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JUN 29 2012

King County Prosecutor  
Appellate Unit

NO. 68275-0-I

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

STATE OF WASHINGTON,

Respondent,

v.

PIERCE DUBOIS

Appellant.

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

The Honorable Julie Spector, Judge

BRIEF OF APPELLANT

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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."<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<sup>2</sup>

1. Charges and verdicts

The State charged Pierce DuBois with first degree murder, based on premeditation, for the October 23, 2010 shooting death of DuBois's longtime friend Jarret Jackson. CP 1-5, 7-8. The State also alleged a

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

<sup>2</sup> The brief refers to the verbatim reports as follows: 1RP – 4/20/11; 2RP – 4/21/11; 3RP – 4/25/11; 4RP – 4/26/11; 5RP – 4/27/11; 6RP – 4/28/11; 7RP – 5/9/11; 8RP – 5/10 and 5/11/11; and 9RP – 2/3/12.

firearm enhancement as to that charge and charged DuBois with first degree unlawful possession of a firearm based on the same incident.<sup>3</sup> CP 7-8.

A jury convicted DuBois of the lesser degree crime of second degree murder based the alternatives of intentional murder and felony murder (assault). The jury also answered “yes” to the corresponding firearm allegation. Finally, the jury convicted DuBois of first degree unlawful possession of a firearm. CP 17-19, 36. DuBois was sentenced to a high-end standard range sentence of 314 months of incarceration. CP 71.

2. Trial testimony

The early morning of October 23, 2010, Officer Joseph Renick stopped a man suspected of vandalism near Twelfth Avenue South and South Jackson Street in Seattle. 4RP 44-46. While speaking with the man, Renick heard a “volley” of gunfire from somewhere nearby. 4RP 46. Renick turned his car in the direction of the shots and soon spotted a car he considered suspicious. 4RP 48. But the car was driven by an off-duty police officer, Brent Moore, who had also heard the shots. 4RP 48.

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<sup>3</sup> DuBois stipulated to a prior “serious offense.” Ex. 179; 7RP 37; RCW 9.41.040(1).

Moore gestured southward and told Renick “white shirt.” 4RP 48, 55, 137.

As Renick drove southbound on Twelfth, he saw a Cadillac Escalade with its headlights off pulling out of a parking lot. 4RP 48. Renick recognized the Escalade from a prior traffic stop; during that stop, DuBois was the driver. 4RP 48, 58, 67. Renick signaled for the Escalade to stop. As it did so, the passenger door opened and a man in a white shirt and jeans left the vehicle and ran south on Twelfth. 4RP 49.

Police arrested the driver, David Duckett. 4RP 158. Renick radioed that the passenger was last seen running west through an overgrown “green belt” between Tenth and Twelfth Avenues South. 4RP 66.<sup>4</sup> Police officers stopped DuBois when he emerged at Tenth Avenue South near South Dearborn Street.<sup>5</sup> He was wearing a white shirt and jeans. 5RP 10-11, 31.

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<sup>4</sup> Much of the incident was captured on video by the recording system of Renick’s patrol car. Ex. 8.

<sup>5</sup> Police officers were unable to find any gun the night of the incident. 6RP 141-47. A week later, county search and rescue volunteers found a rusty revolver near the base of a blackberry bush in the overgrown parcel of land between Tenth and Twelfth Avenues South and South Weller and Dearborn Streets. 5RP 145-51, 157-58; 7RP 15-18; Ex. 19. Witness estimates placed the gun at eight to 20 feet from the nearest trail through the area. 5RP 157; 7RP 16. The State’s firearm expert opined that gun fired the bullets recovered from Jackson’s body. 7RP 132-34. Very small amounts of DNA were recovered from the gun and from a sock found

Despite hearing gunshots, officers were at first unable to find any shooting victim. Eventually officers noticed Jackson on the ground near Twelfth Avenue South and South King Street. 5RP 64-65, 98. Jackson died of his wounds shortly after his arrival at Harborview. 5RP 91-92, 117.

DuBois told police officers he ran because he had outstanding warrants. Ex. 17; 5RP 35; 7RP 68; Exs. 180, 181. DuBois was riding in the Escalade with his cousin Duckett and friend Jackson. DuBois and Jackson were arguing because Jackson accused DuBois of sleeping with the mother of Jackson's children. The two got out of the vehicle, and DuBois punched Jackson, taking Jackson by surprise. After the punch, DuBois returned to the Escalade, and he and Duckett drove away without Jackson. DuBois consistently denied knowing about any shooting. 7RP 69-71, 74; Exs. 180, 181.<sup>6</sup> He also urged police officers to test his hands. 5RP 42. According to the homicide detective assigned to the case, however, Seattle police will not test suspects' hands for gunshot residue. 6RP 63-64.

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wrapped around the gun. Ex. 179; 7RP 37. DuBois stipulated he could neither be "included nor excluded" as a source of the DNA. Id.

<sup>6</sup> Although the Escalade was registered to DuBois's girlfriend, Duckett was driving because DuBois had no license. 4RP 152. Duckett testified he remained in the vehicle when DuBois and Jackson got out, and he did not pay attention to what occurred outside. 4RP 155-56.

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 Mr.

DuBois, 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. . . .

CP 36, 43. This is standard language from the pattern instructions. WPIC 27.02; WPIC 27.04; WPIC 133.02. DuBois contends there is no constitutional "duty to convict" and that the instructions therefore misstate the law. Accordingly, the instructions violated DuBois'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, 391 U.S. at 156.<sup>7</sup>

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<sup>7</sup> In Sofie v. Fibreboard Corp., the majority viewed 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.

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 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." 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." Id.

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).

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>8</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 is also protected by the due process clause of article I, section 3.

While this Court in Meggyesy<sup>9</sup> 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 the preexisting state law. Sofie, 112 Wn.2d at 645; Mace, 98 Wn.2d at 96.

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<sup>8</sup> "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law."

<sup>9</sup> 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).

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 provides 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; Mace, 98 Wn.2d at 93, 96.

This Court distinguished Leonard on the basis that the Leonard court "simply quoted the relevant instruction. . . ." Meggyesy, 90 Wn. App. at 703. This 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. Mace, 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 federal 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 Allen v. State, 192 Md.App. 625, 640-48, 995 A.2d 1013 (2010) (synthesizing over 40 years of case law and rejecting government's use of collateral estoppel to establish an element of the crime).

The constitutional protections against double jeopardy also safeguard 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>10</sup> A jury verdict of not guilty is thus non-reviewable.

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<sup>10</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>11</sup>

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<sup>11</sup> Mr. DuBois 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).

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).

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." Id. at 514.

Professor 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 DuBois'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 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 DuBois's right to a jury trial as to both counts.

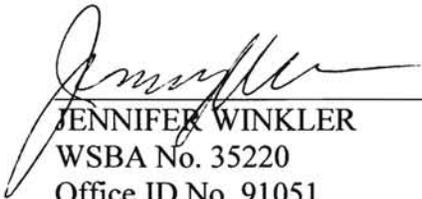
D. CONCLUSION

The trial court's "to convict" instructions, which created a "duty" to return a verdict of guilty, incorrectly stated the law and violated DuBois's right to a jury trial. Both of DuBois's convictions should be reversed.

DATED this <sup>29<sup>TH</sup></sup> day of June, 2012.

Respectfully submitted,

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

STATE OF WASHINGTON )

Respondent, )

v. )

PIERCE DUBIOS, )

Appellant. )

COA NO. 68275-0-1

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 29<sup>TH</sup> DAY OF JUNE 2012, 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] PIERCE DUBIOS  
DOC NO. 877326  
WASHINGTON STATE PENITENTIARY  
1313 N. 13<sup>TH</sup> AVENUE  
WALLA WALLA, WA 99362

**SIGNED** IN SEATTLE WASHINGTON, THIS 29<sup>TH</sup> DAY OF JUNE 2012.

x Patrick Mayovsky

FILED  
COURT OF APPEALS  
STATE OF WASHINGTON  
2012 JUN 29 PM 4:14