93430.4

No. 33109-1-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent/Cross-Appellant,

v.

MARIA HERNANDEZ-MARTINEZ,

Appellant/Cross-Respondent.

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

The Honorable John D. Knodell

BRIEF OF CROSS-RESPONDENT

THOMAS M. KUMMEROW
Attorney for Appellant/Cross-Respondent

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711
tom@washapp.org

TABLE OF CONTENTS

TABLE OF AUTHORITIES

A. ISSUES ON CROSS-APPEAL

1. Since the trial court dismissed the perjury count for a failure of the State to prove all of the elements of the offense, does double jeopardy bar the State from appealing the issue, thus requiring this Court to dismiss the State's cross-appeal?

2. Assuming, arguendo, the State can appeal the trial court's judgment of acquittal, since the State has conceded the issue is moot, should this Court accept the State's concession and refuse to address the issue and dismiss the cross-appeal?

3. Assuming, arguendo, the State can appeal the trial court's judgment of acquittal, since the issue is moot, has the State failed to show that the question it presents is a question of continuing and substantial public interest where the State fails to show the error, if any, has occurred anywhere else, or even in its jurisdiction, or will reoccur in light of the fact it is barred by double jeopardy?

B. STATEMENT OF FACTS RELATING TO COURT'S ACQUITTAL OF THE PERJURY COUNT

Among the other offenses the State charged Mr. Hernandez-Martinez with committing, it charged one count of second degree perjury. CP 1. At the conclusion of the evidence, the trial court dismissed the perjury charge for a lack of sufficient evidence. RP 453-56.

The State filed a cross-appeal, appealing the trial court's acquittal of Ms. Hernandez-Martinez.

C. ARGUMENT

The State is barred from appealing an acquittal for insufficient evidence and the State's cross-appeal must be dismissed.

1. *Double jeopardy bars any appeal by the State of a judgment of acquittal.*

The double jeopardy clause of the United States Constitution guarantees that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb". U.S. Const. amend. V. The Fifth Amendment applies to the states through the Fourteenth Amendment. *Benton v. Maryland,* 395 U.S. 784, 794, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969). The double jeopardy clause of the Washington State

Constitution guarantees that "No person shall ... be twice put in jeopardy for the same offense." Const. art. I, § 9.

The double jeopardy doctrine protects a criminal defendant from being (1) prosecuted a second time for the same offense after acquittal, (2) prosecuted a second time for the same offense after conviction, and (3) punished multiple times for the same offense. *Brown v. Ohio,* 432 U.S. 161, 165, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977); *North Carolina v. Pearce,* 395 U.S. 711, 717, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), *overruled on other grounds by, Alabama v. Smith,* 490 U.S. 794, 109 S.Ct. 2201, 104 L.Ed.2d 865 (1989); *State v. Graham,* 153 Wn.2d 400, 404, 103 P.3d 1238 (2005). The protection against double jeopardy attaches when "some event, such as an acquittal, ... terminates the original jeopardy." *Richardson v. United States,* 468 U.S. 317, 325, 104 S.Ct. 3081, 82 L.Ed.2d 242 (1984).

The public interest in the finality of criminal judgments is so strong that an acquitted defendant may not be retried even though "the acquittal was based upon an egregiously erroneous foundation." *Fong Foo v. United States*, 369 U.S. 141, 143, 82 S.Ct. 671, 7 L.Ed.2d 629 (1962).

The State concedes that a retrial for the perjury charge is barred by double jeopardy. Brief of Cross-Appellant at 18-19. This Court should accept the State's well-taken concession and refuse to address its cross-appeal.

In attempting to get around the double jeopardy bar, the State couches its argument in an appeal of the procedure the trial court used in acquitting Ms. Hernandez-Martinez of perjury. Brief of Cross-Appellant at 19.

> (W)e have emphasized that what constitutes an "acquittal" is not to be controlled by the form of the judge's action. . . . (but) whether the ruling of the judge, whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged.

United States v. Martin Linen Supply Co., 430 U.S. 564, 571, 97 S.Ct. 1349, 51 L.Ed.2d 642 (1977).

Thus, the United States Supreme Court has flatly rejected the State's argument. It matters not how the trial court came to its conclusion, it only matters that the trial court acquitted Ms. Hernandez-Martinez. The State cannot appeal the acquittal and the cross-appeal must be dismissed.

2. *Assuming, arguendo, that the State can appeal a judgment of acquittal, this matter is moot and should be dismissed.*

As a general rule, appellate courts do not consider cases that are moot or present only abstract questions. *State v. Hunley,* 175 Wn.2d 901, 907, 287 P.3d 584 (2012); *Sorenson v. City of Bellingham,* 80 Wn.2d 547, 558, 496 P.2d 512 (1972). A case is moot if the court can no longer provide effective relief. *Hunley,* 175 Wn.2d at 907. Mootness is a jurisdictional. *State v. Deskins,* 180 Wn.2d 68, 80, 322 P.3d 780 (2014). When an appeal is moot, it should be dismissed. *Sorenson,* 80 Wn.2d at 558.

The State has conceded the issue is moot. This Court should accept the State's well-taken concession and dismiss the State's cross-appeal.

3. *Assuming, arguendo, the State can appeal a judgment of acquittal, the State has not shown that the public importance exception to the mootness doctrine applies.*

Even if a case becomes moot, the appellate court has the discretion to decide an issue on appeal if the question is one of continuing and substantial public interest. *Sorenson,* 80 Wn.2d at 558; *Grays Harbor Paper Co. v. Grays Harbor County,* 74 Wn.2d 70, 73, 442 P.2d 967 (1968). This exception to the mootness rule applies only where the *real merits* of the controversy are unsettled and a continuing

question of *great* public importance exists. *Grays Harbor Paper Co,* 74 Wn.2d at 73.

Courts apply the following factors to determine whether a moot issue warrants review: "(1) whether the issue is of a public or private nature, (2) whether an authoritative determination is desirable to provide future guidance to public officers, and (3) whether the issue is likely to recur." *State v. Veazie,* 123 Wn.App. 392, 397, 98 P.3d 100 (2004).

Other than a blanket statement without any support, the State makes no attempt to show that this issue will reoccur or whether it is an issue at all. Anecdotally, counsel has been practicing for 21 years in all three divisions of the Court of Appeals and the Supreme Court of Washington and has never seen this issue arise. The reason this issue will not reoccur, and why it has not arisen before, is it is barred by the Double Jeopardy Clauses of the United States and Washington Constitutions. Once again, it matters not how the trial court, or a jury, comes to its conclusion regarding the acquittal of the charged offense, the fact of the acquittal is all that matters.

In light of the double jeopardy bar to the State's appeal, this Court should dismiss the cross-appeal.

D. CONCLUSION

For the reasons stated, this Court should dismiss the State's cross-appeal.

DATED this 5th day of February 2016.

Respectfully submitted,

s/Thomas M. Kummerow

THOMAS M. KUMMEROW (WSBA 21518)
Washington Appellate Project – 91052
1511 Third Avenue, Suite 701
Seattle, WA. 98101
(206) 587-2711
Fax (206) 587-2710
tom@washapp.org

Attorneys for Appellant/Cross-Respondent