

NO. 70042-1-I

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

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STATE OF WASHINGTON,

Respondent,

v.

COLSON R. MILTON,

Appellant.

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BRIEF OF RESPONDENT

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## I. ISSUES

Did the trial court correctly instruct the jurors that they had a “duty to return a verdict of guilty” if they found the elements of the crime proved beyond a reasonable doubt?<sup>1</sup>

## II. STATEMENT OF THE CASE

On the night of April 10, 2011, A.H. and the defendant, Colson Milton, drove to the Edmonds house where 15-year-old C.H. lived. A.H. was driving, with the defendant in the passenger seat. The two of them intended to take C.H. somewhere to “hang out.” C.H., however, was supposed to stay home that evening. 2/12 RP 50-51, 71-72.

When A.H. and the defendant arrived at the Hall residence, Jody Hall came out to confront them. An argument erupted between Ms. Hall and A.H. 2/11 RP 65-70; 2/12 RP 52-54, 73-74. There was conflicting testimony about what happened next.

Ms. Hall testified that she had no physical contact with A.H.. The defendant stepped out of the car and pushed Ms. Hall. She fell onto the ground. The defendant then lifted her by the ankles and threw her over his shoulder. Her “whole left side” hit the ground.

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<sup>1</sup> Identical issues are pending in State v. Critchell, no. 69247-0-1; State v. Hubbard, no. 69801-0-1; State v. Johnson, no. 70016-2-1; and State v. Moore, no. 69766-8-1.

2/11 RP 70-74. As a result of the impact, she suffered fractures of her forearm, her cheek bone, and her mid face. 2/13-2/14 RP 9-14.

A.H. testified that Ms. Hall hit her in the face. The defendant grabbed Ms. Hall and pulled her out of the car. Ms. Hall jumped on his back and hit him in the face. The defendant "pull[ed] her from this side and down." 2/12 RP 54-55.

The defendant testified that he was sitting in the car next to A.H. Ms. Hall lay across his lap to pull A.H.'s hair and strike her. He pushed Ms. Hall out of the car and tried to close the door, but she was standing in the door. He then got out of the car and pushed her away. When he tried to get back in the car, she grabbed his jacket from behind. She then punched him in the face. He took a couple of steps towards her and wrapped her arms around her waist. She turned around and put him in a headlock. He picked her up from behind, "dump[ed] her to the side," and left. 2/12 RP 75-76.

The defendant was charged with second degree assault. CP 70. The court instructed the jury on the elements of that crime. The instruction contained the following 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.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

CP 41, inst no. 5. The court also instructed the jury on self-defense and defense of others. CP 46-49. No objection was raised to any of the instructions. 2/13-14 RP 20-21. The jury found the defendant guilty. CP 33.

### III. ARGUMENT

#### **ALL THREE DIVISIONS OF THIS COURT HAVE APPROVED THE “DUTY TO CONVICT” LANGUAGE IN THE STANDARD JURY INSTRUCTIONS.**

For the first time on appeal, the defendant argues that the “duty to convict” language in the jury instructions violates his constitutional right to a jury trial. Identical arguments have been rejected by all three divisions of this court. State v. Meggyesy, 90 Wn. App. 693, 958 P.2d 319, review denied, 136 Wn.2d 1098 (1998) (Division One); State v. Brown, 130 Wn. App. 767, 124 P.3d 663 (2005) (Division Two); State v. Wilson, \_\_\_ Wn. App. \_\_\_, 307 P.3d 823 (2013) (Division Three). The Meggyesy opinion includes a detailed analysis of the factors set out in State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986). Meggyesy, 90 Wn. App. at 701-04.

The result of these cases is consistent with Article 4, §16 of the Washington Constitution Under that section, judges have the

duty to “declare the law” to juries. By statute, a person who intentionally assaults another and thereby recklessly inflicts substantial bodily harm “is guilty of assault in the second degree.” RCW 9A.36.021(1)(b). The statute does not say “may be guilty.” If a judge failed to instruct the jury that such a person is guilty, he would not be carrying out his duty to “declare the law.”

The defendant relies on the *power* of a jury to disregard its instructions in returning a verdict of acquittal. This power exists equally for other kinds of verdicts. In both civil and criminal cases, the court is precluded from probing the jurors’ thought processes State v. Crowell, 92 Wn.2d 143, 146, 594 P.2d 905 (1979); Gardner v. Malone, 60 Wn.2d 840, 841, 376 P.2d 651 (1962). This means, among other things, that the court will not consider whether the jury actually made the findings required by the instructions.

In one case, for example, the defendant was charged with conspiracy to deliver marijuana. The jurors were instructed that to convict, they had to find that the defendant intended to deliver marijuana. The jury found the defendant guilty. After trial, the defendant presented affidavits from several jurors. They said that they had never found that the defendant intended to deliver marijuana. The trial court refused to consider these affidavits and

denied a new trial. This court affirmed. The affidavits could not be considered because they involved matters that inhered in the verdict. State v. Hughes, 14 Wn. App. 186, 189-90, 540 P.3d 439 (1975).

A similar result occurred in a civil case. The plaintiff was injured when a cable attached to a tree pulled the tree onto him. The jury was instructed that the only question of negligence was whether the tree was of a sufficient size and strength to withstand the pull of the cable. The jury returned a verdict for the plaintiff. After trial, the defendant presented affidavits from five jurors. They said that the jury had not considered the size of the tree. Instead, the verdict was based on failure to warn. Under the instructions, this was not a proper basis for finding the defendant negligent. Nonetheless, the trial court denied a new trial, and the Supreme Court affirmed. Again, the affidavits could not be considered because they inhered in the verdict. Ralton v. Sherwood Logging Co., 54 Wash. 254, 103 P. 28 (1909).

These cases demonstrate that in *any* case that is properly submitted to a jury, the jurors have the *power* to ignore their instructions. So long as the evidence would support the necessary findings, courts will not inquire whether the jurors actually made

those findings. The duty to convict ultimately rests within the jurors' consciences. But the same is true of the duty to acquit, or the duty to render a verdict for plaintiff or defendant in a civil case. In all such cases, the jurors can ignore their instructions and reach a verdict contrary to their findings, with no fear of adverse consequences.

In short, the State constitution imposes on judges the duty to "declare the law." Judges fulfill that duty by informing jurors of what facts must be proved to justify a particular verdict. The judges then tell jurors that they have a duty to reach an appropriate verdict in light of their determinations concerning those facts. These instructions properly reflect both the judge's duty to declare the law and the jury's duty to determine the facts. As all three Divisions of this court have recognized, such instructions are proper.

#### **IV. CONCLUSION**

The judgment and sentence should be affirmed.

Respectfully submitted on October 8, 2013.

MARK K. ROE  
Snohomish County Prosecuting Attorney

By:   
\_\_\_\_\_  
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**Re: STATE v. COLSON R. MILTON  
COURT OF APPEALS NO. 70042-1-I**

Dear Mr. Johnson:

The respondent's brief does not contain any counter-assignments of error. Accordingly, the State is withdrawing its cross-appeal.

Sincerely yours,

SETH A. FINE, #10937  
Deputy Prosecuting Attorney

cc: Nielsen, Broman & Koch  
Appellant's attorney

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[Handwritten signatures and initials]

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THE STATE OF WASHINGTON,  
  
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No. 70042-1-I

AFFIDAVIT OF MAILING

AFFIDAVIT BY CERTIFICATION:

The undersigned certifies that on the 9<sup>th</sup> day of October, 2013, affiant deposited in the mail of the United States of America a properly stamped and addressed envelope directed to:

THE COURT OF APPEALS - DIVISION I  
ONE UNION SQUARE BUILDING  
600 UNIVERSITY STREET  
SEATTLE, WA 98101-4170

NIELSEN, BROMAN & KOCH  
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containing an original and one copy to the Court of Appeals, and one copy to the attorney for the appellant of the following documents in the above-referenced cause:

BRIEF OF RESPONDENT

I certify under penalty of perjury under the laws of the State of Washington that this is true.

Signed at the Snohomish County Prosecutor's Office this 8<sup>th</sup> day of October, 2013.

A handwritten signature in black ink, appearing to read 'Diane K. Kremenich', written over a horizontal line.

DIANE K. KREMENICH  
Legal Assistant/Appeals Unit