

0-69247-0

0-69247-0

NO. 69247-0-I

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

STATE OF WASHINGTON,

Respondent,

v.

JUSTIN CRITCHELL,

Appellant.

FILED  
COURT OF APPEALS DIV 1  
STATE OF WASHINGTON  
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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR SNHOMISH COUNTY

The Honorable David A. Kurtz, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

Appellant was denied his right to a jury trial where 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. CP 49, 55 (Instructions 6 & 12, respectively).<sup>1</sup>

Issue Pertaining to Assignment of Error

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?

B. STATEMENT OF THE CASE

The Snohomish County Prosecutor charged appellant Erin Justin Critchell with fourth degree assault (count one) and third degree assault (count two). CP 65-66. The prosecutor alleged that on April 30, 2012, Critchell initially assaulted Uttam Lal, a convenience store employee (count one), and subsequently assaulted Everett Police Officer Jeff Klages by kicking him as Klages (count two) was helping to force Critchell into

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<sup>1</sup> This Court rejected the arguments raised here in State v. Meggyesy, 90 Wn. App. 693, 958 P.2d 319, review 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.

the back of a patrol car following his arrest for allegedly assaulting Lal.  
CP 74-75.

At trial, Critchell asserted self-defense as to the assault of Lal, claiming that when he approached Lal to confront him about calling Critchell a "Native piece of shit," Lal brandished a knife, so Critchell shoved him to avoid being stabbed. CP 52 (Instruction 9, defining self defense); 5RP 49.<sup>2</sup> As to the alleged assault of Officer Klages, Critchell denied having the requisite intent. 5RP 55, 57, 59, 94.

C. ARGUMENT

CRITCHELL'S CONSTITUTIONAL RIGHT TO A JURY TRIAL WAS VIOLATED BY THE COURT'S INSTRUCTIONS, WHICH AFFIRMATIVELY MISLED THE JURY ABOUT ITS POWER TO ACQUIT.<sup>3</sup>

The "to convict" instructions given to Critchell's jury provided:

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.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of

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<sup>2</sup> There are six volumes of verbatim report of proceedings referenced as follows: 1RP - June 21, 2012; 2RP - July 19, 2012; 3RP - July 23, 2012; 4RP - July 24, 2012; 5RP - July 25, 2012; and 6RP - July 26-27, 2012 & August 22, 2012.

<sup>3</sup> Critchell did not make this argument to the trial court. He may nevertheless raise it for the first time on appeal as an issue of constitutional magnitude. RAP 2.5(a)(3); State v. Scott, 110 Wn.2d 682, 688, 757 P.2d 492 (1988); State v. Byrd, 72 Wn. App. 774, 782, 868 P.2d 158 (1994), affirmed, 125 Wn. 2d 707, 887 P.2d 396 (1995).

these elements, then it will be your duty to return a verdict of not guilty.

CP 49, 55 (Instructions 6 & 12, respectively). Because there is no constitutional "duty to convict" the instructions misstate the law. Accordingly, the instructions violated Critchell's right to a properly instructed jury.

As the following Gunwall<sup>4</sup> analysis will show, the Washington constitution provides citizens with a broader guarantee to a jury trial than exist under the federal constitution.

a. Textual Language and Differences

i) *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

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<sup>4</sup> Under State v. Gunwall, 106 Wn.2d 54, 58, 720 P.2d 808 (1986), appellate courts are guided in deciding whether the state constitution provides greater protection than the federal constitution based on six factors: " (1) the textual language; (2) differences in the texts; (3) constitutional history; (4) preexisting state law; (5) structural differences; and (6) matters of particular state or local concern."

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, 391 U.S. at 156.<sup>5</sup>

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<sup>5</sup> In Sofie v. Fibreboard Corp., the majority viewed 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).

ii) *Washington Constitution*

The drafters of our state constitution not only granted the right to a jury trial, Art. 1, § 22; they expressly declared it "shall remain inviolate." Const. art. 1, § 21.

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 v. Fibreboard Corp., 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." 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 inviolable." Id.

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 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>6</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 is also protected by the due process clause of article I, section 3.

While this Court in Meggyesy<sup>7</sup> may have been correct when it found there is no specific constitutional language that addresses this precise issue, what language there is indicates the right to a jury trial is so fundamental that any infringement violates the constitution.

b. State Constitutional and Common Law History

Washington based its Declaration of Rights on the Bills of Rights of other states, which relied on common law and not the federal constitution. This difference supports an independent reading of the Washington Constitution. State v. Earls, 116 Wn.2d 364, 392, 805 P.2d 211 (1991).

c. Preexisting State Law

Since article 1, section 21, "preserves the right [to jury trial] as it existed in the territory at the time of its adoption," it is helpful to look at

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<sup>6</sup> "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law."

<sup>7</sup> State v. Meggyesy, 90 Wn. App. 693, 958 P.2d 319, review denied, 136 Wn.2d 1028 (1998), abrogated on other grounds by State v. Recuenco, 154 Wn.2d 156, 110 P.3d 188 (2005).

preexisting state law. Sofie, 112 Wn.2d at 645; Mace, 98 Wn.2d at 96. In Leonard v. Territory, the Supreme Court reversed a murder conviction and set out in some detail the jury instructions given in the case. 2 Wash. Terr. 381, 7 Pac. 872 (1885). The language of those instructions provides a view of the law before the adoption of the Constitution:

If you find the facts necessary to establish the guilt of defendant proven to the certainty above stated, then you *may* find him guilty of such a degree of crime as the facts so found show him to have committed; but if you do not find such facts so proven, then you *must* acquit.

Leonard, 2 Wash. Terr. at 399 (emphasis added).

The courts thus acknowledged, and incorporated into the jury instructions, the threshold requirement that each element be proved beyond a reasonable doubt to permit a conviction; but any reasonable doubt required an acquittal. Because this was the law regarding the scope of the jury's authority at the time of the adoption of the Constitution, it was incorporated into Const. art. 1, § 21, and must remain inviolate. Sofie, 112 Wn.2d at 656; Mace 98 Wn.2d at 93, 96.

This Court distinguished Leonard on the basis that the Leonard court "simply quoted the relevant instruction. . . ." Meggyesy, 90 Wn. App. at 703. This 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.

d. Differences in Structure of the Federal and State Constitutions

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.

It is evident, therefore, that the "inviolable" Washington right to trial by jury was more extensive than that which was protected by the federal constitution when it was adopted in 1789. Mace, 98 Wn.2d at 99.

e. Matters of Particular State Interest or Local Concern

Criminal law is a local matter. State v. Russell, 125 Wn.2d 24, 61, 882 P.2d 747 (1994), cert. denied, 514 U.S. 1129 (1995). There is no need for national uniformity in criminal law. Until the Fourteenth Amendment was interpreted to apply the federal Bill of Rights in state court proceedings, all matters of criminal procedure were considered a matter of state law. See, e.g., Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792, 9

L. Ed. 2d 799 (1963); State v. Gibbons, 118 Wash. 171, 203 P. 390 (1922).

f. 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 Allen v. State, 192 Md.App. 625, 640-48, 995 A.2d 1013 (2010) (synthesizing over 40 years of case law and rejecting government's use of collateral estoppel to establish an element of the crime).

The constitutional protections against double jeopardy also safeguard 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>8</sup> A jury verdict of not guilty is thus non-reviewable.

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<sup>8</sup> "No person shall be . . . twice put in jeopardy for the same offense."

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 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).

Washington courts have also recognized that a jury may always vote to acquit. 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).

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.

g. 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 undermined 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." *Id.* at 514.

Professor 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, review 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.

The instructions given to Critchell's jury did not contain a correct statement of the law. They provided a level of coercion for the jury to return a guilty verdict. When the trial court instructed the jury it had a duty to return a verdict of guilty based merely on finding certain facts, the court took from the jury its constitutional authority to apply the law to the facts to reach its general verdict. The instructions creating a "duty" to return a verdict of guilty were an incorrect statement of law and violated Critchell's right to a jury trial as to both counts.

Moreover, in light of the unique circumstances here, there is a reasonable possibility that the erroneous and coercive language of the to-

convict instructions made the difference between a guilt verdict and acquittal or a hung jury. For example, the one or more jurors could have concluded Critchell's actions towards the Lal, although assaultive in nature and not self-defense, were nonetheless appropriate in light of Lal's use of a racial slur against Critchell, but agreed to a guilty verdict only because it was required to by the language of the to-convict instruction. Similarly, one or more jurors could have concluded Critchell's conduct during his arrest was both assaultive in nature and appropriate in light of how the officers treated him, but complied with the court's instruction because it was required. For either charge, there exists a reasonable possibility that but for the erroneous language in the to-convict instruction, Critchell's would have acquitted or hung.

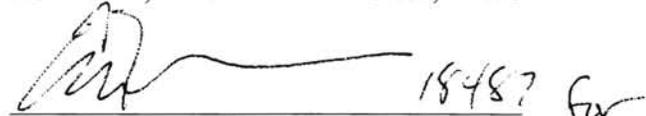
D. CONCLUSION

The "to convict" instructions, which created a "duty" to return a verdict of guilty, incorrectly stated the law and violated Critchell's right to a jury trial. Both of Critchell's convictions should therefore be reversed.

DATED this 22<sup>nd</sup> day of March, 2013.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

A handwritten signature in black ink, appearing to read "CH", followed by a long horizontal line. To the right of the line, the number "18487" is written, followed by the letters "FW".

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE**

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STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 69247-0-1
	)	
JUSTIN CRITCHELL,	)	
	)	
Appellant.	)	

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**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 22<sup>ND</sup> DAY OF MARCH 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- [X] SNOHOMISH COUNTY PROSECUTOR'S OFFICE  
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- [X] JUSTIN CRITCHELL  
DOC NO. 815080  
MONROE CORRECTIONS CENTER  
P.O. BOX 777  
MONROE, WA 98272

**SIGNED** IN SEATTLE WASHINGTON, THIS 22<sup>ND</sup> DAY OF MARCH 2013.

x *Patrick Mayovsky*