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JAN 15 2014

King County Prosecutor
Appellate Unit

NO. 70223-8-I

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

STATE OF WASHINGTON,

Respondent,

v.

EURAL DEBBS, SR.,

Appellant.

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

The Honorable Theresa Doyle, Judge

BRIEF OF APPELLANT

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COURT OF APPEALS
STATE OF WASHINGTON
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TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENT OF ERROR</u>	1
<u>Issue Pertaining to Assignment of Error</u>	1
B. <u>STATEMENT OF THE CASE</u>	1
C. <u>ARGUMENT</u>	2
THE TRIAL COURT ERRED IN INSTRUCTING THE JURY IT HAD A “DUTY TO RETURN A VERDICT OF GUILTY.” ...	2
1. <u>The “Duty to Convict” Instruction Violates the Right to a Jury Trial Under the United States Constitution.</u>	3
2. <u>Under a Gunwall Analysis, the Duty to Convict Instruction Violates the Greater Protection Afforded the Jury Trial Right by the Washington Constitution.</u>	4
a. <u>Textual Language and Differences from Federal Constitutional Provisions</u>	4
b. <u>State Constitutional and Common Law History</u>	6
c. <u>Preexisting State Law</u>	6
d. <u>Differences in Federal and State Constitutions’ Structure.</u> ..	7
e. <u>Matters of Particular State Interest or Local Concern</u>	8
3. <u>A Jury Should Not Be Instructed It Has a Duty to Convict Because No Such Duty Exists.</u>	8
4. <u>Meggyesy Was Wrongly Decided Because It Focused on the Proposed Remedy Rather than the Error.</u>	12
D. <u>CONCLUSION</u>	14

TABLE OF AUTHORITIES

	Page
<u>WASHINGTON CASES</u>	
<u>City of Pasco v. Mace</u> 98 Wn.2d 87, 653 P.2d 618 (1982).....	3, 6, 7, 8
<u>City of Redmond v. Moore</u> 151 Wn.2d 664, 91 P.3d 875 (2004).....	3
<u>Hartigan v. Territory</u> 1 Wash. Terr. 447 (1874).....	7
<u>Leonard v. Territory</u> 2 Wash. Terr. 381, 7 Pac. 872 (1885).....	6, 7
<u>Sofie v. Fibreboard Corp.</u> 112 Wn.2d 636, 771 P.2d 711 (1989).....	5, 6, 7
<u>State v. Bennett</u> 161 Wn.2d 303, 165 P.3d 1241 (2007).....	3
<u>State v. Black</u> 109 Wn.2d 336, 745 P.2d 12 (1987).....	5
<u>State v. Byrd</u> 72 Wn. App. 774, 868 P.2d 158 (1994) aff d, 125 Wn. 2d 707, 887 P.2d 396 (1995)	1
<u>State v. Carlson</u> 65 Wn. App. 153, 828 P.2d 30 (1992).....	12
<u>State v. Green</u> 94 Wn.2d 216, 616 P.2d 628 (1980).....	12
<u>State v. Gunwall</u> 106 Wn.2d 54, 720 P.2d 808 (1986).....	4, 8
<u>State v. Holmes</u> 68 Wash. 7, 122 Pac. 345 (1912).....	9

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>State v. Meggyesy</u> 90 Wn. App. 693, 958 P.2d 319 <u>review denied</u> , 136 Wn.2d 1028 (1998)	1, 5, 7, 8, 12
<u>State v. Primrose</u> 32 Wn. App. 1, 645 P.2d 714 (1982).....	10
<u>State v. Recuenco</u> 154 Wn.2d 156, 110 P.3d 188 (2005).....	1
<u>State v. Russell</u> 125 Wn.2d 24, 882 P.2d 747 (1994) <u>cert. denied</u> 514 U.S. 1129 (1995).....	8
<u>State v. Salazar</u> 59 Wn. App. 202, 796 P.2d 773 (1990).....	10
<u>State v. Scott</u> 110 Wn.2d 682, 757 P.2d 492 (1988).....	1
<u>State v. Wilson</u> __ Wn. App. __, 307 P.3d 823 (Slip Op filed August 15, 2013).....	1
 <u>FEDERAL CASES</u>	
<u>Duncan v. Louisiana</u> 391 U.S. 145, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968).....	3, 4
<u>Gideon v. Wainwright</u> 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963).....	8
<u>Jackson v. Virginia</u> 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979).....	12
<u>Neder v. United States</u> 527 U.S. 1, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999).....	9

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>United States v. Atkinson</u> 512 F.2d 1235 (4th Cir. 1975)	4
<u>United States v. Bejar-Matrecios\</u> 618 F.2d 81 (9th Cir. 1980)	4
<u>United States v. Garaway</u> 425 F.2d 185 (9th Cir. 1970)	4, 8
<u>United States v. Gaudin</u> 515 U.S. 506, 115 S. Ct. 2310, 132 L. Ed. 2d 444 (1995).....	9, 11
<u>United States v. Moylan</u> 417 F.2d 1002 (4th Cir. 1969)	10
<u>United States v. Powell</u> 955 F.2d 1206 (9th Cir. 1991)	10

RULES, STATUTES AND OTHER AUTHORITIES

Alschuler & Deiss <u>A Brief History of the Criminal Jury in the United States</u> 61 U. Chi. L. Rev. 867 (1994)	9
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 (1984).....	5, 6, 7
<u>The Papers of Thomas Jefferson</u> Vol. 15 (Princeton Univ. Press, 1958)	3
Utter & Pitler <u>Presenting a State Constitutional Argument: Comment on Theory, and Technique</u> 20 Ind. L. Rev. 637 (1987).....	8

TABLE OF AUTHORITIES (CONT'D)

	Page
Wigmore	
<u>A Program for the Trial of a Jury</u>	
12 Am. Jud. Soc. 166 (1929)	11, 12
Vaughan 135, 124 Eng. Rep. 1006 (1671)	9
RAP 2.5(a)(3).....	1
U.S. Const. amend. V	3, 9
U.S. Const. amend. VI	3
U.S. Const. amend. VII.....	3
U.S. Const. amend. XIV	3, 8
U.S. Const. art. III, § 2.....	3
U.S. Const. art. III, § 3.....	3
Wash. Const. art. I, § 3	5
Wash. Const. art. I, § 9	9
Wash. Const. art. I, § 21	4, 6, 7
Wash. Const. art. IV, § 16.....	5

A. ASSIGNMENT OF ERROR

The trial court erred in instructing the jury it had a "duty to return a verdict of guilty" if it found all the elements of the offense beyond a reasonable doubt.¹ CP 448 (Instruction 17) & CP 455 (Instruction 24).²

Issue Pertaining to Assignment of Error

In a criminal trial, does a "to-convict" instruction violate the right to a jury trial under the state and federal Constitutions when it 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?

B. STATEMENT OF THE CASE

Appellant Eural Debbs, Sr., was charged with second degree assault - domestic violence, felony harassment, witness tampering and two counts of misdemeanor violation of a court order - domestic violence. Supp CP __ (sub no. 219, Amended Information, 3/27/13). Debbs pled guilty to the misdemeanor charges, and proceeded to a jury trial on the

¹ This Court rejected the argument 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). Division Three of this Court also recently rejected similar arguments in State v. Wilson, 176 Wn. App. 147, 307 P.3d 823 (2013). Counsel respectfully contends Meggyesy and Wilson were incorrectly decided. Because Debbs must include a Gunwall analysis or risk waiver of the issue, the Meggyesy argument is included in its entirety.

² Debbs 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), aff'd, 125 Wn. 2d 707, 887 P.2d 396 (1995).

three felony charges. CP 320-29; 3RP 1-1142.³ The jury acquitted Debbs of the harassment charge, and found him guilty of witness tampering and fourth degree assault as a lesser included offense to the second degree assault charge. CP 423-25, 427; RP 1137-40. The court imposed standard range sentences. CP 475-84; 3RP 1153-56. Debbs appeals. CP 43-51.

C. ARGUMENT

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY IT HAD A “DUTY TO RETURN A VERDICT OF GUILTY.”

The “to-convict” instructions provided to Debbs' jury for the offenses it found Debbs guilty of state: “If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, it will be your duty to return a verdict of guilty.” CP 448 (Instruction 17) & CP 455 (Instruction 24). These instructions misstates the law. A jury always has the power to acquit, and the court never has the power to direct or coerce a verdict. While the jury need not be notified of its power to acquit despite the evidence, it is a misstatement of the law to instruct the jury this power does not exist.

Jury instructions must clearly communicate the relevant law to the jury and must not be misleading. State v. Bennett, 161 Wn.2d 303, 307, 165

³ There are ten volumes of verbatim report of proceedings referenced as follows: **1RP** - pretrial hearings for the dates of 3/29/12, 4/18/12, 7/26/12, 8/7/12, 9/13/12 & 9/25/12; **2RP** - pretrial hearing on 12/10/12; and **3RP** - eight-volume, consecutively paginated set from trial for the dates of 2/19-21/13, 2/25-27/13, 3/4-6/13 & 3/29/13 (sentencing).

P.3d 1241 (2007). Constitutional violations and jury instructions are reviewed de novo. Id. at 307; City of Redmond v. Moore, 151 Wn.2d 664, 668, 91 P.3d 875 (2004).

1. The “Duty to Convict” Instruction Violates the Right to a Jury Trial Under the United States Constitution.

The right to a jury trial is fundamental in our criminal justice system. Indeed this is the only right enumerated in both the original United States Constitution of 1789 and in the Bill of Rights. U.S. Const. art. 3, § 2, 3; U.S. Const. amend. 6; U.S. Const. amend. 7. It is 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); City of Pasco v. Mace, 98 Wn.2d 87, 94, 653 P.2d 618 (1982). 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, 269 (Princeton Univ. Press, 1958).

In addition to being a valued right afforded criminal defendants, the jury trial is 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.

While some federal courts have concluded an instruction on the duty to convict “probably” does not divest the jury entirely of its power to acquit, the courts have also warned against “language that suggests to the jury that it is obliged to return a guilty verdict.” United States v. Bejar-Matrecios, 618 F.2d 81, 85 (9th Cir. 1980) (citing United States v. Atkinson, 512 F.2d 1235 (4th Cir. 1975), and United States v. Garaway, 425 F.2d 185 (9th Cir. 1970)).

2. Under a Gunwall Analysis, the Duty to Convict Instruction Violates the Greater Protection Afforded the Jury Trial Right by the Washington Constitution.

Washington’s constitution provides greater protection than the federal constitution in some areas. State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986). Analysis of the six Gunwall factors demonstrates Washington’s constitution is substantially more protective of the jury trial right than the federal constitution.

a. Textual Language and Differences from Federal Constitutional Provisions

The Washington State Constitution goes further than the federal constitution, declaring the right to a trial by jury shall be held “inviolable.” Const. art. 1, § 21.

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).

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. (“Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law.”). 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.

b. 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. Utter, 7 U. Puget Sound L. Rev. at 497. This difference supports an independent reading of the Washington Constitution.

c. 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; Pasco, 98 Wn. 2d at 96. In Leonard v. Territory, the Supreme Court reversed a murder conviction and set out the jury instructions given in the case. Leonard v. Territory, 2 Wash. Terr. 381, 7 Pac. 872 (1885). These 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.

Id. at 399.

The court 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 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.

Pre-existing state law also recognized a jury's unrestricted power to acquit: "[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 law, either from mistake or a willful disregard of the law, there is no remedy." Hartigan v. Territory, 1 Wash. Terr. 447, 449 (1874).

The Meggyesy court disregarded Leonard on the basis that Leonard "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 instructions from Leonard demonstrate the pre-existing law at the time of the adoption of the Washington Constitution did not require a finding of guilt.

d. 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. The Meggyesy court acknowledged this factor nearly always weighs in favor of independent interpretation of the state constitution. 90 Wn. App. at 703.

e. 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 United States 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). This factor also weighs in favor of an independent state constitutional analysis. The Gunwall factors show the “inviolable” Washington right to jury trial was more extensive than the jury trial right protected by the federal constitution when it was adopted in 1789. Pasco, 98 Wn.2d at 99.

3. A Jury Should Not Be Instructed It Has a Duty to Convict Because No Such Duty Exists.

The court has no power to compel or direct a jury to return a specific verdict. Garaway, 425 F.2d 185 (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. A jury verdict of not guilty is thus not reviewable.

Also well established is "the principle of noncoercion of jurors," established in Bushell's Case, Vaughan 135, 124 Eng. Rep. 1006 (1671). Edward Bushell was a juror in the prosecution of William Penn for unlawful assembly and disturbing the peace. When the jury refused to convict, the court fined the jurors for disregarding the evidence and the court's instructions. Bushell was imprisoned for refusing to pay the fine. In issuing a writ of habeas corpus for his release, Chief Justice Vaughan declared that judges could neither punish nor threaten to punish jurors for their verdicts. See generally Alschuler & Deiss, A Brief History of the Criminal Jury in the United States, 61 U. Chi. L. Rev. 867, 912-13 (1994).

If there is no ability to review a jury verdict of acquittal, no authority to direct a guilty verdict, and no authority to coerce a jury in its decision, there can be no “duty to return a verdict of guilty.” Indeed, there is no authority in law that suggests such a duty.

We recognize, as appellants urge, the undisputed power of the jury to acquit, even if its verdict is contrary to the law as given by the judge and contrary to the evidence. . . . If the jury feels that the law under which the defendant is accused is unjust, or that exigent circumstances justified the actions of the accused, or for any reason 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).

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 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 it has a duty to return a verdict of guilty if it finds certain facts to be proved.

Although a jury may not 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 mere fact-finding. 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.

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.

Wigmore, A Program for the Trial of a Jury, 12 Am. Jud. Soc. 166 (1929).

Furthermore, if such a “duty” to convict exists, it cannot be enforced. 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 (1992). The “duty” to return a verdict of not guilty is genuine and enforceable by law.

But a more accurate description of the jury’s role in a guilty verdict is to say that a legal “threshold” exists before a jury may convict, not that a jury has a duty to convict. A guilty verdict in a case that does not meet this evidentiary threshold is contrary to law and will be reversed. 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.

4. Meggyesy Was Wrongly Decided Because It Focused on the Proposed Remedy Rather than the Error.

The Meggyesy court did not dispute that the court has no power to direct a guilty verdict in a criminal trial. 90 Wn. App. at 699. Instead it

focused on the remedy proposed by the appellant in that case, namely, an instruction that the jury “may” convict if it finds all the elements of the charged offense beyond a reasonable doubt. The Meggyesy court rejected this remedy, interpreting it as informing the jury of its power to nullify or acquit despite the evidence. Id. The Court concluded there was no right to have the jury so instructed. Id. at 699-700.

But a deficiency in the proposed remedy neither resolves nor eliminates the problem. The jury has no “duty” to convict, and, therefore, it is misleading to say that it does. This problem can be remedied without implicitly informing the jury of its power to nullify with the permissive “may.” For example, the jury could be accurately instructed regarding the threshold necessary to return a guilty verdict as follows: 'In order to return a verdict of guilty, you must unanimously find from the evidence that each of these elements has been proved beyond a reasonable doubt.' This puts the duty in its proper place.

The instructions given here, however, provided a measure of coercion for the jury to return guilty verdicts. When the trial court told the jury it had a *duty* to return a guilty verdict based merely on finding certain facts, the court took from the jury its constitutional authority to apply the law to the facts to reach a general verdict. The instructions were an incorrect statement of law and violated Debbs' right to a jury trial.

D. CONCLUSION

Debbs' judgment and sentences for fourth degree assault and witness tampering should be reversed because of the erroneous to-convict instructions associated with those offenses.

DATED this _____ day of January 2014.

Respectfully submitted,

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	COA NO. 70223-8-1
)	
EURAL DEBBS, SR.,)	
)	
Appellant.)	

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 15TH DAY OF JANUARY, 2014 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] EURAL DEBBS, SR.
C/O DOROTHY BROOKINGS
7309 POCKET ROAD
SACRAMENTO, CA 95831

SIGNED IN SEATTLE WASHINGTON, THIS 15TH DAY OF JANUARY, 2014.

X *Patrick Mayovsky*