No. 93430-4
COA No. 33109-1-III

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner/Cross-Respondent,

v.

MARIA HERNANDEZ MARTINEZ,

Respondent/Cross-Petitioner.

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

The Honorable John D. Knodell

ANSWER TO STATE'S PETITION FOR REVIEW
CROSS PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Maria Hernandez Martinez asks this Court to deny the State's petition for review and accept her petition for review of the Court of Appeals decision terminating review designated in part B of this petition.

B. COURT OF APPEALS DECISION

Pursuant to RAP 13.4(b), petitioner seeks review of the unpublished Court of Appeals decision in *State v. Maria Hernandez Martinez*, No. 33109-1-III (June 21, 2016). A copy of the decision is in the Appendix.

C. ISSUES PRESENTED IN STATE'S PETITION FOR REVIEW

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?

2. Assuming, arguendo, the State can appeal the trial court's judgment of acquittal, since the issue is moot, should this Court refuse to address the issue and deny the petition?

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?

D. ISSUES PRESENTED IN CROSS-PETITION

1. Due process requires the State to prove every element of the charged offense. Ms. Hernandez-Martinez was charged with first degree arson which required the State to prove she started the fire. Is a significant question of law under the United States and Washington Constitutions presented where the State failed to provide any evidence linking Ms. Hernandez-Martinez to the fire, thus entitling her to reversal of the arson conviction with instructions to dismiss?

2. The Washington Constitution requires that a jury be unanimous regarding the alternative means of committing an offense. Arson has several alternative means of which two were charged. The trial court failed to instruct the jury it had to be unanimous regarding the alternative means of committing arson. Is a significant question of law under the United States and Washington Constitutions presented entitling Ms. to reversal of the arson conviction for a failure of jury unanimity?

3. Evidence that is not relevant is not admissible. Even otherwise admissible evidence is inadmissible if its prejudicial impact outweighs its probative value. Here, over repeated defense objections, the State was allowed to admit a photograph of a gas can discovered three weeks after the fire near Ms. Hernandez-Martinez's residence. The State failed to link this can to the fire or otherwise show why the photograph was relevant except to suggest to the jury without a foundation that it was used in starting the fire. Is a substantial issue of public interest involved where the trial court erred in admitted this irrelevant evidence whose sole purpose was to allow the jury to improperly speculate that the can was used in starting the fire?

E. STATEMENT OF THE CASE

In the morning of August 29, 2012, a fire occurred at Maria Hernandez-Martinez's residence in Moses Lake. RP 288. At the time of the fire, Ms. Hernandez-Martinez and her children had left the residence at 6:30 in the morning and were on their way to Spokane for a doctor's appointment. RP 353.

Grant County Fire Marshall Bruce Gribble went to Ms. Hernandez-Martinez's residence shortly after the fire was extinguished. RP 290. When he entered the residence, Gribble did not smell any odor

of gasoline or other accelerants. RP 303. Gribble also did not observe any televisions in the residence. RP 302. His initial evaluation was that the fire appeared to have started in the south side of the trailer near a window and air conditioner. RP 293. Gribble also noted that records showed a fire had occurred at Ms. Hernandez-Martinez's residence in the same location in May 2009. RP 306.

Ms. Hernandez-Martinez made a claim with her insurance company, Foremost Insurance, which was owned by Farmer's Insurance. RP 251. In the claim she included two televisions and $3,800 in cash. RP 253-54. The insurance claims adjuster assigned to investigate the claim, Jonathon Hull, met with Ms. Hernandez-Martinez at her residence in September 2012. RP 251. Hull noted the effective date of Ms. Hernandez-Martinez's policy was August 9, 2012. RP 252. Ms. Hernandez-Martinez told Hull the money was on a sofa. RP 253-54.

Farmer's Investigator Craig Harris spoke to Ms. Hernandez-Martinez on August 29, 2012. RP 265. Ms. Hernandez-Martinez told Harris that she lived at the residence with her three children. RP 277. She said she received $660 per month in income and her monthly mortgage payment on the trailer was $500 per month. Ms. Hernandez-

Martinez again related that two televisions were damaged in the fire and that she had lost $3800 in cash as well. RP 279. According to Ms. Hernandez-Martinez, the money was in a leather purse that was on a sofa. RP 279.

Barry Kerth, a private fire investigator retained by Farmer's Insurance inspected the trailer on September 3, 2012. RP 153. He returned for a second time on September 8, 2012, for further investigation. RP 158. During his first inspection, Kerth did not observe any televisions in the trailer. RP 158. The televisions were present during his second inspection of September 8. RP 158. Kerth did not recall seeing a gas can at the scene. RP 160. Kerth inspected the sofas in the trailer and did not find any evidence of cash. RP 167. Kerth traced the origin of the fire to a point behind one of the sofas near a window. RP 171. Kerth stated that when he first moved this sofa to investigate further, he did not smell anything. RP 174. As he began to dig around in the fire debris, he began to smell a strong odor of an accelerant. RP 174-75.

Following Kerth's discovery of the smell of an accelerant, Eileen Porter, the handler of an accelerant detection dog, was sent by Farmer's Insurance to Ms. Hernandez-Martinez's residence. RP 208.

During her sweep of the residence, the dog alerted four times to the presence of an accelerant; three alerts outside the window near the sofa and air conditioner, and once inside the same window. RP 210. Ms. Porter took samples from this area and sent it to a private laboratory for testing. RP 211. This testing revealed the presence of automobile gasoline. RP 240-44. Ms. Porter also saw a gas can about 50 feet from the trailer. RP 229. Ms. Porter did not collect the gas can, but she took a photograph of it. RP 229.

On September 25, 2012, Ms. Hernandez-Martinez was interviewed by Grant County Sheriff's Deputy Jon Melvin along with Fire Marshall Gribble. RP 345-47. During this interview, Ms. Hernandez-Martinez reiterated that two televisions were damaged and $3800 in cash was lost in the fire. RP 355.

Ms. Hernandez-Martinez was subsequently charged with first degree arson, based upon the alternative means of damaging a dwelling and intent to collect insurance proceeds on a property valued at $10,000 or more; second degree perjury, and filing a false insurance claim in excess of $1,500. CP 52-55. At trial, over repeated defense objections on relevancy and prejudice grounds, the trial court admitted the photograph of the unrelated gas can

At the completion of the jury trial, Ms. Hernandez-Martinez was convicted of first degree arson, filing a false insurance claim, and the lesser included offense of making a false or misleading statement to a public servant. CP 105-07. Further, the State also charged Mr. Hernandez-Martinez with one count of second degree perjury that, at the conclusion of the evidence, the trial court dismissed for a lack of sufficient evidence. CP 1; RP 453-56.

On appeal, the Court of Appeals rejected Ms. Hernandez Martinez's challenges to her convictions, and ruled the State could not appeal the dismissal of the perjury count pursuant to RAP 2.2(b)(1) and on double jeopardy grounds.

F. ARGUMENT ON WHY STATE'S PETITION SHOULD BE DENIED

The State is barred from appealing an acquittal for insufficient evidence.

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 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).

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. No matter what the State wishes to call it, the State is still attempting to appeal an acquittal, which necessarily violates double jeopardy and RAP 2.2(b)(1).

> (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.

Under RAP 2.2(b), the State may only appeal in limited circumstances. One authoritative bar of the State's right to appeal is where the appeal would place the defendant in double jeopardy. RAP 2.2(b)(1). That is precisely the case here and the Court of Appeals recognized that fact in dismissing the State's cross-appeal. Decision at 15-16. This Court should agree and deny the State's petition.

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

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 issue is moot. Since the trial court acquitted Ms. Hernandez Martinez of the perjury count, there is no relief that the State can gain, thus the issue is moot.

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 this Court 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 deny the State's petition for review.

G. ARGUMENT ON WHY THE CROSS-PETITION SHOULD BE GRANTED

1. **There was not sufficient evidence that Ms. Hernandez-Martinez was responsible for the fire.**

a. *The State bears the burden of proving each of the essential elements of the charged offense beyond a reasonable doubt.*

The State is required to prove each element of the crime charged beyond a reasonable doubt. U.S. Const. amend XIV; *Apprendi v. New Jersey,* 530 U.S. 466, 471, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). The standard the reviewing court uses in analyzing a claim of insufficiency of the evidence is "[w]hether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

b. *The State failed to prove Ms. Hernandez-Martinez had anything to do with the arson.*

While the State arguably proved the fire in Ms. Hernandez-Martinez's residence was intentionally set, the State failed to prove she had anything to do with the fire, either as a principal or accomplice.

Accordingly, Ms. Hernandez-Martinez is entitled to reversal of her conviction for arson.

To prove first degree arson, the State was required to prove Ms. Hernandez-Martinez knowingly and maliciously caused a fire or explosion which damaged a dwelling, or knowingly and maliciously causing a fire or explosion on property valued at ten thousand dollars or more with intent to collect insurance. RCW 9A.48.020(1)(b), (d).

The State produced no physical evidence that Ms. Hernandez-Martinez started the fire, thus the entire case was based on what the State correctly characterized as circumstantial evidence. At the time of the fire, Ms. Hernandez-Martinez and her children were in their car on the way to Spokane.

The State relied upon several facts which it claimed showed Ms. Hernandez-Martinez was responsible for the fire but which do not support the State's claim. The State relied upon the fact that Ms. Hernandez-Martinez had just purchased the insurance which proved nothing. The State also relied upon the fact Ms. Hernandez-Martinez had a fire in her residence a few years prior. But the State had candidly admitted that it knew nothing about this fire, how it started or how

much damage was caused, but still wanted the jury to speculate that this fire was also arson despite a complete lack of evidence of this fact.

Finally, the State relied upon Ms. Hernandez-Martinez's insurance claims in this matter to support its theory that she started the fire. Once again, all this evidence proves is that Ms. Hernandez-Martinez took advantage of the fire, it did nothing to prove she had any involvement in starting it.

The only thing the State proved at trial was that the fire was arson, period. The State completely failed to prove who was responsible for its ignition. Accordingly, the State failed in its burden of proving Ms. Hernandez-Martinez responsible for the fire.

c. The failure to instruct the jury on unanimity was error.

The trial court failed to instruct the jury on jury unanimity of the alternative means of committing arson. The first degree arson statute has long been recognized to specify alternative means by which a person may commit the crime. *State v. Flowers,* 30 Wn.App. 718, 722-23, 637 P.2d 1009 (1981), *review denied,* 97 Wn.2d 1024 (1982). In an alternative means case, where a single offense may be committed in more than one way, there must be jury unanimity as to guilt for the crime charged. Unanimity is not required, however, as to the means by

which the crime was committed *so long as* substantial evidence supports each alternative means. *State v. Whitney,* 108 Wn.2d 506, 739 P.2d 1150 (1987).

In light of Ms. Hernandez-Martinez's argument regarding the sufficiency of the evidence, the failure to instruct on unanimity provided an additional argument for reversal of the arson count.

This Court should grant review and reverse the arson conviction.

2. **The error in admitting a photograph of an unrelated and irrelevant gas can which the prosecutor subsequently took advantage of prejudiced Ms. Hernandez-Martinez and required reversal of the arson count.**

    a. *The admission of irrelevant evidence violates the due process right to a fair trial.*

Erroneous evidentiary rulings violate due process by depriving the defendant of a fundamentally fair trial. U.S. Const. amend. XIV; *Estelle v. McGuire,* 502 U.S. 62, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991); *Pulley v. Harris*, 465 U.S. 37, 41, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984). Generally, the mere failure to comply with state evidentiary rules does not violate due process. *Jammal v. Van de Kamp*, 926 F.2d 918, 919-20 (9th Cir. 1991). But, mere compliance with state evidentiary and procedural rules does not *guarantee* compliance with

the requirements of due process. *Id.*, *citing Perry v. Rushen*, 713 F.2d 1447, 1453 (9th Cir. 1983), *cert. denied*, 469 U.S. 838 (1984). Due process *is* violated where the admission of evidence was arbitrary or so prejudicial that it rendered the trial fundamentally unfair. *Walters v. Maass*, 45 F.3d 1355, 1357 (9th Cir. 1995); *Colley v. Sumner*, 784 F.2d 984, 990 (9th Cir. 1986).

b. *Only relevant evidence is admissible at trial.*

"Relevancy and the admissibility of relevant evidence are governed by ER 401 and ER 402." *State v. Rice,* 48 Wn.App. 7, 11, 737 P.2d 726 (1987). Irrelevant evidence is inadmissible, even if offered by a criminal defendant in his defense. ER 402; *State v. Maupin,* 128 Wn.2d 918, 925, 913 P.2d 808 (1996); *State v. Otis,* 151 Wn.App. 572, 578, 213 P.3d 613 (2009).

To be relevant, evidence must meet two requirements: (1) the evidence must have a tendency to prove or disprove a fact (probative value), and (2) that fact must be of consequence in the context of the other facts and the applicable substantive law (materiality). ER 401; *Davidson v. Metropolitan Seattle,* 43 Wn.App. 569, 573, 719 P.2d 569, *review denied,* 106 Wn.2d 1009 (1986). Facts that are "of consequence" have some tendency to prove, qualify, or disprove an

issue in the case. *State v. Peterson,* 35 Wn.App. 481, 484, 667 P.2d 645 (1983). The relevance of evidence depends on the circumstances of each individual case and the relationship between the facts and the ultimate issue. *Davidson,* 43 Wn.App. at 573.

Relevant evidence may still be inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice. ER 403. A danger of unfair prejudice exists "'[w]hen evidence is likely to stimulate an emotional response rather than a rational decision.'" *State v. Beadle,* 173 Wn.2d 97, 120, 265 P.3d 863 (2011), *quoting State v. Powell,* 126 Wn.2d 244, 264, 893 P.2d 615 (1995). "When evidence is likely to stimulate an emotional response rather than a rational decision, a danger of unfair prejudice exists." *Powell,* 126 Wn.2d at 264.

c. *The gas can was not relevant as there was no attempt to connect it to the fire at Ms. Hernandez-Martinez's residence.*

The gas can had no relation to the fire in question and the State conceded as much. The can was found over three weeks after the fire by the dog handler who took the photograph. The State did not seize the can, nor did it do any analysis of the can to determine whether DNA or fingerprints were present to tie it to the arson. Nevertheless, the court allowed the State to admit the photograph of the gas can despite noting

that it had "very little probative value" and later "very, very minimal, minimal probative value." RP 224-25.

Given the fact the can was found so late in time after the fire, the State did no analysis on the can and, thus, could not link it to the arson, the can was not relevant. More importantly, the photo allowed the jury to speculate that the can was the source of the gasoline used to start the fire, a fact that the State used to its advantage. The can was simply not relevant and its admission was substantially more prejudicial than probative.

This Court should accept review to further clarify the standard for relevant evidence and reverse Ms. Hernandez Martinez's convictions and remand for a new trial.

H. CONCLUSION

For the reasons stated, Ms. Hernandez Martinez asks this Court to deny the State's petition and grant review of her petition. Ms. Hernandez Martinez then asks this Court to reverse her convictions.

DATED this 20th day of July 2016.

Respectfully submitted,

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APPENDIX

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June 21, 2016

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CASE # 331091
State of Washington v. Maria Hernandez Martinez
GRANT COUNTY SUPERIOR COURT No. 131004421

Counsel:

Enclosed please find a copy of the opinion filed by the Court today.

A party need not file a motion for reconsideration as a prerequisite to discretionary review by the Supreme Court. RAP 13.3(b); 13.4(a). If a motion for reconsideration is filed, it should state with particularity the points of law or fact which the moving party contends the court has overlooked or misapprehended, together with a brief argument on the points raised. RAP 12.4(c). Motions for reconsideration which merely reargue the case should not be filed.

Motions for reconsideration, if any, must be filed within twenty (20) days after the filing of the opinion. Please file an original and two copies of the motion (unless filed electronically). If no motion for reconsideration is filed, any petition for review to the Supreme Court must be filed in this court within thirty (30) days after the filing of this opinion (may be filed by electronic facsimile transmission). The motion for reconsideration and petition for review must be received (not mailed) on or before the dates they are due. RAP 18.5(c).

Sincerely,

Renee S. Townsley
Clerk/Administrator

RST:sh
Enclosure
c: **E-mail** Honorable John D. Knodell

c: Maria H Hernandez Martinez
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FILED

JUNE 21, 2016

In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON,	)	
	)	No. 33109-1-III
Respondent,	)	
	)	
v.	)	
	)	
MARIA H. HERNANDEZ MARTINEZ,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	

FEARING, C.J. — Maria Hernandez Martinez appeals her convictions of arson in the first degree, making a misleading statement to a public servant, and filing a false insurance claim. The State cross appeals the trial court's dismissal of a perjury charge. We affirm.

FACTS

Maria Hernandez Martinez purchased a Foremost Insurance Company policy, with an effective date of August 9, 2012, insuring her Moses Lake mobile home. Farmers Insurance Company owns Foremost Insurance and the latter company specializes in coverage for mobile homes.

On the morning of August 29, 2012, Maria Martinez's mobile home caught fire. The fire likely began in or near a window air conditioning unit in the home's family room. The fire was a low heat burn. We do not know when or who first noticed the fire or when or who notified firefighters of the fire. Firefighters extinguished the fire by 9:15 a.m., on August 29. Martinez and her children left their residence at 6:30 a.m., on August 29, to travel to Spokane for a 9:30 a.m. doctor's appointment.

At 8:15 a.m., on August 29, Grant County Chief Deputy Fire Marshal Bruce Gribble learned of the Hernandez Martinez mobile home fire. Gribble arrived at the mobile home at 9:15 a.m. Gribble entered the home. He found no residue from burned cash on the home's living room couch. He saw no television in the master bedroom.

In early September 2012, Jonathan Hull, a Farmers Insurance Company adjuster, met with Maria Martinez at the latter's Moses Lake mobile home. Hull directed Martinez to complete an inventory of property damaged or destroyed by the August 29 fire. Hull assisted by writing the list of property on a four-page undated and unsigned claim form. Martinez claimed that two televisions were lost or damaged in the fire and the claim form listed the televisions on the first page. Martinez claimed one television sat in the family room and one in her bedroom at the time of the fire.

During her first meeting with Jonathan Hull, Maria Hernandez Martinez did not mention the loss of any cash. A day or two later, Martinez notified Hull that the fire

destroyed $3,800 in cash that lay on or near the living room couch at the time of the fire.

On September 7, 2012, adjuster Jonathan Hull prepared an eighteen-page contents valuation report. The report listed a loss of two televisions and $3,800 in cash. The valuation report totaled the cash value of the loss as $22,343.66. No one signed the contents valuation report.

Barry Kerth, a fire investigator hired by Foremost Insurance Company, examined Maria Martinez's mobile home on September 3, 2012 and September 8, 2012. On September 3, he saw no televisions in the home; on September 8, he noticed two sets inside the mobile home. Kerth observed no damage to the televisions. When investigating the fire on September 3, Barry Kerth identified an irregular burn pattern on a table outside the mobile home, but near a window where some of the fire escaped the home. The window had held the air conditioner that likely was the source of the fire. We do not know if the table was inside at the time of the fire.

When Barry Kerth examined the table on September 3, the air conditioner rested thereon. The burn pattern signaled the earlier presence of an ignitable liquid. Kerth observed an electrical outlet inside the home and near the air conditioner's window. The outlet contained no evidence of a melted electrical plug such that Kerth concluded no appliance was plugged into the outlet at the time of the fire.

During his second inspection of the mobile home on September 8, 2012, Barry Kerth moved a severely burned couch, resting in the family room near the origin of the fire, to search for cash residue. He found no residue. On relocating the couch, Kerth did not smell any accelerants, but, after sifting through debris on the floor, he smelled a strong odor of accelerants. Based on the smell, he recommended to Foremost Insurance Company that it bring an accelerant detection dog to the mobile home.

Dog handler Eileen Porter, at the request of Foremost Insurance Company, investigated the fire with an accelerant dog. The dog detected accelerants at four locations on Maria Martinez's property, one inside the home and three outside the residence. Porter collected samples from each location. While investigating, Porter took photographs, including a picture of a gas can in front of another trailer located on the Martinez property. Scientist Dale Mann analyzed the samples collected by Porter and found the presence of automotive gasoline in all samples.

On September 25, 2012, Grant County Sheriff Deputy Jon Melvin and Fire Marshal Bruce Gribble interviewed Maria Martinez at the county sheriff station for many hours. During the interview, Martinez, through an interpreter, claimed that two televisions and $3,800 burned in the fire. Deputy Melvin wrote notes from Martinez's answers to questions and placed the notes on a six-page document entitled "Written Statement." Ex. 48. On the completion of the interview, the translator translated the

statement for Martinez, and Martinez signed the document. The statement contained language, above Martinez's signature, stating that she signed under penalty of perjury.

On September 25, 2012, Bruce Gribble found, in the unburned trailer on Maria Martinez's property, boxes of jewelry. During trial, Leovigildo Mendoza Flores, the father of Maria Martinez's children, identified the jewelry as belonging to Martinez. According to Flores, Martinez usually stored her jewelry in the mobile home in which she resided.

In 2012, Maria Martinez supported three children on an income of $660 a month. She monthly paid $500 on the mortgage. She possessed a working cell phone. Martinez's mobile home previously suffered a fire on May 1, 2009.

PROCEDURE

The State of Washington charged Maria Hernandez Martinez with arson in the first degree, perjury in the second degree, and filing a false insurance claim for property exceeding $1,500. The State alleged alternate theories for the first degree arson charge: (1) a damaged dwelling, and (2) insurance fraud in an amount exceeding $10,000.

During trial, the State sought to admit as exhibit 46, the photo of the gas can taken by Eileen Porter. The trial court admitted the exhibit over the objection of Maria Martinez.

Maria Martinez moved to dismiss both the arson and perjury charges at the close

of the State's case and at the end of trial. The trial court denied the motion to dismiss at the close of the State's case. The court, at the conclusion of trial, denied the motion to dismiss the arson charge, but granted the motion to dismiss the perjury charge. The trial court reasoned that the oath found above Maria Martinez's signature on the written statement given to law enforcement was not authorized or required by law. Thus, the State could not sustain perjury charges. The trial court instead instructed the jury on a lesser included crime of making a false or misleading statement to a public servant.

The jury found Maria Martinez guilty of arson in the first degree, making a false or misleading statement to a public servant, and filing a false insurance claim. Special verdict form 1 directed the jury to place a checkmark next to the ground or grounds on which it found Martinez guilty of first degree arson. The verdict form read:

> We, the jury, having found the defendant guilty of the crime of arson in the first degree, unanimously find the defendant committed the arson knowingly and maliciously to: (check any or all that apply)
> [ ] 2(a) cause a fire or explosion which damages a dwelling;
> [ ] 2(b) cause a fire or explosion on property valued at ten thousand dollars or more with intent to collect insurance proceeds.
> [ ] None of the arson first degree elements 2(a) or 2(b) were found unanimously.

Clerk's Papers at 108. The jury did not enter any checkmark on special verdict form 1, although the jury foreperson signed the form. The trial court imposed a $500 victim assessment fee, a $200 criminal filing fee, and a $100 deoxyribonucleic acid (DNA) collection fee.

LAW AND ANALYSIS

On appeal, Maria Hernandez Martinez contends the trial court erred in admitting, as an exhibit, the photograph of the gas can in front of her other trailer. Martinez also challenges the sufficiency of the evidence to convict her of arson and the failure of the trial court to require jury unanimity with regard to the alternative means of committing first degree arson. Finally, she contests the imposition of legal financial obligations. The State cross appeals the trial court's dismissal, at the close of the trial, of the perjury charge. We affirm the trial court's evidentiary ruling, the convictions of Maria Martinez, and the imposition of financial obligations. We decline entertainment of the State's cross appeal.

Gas Can Photograph

Maria Martinez argues that the trial court erred by admitting a picture that showed a gas can on her property and in front of the second trailer. In the alternative, she contends that, if relevant, the evidence was more prejudicial than probative. This court reviews evidentiary rulings for manifest abuse of discretion. *State v. Russell*, 125 Wn.2d 24, 78, 882 P.2d 747 (1994). The trial court abuses its discretion only when no reasonable person would have decided the issue as the trial court did. *State v. Rice*, 110 Wn.2d 577, 600, 757 P.2d 889 (1988).

> "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the

> action more probable or less probable than it would be without the evidence.

ER 401. Relevance is a very low bar. *Mut. of Enumclaw Ins. Co. v. Gregg Roofing, Inc.*, 178 Wn. App. 702, 729, 315 P.3d 1143 (2013). Even minimally relevant evidence is admissible. *State v. Darden*, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002). Relevancy means a logical relation between evidence and the fact to be established. *State v. Whalon*, 1 Wn. App. 785, 791, 464 P.2d 730 (1970).

In an arson case, the presence of a gas can near the scene possesses relevance. The relevance increases when an expert opines at trial that someone used gasoline to accelerate the fire. Maria Martinez emphasizes that Eileen Porter took the photograph after the fire, no evidence tied Martinez to the can other than its presence on her property, the State presented no testimony that the can contained gasoline, and the State never investigated the role the gas can might have played in the fire. Martinez's criticisms of the importance of the gas can is well taken, but goes to the weight, not admissibility, of the photograph.

Maria Hernandez Martinez also contends that the picture was substantially more prejudicial than it was probative.

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

ER 403. A danger of unfair prejudice exists when evidence is likely to stimulate an emotional response rather than a rational decision. *State v. Beadle*, 173 Wn.2d 97, 120, 265 P.3d 863 (2011); *State v. Barry*, 184 Wn. App. 790, 801, 339 P.3d 200 (2014). The burden of demonstrating unfair prejudice is on the party seeking to exclude the evidence. *State v. Burkins*, 94 Wn. App. 677, 692, 973 P.2d 15 (1999).

When administering ER 403, we recognize that nearly all evidence worth offering in a contested case will prejudice one side or the other. *Carson v. Fine*, 123 Wn.2d 206, 224, 867 P.2d 610 (1994). Evidence is not rendered inadmissible under ER 403 just because it may be prejudicial. *Carson v. Fine*, 123 Wn.2d at 224. Under ER 403, the court is not concerned with this ordinary prejudice. *Carson v. Fine*, 123 Wn.2d at 224. Because of the trial court's considerable discretion in administering ER 403, reversible error is found only in the exceptional circumstance of a manifest abuse of discretion. *State v. Gould*, 58 Wn. App. 175, 180, 791 P.2d 569 (1990).

Maria Hernandez Martinez argues that the gas can picture improperly allowed the jury to speculate. Nevertheless, as reasoned by the trial court, a picture of a gas can is not likely to elicit an emotional response. The picture may posit little probative value, but it also creates little prejudicial effect. The trial court did not abuse its discretion in admitting the photograph as an exhibit.

Sufficiency of Evidence

Maria Hernandez Martinez challenges the sufficiency of the evidence to convict her of arson. She underscores that the State presented no evidence that she set or assisted in setting the fire.

Evidence is sufficient if a rational trier of fact could find each element of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980). Both direct and indirect evidence may support the jury's verdict. *State v. Brooks*, 45 Wn. App. 824, 826, 727 P.2d 988 (1986). This court draws all reasonable inferences in favor of the State. *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977). Only the trier of fact weighs the evidence and judges the credibility of witnesses. *State v. Carver*, 113 Wn.2d 591, 604, 781 P.2d 1308, 789 P.2d 306 (1989).

The jury convicted Maria Hernandez Martinez of first degree arson under RCW 9A.48.020. The statute declares, in part:

> (1) A person is guilty of arson in the first degree if he or she knowingly and maliciously: . . . (b) Causes a fire or explosion which damages a dwelling; or . . . (d) Causes a fire or explosion on property valued at ten thousand dollars or more with intent to collect insurance proceeds.

The absence of direct evidence is no bar to conviction in an arson case. *State v. Evans*, 32 Wn.2d 278, 280, 201 P.2d 513 (1949); *State v. McLain*, 43 Wash. 267, 269, 86 P. 390 (1906); *State v. Deaver*, 6 Wn. App. 216, 218, 491 P.2d 1363 (1971). The verdict

must stand if substantial evidence supports it, even though that evidence might not be the most convincing kind. *State v. Despain*, 152 Wash. 488, 491, 278 P. 173 (1929); *State v. Deaver*, 6 Wn. App. at 218. Arson is a crime most often proved by circumstantial evidence. *State v. Plewak*, 46 Wn. App. 757, 764-65, 732 P.2d 999 (1987).

The Washington Supreme Court places a high premium on "convincing proof of motive" in arson cases including interest in the collection of insurance. *State v. Pfeuller*, 167 Wash. 485, 490, 9 P.2d 785 (1932). In *Pfeuller*, the Supreme Court reversed Fred Pfeuller's conviction for arson in the second degree. Evidence established that Pfeuller's shoes were wet and muddy and another pair of shoes, which appeared to belong to the arsonist, echoed Pfeuller's shoe size. No evidence showed a feud or monetary motive for Pfeuller to set the fire. The state high court stated that, when evidence of motive is lacking and the remainder of the evidence is circumstantial, the court is less likely to find the evidence sufficient.

The State relies on two cases to argue that the evidence is sufficient: *State v. Clark*, 78 Wn. App. 471, 898 P.2d 854 (1995) and *State v. Wood*, 44 Wn. App. 139, 721 P.2d 541 (1986). In *Clark*, the State charged Garith Clark with first degree arson for a fire at his office. This court reversed the trial court because of the exclusion of relevant evidence exculpatory to Clark, but remanded for a new trial because of sufficient evidence to convict. At trial, the State presented evidence of arson and testimony that

Clark filed an insurance claim for the fire loss. Clark conceded that he had reached the maximum amount on his credit cards and his business was slow. Clark entered his office during the night of the fire and removed a fish tank.

In *State v. Wood*, the jury found Clara Wood guilty of first degree arson. The State presented evidence that fire destroyed a vacant home owned by Wood. Wood rested in Reno at the time of the fire. An investigation showed arson. Witness Charles Blinkenderfer saw a suspicious silver Toyota parked on the street near the home and later a man running from the vacant home. Blinkenderfer chased the man. Fire Marshal Richard Carman researched the Toyota license plate submitted by Blinkenderfer and found that David Curtindale owned the vehicle. Blinkenderfer picked Curtindale out of a line up as the man he chased. Curtindale was Wood's brother. Wood submitted a claim for loss to her insurance. The State discovered that Wood telephoned Curtindale multiple times before the fire. This court held that sufficient evidence supported Wood's arson conviction.

We hold that the State provided sufficient evidence to support Maria Martinez's conviction. The State presented evidence of Martinez's financial need. The State presented evidence that Martinez had a motive to collect insurance proceeds. The evidence about motive is arguably stronger than in *State v. Clark* because the State showed that Martinez purchased insurance on her mobile home weeks before the fire and

she forwarded a claim for fire loss on the policy. Martinez sustained loss in a fire in 2009 and received insurance proceeds to cover those losses. Martinez removed jewelry and may have removed television sets from the home before the fire.

Jury Unanimity

Maria Hernandez Martinez also argues that the trial court improperly instructed the jury regarding a unanimous verdict. The State argues that there was adequate evidence to support either of the alternative circumstances charged. Therefore, no error occurred. We agree with the State.

While jury unanimity as to the underlying crime is required, there is no such unanimity requirement for alternative circumstances. *State v. Flowers*, 30 Wn. App. 718, 722-23, 637 P.2d 1009 (1981). A conviction of a crime with alternate means of committing may be affirmed if the alternative ways are not repugnant to each other and substantial evidence supports a conviction on each of the alternative means. *State v. Richardson*, 24 Wn. App. 302, 304, 600 P.2d 696 (1979). The first prong is satisfied so long as proof of one does not disprove the other. *Richardson*, 24 Wn. App. at 305. The second prong is satisfied if there is sufficient evidence from which the trier of fact can reasonably infer the existence of a fact. *Richardson*, 24 Wn. App. at 305.

Maria Martinez's jury convicted her of first degree arson. The State charged two alternate circumstances: fire that damaged a dwelling or fire set for insurance proceeds.

RCW 9A.48.020(1)(b), (1)(d). The alternate means are not antagonistic to one another. An arson may both burn a dwelling and burn property worth more than $10,000 in order to receive insurance proceeds.

Testimony and exhibits showed that Maria Martinez and at least three of her children lived in the mobile home that burned. The insurance documents admitted in evidence established that the mobile home and its contents exceeded $10,000 in value. Martinez filed an insurance claim. A reasonable trier of fact could find the mobile home was a dwelling and that property worth more than $10,000 was set on fire in order to receive insurance proceeds.

Legal Financial Obligations

Maria Hernandez Martinez contends that the trial court erroneously imposed a $200 criminal filing fee as a financial obligation without considering, under RCW 10.01.160(3), her financial resources. Martinez, who did not object to the imposition of these costs at sentencing, argues that she may raise this issue for the first time on appeal, citing *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015).

The record does not show that the trial court inquired into Maria Martinez's ability to pay legal financial obligations. Nevertheless, the criminal filing fee is a mandatory, not discretionary, obligation. *State v. Lundy*, 176 Wn. App. 96, 110, 308 P.3d 755

(2013); *State v. Clark*, 191 Wn. App. 369, 374, 362 P.2d 309 (2015). Despite the lack of inquiry into Martinez's financial capability, we affirm the imposition of the obligation.

Cross Appeal

The State of Washington challenges the trial court's dismissal of the perjury charge at the close of the case. The State mentions that dismissal as a matter of law after jeopardy attaches unfairly precludes the State from challenging a legal ruling of the trial court.

The Rules of Appellate Procedure curtail the State's ability to appeal decisions in criminal prosecutions. RAP 2.2 declares:

> (b) Appeal by State or a Local Government in Criminal Case. Except as provided in section (c), the State or a local government may appeal in a criminal case only from the following superior court decisions *and only if the appeal will not place the defendant in double jeopardy:*
>
> (1) Final Decision, Except Not Guilty. A decision that in effect abates, discontinues, or determines the case other than by a judgment or verdict of not guilty, including but not limited to a decision setting aside, quashing, or dismissing an indictment or information, or a decision granting a motion to dismiss under CrR 8.3(c).
>
> (2) Pretrial Order Suppressing Evidence. A pretrial order suppressing evidence, if the trial court expressly finds that the practical effect of the order is to terminate the case.
>
> . . . .
>
> (6) Sentence in Criminal Case. A sentence in a criminal case that (A) is outside the standard range for the offense, (B) the state or local government believes involves a miscalculation of the standard range, (C) includes provisions that are unauthorized by law, or (D) omits a provision that is required by law.

RAP 2.2 (emphasis added) (boldface and italics omitted).

RAP 2.2(b) articulates that the State may only appeal if the appeal will not subject the defendant to double jeopardy. As a general rule, if the trial court weighed the evidence in entering an order terminating the prosecution, the prohibition against double jeopardy precludes a retrial. 12 ROYCE A. FERGUSON, JR., WASHINGTON: PRACTICE, CRIMINAL PRACTICE & PROCEDURE § 2110, at 474 (3d ed. 2004). "It makes no difference that the ruling of the court may have resulted from an erroneous interpretation of governing legal principles. Such an error affects the accuracy of a determination, but it does not alter its essential character as a judgment of acquittal." *State v. Bundy*, 21 Wn. App. 697, 702-03, 587 P.2d 562 (1978).

The State concedes that jeopardy attached to Maria Martinez's prosecution, and thus it cannot appeal the judgment dismissing the perjury charge. The State astutely claims it is appealing the process used to dismiss the charge, not the dismissal itself. Nevertheless, RAP 2.2 offers a comprehensive list of rulings or orders the State can appeal. Use of a procedure is not listed. We discern no practical difference between appealing the dismissal procedure and the end result of the procedure. Therefore, we refuse to entertain the cross appeal.

CONCLUSION

We affirm Maria Hernandez Martinez's convictions for arson, a misleading statement, and filing a false insurance claim. We also affirm the imposition of legal financial obligations on Martinez. We deny review of the State's cross appeal.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Fearing, J.
Fearing, C.J.

WE CONCUR:

Siddoway, J.
Siddoway, J.

Pennell, J.
Pennell, J.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	
v.	)	COA NO. 33109-1-III
	)	
MARIA HERNANDEZ MARTINEZ,	)	
	)	
PETITIONER.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 20TH DAY OF JULY, 2016, I CAUSED THE ORIGINAL **ANSWER TO PETITION FOR REVIEW** TO BE FILED IN THE **WASHINGTON STATE SUPREME COURT** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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[X] MARIA HERNANDEZ MARTINEZ	(X)	U.S. MAIL
PO BOX 253	( )	HAND DELIVERY
NEW PLYMOUTH, ID 83655	( )	_____

SIGNED IN SEATTLE, WASHINGTON THIS 20TH DAY OF JULY, 2016.

X_____

Washington Appellate Project
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Seattle, Washington 98101
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WASHINGTON APPELLATE PROJECT

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Court of Appeals
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