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Court of Appeals
Division III
State of Washington

No. 31185-6-III
IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

KELLY EUGENE SMALL,

Defendant/Appellant.

APPEAL FROM THE OKANOGAN COUNTY SUPERIOR COURT
Honorable Jack Burchard, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in admitting evidence of an “indented writing”¹ over Mr. Small’s objection.
2. The trial court erred in imposing a sexual motivation enhancement on the first degree burglary conviction.
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.

Issues Pertaining to Assignments of Error

1. Should the evidence of an “indented writing” have been excluded because it was irrelevant and its probative value was substantially outweighed by the danger of unfair prejudice?
2. Since RCW 9.94A.533(8)(a) only applies to offenses committed after July 1, 2006, did the sentencing court err in imposing a 24 month sexual motivation enhancement on the first degree burglary conviction which had an offense date of February 25, 2006?
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?

B. STATEMENT OF THE CASE

Background. On February 25, 2006, a male intruder entered the Omak residence of 75-year-old Bonnie Marriott through a window, and sexually assaulted her. DNA was later found on the handset of a phone used to ward off the attacker. This DNA appeared to match DNA earlier obtained in the March 1998 murder of another Omak resident, Sandra Bauer. 8/16/12 RP 2110, 2125, 2132, 2135; CP 908–10.

In 2009, Omak Police Department Detective Jeffrey Koplín was assigned to continue investigation into these unsolved cases. 8/16/12 RP 2860–63. Eventually he decided to take a new approach, which included obtaining voluntary DNA reference samples from all male witnesses in the Bauer matter for comparison with the DNA results on file. CP 910.

On Friday, January 15, 2010, Det. Koplín interviewed Kelly Eugene Small because he was listed as a witness in the Bauer matter. CP 910–11. In discussion the detective told Mr. Small he was not a suspect in either case, but indicated police believed the same person was responsible

¹ An indented writing is the impression left on a piece of paper that is beneath another piece of paper being written on. Bramblett v. True, 59 F. App'x 1, 5 (4th Cir. 2003).

for both incidents due to DNA evidence. Mr. Small denied knowledge of either incident. He mentioned locations where he'd lived in the past, none of which were close to either victim's addresses. The recorded interview portion primarily addressed Mr. Small's activities at the time of the Bauer murder in 1998. At some point Mr. Small had done work for Mrs. Bauer and had a key to her apartment which he later returned to her son. On the night in question he'd been at a tavern with friends, got very drunk, and drove home to Brewster alone. After the interview, Det. Koplín took buccal cheek swabs with Mr. Small's consent. The samples were submitted for testing. CP 911-12.

On Tuesday night, January 19, 2010, Marla Small reported her husband missing because he'd said he was going to Oroville that day and was overdue. While talking to Mrs. Small the next day, Det. Koplín learned the Small family had lived in an apartment next door to Mrs. Marriott for a period of time. They moved away about nine months before the sexual assault occurred, and Mr. Small's best friend from high school, Terry Paul, continued to reside across the street from Mrs. Marriott. The family found some clothing and an electric razor missing, as well as a 4-wheeler (all terrain - ATV) vehicle. CP 912-13.

On January 30, 2010, Mr. Small called his family and had them pick him up in Spokane. He told police he had gone by bus and plane to various out of state places because he was stressed out about money, had forged his wife's signature on its title and sold the 4-wheeler for travelling money, and just needed to get away and take time to think. CP 914.

On February 1, 2010, police learned there was a match between Mr. Small's DNA and the suspect DNA in the Bauer and Marriott cases. CP 914. After an interview the next day, Mr. Small was arrested. CP 460-61.

Based on information from the interview, police located a duffel bag Mr. Small had left behind in a Las Vegas, Nevada hotel during his time away. Among other items, the bag contained a red spiral notebook together with a receipt for its apparent purchase on January 23, 2010. CP 449; 8/20/12 RP 2426-27. When opening the notebook, Detective Koplín noticed there were indentations on the top page of blank paper on the right side and also on the inside of the front cardboard cover. Due to overlapping indentations, it appeared someone may have written or drafted a letter or several letters. CP 449-50.

The notebook was sent to the Washington State Patrol Crime Lab's Questioned Documents Unit. Using oblique lighting and other techniques

to create shadows, an analyst was able to “recover” the intended writing represented by the indentations. He compared the resulting images to a known writing sample and determined that Mr. Small was “probably” the source of the indented writing. CP 450; 8/16/12 RP 2967–77, 2982–3010.

Relevant pre-trial procedural history. Mr. Small was charged in connection with both incidents. CP 916-25. Regarding the 1998 Sandra Bauer incident, the counts were aggravated murder, first degree rape and first degree burglary. As to the 2006 Bonnie Marriott incident, the counts were attempted first degree premeditated murder, first degree rape and first degree burglary. Mr. Small was also charged with a seventh count of forgery. CP 916-25.

Pre-trial, the court ruled that evidence of the forgery and the trip would be admissible because it occurred so quickly after the interview and one could rationally argue that Mr. Small’s reaction to having to provide a DNA sample was (or was not) evidence of guilt. 6/7/11 RP 309–10.

Pre-trial, the court denied a defense motion to suppress the duffel bag itself. 7/10/12 RP 606–09. The defense then filed a motion in limine to “prohibit and exclude any testimony or evidence concerning [the] alleged letter [found in the duffel bag]. ER 401, 403, 404(b).” CP 492. The existence and potential significance of the “indented writing” found in

the notebook had initially been explored with the court in filed documents and over several hearings. CP 658, 666; 1/12/12 RP 365–67; 1/19/12 376–77. This included defense assertion in a suppression motion that some of the writing might be viewed as a confession to the Bauer murder. CP 566, 577–80. In part the State responded the writing’s indication the defendant left to avoid prison and was not intending to return was part of flight conduct evidencing guilt. CP 532.

On July 12, 2012, the trial court severed the Bauer counts from the Marriott counts. It reversed its previous denial of the defense motion to sever, made after “extended briefing and argument on June 7, 2011.” CP 510; *see* 6-7-12 RP 217–323. The court issued a six-page comprehensive memorandum opinion in granting the severance. CP 510–15. The trial that is the subject of the appeal here, on the Marriott counts and the forgery count, was set to take place first. CP 448.

On July 31, 2012 the court considered the parties’ various motions in limine (“MIL”), including a defense MIL to prohibit the State from mentioning anything about the Bauer investigation or the “indented letter” found in the duffel bag. 7/31/12 RP 645–729; CP 491–92. In response to the defense position that the letter was irrelevant to the Marriott case, the State argued:

... And, Your Honor, it is, we believe, absolutely relevant to either or both cases. The letter was basically kind of a goodbye letter or letters, there's multiple writings, on these recovered documents, and they clearly indicate this intent not to come back, his intent to avoid prison, those sort of things, so we believe it is absolutely relevant to, to both cases, just as the evidence of his flight that the Court previously ruled on is admissible.

... [T]he only issue in the State's view that the defense is claiming is there's one reference on one page to 12 years ago. Otherwise it seems that the letter is generally a goodbye to his family.

7/31/12 RP 725, 727. Noting that it had heard a lot of argument about the letter but had never seen it and didn't know what it said or what its purpose was, the court continued the matter to a later date and asked the State to file an offer of proof. 7/31/12 RP 724–29.

On August 7, 2012, the court considered the State's motion to reconsider severance, and after lengthy discussion of the facts and bases for its prior ruling, denied the motion. 8/7/12 RP 744–74.

The court next considered the State's offer of proof², which included an itemization of the purported words and sentences recovered from the “indented writing” by the forensic scientist. CP 448–53. A copy of the itemization is attached hereto as **Appendix A**. The itemization shows recovered “sentences and words, which appear in th[e notebook] on

² CP 448–53.

two separate pages, one from the inside front cover (cardboard cover) [hereafter **PAGE ONE**³] and the other page taken from impressions from the first [or top blank] page of the notebook [hereafter **PAGE TWO**⁴].” CP 450; 8/7/12 RP 774–89. The State represented that more than 50% of the words had been recovered from the “indented writing.” 8/7/12 RP 782.

The parties agreed that **PAGE TWO** contains the date “1-26-10”, as likely being the date it was written (coinciding with Mr. Small’s stay in Las Vegas).⁵ They agreed **PAGE TWO**’s notation,

Why I left because I don’t want this to go to court and go on for months in the news + paper. It better to ... hit the news paper tonse [sic] then tell you what happen 12 years ago (sentence begins on “[**PAGE ONE**]” and is carried over to this page)

likely refers to the 1998 Bauer murder.⁶ They disagreed whether the phrases on **PAGE TWO**: “It was one of my all night drinking” and “I wish I could take that night back” and “I wish I could take that night back ... I can’t ... I hate myself for what I did ... I have to remember that night for ever and everything I lost ...” and “Take that day back” pertained only to the Bauer incident.⁷ They agreed both pages mentioned prison: “I’m

³ Appendix A at CP 451.

⁴ Appendix A at CP 451-452.

⁵ Appendix A, CP 451, (1) at bottom of page.

⁶ Appendix A, CP 452, (3).

⁷ Appendix A, CP 452, (4), (6), (8), (13).

not going to prison for life, I'm going to hell instead" and "I'm not going to prison for life because I know no one will visit me ...".⁸ Overall the parties agreed it was not clear whether **PAGE ONE** and **PAGE TWO** represented one letter, two letters, a draft of one letter or a draft of two letters or even something else. 8/7/12 RP 775–84; 8/14/12 RP 1757–91.

THE COURT: This is a most unusual situation because

- an argument can be made that the document shows that the author had done something bad, terrible, felt guilty about, thought he would go to prison for, was thinking about killing himself, and that whatever had happened had happened when he was drinking,
- and the defense argument is that the cases have been severed and that if this is an admission, it's an admission having only to do with the [Bauer] incident, and that there's no logical connection between this and the Marriott incident between this, this letter and the Marriott incident,
- and the State's arguing that the officer, just before the Defendant left town, contacted him, took a DNA sample, and said that they'd established that the same perpetrator had, had been at both scenes or had done both crimes ...
- So this could arguably be that some of these references are to *one incident*, some are to *another*, or it could be that *the author felt guilty about one incident, but he didn't do the other one* so he didn't feel guilty about that. I, I don't know.

8/7/12 RP 784–85 (emphasis added).

At further hearing, State again acknowledged the indented writings appeared to be superimposed or overlapping images and referred to **PAGE ONE** and **PAGE TWO** both as two drafts of separate letters and as two

⁸ Appendix A, CP 451 (12); CP 452 (10).

drafts of the same letter. The State noted that each page appeared to have its own signature area. 8/14/12 RP 1758–61, 1765, 1775, 1780–81, 1788. Defense counsel continued to argue that the letter was irrelevant and highly prejudicial. 8/14/12 RP 1777–79.

Noting that it didn't understand how the different layers of writing "hook together and whether this is one writing or separate writings," the court withheld ruling on admissibility of the "indented writing" until it heard expert testimony of the expert as to the scientific procedure used to recover such writing. 8/14/12 RP 1779–80. The court ruled that **PAGE ONE** (Nos. 1–12) was admissible because "it seems to be more general and doesn't refer to one incident or one night. It *might* refer to more than one event. It *might refer to one event*, it *might refer to two events*, it *might refer to a whole bunch of things*, but it says -- it concludes by it seems to be from a despondent person who might be committing suicide or thinking about it or giving up or who knows, you know, what the, what the nuances of that are, but it ends with, "I'm not going to prison for life. I'm going to hell instead. I love all of you. Bye." Now, that seems to the Court that it might be referencing multiple events" 8/14/12 RP 1783–84 (emphasis added).

And my thinking on that is because it seems to generally -- it seems to be consistent with [the State's] argument that he was told that

both crimes were committed by the same person, or at least they were related because the DNA was found, he provided the DNA sample, left town. And I think that this letter is -- that portion, 1 through 12 as listed in your offer of proof on page 4⁹, that that seems consistent with that .

8/14/12 RP 1789.

The court subsequently ruled the expert testimony met the Frye¹⁰ standard, and Detective Koplin would be allowed to testify as a lay witness as to his understanding of the words and sentences on **PAGE ONE**.

8/16/12 RP 3037–40; Appendix A at CP 451.

Relevant trial testimony. Bonnie Marriott was sexually assaulted on February 25, 2006, by a male intruder who entered her residence through a window. She hit him with a rubber mallet and a phone handset in attempts to resist his actions, and lost consciousness several times during the struggle. After he left she notified a neighbor, and received care in a hospital. Ms. Marriott was unable to identify her intruder. She described and a police artist later sketched a composite of the intruder.

8/15/12 RP 1842–4, 1893–98, 1989; 8-17-12 RP 2110–72, 2136–37., 2174–83.

⁹ Appendix A, CP 451.

¹⁰ Frye v. United States, 293 F. 1013, 34 A.L.R. 145 (D.C.Cir.1923).

Four years later, on January 15, 2010, Det. Koplín interviewed Mr. Small because he was listed as a witness in another case¹¹ being investigated. In discussion the detective told Mr. Small he was not a suspect in the Mariott case, but indicated DNA evidence had been found at the scene and police believed if they found matching DNA they would have the person who committed the crime. Mr. Small denied knowledge of the incident. He mentioned locations where he'd lived in the past, none of which were close to the Mariott address. After the interview, Det. Koplín took buccal cheek swabs with Mr. Small's consent. 8/16/12 RP 2860–71, 2881–82.

The detective later learned from Mr. Small's wife, Marla, that the Small family had lived in an apartment next door to Mrs. Marriott for a period of time. They moved away about nine months before the sexual assault occurred, and Mr. Small's best friend from high school, Terry Paul, continued to reside across the street from Mrs. Marriott. 8/16/12 RP 2872–78.

On January 19, 2010, Marla Small reported her husband missing because he'd said he was going to Oroville that day and was overdue. The family found some clothing and an electric razor missing, as well as a 4-

¹¹ The jury in this case involving Bonnie Marriott heard no testimony about the Sandra Bauer murder case. *Passim*.

wheeler (all terrain - ATV) vehicle. Mr. Small had apparently forged his wife's signature on the title and sold the ATV that day, for \$3,000.

8/16/12 RP 2900-08, 3089-99, 3137-40.

On January 30, 2010, Mr. Small called his family and had them pick him up in Spokane. Det. Koplín learned of his return, and called him in for an interview, saying his leaving at that particular time made him look suspicious. Mr. Small told police he had gone by bus and plane to various out of state places because he was stressed out about money, had forged his wife's signature on its title and sold the 4-wheeler for travelling money, and just needed to get away and take time to think. This was not the first time Mr. Small had "gone missing". 8/16/12 RP 2911-17; 8-17-12 RP 2259; 8-21-12 RP 2543.

On February 1, 2010, police learned there was a match between Mr. Small's DNA and the suspect DNA in the Marriott case. Following another interview, Mr. Small was arrested. Police retrieved a duffel bag Mr. Small had left behind in a Las Vegas, Nevada hotel during his time away. Included in its contents was a red notebook. 8/16/12 RP 2931-34, 2939-54, 2956-66; 8/20/12 RP 2429; CP 461.

Andrew Szymanski, a forensic scientist in the Washington State Patrol Crime Lab's Questioned Documents unit, described the meaning of

and processes used to develop or “recover” indented writing. During his testimony various exhibits were admitted, showing images, enhanced images and blow-up enlargements of material contained on **PAGE ONE**¹². After comparison with a known sample, it was his opinion that Mr. Small was “probably” the source of the indented writing. He testified it was his job to develop images, not to testify about what the images say, and that “anyone could read the decipherments of the indented language.” 8/16/12 RP 2967–3011, 3012, 3013–21.

Detective Koplín testified regarding the indented writing contained on **PAGE ONE**. He had spent weeks trying to analyze the images. It appeared to him that two letters or letter drafts may have been written on the inside front cover of the notebook. While pointing a laser to relevant images on the overhead projector, the detective testified to all words and sentences as seen on **PAGE ONE**¹³. He also identified Savannah and Cody as Mr. Small’s children, said the phrase “victory is an angel ” referred to Mr. Small’s granddaughter Victoria, and noted in connection with “Cody, I’ll never see your son” that police found in Cody’s room an ultrasound picture of his unborn son. 8/16/12 RP 3043–70.

¹² Appendix A at CP 451.

¹³ Appendix A at CP 451, (1) through (12).

In March 2006, testing by Adam Vawter of the Washington State Patrol Crime Lab, Cheney confirmed the presence of human blood on the back of the handset. 8/15/12 RP 2044–58. In May 2006, his colleague Matthew Gamette found that some of Vawter’s extracts were contaminated. By using other source material obtained by Vawter, Gamette recovered DNA from the handset. Gamette did not independently examine the handset to determine presence of blood. He concluded the major contributor to the DNA profile was male, which therefore excluded Bonnie Mariott. Gamette entered the DNA data into the FBI’s database, CODIS¹⁴, for a possible future match. 8/20/12 RP 2313–55.

Police sent Mr. Small’s January 2010 buccal swabs for testing at the same time as those for a “Cameron Gregg”, whose DNA samples had been obtained a few days earlier. The two names had been mixed up on the property evidence sheet. 8/16/12 RP 2884–87, 2896–97, 3083. In May 2012 Detective Koplín obtained a second consensual buccal swab from Mr. Small. 8/16/12 RP 2897–98.

Lisa Turpin, forensic scientist with the Washington State Patrol Crime Lab, tested the 2010 swabs and determined Mr. Small’s DNA profile matched the profile Gamette had developed from Vawter’s phone

¹⁴ Combined DNA Index System. 8/20/12 RP 2354–55.

blood samples. There was a statistical probability of 1 in two quadrillion that a random person would have the same genetic profile. She later tested the 2012 swab. The new file matched her prior profile of Mr. Small's DNA. Since the reference samples matched each other, she testified the same statistics applied. 8/20/12 RP 2367–82, 2387–98.

The State's closing argument. In closing, the State emphasized that before leaving town, Mr. Small had been told that suspect DNA was found at the scene of Bonnie Marriott's sexual assault and police believed if they found matching DNA they would have their guilty person. The State also stressed that the words and sentences recovered from the "indented writing" revealed despondency and therefore guilt.

... Detective Koplin, in 2010, goes back and he makes contact with the Defendant in relation to an investigation he was conducting. January 15, 2010 he contacts the Defendant. It was the Friday before the Martin Luther King holiday. *He tells the Defendant about the fact that there was a case of an elderly woman who had been raped at a residence in Omak and DNA was recovered from the scene.* The Defendant was not a suspect, but he ask[ed] if he would voluntarily provide a swab, a buccal swab, a cheek swab, and he provided four swabs. That was on Friday.

8-21-12 RP 2625 (emphasis added).

... We know that following that weekend, the Defendant had said he was going to -- at some point go to Oroville to get a part. That was the last that the family had heard of him. The Defendant instead took an ATV that he and his wife owned and sold it for about \$3,000.00

8-21-12 RP 2626.

... The Defendant, after getting the cash, takes off. The family and friends of the Defendant become concerned, especially when he doesn't show up by the end of the day. They're searching for him, you heard testimony, they're out looking for him to Oroville, out in the woods. The Defendant takes off and what does he do? ... The Defendant, after catching a flight out of Seattle, flies to, I believe, California, takes a bus down -- clear down to the southern US border in Texas. ... [H]e then comes back to Las Vegas by bus and stayed at the Circus Circus. ...

... At some point during his travels, after he leaves Circus Circus, there is some contact with a family member, his daughter ... *you heard testimony* from Ms. Kerr, the Defendant's sister, about some information about that contact *that Savannah, his daughter, was upset, maybe he had something to do with it, the crime*, and they were going to go pick him up.

8-21-12 RP 2627–28 (emphasis added).

... But what else do we know? Well, *we know a little bit more about the intent behind the leaving because we did recover the bag*, and it didn't just have dirty clothes, it *had a notebook*. The Defendant ... had gone out while in Las Vegas and purchased envelopes, the notebook, a bottle of Drano, and he had made some writings in that notebook. That notebook you heard was recovered, the pages were gone, but there w[ere] indentations on the cover of that notebook, which were sent to the crime lab and also recovered using different lighting sources and angles to photograph that ...

8-21-12 RP 2630–31 (emphasis added).

... [Y]ou heard testimony from Detective Koplin who spent a good deal of time going through this writing, and some of the areas I want to point out, if you want to, to look at that, up in the upper portion, up in here, "put you through," and that goes on to say, "*put you through, I'm sorry. I put drinking and partying and friends first,*" pardon my language, "*fuck, I hate myself for it,*" he goes on to say. Down here there's a passage you heard testimony about saying, "*You were always a great wife, a wonderful mother.*" It goes on to say, "*I wish you could say we had -- or you had 26*

wonderful years, but I know you can't." (inaudible - away from mic) please tell your kids that I," and, again, some of his writing, you heard testimony, is apparently multiple drafts or pages, so there is some overlap, but it basically goes on to say, "*Please tell your kids that I, Savannah and Cody, wrecked so they don't have to go through life like you two,*" referring to Savannah and Cody's kids, apparently. ... "*You were great kids. I'm sorry I can't be there for you,*" and, "*I'll never see my grandchild ever again. Victory is an angel,*" referring to the child's name, "*Cody, I'm sorry I will never see your son.*"

... "*I'm sorry. Take care of your mother, Cody, you're the man of the house.*" Going down and underlying the same area there's another passage about, "*I wasn't always bad. There was some good.*" And then, "*Why I left,*" it goes on to say, "*because I don't want this to...*" It trails off. It says, "*I love you all. Bye,*" here. Also underlying that you see is underlying this, this other indent, "*I'm not going,*" it does go on to say, ... "*I'm not going to prison for life, I'm going to hell instead.*" You'll have this to look at, it'll go back with you.

So what do we know? We know a lot (inaudible - away from mic) *We know the Defendant left, he didn't tell his family and pretty clearly was not planning on coming back.* W[hat] he intended ultimately when he went down to the border and realized it wasn't (inaudible - away from mic) to leave, went back to Las Vegas[?] Maybe he was going to commit suicide or do something of that sort, *pretty likely clearly from his letter and from his actions, he had no intent of coming back.*

8-21-12 RP 2631-33 (emphasis added).

In rebuttal closing, the State continued to underscore Mr. Small's knowledge that DNA was found at the scene of Bonnie Marriott's assault and that the "indented writing" disclosed hopelessness and therefore guilt:

[REBUTTAL:] ... The trip, okay? "[The defense attorney argues] [h]e had financial concerns so he waited three days, and then he took off, *but it had nothing to do with the fact that he had just gotten contacted by police and provided DNA sample[s] and was*

told it was in connection to the rape of an elderly woman at a location next door to where he used to live, that police had no idea at that point that that's where he lived. There was no match yet between the Defendant and that." Why did the Defendant run? Was it financial or was (inaudible - away from mic)[?] He knows how his DNA would've gotten in there. Absolutely he did. He did it. ...

8-21-12 RP 2684 (emphasis added).

...The letter. Defense now wants to argue, "Well, it was because he took the ATV." (inaudible - away from mic) not going to prison, I'm going to hell." His family didn't even report him coming back. There's not much concern about an ATV at that point.

8-21-12 RP 2686 (emphasis added).

For all it's worth, the bottom line is he did it. Not only did he do it, but his actions after that when he first was contacted about it further was knowledge of the crime. ...

8-21-12 RP 2688 (emphasis added).

Relevant end of trial matters. The jury was given "to convict" instructions regarding attempted first and second degree murder, first degree rape, first degree burglary and forgery. The "to convict" instructions contained *Washington Pattern Jury Instructions: Criminal* language 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.

Instruction Nos. 9 and 15 (CP 197, 203, WPIC 26.02, 27.02, 100.02);

Instruction No. 17 (CP 205, WPIC 40.02); Instruction No. 21 (CP 209,

WPIC 60.02); Instruction No. 25 (CP 213, WPIC 130.03).

The jury convicted Mr. Small of first degree rape, first degree burglary, and forgery.¹⁵ CP 46, 150. By special verdict, the jury found the rape was committed with knowledge of particular vulnerability and involved deliberate cruelty, and that the burglary was sexually motivated. CP 149.

At sentencing, the court imposed an exceptional sentence. Regarding the rape conviction, it imposed 236¹⁶ months plus 60 months each based on the jury's two findings of particular vulnerability and deliberate cruelty, for a total of 356 months. Regarding the burglary conviction, it imposed 89¹⁷ months concurrent plus a 24 month enhancement (consecutive to the entire sentence) based on the jury finding of sexual motivation pursuant to RCW 9.94A.835(2) and 9.94A.533(8)(a). It imposed 12 months concurrent on the forgery conviction. The total term of confinement was 380 months. CP 50; 10/5/12 RP 2815–16, 2818, 2822. The court entered written “Findings of Fact and Conclusions of Law for Sentencing”. CP 39–42. This appeal followed. CP 13-38.

¹⁵ The jury was unable to agree on a fourth count, attempted first degree murder, and the count was later dismissed without prejudice. CP 1–2, 147.

¹⁶ High end of the standard range of 178 to 236 months based on an offender score of 7. CP 43, 49–50.

¹⁷ High end of the standard range of 67 to 89 months based on an offender score of 7. CP 44, 49–50.

C. ARGUMENT

1. The evidence of an “indented writing” should have been excluded because it was irrelevant and its probative value was substantially outweighed by the danger of unfair prejudice.

ER 402 prohibits the admission of evidence that is not relevant. ER 401 defines “relevant evidence” as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence”. ER 403 requires the exclusion of evidence, even if relevant, if the probative value is substantially outweighed by the danger of unfair prejudice”. State v. Wilson, 144 Wn. App. 166, 176, 181 P.3d 887 (2008). The determination of relevance is within the broad discretion of the trial court, and will not be disturbed absent manifest abuse of that discretion. In re Young, 122 Wn.2d 1, 53, 857 P.2d 989 (1993). However, discretion is abused if it is exercised on untenable grounds or for untenable reasons. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

ER 403 is the same as Federal Rule of Evidence 403, so our courts look to both state and federal case law for guidance. *See* ER 403 comment, 1994 Washington Rules of Court, at 196. Both rules are concerned with what is termed “unfair prejudice”, which one court has

termed as prejudice caused by evidence of " 'scant or cumulative probative force, dragged in by the heels for the sake of its prejudicial effect.' "

Carson v. Fine, 123 Wn.2d 206, 223, 867 P.2d 610 (1994) (citing United States v. Roark, 753 F.2d 991, 994 (quoting United States v. McRae, 593 F.2d 700, 707 (5th Cir.), cert. denied, 444 U.S. 862, 100 S.Ct. 128, 62 L.Ed.2d 83 (1979)), reh'g denied, 761 F.2d 698 (11th Cir.1985); see also 5 K. Tegland, Wash.Prac., Evidence § 106, at 349 (3d ed. 1989); State v. Rice, 48 Wn. App. 7, 13, 737 P.2d 726 (1987) (in determining prejudice, the linchpin word is "unfair"))).

Another authority states that evidence may be unfairly prejudicial under rule 403 if it appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish, or "triggers other mainsprings of human action." Carson, 123 Wn.2d at 223 (citing 1 J. Weinstein & M. Berger, Evidence § 403[.03], at 403-36 (1985)). Washington cases are in agreement, stating that unfair prejudice is caused by evidence likely to arouse an emotional response rather than a rational decision among the jurors. Id. (citing Lockwood v. AC & S, Inc., 109 Wn.2d 235, 257, 744 P.2d 605 (1987); State v. Cameron, 100 Wn.2d 520, 529, 674 P.2d 650 (1983)).

Here, the words and sentences recovered from the indented writing were absolutely irrelevant to the reason Mr. Small left Omak and his family. The original writing or writings had never been found. Despite numerous pretrial hearings and ensuing discussion, there was no consensus the writings represented one letter or two letters or something else.

As for content, the court itself recognized it was unable to attribute most of the content of **PAGE ONE** and **PAGE TWO** to the Bauer murder, to the Marriott assault, “or it could be that the author felt guilty about one incident, but he didn’t do the other one so he didn’t feel guilty about that.”¹⁸ The court ruled that **PAGE ONE** was admissible because “it seems to be more general and doesn’t refer to one incident or one night”. Yet the court acknowledged that even that single page “might refer to more than one event. It might refer to one event, it might refer to two events, it might refer to a whole bunch of things ... “. ¹⁹ Because **PAGE ONE** “seems to be from a despondent person who might be committing suicide or thinking about it or giving up or who knows, you know, what the, what the nuances of that are ... [and] ends with, ‘I’m not going to prison for life. I’m going to hell instead. I love all of you. Bye.’ “, the

¹⁸ 8/7/12 RP 784–85.

¹⁹ 8/14/12 RP 1783–84.

court believed the page “might be referencing multiple events”²⁰ and therefore was admissible.

The challenged evidence was not relevant in this case simply because the court believed it “might be referencing multiple events”. The fundamental irrelevancy is that all the content of **PAGE ONE** could just as easily reference the Bauer murder or even something else. And for the same reasons, even if relevant, the evidence was unduly prejudicial under ER 403. As shown in the pretrial hearings, the parties and the court were acutely aware of the weakness of a 50% interpretation of words and sentences recovered from multi-layered impressions left on cardboard and a pad of paper. The jury in this trial had no inkling whatsoever that before the letters were written, police had told Mr. Small they had DNA showing that two crimes were committed by the same person. They were told only that he was aware DNA was found at the Marriott scene. As shown above in the facts section, as a result of the court’s erroneous admission of the writing the State—in closing—misled the jury as to Mr. Small’s actual knowledge of the status of DNA recovery from two crime scenes and attributed words of despondency and possible suicide to this Marriott case that may instead relate solely to the Bauer murder or something else.

²⁰ Id.

Under all of the above facts, the content of **PAGE ONE** had zero tendency to make it more or less probable that Mr. Small left Omak because he feared analysis of his DNA sample would pin him as the person who sexually assaulted Bonnie Marriott. ER 402. The evidence was irrelevant to the jury's task. It was highly and unfairly prejudicial. The court abused its discretion in admitting it.

Evidentiary errors require reversal if, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred. State v. Neal, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001); State v. Thomas, 35 Wn. App. 598, 609, 668 P.2d 1294 (1983). "[W]here there is a risk of prejudice and no way to know what value the jury placed upon the improperly admitted evidence, a new trial is necessary." Salas v. Hi-Tech Erectors, 168 Wn. 2d 664, 673, 230 P.3d 583 (2010). In Salas, the Supreme Court held the trial court abused its discretion under ER 403 by admitting evidence of the plaintiff's immigration status in a personal-injury case. *Id.* at 672-73. The Court further held that reversal was required: "We find the risk of prejudice inherent in admitting immigration status to be great, and we cannot say it had no effect on the jury." *Id.* at 673.

If the risk of prejudice inherent in admitting immigration status is great, the risk of prejudice inherent in admitting questionable evidence purporting to establish recognition of guilt is at least an order of magnitude greater. As in Salas, this Court cannot say the admission of the improper evidence had no effect on the jury.

Here, the defense had arguable evidence to counter the State's DNA evidence linking Mr. Small to the crime scene and apparent evidence of flight. Mr. Small obtained cash and took off from Omak because he was under a lot of financial stress. He'd been known to take off before prompted by similar circumstances. As to DNA, police may have mistakenly attributed someone else's DNA to Mr. Small, and/or test results could be faulty where the DNA suspect sample was years old or instead of a single analyst there were three, each of whom relied on work performed by someone else. There is no way to know what value the jury placed upon the improperly admitted evidence, which conveyed deep hopelessness and despair. It is reasonably probable that Mr. Small would not have been convicted but for the erroneous admission of the irrelevant and unfairly prejudicial evidence. This Court should reverse and remand for a new trial at which such evidence will be excluded.

2. Since RCW 9.94A.533(8)(a) only applies to offenses committed after July 1, 2006, the court erred in imposing a sexual motivation enhancement on the first degree burglary conviction and the total amount of confinement must be reduced by 24 months.

RCW 9.94A.533 provides in pertinent part:

(8)(a) The following additional times shall be added to the standard sentence range for felony crimes committed on or after July 1, 2006, if the offense was committed with sexual motivation, as that term is defined in RCW 9.94A.030. If the offender is being sentenced for more than one offense, the sexual motivation enhancement must be added to the total period of total confinement for all offenses, regardless of which underlying offense is subject to a sexual motivation enhancement. ...

(i) Two years for any felony defined under the law as a class A felony or with a statutory maximum sentence of at least twenty years, or both;

RCW 9.94A.533(8)(a).

A plain reading of this statute clearly indicates the imposition of a sexual motivation enhancement does not apply to offenses committed before July 1, 2006. The first degree burglary offense herein was committed on February 25, 2006. Therefore, RCW 9.94A.533(8)(a) does not apply.

The State may respond that a finding of sexual motivation is by itself a sufficient basis for a sentence above the standard range. *See* RCW 9.94A.535(3)(f). However, the court did not consider the jury finding as

an independent basis for imposing the sexual motivation enhancement; it relied only on the statute. 10/5/12 RP 2817–18. Similarly, the State argued the court should impose an exceptional sentence only on the basis of running the high-ends of the standard ranges for rape and burglary consecutively. 10/5/12 RP 2790–91. The State argued separately that RCW 9.94A. 533(8)(a) created a mandatory imposition of 24 months based on the jury finding and that it must run consecutive to the total amount of confinement. 10/5/12 RP 2791. Thus, there is no support in the record to conclude that the court would have imposed an additional 24 months had it known the sexual motivation enhancement could not apply to the facts of this case.

RCW 9.94A.533(8)(a) does not apply to this case. Therefore, the trial erred in imposing the sexual motivation enhancement on the first degree burglary conviction. The matter must be remanded to reduce the total amount of confinement by 24 months.

3. Mr. Small’s 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 in this case, the trial court instructed the jury as follows, using standard language from the pattern instructions:

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.

Instruction Nos. 9 and 15 (CP 197, 203, WPIC 26.02, 27.02, 100.02); Instruction No. 17 (CP 205, WPIC 40.02); Instruction No. 21 (CP 209, WPIC 60.02); Instruction No. 25 (CP 213, WPIC 130.03). Mr. Small contends there is no constitutional “duty to convict” and that the instruction accordingly misstates the law. The instruction violated Mr. Small’s right to a properly instructed jury.²¹

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. Bashaw, 169 Wn.2d 133, 140, 234 P.3d 195 (2010) , *overruled in part on other*

²¹ 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

grounds, 174 Wn.2d 707, ___ P.3d ___ (June 7, 2012). Instructions must make the relevant legal standard manifestly apparent to the average juror. State v. Kylo, 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. Small’s right to a fair trial and, thus, constituted a manifest constitutional error.

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

(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 156.²²

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

²² 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).

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).

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, § 22,²³ they expressly declared it “shall remain inviolate.” Const. art. 1, § 21.²⁴

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, 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 inviolable." 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

²³ **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

²⁴ “The right of trial by jury shall remain inviolable”

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, § 16.²⁵ 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. Meggyesy²⁶ 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.

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. Furthermore, 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

²⁵ “Judges shall not charge juries with respect to matters of fact, not comment thereon, but shall declare the law.”

²⁶ 90 Wn. App. 693, 701, 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).

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.²⁷ 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.²⁸ Id.

²⁷ The trial court’s instructions were found erroneous on other grounds.

²⁸ 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.")²⁹

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*.

²⁹ 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. Id., 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, § 9.³⁰ 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

³⁰ "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).

History shows jurors are endowed with the power to nullify. The power of a jury to acquit even in the face of overwhelming evidence of guilt, (i.e. jury nullification) long has been recognized and accepted as an integral and essential aspect of the criminal justice system. E.g., Bushell's Case, 6 Howell's State Trials 999 (1670); *see also* United States v. Polouizzi, 687 F.Supp.2d 133, 184–98 (E.D.N.Y. 2010)³¹ (providing a thorough historical survey of this right). As one commentator has observed: “The only real issue concerning jury nullification is whether or not the jury should be honestly instructed as to its authority. The value of nullification to the legal system no longer appears to be a matter of dispute.” Schelin & Van Dyke, Jury Nullification: The Contours of a Controversy, 43 L. & Contemp.Probs. 51, 113 n.55 (1980).

Despite this recognized power, nullification instructions—once historically common—are no longer given. Wrongly relying on Sparf v. United States, 156 U.S. 51, 102, 15 S.Ct. 273, 39 L.Ed. 343 (1895), judges often refuse to inform juries of their full powers. Yet, Sparf—supposedly

the bedrock case against jury nullification—adopted no such holding. As one commentator explains:

[Sparf] did not preclude judges from rendering nullification instructions or allowing nullification arguments in proper circumstances, it did not require judges to mislead jurors about their power to judge the law, and it did not sanction a judicial denial of the jury's nullification power, either by instruction or interference. Sparf only held that it was not reversible error to instruct the jury that it would be wrong to disregard the court's instruction as to the law. In fact, the trial judge in Sparf informed the jury that it had the 'physical power' to render a verdict contrary to his instructions.

Andrew J. Parmenter, Nullifying the Jury, The Judicial Oligarchy Declares War on Jury Nullification, 46 Washburn L.J. 379, 388 (2007) (footnotes omitted).

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

³¹ Reversed on others ground in an unpublished case.

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, 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.³² In State v. Meggyesy, the appellant challenged the WPIC’s “duty to return a verdict of guilty” language. The

³² A decision is incorrect if the authority on which it relies does not support it. State v. Nunez, 174 Wn.2d 707, 713, 285 P.3d 21 (2012).

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. Bonisio, 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.^{33, 34} These concepts support Mr. Small’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

³³ 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.”).

³⁴ 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: ...

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,³⁵ Mr. Small 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; 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 instructions given in Mr. Small’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

³⁵ And the appellant in Bonisisio.

“duty” to convict the defendant if the elements were proved beyond a reasonable doubt. Instruction Nos. 9 and 15 (CP 197, 203, WPIC 26.02, 27.02, 100.02); Instruction No. 17 (CP 205, WPIC 40.02); Instruction No. 21 (CP 209, WPIC 60.02); Instruction No. 25 (CP 213, WPIC 130.03).

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). Sparf, *supra*, does not provide any reasonable basis for instructing the jury that it has a “duty” to return a guilty verdict when all of the elements of the alleged crime have been proven. Although a survey of the states’ and federal circuits’ corresponding jury instruction language revealed that 24 (almost 40 percent) of the state courts and federal circuits use the command “must” or its equivalent (“shall” or “duty”) to point juries to verdicts of guilty³⁶, such instructions affirmatively mislead the jury to conclude they are without power to nullify. As such, these instructions are disingenuous by omission and, therefore, have no place in any justice system.

As this Court’s very recent decision in State v. Smith, ___ Wn. App. ___, 298 P.3d 785 (2013) suggests, a more accurate and complete elements instruction would substitute the word “should” for “duty.” For as

this Court has recognized, the term “duty” is equivalent to the obligatory or mandatory terms “ought”, “shall” or “must”, while the term “should” strongly encourages a particular course of action but is still the “weaker companion” to the obligatory “ought”. Smith, ___ Wn.2d ___, 298 P.3d at 790 (citations omitted). By substituting “should” for “duty”, a trial court would be able to strongly suggest that the jury convict if it has found all the elements proved beyond a reasonable doubt. Indeed, as this Court recognizes, the language might even be considered to be nearly mandatory. Id. Yet, by using the term “should”, the trial court would no longer be affirmatively misleading jurors about their power to nullify.³⁷

Here, 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 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

³⁶ See B. Michael Dorn, “Must Find the Defendant Guilty” Jury Instructions Violate the Sixth Amendment, 91 *Judicature* 12, 12 (2007).

³⁷ For example, a constitutionally proper instruction would read as follows:

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 trial court's error violated Mr. Small'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*.

D. CONCLUSION

For the reasons stated, this Court should reverse the convictions and remand for a new trial based on the erroneous admission of prejudicial evidence and/or to-convict instructions constituting manifest constitutional error. Alternatively, the matter should be remanded for resentencing.

Respectfully submitted on June 21, 2013.

s/Susan Marie Gasch, WSBA #16485
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If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then you should return a verdict of guilty.

PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on June 21, 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 brief of appellant and

Appendix A:

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s/Susan Marie Gasch, WSBA #16485

1 **INSIDE FRONT COVER OF NOTEBOOK:**

- 2 (1) "I'm sorry for everything I put you threw.... I put drinking and partying and my
3 friends first. Fuck I hate myself for it...she is" (sentence begins from "top
4 page" and carries over to this page);
5
6 (2) "You were always a great wife and a wonderful mother. I just wish you could say
7 that you had 26 wonderful years, but I know you can't";
8
9 (3) "...of your family and both of you take care of your mother. Cody you're the man
10 of the house..."
11
12 (4) "Please tell your kids that I ...a... wreck so they don't have to go threw life like
13 you two....."
14
15 (5) "Savannah and Cody. I'm so sorry... I really love you two... weren't very old";
16
17 (6) "You're great kids and I'm sorry I can't be there for you";
18
19 (7) "I know that I will never see my grandkid ever again, victory is an angel, and
20 Cody, I'm sorry that I will never see your son.";
21
22 (8) "I'm sorry. You take care of your mother Cody. Your the man of the house
23 now."
24
25 (10)"I wasn't always bad there was some good...."
26
27 (11) "By the time...." (partially crossed out);
28
29 (12) "I'm not going to prison for life, I'm going to hell instead. I love all of you, Bye!!"

30 **TOP PAGE OF NOTEBOOK:**

- 31 (1) In right upper corner, "1-26-10";
32
33 (2) "To Marla, Savannah, and Cody"
34 State's Offer of Proof

35 4

APPENDIX "A" Page One

1 (3) "Why I left because I don't want this to go to court and go on for months in the
2 news + paper. It better to ... hit the news paper touse then tell you what happen
3 12 years ago" (sentence begins on "inside front cover" and is carried over to this
4 page);

5 (4) "It was one of my all night drinking.....";

6 (5) "I really do love all of you..."

7 (6) "I wish I could take that night back..."

8 (7) "I'm so sorry you have all gone threw this mess together..."

9 (8) "I wish I could take that night back...I can't... I hate myself for what I did... I
10 have to remember that night for ever and everything I lost...";

11 (10)"I'm not going to prison for life because I know no one will visit me..."

12 (11) "...drinking you drink like I did.";

13 (12) Various words are listed in this section, including: "some day", "you", "I", "will",
14 "know", "hate", "I", "mean", "ask", "me", "don't", "blame", "them", "you"....

15 (13) "Take that day back..."

16 (14) "I hate myself";

17 (15) "-I know- I know that I will never see you... Marla, Savannah + Cody. I really do
18 love you so much and I can't live with out you. I'm so sorry I have to go know..."

19 (16) "...take my life..."

20 (16) "....I really did... to grow old with you..."

21 (17) "I really do love you with all my heart always have..."

22 (18) "Kelly, Dad".

23
24
25
26
27 State's Offer of Proof

28 5

APPENDIX "A" *Page Two*