

31316-6-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

NEIL A. MCGINNIS, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

STEVEN J. TUCKER
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Andrew J. Metts
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I.

ASSIGNMENTS OF ERROR

- A. The “to convict” instruction erroneously stated the jury had a “duty to return a verdict of guilty” if it found each element proven beyond a reasonable doubt.
- B. The record does not support the implied finding that Mr. McGinnis as the current or future ability to pay Legal Financial Obligations.
- C. The Judgment and Sentence contains a scrivener’s error that should be corrected.

II.

ISSUES

- A. ARE THERE ANY DECISIONS IN THE STATE OF WASHINGTON ALLOWING A JURY TO BE INSTRUCTED ON JURY NULLIFICATION?
- B. WHEN THE LEGAL FINANCIAL OBLIGATIONS (LFOs) BEING IMPOSED ON A DEFENDANT ARE MANDATORY IN NATURE, MUST THE TRIAL COURT FIND THAT THE DEFENDANT HAS THE PRESENT AND FUTURE ABILITY TO PAY?

- C. THE STATE AGREES THAT THE SCRIVENER'S ERROR REGARDING THE DATE OF THE CRIME SHOULD BE CORRECTED.

III.

STATEMENT OF THE CASE

For the purposes of this appeal only the State accepts the defendant's version of the Statement of the Case.

IV.

ARGUMENT

- A. THE TRIAL COURT DID NOT GIVE A FAULTY "TO-CONVICT" JURY INSTRUCTION.

Instructions satisfy the requirement of a fair trial when, taken as a whole, they properly inform the jury of the applicable law, are not misleading, and permit the defendant to argue his theory of the case. *State v. Thereof*, 95 Wn.2d 385, 389, 622 P.2d 1240 (1980).

At the outset, the State submits that the defendant has no grounds upon which to present his jury instruction arguments. CrR 6.15(c) requires timely and well-stated objections to jury instructions "in order that the trial court may have the opportunity to correct any error." *State v. Scott*, 110 Wn.2d 682, 685-86,

757 P.2d 492 (1988). (quoting *City of Seattle v. Rainwater*, 86 Wn.2d 567, 571, 546 P.2d 450 (1976)). In failing to object below, the defendant did not give the trial court an opportunity to correct this instructional error. Because the defendant failed to object at trial, normally he cannot raise the argument on appeal.

There is an exception to the general rule regarding raising issues for the first time on appeal. If a defendant is able to show that the error implicates a specifically identified constitutional right, and (2) the error is “manifest” in that it had “practical and identifiable consequences” in the trial below an appellate court may hear the argument. *State v. Bertrand*, 165 Wn. App. 393, 267 P.3d 511 (2011). It does not appear that the defendant has addressed the requirements of RAP 2.5.

Fortunately, the courts have rejected arguments such as are presented by the defendant in this case. In *State v. Meggyesy*, 90 Wn. App. 693, 958 P.2d 319 (1998) *abrogated on other grounds by State v. Recuenco*, 154 Wn.2d 156, 110 P.3d 188 (2005); *see also State v. Bonisisio*, 92 Wn. App. 783, 794, 964 P.2d 1222 (1998) the defendant raised arguments that (for all intents and purposes) are identical to those raised by the defendant in this case.

The court in *Meggyesy* applied the six-step analysis set forth in *Gunwall* and found no independent state constitutional basis to invalidate the challenged instructions. *Meggyesy*, 90 Wn. App. at 703–04, 958 P.2d 319; *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986).

Not surprisingly, the defendant claims that decision in *Meggyesy* is flawed and should not be given authority. Brf. Of App. 4.

Woven throughout the defendant's arguments, but never mentioned, is the concept of "jury nullification." The defendant is asking for complete chaos in the justice system which would include the overturning of nearly every jury trial in the history of the State of Washington. Such may seem an overly dramatic point, but the fact is that the defense clearly does not care about the judicial system in this State. Under the defendant's arguments, a jury would have no "duty" to convict a defendant, no matter how overwhelming the evidence. This is classic "jury nullification."

"Jury nullification" has been defined by the Washington State Supreme Court as: a juror's "knowing and deliberate rejection of the evidence or refusal to apply the law ... because the result dictated by law is contrary to the [juror's] sense of justice, morality, or fairness." *State v. Elmore*, 155 Wn.2d 758, 761 n. 1, 123 P.3d 72 (2005), (alterations in original) (*quoting* Black's Law Dictionary 875 (8th ed.2004)).

Both Division I and Division II of the Courts of Appeal have held that "jury nullification" is not a legal defense in Washington State. *State v. Meggyesy*, *supra*.

The defendant has not cited a scintilla of legal support for the idea that a defendant in Washington State is entitled to a jury instruction on “jury nullification”

Even the federal courts have come down opposed to instructions (and presumably argument) on the issue of “jury nullification”. “We must hold firmly to the doctrine that in the courts of the United States it is the duty of juries in criminal cases to take the law from the court, and apply that law to the facts as they find them to be from the evidence.” *U.S. v. Moylan*, 417 F.2d 1002 C.A.Md. (1969).

It should be noted that the defendant did not object to the giving of the standard instructions. No issue regarding “jury nullification” was raised at the trial level.

B. THE ONLY LFOs IMPOSED ON THE DEFENDANT WERE MANDATORY.

The defendant appeals the imposition of LFOs without any factual basis for the present and/or future ability to pay.

The arguments put forth by the defendant are fairly pointless. Pages 6-7 of the Judgment and Sentence show that the trial court imposed: \$500.00 victim assessment, \$200.00 court costs, and a \$100.00 DNA collection fee. The total of the ordered amounts is \$800.00.

The defendant has not explained how a lack of earning information gathered by the trial court would have any effect on the totals in the Judgment and Sentence. These fees are mandatory. It is not as if the defendant is going to be able to have any of the listed costs waived.

The only area that could have been addressed by the sentencing court would be the amount of the monthly payment. The sentencing court held the LFO payments until the defendant's appeal was decided. According to the sentencing court, if the defendant was not successful on his appeal, the trial court might order the defendant to repay the costs of his appellate attorney and the costs of preparing the transcript. RP 155-56.

The record here appears devoid of any evidence of Mr. McGinnis' financial resources. The State suggests that a proper remedy would be to affirm the imposition of LFOs, reverse the finding of present or future ability to pay, and remand to the trial court to strike the unsupported finding from the judgment and sentence.

C. THE STATE AGREES THAT THE JUDGMENT AND SENTENCE NEEDS TO HAVE A SCRIVENER'S ERROR CORRECTED TO REFLECT THE PROPERTY OF THE CRIME.

The Judgment and Sentence has the incorrect date for the date of the crime. The State agrees that the date should be moved two days in order to have the Judgment and Sentence match the original information.

V

CONCLUSION

For the reasons stated above the State asks this court to reject the defendant's attempts to inject jury nullification into the jury instructions of the State of Washington. The State also respectfully requests that the judgment of the sentencing court regarding LFOs be affirmed.

Dated this 5th day of June, 2013.

STEVEN J. TUCKER
Prosecuting Attorney

A handwritten signature in black ink, appearing to read "Andrew J. Metts", written over a horizontal line.

Andrew J. Metts #19578
Deputy Prosecuting Attorney
Attorney for Respondent