

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

REPLY BRIEF

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I. AUTHORITIES CITED

Washington Cases

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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 This Court affirmed in *State v. Arquette*, Unpublished Opinion No. 40776-1-II, filed June 21, 2011 (*Arquette I*).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.

For a full Statement of the Case with citation to the record, please see the Appellant's Brief at 2.

III. ARGUMENTS IN REPLY

1. THE COURT SHOULD REVERSE AND DISMISS FOR FAILURE TO ENTER BENCH TRIAL FINDINGS.

In a case tried to the bench without a jury, the rules require the court to enter findings of fact and conclusions of law. CrR 6.1(d). This is mandatory. *State v. Head*, 136 Wn.2d 619, 623-24, 964 P.2d 1187 (1998). Otherwise, there is no formal conviction to vacate. *Head*, 136 Wn2.d at 622.

The State asks the Court to remand for entry of bench trial findings. 1BR at 11.¹ This remedy is disapproved, however. It is a “bad practice” 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). 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).

The State offers no argument supporting remand rather than reversal at this late stage in the appeal. This Court distinguishes between inadequate findings that can be remedied by remand for entry of additional findings, and a complete lack of findings. *State v. Naranjo*, 83 Wn. App. 300, 302, 921 P.2d 588 (1996). Remanding for entry of findings after the appeal had been briefed is inherently prejudicial and creates the appearance of unfairness. *Id.* Moreover, overlooking the State’s complete disregard for procedure in a criminal prosecution creates an appearance of unfairness in itself. *State v. Witherspoon*, 60 Wn. App. 569, 571-72, 805 P.2d 248 (1991).

¹ The State has filed two responding briefs. The first, dated April 14, 2012, is designated 1BR. The second, dated June 8, 2012, is 2BR.

Mr. Arquette has filed all his arguments in detail. It would defeat the ends of justice to allow the State to craft findings at this point. Moreover, the trial took place ten months ago, on August 11, 2011, based solely on a tape recording of a proceeding on May 5, 2010. It is highly unlikely that the trial judge will retain sufficient independent memory to enter meaningful findings rather than merely rubber-stamping whatever the prosecutor presents.

The proper remedy is to reverse.

2. THE SECOND PROSECUTION VIOLATES DOUBLE JEOPARDY.

The State claims initiating a second perjury prosecution based on the accused's trial testimony regarding the identical facts alleged in an earlier perjury charge does not violate double jeopardy. 1BR 12-13. The State concedes Arquette was prosecuted twice for the same false statement. 1BR 14.

The double jeopardy doctrine prohibits 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). Unless the legislature expressly authorizes multiple punishments, the Court analyzes a double jeopardy

challenge under the test first articulated in *Blockburger v. United States*, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932). A proper Blockburger analysis compares the two prosecutions in light of what actually happened. *State v. Potter*, 31 Wn. App. 883, 887-888, 645 P.2d 60 (1982). Double jeopardy is violated where the evidence required to support a conviction on one crime would be sufficient to convict on the other. *In re Orange*, 152 Wn.2d 795, 820, 100 P.3d 291 (2004).

Here, the evidence required to support the second conviction included in its entirety the same evidence used to obtain the first conviction. The conviction before this Court in this direct appeal is therefore barred by double jeopardy.

3. IN BOTH PROSECUTIONS, THE EVIDENCE IS INSUFFICIENT ON ITS FACE TO MEET THE STATE'S RIGOROUS BURDEN TO PROVE PERJURY.

Contrary to the State's argument, 1BR 12, if the Court elects not to reverse for failure to enter findings, it should review the sufficiency of the evidence on the record before it.

The general rule is that 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).

To prove perjury, however, the State's burden exceeds beyond reasonable doubt. *State v. Dial*, 44 Wn. App. 11, 16, 720 P.2d 461 (1986). 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). Accordingly, the general rule that a sufficiency challenge admits the truth of the State's evidence and all reasonable inferences simply does not apply. *Olson*, 92 Wn.2d at 135-36.

Here, on its face the evidence does not include direct testimony of at least one credible witness that positively and directly contradicts Arquette's oath. See *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). Moreover, in addition to that direct eye-witness testimony, the State needed to produce either another direct eye witness or independent corroborating evidence "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." *Nessman*, 27 Wn. App. at 23.

All the State had here were hearsay reports from officer Meadows, and Mr. McKee's on-again-off-again claim that Arquette signed over the title to the Datsun in his presence. But McKee admitted under oath that he could not have seen Arquette sign the title because Arquette was alone inside the house and McKee was waiting outside. RP² 52, CP 61.

Moreover, the State concedes it had nothing to back up McKee's allegations except the testimony of Doyle Ash. 2BR 11. But Mr. Ash admitted his poor memory qualified him to receive disability payments. RP 81, CP 91. Ash also admitted that he spent 15 minutes with McKee outside the courtroom after which he changed his testimony. RP 80, CP 90. Ash knew nothing about how the truck was purchased. RP 77, CP 87. And the judge stated on the record that Doyle was not a credible witness. 8/11 RP 24. The circumstantial evidence is equally consistent with Arquette's version as with McKee's. 8/11 RP 24-25; see also 2BR 12.

Thus, even viewing the evidence in the light most favorable to the State, which is not the standard, the State failed to prove perjury. 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

² RP denotes the verbatim report of the trial on May 5, 2010. 8/11 RP is the second trial on August 11, 2011.

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.

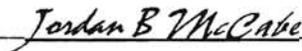
The Court should reverse the perjury conviction and dismiss the prosecution for insufficient evidence.

If the Court reverses the conviction before it in this direct appeal, it should also grant Arquette's Personal Restraint Petition challenging the identical conviction erroneously affirmed in *Arquette I*.

IV. 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 18th day of June, 2012.



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CERTIFICATE OF SERVICE

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

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

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