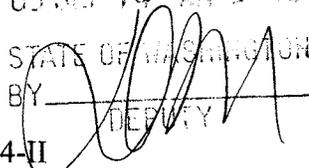


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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON

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NO. 39009-4-II

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COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

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STATE OF WASHINGTON,

Appellant,

vs.

JOANNE MARIE GARDNER,

Respondent.

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**RESPONDENT'S OPENING BRIEF**

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Curtis M. Janhunen, WSBA #4168  
Brown Lewis Janhunen & Spencer  
101 East Market Street, Suite 501  
P O Box 1806  
Aberdeen, WA 98520  
Phone: (360) 533-1600  
Facsimile: (360) 532-4116

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## I. COUNTER STATEMENT OF THE CASE

Joanne Gardner was a long-time employee of Grayland Beach State Park. Based upon an investigation by park rangers and the Pacific County Sheriff's office, she was charged with stealing \$266 "in a series of transactions . . . as part of a common scheme or plan". CP at 1-2, the Information. The crime charged was Theft in the 2<sup>nd</sup> Degree, a felony. No alternative charge of Third Degree Theft, a gross misdemeanor, was alleged in the Information, only the felony.

The trial was to the court and lasted three days. At the conclusion of the trial, the court initially found Joanne guilty of Third Degree Theft, a lesser included offense, for taking \$186.50.

Neither the State nor the Defendant requested the court to consider the lesser included offense. It was not charged in the Information and was never argued to the court.

The court did in its initial verdict invite defense counsel to offer authority on the issue of the court's finding of a lesser included offense. RP December 19, 2008, page 9, at line 17.

Prior to the January 23, 2009, hearing, the defense filed a motion to set aside the oral verdict. The Defendant's motion is found at CP 41-42. The Defendant did not argue that the court lacked authority to *sua sponte* consider a lesser included offense; the Defendant did argue that the court should not have because neither the State nor the Defendant

requested it. It was not alleged as an alternative in the Information; it was not argued by the prosecutor; it was not argued by the Defendant.

The trial court was troubled by its initial decision to find the Defendant guilty of the lesser included offense. The words of the judge are revealing:

“Mr. Janhunen, your argument’s very persuasive.”

RP January 23, 2009, page 9, line 19.

“THE COURT: No, I don’t have a problem reversing myself if I - - I understand more of what your argument is now.”

RP January 23, 2009, page 5, lines 9-11.

“Looking back on it, should I have gone and found a misdemeanor? I don’t feel - - - I don’t feel bad about it. I mean, I don’t feel that I shouldn’t have but I just think your argument holds a lot of weight, Mr. Janhunen, in terms of just that gut feeling inside myself as a judge about what’s fair.”

RP January 23, 2009, page 10, lines 7-12.

“Well, I’ve thought a lot about this case. It’s sort of - - - it’s just sort of sticking in my craw so to speak. I am going to reconsider on the Court’s motion . . . well, actually it’s Mr. . . . sort of informal motion. Mr. Janhunen requested I take one more look at - - - at whether or not to find a lesser included.”

RP February 6, 2009, page 22, lines 12-21.

“And I am going to reconsider my decision whether to find a lesser included or not and I’ll give that in writing.”

RP February 6, 2009, page 29, lines 2-4.

By Memorandum dated March 16, 2009, the trial court reversed itself and found Joanne Gardner not guilty. That same day, the Court signed an Order Granting the Defendant’s Motion to Reconsider Verdict and Entry of New Verdict. CP 66-71.

The prosecution filed a Notice of Appeal dated March 16, 2009, seeking review of the Order Granting the Defendant’s Motion to Reconsider Verdict and to Entry of New Verdict.

Commissioner Skerlec ruled initially that the appeal by the State was of a not guilty verdict, an obviously nonappealable issue by the State. The State filed a Motion to modify the Commissioner’s ruling and by letter order dated June 23, 2009, the appeal was allowed to go forward under RAP 2.2(b)3, by Acting Chief Judge, Penoyar.

After this Court allowed the State’s appeal to go forward, the State used this ruling as an opportunity to assign error to decisions by the trial court which are not appealable. See, Assignments of Error Nos. 1, 3, 4, 5 and 6.

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## II. ISSUE RELATED TO APPELLANT'S ASSIGNMENT OF ERROR NO. 2

**Does the Appeal by the State of Washington of the Trial Judge's Order Granting Defendant's Motion to Reconsider Verdict and Entry of New Verdict Place the Defendant in Double Jeopardy in Violation of Article I, Section 9 of the Washington State Constitution and the Fifth Amendment to the United States Constitution?**

Respondent does not believe the State of Washington has the authority to assign error and then argue in support of Assignment of Errors Nos. 1, 3, 5, and 6. The Order of June 3, 2009, granting the State's Motion and modified the Commissioner's ruling of March 24, 2009, by specifically ordering that the "State's appeal is limited to the order vacating Gardner's conviction". That is the sole issue before this Court.

## III. ARGUMENT

It is the Respondent's position that the trial judge found her not guilty and therefore an appeal will place her in double jeopardy. RAP 2.2(b). The trial judge did reverse himself. The Respondent had not been sentenced. In State vs. Willoughby, 29, Wn.App. 828, 630 P.2d 1387 (1981), the court stated:

“. . . [F]urther there is no judgment in a criminal case until sentence is pronounced. [Citations omitted.] The failure to file a judgment and sentence means there has been no final adjudication of a case, [Citations omitted.]

29 Wn.App. 828 at 835.

See also, CrR 7.3.

The statements made by the judge indicated that he was troubled by his initial decision and wanted to revisit it, which he did. There is no

rule which prevents a trial judge sitting as the finder of fact from changing his mind. While the law may favor finality, it must also support a judge who wants to do the right thing, make the right decision, even if it means reversing himself.

The judge sat through many hours of testimony. He took notes. He had the opportunity to observe the demeanor of the witnesses and judge their credibility. No rule, no case law, should prevent a judge from deciding a case, particularly a criminal case, in a manner with which he is comfortable and in which he believes justice has been done.

Here, neither the State, nor the Defendant, asked the judge to consider a lesser included offense. The State could have, but did not, include in its charging document a count of Third Degree Theft. It could have charged in the alternative. The State wanted a felony conviction which is why three days of trial were spent trying to prove a theft of \$266.

Both the State and the Defendant went all in. In its brief, the State argues that counsel's trial strategy likely fell "outside the range of professionally competent assistance". Appellant's Brief at page 20. On the contrary, the trial strategy was well calculated given the ineffective and clumsy manner the prosecution's case was presented. The very small amount allegedly stolen, only \$16 over the felony threshold and that amount was reached only as a result of aggregating the alleged separate crimes, obviously convinced the judge that the State did not want to settle for a misdemeanor conviction. With the action taken in the last legislative session, with the felony threshold having been raised to \$500, the State's pursuit of a felony conviction indicates its single mindedness. The

Defendant believed the trial judge would find no evidence to support the majority of the alleged thefts and would throw out the remainder.

Had the trial judge asked counsel if either wanted a lesser included offense to be considered, the Defendant would have said absolutely not. Neither side asked the judge to consider a lesser included offense. If a Defendant rejects a lesser included offense instruction, assuming it is a defensible trial strategy, the Defendant lives with the result.

“The defendants cannot have it both ways; having decided to follow one course at trial, they cannot on appeal now change their course and complain that their gamble did not pay off.”

State vs. Hoffman, 116 Wn.2d 51, 112, 804 P.2d 577 (1991).

The State should as well not be allowed to complain now that its gamble did not pay off.

Mrs. Gardner had maintained her innocence of any theft from the very beginning. No authority was ever given to counsel to argue for a lesser included offense. In fact, arguing for a lesser included offense to the trial judge would have been tantamount to a plea of guilty. It would have weakened, if not destroyed, the Defendant’s claim of innocence. Cf. State vs. Hassan, 151 Wn.App. 209, 211 P.3d 441 (2009). Likewise, had the prosecution argued for a lesser included offense, the same fatal flaw would have been exposed in its case. The argument would have been tantamount to a statement that the Defendant was not guilty of the felony as the prosecution had charged.

One of the core issues is at what point a trial judge sitting as the trier of fact in a criminal case may change his mind and either find a defendant guilty after rendering an earlier verdict of not guilty, or whether a judge can find a defendant not guilty after having rendered an earlier verdict of guilty. In State vs. Bastinelli, 81 Wn.2d 947, 506 P.2d 854 (1973), the defendant was charged with Grand Larceny. The case was tried to the court. Following the receipt of evidence, the judge announced his oral verdict that the case had not been proved and dismissed the case. A journal entry was made following the oral statement. Three weeks later, the prosecution moved for reconsideration, which the court took under consideration. On April 21, almost a month following the judge's earlier statement dismissing the case, the judge indicated that he was reconsidering the issue of guilt. The appellate court concluded that the judge could not change his mind having entered a formal journal entry of dismissal. Judge Hale, concurring specially, pointed out that a trial judge is free to change his mind until a judgment is entered, and that even a written memorandum of opinion filed prior to the entry of a formal judgment does not provide the trial court of the power to change its indicated ruling. Bastinelli, at page 954.

In a later case, State of Washington vs. Collins, 112 Wn.2d 303, 771 P.2d 350 (1989), the court was asked to revisit Bastinelli and several cases which followed in order to craft a rule that provided clear guidance to trial judges. The court concluded as follows:

“To serve the ends of certainty, reliance on the final written court order or written journal entry to determine the finality of a ruling is the better rule.”

State vs. Collins, at page 308.

#### IV. CONCLUSION

There is no dispute regarding the applicable law. The issue is whether Judge Sullivan found Mrs. Gardner not guilty and whether this appeal is a forbidden appeal of a not guilty verdict. It clearly is and this was recognized by the Commissioner.

“To permit a second trial after an acquittal, however mistaken the acquittal may have been, would present an unacceptably higher risk that the government, with its vastly superior resources, might wear down the defendant so that ‘even though innocent he may be found guilty’.”

Green vs. United States, 355 U.S. 184, 187 (2 Lars 2d 199), 78 S. Ct. 221 (1957).

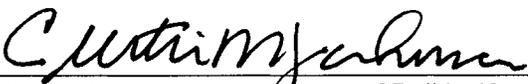
No matter how the State wants to call its appeal, it is an appeal of a not guilty verdict entered on March 16, 2009, by trial judge Michael J. Sullivan. The old adage of “if it quacks like a duck” applies here.

The appeal should be dismissed with costs to the Defendant.

Dated this 11 day of September, 2009.

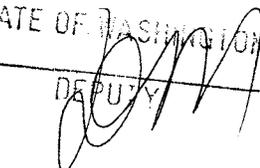
Respectfully submitted,

BROWN LEWIS JANHUNEN & SPENCER  
Attorneys for Respondent

By   
CURTIS M. JANHUNEN, WSB #4168

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IN THE WASHINGTON STATE COURT OF APPEALS, DIVISION TWO

STATE OF WASHINGTON,	)	
	)	NO. 39009-4-II
Appellant,	)	
	)	
vs.	)	AFFIDAVIT OF SERVICE BY
	)	MAIL
	)	
JOANNE MARIE GARDNER,	)	
	)	
Respondent.	)	

STATE OF WASHINGTON )  
 ) ss.  
 GRAYS HARBOR COUNTY )

The undersigned being first duly sworn on oath, deposes and says:

That I am a citizen of the State of Washington, over the age of 18 years, and competent to be a witness herein. That I deposited the original of the "Respondent's Opening Brief" to the Court of Appeals, and deposited a true and correct copy of the Brief to the attorney for Appellant, in the United States mails, postage prepaid, on the 11th day of September, 2009, addressed as follows:

David Ponzoha, Clerk of Court	David Bustamante
Court of Appeals, Division II	Deputy Prosecuting Attorney
950 Broadway Ste 300	P O Box 45
Tacoma WA 98402	South Bend, WA 98586

  
 CURTIS M. JANHUNEN

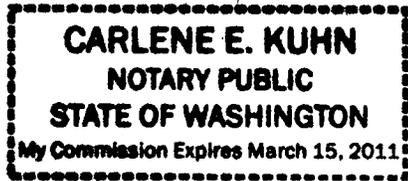
AFFIDAVIT OF SERVICE  
BY MAIL - 1

ORIGINAL

BROWN LEWIS JANHUNEN & SPENCER  
 A PROFESSIONAL SERVICE CORPORATION  
 ATTORNEYS AT LAW  
 BANK OF AMERICA BUILDING  
 SUITE 501  
 101 EAST MARKET STREET  
 POST OFFICE BOX 1806  
 ABERDEEN, WASHINGTON 98520  
 (360) 533-1600 OR 532-1960

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SUBSCRIBED and SWORN to before me on September 11, 2009.



*Carlene E. Kuhn*  
NOTARY PUBLIC for Washington,  
residing at Aberdeen.

AFFIDAVIT OF SERVICE  
BY MAIL - 2

**BROWN LEWIS JANHUNEN & SPENCER**  
A PROFESSIONAL SERVICE CORPORATION  
ATTORNEYS AT LAW  
BANK OF AMERICA BUILDING  
SUITE 501  
101 EAST MARKET STREET  
POST OFFICE BOX 1806  
ABERDEEN, WASHINGTON 98520  
(360) 533-1600 OR 532-1960