

NO. 44403-8-II

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

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STATE OF WASHINGTON,

Respondent,

v.

GARY HAMMELL,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR GRAYS HARBOR COUNTY

The Honorable F. Mark McCauley, Judge

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REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. HAMMELL MAY CHALLENGE THE “TO- CONVICT” INSTRUCTIONS FOR THE FIRST TIME ON APPEAL.

The State asserts Hammell waived a challenge to the “to-convict” instructions because he failed to object to the challenged language at trial. Brief of Respondent at 4-8. But under RAP 2.5(a)(3), certain instructional errors of constitutional magnitude may be challenged for the first time on appeal.<sup>1</sup> “Constitutional errors are treated specially because they often result in serious injustice to the accused.” State v. Scott, 110 Wn.2d 682, 686-87, 757 P.2d 492 (1988). The appellant must demonstrate the error is both manifest and truly of constitutional dimension. State v. O’Hara, 167 Wn.2d 91, 98, 217 P.3d 756 (2009). An error is manifest if it results in actual prejudice or had practical and identifiable consequences in the trial. State v. WWJ Corp., 138 Wn.2d 595, 602-03, 980 P.2d 1257 (1999).

Errors affecting a defendant’s constitutional right to jury trial can be raised for the first time on appeal. State v. Camarillo, 115 Wn.2d 60, 62-64, 794 P.2d 850 (1990); State v. Hansen, 59 Wn. App. 651, 659, 800 P.2d 1124

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<sup>1</sup> In pertinent part, RAP 2.5(a) provides, “The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors in the appellate court: . . . (3) manifest error affecting a constitutional right.” By its terms, RAP 2.5(a) is a discretionary, not mandatory, rule. Ford Motor Co. v. Seattle Exec. Services Dept., 160 Wn.2d 32, 49 n.4, 156 P.3d 185 (2007).

(1990) (failure to give Petrich instruction affects constitutional right to jury trial and may be raised for the first time on appeal).

The trial court infringed Hammell's right to trial by a jury in full possession of the power to acquit when it instructed jurors they had a "duty to return a verdict of guilty" if they found from the evidence that each element had been proved beyond a reasonable doubt. See State v. Primrose, 32 Wn. App. 1, 2, 4, 645 P.2d 714 (1982) (reversal of bail jumping conviction required where trial court instructed jurors that, "[a]s a matter of law the defendant has not introduced evidence concerning a lawful excuse for his failure to appear[;]" court ignored "the jury's prerogative to acquit against the evidence, sometimes referred to as the jury's pardon or veto power."); United States v. Leach, 632 F.2d 1337, 1341 n.12 (5th Cir. 1980) ("Jury nullification – the right of a jury to acquit for whatever reasons even though the evidence supports a conviction – is an important part of the jury trial system guaranteed by the Constitution."). This Court should reject the State's assertion that Hammell may not raise his challenge to the "to-convict" language for the first time on appeal.

2. INSTRUCTING THE JURY OF ITS "DUTY TO RETURN A VERDICT OF GUILTY" VIOLATED HAMMELL'S CONSTITUTIONAL RIGHT TO A JURY TRIAL.

Hammell is not arguing the jury should be informed of its power to nullify, as was argued 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), and State v. Bonisio, 92 Wn. App. 783, 794, 964 P.2d 1222 (1998). Hammell is arguing the jury instructions should reflect that the standard for conviction is a threshold of evidence, not a duty. Courts have long recognized this reality.

In State v. Wilson, 9 Wash. 16, 36 P. 967 (1894), the Court concluded “it would have been better that the word ‘may’ should have been substituted” for the word “must” in the phrase, “if they [jurors] found that the game was carried on for gain, they must find defendant guilty.” Wilson, 9 Wash. at 21. This portion of Wilson supports Hammell’s contention that, at the time the Constitution was adopted,<sup>2</sup> courts instructed juries using the permissive ‘may’ as opposed to the current practice of requiring the jury to make a finding of guilt. See also State v. Wentworth, 118 N.H. 832, 839, 395 A.2d 858, 863 (N.H. 1978) (in New Hampshire, jurors are instructed in part that “[I]f you find that the State has proved all of the elements of the offense charged beyond a reasonable doubt, you *should* find the defendant guilty.”) (emphasis added).

Division Three’s recent decision in State v. Wilson, \_\_\_ Wn. App. \_\_\_, \_\_\_ P.3d \_\_\_, 2013 WL 4176077 (filed Aug. 15, 2013), also does not address the differences between the remedy requested in Meggyesy and

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<sup>2</sup> See Seattle School Dist. No. 1 of King County v. State, 90 Wn.2d 476, 499, 585 P.2d 71 (1978) (referring to “original version of the constitution adopted in 1889”).

Brown (i.e. an instruction that the jury “may” convict) and the remedy requested in this case, (i.e. an instruction telling the jury what it must find in order to convict). For this reason and those contained in the Brief of Appellant, Hammell requests this Court reject the State’s argument that Meggyesy and its progeny dispose of the issue in this case.

B. CONCLUSION

For the foregoing reasons and for the reasons stated in the opening Brief of Appellant, Hammell requests this Court reverse his conviction and remand for a new trial.

DATED this 11<sup>th</sup> day of September, 2013.

Respectfully submitted,

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Attorney for 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 11<sup>TH</sup> DAY OF SEPTEMBER, 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] GARY HAMMELL  
DOC NO. 770090  
MONROE CORRECTIONS CENTER  
P.O. BOX 777  
MONROE, WA 98272

**SIGNED** IN SEATTLE WASHINGTON, THIS 11<sup>TH</sup> DAY OF SEPTEMBER, 2013.

x *Patrick Mayovsky*

# NIELSEN, BROMAN & KOCH, PLLC

## September 11, 2013 - 2:00 PM

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