a verdict of guilty if it finds every element of a crime proven beyond a reasonable doubt is a misstatement of the applicable law.

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 v. Territory:

> 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 v. Territory, 2 Wash.Terr. 381,399, 7 Pac. 872 (Wash.Terr.1885) (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. The language of the special verdict instruction 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.[7] 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. Bonisisio, 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

[7] A decision is incorrect if the authority on which it relies does not support it. State v. Nunez, 174 Wn.2d 707, 719, 285 P.3d 21 (2012).

One's concerns that instructing with the language 'may" was tantamount to instructing on jury nullification.

Petitioner respectfully submits the Meggyesy analysis addressed a different issue. "Duty" is the challenged language herein. By focusing on 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 that this 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.[8, 9] These concepts support Mr. Wilson's position and do not contradict the arguments set forth herein.

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,[10] Mr. Wilson 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;

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[8] 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.").

[9] 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: ..."

[10] And the appellant in 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 instruction in this case affirmatively misled the jury about its power to acquit even if the prosecution proved its case beyond a reasonable doubt. The instruction given in Mr. Wilson's 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. Instructions No. 1[11] and 10 at CP 299. 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). 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

[11] The first page of Instruction 1, Court's Instructions, appears to be missing from the court file. Pages 2 to 4 of the WPIC 1.02 Conclusion of Trial–Introductory Instruction are found at CP 288–290. The relevant language is: "It also is your duty to accept the law from my instructions, regardless of what you personally believe the law is or what you personally think it should be." 11 Washington Practice: Washington Pattern Jury Instruction: Criminal 1.02 (3d ed. 2008).

of sufficient evidence, and failed to make the correct legal standard manifestly apparent to the average juror. Leonard, *supra*[12]; 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 error violated Mr. Wilson's 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.*

[12] 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. 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. Leonard, at 398-399. Thus the common law

VI. CONCLUSION.

For the reasons stated, Petitioner asks this Court to reverse and remand the matter for a new trial.

Respectfully submitted on September 14, 2013.

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practice *required* the jury to acquit upon a failure of proof, and *allowed* the jury to acquit even if the proof was sufficient. Id.

PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on September 14, 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 Mr. Wilson's petition for review and Appendix A:

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August 15, 2013

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CASE # 303781
State of Washington v. Patrick Gale Wilson
BENTON COUNTY SUPERIOR COURT No. 091010319

Counsel:

Enclosed please find a copy of the opinion filed by the Court today.

A party need not file a motion for reconsideration as a prerequisite to discretionary review by the Supreme Court. RAP 13.3(b); 13.4(a). If a motion for reconsideration is filed, it should state with particularity the points of law or fact which the moving party contends the court has overlooked or misapprehended, together with a brief argument on the points raised. RAP 12.4(c). Motions for reconsideration which merely reargue the case should not be filed.

Motions for reconsideration, if any, must be filed within twenty (20) days after the filing of the opinion. Please file an original and two copies of the motion. If no motion for reconsideration is filed, any petition for review to the Supreme Court must be filed in this court within thirty (30) days after the filing of this opinion (may be filed by electronic facsimile transmission). The motion for reconsideration and petition for review must be received (not mailed) on or before the dates they are due. RAP 18.5(c).

Sincerely,

Renee S. Townsley

Renee S. Townsley
Clerk/Administrator

RST:sh
Enclosure

c: **E-mail**
Honorable Bruce Spanner

c: Patrick Gale Wilson
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FILED
AUGUST 15, 2013
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON,	)	No. 30378-1-III
	)	
Respondent,	)	
	)	
v.	)	OPINION PUBLISHED
	)	IN PART
PATRICK GALE WILSON,	)	
	)	
Appellant.	)	

KULIK, J. — Patrick Gale Wilson was found guilty of first degree child rape. On appeal, he contends that his constitutional right to a jury trial was violated by the trial court's instruction that the jury had a duty to return a guilty verdict if each of the elements of the crime had been proved beyond a reasonable doubt. We agree with the opinions of Divisions One and Two that uphold the instruction. Mr. Wilson also challenges the repayment of his legal financial obligations (LFOs) and the imposition of community custody conditions on the possession of pornography and alcohol.

FACTS

Patrick Wilson was charged with first degree child rape of his daughter, D.M.S. (D.O.B. March 13, 2002). At trial, the court gave the standard to convict instruction for the crime as presented by the State. The instruction included, "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." Clerk's Papers (CP) at 299. Consequently, the court rejected Mr. Wilson's proposed instruction that stated, "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." CP at 284. Mr. Wilson maintained that this jury instruction was more appropriate because the constitution did not impose a duty on the jury to convict, even if it found proof of the elements beyond a reasonable doubt.

A jury convicted Mr. Wilson of rape of a child in the first degree. Mr. Wilson was sentenced to a minimum of 136 months to life.

The court ordered Mr. Wilson to pay over $15,000 in LFOs. Mr. Wilson's judgment and sentence contained section 2.5, which stated, "The court has considered the total amount owing, the defendant's past, 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 at 325. However, the trial court did not indicate on the judgment and sentence that it found that Mr. Wilson had the ability or future ability to pay the LFOs.

Section 4.1 of the judgment and sentence ordered that "[t]he defendant shall pay up to $50.00 per month to be taken from any income the defendant earns while in the custody of the Department of Corrections. This money is to be applied towards legal financial obligations." CP at 326.

Additionally, the trial court imposed conditions on Mr. Wilson's term of community custody. The trial court ordered that Mr. Wilson not possess or pursue pornographic materials. The court also ordered that Mr. Wilson not purchase, possess, or use alcohol, that Mr. Wilson submit to testing and searching by the community corrections officer to monitor compliance with the alcohol conditions, that Mr. Wilson not enter a business where alcohol is the primary commodity for sale, and that Mr. Wilson undergo alcohol evaluation and follow recommended treatment.

Mr. Wilson appeals. He contends that the to convict jury instruction violated his constitutional right to a jury trial, that the trial court erroneously ordered him to pay his LFOs without finding that he has the ability to pay, and that the trial court exceeded its authority by ordering community custody conditions on pornography and alcohol.

ANALYSIS

"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." *State v. Meggyesy*, 90 Wn. App. 693, 698, 958 P.2d 319 (1998), *abrogated on other grounds by State v. Recuenco*, 154 Wn.2d 156, 110 P.3d 188 (2005).

Mr. Wilson assigns error to the trial court's instruction to the jury that "[i]f 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." CP at 299. The language of this instruction is from 11 *Washington Practice: Washington Pattern Jury Instructions: Criminal* 44.11 (3d ed. 2008). Mr. Wilson argues that, under Washington law, juries never have a duty to return a verdict of guilty and that the instruction violates article I, sections 21 and 22 of the Washington Constitution. The rationale that underlies Mr. Wilson's challenge has been rejected in cases arising from Division One and Division Two of this court. *Meggyesy*, 90 Wn. App. 693; *State v. Brown*, 130 Wn. App. 767, 124 P.3d 663 (2005).

In *Meggyesy*, the defendants challenged the same jury instruction as Mr. Wilson. *Meggyesy*, 90 Wn. App. at 697. The defendants opposed the instruction that required the jury to return a guilty verdict upon finding proof of each element beyond a reasonable

doubt and, instead, asserted that a proper instruction should have informed the jury that it "may" convict upon a finding of proof beyond a reasonable doubt. *Id.* Division One upheld the language in the challenged jury instruction. *Id.* at 698. The court concluded that the instruction did not implicate the federal constitutional right to a jury trial or misstate the law. *Id.* at 701. The court determined defendants essentially proposed a jury nullification instruction, and that the defendants were not entitled to an instruction that permitted the jury to acquit against the evidence. *Id.* at 699-700.

The court also conducted a six-step *Gunwall*[1] analysis and concluded that there was "no independent state constitutional basis to invalidate the challenged instructions." *Id.* at 704. Of particular importance, the court reviewed state constitutional history and pre-existing state law and determined that the Washington Constitution does not provide a broader right to a jury trial with respect to the challenged jury instructions. *Id.* at 702-03.

Brown also challenged the jury instruction, claiming that the "to convict" language affirmatively misled the jury about its power to acquit, and that the word "duty" conveyed to the jury that it could not acquit if the elements had been established. *Brown*, 130 Wn. App. at 771. Division Two concluded that Mr. Brown raised the same issues that were addressed in *Meggyesy*, and then rejected Mr. Brown's argument based on *Meggyesy*. *Id.*

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[1] *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986).

Further, the court held that the purpose of the instruction is to provide the jury with the law applicable to each particular case, and that jury nullification is not a law to be applied to Mr. Brown's charged crime. *Id.*

Here, Mr. Wilson requests that we reconsider this issue. He raises the same challenge as in *Brown* and uses the same constitutional arguments set forth in *Meggyesy*. Despite Mr. Wilson's request, we agree with the reasoning in the aforementioned cases and hold that "such an instruction is equivalent to notifying the jury of its power to acquit against the evidence and that a defendant is not entitled to a jury nullification instruction." *State v. Bonisisio*, 92 Wn. App. 783, 794, 964 P.2d 1222 (1998) (citing *Meggyesy*, 90 Wn. App. at 700). We hold that Mr. Wilson's constitutional right to a jury trial was not violated by the "to convict" jury instruction.

The remainder of this opinion has no precedential value. Therefore, it will be filed for public record in accordance with RCW 2.06.040, the rules governing unpublished opinions.

LFO. Under RCW 10.01.160, a court "may [order] a [criminal] defendant to pay costs . . . incurred by the [S]tate in prosecuting the defendant." RCW 10.01.160(1), (2). "Inquiry into the defendant's ability to pay is appropriate only when the State enforces collection under the judgment or imposes sanctions for nonpayment; a defendant's

indigent status at the time of sentencing does not bar an award of costs." *State v. Crook*, 146 Wn. App. 24, 27, 189 P.3d 811 (2008). A trial court's consideration of a defendant's ability to pay applies to the setting of the minimum monthly payment; it does not apply to the setting of the total amount of financial obligations owed. *State v. We*, 138 Wn. App. 716, 728, 158 P.3d 1238 (2007); RCW 9.94A.753(1).

Funds earned by a convicted person during custody are under the charge of the Secretary of the Department of Corrections. RCW 72.11.020. The secretary has the authority to disburse money from the inmate's personal account for the purpose of satisfying a court-ordered LFO. *Id.* LFO deductions shall be made as stated in RCW 72.09.111(1) and RCW 72.65.050. RCW 72.11.020. The withdrawal of funds for the payment of LFOs shall not reduce the inmate's account to less than the level of indigency as defined by the department. *Id.* "Further, unless specifically altered herein, court-ordered legal financial obligations shall be paid." *Id.*

RCW 72.09.111 mandates the minimum deductions from wages received by prisoners. The statute sets forth "specific formulas allowing for fluctuating amounts to be withheld, based on designated percentages and inmate account balances, assuring inmate accounts are not reduced below indigency levels." *Crook*, 146 Wn. App. at 28 (citing RCW 72.09.111(1)). This includes a minimum 20 percent deduction for payment of

LFOs for all inmates who have LFOs owing in any Washington superior court. RCW 72.09.111(1)(a)(iv).

"Mandatory Department of Corrections deductions from inmate wages for repayment of legal financial obligations are not collection actions by the State requiring inquiry into a defendant's financial status." *Crook*, 146 Wn. App. at 27-28.

Mr. Wilson contends that the trial court made an implied finding that he had the current or future ability to pay his LFOs when it ordered him to pay $50 per month from his Department of Corrections account. He contends that the finding is not supported by the record and must be stricken.

However, the trial court did not make an implied finding regarding Mr. Wilson's ability to pay. Instead, the court limited the amount of inmate wages to be applied to Mr. Wilson's LFOs. The Department of Corrections has the statutory authority to deduct a portion of his inmate wages for this purpose. RCW 72.11.020.

Furthermore, the trial court was not required to address Mr. Wilson's ability to pay. The deduction from Mr. Wilson's inmate wages while in custody of the Department of Corrections was not a collection action by the State. Statutory guidelines are in place to assure inmate accounts are not reduced below indigency levels. RCW 72.11.020. Mr. Wilson's ability to pay was not at issue.

The judgment and sentence does not contain an unsupported finding that Mr. Wilson has the ability to pay LFOs.

Sentencing Conditions. This court reviews crime-related prohibitions or conditions imposed by the trial court for an abuse of discretion. *State v. Riley*, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993). To be reversed, the sentence must be manifestly unreasonable so that "'no reasonable man would take the view adopted by the trial court.'" *Id.* (quoting *State v. Blight*, 89 Wn.2d 38, 41, 569 P.2d 1129 (1977)). Unauthorized conditions of a sentence may be challenged for the first time on appeal. *State v. Ford*, 137 Wn.2d 472, 477, 973 P.2d 452 (1999).

As a part of any term of community custody, the court has the discretion to order an offender to comply with any crime-related prohibition. RCW 9.94A.703(3)(f). A "crime-related prohibition" is defined, in relevant part, as "'[a]n order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted.'" *State v. Letourneau*, 100 Wn. App. 424, 431, 997 P.2d 436 (2000) (quoting former RCW 9.94A.030(12) (1999)). "Although the conduct prohibited during community custody must be directly related to the crime, it need not be causally related to the crime." *Id.* at 432.

Sentencing courts may impose sentences only if the legislature had authorized the sentence by statute. *State v. Phelps*, 113 Wn. App. 347, 354-55, 57 P.3d 624 (2002) (quoting *State v. Theroff*, 33 Wn. App. 741, 744, 657 P.2d 800 (1983)). Whenever a sentencing court exceeds its statutory authority, its action is void. *Id.* (quoting *Theroff*, 33 Wn. App. at 744).

Mr. Wilson challenges the condition that prohibits him from possessing or pursuing any pornographic materials, including those found on the Internet. He contends that the condition is unconstitutionally vague.

"A statute is unconstitutionally vague if it '(1) . . . does not define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is proscribed, or (2) . . . does not provide ascertainable standards of guilt to protect against arbitrary enforcement.'" *State v. Bahl*, 164 Wn.2d 739, 752-53, 193 P.3d 678 (2008) (alterations in original) (quoting *City of Spokane v. Douglass*, 115 Wn.2d 171, 178, 795 P.2d 693 (1990)). A general restriction on accessing or possessing pornographic materials is unconstitutionally vague. *Bahl*, 164 Wn.2d at 758.

As recognized in *Bahl*, the condition generally prohibiting Mr. Wilson from possessing or pursuing pornography is unconstitutionally vague. We remand to the trial court to narrowly tailor the condition. At resentencing, the State may recommend that the

court revise the condition to prohibit Mr. Wilson from possessing any depictions of sexually explicit conduct as defined in former RCW 9.68A.011(3) (2002).

Mr. Wilson also challenges the conditions related to alcohol, specifically the conditions that (1) prohibited Mr. Wilson from purchasing, possessing, or using alcohol and ordered Mr. Wilson to consent to searches to monitor compliance, (2) prohibited Mr. Wilson from entering a business where alcohol is the primary commodity for sale, and (3) ordered Mr. Wilson to undergo alcohol evaluation and follow recommended treatment. Except for the condition that prohibits Mr. Wilson from consuming alcohol, Mr. Wilson contends that the court exceeded its statutory authority in imposing the remaining conditions because they are not crime related.

There is no dispute that the trial court had the statutory authority under RCW 9.94A.703(3)(e) to prohibit Mr. Wilson from consuming alcohol. This condition stands. For the remaining conditions, the State concedes that the conditions are not proper because there is no evidence that alcohol was involved in the commission of Mr. Wilson's crime. Thus, on remand, the remaining conditions regarding alcohol are to be stricken.

We affirm the conviction for first degree child rape. We affirm the condition regarding the consumption of alcohol. We remand for clarification of the condition on pornography and to strike the remaining conditions regarding alcohol.

Kulik, J.

WE CONCUR:

Korsmo, C.J.

Siddoway, J.