

42546-7-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

State of Washington
Respondent

v.

NICK TAYLOR ARQUETTE
Appellant

42546-7-II

On Appeal from the Superior Court of Cowlitz County
Superior Court Cause number 10-1-01249-1

The Honorable S. Brooke Taylor

BRIEF OF APPELLANT

Jordan B. McCabe, WSBA No. 27211
Attorney for Appellant, Nick Arquette

MCCABE LAW OFFICE
PO Box 46668, Seattle, WA 98146
206-453-5604 • mccabejordanb@gmail.com

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II. **ASSIGNMENTS OF ERROR AND ISSUES**

A. **Assignments of Error**

1. The trial court failed to enter written findings and conclusions, and it is not clear from the record that the court made findings supported by the record or that its conclusions are supported by findings.
2. The court relieved the State of its heightened burden of proof in a prosecution for perjury in violation of Wash. Const. art. 1 § 22 and the Sixth Amendment.
3. This second perjury prosecution for the same conduct subjected Appellant to double jeopardy in violation of Wash. Const. art. 1, § 22 and the Fifth Amendment.

B. **Issues Pertaining to Assignments of Error**

1. Is the record sufficient to permit review of the trial court's decision absent written findings and conclusions?
2. Was the evidence sufficient to meet the State's heightened burden of proof in a prosecution for perjury?
3. Does double jeopardy prohibit two perjury prosecutions: one for making false statements to the police and another for repeating those statements while testifying at trial in the first prosecution?

III. **SUMMARY OF THE CASE**

Arquette I. Appellant, Nick T. Arquette, owned an old Datsun pickup. His roommate purported to sell the pickup to Gary McKee. When McKee removed the truck from Arquette's back yard, Arquette filed a stolen vehicle report with the police. McKee claimed Arquette freely released the pickup and gave him a signed title. Arquette denied this, claiming the roommate had stolen the title and that McKee took the truck unlawfully. The State believed McKee and charged Arquette with filing a false report. He was tried to a jury on May 5, 2010. Arquette testified in his own defense. He repeated the allegations from the stolen vehicle report and testified under oath that those allegations were true. The jury convicted him of second degree perjury. This Court affirmed in *State v. Arquette*, Unpublished Opinion No. 40776-1-II, filed June 21, 2011 (*Arquette I*).

Arquette II. The State then filed new charges of first degree perjury based on Arquette's trial testimony in *Arquette I*. This time, Arquette opted for a bench trial. The trial consisted of the judge's reviewing the record from *Arquette I* and hearing argument of counsel. The court rejected Arquette's challenge to the sufficiency of the evidence, and convicted him again. Arquette again appealed. That appeal, 42546-7-II, filed August 30, 2011 is the matter currently before this Court.

Arquette challenges the sufficiency of the evidence to satisfy the State's heightened burden of proof to obtain a perjury conviction. In addition to the sufficiency of the evidence, Arquette challenges his conviction in *Arquette II* as a violation of double jeopardy.

PRP: Arquette has also filed a Personal Restraint Petition for relief from unlawful restraint resulting from a manifest injustice in *Arquette I*. Appeal No. 40776-1-II. He challenges the sufficiency of the evidence to support the conviction and claims his appellate counsel was ineffective in failing to challenge the sufficiency of the evidence.

Relief Requested. Arquette asks the Court to consolidate the PRP with this appeal and to reverse both convictions.

IV. STATEMENT OF THE CASE

In March of 2009, Gary McKee showed up at the home of Appellant, Nick T. Arquette, and announced that he had purchased a 1970 Datsun pickup from Robert Tribble, Arquette's erstwhile room mate, known to McKee only as Rob. RP 45, CP 54. McKee told Arquette that he had paid Rob for the Datsun, that Rob had failed to deliver it. He demanded that Arquette give it to him. RP 46, CP 55.

Gary McKee and his brother, Larry, visited Arquette several times and were very aggressive when Arquette would not release the truck. RP 31-32, CP 22-23. According to Arquette, he explained that the Datsun

belonged to him, not Tribble, and told the McKees in no uncertain terms that he would report the pickup stolen if McKee followed up on his threat to take it by force. RP 23, CP 14.¹

Arquette's friend, Greg Rupert, witnessed this. Rupert told the McKee brothers they had "got screwed," because Rob had done this sort of thing before. The McKees again became very aggressive and threatening. RP 34, CP 25; RP 46, CP 37. Another defense witness, Chris Hawkins, witnessed Arquette telling McKee in no uncertain terms that the truck was not Rob's but his. RP 6, CP 180; RP 10, CP 184. Hawkins corroborated Arquette's story that he threatened to call the police if McKee took the truck. RP 11, CP 185. Greg Rupert, also personally heard Arquette say he would call the police if the McKees took the truck. RP 60, CP 198.

The next day, while Arquette was at work and his driveway was clear of obstructions, McKee returned, took possession of the Datsun, and towed it to his brother Larry's house. Arquette claimed the Datsun was in

¹ This current appeal is based on the same verbatim report of proceedings as the first appeal, No. 40776-1-II. That is the VRP of the original trial on May 5, 2010. This transcript is included as Exhibit 1 in a Stipulation of the Parties filed in the current appeal, No. 42546-7-II, starting at CP 7. This brief gives both cites: RP denotes 5/5/10; CP denotes the current Stipulation. The Court will use the same VRP in resolving Arquette's Personal Restraint Petition.

his back yard in the morning but gone when he came home from work in the evening. RP 34, CP 25.

Arquette called the Longview Police Department to report truck stolen on March 27, 2009. RP 33; CP 24. Officer Alan Buchholz took the report. RP 22, CP 13; RP 35-36, CP 26-27. Buchholz would testify that Arquette told him McKee had tried earlier to take the truck without authority to do so and that he thought McKee might have returned and taken it. RP 102, CP 102. Arquette told Buchholz that McKee thought he had bought the truck from Tribble. RP 103, CP 103. McKee claimed Arquette freely released the truck, and that he even moved another vehicle from the driveway so McKee could get the Datsun out of the back yard. RP 34, CP 25.

Arquette told Buchholz he had received title to the truck from the finance company on March 11, 2009, after he made the final payment. He said he signed the title that same day, because he intended to sell the truck to a buyer in Kelso. RP 25, CP 16; CP 50. When that deal fell through, he put the title on top of a dresser in the closet of his spare bedroom. Tribble was living with Arquette at that time. RP 28, CP 19. Arquette thought Tribble had taken the title. RP 28, CP 19; RP 139, CP 145.

Arquette would testify that he told Buchholz about several missing items from his home in addition to the title to the Datsun. RP 36;

CP 27. Buchholz first denied that Arquette reported any stolen items other than the vehicle. RP 102, CP 102. But then, he conceded that Arquette did indeed tell him that it appeared someone had recently broken into his house and stolen the title along with video games, a weed eater and some mail. RP 105, CP 105. Arquette said he told Buchholz he believed Tribble had stolen the title. RP 106, CP 106. He told Buchholz he had filed a lost title report. RP 114, CP 114; RP 65, CP 126. He testified he had since obtained a replacement title for the Datsun but that he did not bring it to court. RP 45, CP 36.

Buchholz testified that Arquette never contacted him after making the report to inquire about the vehicle or the progress of the investigation. RP 111, CP 111. But Buchholz's involvement in the case had ended after three days when he passed the file onto another officer, Deputy Charles Meadows. RP 112, CP 112.

Buchholz first testified there was no-one present who appeared to be a witness. Otherwise, he would have noted their names in his report. RP 103, CP 103. On cross, however, he admitted that other people were present. RP 113, CP 113. But he did not feel the need to question them. RP 117-18, CP 117-18. Buchholz said a woman called Tawni Rodriguez was present when he took the report and that believed she may have been able to help the police locate McKee. RP 104, CP 104. For unexplained

reasons, he did not try to contact Rodriguez, and did not even jot down her name in the incident report. RP 122, CP 122.

In the course of the investigation, McKee disputed Arquette's account. He claimed that, upon learning that McKee had paid Tribble for the truck, Arquette agreed to turn over the vehicle and the title to him if McKee would bring Tribble to the house so Arquette could deal with him. RP 48, CP 57; RP 49, CP 58. McKee claimed he did so and that Arquette then signed the title and gave it to McKee. RP 51, CP 60.

McKee testified that Arquette retrieved the Datsun title from the glove box of a Toyota pickup parked in his driveway and took it inside the house, where he signed it, then handed it to McKee. McKee initially implied that he was inside the house and actually witnessed Arquette sign the title. McKee said Arquette "brought the title inside" the house, where he signed it and handed it to McKee. RP 51, CP 60. When asked directly whether he saw Arquette sign the title, however, McKee answered: "Mr. Arquette was the only one in the house when it was signed." He said that McKee and Rob were waiting outside. RP 52, CP 61.²

The only dated signature on the title is that of a Finance Company Employee. Arquette's name is printed to the right of that as the registered

² On cross examination, defense counsel appeared to have been misled by McKee's original choice of words and asked if he saw Arquette sign the title. McKee said he did. RP 64, CP 73.

owner. Below the dated finance company signature is Arquette's undated signature. Trial Exhibit 2, CP 50. Confronted with this, McKee could not explain why the date of signing was March 11, considerably before the alleged transaction, or why the only date appeared above Arquette's signature rather than next to it. RP 66, CP 75. McKee seemed to think it was March 11, 2009, when he saw Arquette sign the title. RP 66, CP 75.

McKee said he returned the next day, and that is when Arquette moved another truck out of the driveway, giving McKee access to the Datsun. RP 53-54, CP 62-63.

On March 29, 2009, Arquette called the police and reported that he believed the Datsun was "somewhere on the 200 block of Cypress." RP 37, CP 28. Officer Charles Meadows responded. RP 124-25, 130-31. He found the Datsun in plain sight in a carport located in the same complex where Larry McKee lived. McKee's father saw Officer Meadows examining the pickup and contacted the police to find out why. RP 127, CP 133. The ignition was undamaged, RP 128, CP 134, and the plates were still on it. RP 129, CP 135. McKee produced the title to the truck. RP 51, CP 42; RP 58, CP 67. Arquette had told Buchholz the keys to the truck were all accounted for. RP 107, CP 107. McKee said there was no key. RP 54, CP 63. McKee never changed the title of the truck to his own

name. RP 71-72, CP 80-81. Instead, he moved the truck out of state. RP 57, CP 66.

Deputy Meadows presented a photo montage to Larry McKee and to a man called Doyle Ash, who was the State's sole corroboration witness at Arquette's perjury trial. RP 150, CP 156. Neither was able to identify Arquette. RP 151, CP 157. Mr. Doyle actually selected another individual. RP 152, CP 158; RP 161, CP 167.

Meadows invited Arquette to come get the truck, but Arquette was not able to just then. RP 130, CP 136. He told Meadows he could not afford to have it towed at that time. RP 131, CP 137.

On April 18, 2009, Meadows came to Arquette's home and requested another written statement. RP 138, P 144. Meadows left a form which Arquette filled out after Meadows left. RP 142, CP 148. At trial, Arquette admitted signing this second statement. RP 23, CP 14. The statement was under penalty of perjury. Trial Ex. 1B; RP 142, CP 148; RP 49, CP 40. It is this statement that gave rise to the second degree perjury charge in *Arquette I*. RP 142, CP 148.

The statement said that Gary McKee visited Arquette two or three times claiming to have bought the Datsun from Tribble. RP 23, CP 14; RP 38, CP 29. The statement said Arquette told McKee the truck belonged to him, not to Tribble, and that it was not for sale. Arquette said he warned

McKee that he would report the truck stolen if McKee removed it from Arquette's property, but that, when he came home from work on the Friday, the truck was gone, so he reported it stolen. RP 23, CP 14. Arquette did not tell either Buchholz or Meadows about the intended sale on March 11. RP 53, CP 44.

Arquette left the signed statement in the door of his house, and Meadows retrieved it while Arquette was at work. This is Trial Exh. 1B. RP 38, CP 29; RP 47, CP 38. The State Crime Lab confirmed that the signature on the vehicle title matched those on Arquette's signed statements. RP 146-47, CP 152-53; RP 163, CP 169.

Arquette's statement to Meadows was consistent with his earlier statement to Buchholz. RP 139, CP 145; RP 46, CP 37; Trial Exhibit 1C; RP 154, CP 160. Buchholz did not try to contact either Robert Tribble or Gary McKee. RP 117, CP 117. Meadows also failed to locate Robert Tribble. Meadows was not even aware of the existence of Tawni Rodriguez. RP 145, CP 151.

On October 9, 2009, the State charged Arquette with two counts of second degree perjury. RP 163, CP 169. One count for his statements to officer Buchholz on March 27, 2009, and one count for his statements to Officer Meadows on April 18, 2009. The trial court dismissed the first

count involving the Buchholz statement. The Meadows statement, Count 2, was tried to a jury on May 5, 2010.

At trial on May 5, 2010, Arquette did not deny that he had signed the title to the Datsun. He explained that he signed it on March 11, 2009, before he met McKee, in anticipation of the unrelated sale. Arquette testified under oath that his truck was in fact stolen. RP 23, CP14. The prosecutor went through the Meadows statement line by line, challenging its overall credibility because it did not include every word Arquette had testified to in court. RP 48-49, CP 39-40.

Arquette conceded that Meadows was performing his official duties when Arquette signed the statement. RP 49, CP 40. He agreed that a false stolen vehicle report is a serious matter for which people should be held accountable. RP 50, CP 41; RP 55, CP 46. He denied having filed a false report, however. RP 56, CP 47. Rather, Arquette testified that he never gave Rob permission to sell the Datsun, that he never agreed to sell it to McKee, that he did not relinquish the title to McKee, and that he had reported both the truck and the title stolen. RP 39, CP 30.

McKee's friend, Doyle Ash, testified that he went with McKee to Arquette's house to help him move the truck. RP 74-75, CP 84-85. Ash admitted that defense counsel had interviewed him moments before, upon his arrival at court, and that he told counsel he had been called to testify

that he went to help McKee obtain the title.³ RP 80-81, CP 90-91. But, after sitting with McKee for fifteen minutes in the hallway, Ash remembered that he really was supposed to say it was the truck they went to retrieve. RP 80, CP 90. Ash testified that his memory was so bad, he receives disability for it. RP 81, CP 91. Ash had never met Arquette and testified that he had no personal contact with Arquette that day. RP 76. CP 86; RP 78, CP 88. Consequently, Ash was not able to identify Arquette — either in a photo montage or in court. RP 74, CP 84; RP 79, CP 89.

Ash testified that he knew nothing about how the Datsun was purchased. RP 77, CP 87. He testified solely that a person he could not identify moved a truck from what he believed was Arquette's driveway so he and McKee could tow the Datsun from the back yard. *Id.*

Meadows testified that he too had no personal knowledge about when, where, and by whom the title was signed. RP 136, 144, CP 142, 150. Meadows also had no personal knowledge whether the pickup was sold or stolen. RP 144, CP 150.

The jury received the following instruction:

Instruction No. 12: To convict the defendant of the crime of perjury in the second degree there must be one credible direct witness along with independent direct or

³ Possibly because it was heavy?

circumstantial evidence of supporting circumstances that clearly overcomes the oath of the defendant and the legal presumption of the defendant's innocence.

Arquette I, Slip Op. 40776-1-II at 2.

The jury found Arquette guilty of perjury. In *Arquette I*, appellate counsel argued that Instruction No. 12 was defective and relieved the State of its burden of proof. This Court disagreed in an unpublished opinion issued June 21, 2011, and affirmed the conviction. *Arquette I*, 40776-1-II.

In a bizarre twist, the State filed an Information on December 10, 2010, charging Arquette with a second instance of first degree perjury, based on allegedly testifying falsely at his trial on May 5, 2011. CP 1. The alleged conduct comprising the offense was that Arquette testified:

- that he did not sell his vehicle and/or
- that he had a replacement title to the vehicle, and/or
- that his vehicle was stolen.

CP 1. In other words, precisely the same statements constituting the offense in *Arquette I*.

Arquette waived a jury on the new charge and was tried to the bench. CP 8. Arquette stipulated that, while he was under oath in *Arquette I*, that he made the statements contained in Exhibit 1 to the Stipulation (his testimony on May 5, 2010), and that he signed the title to the 1970 Datsun. CP 8(1), (3) & (4).

The State claimed it had met the enhanced burden of proof for perjury by presenting two credible witnesses, McKee and Ash. 8/11 RP 22.⁴ In addition, the State claimed circumstantial evidence corroborated McKee's story: the existence of Arquette's signature on the Datsun's title; McKee's subsequent conduct in leaving the plates on the Datsun and parking it in his carport; the fact that his family contacted police when they heard about Meadows's visit; and the fact that Arquette did not manifest sufficient concern about the progress of the investigation. 8/11 RP 22.

The court viewed the tape of the proceedings in *Arquette I*. In its bench ruling, the court opined that the corroboration prong establishing perjury can consist merely of "an overwhelming belief in the truth of the person who makes the contrary statement." 8/11 RP 23.

The court found it significant that Arquette signed the title and did not offer a plausible explanation. 8/11 RP 23. Defense counsel interrupted to point out that this was contrary to the record in which Arquette explained about the earlier sale that fell through, but the court was unmoved. 8/11 RP 23. The court thought it was dispositive that the truck and title both ended up in the possession of McKee. 8/11 RP 24.

⁴ This is the verbatim report of the August 11, 2011 bench trial proceedings, submitted in the current appeal, 42546-7-II.

The court conceded that Doyle Ash was “problematic about a lot of his testimony,” by which the court presumably meant Ash was not a credible witness. 8/11 RP 24. Also, the court noted that Ash’s evidence was merely that “somebody” moved a vehicle to give McKee access to the disputed truck. 8/11 RP 24. The court did not attach significance to Arquette’s failure to follow up on the recovery of a “relatively worthless vehicle.” 8/11 RP 24-25.

In summary, the court found the State had met its burden by producing testimony of the falsity of “the statement” and “some corroboration” in the form of the circumstantial evidence that Arquette signed the title and that a vehicle got moved out of the way in order to allow this vehicle to be removed. 8/11 RP 25

The trial court found Arquette guilty of first degree perjury on May 5, 2010, and entered a Judgment and Sentence August 17, 2011. The court did not enter Findings and Conclusions.

Arquette filed this timely appeal. CP 216. He has also filed a personal restraint petition, attacking the conviction in *Arquette I*, which he asks the Court to consolidate with his direct appeal.

V. **ARGUMENT**

1. FAILURE TO ENTER WRITTEN FINDINGS & CONCLUSIONS REQUIRES REVERSAL.

“In a case tried without a jury, the court shall enter findings of fact and conclusions of law.” CrR 6.1(d). Without entry of written findings of fact and conclusions of law following a bench trial, there is no formal conviction to vacate. *State v. Head*, 136 Wn.2d 619, 622, 964 P.2d 1187 (1998) (trial court’s oral opinion and memorandum opinion are not formal orders and have no final or binding effect) citing *State v. Mallory*, 69 Wn.2d 532, 533-34, 419 P.2d 324 (1966). A court’s oral ruling “has no final or binding effect unless formally incorporated into the findings, conclusions, and judgment.” *Head*, 136 Wn.2d at 622, quoting *Mallory*, 69 Wn.2d at 533-34.

This Court has held that the failure to enter written findings and conclusions may be harmless and can be remedied by remanding for entry of findings. It is a “bad practice,” however, to remand for entry of findings after the filing of the Appellant’s brief. *State v. Garcia*, 146 Wn. App. 821, 826, 193 P.3d 181, 183 (2008), citing *State v. Cannon*, 130 Wn.2d 313, 329, 922 P.2d 1293 (1996), *review denied*, --- Wn.2d ---- (2009). When the findings and conclusions are filed many months after the trial, it is difficult for the trial judge to remember his or her essential

findings and the reasons for a decision. *Garcia*, 146 Wn. App. at 826. Late findings increase the potential for tailoring to avoid reversal when, as here, they are presented after the initial appellate briefing. *Id.* Reversal is appropriate where the lack of findings and conclusions prevents effective appellate review. *State v. Vailencour*, 81 Wn. App. 372, 378, 914 P.2d 767 (1996).

Alternatively, if “the trial court’s oral opinion and the hearing record are so comprehensive and clear that written facts would be a mere formality,” then the failure to enter written findings and conclusions is harmless. *State v. Hickman*, 157 Wn. App. 767, 771 n.2, 238 P.3d 1240 (2010) (CrR 3.5 findings). But to constitute an adequate record for review, a trial court’s oral opinion must be “comprehensive and must detail the trial court’s reasons for its decision.” *Johnson v. Mermis*, 91 Wn. App. 127, 136, 955 P.2d 826 (1998).

Here, the trial court’s oral findings are far from clear and lack sufficient detail. It is a mystery what evidence the court perceived as satisfying a burden of proof comparably rigorous to that for treason and consisting of direct (that is first-hand) evidence from two credible witnesses, or evidence from one such witness supported by essentially irrefutable circumstantial evidence. 8/11/11 RP 23-24.

The Court should reverse the conviction upon that ground alone.

2. THE EVIDENCE WAS INSUFFICIENT TO MEET THE BURDEN OF PROOF OF PERJURY.

A person is guilty of perjury in the first degree if in any official proceeding he or she makes a materially false statement which he or she knows to be false under an oath required or authorized by law. RCW 9A.72.020(1). The knowledge element applies solely to whether the statement is false, not to its materiality. RCW 9A.72.010(2).⁵

The General Sufficiency Standard Does Not Apply to Perjury:

Generally, review of a challenge to the sufficiency of the evidence to support a criminal conviction is governed by the following principles. The Due Process Clause of the Fourteenth Amendment mandates that the State must prove the essential components of a crime beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 361-62, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). Evidence is deemed sufficient to support a conviction if a rational fact finder could find the essential elements of the crime beyond a reasonable doubt when viewing the evidence in the light most favorable to the State. *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004).

Proof of Perjury Must Exceed Beyond Reasonable Doubt: The general sufficiency standards do not apply in a prosecution for perjury.

⁵ Under federal law, the government must also prove knowledge of materiality. See, former 18 U.S.C. § 1001(a) (knowingly and willfully makes any materially false, fictitious, or fraudulent statement.); 18.U.S.C § 1623(a) (knowingly makes any false material declaration.)

State v. Dial, 44 Wn. App. 11, 16, 720 P.2d 461, review denied, 106 Wn.2d 1016 (1986). Rather, the proofs required to sustain a perjury conviction are the strictest known to the law, with the sole exception of treason. *State v. Olson*, 92 Wn.2d 134, 136, 594 P.2d 1337 (1979). Because the perjury standard is more stringent than beyond reasonable doubt, the general rule that a sufficiency challenge admits the truth of the State's evidence and all reasonable inferences such that the evidence is viewed in the light most favorable to the State simply does not apply. *Olson*, 92 Wn.2d at 135-36.

The rigorous requirements to prove perjury are of long standing and are well established:

There must be the direct testimony of at least one credible witness, and that testimony to be sufficient must be positive and directly contradictory of the defendant's oath; in addition to such testimony, there must be either another such witness or corroborating circumstances established by independent evidence, and of such a character as clearly to turn the scale and overcome the oath of the defendant and the legal presumption of his innocence. Otherwise the defendant must be acquitted."

Arquette I. quoting the seminal Washington perjury case of *Nessman v. Sumpter*, 27 Wn. App. 18, 23, 615 P.2d 522 (1980), quoting *State v. Rutledge*, 37 Wash. 523, 528, 79 P. 1123 (1905).

In *Arquette I.*, this Court held that, absent a second direct witness, corroboration could consist of the run-of-the-mill variety of circumstantial

evidence, based on the general principle that direct and circumstantial evidence are deemed equally reliable. *Arquette I*, at 2, citing *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). The Court held that “this was what *Nessman* meant by independent.” This was wrong.

In *Nessman*, the defendant was arrested for trespass and admitted he was known in California as Ronnie Howie. Under oath at a subsequent fugitive hearing, he denied this and insisted his true name was Nessman. *Nessman*, 27 Wn. App. at 20. The State charged him with first degree perjury for lying at that hearing.

The State’s direct evidence that the sworn testimony was false was the arresting officer’s testimony that Nessman had acknowledged his name was Howie. As corroboration, the State also presented: a certified copy of a California driver’s license issued to Ronnie Monroe Howie with Nessman’s photograph, a photograph album containing many snapshots of Nessman identified as “Ronnie,” a small box bearing his name and social security number, and the fact Nessman responded to a greeting from a California police officer.

Because of the “peculiar impact” perjury has on the administration of justice, the requisite degree of proof is unique in the rules of criminal evidence. “Perjury requires a higher measure of proof than any other crime known to the law, treason alone excepted.” *Nessman*, 27 Wn. App. at 22,

quoting *State v. Wallis*, 50 Wn.2d 350, 311 P.2d 659 (1957); and citing 7 J. Wigmore, EVIDENCE §§ 2032, 2038, 2040 (1978). The testimony of a single witness or circumstantial evidence alone is not sufficient. *Nessman*, 27 Wn. App. at 22-23. The necessary contradicting testimony must be given by a witness with personal knowledge of the facts. *Nessman*, 27 Wn. App. at 24.

Absent a second direct witness, the State was required to establish corroborating circumstances by independent evidence “of such a character as clearly to turn the scale and overcome the oath of the defendant and the presumption of innocence.” *Nessman* at 23, quoting *Rutledge*, 37 Wash. at 528. Otherwise the defendant must be acquitted. *Id.*

In *Arquette I*, this Court held that the State could rely on circumstantial evidence such as was found sufficient to sustain a conviction in *State v. Delmarter*, 94 Wn.2d 634, 618 P.2d 99 (1980). That was error.

First, the conviction in *Delmarter* was for attempted theft, not perjury. Accordingly, second, the Court reviewed the evidence in the light most favorable to the State. 94 Wn.2d at 638. The Court stated that, in that context, “circumstantial evidence is not to be considered any less reliable than direct evidence.” *Id.* It was deemed sufficient where the fact at issue was “plainly indicated as a matter of logical probability.”

Delmarter, 27 Wn. App. at 638. But in a prosecution for perjury, circumstantial evidence most definitely is considered less reliable than direct evidence. The State must produce corroborating evidence that is (a) independent of the direct witness, and (b) “of such a character as clearly to turn the scale and overcome the oath of the defendant and the presumption of innocence.” *Nessman* at 23.

Delmarter relied on *State v. Gosby*, 85 Wn.2d 758, 539 P.2d 680 (1975), which concerned armed robbery, not perjury. In that context, *Gosby* held that there is no “‘base line’ of reliability” below which evidence will not be admitted, and that no sound policy reason justified creating such a baseline of reliability. *Id.* at 760-61. *Gosby* defined circumstantial evidence as evidence that “relates to facts and circumstances from which the jury may infer other or connected facts which usually and reasonably follow according to the common experience of mankind.” *Gosby*, at 761. Compare this with *Arquette I*’s definition that “circumstantial evidence” simply means “evidence of circumstances,” which *Nessman* merely says must be independent. *Arquette I*, 40776-1-II at 2. But all evidence is evidence of circumstances. Rather, “circumstantial” evidence is a term of art used to distinguish between evidence from which an alleged fact may logically be inferred as opposed to evidence based on personal knowledge.

Gosby held merely that circumstantial evidence is not necessarily less reliable than direct evidence, comparing, for example, the circumstantial evidence of clear fingerprints at the crime scene versus direct eye witness testimony with all its proven weaknesses. *Gosby*, at 766. The probative value of both direct and circumstantial evidence depends **upon the particular facts of the case**. *Gosby* at 766.

Thus, in prosecutions for crimes other than perjury, circumstantial evidence need not be demonstrably inconsistent with innocence. *Gosby*, at 765-66. And “all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant.” *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

But neither of the standard rules governing circumstantial evidence in particular and the sufficiency of the evidence in general hold in a prosecution for perjury. A prosecution for perjury exerts a “peculiar impact” upon the administration of justice which creates a sound policy reason for elevating the requisite degree of proof to a level “unique in the rules of criminal evidence.” *Nessman*, 27 Wn. App. at 22. Accordingly, perjury “requires a higher measure of proof than any other crime known to the law, treason alone excepted.” *Id.*, quoting *Wallis*, 50 Wn.2d 350, 350; and citing 7 J. Wigmore, EVIDENCE §§ 2032, 2038, 2040 (1978).

In holding that the evidence must be “of such a character as clearly to turn the scale and overcome the oath of the defendant and the presumption of innocence,”⁶ *Nessman* is effectively saying that the reviewing court must view the evidence in a light most favorable to the defendant. Where, as here, the evidence of a single direct witness is equally consistent with the defendant’s version of the facts, and the State produced no independent evidence sufficient to overcome the presumption of innocence (which is to say evidence that constitutes proof beyond a reasonable doubt), then the defendant must be acquitted. *Rutledge*, 37 Wash. at 528.

In holding that “circumstantial evidence is not to be considered as any less reliable than direct evidence,” *Delmarter* did not establish that circumstantial evidence is always to be considered as reliable as direct evidence by definition. Only that the particular facts must be taken into account in evaluating the probative value of both circumstantial and direct evidence. In *Delmarter*, the fact at issue was “plainly indicated as a matter of logical probability.” *Delmarter*, at 638. That is not the case here. The facts alleged as contradicting Arquette’s story were not plainly indicated as a matter of logical probability. Arquette’s story was no less logical or plausible than McKee’s.

⁶ *Nessman* at 23.

In addition, *Delmarter's* holding that the particular circumstances of each case must be considered when evaluating the trustworthiness of circumstantial evidence has drifted over the years. As did this Court in *Arquette I*, courts now routinely state the proposition as the bald, unqualified holding that circumstantial evidence is just as reliable as direct. See, e.g., *State v. Meah*, ___ Wn. App. ___, ___ P.3d ___ (2011 WL 6144964), Slip Op. 65566-3-I at 1; *State v. Grimes*, ___ Wn. App. ___, ___ P.3d ___, 2011 WL 6018399, Slip Op. 40392-7-II at 10.

The State presented no corroborating evidence of sufficient reliability to overcome Arquette's oath. That McKee somehow had acquired the signed title proves nothing. That fact is equally consistent with Arquette's claim that the title had been stolen, probably by Tribble. If true, then McKee could have obtained the title from Tribble. It is insufficient that the trial court find McKee's version more credible in light of the "known facts," as the State argued. 8/11/11 RP 15. The State did not prove any "known facts." The evidence consisted solely of two equally plausible stories, one by Arquette and one by McKee.

Even if the written stolen vehicle report could be proven false, it would not constitute a crime. Arquette wrote that statement on a form that included in the signature box a boilerplate warning that it was being signed "on penalty of perjury." Stip. at 142. This did not constitute an

oath to tell the truth. Nor did it constitute a concession that the State could convict the signer of perjury merely by producing a witness with a different story. At most, the signer under such boilerplate assumes the risk that the State may attempt to produce overwhelming evidence “of such a character as clearly to turn the scale and overcome the oath,” either from two direct witnesses or one such witness plus independent evidence sufficient to constitute proof beyond a reasonable doubt. His signature essentially says, “Bring it on.”

Thus, it is not the case that, the State can survive a sufficiency challenge and avoid reversal of a perjury conviction merely by pointing to evidence sufficiently plausible for a reasonable jury to have believed it. *See, e.g., State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). Rather, the State must produce direct testimony of at least one credible witness that positively and directly contradicts the defendant’s oath. In lieu of a second direct witness, the corroboration “must be clear and positive, and so strong that, with the evidence of the witness who testifies directly to the falsity of the defendant’s testimony, it will convince the jury beyond a reasonable doubt.” *Rutledge*, 37 Wash. at 527.

In *Arquette I*, this Court applied the general rule that direct evidence and circumstantial evidence are equally reliable. *Arquette I*, citing *Delmarter*, 94 Wn.2d at 638. This is wrong in the context of a

perjury prosecution, where direct evidence is distinguished from circumstantial evidence.

First, there must be “testimony by at least one witness furnishing direct evidence of facts contrary to, or absolutely incompatible or physically inconsistent with, that sworn to by the accused.” *State v. Hanson*, 14 Wn. App. 625, 628, 544 P.2d 119 (1976), quoting *People v. Roubus*, 65 Cal. 2d 218, 53 Cal. Rptr. 281, 283, 417 P.2d 865 (1966). Arguably, Gary McKee’s evidence meets that standard. If McKee was telling the truth, then Arquette was lying. The converse, however, is equally true.

Therefore, the State was required to back up McKee’s direct testimony either with a second direct witness who, from personal knowledge, can directly contradict the accused’s statement, or the State was required to produce independent corroborating evidence of such a character as clearly to “overcome the oath of the defendant and the legal presumption of his innocence. Otherwise the defendant must be acquitted.” *Nessman*, 27 Wn. App. at 23, quoting *Rutledge*, 37 Wash. at 528.

Here, the State satisfied none of these elements of the enhanced proof of perjury. Standing alone, McKee’s testimony was insufficient overcome Arquette’s oath that Robert Tribble stole the signed title to the

Datsun from his home and could have given it to McKee. McKee simply told a different story that pitted McKee's oath against Arquette's.

As for iron-clad corroboration, Doyle Ash's evidence was not sufficient to overcome Arquette's oath. Ash, whose veracity was thoroughly discredited, did not even claim to have seen Arquette at all. 8/11/11 RP 19; Stip at 75, 79. Even if Doyle saw someone hand a paper to McKee, he did not know from personal knowledge that the paper was a title, or that the person he saw was not Tribble. Likewise, neither Buchholz nor Meadows claimed any direct knowledge. Their evidence consisted solely of statements from others.

The corroborating evidence" must be clear and positive, and so strong that, with the evidence of the witness who testifies directly to the falsity of the defendant's testimony, it will convince the jury beyond a reasonable doubt." *Rutledge*, 37 Wash. at 527, citing *Underhill*, Crim. Ev. § 468; Wharton on Criminal Evidence (9th Ed.) § 387.

The State simply did not meet that test in *Arquette I*, and, by the same reasoning, also failed to prove that Arquette committed perjury at his trial defending the false statement charge in that case.

This Court should reverse both convictions for insufficient evidenced and dismiss the prosecution. "Retrial following reversal for insufficient evidence is 'unequivocally prohibited' and dismissal is the

remedy.” *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998), quoting *State v. Hardesty*, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996).

3. THE SECOND PERJURY PROSECUTION CONSTITUTES DOUBLE JEOPARDY.

The Fifth Amendment to the United States Constitution, made applicable to the states through the Fourteenth Amendment, guarantees that “[n]o person shall be ... subject for the same offense to be twice put in jeopardy of life or limb.” U.S. Const. amend. V. The Washington Constitution guarantees that “[n]o person shall ... be twice put in jeopardy for the same offense.” Wash. Const. art. I, § 9. Washington courts interpret both clauses identically. *State v. Gocken*, 127 Wn.2d 95, 107, 896 P.2d 1267 (1995); *State v. Schoel*, 54 Wn.2d 388, 391, 341 P.2d 481 (1959); *State v. Ervin*, 158 Wn.2d 746, 752, 147 P.3d 567 (2006); *State v. Tvedt*, 153 Wn.2d 705, 710, 107 P.3d 728 (2005); *United States v. Scott*, 437 U.S. 82, 87-88, 98 S. Ct. 2187, 57 L. Ed. 2d 65 (1978). A claim of double jeopardy is a question of law that is reviewed de novo. *State v. Jackman*, 156 Wn.2d 736, 746, 132 P.3d 136 (2006); *State v. Jones*, 159 Wn.2d 231, 237, 149 P.3d 636 (2006).

The double jeopardy doctrine protects against a second prosecution for the same offense, after acquittal, conviction, or a reversal for lack of sufficient evidence. *State v. Hardesty*, 129 Wn.2d 303, 309, 915 P.2d

1080 (1996), citing *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S. Ct. 2072, 2076, 23 L. Ed. 2d 656 (1969). It functions to protect us against governmental abuse by bringing a second prosecution for the same offense after a conviction is final. *State v. Wright*, 165 Wn.2d 783, 791, 203 P.3d 1027 (2009); see *Ervin*, 158 Wn.2d at 752-53. Where a conviction is reversed on appeal, a second prosecution is generally permissible. *United States v. Tateo*, 377 U.S. 463, 465, 84 S. Ct. 1587, 12 L. Ed. 2d 448 (1964); *State v. Anderson*, 96 Wn.2d 739, 742, 638 P.2d 1205 (1982); *State v. Cochran*, 51 Wn. App. 116, 118, 751 P.2d 1194 (1988). But where a conviction was affirmed, the three elements of double jeopardy are met.

First, jeopardy must have previously attached. *Cochran*, 51 Wn. App. at 118. Second, jeopardy must have terminated. *Id.* And, third, the defendant must be placed in jeopardy again for the same offense. *State v. Corrado*, 81 Wn. App. 640, 645, 915 P.2d 1121 (1996).

Whenever jeopardy has previously attached and terminated, the double jeopardy clause prohibits the government from again placing the defendant in jeopardy for the same offense. *Ervin*, 158 Wn.2d at 752. For a defendant's double jeopardy right to be violated, three elements must be present: (1) jeopardy must have previously attached, (2) jeopardy must have previously terminated, and (3) the defendant is again being put in

jeopardy for the same offense. *Corrado*, 81 Wn. App. at 645. For example, a thief may not be convicted of stealing goods and possessing or receiving the same stolen goods. *State v. Melick*, 131 Wn. App. 835, 840-41, 129 P.3d 816 (2006); *State v. Hancock*, 44 Wn. App. 297, 300-01, 721 P.2d 1006 (1986). By the same reasoning, a person cannot be punished for making a false statement and again for defending himself against a criminal charge based on the same alleged untruth.

The dispositive case is *Ashe v. Swenson*, 397 U.S. 436, 90 S. Ct. 1189, 25 L. Ed. 2d 469 (1970). That decision holds that the double jeopardy clause encompasses the doctrine of collateral estoppel as a constitutional requirement. It operates to forbid a prosecution for perjury based on testimony in a prior proceeding if the reviewing court's examination of the prior record shows that a rational jury could not have based its verdict on an issue different from that presented in the second prosecution. *Bridle v. Illinois*, 450 U.S. 986, 987, 101 S. Ct. 1527, 1528, 67 L. Ed. 2d 823 (1981), citing *Ashe*, 397 U.S., at 444.

Here, the first jury could only have based the conviction on a finding that Arquette made false statements in the stolen vehicle report obtained by Meadows, which is precisely what the State had to prove to obtain the second conviction. Jeopardy for the offense of making a false statement attached in *Arquette I*. Jeopardy terminated when this Court

affirmed the conviction. This second prosecution puts Arquette in jeopardy for the same offense. This perjury charge was based entirely on Arquette's testimony at the first trial for making a false statement. 7/13/11 RP 72. The parties did not dispute the trial court's determination that the only issue in this trial was the same as at the first trial — whether Arquette made a materially false statement in the written statement he gave Officer Meadows. 8/11/11 RP 11. Everyone agreed that no more testimony need be taken and that the judge should decide the case based solely on the transcript of the first trial. 8/11/11 RP 12.

The trial court expressed the opinion, without citation to authority, that the burden of proof for perjury had been "watered down" in recent cases and that it was now sufficient for a fact-finder to entertain an "overwhelming belief" in the veracity of a single State's witness. 8/11/11 RP 23. The judge simply found McKee more believable than Arquette. The court thought it was "pretty clear" that the title to the Datsun was been stolen in an earlier burglary, and that McKee's possession of the title and his story as to how he acquired it constituted corroboration of his direct testimony. 8/11/11 at 26.

Thus, Arquette was convicted in a second prosecution for the very same offense based on the same evidence. This is double jeopardy by definition.

Vacating a conviction is the proper remedy when the conviction violates double jeopardy. *State v. Knight*, 162 Wn.2d 806, 811, 174 P.3d 1167 (2008).

VI. **CONCLUSION**

For the foregoing reasons, the Court should reverse Mr. Arquette's current conviction, vacate the previous conviction, dismiss the prosecution with prejudice, and remand for proceedings to compensate Arquette for costs paid assessed in *Arquette I*.

Respectfully submitted this 16th day of January, 2012.

Jordan B McCabe

Jordan B. McCabe, WSBA No. 27211
Counsel for Nick T. Arquette

CERTIFICATE OF SERVICE

Jordan McCabe served a copy of this Appellant's Brief upon opposing counsel by the Division II upload portal.

Susan I. Baur, Cowlitz County Prosecutor's Office
sasserm@co.cowlitz.wa.us

A copy was deposited in the U.S. Mail, first class postage prepaid, addressed to:

Nick T. Arquette
260 25th Avenue
Longview, WA 98632

Jordan B McCabe

Date: January 17, 2012

Jordan B. McCabe, WSBA No. 27211

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