

FILED

FEB 28, 2013

Court of Appeals
Division III
State of Washington

No. 31264-0-III

IN THE COURT OF APPEALS
OF THE
STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

JERRY WAYNE CLARK, JR.

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SPOKANE COUNTY

The Honorable Judge Salvatore F. Cozza

APPELLANT'S OPENING BRIEF

KRISTINA M. NICHOLS
Nichols Law Firm, PLLC
Attorney for Appellant
P.O. Box 19203
Spokane, WA 99219
(509) 280-1207
Fax (509) 299-2701
Wa.Appeals@gmail.com

TABLE OF CONTENTS

A. SUMMARY OF ARGUMENT 1

B. ASSIGNMENTS OF ERROR 1

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 1

D. STATEMENT OF THE CASE..... 2

E. ARGUMENT..... 4

Issue 1: Whether the court erred by admitting Mr. Clark’s
1998 theft conviction to attack his credibility..... 4

Issue 2: Whether Mr. Clark’s constitutional right to a jury
trial was violated when the court instructed the jury that it had
a “duty to convict,” misleading the jury about its duty to acquit... 15

F. CONCLUSION..... 31

TABLE OF AUTHORITIES

Washington Supreme Court

| | |
|---|------------------------|
| <i>Bellevue School Dist. v. E.S.</i> , 171 Wn.2d 695, 257 P.3d 570 (2011)..... | 15 |
| <i>Hartigan v. Washington Territory</i> , 1 Wash.Terr. 447, 449 (1874)..... | 20, 23, 31 |
| <i>Leonard v. Territory</i> , 2 Wash.Terr. 381, 7 Pac. 872 (Wash.Terr.1885)..... | 19, 20, 26, 27, 30, 31 |
| <i>Miller v. Territory</i> , 3 Wash.Terr. 554, 19 P. 50 (Wash.Terr.1888)..... | 19 |
| <i>Pasco v. Mace</i> , 98 Wn.2d 87, 653 P.2d 618 (1982)..... | 16, 17, 19 |
| <i>Sofie v. Fibreboard Corp.</i> , 112 Wn.2d 636, 771 P.2d 711, 780 P.2d 260 (1989)..... | 16, 17, 19 |
| <i>State v. Alexis</i> , 95 Wn.2d 15, 621 P.2d 1269 (1980)..... | 5-8, 11, 12 |
| <i>State v. Bennett</i> , 161 Wn.2d 303, 165 P.3d 1241 (2007)..... | 15 |
| <i>State v. Black</i> , 109 Wn.2d 336, 745 P.2d 12 (1987)..... | 18 |
| <i>State v. Boogaard</i> , 90 Wn.2d 733, 585 P.2d 789 (1978)..... | 27 |
| <i>State v. Christiansen</i> , 161 Wash. 530, 297 P. 151 (1931)..... | 20 |
| <i>State v. Green</i> , 94 Wn.2d 216, 616 P.2d 628 (1980)..... | 25 |
| <i>State v. Gunwall</i> , 106 Wn.2d 54, 720 P.2d 808 (1986)..... | 17, 21 |
| <i>State v. Hobble</i> , 126 Wn.2d 283, 892 P.2d 85 (1995)..... | 19 |
| <i>State v. Holmes</i> , 68 Wash. 7, 122 P. 345 (1912)..... | 20, 22 |
| <i>State v. Jones</i> , 101 Wn.2d 113, 677 P.2d 131 (1984), <i>overruled on other grounds</i> , <i>State v. Brown</i> , 111 Wn.2d 124, 761 P.2d 588 (1988)..... | 5-8 |
| <i>State v. Kylo</i> , 166 Wn.2d 856, 215 P.3d 177 (2009)..... | 15, 24, 30 |
| <i>State v. Nunez</i> , 174 Wn.2d 707, 285 P.3d 21 (2012)..... | 27 |

| | |
|---|----|
| <i>State v. Ortiz</i> , 119 Wn.2d 294, 831 P.2d 1060 (1992)..... | 21 |
| <i>State v. Ray</i> , 116 Wn.2d 531, 806 P.2d 1220 (1991)..... | 8 |
| <i>State v. Recuenco</i> , 154 Wn.2d 156, 110 P.3d 188 (2005)..... | 15 |
| <i>State v. Rivers</i> , 129 Wn.2d 697, 921 P.2d 495 (1996)..... | 8 |
| <i>State v. Russell</i> , 125 Wn.2d 24, 882 P.2d 747 (1994), cert. denied, 514 U.S. 1129 (1995)..... | 21 |
| <i>State v. Smith</i> , 150 Wn.2d 135, 75 P.3d 934 (2003)..... | 21 |
| <i>State v. Strasburg</i> , 60 Wash. 106, 110 P. 1020 (1910)..... | 17 |
| <i>State v. Thang</i> , 145 Wn.2d 630, 41 P.3d 1159 (2002)..... | 9 |
| <i>White v. Territory</i> , 3 Wash.Terr. 397, 19 P. 37 (Wash.Terr.1888)..... | 19 |

Washington Courts of Appeals

| | |
|---|-------------------|
| <i>State v. Bankston</i> , 99 Wn. App. 266, 992 P.2d 1041 (2000)..... | 8 |
| <i>State v. Bond</i> , 52 Wn. App. 326, 759 P.2d 1220 (1988)..... | 6 |
| <i>State v. Bonisisio</i> , 92 Wn. App. 783, 964 P.2d 1222 (1998), <i>review denied</i> , 137 Wn.2d 1024 (1999)..... | 28, 29, 30 |
| <i>State v. Brown</i> , 130 Wn. App. 767, 124 P.3d 663 (2005)..... | 28, 30 |
| <i>State v. Carlson</i> , 65 Wn. App. 153, 828 P.2d 30, <i>review denied</i> , 119 Wn.2d 1022 (1992)..... | 25 |
| <i>State v. Gomez</i> , 75 Wn. App. 648, 880 P.2d 65 (1994)..... | 5-8 |
| <i>State v. Gonzales</i> , 83 Wn. App. 587, 922 P.2d 210 (1996)..... | 8 |
| <i>State v. Kitchen</i> , 46 Wn. App. 232, 730 P.2d 103 (1986)..... | 20 |
| <i>State v. Meggyesy</i> , 90 Wn. App. 693, 958 P.2d 319, <i>review denied</i> , 136 Wn.2d 1028 (1998)..... | 15, 18, 20, 27-30 |

| | |
|---|-------------|
| <i>State v. Millante</i> , 80 Wn. App. 237, 908 P.2d 374 (1995)..... | 7 |
| <i>State v. Primrose</i> , 32 Wn. App. 1, 645 P.2d 714 (1982)..... | 24 |
| <i>State v. Russell</i> , 104 Wn. App. 422, 16 P.3d 664 (2001)..... | 5, 6, 9, 13 |
| <i>State v. Salazar</i> , 59 Wn. App. 202, 796 P.2d 773 (1990)..... | 24 |
| <i>State v. Saunders</i> , 91 Wn. App. 575, 958 P.2d 364 (1998)..... | 9 |
| <i>State v. Silva</i> , 107 Wn. App. 605, 27 P.3d 663 (2001)..... | 18 |
| <i>State v. Teal</i> , 117 Wn. App. 831, 73 P.3d 402 (2003), <i>affirmed</i> , 152 Wn.2d 333 (2004)..... | 9 |

Federal Authorities

| | |
|---|----|
| U.S. Const. art. 3, § 2, ¶ 3..... | 15 |
| U.S. Const. amend. 5..... | 22 |
| U. S. Const. amend. 6..... | 15 |
| U.S. Const. amend. 7 | 15 |
| <i>Duncan v. Louisiana</i> , 391 U.S. 145, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968)..... | 16 |
| <i>Neder v. U.S.</i> , 527 U.S. 1, 119 S. Ct. 1827, 144 L.Ed.2d 35 (1999)..... | 22 |
| <i>Jackson v. Virginia</i> , 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)..... | 25 |
| <i>Sullivan v. Louisiana</i> , 508 U.S. 275, 124 L.Ed.2d 182, 113 S.Ct. 2078 (1993)..... | 29 |
| <i>United States v. Moylan</i> , 417 F.2d 1002, 1006 (4 th Cir. 1969)..... | 20 |
| <i>United States v. Garaway</i> , 425 F.2d 185 (9th Cir. 1970)..... | 22 |
| <i>United States v. Gaudin</i> , 515 U.S. 506, 115 S. Ct. 2310, | |

| | |
|---|------------|
| 132 L. Ed. 2d 444 (1995)..... | 22, 24, 25 |
| <i>United States v. Moylan</i> , 417 F.2d 1002 (4th Cir. 1969), cert. denied, 397 U.S. 910 (1970)..... | 23 |
| <i>United States v. Powell</i> , 955 F.2d 1206 (9th Cir. 1991)..... | 24, 29 |

Washington Constitution, Statutes & Court Rules

| | |
|-------------------------------|--------|
| ER 609..... | 5 |
| Wash Const. art. I, § 9..... | 22 |
| Wash Const. art. 1, § 21..... | 17, 18 |
| Wash Const. art. 1 §22..... | 18, 21 |
| WPIC 160.00..... | 26 |

Secondary Authorities

| | |
|--|------------|
| Alschuler & Deiss, <u>A Brief History of the Criminal Jury in the United States</u> , 61 U. Chi. L. Rev. 867, 912-13 (1994)..... | 23 |
| <i>Bushell's Case</i> , Vaughan 135, 124 Eng. Rep. 1006 (1671)..... | 22 |
| Hon. Robert F. Utter, <u>Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights</u> , 7 U. Puget Sound L. Rev. 491, 515 (1984)..... | 17, 18, 21 |
| John H. Wigmore, " <u>A Program for the Trial of a Jury</u> ", 12 Am. Jud. Soc. 166 (1929)..... | 25 |
| <i>The American Heritage Dictionary (Fourth Ed., 2000, Houghton Mifflin Company)</i> | 30 |
| The Papers of Thomas Jefferson, Vol. 15, p. 269 (Princeton Univ. Press, 1958)..... | 16 |
| Utter & Pitler, " <u>Presenting a State Constitutional Argument: Comment on Theory and Technique</u> ," 20 Ind. L. Rev. 637, 636 (1987)..... | 21 |

A. SUMMARY OF ARGUMENT

Jerry Wayne Clark, Jr., appeals his conviction of attempting to elude police. Mr. Clark did not receive a fair trial when the trial court erroneously admitted his 14-year-old theft conviction without conducting the proper inquiry and without properly considering the prejudicial impact the conviction would have on this trial. Moreover, this error cannot be considered harmless where the State's evidence was tenuous at best. Finally, the conviction should be reversed because the jury was improperly instructed that it had a "duty to convict" Mr. Clark, which was a constitutionally infirm instruction, invaded the province of the jury, and misled the jury on its right to acquit.

B. ASSIGNMENTS OF ERROR

1. The court erred by performing an incomplete balancing of the pertinent factors required under ER 609 in order to admit a prior conviction that was over 10 years old.
2. The court erred by admitting the defendant's 14-year-old theft conviction in order to attack his credibility.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Issue 1: Whether the court erred by admitting Mr. Clark's 1998 theft conviction to attack his credibility.

Issue 2: Whether Mr. Clark's constitutional right to a jury trial was violated when the court instructed the jury that it had a "duty to convict," misleading the jury about its duty to acquit.

D. STATEMENT OF THE CASE

Around midnight on June 23-24, 2012, Jerry Wayne Clark, Jr., and his then-girlfriend Devon Vos arrived at their shared duplex in north Spokane, Washington. (RP 53-54) The couple argued (RP 57, 178-92), which could be overheard by the girl living next door (RP 226-34). Ms. Vos alleged that Mr. Clark hit and strangled her during their argument, but Mr. Clark denied these physical accusations. (RP 57-68, 75-84, 91)

After about 20 minutes of arguing, Mr. Clark drove away in his red Cadillac to a friends' home about half a mile away. (RP 70-71, 195, 243-44) Mr. Clark said that, when he arrived at his friends' residence, he parked his car and left it running with the keys in the ignition. (RP 220, 249) After he knocked on his friends' door, he tried to return to his vehicle and instead saw it speed away. (RP 195) Mr. Clark testified that he never reported the vehicle stolen because he was under the influence of drugs at the time, so he did not want the police there. (RP 162, 196-97, 205)

Meanwhile, Ms. Vos called 911 after Mr. Clark left their home, and Officer Christopher Johnson responded shortly after midnight. (RP 71-72, 112-15) Then, with the officer overhearing, Ms. Vos received a call from a phone number registered to "Jerry Clark." (RP 121, 174) The male voice stated he would be back shortly to talk with Ms. Vos. (*Id.*) Officer Johnson said the phone displayed the caller's name as "Jerry,"

although Ms. Vos said the defendant's name was programmed in her phone under his middle name "Wayne." (RP 74-75, 121, 174) Ms. Vos did not remember this phone call, and Mr. Clark denied making any such call that night. (RP 174, 217-18)

After Officer Johnson completed his interview of Ms. Vos, he waited outside in his patrol vehicle while another officer took pictures. (RP 124) Officer Johnson then saw a two-door red Cadillac approaching, but the car turned into a nearby alleyway and accelerated away. (RP 124) The officer pursued the vehicle for about two miles through north Spokane's main arterial and residential streets at speeds reaching approximately 70 mph. (RP 125-26) The patrol vehicle's emergency siren and lights were activated. (RP 128-29) The Cadillac sped by another vehicle on the road, coming within inches of it, and it did not slow for stop signs or unmarked intersections. (RP 125-26, 128)

The Cadillac eventually stopped, and the driver fled the vehicle before Officer Johnson could identify him. (RP 126) Officer Johnson said the driver had a similar "average" build to Mr. Clark, who was 6 feet 3 inches, but the officer was unable to identify the driver as Mr. Clark. (RP 129-30, 142) The vehicle, which was registered to Mr. Clark, was seized. (RP 133, 135)

Mr. Clark was arrested at his home later that evening. (RP 175) He informed officers then and also testified that he was not the driver of the vehicle that Officer Johnson had pursued, that someone else had stolen his vehicle, and that he would never have abandoned his beloved vehicle. (RP 199-200, 204, 248-49) Ms. Vos testified that Mr. Clark had called her before he was arrested and said he knew officers were looking for him. (RP 87-88) But Mr. Clark told Ms. Vos officers were looking for him because his mother had informed him as much, not because he was driving the pursued vehicle. (RP 198, 217-19, 222)

Mr. Clark was charged with second-degree assault and attempt to elude. (CP 1) The jury ultimately acquitted Mr. Clark of assault and found him guilty of attempting to elude police. (RP 303; CP 76-77) Mr. Clark received a standard range sentence of six months, and this appeal timely followed. (CP 93-103, 104) Additional facts may be cited as pertinent to the issue on appeal.

E. ARGUMENT

Issue 1: Whether the court erred by admitting Mr. Clark's 1998 theft conviction to attack his credibility.

The court abused its discretion by admitting Mr. Clark's 14-year-old theft conviction to attack the defendant's credibility. (RP 9-11) The court did not properly consider all the necessary factors before admitting the prior conviction. Moreover, the prejudice from admitting this

conviction outweighed any probative value and materially affected the outcome of this trial.

Pursuant to ER 609,

“For the purpose of attacking the credibility of a witness in a criminal or civil case, evidence that the witness has been convicted of a crime shall be admitted if but only if the crime... involved dishonesty...” However, such evidence is “not admissible if a period of more than 10 years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect.”

ER 609(a), (b) (emphases added).

Prior to admitting a conviction that is over 10-years-old, a trial court is required to weigh certain factors as set forth in *State v. Alexis, infra*, balancing the prejudicial impact of the prior conviction against its probative value. *State v. Gomez*, 75 Wn. App. 648, 651, 880 P.2d 65 (1994) (citing *State v. Alexis*, 95 Wn.2d 15, 621 P.2d 1269 (1980); *State v. Jones*, 101 Wn.2d 113, 677 P.2d 131 (1984), *overruled on other grounds*, *State v. Brown*, 111 Wn.2d 124, 761 P.2d 588 (1988)). “[T]he trial court must state, on the record, its reasons for admitting or excluding the evidence.” *Id.*¹ “A failure to balance the *Alexis* factors on the record is

¹ See also *State v. Russell*, 104 Wn. App. 422, 433-34, 16 P.3d 664 (2001) (“A trial court is always required to balance on the record when a conviction is more than ten years old... [and enter] “specific findings on the record as to the particular facts and circumstances it has considered in determining that the probative value of the conviction substantially outweighs its prejudicial impact.”) (Emphasis in original opinion.)

harmless if the appellate court can determine, from the record as a whole, whether the evidence was properly admitted.” *Id.* (citing *State v. Bond*, 52 Wn. App. 326, 333, 759 P.2d 1220 (1988)). The factors the trial court is required to balance before admitting prior convictions are:

- “(1) the length of the defendant’s criminal record;
- (2) the remoteness of the prior conviction;
- (3) the nature of the prior crime(s);
- (4) the age and circumstances of the defendant;
- (5) the centrality of the credibility issue; and
- (6) the impeachment value of the prior crime(s).”

Gomez, 75 Wn. App. at 651-52 (citing *Alexis*, 95 Wn.2d at 19).

First, the length of a defendant’s criminal record may favor exclusion, because “ ‘unnecessarily cumulative’ prior convictions are prejudicial.” *Gomez*, 75 Wn. App. at 652 (quoting *Jones*, 101 Wn.2d at 121-22). Second, a defendant’s conviction that is too remote in time favors exclusion. *See Gomez*, 75 Wn. App. at 652. Convictions that are “over 10 years old should generally be excluded because they have little or no bearing on a defendant’s veracity and, therefore, the prejudicial effect of admitting those convictions will almost always outweigh their probative value.” *Id.* “Generally, the older a conviction is, ‘the less probative it is of the defendant’s credibility.’” *Id.* (quoting *Jones*, 101 Wn.2d at 121). Remote convictions are generally admissible “very rarely and only in exceptional circumstances.” *Russell*, 104 Wn. App. at 437.

The third factor suggests that the greater the similarity between the prior conviction and the crime charged, the greater the possible prejudice in admitting it. *Gomez*, 75 Wn. App. at 653 (citing *Jones*, 101 Wn.2d at 121). The fourth factor the court must balance is the age and circumstances of the defendant at the time of the prior conviction. “Generally, the younger a defendant was at the time he was convicted of the earlier crimes, the more likely it is that the prejudicial effect of the prior convictions will outweigh their probative value or that there may be extenuating circumstance the trial court should consider.” *Gomez*, 75 Wn. App. at 653 (citing *Jones*, 101 Wn.2d at 121).

The fifth factor focuses on the centrality of the credibility issue. Generally, where a determination of the defendant’s credibility is central to the defense, this may favor admission. *Gomez*, 75 Wn. App. at 653-54.

Sixth, the court must weigh the impeachment value of the crime to determine if it favors admission. *Gomez*, 75 Wn. App. at 654. “[B]ecause of the high risk of prejudice inherent in prior conviction evidence, the trial court should initially focus on whether an alternative basis for impeachment exists, such as eye witness testimony...” *State v. Millante*, 80 Wn. App. 237, 246, 908 P.2d 374 (1995). “When such evidence is available, the need for [prior conviction] evidence to determine credibility is less compelling.” *Id.* (citing *Alexis*, 95 Wn.2d at 20).

A trial court's ruling under ER 609 is reviewed for abuse of discretion. *State v. Bankston*, 99 Wn. App. 266, 268, 992 P.2d 1041 (2000) (citing *State v. Rivers*, 129 Wn.2d 697, 704-05, 921 P.2d 495 (1996)); *State v. Gonzales*, 83 Wn. App. 587, 594, 922 P.2d 210 (1996) (“overall balancing of the *Alexis* factors is left to the discretion of the trial court”). “Abuse occurs when the ruling of the trial court is manifestly unreasonable or discretion is exercised on untenable or unreasonable grounds.” *Id.* (internal citations omitted). Failing to balance the *Alexis* factors on the record and make specific findings of those particular facts and circumstances it considered in admitting prior conviction evidence is clear error. *Gomez* 75 Wn. App. at 656 n.11 (citing *Jones*, 101 Wn.2d at 122); *c.f.* *Gonzales*, 83 Wn. App. at 593-94 (trial ““court engaged in a proper and meaningful *Alexis* analysis before deciding to allow’ the prior conviction evidence.”)

Finally, where the court errs by admitting the prior conviction evidence and/or by failing to properly balance the *Alexis* factors on the record before admitting such evidence, the error only results in reversal if ““within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected.”” *Gomez*, 75 Wn. App. at 657 (quoting *State v. Ray*, 116 Wn.2d 531, 546, 546, 806 P.2d 1220 (1991)); *Bankston*, 99 Wn. App. at 270-71. The crux of this harmless

error analysis is the strength of the other evidence. *Russell*, 104 Wn. App. at 438 (court found error harmless since evidence was “airtight” and any jury would have convicted the defendant, emphasizing that most other instances of improper admission of prior conviction evidence are highly prejudicial.) Courts are mindful that “[e]vidence of a prior conviction is inherently prejudicial when the defendant is the witness because it shifts the jury focus from the merits of the charge to the defendant’s general propensity for criminality.” *State v. Saunders*, 91 Wn. App. 575, 580, 958 P.2d 364 (1998) (internal citations omitted).

In this appeal, as a threshold matter, Mr. Clark may raise this issue even though evidence of his prior conviction was first introduced in his own direct testimony. After the trial court denied the defendant’s motion to exclude the prior conviction evidence, as a tactical matter, defense counsel chose to elicit the same on direct rather than wait for the State to do so and make Mr. Clark appear less forthright. This tactical decision does not limit Mr. Clark’s ability to now challenge the trial court’s decision. “[T]he preemptive strategy of introducing such evidence in direct examination after losing a battle to exclude it does not constitute waiver of appellate review.” *State v. Teal*, 117 Wn. App. 831, 843, 73 P.3d 402 (2003), *affirmed*, 152 Wn.2d 333 (2004), (citing *State v. Thang*, 145 Wn.2d 630, 648-49, 41 P.3d 1159 (2002)).

Next, there is no dispute that the challenged prior conviction was more than 10 years old. Indeed, the State informed the trial court that Mr. Clark's prior theft conviction from 8/13/1998 was more than 14-years-old at the time of trial. (RP 5) Thus, ER 609(b) applied, prompting the trial court's requirement to balance the *Alexis* factors on the record and make specific findings as to how the probative value of admitting this older conviction substantially outweighed its prejudicial effect.

Here, the trial court did not fully balance the pertinent *Alexis* factors, and its findings were limited to essentially only one factor – the centrality of credibility in this case. (RP 9-10) While the issue of credibility could weigh in favor of admission, the trial court does not appear to have considered the remaining *Alexis* factors that weighed more strongly for the ultimate exclusion of the prior conviction evidence.

For example, the fact that Mr. Clark's prior theft conviction was so remote in time favored exclusion, which the court did not consider. Mr. Clark's 14-year-old conviction had little bearing on his credibility at this trial. Remote convictions, such as the underlying theft in this case, are "very rarely" admissible and only in "exceptional circumstances." The trial court made no analysis of how this remote conviction fell into one of the "exceptional circumstances" favoring admissibility. Indeed, there were no facts that supported such a unique conclusion.

Furthermore, the age and circumstances of the defendant were not considered on the record by the trial court, let alone the related findings made, even though defense counsel challenged admission of the prior conviction based on the defendant's age and circumstances. Mr. Clark was over 40-years-old at the time of trial and his prior crime of dishonesty was committed in his mid-twenties. He had no intervening crimes of dishonesty. The younger a defendant is at the time of the prior conviction, the greater the prejudice to the defendant in admitting it. The trial court failed to consider these factors that weighed heavily in favor of excluding the 14-year-old theft conviction in this case.

Finally, the trial court did not consider or make the necessary findings regarding the impeachment value of Mr. Clark's prior conviction compared to the other impeachment evidence available. The prior conviction evidence was less significant and compelling when there were other methods of impeachment available, such as eye witness testimony. In this case, Mr. Clark testified that he was not the driver of the vehicle that was pursued by the officer. But, the officer had overheard a telephone conversation from someone with the defendant's first name and registered phone number, indicating that he would be driving over soon to where the officer was waiting. Shortly thereafter, the officer noticed Mr. Clark's red Cadillac driving onto the block where the defendant lived with his

girlfriend. And, the officer noticed a person eventually running from the vehicle that matched the defendant's build and body type. There were certainly other methods available for impeaching Mr. Clark's testimony. It was, therefore, highly prejudicial to admit the prior conviction evidence, especially since its impeachment value was less compelling in view of the other impeachment evidence that was introduced.

The trial court committed clear error by failing to balance all the required *Alexis* factors and thereafter make the necessary specific findings prior to admitting Mr. Clark's 14-year-old theft conviction. Had the trial court made the proper inquiry, it likely would have excluded the prior conviction evidence. Other than the fact that credibility was an issue in this trial, the other factors that the court failed to consider weighed heavily in favor of exclusion, including the remoteness of the conviction, the age of the defendant, lack of intervening crimes of dishonesty between the theft in Mr. Clark's mid-twenties and the current trial, and the impeachment value of the other evidence that was admitted against the defendant. The court abused its discretion by failing to conduct the proper balancing, failing to make the required findings, and/or making a decision that was manifestly unreasonable due to the high prejudice and lack of probative value for this remote 14-year-old theft conviction.

The trial court's error in this case should result in reversal because the error was not harmless. It cannot be concluded from this record that the trial was probably not materially affected. This case stands in stark contrast to *State v. Russel, supra*, where the court found the error in admitting prior conviction evidence harmless. There, the court described the evidence against the defendant as "airtight," concluding that "any" jury would have convicted that defendant. Whereas here, the evidence was not so clearly in the State's favor.

Indeed, Mr. Clark testified that someone had stolen his vehicle only a few blocks from where the officer saw the vehicle and took chase. The person who was driving that vehicle without permission could certainly have become nervous at seeing the patrol vehicle and have attempted to flee the area. Also, although the officer testified that Ms. Vos had shortly beforehand received a phone call from a male with a phone number registered to the defendant, the jury could have believed that the officer was mistaken or someone else had made the call. After all, Ms. Vos could not remember the phone call, Mr. Clark denied making the phone call, and Ms. Vos repeatedly testified that Mr. Clark's name was listed in her phone under his middle name of "Wayne," rather than the name of "Jerry" that the officer thought he remembered seeing.

Mr. Clark and Ms. Vos also testified regarding various friends, some of whom were obviously criminally involved. There could certainly have been doubt among jurors, suspecting that one of the known criminal acquaintances or an unknown person had taken the vehicle. Furthermore, no one ever positively identified Mr. Clark as the driver of the pursued vehicle. The pursuing officer saw a person of medium or average build run from the vehicle, but he did not know if that person was the defendant, and Mr. Clark happened to be a fairly tall six feet three inches.

While a review for sufficiency of the evidence may be satisfied by the above circumstantial evidence, a review for harmless error goes much further. It requires much stronger evidence than that here to overlook the trial court's error in admitting the highly prejudicial 14-year-old conviction of dishonesty. In other words, the improper attack on Mr. Clark's credibility did probably materially affect the outcome of this trial and tip the jury's scales in favor of guilt rather than acquittal. Mr. Clark respectfully requests that this matter be reversed so that he can be fairly retried based on the merits of the State's case, rather than based on the prejudicial presumption that he was a dishonest person.

Issue 2: Whether Mr. Clark’s constitutional right to a jury trial was violated when the court instructed the jury that it had a “duty to convict,” misleading the jury about its duty to acquit.

The jury was instructed: “If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.” (CP 65) But this instruction misstates the law in violation of Mr. Clark’s constitutional rights, because there is no constitutional “duty to convict.”²

a. Standard of review. Constitutional violations are reviewed de novo. *Bellevue School Dist. v. E.S.*, 171 Wn.2d 695, 702, 257 P.3d 570 (2011). Jury instructions are reviewed de novo. *State v. Bennett*, 161 Wn.2d 303, 307, 165 P.3d 1241 (2007). Instructions must make the relevant legal standard manifestly apparent to the average juror. *State v. Kyllo*, 166 Wn.2d 856, 864, 215 P.3d 177 (2009).

b. The United States Constitution. The right to jury trial in a criminal case was one of the few guarantees of individual rights enumerated in the United States Constitution of 1789. It was the only guarantee to appear in both the original document and the Bill of Rights. U.S. Const. art. 3, § 2, ¶ 3; U. S. Const. amend. 6; U.S. Const. amend. 7. Thomas Jefferson wrote of the importance of this right in a letter to

² This issue has been rejected by Division One of the Washington State Court of Appeals. See *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.

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 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 156.³

c. Washington Constitution. The Washington Constitution provides greater protection to its citizens in some areas than does the

³ 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).

United States Constitution. *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 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, § 22,⁴ they expressly declared it “shall remain inviolate.” Const. art. 1, § 21.⁵

The term "inviolate" connotes deserving of the highest protection . . . Applied to the right to trial by jury, this language indicates that the right must remain the essential component of our legal system that it has always been. For such a right to remain inviolate, it must not diminish over time and must be protected from all assault to its essential guarantees.

Sofie, 112 Wn.2d at 656. Article 1, section 21 "preserves the right [to jury trial] as it existed in the territory at the time of its adoption." *Pasco v. Mace*, 98 Wn.2d at 96; *State v. Strasburg*, 60 Wash. 106, 115, 110 P. 1020 (1910). The right to trial by jury "should be continued unimpaired and inviolate." *Strasburg*, 60 Wash. at 115.

The difference in language suggests the drafters meant something different from the federal Bill of Rights. See Hon. Robert F. Utter,

Freedom and Diversity in a Federal System: Perspectives on State

⁴ 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

⁵ “The right of trial by jury shall remain inviolate”

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, § 16.⁶ Even a witness may not invade the province of the jury. *State v. Black*, 109 Wn.2d 336, 350, 745 P.2d 12 (1987). The right to jury trial also is protected by the due process clause of article I, section 3.

While the Court in *State v. Meggyesy* may have been correct when it found there is no specific constitutional language that addresses this precise issue, the language that *is* there indicates the right to a jury trial is so fundamental that any infringement violates the constitution. *Meggyesy*, 90 Wn. App. at 701.

ii. State constitutional and common law history.

State constitutional history favors an independent application of Article I, Sections 21 and 22. In 1889 (when the constitution was adopted), the Sixth Amendment did not apply to the states. Instead, Washington based its Declaration of Rights on the Bills of Rights of other states, which relied on common law and not the federal constitution. *State v. Silva*, 107 Wn. App. 605, 619, 27 P.3d 663 (2001), *citing* Utter, 7 U.

⁶ “Judges shall not charge juries with respect to matters of fact, not comment thereon, but shall declare the law.”

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.⁷ *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.⁸ *Id.*

⁷ The trial court’s instructions were found erroneous on other grounds.

⁸ Furthermore, the territorial court reversed all criminal convictions that resulted from erroneous jury instructions (unless the instructions favored the defense). *See, e.g., Miller 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*.

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.")⁹

iv. Differences in federal and state constitutions' structures.

⁹ This is likewise true in the federal system. *See, e.g., United States v. Moylan*, 417 F.2d 1002, 1006 (4th Cir. 1969).

State constitutions were originally intended to be the primary devices to protect individual rights, with the United States Constitution a secondary layer of protection. Utter, 7 U. Puget Sound L. Rev. at 497; Utter & Pitler, "Presenting a State Constitutional Argument: Comment on Theory and Technique," 20 Ind. L. Rev. 637, 636 (1987). Accordingly, state constitutions were intended to give broader protection than the federal constitution. An independent interpretation is necessary to accomplish this end. *Gunwall* indicates that this factor will always support an independent interpretation of the state constitution because the difference in structure is a constant. *Gunwall*, 106 Wn.2d at 62, 66; *see also State v. Ortiz*, 119 Wn.2d 294, 303, 831 P.2d 1060 (1992).

v. *Matters of particular state interest or local concern.*

The manner of conducting criminal trials in state court is of particular local concern, and does not require adherence to a national standard. *See e.g., State v. Smith*, 150 Wn.2d 135, 152, 75 P.3d 934 (2003); *State v. Russell*, 125 Wn.2d 24, 61, 882 P.2d 747 (1994), cert. denied, 514 U.S. 1129 (1995). This *Gunwall* factor 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. U.S.*, 527 U.S. 1, 8, 15-16, 119 S. Ct. 1827, 144 L.Ed.2d 35 (1999) (omission of element in 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, § 9.¹⁰ 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

¹⁰ "No person shall be ... twice put in jeopardy for the same offense."

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).

Under Washington law, juries have always had the ability to deliver a verdict of acquittal that is against the evidence. *Hartigan*, supra. A judge cannot direct a verdict for the state because this would ignore "the jury's prerogative to acquit against the evidence, sometimes referred to as

the jury's pardon or veto power." *State v. Primrose*, 32 Wn. App. 1, 4, 645 P.2d 714 (1982). *See also State v. Salazar*, 59 Wn. App. 202, 211, 796 P.2d 773 (1990) (relying on jury's "constitutional prerogative to acquit" as basis for upholding admission of evidence). An instruction telling jurors that they *may not* acquit if the elements have been established affirmatively misstates the law, and deceives the jury as to its own power. Such an instruction fails to make the correct legal standard manifestly apparent to the average juror. *Kyllo*, 166 Wn.2d at 864.

This is not to say there is a right to instruct a jury that it may disregard the law in reaching its verdict. *See, e.g., United States v. Powell*, 955 F.2d 1206, 1213 (9th Cir. 1991) (reversing conviction on other grounds). However, if a 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:

“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 review ends. But, if juries convict on insufficient evidence, 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. To instruct otherwise misstates this constitutional law.

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 misstates the law. The instruction 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.¹¹ In *Meggyesy*, the appellant challenged the WPIC’s “duty to return a verdict of guilty” language. The court held the federal and state constitutions did not “preclude” this language, and so affirmed. *Meggyesy*, 90 Wn. App. at 696.

In its analysis, Division One of the Court of Appeals characterized the alternative language proposed by the appellants—“you *may* return a verdict of guilty”—as “an instruction notifying the jury of its power to

¹¹ A decision is incorrect if the authority on which it relies does not support it. *State v. Nunez*, 174 Wn.2d 707, 719, 285 P.3d 21 (2012).

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. Bonisisio*, 92 Wn. App. 783, 964 P.2d 1222 (1998), *review 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 convict” language required the jury 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.^{12, 13} These concepts support your Appellant’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 proven beyond a reasonable doubt. The question is whether *the law* ever requires the jury to return a verdict of guilty. If the law never requires the jury to return a verdict of guilty, it is an incorrect statement of the law to instruct the jury it does. And an instruction that says it has such a duty impermissibly directs a verdict. *Sullivan v. Louisiana*, 508 U.S. 275, 124 L.Ed.2d 182, 113 S.Ct. 2078 (1993).

Unlike in *Meggyesy*,¹⁴ the Appellant here does not ask the court to approve an instruction that affirmatively notifies the jury of its power to acquit. Instead, we submit that jurors should not be affirmatively misled.

¹² 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.”).

¹³ 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:...”

¹⁴ And *Bonisisio*, *supra*.

This question was not addressed in either *Meggyesy* or *Bonisisio*; thus the holding of *Meggyesy* should not govern here. The *Brown* court erroneously found that there was “no meaningful difference” between the two arguments. *Brown*, 130 Wn. App. at 771. *Meggyesy* and its progeny should be reconsidered, and the issue should be analyzed on its merits.

h. The court’s instructions in this case affirmatively misled the jury about its power to acquit even if the prosecution proved its case beyond a reasonable doubt. The instruction given in this case did not contain a correct statement of the law. The court instructed the jurors that it was their “duty” to accept the law, and that it was their “duty” to convict the defendant if the elements were proved beyond a reasonable doubt. A duty is “[a]n act or a course of action that is required of one by... law.” *The American Heritage Dictionary* (Fourth Ed., 2000, Houghton Mifflin Company). The court’s use of the word “duty” in the “to-convict” instruction conveyed to the jury that it *could not* acquit if the elements had been established.

This misstatement of the law provided a level of coercion for the jury to return a guilty verdict, deceived the jurors about their power to acquit in the face of sufficient evidence, *Leonard, supra*, and failed to make the correct legal standard manifestly 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 on finding certain facts, the court inhibited the jury's constitutional authority to apply the law to the facts to reach a contrary general verdict.

The instruction creating a "duty" to return a guilty verdict was an incorrect statement of law. The error violated state and federal constitutional rights to a jury trial. Accordingly, Appellant's conviction should be reversed and the case remanded for a new trial. *Hartigan*, supra; *Leonard*, supra.

F. CONCLUSION

The court erred by failing to conduct an appropriate balancing of the necessary *Alexis* factors and make the related findings prior to admitting Mr. Clark's highly prejudicial theft conviction from 14 years before trial. The decision to admit the conviction was manifestly unreasonable in light of the factors that weighed in favor of exclusion. And, the error was significant enough that it cannot be considered harmless in light of the evidence introduced in this case. Finally, the jury was improperly instructed that it had a duty to convict in violation of Mr. Clark's state and federal constitutional rights. Wherefore, Mr. Clark respectfully requests that this Court reverse his conviction for attempting to elude and remand for a new trial.

Respectfully submitted this 28th day of February, 2013.

/s/ Kristina M. Nichols
Kristina M. Nichols, WSBA #35918
Attorney for Appellant

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON)
Plaintiff/Respondent) COA No. 31264-0-III
vs.)
)
) PROOF OF SERVICE
JERRY WAYNE CLARK, JR.)
Defendant/Appellant)
_____)

I, Kristina M. Nichols, assigned counsel for the Appellant herein, do hereby certify under penalty of perjury that on February 28, 2013, I mailed by U.S. Postal Service first class mail, postage prepaid, a true and correct copy of the Appellant's opening brief to:

Jerry W. Clark, Jr.
c/o Gloria Richardson
3809 N Jefferson St
Spokane, WA 99205-2757

Having obtained prior permission from Spokane County Prosecutor's Office, I also served Mark Lindsey at kowens@spokanecounty.org by e-filing electronic e-mail service with the same.

Dated this 28th day of February, 2013.

/s/ Kristina M. Nichols
Kristina M. Nichols, WSBA #35918
Nichols Law Firm, PLLC
PO Box 19203
Spokane, WA 99219
Phone: (509) 280-1207
Fax: (509) 299-2701
Wa.Appeals@gmail.com