

No. 44267-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

MIKHAIL MIKERIN,

Appellant.

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

The Honorable Lisa L. Sutton, Judge

BRIEF OF RESPONDENT

Carol La Verne
Attorney for Respondent

2000 Lakeridge Drive S.W.
Olympia, Washington 98502
(360) 786-5540

TABLE OF CONTENTS

A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR..... 1

B. STATEMENT OF THE CASE..... 1

C. ARGUMENT..... 1

D. CONCLUSION 6

TABLE OF AUTHORITIES

U.S. Supreme Court Decisions

<u>Strickland v. Washington</u> , 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).....	5
--	---

Washington Supreme Court Decisions

<u>Cox v. Spangler</u> , 141 Wn.2d. 431, 5 P.3d 1265, 22 P.3d 791 (2000).....	2
--	---

<u>Leonard v. Territory</u> , 2 Wash Terr. 381, 7 P. 872 (Wash. Terr. 1885).....	1, 2
---	------

<u>State v. Bashaw</u> , 169 Wn.2d 133, 234 P.3d 195 (2010).....	6
---	---

<u>State v. Nunez</u> , 174 Wn.2d 707, 285 P.3d 21 (2012).....	6
---	---

<u>State v. Recuenco</u> , 154 Wn.2d 156, 110 P.3d 188 (2005).....	2
---	---

Decisions Of The Court Of Appeals

<u>State v. Bonisisio</u> , 92 Wn. App. 783, 964 P.2d 1222 (1998).....	3, 4
---	------

<u>State v. Brown</u> , 130 Wn. App. 767, 124 P.3d 663 (2005).....	3, 4
---	------

<u>State v. Davis</u> , No. 41357-4-II (April 30, 2013)	4
--	---

<u>State v. Donery</u> , 131 Wn.App. 667, 128 P.3d 1262 (2006).....	2
--	---

<u>State v. Meggyesy</u> , 90 Wn. App. 693, 958 P.2d 319 (1998).....	2, 4
---	------

Other Authorities

<u>Farina v. United States</u> , 622 A.2d 50, 60-61 (D. C. App. 1993).....	5
<u>Kuenzel v. State</u> , 577 So.2d 474, 517 (Ala. Crim. App. 1990), <i>aff'd. sub nom Ex Parte</i> <u>Kuenzel</u> , 577 So. 2d 531 (Ala. 1991)	5
<u>Patterson v. State</u> , 45 Ala. App. 229, 228 So.2d 843, 849 (1969).....	5

A. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Whether Mikerin was denied his constitutional right to a jury trial when the “to-convict” instruction told the jury that it had a duty to return a verdict of guilty if it found each element was proved beyond a reasonable doubt.

B. STATEMENT OF THE CASE.

The State accepts Mikerin’s statement of the substantive and procedural facts of the case.

C. ARGUMENT.

Mikerin was not denied his constitutional right to a jury trial where the court gave instructions which correctly stated the law.

Mikerin’s sole claim in this appeal is that the court instructed the jury that if it found that all of the elements of the charged crime had been proven beyond a reasonable doubt, it had a duty to return a verdict of guilty. CP 55, 58. He offers an argument based on a Washington Territorial case, Leonard v. Territory, 2 Wash Terr. 381, 7 P. 872 (Wash. Terr. 1885), in which the court instructed the jury that it had a mandatory duty to acquit if the State failed to prove its case but no such duty to convict if it found the elements of the charge had been proven. Id. at 398-99.

Jury instructions are reviewed *de novo*. Instructions suffice when, “they allow counsel to argue their theories of the case, do not mislead the jury, and when taken as a whole, properly inform the jury of the law to be applied.” State v. Donery, 131 Wn.App. 667, 674, 128 P.3d 1262 (2006). If, however, a jury instruction contains an erroneous statement of the applicable law, then that instruction is reversible error when it prejudices a party. Id. (citing Cox v. Spangler, 141 Wn.2d. 431, 442, 5 P.3d 1265, 22 P.3d 791 (2000)).

The Washington cases which have addressed similar claims have uniformly rejected them, and Mikerin has offered no new authority or reasoning to change that result. In State v. Meggyesy, 90 Wn. App. 693, 958 P.2d 319 (1998) (*overruled on other grounds*, State v. Recuenco, 154 Wn.2d 156, 162, 110 P.3d 188 (2005)), the appellants also cited to Leonard to make the identical argument Mikerin makes in this case. Id. at 702-03. Mikerin attempts to distinguish his argument from Meggyesy’s, Appellant’s Opening Brief at 18, but they are in fact the same arguments. “The appellants are in effect asking the court to require an instruction notifying the jury of its power to acquit against the evidence.” Meggyesy, 90 Wn. App. at 699. “We discern no difference in practical effect between the instruction appellants requested and

one expressly permitting 'jury nullification,' as those words are generally understood." Id. at 699-700. The court further pointed to article IV, section 16 of the Washington Constitution, which provides in part, "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." The judge, not the jury, determines what the law is. The court found that to be inconsistent with an instruction that tells the jury it may acquit even if the State has met its burden of proof.

The Court of Appeals addressed a similar argument in State v. Bonisisio, 92 Wn. App. 783, 964 P.2d 1222 (1998). That court said:

We agree with the reasoning in *Meggyesy* that such an instruction is equivalent to notifying the jury of its power to acquit against the evidence and that a defendant is not entitled to a jury nullification instruction.

Bonisisio, 92 Wn. App. at 794.

In State v. Brown, 130 Wn. App. 767, 124 P.3d 663 (2005), Brown argued that the language of the "to convict" instruction which tells the jury it has a duty to convict if it finds the charges proven beyond a reasonable doubt affirmatively misleads a jury. The Brown court found no difference between his argument and those in Meggyesy and Bonisisio. "[T]he purpose of a jury instruction is to

provide the jury with the applicable law to be applied. . . .The power of jury nullification is not an applicable law. . . “ Brown, 130 Wn. App. at 771 (internal cites omitted).

This court has recently addressed an identical claim in State v. Davis, No. 41357-4-II (April 30, 2013). Davis claimed that his right to a jury trial was violated because the court failed to instruct the jury that it had the power to nullify the law. “We unequivocally rejected Davis’s argument in *State v. Brown* . . . “ Davis, slip. op. at 15.

Recognizing that Mikerin is basing his argument on Washington authorities,¹ Washington is not the only jurisdiction to refuse a jury nullification instruction.

In a very real sense, a jury does have the “duty” to convict the accused of the offense charged in the indictment. . . .”A jury is not empowered to waive the law or any of its rules—its only power is to take the law of the case as given by the trial judge and apply it to the facts as developed in the trial. Out of this process comes the verdict.

Kuenzel v. State, 577 So.2d 474, 517 (Ala. Crim. App. 1990), *aff’d*.
sub nom Ex Parte Kuenzel, 577 So. 2d 531 (Ala. 1991) (citing

¹ The court in Meggysey concluded that with respect to this issue, there is no independent state constitutional basis on which to decide. Meggysey, 90 Wn. App. at 703-04.

Patterson v. State, 45 Ala. App. 229, 236, 228 So.2d 843, 849 (1969)).

Courts have held that while the jury has the power to ignore the law in order to find a defendant not guilty, that power is to be used sparingly and courts will not inform the jury of that option. While acknowledging that “no doubt juries sometimes act out of compassion and in disregard of the law,” this court has concluded that it “will not place upon such conduct by juries the stamp of judicial approval through instruction from the court.”

Farina v. United States, 622 A.2d 50, 60-61 (D. C. App. 1993).

Although the court was addressing the question of prejudice following ineffective assistance of counsel, in Strickland v. Washington the court said: “An assessment of the likelihood of a result more favorable to the defendant must exclude the possibility of arbitrariness, whimsy, caprice, “nullification,” and the like. *A defendant has no entitlement to the luck of a lawless decisionmaker, even if a lawless decision cannot be reviewed.*” Strickland v. Washington, 466 U.S. 668, 695, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) (emphasis added).

Mikerin refers to WPIC 160.00, which tells a jury it need not be unanimous to answer “no” in a special verdict, to support his argument that the jury has no duty to return a verdict of guilty. Appellant’s Opening Brief at 14-15. First, that instruction does not

inform a jury it can answer “no” if it finds that the State has proven the special allegation. More to the point, however, that instruction as set forth in Appellant’s Opening Brief has been disapproved in State v. Nunez, 174 Wn.2d 707, 285 P.3d 21 (2012). The WPIC to which he cites is a 2011 amendment conforming to the holding in State v. Bashaw, 169 Wn.2d 133, 234 P.3d 195 (2010). That holding was overruled in Nunez, 174 Wn.2d at 719, and thus the instruction is no longer correct.

The above-cited authorities have consistently held that the instruction given in Mikerin’s case was not error. If there is no error, Mikerin has not been denied his right to a jury trial.

Finally, informing a jury it could ignore the law would fundamentally change the constitutional structure of our laws. If a jury is free to disregard the law, equal protection of the law is impossible. This court should reject that Mikerin’s claim.

D. CONCLUSION.

Based upon the foregoing arguments and authorities, the State respectfully asks this court to affirm Mikerin’s conviction

Respectfully submitted this 27th day of June, 2013.



Carol La Verne, WSBA# 19229
Attorney for Respondent

CERTIFICATE OF SERVICE

I certify that I served a copy of Respondent's Brief, on the date below as follows:

Electronically filed at Division II

TO: DAVID C. PONZOHA, CLERK
COURTS OF APPEALS DIVISION II
950 BROADWAY, SUITE 300
TACOMA, WA 98402-4454

--AND--

MAUREEN M. CYR, ATTORNEY FOR APPELLANT
MAUREEN@WASHAPP.ORG

I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 27th day of June, 2013, at Olympia, Washington.


Chong McAfee

THURSTON COUNTY PROSECUTOR

June 27, 2013 - 3:50 PM

Transmittal Letter

Document Uploaded: 442671-Respondent's Brief.pdf

Case Name: STATE V. MIKHAIL MIKERIN

Court of Appeals Case Number: 44267-1

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

Brief: Respondent's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Chong H McAfee - Email: mcafeec@co.thurston.wa.us

A copy of this document has been emailed to the following addresses:
maureen@washapp.org