No. 30256-3-III
IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

VANCE L. BAKER,

Defendant/Appellant.

Appellant's Brief

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2. The trial court erred in not allowing Mr. Baker to question L.L.B. about an incident in February 2008, when she called the police and falsely reported somebody was trying to break into her house and rape her.

3. The "to-convict" instructions erroneously stated the jury had a "duty to return a verdict of guilty" if it found each element proven beyond a reasonable doubt.

4. The trial court erred in imposing a variable term of community custody for 48 months as part of the sentence.

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Should the conviction for second degree child molestation (count 2) be dismissed because the jury did not find the defendant guilty of the crime as charged in the information?

2. Did the trial court abuse its discretion in excluding evidence of L.L.B. calling the police and falsely reporting burglary and rape when such evidence was relevant to the defense theory of the case?

3. 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?

4. Did the sentencing court not have the statutory authority to impose a variable term of community custody for 48 months contingent on the amount of earned early release under RCW 9.94A.701, the statute authorizing the superior court to impose a sentence of community custody?

C. STATEMENT OF THE CASE

Vance Baker was convicted by a jury of two counts of first degree child molestation (Counts 3 & 4) and one count of second degree child molestation (Count 2). CP 265-67. The third and final amended information charged in Count 2 that Mr. Baker "during the time intervening between the 25th day of May, 2004, and the 24th day of May, 2007, in violation of RCW 9A.44.086, did engage in sexual contact with and was at least thirty-six months older than L.L.B. (DOB 5-25-1995), a person who was at least twelve years of age but less than fourteen years of age and not married to the accused . . ." CP 148.

The jury was instructed on count 2 in pertinent part:

> To convict the defendant of the crime of child molestation in the second degree as charged in Count II, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That between May 25, 2007 and November 1, 2008, the defendant had sexual contact with [L.L.B.];
>
> (2) That [L.L.B.] was at least twelve years old but less than fourteen years old at the time of the sexual contact and was not married to the defendant;
>
> CP 253.

During the trial Mr. Baker requested permission to cross examine L.L.B. about an incident in February 2008, where she called the police and falsely reported somebody was trying to break into her house and rape her. RP[1] 173, 175. Before issuing its ruling the trial court allowed defense counsel to question L.L.B. outside the presence of the jury. RP 175. L.L.B. admitted calling the police and admitted that the rape report was false. RP 175, 176-77. The Court excluded the evidence from the jury finding it had only slight probative value. RP 181.

The jury was given "to convict" instructions 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 253, 255, 256.

[1] RP refers to the three volumes of trial transcript reported by John McLaughlin held May 16-20, 2011.

The trial court imposed the following sentence of community custody as part of his sentence:

> (A) The defendant shall be on community custody for the longer of:
>
> (1) the period of early release. RCW 9.94A.728(1)(2); or
>
> (2) the period imposed by the court, as follows: . . .
>
> 48 months . . .

CP 299, ¶4.5.

This appeal followed. CP 308-09.

D. ARGUMENT

Issue No. 1. The conviction for second degree child molestation (count 2) should be dismissed because the jury did not find the defendant guilty of the crime as charged in the information.

The State must prove the essential elements of a crime. *State v. Byrd*, 125 Wn.2d 707, 713, 887 P.2d 396 (1995). If the State elects, even through inadvertence, to charge a defendant with different alternative of the crime than it intends to prove, that is what it has to prove. *State v. Goldsmith*, 147 Wn. App. 317, 324-25, 195 P.3d 98, (2008) (citing *State v. Bryant*, 73 Wn.2d 168, 171, 437 P.2d 398 (1968) ("It is axiomatic that the state has the burden of proving every element of the crime charged.").

In *Goldsmith*, the State charged Mr. Goldsmith with child molestation in the first degree by the second of two alternative means. *Goldsmith*, 147 Wn. App. at 322, 195 P.3d 98. The State charged the second alternative means of committing first degree child molestation only. But it offered only evidence to show the first alternative means. *Id*. This Court held the State was required to prove the essential elements of the crime it charged. *Goldsmith*, 147 Wn. App. at 325, 195 P.3d 98.

The Court did not buy the argument that the problem was "merely a problem of notice." *Id*. It held that the information adequately notified Mr. Goldsmith of the necessary elements of the crimes the State says he committed. The State simply failed to prove those crimes. *Id*., citing *State v. Brown*, 45 Wn. App. 571, 576, 726 P.2d 60 (1986) (finding that one cannot be tried for an uncharged offense). The Court went on to hold that the information adequately charged and notified the defendant of the essential elements of the crime the State charged, just not the elements that the State proved or that the court instructed on. *Id*. The fact that the court's instructions set out the correct elements of the crime does not resolve the problem. *Id*., citing *State v. Holt*, 104 Wn.2d 315, 323, 704 P.2d 1189 (1985) ("an information which is constitutionally defective

because it fails to state every statutory element of a crime cannot be cured by a jury instruction which itemizes those elements" (emphasis omitted)).

In *Goldsmith*, the State also complained that the defendant "sandbagged" the prosecutors, presumably by not complaining about the information when the State could have done something about it. *Goldsmith*, 147 Wn. App. at 326, 195 P.3d 98. But the Court held there is no authority for the proposition that the defendant has an affirmative obligation to notify the State that he did not commit the crime by the means charged, but that he did commit the crime by another means. *Id*.

Finally, the Court held that when the State charged one crime and proved another, it cannot now amend the information and again prove the same crime it proved during Mr. Goldsmith's first trial, as this violates constitutional prohibitions against double jeopardy. *Id*. The proper remedy is dismissal. *Id*.

Turning then to the facts of the present case, RCW 9A.44.086 provides in pertinent part:

> (1) A person is guilty of child molestation in the second degree when the person has, or knowingly causes another person under the age of eighteen to have, sexual contact with another who is at least twelve years old but less than fourteen years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim.

RCW 9A.44.086(1)

The jury was instructed on count 2 in pertinent part:

> To convict the defendant of the crime of child molestation in the second degree as charged in Count II, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That between May 25, 2007 and November 1, 2008, the defendant had sexual contact with [L.L.B.];
>
> (2) That [L.L.B.] was at least twelve years old but less than fourteen years old at the time of the sexual contact and was not married to the defendant;
>
> CP 253 (emphasis added).

But the information charged that Mr. Baker engaged in sexual contact with L.L.B, who was at least twelve years of age but less than fourteen years of age, "during the time intervening between the 25th day of May, 2004, and the 24th day of May, 2007." CP 148 (emphasis added). Since the dates in the jury instruction differ from those in the information by as much as four years, the jury did not find Mr. Baker guilty of the crime as charged in the information. The time of the offense is a material element to the charge of child molestation in the second degree, since the victim must be between the ages of twelve and fourteen.[2]

As in *Goldsmith*, the State charged one crime and proved another. The problem is not a defective information or lack of notice. The

[2] Interestingly, LLB would not have been between twelve and fourteen during the time period alleged in the information.

information adequately notified Mr. Baker of the necessary elements of the crime the State says he committed. The State simply failed to prove that crime. As in *Goldsmith*, the State cannot now amend the information and again prove the same crime it proved during Mr. Baker 's trial without violating double jeopardy. Therefore, he proper remedy is dismissal. *Goldsmith*, 147 Wn. App. at 326, 195 P.3d 98.

Issue No. 2. The trial court abused its discretion in excluding evidence of L.L.B. calling the police and falsely reporting burglary and rape when such evidence was relevant to the defense theory of the case.

Mr. Baker's defense at trial was that he did not touch L.L.B. inappropriately and that L.L.B. fabricated the allegations of child molestation. See RP 345, 383-89. Mr. Baker sought to support his defense with a specific instance of similar fabrication where L.L.B. called the police and falsely reported somebody was trying to break into her house and rape her. This evidence was relevant to the defense and should have been admitted under ER 402.

Character evidence is generally inadmissible for the purposes of proving action in conformity therewith, subject to certain exceptions. ER 404(a); c.f., ER 404(a)(2) (making admissible "[e]vidence of a pertinent trait of character of the victim of the crime offered by an accused…"),

State v. O'Connor, 155 Wn.2d 335, 349, 119 P.3d 806 (2005) (quoting ER 608(b)) ("specific instances of a witness's conduct, introduced for the purpose of attacking his or her credibility, may not be proved by extrinsic evidence, but may 'in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross examination of the witness ... concerning the witness' character for truthfulness or untruthfulness.'") In sum, this analysis under ER 608(b) considers whether the instance of misconduct is relevant to the witness' veracity on the stand and whether it is germane or relevant to the issues presented at trial. *O'Connor*, 155 Wn.2d at 349.

"As a general rule, evidence tending to establish the defendant's theory of the case, or to qualify or disprove the State's theory, is normally relevant and admissible." *State v. Sheets*, 128 Wn. App. 149, 156, 115 P.3d 1004 (2005), *review denied*, 156 Wn.2d 1014 (2006) *(*citing *State v. Harris,* 97 Wn. App. 865, 872, 989 P.2d 553 (1999) ("Evidence tending to establish a party's theory, or to qualify or disprove the testimony of an adversary, is always relevant and admissible.") To that end, the defendant must demonstrate the relevance of the evidence for it to be admitted. *Harris*, 97 Wn. App. at 872; ER 402. "Evidence is relevant and thus probative if it has 'any tendency to make the existence of any fact that is of

consequence to the determination of the action more probable or less probable that it would be without the evidence." *State v. Cochran*, 102 Wn. App. 480, 486, 8 P.3d 313 (2000) (quoting ER 401)).

Here, Mr. Baker's defense was that no inappropriate touching occurred and that there was reason to doubt L.L.B.'s accusations. There were numerous inconsistencies in L.L.B.'s accounts to various people of what occurred that were brought out by defense counsel during the testimony and in closing argument. See e.g. RP 148-54, 200-01, 315-16. The evidence of L.L.B.'s false report of rape and burglary was relevant to support the defense theory of the case. Contrary to the trial court's ruling the probative value was not insignificant. Moreover, the incident of false reporting in February 2008 occurred during the same timeframe as the current offense. Accordingly, the trial court erred in refusing to admit this evidence.

Issue No. 3. Mr. Baker' 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 to convict Mr. Baker, the trial court instructed the jury 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." CP 253, 255, 256. Mr. Baker contends there is no constitutional "duty to convict" and that the instruction accordingly misstates the law. The instruction violated Baker's right to a properly instructed jury. [3]

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. Bennett*, 161 Wn.2d 303, 307, 165 P.3d 1241 (2007). 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).

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

[3] 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.

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.[4]

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

[4] 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).

(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,[5] they expressly declared it "shall remain inviolate." Const. art. 1, § 21.[6]

> The term "inviolate" 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 inviolate, 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

[5] 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 … .

[6] "The right of trial by jury shall remain inviolate … ."

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.[7] 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* 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. *Meggyesy*, 90 Wn. App. at 701

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. Instead, 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*

[7] "Judges shall not charge juries with respect to matters of fact, not comment thereon, but shall declare the law."

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.[8] *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 sufficient.[9] *Id.*

[8] The trial court's instructions were found erroneous on other grounds.

[9] Furthermore, the territorial court reversed all criminal convictions that resulted from erroneous jury instructions (unless the instructions favored the defense). See, e.g., *Miller*

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 plainly contrary to the law, either from mistake or a willful disregard of the law, there is no remedy.")[10]

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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.

[10] This is likewise true in the federal system. See, e.g., *United States v. Moylan,* 417 F.2d 1002, 1006 (4th Cir. 1969).

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. *Gunwall*, 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 (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.[11] A jury verdict of not guilty is thus non-reviewable.

Also well-established is "the principle of noncoercion of jurors," established in *Bushell's Case*, Vaughan 135, 124 Eng. Rep. 1006 (1671). Edward Bushell was a juror in the prosecution of William Penn for unlawful assembly and disturbing the peace. When the jury refused to convict, the court fined the jurors for disregarding the evidence and the court's instructions. Bushell was imprisoned for refusing to pay the fine. In issuing a writ of habeas corpus for his release, Chief Justice Vaughan declared that judges could neither punish nor threaten to punish jurors for their verdicts. See generally Alschuler & Deiss, A Brief History of the Criminal Jury in the United States, 61 U. Chi. L. Rev. 867, 912-13 (1994).

If there is no ability to review a jury verdict of acquittal, no authority to direct a guilty verdict, and no authority to coerce a jury in its decision, there can be no "duty to return a verdict of guilty." Indeed, there is no authority in law that suggests such a duty.

> We recognize, as appellants urge, the undisputed power of the jury to acquit, even if its verdict is contrary to the law as given by the judge and contrary to the evidence… .If the jury feels that the law under which the defendant is accused is unjust, or that exigent circumstances justified the actions of the accused, or for any reason

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

> 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*, 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, 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, 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.[12] In *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.

[12] 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).

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 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 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.[13, 14] These concepts support Mr. Baker'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*,[15] Mr. Baker 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

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[13] 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.").

[14] 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: …

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 beyond a reasonable doubt. The instruction given in Mr. Baker'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, and that it was their "duty" to convict the defendant if the elements were proved beyond a reasonable doubt. RP 163, 166, 168. 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 of sufficient evidence, *Leonard, supra*, and failed to make the correct legal standard manifestly

[15] And the appellant in *Bonisisio.*

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 error violated Mr. Baker'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*; Leonard,* supra.

Issue No. 4. The sentencing court did not have the statutory authority to impose a variable term of community custody of 48 months contingent on the amount of earned early release under RCW 9.94A.701, the statute authorizing the superior court to impose a sentence of community custody.

Sentencing is a legislative power, not a judicial power. *State v. Bryan*, 93 Wn.2d 177, 181, 606 P.2d 1228 (1980). The legislature has the power to fix punishment for crimes subject only to the constitutional limitations against excessive fines and cruel punishment. *State v. Mulcare,* 189 Wn. 625, 628, 66 P.2d 360 (1937). It is the function of the legislature and not the judiciary to alter the sentencing process. *State v.*

Monday, 85 Wn.2d 906, 909-910, 540 P.2d 416 (1975). A trial court's discretion to impose sentence is limited to what is granted by the legislature, and the court has no inherent power to develop a procedure for imposing a sentence unauthorized by the legislature. *State v. Ammons*, 105 Wn.2d 175, 713 P.2d 719, 718 P.2d 796 (1986).

Statutory construction is a question of law and reviewed de novo. *Cockle v. Dep't of Labor & Indus.*, 142 Wn.2d 801, 807, 16 P.3d 583 (2001). A trial court may only impose a sentence that is authorized by statute. *In re Pers. Restraint of Carle*, 93 Wn.2d 31, 604 P.2d 1293 (1980).

The statute authorizing the superior court to impose a sentence of community custody is RCW 9.94A.701, which provides in pertinent part:

> (1) If an offender is sentenced to the custody of the department for one of the following crimes, the court shall, in addition to the other terms of the sentence, sentence the offender to community custody for three years:. . .
>
> (a) A sex offense not sentenced under RCW 9.94A.507 . . .

RCW 9.94A.701(1)(a).

First and second degree child molestation are both sex offenses. Under RCW 9.94A.701(1), the amount of community custody authorized for a sex offense is three years not 48 months. Therefore, the sentencing

court did not have the statutory authority to impose a sentence of community custody for 48 months.

Additionally, "[u]nder [RCW 9.94A.701], a court may no longer sentence an offender to a variable term of community custody contingent on the amount of earned release but instead, it must determine the precise length of community custody at the time of sentencing." *State v. Franklin*, 172 Wn.2d 831, 836, 263 P.3d 585 (2011).

Here, the trial court imposed the following sentence of community custody:

> (A) The defendant shall be on community custody for the longer of:
>
> (1) the period of early release. RCW 9.94A.728(1)(2); or
>
> (2) the period imposed by the court, as follows: . . .
>
> 48 months . . .

CP 299, ¶4.5.

The trial court did not have the statutory authority to sentence Mr. Baker to a variable term of community custody contingent on the amount of earned release. Under RCW 9.94A.701 it could only sentence him to a finite term of three years. Therefore, the variable term of community custody imposed by the trial court was improper.

E. CONCLUSION

For the reasons stated, the convictions should be reversed or in the alternative, the matter should be remanded for resentencing with instructions to impose a finite term of three years community custody.

Respectfully submitted May 3, 2013,

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s/David N. Gasch
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PROOF OF SERVICE (RAP 18.5(b))

I, David N. Gasch, do hereby certify under penalty of perjury that on May 3, 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 the brief of appellant:

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