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NO. 66069-1-I

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

REC'D  
MAR 25 2011  
King County Superior  
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

NESTER OVIDIO-MEJIA,

Appellant.

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

The Honorable Laura Gene Middaugh, Judge

BRIEF OF APPELLANT

ANDREW ZINNER  
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC  
1908 E Madison Street  
Seattle, WA 98122  
(206) 623-2373

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A. ASSIGNMENT OF ERROR

Each pertinent "to-convict" instruction erroneously stated the jury had a "duty to return a guilty verdict if it found each element proven beyond a reasonable doubt." Supp. CP \_\_\_, (sub. no. 51A, King County Superior Court no. 09-1-03009-6: Court's Instructions, instructions 16, 40-42, attached as appendix).<sup>1</sup>

Issue Pertaining to Assignment of Error

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

As they did periodically, Nestor Ovidio-Mejia and Dominick Reed got together one spring morning to find and smoke marijuana. 11RP 42-

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<sup>1</sup> This Court rejected the arguments raised here in its decision in 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. Because Ovidio-Mejia must include a Gunwall analysis or risk waiver of the issue, the Meggyesy argument is included in its entirety.

45, 145-47.<sup>2</sup> With that goal in mind, they got into Reed's car and Reed drove up Seattle's Rainier Avenue. 11RP 46. After a few minutes, they came upon several police cars. Reed saw two friends standing at the scene, so he pulled over into a store parking lot to find out what was going on. 11RP 46-47, 150. Reed and Ovidio-Mejia stepped out of the car and Reed saw his close friend, Ronald Preston, being loaded into an ambulance. Preston had been shot seven times in the stomach and back. 11RP 48, 16RP 16.

Reed's friends told him Mario Spearman had arranged the shooting. Reed described Spearman as "real mean and real feisty, always want to have a conflict." 11RP 48-49. Reed was very upset and angry. He immediately called Antoine Davis and told him about Preston. 11RP 49-51, 151. Davis told Reed to meet him at Jontae Chatman's residence. Reed, Davis, and Chatman were very close friends. 11RP 49-50.

In contrast, Ovidio-Mejia was not close with Davis, Chatman, or Preston. They were not friends. Davis, Chatman and Preston simply

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<sup>2</sup> Ovidio-Mejia cites to the 20-volume verbatim report of proceedings as follows: 1RP – 6/21/10; 2RP – 6/22/10; 3RP – 6/23/10; 4RP – 6/24/10; 5RP – 6/30/10; 6RP – 7/1/10; 7RP – 7/6/10; 8RP – 7/7/10 (two sequentially paginated volumes); 9RP – 7/8/10; 10RP – 7/12/10; 11RP – 7/13/10; 12RP – 7/14/10; 13RP – 7/15/10; 14RP -- 7/19/10; 15RP – 7/20/10; 16RP -- 7/21/10; 17RP – 7/22, 26, 28/10 ; 18RP – 8/3/10; 19RP 9/24/10.

tolerated Ovidio-Mejia's presence because of his acquaintanceship with Reed. 11RP 150-51. Ovidio-Mejia did not seem to care that Preston had been shot. 11RP 150.

On the drive to Chatman's residence, Reed and Ovidio-Mejia discussed the shooting of Preston. According to Reed, Ovidio-Mejia was "laid back. He didn't really sound too hurt." 11RP 52-53. When they arrived, a group of people including Davis, Chatman, and Chatman's mother were outside. 11RP 52-55, 15RP 92-96. Reed, Davis and Chatman discussed how they had to put an end to the problems they had with Spearman. 11RP 54, 56-57. Ovidio-Mejia remained in Reed's car during the meeting between the close friends. 11RP 57, 59-60, 153-54. At some point, Ovidio-Mejia yelled out, "Let's go get some [marijuana]." 16RP 98.

But the others had a different plan. They decided to find Spearman and "get him." 11RP 60-61. Davis retrieved an AK-47 assault rifle from his girlfriend's car and put it on the rear floorboard of Reed's car. 11RP 57-59, 153. Reed, Davis, and Chatman climbed into Reed's car and headed to Pacific Highway South, because Reed had heard Spearman was pimping girls there. 11RP 61-62, 65. There was very little or no discussion on the way. 11RP 66-67, 154. Ovidio-Mejia was on the

telephone trying to find marijuana so everyone in the car could go smoke. 11RP 175. Ovidio-Mejia was armed with his .380 handgun, which Reed had seen before. 11RP 64-65, 81-82, 96, 164-70; 12RP 151; 13RP 89.

Eventually Ovidio-Mejia pointed out Spearman's car traveling the opposite way. Reed U-turned his car so they could follow Spearman. 11RP 68-70, 157-58. No one told him to do it; they wanted to "get revenge." 11RP 70. Spearman's car stopped for a red light. Reed stopped his car behind another and the three passengers hopped out. Reed heard Chatman tell Ovidio-Mejia he had his "back," and Ovidio-Mejia said yes. 11RP 73-75. Reed later backtracked, saying he was not sure Chatman said that to Ovidio-Mejia. 11RP 168. Chatman had the AK-47 but, according to Reed, Davis and Ovidio-Mejia did not have guns displayed. 11RP 75-77.<sup>3</sup> The men ran out of Reed's view, but he heard a series of gunshots. 11RP 77-78.

Several other motorists were waiting for the same red light. Gloria Harrison heard footsteps from more than one person running from behind her car, then a volley of gunfire. She did not see who was running or where the shots came from. 6RP 64-67, 93-94.

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<sup>3</sup> Chatman later admitted to police he repeatedly fired the AK-47 into Spearman's car. 13RP 105-06.

Neil Janis looked into the rear-view mirror of his mini-van and saw Chatman run from the sidewalk and raise an AK-47 to his shoulder. Another car then slammed into the rear of Janis' mini-van. 7RP 98-103, 114, 124, 126-30, 137. He then heard some shots. 7RP 101-02.

Cynthia Bowman saw Chatman advance from the sidewalk and repeatedly fire the AK-47 into Spearman's car. 7RP 141-43, 148. After that shooting began, she saw a Hispanic man with a light-colored shirt appear to do the same thing with a silver handgun. 7RP 146-47, 8RP 3-6, 23. She did not, however, specifically hear shots coming from the handgun. 8RP 3-5. Two witnesses with military experience testified all the shots sounded like they came from the same gun. 8RP 154, 183-84.

Later that night, police showed Bowman six separate photos including Ovidio-Mejia's photo, but Bowman picked a photo of someone other than Ovidio-Mejia. 7RP 154-55; 8RP 11-14; 12RP 138-40, 154-55.

Spearman's car slowly came to rest after going up on the curb to the right. 7RP 103-04, 130; 8RP 36-37. It was riddled with bullet holes, all but two of which were of a size consistent with AK 47 shells. 7RP 153-54, 12RP 45-47, 58-59. So were all the shell casings found at the scene. 10RP 47-48, 55-60, 124-34, 14RP 154-56.

Spearman had been hit numerous times and died six days after the shooting. 13RP 85, 92-97; 15RP 60-83, 86. Front seat passenger David Route was also hit. Page Sauer and her young son, who was seated in the rear, were unhurt. 7RP 70-74; 8RP 40-42, 97-99, 230-33; 10RP 25-26; 15RP 13-20; 16RP 53-54. Sauer later chose Ovidio-Mejia's photo from a montage as someone who looked familiar, but from school and not from the shooting. 12RP 146-47; 15RP 39-40.

Meanwhile, Reed had pulled his car into a business driveway and waited for the others. Chatman returned with the AK 47, and both Ovidio-Mejia and Davis had guns in their hands. 11RP 78-81. Reed drove off, and on the way Ovidio-Mejia kept playing with his handgun and saying, "My gun, my gun." 11RP 84-85. Reed had seen Ovidio-Mejia with a gun about 10 times before and was not surprised he had it. He said the gun was a black automatic. 11RP 64-65, 85, 155.

All of a sudden Ovidio-Mejia's gun fired and a bullet struck Reed in the thigh. 11RP 86. Reed drove for a while longer, but ceded the wheel to Ovidio-Mejia. During this time, Chatman and Davis got out of the car and took off. 9RP 177; 10RP 13-16; 11RP 87-89. Ovidio-Mejia drove Reed to the hospital and at Reed's urging, dropped him off there and left with Reed's car. 11RP 92-94.

One of the witnesses noted the license plate number of Reed's car and reported it to the police. 8RP 133-35. Officers quickly found the car moving down the street near Ovidio-Mejia's residence. Ovidio-Mejia pulled the car over to the shoulder and stopped of his own accord. Plainclothes police officers then jumped out and arrested Ovidio-Mejia. 9RP 129, 136-40, 157-59; 10RP 16-20. Officers found bloody clothes in the car that Reed had taken off on the way to the hospital. 9RP 144-45; 11RP 92-94.

Ovidio-Mejia told the arresting officer that Reed called him and said he had been shot. Reed picked Ovidio-Mejia up at a restaurant and Ovidio-Mejia drove Reed to the hospital. 9RP 142-44, 184-86. The officers did not ask Ovidio-Mejia about the Spearman shooting. 9RP 187.

Ovidio-Mejia later gave a taped statement to detectives at the police station. The state played the DVD of the interview and provided a transcript to jurors so they could follow along. 10RP 163-66; 14RP 13-16; Exs. 57-58. In that statement, Ovidio-Mejia maintained he knew Reed from high school and that they smoke marijuana together and nothing else. Ex. 58 at 18-19, 22. Reed called him, said he had been shot, and asked for help. Ex. 58 at 4. Ovidio-Mejia agreed to help and Reed drove up to an agreed meeting place shortly thereafter. Ex. 58 at 4-8, 25-28.

Reed hopped into the back seat of his car and Ovidio-Mejia drove to a nearby hospital. On the way he asked Reed what had happened, but Reed repeatedly said he was about to pass out and offered no details of the shooting. Ex. 58 at 4-6, 17, 19-20, 23, 33. When Ovidio-Mejia dropped Reed off at the hospital, Reed told him to park his car somewhere. Ex. 58 at 5. Ovidio-Mejia parked the car in front of his house, then decided to move it because he suspected there was trouble. He pulled the car over and was detained by several officers at gunpoint. Ex. 58 at 29-31.

A week later, Ovidio-Mejia told another detective he was armed with a .380 during the shooting. He said Reed, Chatman, and Davis wanted to find Spearman because Preston had been shot. The word on the street, Ovidio-Mejia disclosed, was that Spearman was looking for them. 13RP 89-91.

Reed was arrested at the hospital. 11RP 26-28, 98-102. Davis was arrested in Idaho three days after the shooting. 12RP 7-17. Chatman turned himself in four days after the shooting. 13RP 71-75. He later told police Spearman believed he and Preston disclosed information to police because they had witnessed a previous shooting. 13RP 103-04. Chatman also said Spearman had shot Preston before, and told Chatman he meant to

shoot him (Chatman) instead. Chatman feared Spearman, who also threatened Chatman's family and the mother of his child. 13RP 104.

Chatman said on the day of the shooting, Reed called him and told him Preston had been shot. 13RP 104. Reed said Spearman was responsible. Reed came to Chatman's residence and, according to Chatman, picked him up so they could drive around and find marijuana. When he got into Reed's car, the AK-47 was already inside. As Reed drove, they saw Spearman, who made a threat out of his car window. 13RP 105-06. Chatman grabbed the AK-47 and began shooting at Spearman. 13RP 106-08. He said he did not see anyone else in Reed's car with a weapon. 13RP 106.

Police charged each of the four occupants of Reed's car with first degree premeditated murder and three counts of attempted first degree murder. The state also alleged each offense was committed with a firearm. CP 14-25. Despite giving police a series of false statements, Reed was later offered a plea agreement. 11RP 98-114, 134-35.

Reed pleaded guilty to second degree murder and three counts of second degree assault, each while armed with a firearm. 11RP 116-19. The state agreed to recommend a 20-year sentence plus corresponding

firearm enhancements. 11RP 117-19. Reed testified against his friends in a joint trial, the substance of which is summarized above.

Police collected a store security video from a camera that captured the incident. 8RP 196-200; 10RP 77; Ex. 13. The state played the video during trial and a detective explained what appeared to be depicted. 10RP 77-80. The detective said it appeared two African-American men jumped into Reed's car after the shooting, the first of whom appeared to be holding a handgun and the second an assault rifle. 10RP 67-68, 80-81.

After the jury heard the above and more, it found Ovidio-Mejia guilty of the first degree murder of Spearman and of three counts of the lesser degree attempt to commit second degree assault. CP 70, 74, 77, 80. The jury found Ovidio-Mejia committed each offense while armed with a firearm. CP 71, 75, 78, 81. The trial court imposed consecutive standard range sentences, plus four firearm enhancements, totaling 757 months. CP 100-07.

C. ARGUMENT

THE TRIAL COURT ERRED BY INSTRUCTING THE JURY THAT IT HAD A "DUTY TO RETURN A VERDICT OF GUILTY."

As part of the "to-convict" instructions used to convict Ovidio-Mejia, the trial court instructed the jury 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 . . . .

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

Supp. CP \_\_, (sub. no. 51A, supra, instructions 16, 40-42). This is standard language from the pattern instructions. WPIC 26.02, 27.02. Ovidio-Mejia contends there is no constitutional "duty to convict" and that the instruction accordingly misstates the law. The instruction violated Ovidio-Mejia's right to a properly instructed jury.

a. 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 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.<sup>4</sup>

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<sup>4</sup> 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).

b. Washington Constitution

The drafters of our state constitution not only granted the right to a jury trial, Art. 1, § 22; they expressly declared it "shall remain inviolate." Const. art. 1, § 21.<sup>5</sup>

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 v. Fibreboard Corp., 112 Wn.2d 636, 656, 771 P.2d 711 (1989).

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 Constitutions and the Washington Declaration of Rights, 7 U. Puget Sound L. Rev. 491, 515 (1984) (Utter).

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<sup>5</sup> "The right of trial by jury shall remain inviolate . . . ."

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.<sup>6</sup> 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 this Court in Meggyesy may have been correct when it found there is no specific constitutional language that addresses this precise issue, what language there is indicates the right to a jury trial is so fundamental that any infringement violates the constitution.

c. State Constitutional and Common Law History

Washington based its Declaration of Rights on the Bills of Rights of other states, which relied on common law and not the federal constitution. This difference supports an independent reading of the Washington Constitution.

d. Preexisting state law

Since article I, section 21, "preserves the right [to jury trial] as it existed in the territory at the time of its adoption," it is helpful to look at

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<sup>6</sup> "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law."

the preexisting state law. Sofie, 112 Wn.2d at 645; Pasco, 98 Wn.2d at 96. In Leonard v. Territory, the Supreme Court reversed a murder conviction and set out in some detail the jury instructions given in the case. 2 Wash. Terr. 381, 7 Pac. 872 (1885). The language of those instructions provide a view of the law before the adoption of the Constitution:

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 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).

The courts thus acknowledged, and incorporated into the jury instructions, the threshold requirement that each element be proved beyond a reasonable doubt to permit a conviction; but any reasonable doubt required an acquittal. Because this was the law regarding the scope of the jury's authority at the time of the adoption of the Constitution, it was incorporated into Const. art. 1, § 21, and remains inviolate. Sofie, 112 Wn.2d at 656; Pasco, 98 Wn.2d at 93, 96.

The Court of Appeals attempts to distinguish Leonard on the basis that the Leonard court "simply quoted the relevant instruction. . . ." Meggyesy, 90 Wn. App. at 703. 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.

e. Differences in Federal and State Constitutions' Structure

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.

It is evident, therefore, that the "inviolable" Washington right to trial by jury was more extensive than that which was protected by the federal constitution when it was adopted in 1789. Pasco, 98 Wn.2d at 99.

f. Matters of Particular State Interest or Local Concern

Criminal law is a local matter. State v. Russell, 125 Wn.2d 24, 61, 882 P.2d 747 (1994), cert. denied, 514 U.S. 1129 (1995). There is no need for national uniformity in criminal law. Until the Fourteenth Amendment was interpreted to apply the U.S. Bill of Rights in state court proceedings, all matters of criminal procedure were considered a matter of state law.

See, e.g., Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963); State v. Gibbons, 118 Wash. 171, 203 P. 390 (1922).

g. 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); State v. Holmes, 68 Wash. 7, 12-13, 122 Pac. 345 (1912). 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.<sup>7</sup> A jury verdict of not guilty is thus non-reviewable.

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<sup>7</sup> "No person shall be . . . twice put in jeopardy for the same offense."

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.<sup>8</sup>

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

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<sup>8</sup> Ovidio-Mejia did not make this argument to the trial court. He may nevertheless raise it for the first time on appeal as an issue of constitutional magnitude. RAP 2.5(a)(3); State v. Scott, 110 Wn.2d 682, 688, 757 P.2d 492 (1988); State v. Byrd, 72 Wn. App. 774, 782, 868 P.2d 158 (1994), affirmed, 125 Wn. 2d 707, 887 P.2d 396 (1995).

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).

Washington courts have also recognized that a jury may always vote to acquit. 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).

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.

h. 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 undermined 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, 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.

The instructions given in Ovidio-Mejia's case did not contain a correct statement of the law. They provided a level of coercion for the jury

to return a guilty verdict. When the trial court instructed the jury it had a duty to return a verdict of guilty based merely on finding certain facts, the court took away from the jury its constitutional authority to apply the law to the facts to reach its general verdict. The instructions creating a "duty" to return a verdict of guilty were an incorrect statement of law and violated Ovidio-Mejia's right to a jury trial.

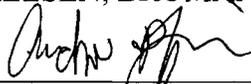
D. CONCLUSION

The trial court's "to-convict" instructions, which created a "duty" to return a verdict of guilty, incorrectly stated the law and violated Ovidio-Mejia's right to a jury trial.

DATED this 25 day of March, 2011.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



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ANDREW P. ZINNER

WSBA No. 18631

Office ID No. 91051

Attorneys for Appellant

## APPENDIX

No. 16

To convict the defendant, NESTOR OVIDIO-MEJIA, of the crime of Murder in the First Degree, as charged in Count One, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about April 7, 2009, the defendant acted with intent to cause the death of Mario Spearman;

(2) That the intent to cause the death was premeditated;

(3) That Mario Spearman died as a result of the defendant's acts; and

(4) That any of these acts occurred in the State of Washington.

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 as to Count One.

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

No. 40

To convict the defendant, NESTOR OVIDIO-MEJIA, of the crime of Attempted Murder in the Second Degree, a lesser crime of Attempted Murder in the First Degree as charged in Count Two, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about April 7, 2009, the defendant did an act that was a substantial step toward the commission of Murder in the Second Degree of David Route;

(2) That the act was done with the intent to commit Murder in the Second Degree; and

(3) That the act occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

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

No. 41

To convict the defendant, NESTOR OVIDIO-MEJIA, of the crime of Attempted Murder in the Second Degree, a lesser crime of Attempted Murder in the First Degree as charged in Count Three, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about April 7, 2009, the defendant did an act that was a substantial step toward the commission of Murder in the Second Degree of Paige Sauer;

(2) That the act was done with the intent to commit Murder in the Second Degree; and

(3) That the act occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

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

No. 42

To convict the defendant, NESTOR OVIDIO-MEJIA, of the crime of Attempted Murder in the Second Degree, a lesser crime of Attempted Murder in the First Degree as charged in Count Four, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about April 7, 2009, the defendant did an act that was a substantial step toward the commission of Murder in the Second Degree of Noah Sauer;

(2) That the act was done with the intent to commit Murder in the Second Degree; and

(3) That the act occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

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

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE**

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STATE OF WASHINGTON/DSHS,	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 66069-1-1
	)	
NESTER OVIDIO-MEJIA,	)	
	)	
Appellant.	)	

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**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 25<sup>TH</sup> DAY OF MARCH 2011, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] NESTER OVIDIO-MEJIA  
DOC NO. 343949  
CLALLAM BAY CORRECTIONS CENTER  
1830 EAGLE CREST WAY  
CLALLAM BAY, WA 99326

**SIGNED** IN SEATTLE WASHINGTON, THIS 25<sup>TH</sup> DAY OF MARCH 2011.

x *Patrick Mayovsky*