

360466

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

---

STATE OF WASHINGTON,

Respondent,

v.

JAMES GEARHARD,

Appellant.

---

APPELLANT'S RESPONSE AND REPLY BRIEF

---

Richard D. Gilliland WSBA # 40474  
Hall and Gilliland Law PLLC  
Attorney for Appellant  
1111 West Yakima Ave.  
Yakima, WA 98902  
509-452-8120  
richardg@handglegal.com

**TABLE OF CONTENTS**

A. TABLE OF AUTHORITIES.....ii

B. INTRODUCTION.....1

C. ASSIGNMENTS OF ERROR.....1

D. ISSUES RELATED TO ASSIGNMENTS OF ERROR.....2

E. STATEMENT OF THE CASE.....3

F. ARGUMENT.....5

G. CONCLUSION.....23

**A. TABLE OF AUTHORITIES**

**Case Law:**

United States Supreme Court Cases:

*Evans v. Michigan*, 568 U.W. 313, 317, 133 S.Ct. 1069, 185 L.Ed.2d 124 (2013)  
.....16

*Foo Foo v. U.S.*, 369 U.S. 141, 82 S.Ct. 671, 7 L.Ed.2d 629 (1962).....15, 16

*Lee v. United States*, 432 U.S. 23, 97 S.Ct. 2141, 53 L.Ed.2d 80 (1977).....15

*United States v. Ball*, 163 U.S. 662, 16 S.Ct. 1192, 41 L.Ed. 300 (1896).....16

*United States v. Martin Linen Supply Co.*, 430 U.S. 564, 97 S.Ct. 1349, 51 L.Ed.2d  
642 (1977).....15

Washington State Cases:

*Burton v. Lehman*153 Wn.2d 416, 103 P.3d 1230 (2005).....8, 9

*City of Federal Way v. Koenig*, 167 Wn.2d 341, 217 P.3d 1172 (2009).....9, 10

*Hizey v. Carpenter*, 119 Wn.2d 251, 830 P.2d 646 (1992).....19

*Hollman v. Corcoran*, 89 Wn. App. 232, 949 P.2d 386 (1997).....18

*Industrial Indem. Co. of the N.W. v. Kallegig*, 114 Wn.2d 907, 792 P.2d 520 (1990)  
.....19

*In re Det. of Williams*, 147 Wn.2d 476, 55 P.3d 597 (2002).....5, 20

*In re Pers. Restraint of Williams*, 121 Wn.2d 655, 853 P.2d 444 (1993).....7

*Matter of Dowling*, 98 Wn.2d 542, 656 P.2d 497 (1983).....15

<i>Moses v. State, Dept. of Social and Health Services</i> , 90 Wn.2d 271, 581 P.2d 152 (1978) .....	8
<i>Nast v. Michels</i> , 107 Wn.2d 300, 730 P.2d 54 (1986).....	9
<i>Roberson v. Perez</i> , 156 Wn.2d 33, 123 P.3d 844 (2005).....	21
<i>Soproni v. Polygon Apartment Partners</i> , 137 Wn.2d 319, 971 P.2d 500 (1999)...	10
<i>State v. Barnes</i> , 157 Wn. App. 1076 (2010) (unpublished).....	12
<i>State v. Bassett</i> , 192 Wn.2d 67, 428 P.3d 343 (2018).....	5, 20
<i>State v. Caliguri</i> , 99 Wn.2d 501, 664 P.2d 466 (1983).....	6, 7, 9, 12
<i>State v. Collins</i> , 112 Wn.2d 303 771 P.2d 350 (1989).....	15
<i>State v. Delmarter</i> , 94 wn.2d 634, 618 P.2d 99 (1980).....	20
<i>State v. Ervin</i> , 169 Wn.2d 815, 239 P.3d 354 (2010).....	5, 20
<i>State v. Evans</i> , 177 Wn.2d 186, 298 P.3d 724 (2013).....	7, 10
<i>State v. Fjermestad</i> , 114 Wn.2d 828, 836, 791 P.2d 897 (1990).....	12
<i>State v. Green</i> , 94 Wn.2d 216, 616 P.2d 628 (1980).....	20
<i>State v. Gore</i> , 101 Wn.2d 481, 681 P.2d 227 (1984).....	8
<i>State v. Hickman</i> , 135 Wn.2d 97, 954 P.2d 900 (1998).....	21, 22
<i>State v. Hunley</i> , 175 Wn.2d 901, 287 P.3d 584 (2012).....	5, 20
<i>State v. J.P.</i> , 149 Wn.2d 444, 69 P.3d 318 (2003).....	7
<i>State v. Kerry</i> , 34 Wn. App. 674, 663 P.2d 500 (1983).....	20
<i>State v. Longshore</i> , 97 Wn. App. 144, 982, P.2d 1191 (1999).....	19
<i>State v. Salinas</i> , 121 Wn.2d 689, 693-4, 853 P.2d 439 (1993).....	11, 12

<i>State v. Sweany</i> , 174 Wn.2d 909, 281 P.3d 305 (2012).....	7
<i>State v. Williams</i> , 94 Wn.2d 531, 617 P.2d 1012 (1980) .....	6, 7, 9, 12
<i>Weeks v. Chief of the Washington State Patrol</i> , 96 Wn.2d 893, 639 P.2d 732 (1982) .....	8
<i>Young v. Seattle</i> , 25 Wn.2d 888, 172 P.2d 222 (1946).....	8
<b><u>Statutes:</u></b>	
RCW 9.73.....	2, 4, 6, 12
RCW 9.73.030.....	2, 3, 4, 7, 9, 10, 11, 12, 13
RCW 9.73.050.....	1, 11
RCW 4.44.340.....	17, 18
<b><u>Other Authorities:</u></b>	
ER 801.....	11
RAP 2.2.....	1, 2, 13, 14, 16, 17
United States Constitution, Fifth Amendment.....	1, 2
Washington State Constitution.....	1, 2

## **A. INTRODUCTION**

The State's entire argument in defense of the Superior Court's ruling denying Appellant's Motion to Suppress the "pretext phone call" is that the Washington State Supreme Court is wrong. This argument is unquestionably meritless because, on matters of Washington State black letter law interpretation, the Washington State Supreme Court cannot be wrong unless it later determines that it is, in fact, wrong. Furthermore, the State's cross appeal must be rejected because it is not allowed under RAP 2.2(b)(1), the Washington State Constitution, the double jeopardy clause of the Fifth Amendment to the United States Constitution, and is also otherwise without merit.

## **B. ASSIGNMENTS OF ERROR**

1. The Superior Court erred by denying Mr. Gearhard's Motion to Suppress all evidence associated with the "pretext phone call" conducted by the investigating officer, Detective Anderson, on May 11, 2016, which was recorded without the consent of Mr. Gearhard, who was a party to the call, in violation of RCW 9.73.050 and Washington State case law.
2. The Superior Court erred by admitting all testimony about the "pretext phone call" conducted by the investigating officer, Detective Anderson, on May 11, 2016, which was recorded without the consent of Mr. Gearhard, who was a

party to the call, without determining which parts of the call fit within the State's claimed exception of RCW 9.73.030(2)(b).

3. The State assigns error to the Superior Court's granting of Mr. Gearhard's Motion for Directed Verdict as to the Child Molestation in the Third Degree charge.

### **C. ISSUES RELATING TO ASSIGNMENTS OF ERROR**

1. Under Washington's Privacy Act of RCW 9.73, and Washington State case law, should this court reverse the Superior Court's decision denying Mr. Gearhard's motion to exclude the "pre-text phone call" when: 1) the recording was of a conversation and a communication, 2) Mr. Gearhard had a reasonable expectation of privacy in the conversation/communication, 3) Mr. Gearhard did not consent to the recording, 4) the recording was made in violation of RCW 9.73.030(1), 5) during this conversation/communication Mr. Gearhard allegedly asks JAC to not tell the police about an alleged incident for which Mr. Gearhard has been acquitted?
2. Under Washington's Privacy Act of RCW 9.73, and Washington State case law, even if Mr. Gearhard's statement falls within the exception of RCW 9.73.030(2)(b), did the Superior Court err by admitting testimony about the entirety of the conversation as opposed to only the portion of the conversation that falls within this exception when the vast majority of the conversation does not even arguably fall within this exception?
3. Under Washington's Rules of Appellate Procedure 2.2, the Washington State Constitution, the Fifth Amendment to the United States Constitution and case law, is the State prohibited from appealing the Superior Court's acquittal of Mr. Gearhard on the charge of Child Molestation in the Third Degree?
4. Under Washington State case law, even if the State can appeal the Superior Court's acquittal of Mr. Gearhard on the charge of Child Molestation in the Third Degree, should this court affirm the Superior Court when there is no case law saying the Superior Court cannot grant a directed verdict following a hung jury, and to rule otherwise would be a grievous injustice?

5. Under Washington State case law, even if the State can appeal the Superior Court's acquittal of Mr. Gearhard on the charge of Child Molestation in the Third Degree, was the Superior Court correct to apply the Law of the Case doctrine to this case when the State failed to object to the "to convict" jury instruction which added an element that the State failed to prove at trial?

#### **D. STATEMENT OF THE CASE**

On May 5, 2016, Sarah Henry called Klickitat County Dispatch to report an alleged Child Molestation against her son, JAC. CP 73.

Klickitat County Sheriff's Office Sgt. Anderson interviewed JAC on May 11, 2016. *Id.* Following the interview, Sgt. Anderson decided to do a "phone tip", or "pretext phone call" between JAC and Mr. Gearhard. CP 73-4. Sgt. Anderson did not get judicial consent to conduct this "pretext phone call". CP 74. Sgt. Anderson recorded this phone call with a recording device which he placed on the table a couple feet from JAC. *Id.* Sgt. Anderson only obtained JAC's consent to record the conversation. CP 73-4. During the conversation, Mr. Gearhard "requested that JAC not tell the police of the incident, that he (the defendant) was scared and this could ruin his life and for JAC to 'do this favor for him.'" CP 74. This conversation was made in violation of RCW 9.73.030(1). CP 75.

The State subsequently charged Mr. Gearhard with Child Molestation in the Third Degree and Indecent Liberties with Forcible Compulsion for the alleged July 3, 2015, incident and Witness Tampering for the May 11, 2016, "pretext phone call". CP 76-7.

Mr. Gearhard filed a motion to suppress the “pretext phone call” because it violated RCW 9.73—Washington State’s Privacy Act. CP 6. The motion was heard May 15, 2017. CP 71-2. The Court entered its Findings of Fact and Conclusions of Law denying Mr. Gearhard’s Motion to Suppress on June 5, 2017. CP 73-75.

On July 19, 2017, Mr. Gearhard filed his motions in limine for trial, within which Mr. Gearhard again moved the court to exclude the “pretext phone call”. CP 137. In the alternative, Mr. Gearhard also moved the court to exclude any evidence from the “pretext phone call” that did not fit within the exception of RCW 9.73.030(2). *Id.* On September 18, 2017, the Superior Court heard oral argument on Mr. Gearhard’s motions in limine, but the Superior Court reserved ruling on the “pretext phone call” motions until the morning of trial. RP September 18, 2017, at 2:15-4:3; CP 139.

On October 4, 2017, the first day of trial, the Superior Court readdressed the “pretext call” motions in limine by Mr. Gearhard and denied them, ruling that the State could introduce testimony about the entire “pretext phone call”. RP October 4, 2017, at 25:7-28:19; CP 140.

Following trial, on October 9, 2017, the jury returned a verdict of not guilty on the Indecent Liberties charge, but was unable to reach a verdict on the Child Molestation 3 and Witness Tampering charges. On October 16, 2017, Mr.

Gearhard filed a Motion for Directed Verdict on the Child Molestation in the Third Degree charge. CP 101-5.

On December 8, 2017, the Superior Court granted Mr. Gearhard's motion for a directed verdict as to the Child Molestation in the Third Degree charge and found Mr. Gearhard Not Guilty of that charge based on insufficient evidence. CP 116-8.

Mr. Gearhard subsequently waived jury and submitted the lone remaining charge of Witness Tampering to the Superior Court on stipulated facts which resulted in a finding of guilt to which Mr. Gearhard timely appealed. CP 79-87.

#### **E. ARGUMENT**

##### **1. THIS COURT SHOULD REVERSE THE SUPERIOR COURT BECAUSE THE PRETEXT PHONE CALL AT ISSUE HERE DOES NOT FIT WITHIN THE NARROW PRIVACY ACT EXCEPTION OF RCW 9.73.030(2)(b).**

Here, the issue is whether the Superior Court erred by ruling that Mr. Gearhard's alleged statements fall within the Privacy Act exception of RCW 9.73.030(2)(b). This is a question of law. Thus the standard of review is de novo. *State v. Bassett*, 192 Wn.2d 67, 348, 428 P.3d 343 (2018) citing *State v. Hunley*, 175 Wn.2d 901, 908, 287 P.3d 584 (2012); *State v. Ervin*, 169 Wn2d 815, 821, 239 P.3d 354 (2010) citing *In re Det. of Williams*, 147 Wn.2d 476, 486, 55 P.3d 597 (2002).

In its Response Memorandum, the State begins by declaring that Mr. Gearhard's constitutional privacy rights were not violated by the pretext call at issue in this case. *State's Opening Brief* at 3-4. This argument is a red herring as Mr. Gearhard has never alleged a constitutional violation as the basis for suppression. The violation here involves Mr. Gearhard's statutory privacy rights as discussed in Washington's Privacy Act of RCW 9.73.

The State continues its argument by listing off multiple definitions contained within Washington's Privacy Act that are also not at issue. *State's Opening Brief* at 4-5.

Finally, the State gets to the crux of its argument—the State's belief that the Washington State Supreme Court was incorrect in its interpretation of RCW 9.73.030(2)(b) in the companion cases of *State v. Williams* and *State v. Caliguri*. 94 Wn.2d 531, 534, 617 P.2d 1012 (1980); 99 Wn.2d 501, 664 P.2d 466 (1983); *State's Opening Brief* at 6.

Specifically, the State believes that the black letter law of RCW 9.73.030(2)(b) does not limit the “unlawful requests or demands” language to acts “similar to threats of extortion, blackmail or bodily harm” as interpreted by the Washington State Supreme Court. *State's Opening Brief* at 6. The State further argues that this interpretation by the Supreme Court “thwarts the plain meaning of the statute and is a misapplication of basic rules of statutory construction.” *Id.*

The State futilely attempts to sustain this argument by discussing statutory interpretation at length. *Id* at 6-8. In sum, the State correctly concedes that Mr. Gearhard's actions do *not* fall within the exception to Washington's Privacy Act of RCW 9.73.030(2)(b) as interpreted by the Washington Supreme Court.

Unfortunately for the State, this argument is without merit because: 1) the statutory interpretation process the State argues for is exactly what the *Williams* and *Caliguri* Courts used; 2) the Washington Supreme Court has the final say on statutory construction; and 3) if the legislature disagreed with the Washington State Supreme Court's interpretation, it had over 35 years to correct the error and has now acquiesced to the Supreme Court's interpretation.

First, “[t]he purpose of statutory interpretation is ‘to determine and give effect to the intent of the legislature’”. *State v. Evans*, 177 Wn.2d 186, 192, 298 P.3d 724 (2013) citing *State v. Sweany*, 174 Wn.2d 909, 914, 281 P.3d 305 (2012); *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003); *In re Pers. Restraint of Williams*, 121 Wn.2d 655, 663, 853 P.2d 444 (1993). This process is exactly what the Supreme Court repeatedly did in *State v. Williams*. 94 Wn.2d at 547-8 (egs. “there is no indication in either the language or history of subsection (2)...”; “Similarly, the legislative history showing the legislature intended to restrict...”; “The legislature intended to establish protections for individuals’ privacy and to require suppression...”).

Interestingly, the State never even attempts to say this process was not followed, rather the State inaccurately attempts to imply that the Court failed to follow its own rules. *State's Opening Brief* at 6-7. Thus, the State's attempts to act as if the Supreme Court failed to follow its own rules in statutory interpretation is meritless.

Second, the State's argument necessarily asks this court to ignore the law, similar to the situation in *State v. Gore*. 101 Wn.2d 481, 681 P.2d 227 (1984). In *Gore*, Division I of the Washington State Court of Appeals decided to follow the U. S. Supreme Court's interpretation of the federal firearm statute as opposed to the Washington State Supreme Court's opposite interpretation of the Washington State firearm statute when the two decisions were on identical issues. *Id.* The Washington State Supreme Court reversed Division I and had harsh language for the lower court. *Id.* Specifically, the Washington State Supreme Court stated "[i]n failing to follow directly controlling authority of this court, the Court of Appeals erred... Further, once this court has decided an issue of state law, that interpretation is binding on all lower courts until it is overruled by this court." *Id.* at 487 citing *Weeks v. Chief of the Washington State Patrol*, 96 Wn.2d 893, 897, 639 P.2d 732 (1982); *Young v. Seattle*, 25 Wn.2d 888, 894, 172 P.2d 222 (1946).

Moreover, the final authority of the Washington Supreme Court over statutory construction cannot be legitimately disputed. *See Burton v. Lehman*, 153 Wn.2d 416, n4, 103 P.3d 1230 (2005) citing *Moses v. State, Dept. of Social and*

*Health Services*, 90 Wn.2d 271, 274, 581 P.2d 152 (1978) (“the court is the final authority on statutory construction”).

Thus, this court is mandated to follow the statutory construction of RCW 9.73.030(2)(b) as laid out by the Washington State Supreme Court, notwithstanding the State’s attempts to convince this court to do otherwise.

Finally, if the legislature disagreed with the Washington State Supreme Court’s interpretation of RCW 9.73.030(2)(b), the legislature would have corrected the issue within the last 35 years since *Williams* and *Caliguri* were decided.

A similar legal scenario played out in *City of Federal Way v. Koenig*, where the Plaintiff filed a Public Records Act lawsuit alleging certain judicial records needed to be supplied by the City of Federal Way. 167 Wn.2d 341, 343-4, 348, 217 P.3d 1172 (2009). In opposition to the lawsuit, the City of Federal Way cited the Washington Supreme Court case of *Nast v. Michels*, 107 Wn.2d 300, 730 P.2d 54 (1986) for the proposition that judicial records are not subject to the Public Records Act. *Koenig* at 343-348. Despite persistent arguments by the Plaintiff that *Nast* was wrongly decided and in direct contradiction to the black letter law of the Public Records Act, the Washington Supreme Court affirmed *Nast*. *Koenig* at 348.

The Court noted that *Nast* was a 23 year old decision in concluding that the legislature had, at a minimum, acquiesced to the Courts interpretation of the Public Records Act. *Koenig* at 348. In making this decision, the Court stated, “[t]his court presumes that the legislature is aware of judicial interpretations of its enactments

and takes its failure to amend a statute following a judicial decision interpreting that statute to indicate legislative acquiescence in that decision.” *Id* citing *Soproni v. Polygon Apartment Partners*, 137 Wn.2d 319, 327 n. 3, 971 P.2d 500 (1999).

Here the legislature has had 35 years as opposed to the 23 years in *Koenig*, so acquiescence is even clearer than in *Koenig*.

Thus, the State’s argument is without merit and it would be error for this court to affirm the Superior Court. Therefore, this court should reverse and remand to the Superior Court with an order to suppress all evidence associated with the “pretext phone call.”

## **2. THE SUPERIOR COURT ERRED IN ADMITTING ALL TESTIMONY SURROUNDING THE UNLAWFULLY RECORDED CONVERSATION.**

As with the first issue, this issue is a matter of law—whether all statements, or just those statements which are within the narrow exception to RCW 9.73.030(2)(b) are admissible at trial. Thus the standard of review is *de novo*. *State v. Evans*, 177 Wn.2d 186 at 192.

The State asserts that there is no merit or authority for Mr. Gearhard’s argument that even if portions of recorded conversation at issue fall within the Privacy Act exception of RCW 9.73.030(2)(b), only those portions of the recorded conversation that fall within the exception are admissible. *State’s Opening Brief* at 8-9.

The State attempts to support this assertion in a single paragraph with the only support being the State's assertions that the evidence would be admissible under ER 801, and the Defendant failed to object to the testimony during trial. *State's Opening Brief* at 9.

These arguments are completely without merit. First, RCW 9.73.050—"Admissibility of intercepted communication in evidence" states:

*"Any* information obtained in violation of RCW 9.73.030 or pursuant to any order issued under the provisions of RCW 9.73.040 shall be inadmissible in any civil or criminal case in all courts of general or limited jurisdiction in this state, except with the permission of the person whose rights have been violated in an action brought for damages under the provisions of RCW 9.73.030 through 9.73.080, or in a criminal action in which the defendant is charged with a crime, the commission of which would jeopardize national security." (emphasis added)

Here, there was no national security issue, thus all information obtained in violation of RCW 9.73.030 is inadmissible per statute. Thus, ER 801 is irrelevant. Further, the State supplies no authority, and Mr. Gearhard is aware of no authority for the proposition that the hearsay rule of ER 801 trumps statutory inadmissibility. This would be the equivalent of saying that the hearsay rule trumps confrontation clause inadmissibility.

In addition, this Privacy Act inadmissibility is bolstered by a litany of cases that hold that Washington's Privacy Act requires suppression of *all* evidence obtained in violation of RCW 9.73.030. *See examples State v. Salinas*, 121 Wn.2d

689, 693-4, 853 P.2d 439 (1993); *See also State v. Fjermestad*, 114 Wn.2d 828, 836, 791 P.2d 897 (1990).

Moreover, Washington courts have specifically addressed whether all testimony, or just testimony that fits within the RCW 9.73.030(2)(b) except is admissible. *See State v. Williams*, 94 Wn.2d at 549 (The trial court in the Williams case properly suppressed the recordings and testimony concerning the conversations with Williams and his alleged co-conspirator, and ***correctly ruled admissible those parts of the conversations relating to threats of extortion, blackmail, bodily harm or other unlawful requests of a similar nature.***) (emphasis added).

This requirement to partition RCW 9.73 evidence into admissible RCW 9.73.030(2)(b) evidence and that evidence which does not fit within those limited criteria has been followed by Washington Courts since *Williams* and *Caliguri*. *See example State v. Barnes*, 157 Wn.App. 1076 at 3 (2010) (unpublished). Thus it is the State, not Mr. Gearhard, who has failed to cite authority for legal assertions.

Therefore, even if this Court believes that the alleged statement at issue in this case falls within the limited exception of RCW 9.73.030(2)(b), the Superior Court still erred by admitting all evidence about the conversation as opposed to the limited portion that fell within the exception.

Finally, the State's assertion that Mr. Gearhard failed to object to the admission of all evidence at trial is simply false. In his Motions and Limine, Mr.

Gearhard objected for a second time to the admission of any evidence surrounding the unlawfully recorded conversation. CP 102; RP September 18, 2017, at 2:17-3:19. In addition, Mr. Gearhard's Motions in Limine specifically requested the court limit testimony to the sections of the recording the court believed fit within the exception of RCW 9.73.030(2)(b). CP 102. These motions were denied. RP October 4, 2017, at 25:7-28:19.

Thus, should the court find any statements fall within the Privacy Act exception of RCW 9.73.030(2)(b), Mr. Gearhard respectfully request this Court reverse and remand to the Superior Court for determination of which portions of the recorded conversation fall within the RCW 9.73.030(2)(b) exception.

**3. THE STATE CANNOT APPEAL THE SUPERIOR COURTS ACQUITTAL ON THE CHILD MOLESTATION IN THE THIRD DEGREE CHARGE AS AN APPEAL IS PROHIBITED BY RAP 2.2, THE WASHINGTON STATE CONSTITUTION, AND THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION**

RAP 2.2—Decisions of the Superior Court that may be appealed—states in pertinent part:

(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).

(emphasis added)

Thus, under RAP 2.2(b)(1), the State is prohibited from appealing a finding of not guilty.

In this case, the Superior Court issued judgment as follows:

“While instruction no. 8 clearly states a physical impossibility, the case law as it stands now appears extremely clear that when an erroneous to-convict instruction containing an obvious scrivener’s error is given, and not objected to, that it becomes the law of the case. In the present case, the State failed to provide evidence that the defendant was 48 months younger than himself (the defendant) as required by Instruction No. 8. Furthermore, the State proposed instruction no. 8 with the scrivener’s error and failed to object to the giving of instruction no 8. When the State fails or is unable to provide evidence that supports the instruction, the court is unable to find substantial evidence or any reasonable inference to sustain a finding of other than not guilty to the crime of Child Molestation in the Third Degree as charged in Count 1. Since the no substantial evidence exists nor any reasonable inference can be had from the evidence to prove that the defendant was 48 months younger than himself, the court is constrained to grant the defendant’s motion for directed verdict and a ***Not Guilty is entered as to Count 1*** – Child Molestation in the Third Degree.”

CP 118 (emphasis added).

Therefore, because the Superior Court directed a verdict of not guilty based on insufficient evidence, the State is prohibited from appealing and the State’s appeal must be summarily rejected.

In addition to being barred from appealing by RAP 2.2, once a finding of not guilty has been made based on insufficient evidence, retrial is not permitted by

either the Washington State Constitution or the United States Constitution. *Matter of Dowling*, 98 Wn.2d 542, 543-4, 656 P.2d 497 (1983) overruled on different grounds by *State v. Collins*, 112 Wn.2d 303, 771 P.2d 350 (1989). Moreover, “[a]n acquittal is defined by the Supreme Court as a resolution, correct or not, of some or all of the factual elements of the offense charged.” *Matter of Dowling* at 544, citing *Lee v. United States*, 432 U.S. 23, 30 n. 8, 97 S.Ct. 2141, 2145 n. 8, 53 L.Ed.2d 80 (1977); *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571, 97 S.Ct. 1349, 1354, 51 L.Ed.2d 642 (1977).

Furthermore, the exact issue of retrial following a directed verdict was addressed by the United States Supreme Court (SCOTUS) in *Foo Foo v. U.S.*, 369 U.S. 141, 82 S.Ct. 671, 7 L.Ed.2d 629 (1962). In *Foo Foo*, seven days into trial, the District Court Judge directed a verdict of not guilty. *Id* at 141-2. The Government appealed and asked the First Circuit Court of Appeals to vacate the acquittal and reassign the case for trial. *Id* at 142. The First Circuit reversed the District Court on the grounds that the District Court lacked the power to grant the directed verdict of not guilty. *Id*.

SCOTUS granted certiorari and reversed the First Circuit, holding that allowing a second trial following a directed verdict of not guilty violates the Fifth Amendment’s prohibition that “no person shall ‘be subject for the same offense to be twice put in jeopardy of life or limb’”. *Id*. Thus SCOTUS has definitively stated

that retrial following a directed verdict of not guilty violates the Fifth Amendment prohibition against double jeopardy.

Furthermore, SCOTUS has affirmed this decision on multiple occasions. For example, in *Evans v. Michigan*, SCOTUS “granted certiorari to resolve the disagreement among state and federal courts on the question whether retrial is barred when a trial court grants an acquittal because the prosecution failed to prove an ‘element’ of the offense that, in actuality, it did not have to prove.” 568 U.S. 313, 317, 133 S.Ct. 1069, 185 L.Ed.2d 124 (2013).

In re-affirming *Foo Foo*, SCOTUS stated “[a] mistaken acquittal is an acquittal nonetheless, and we have long held that ‘[a] verdict of acquittal ... could not be reviewed, on error or otherwise, without putting [a defendant] twice in jeopardy, and thereby violating the Constitution.’” *Evans* at 318, citing *United States v. Ball*, 163 U.S. 662, 671, 16 S.Ct. 1192, 41 L.Ed. 300 (1896).

Consequently, erroneous or not, this court is legally obligated to reject the State’s appeal because Mr. Gearhard was found not guilty based on insufficient evidence and (along with this appeal by the State being prohibited by RAP 2.2) allowing retrial would violation the Fifth Amendment’s Double Jeopardy Clause along with the Washington State Constitution.

**4. EVEN IF THE STATE COULD LEGALLY APPEAL, WHICH IT CANNOT, THE TRIAL COURT DID NOT ERROR IN GRANTING THE DIRECTED VERDICT AND DISMISSING THE CHARGE OF CHILD MOLESTATION IN THE THIRD DEGREE**

Despite RAP 2.2 and double jeopardy issues, should this court decide that the State does still have a right to appeal the Superior Court's directed verdict of not guilty on the Child Molestation in the Third Degree charge, the State's argument is still without merit.

Here, the State alleges that a directed verdict is improper on the grounds that "[a]fter the jury was discharged there was no verdict as to the count at issue, and therefore there could be no ruling on it." *State's Opening Brief* at 9. The State offers no legitimate legal support for this argument. *Id.* Instead the State hinges its entire legal theory on the argument that after a mistrial, the State can retry a defendant. *Id.* This court should reject the State's argument.

First, the State's argument assumes that the State's ability to retry a case following a mistrial is absolute and supersedes every possible legal issue and procedure afforded to criminal defendants. The State provides nothing but misleading legal support to this theory. Specifically, the State relies on RCW 4.44.340 which states: "[i]n all cases where a jury are discharged or prevented from giving a verdict, by reason of accident or other cause, during the progress of the trial or after the cause is submitted to them, the action shall thereafter be for trial anew."

RCW 4.44.340 is one of numerous statutes that lay out court procedures and timelines. However, as with every one of these statutes, there are overlapping

procedures. In addition, while the State cites no law to support its assertion that the right to retrial following a mistrial is absolute, there is law supporting Mr. Gearhard's contrary position. For example, in *Hollman v. Corcoran*, the trial court granted a motion for judgment as a matter of law following the jury being hung pursuant to RCW 4.44.230. 89 Wn. App. 323, 330, 949 P.2d 386 (1997). In reversing the trial court on the grounds that there was possibly sufficient evidence, this court (Division III) never asserted that there was any procedural issue with a trial court granting a motion for judgment as a matter of law following a hung jury. *Id* at 334. Counsel for Mr. Gearhard has been unable to find a single case where a Washington Appellate Court rejected a directed verdict or judgment as a matter of law motion as improper following a hung jury.

In addition, the State's position violates the constitutional requirements of proof beyond a reasonable doubt as a part of criminal due process. Essentially the State's argument is as follows: *while the State concedes that it did not produce evidence sufficient to prove the elements of the crime as presented to the jury beyond a reasonable doubt, the State believes it should get a second bite at the apple because one or more of the jurors **actually followed the law.***

Thus, the state's position is that because less than twelve jurors didn't follow the law, the State now gets a second trial.

In other words, the State concedes that if the entire jury followed the law Mr. Gearhard would have been acquitted and double jeopardy would attach.

However, the State argues that because some jurors didn't follow the law, the State should be allowed a second opportunity to convict Mr. Gearhard. Thus, the State argues that the number of jurors that don't follow the law determines whether the State is required to prove its case beyond a reasonable doubt. This argument defies all common sense and undermines the Washington State Constitution and the right to due process as guaranteed by the United States Constitution.

However, contrary to the State's assertion, there is ample case law on the appropriateness of a directed verdict when the State did not meet its burden of proof.

For example, in *State v. Longshore*, the court stated, "a directed verdict is appropriate if, when viewing the evidence in the light most favorable to the nonmoving party, the court can say, as a matter of law, that there is no substantial evidence or reasonable inference to sustain a verdict for the nonmoving party." 97 Wn. App. 144, 147, 982 P.2d 1191 (1999) citing *Hizey v. Carpenter*, 119 Wn.2d 251, 271-72, 830 P.2d 646 (1992) (quoting *Industrial Indem. Co. of the N.W. v. Kallevig*, 114 Wn.2d 907, 915-16, 792 P.2d 520 (1990)).

Whether the jury reached a consensus is irrelevant to whether there was "substantial evidence or reasonable inference to sustain a verdict for the nonmoving party." Thus the issue is whether *any* juror could reach a verdict of guilty, not whether all jurors reached an improper guilty verdict. The number of jurors voting

each way is irrelevant to the analysis of the sufficiency of the evidence. To decide otherwise would be a truly absurd result.

Finally, criminal defendants can *always* challenge the sufficiency of the evidence. *State v. Kerry*, 34 Wn.App. 674, 677, 663 P.2d 500 (1983) citing *State v. Green*, 94 Wn.2d 216, 616 P.2d 628 (1980); *State v. Delmarter*, 94 Wn.2d 634, 618 P.2d 99 (1980).

Therefore it was proper for the Superior Court to hear and grant Mr. Gearhard's Motion for Directed Verdict, and this court should affirm that decision.

#### **5. THE SUPERIOR COURT PROPERLY INVOKED THE LAW OF THE CASE DOCTRINE IN GRANTING MR. GEARHARD'S DIRECTED VERDICT MOTION**

While this particular analysis is unnecessary because the State cannot legally appeal in this case, Mr. Gearhard will nevertheless address the State's assertions regarding the Law of the Case doctrine. The State alleges that the Law of the Case doctrine only applies on appeal and was thus improperly used by the Superior Court to grant Mr. Gearhard's Motion for Directed Verdict. *State's Opening Brief* at 9-14. This is purely legal issue which is reviewed de novo on appeal. *State v. Bassett*, 192 Wn.2d 67, 348, 428 P.3d 343 (2018) citing *State v. Hunley*, 175 Wn.2d 901, 908, 287 P.3d 584 (2012); *State v. Ervin*, 169 Wn.2d 815, 821, 239 P.3d 354 (2010) citing *In re Det. Of Williams*, 147 Wn.2d 476, 486, 55 P.3d 597 (2002).

The State begins its argument by making a variety of assertions about the Law of the Case doctrine without providing any legal support whatsoever for those assertions, so they should be summarily dismissed by this court. *State's Opening Brief* at 11. When the State does finally provide legal support, it is for the proposition that the Law of the Case doctrine's purpose is to promote finality and efficiency in the judicial process. *Id.* This is an accurate assessment of the law as laid out by the Washington State Supreme Court in *Roberson v. Perez*, and many other cases. 156 Wn.2d 33, 41, 123 P.3d 844 (2005). Unfortunately for the State, this law supports Mr. Gearhard's position, not the State's position.

Following this admission, the State then cites to case law for the proposition that the Law of the Case doctrine *generally* refers to the effect of appellate court determinations on subsequent trial court proceedings. *State's Opening Brief* at 12. What the State fails to do is cite a single case for the proposition that the Law of the Case doctrine did not apply in Mr. Gearhard's case. In fact, despite a diligent search, Mr. Gearhard has been unable to find a single case that even implies that the Law of the Case doctrine would not be applicable here.

However, contrary to the State's assertions, the Law of the Case Doctrine is applicable to the Superior Court as the Washington Supreme Court made clear in *State v. Hickman*, 135 Wn.2d 97, 101-2, 954 P.2d 900 (1998). In *Hickman*, the Court gave the following synopsis of the Law of the Case doctrine:

“The law of the case is an established doctrine with roots reaching back to the earliest days of statehood. Under the doctrine jury instructions not objected to become the law of the case. *State v. Hames*, 74 Wn.2d 721, 725, 446 P.2d 344 (1968) (“ ‘The foregoing instructions were not excepted to and therefore, became the law of the case.’ ”) (quoting *State v. Leohner*, 69 Wn.2d 131, 134, 417 P.2d 368 (1966)); *State v. Salas*, 127 Wn.2d 173, 182, 897 P.2d 1246 (1995) (“[I]f no exception is taken to jury instructions, those instructions become the law of the case.”). ***In criminal cases, the State assumes the burden of proving otherwise unnecessary elements of the offense when such added elements are included without objection in the “to convict” instruction.*** *State v. Lee*, 128 Wn.2d 151, 159, 904 P.2d 1143 (1995) (“Added elements become the law of the case ... when they are included in instructions to the jury.”) (citing *State v. Hobbs*, 71 Wn.App. 419, 423, 859 P.2d 73 (1993); *State v. Rivas*, 49 Wn.App. 677, 683, 746 P.2d 312 (1987)). See also *State v. Barringer*, 32 Wn.App. 882, 887-88, 650 P.2d 1129 (1982) (“Although the charging statute ... did not require reference to [the added element], by including that reference in the information and in the instructions, it became the law of the case and the State had the burden of proving it.”) (citing *State v. Worland*, 20 Wn.App. 559, 565-66, 582 P.2d 539 (1978)), *overruled in part on other grounds by State v. Monson*, 113 Wn.2d 833, 849-50, 784 P.2d 485 (1989).”

*Id.* (emphasis added).

Thus the State’s argument is without merit. The reality is this: the State proposed an instruction which it failed to object to, then the State failed to prove the element it proposed. Under *Hickman*, the State’s failure to object is fatal to the State’s argument because the Law of the Case doctrine refers to proof of the elements in the “to convict” jury instruction at all levels of a case, not just on appeal.

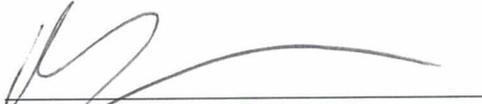
*Id.*

Therefore, the Superior Court did not error when it applied the Law of the Case Doctrine.

**F. CONCLUSION**

For the above reasons James Gearhard respectfully requests this Court reverse the decisions of the Superior Court denying Mr. Gearhard's Motion to Suppress and admitting the all evidence related to the "pretext phone call" at issue here. Further Mr. Gearhard respectfully requests this court reject the State's appeal and affirm the directed verdict of not guilty on the Child Molestation in the Third Degree charge.

**RESPECTFULLY SUBMITTED** this 24<sup>th</sup> day of September, 2019.

  
RICHARD GILLILAND  
Attorney for Defendant  
WSBA # 40474

**HALL AND GILLILAND PLLC**

**September 27, 2019 - 12:29 PM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division III  
**Appellate Court Case Number:** 36046-6  
**Appellate Court Case Title:** State of Washington v. James Patton Gearhard  
**Superior Court Case Number:** 16-1-00050-1

**The following documents have been uploaded:**

- 360466\_Briefs\_20190927122816D3469032\_5842.pdf  
This File Contains:  
Briefs - Appellants Reply  
*The Original File Name was Appellant Response and Reply Brief.pdf*

**A copy of the uploaded files will be sent to:**

- davidq@klickitatcounty.org
- davidw@klickitatcounty.org
- paapeals@klickitatcounty.org

**Comments:**

Also includes Appellant's Response

---

Sender Name: Richard Gilliland - Email: richard.gilliland@hallandgilliland.com  
Address:  
1111 W YAKIMA AVE STE A  
YAKIMA, WA, 98902-3077  
Phone: 509-452-8120

**Note: The Filing Id is 20190927122816D3469032**