NO. 33109-1-III

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Respondent –
Cross-Appellant,

v.

MARIA HERNANDEZ MARTINEZ,

Appellant –
Cross-Respondent.

BRIEF OF RESPONDENT – CROSS-APPELLANT

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III. STATEMENT OF THE CASE

A. Substantive Facts

At about 9:15 in the morning of August 29, 2012 Grant County Deputy Fire Marshall Bruce Gribble arrived at the mobile home of Maria Hernandez Martinez, which had just burned. 2RP 289-90. The fire was out and firefighters were awaiting his arrival. 2RP 290. Fire Marshall Gribble inspected the house and took photographs. He did not note any evidence of money having been left on the couches. 2RP 299-300. Soot was deposited on all surfaces. 2RP 302. He did not observe any jewelry in the house. 3RP 421. Fire Marshall Gribble checked his records and noted a fire at the same location in May 2009, after which Ms. Hernandez had received a new mobile home. 2RP 308.

In early September 2012, Farmers Insurance adjuster Johnathan Hull assisted Ms. Hernandez Martinez in filling out insurance claim forms. 2RP 251. The effective date on the policy was August 9, 2012. 2RP 252. Ms. Hernandez Martinez claimed that two television sets and some cash had been lost to the fire, among other things. 2RP 254-55.

Insurance investigator Craig Harris interviewed Ms. Hernandez Martinez. She claimed that she was making $660 a month. 2RP 270. She had three children and a working cell phone. 2RP 277. She had a

mortgage payment of $500 a month. She said she left a leather purse with cash on the couch. 2RP 279. Ms. Hernandez Martinez told Mr. Harris she did not have any previous insurance claims. 2RP 280. According to the Farmers database, Ms. Hernandez Martinez had a prior claim in 2009.

On September 3, 2012 insurance investigator Barry Kerth went to the fire scene at the behest of Foremost Insurance. 1RP 153. He noticed that the fire burned down the table in the charring, making an unusual pattern. 1RP 164. This table was on the outside of the trailer holding an air conditioner that was sitting in a window. There was an irregular pattern consistent with gasoline. 1RP 170. He noted the fire did not start in the kitchen. 1RP 165. Mr. Kerth testified that the fire's areas of origin were behind a couch and in the vicinity of the air conditioner. 1RP 171, 185. After digging through the area behind the couch, Mr. Kerth smelled an accelerant. 1RP 174 – 75. He requested an accelerant detection dog. 1RP 175.

On Mr. Kerth's second trip, a few days later, he was told to look for evidence of $3800 in cash. There was no evidence of the cash on the couch in the fire. There would have been remains had the money been on the couch during the fire. 1RP 167, 194. On the same trip Mr. Kerth noted two undamaged TV's that were not in the house on his first visit.

1RP 172-73. Most of the items in the house had smoke damage on them. 1RP 190.

Eileen Porter brought her accelerant detection dog to the scene on September 4. 2RP 208. Her dog alerted on the wooden table outside, some debris and the floor just inside that window. 2RP 210. She took a sample and sent it off to be analyzed. 2RP 211. She noted a gasoline can near a camp trailer parked on the property and took a picture of it. 2RP 213-32. Dale Mann, who works for private testing company MDE, tested the sample taken by Ms. Porter and found it contained gasoline that had been placed there shortly before it burned. 2RP 240-49.

On September 25, 2012 Fire Marshall Gribble, along with Deputy John Melvin, conducted a voluntary interview with Ms. Hernandez Martinez at a Grant County Sheriff's Office station. 2RP 310. Ms. Hernandez Martinez signed a statement under the penalty of perjury written based on information given during the interview. 2RP 319. In the statement she described the televisions and cash that were supposedly in the trailer at the time of the fire. 2RP 320-21. The statement also had penalty of perjury language in it that Deputy Melvin went over with Ms. Hernandez Martinez. 2RP 353. In this interview she described the money as being in a plastic bag, for which there would have been residue according to Marshall Gribble. 2RP 322. After the interview Ms.

Hernandez Martinez gave Marshall Gribble and Deputy Melvin permission to go back to her trailer and look around. Marshal Gribble also looked for evidence of the money but failed to find it. 2RP 337-38. They did find Ms. Hernandez Martinez's jewelry, usually kept in the house, in the unburned camp trailer located on the property, showing no signs of soot, smoke or heat damage on the containers. 3RP 415, 424.

B. Procedural History

The State initially charged one count of perjury in the second degree in July 2013. CP 1. On May 13, 2014 the State amended the Information to add counts of arson in the first degree and false insurance claim. CP 15-16. On November 13, 2014 the State filed a Second Amended Information, clarifying under which prongs of first-degree arson it was proceeding.

The Court took a several day break in the middle of trial after most, but not all, of the State's testimony. 2RP 364. Just prior to the break the court questioned the State about the perjury charge and the evidence to support it, citing *State v. Olson*, 92 Wn.2d 134, 594 P.2d 1337 (1979), and also questioned what law required or authorized the oath in a *Smith* affidavit.[1] 2RP 368-73. The court also questioned the strength of the State's case as to Ms. Hernandez Martinez's involvement in the arson.

[1] *State v. Smith*, 97 Wn.2d 856, 651 P.2d 207 (1982)

2RP 373. The State filed a written brief in response. CP 57-72. In it, the State argued: (1) that the court should delay any motion to dismiss at close of the State's evidence until after the jury returned its verdict; (2) under *State v. Hanson*, 14 Wn. App. 625, 544 P.2d 119 (1975) and RCW 9A.72.085, there was enough evidence to provide the oath was authorized by law and provide the direct contradiction required for a perjury charge; and (3) there was sufficient circumstantial evidence to submit the arson charge to the jury.

After the State rested, Ms. Hernandez Martinez moved to dismiss the arson and perjury counts as a matter of law. 3RP 391-92. She conceded there was sufficient evidence for the arson, but argued the evidence was insufficient to demonstrate her involvement. On the perjury charge, she argued there was insufficient evidence to show she understood that she was signing a document under penalty of perjury. *Id.* The State opposed hearing the motion while jeopardy was attached. The court responded:

> THE COURT: We're talking about a procedure that is—that has been used over and over again and has been upheld by the Court of Appeals:
>
> MR. McCRAE (the prosecutor): No, it hasn't.
>
> THE COURT: I think so.
>
> MR. McCRAE: What case has it been upheld in?

> THE COURT: Well, I can't cite to you chapter and verse today, Mr. McCrae, but we do this all the time. We've been doing it for years. You're asking me to depart from established custom on the basis of no authority whatsoever.

3RP 398-99. In ruling on the motion to dismiss the court expressed its opinion that the arson case was "complete speculation," but that he was bound by *State v. Clark*, 78 Wn. App. 471, 898 P.2d 854 (1995), to allow the case to go to the jury. 3RP 440.

On the perjury charge, the defense argued that the statement in the *Smith* affidavit was not made to mislead the investigators and the penalty of perjury language was not conveyed to Ms. Hernández Martinez. 3RP 442. The trial court then asked counsel whether the oath was authorized or required by law. The State argued that it was authorized by law pursuant to RCW 9A.72.085. When asked about the court's proposition defense counsel declined to adopt it, instead arguing his original theory that the notice given was insufficient. 3RP 452-55. The court dismissed the perjury charge. 3RP 456. In doing so the court rejected the defendant's argument. 3RP 463-64. Instead, it dismissed on the grounds that the oath was not required or authorized by law. *Id.* The court rejected a lesser-included charge of false swearing on the same grounds but did allow a lesser-included charge of making a false or misleading statement to a

public servant. 3RP 459, *Id.* The jury returned guilty verdicts on all counts submitted to it. 3RP 526-32.

IV. ARGUMENT

A. Appellant's Issues

1. Evidence was sufficient for a reasonable trier of fact to convict on the arson in the first degree.

a. Standard of review

Well-settled standards govern challenges to sufficiency of evidence. Whether sufficient evidence supported a conviction turns on whether, after viewing the evidence most favorable to the State, any rational trier of fact could have found beyond a reasonable doubt the essential elements of the crime charged. *State v. Green*, 94 Wn.2d 216, 221-222, 616 P.2d 628 (1980) (citing *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)). Whether the State has met that burden of production is a question of law that appellate courts review de novo. *State v. Werneth*, 147 Wn. App. 549, 552, 197 P.3d 1195 (2008).

Reviewing courts must defer to the trier of fact "on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence." *State v. Thomas*, 150 Wn.2d 821, 874-875, 83 P.3d 970 (2004). "Credibility determinations are for the trier of fact and are not subject to review." *Id.* at 874.

b. There was sufficient evidence.

Evidence of Ms. Hernandez Martinez' involvement in the arson fire is circumstantial. However, circumstantial evidence is as good as direct evidence. *State v. Gosby*, 85 Wn.2d 758, 766-67, 539 P.2d 680 (1975).

> Arson is a crime most often proven by circumstantial evidence. It is a crime of particularly secret preparation and commission, and the State can seldom produce witnesses to the actual setting of such a fire. Nevertheless, a well-connected train of circumstances may be as satisfactory as an array of direct evidence in proving the crime of arson.

State v. Plewak, 46 Wn. App. 757, 765-66, 732 P.2d 999 (1987) (internal citation omitted). Here there was significant circumstantial evidence. Ms. Hernandez Martinez concedes there was enough evidence to conclude that the fire was caused by arson. She also concedes there is enough evidence to conclude that she took advantage of the arson by claiming to have lost money that was not consumed in the fire and damage to television sets that that were not in the wreckage of the mobile home immediately following the fire but subsequently appeared there during the investigation.

The previous fire in 2009 shows that Ms. Hernandez Martinez was familiar with the insurance claim system and knew she could get money from an insurance company. Although her mobile home had been uninsured for years, she purchased insurance three weeks prior to the fire.

It is reasonable to infer Ms. Hernandez Martinez was setting up a condition precedent to the arson for insurance fraud. Her jewelry, normally kept in her residence, was found undamaged in a separate trailer on the property. There was extensive soot and smoke damage covering everything in the mobile home, but none was observed on the jewelry boxes. It is reasonable to infer that the jewelry had been removed from the residence before the fire. The same is true about the television sets that magically appeared. There was compelling evidence Ms. Hernandez Martinez, with a declared monthly income of $660, was living beyond her means. She had three children, a $500 mortgage payment and a working cell phone. She clearly needed funds. There is direct evidence that Ms. Hernandez Martinez set up the conditions for an insurance fraud fire shortly before the fire and continued to execute the fraud after the fact. There is direct evidence of motive. This constitutes sufficient circumstantial evidence that she either directly, or with assistance, committed the arson.

c. Washington case law supports the conviction.

Washington case law supports a finding that evidence here was sufficient. The trial court correctly relied on *State v. Clark*, 78 Wn. App. 471, 898 P.2d 854 (1995). There was evidence the fire was caused by

arson. *Id.* at 475. The defendant had removed a fish tank from the building that burned, was present shortly before the fire, had financial difficulties, and attempted to collect insurance proceeds. *Id* at 476. The appellate court ruled this evidence sufficient to support a conviction. *Id.* at 479.

In *State v. Wood*, 44 Wn. App. 139, 721 P.2d 541 (1986), the defendants bought a house to renovate. The defendant was in financial difficulty over the house. The house was destroyed by arson and the defendant's brother was observed in the area at the time of the fire. Phone records show the defendant called her brother twice the day before the fire. The defendant submitted an insurance claim. The appellate court ruled this evidence sufficient to support the arson charge.

Here, the State produced all the evidence found sufficient in *Wood* and *Clark*, and then some. There is an arson fire, financial difficulty, removal of objects to be preserved, and an insurance claim. In this case, there is also evidence that Ms. Hernandez Martinez purchased insurance shortly before the fire and made claims of destroyed or damaged property that were contradicted by other evidence. Evidence was sufficient to convince a reasonable finder of fact beyond a reasonable doubt that Ms. Hernandez Martinez participated in the torching of her residence.

d. The alternative means were supported by adequate evidence.

Ms. Hernandez Martinez argues in a footnote that failure to give a jury unanimity instruction was reversible error, but admits the jury did not need to be unanimous on the alternative means, so long as each alternative means was supported by sufficient evidence. The alternative means of first degree arson charged in this case were arson of a dwelling and arson for insurance fraud. There was no dispute the mobile home was the residence Ms. Hernandez Martinez and her children lived in. She does not challenge her insurance fraud conviction. There was more than adequate evidence to support both alternative means charged and sent to the jury.

2. The photograph of a gasoline can on the premises, while not overwhelming evidence in and of itself, showed accelerant available on the property and was admissible.

Determination of evidentiary relevance is within the broad discretion of the trial court and will not be disturbed absent a manifest abuse of discretion. *State v. Swan*, 114 Wn.2d 613, 658, 790 P.2d 610 (1990). Similarly, a determination of whether probative value outweighs substantial prejudice is within the broad discretion of the trial court and will only be reversed in the exceptional circumstance of a manifest abuse of discretion. *State v. Gould*, 58 Wn. App. 175, 180, 791 P.2d 569 (1990). "Relevancy means a logical relation between evidence and the fact to be

established. Any evidence which tends to identify the accused as the person guilty is relevant." *State v. Whalon*, 1 Wn. App. 785, 791, 464 P.2d 730 (1970) (citation omitted). Material evidence is also admissible. *Id.* Material evidence is evidence that logically tends to prove a defendant's connection with a crime either alone or from whatever inferences may be drawn when it is considered with other evidence. *Id.*

Even relevant evidence can be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice." ER 403. Unfair prejudice is that which is more likely to arouse an emotional response rather than a rational decision by the jury. *Gould*, 58 Wn. App. at 183. Crucial consideration is given to the word "unfair" when applying ER 403 to prejudicial evidence. *State v. Bernson*, 40 Wn. App. 729, 736, 700 P.2d 758 (1985).

> In almost any instance, a defendant can complain that the admission of potentially incriminating evidence is prejudicial in that it may contribute to proving beyond a reasonable doubt he committed the crime with which he is charged. Addition of the word "unfair" to prejudice obligates the court to weigh the evidence in the context of the trial itself, bearing in mind fairness to both the State and defendant.

Id.

Eileen Porter, the accelerant dog handler, spotted the gasoline can on the property a week after the fire. Relevant evidence means evidence

having *any* tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. ER 401 (emphasis added). ER 402 provides all relevant evidence is admissible, except as provided by other rules. ER 403 allows exclusion of evidence if its probative value is *substantially* outweighed by the dangers of *unfair* prejudice, confusion of the issues or by misleading the jury, waste of time or needless presentation of cumulative evidence (emphasis added).

The State was endeavoring to prove the fire was a gasoline-fueled arson. It did that primarily through the dog search and subsequent lab test. But the fact that a container for the type of accelerant used was found on the property shortly after the fire also supports a finding of arson. While the photograph of that container is not overwhelming evidence, its evidentiary value is greater than zero. Absent substantial prejudice, "greater than zero" is all that is required for admissibility of relevant evidence. A photograph of a gas can is unlikely to provoke an emotional response in a jury. A gasoline can is an object common to many households and innocuous unless included with other evidence of an arson fire. It is in no sense of the word "unfair" for the jury to have considered its proximity in time and place to the arson.

Relevance of the gasoline can did not depend on whether the State could prove beyond a reasonable doubt it actually played a part in the crime. *State v. Burkins*, 94 Wn. App. 677, 693, 973 P.2d 15 (1999) (citing *State v. Quigg*, 72 Wn. App. 828, 838, 866 P.2d 655 (1994). There, the trial court admitted evidence of a rope found at a homicide scene, despite the fact it had not been used to bind the victim. Noting that relevant evidence need only have a tendency to make the existence of a contested fact more probable, the court found the presence of the rope at the scene tended to support the State's theory that the defendant planned to bind the one victim's hands as he had the hands of another victim. *Id.* Evidence of the presence of the rope bears the same relationship to that case that the gasoline can does here. While not dispositive, it is relevant and has some weight.

If it was error to admit the photograph, it was harmless in that there is no reasonable probability the photograph materially affected the trial outcome. The findings of Mr. Kerth, Mr. Mann and the arson dog established that the fire was fueled by gasoline. The photograph of the gasoline can minimally supported that finding. The State's only mention of the evidence in closing was in conjunction with its theory of how the fire started, not the identity of the person pouring gasoline. 3RP 509. The

jury verdict would have been the same without the evidence. Any error was harmless.

3. Legal financial obligations (LFO's).

The State asks as a matter of policy that the LFO issue not be reviewed pursuant to RAP 2.5. However, Ms. Hernandez Martinez's sentence was stayed pending appeal. She will have to reappear before the trial court to have the stay lifted on remand. It would not impose significant costs to hear argument concerning the LFO's at that time.

B. State's cross appeal regarding the motion to dismiss at close of State's evidence.

There are many asymmetries in a criminal trial. A key witness, the defendant, is available only to one side. The standard of proof is guilt beyond a reasonable doubt. The State cannot appeal an adverse jury verdict. The State cannot move for judgment as a matter of law. For the most part, these asymmetries serve values other than efficiency and truth finding in trials and are the product of long-standing law dating back centuries, having been the subject of numerous well-reasoned judicial opinions. These asymmetries, supported by statutes and court rules, are universal across the United States.

There is one asymmetry in Washington trials, however, that impairs the truth-finding function of a trial, but is not the product of long standing law, is not the subject of any well-reasoned judicial opinion, is

not universal across American jurisdictions, does not serve to promote efficient adjudication, is contrary to statutes and court rules, and does not serve an identifiable value that is worth compromising the truth seeking function of a trial. This asymmetry is the court's consideration, while jeopardy is attached, of a defendant's motion to dismiss for insufficient evidence. These midtrial motions should not be permitted, or, if permitted, trial courts should carefully exercise their discretion when hearing them and, except in exceptional cases, delay ruling until the jury returns a verdict.

1. The issue is moot, but meets all exceptions for review of a moot issue.

The State is not an aggrieved party regarding the arson charge, having prevailed on the motion to dismiss on that charge. The State did not prevail on the motion to dismiss the perjury charge. Double jeopardy now prevents the State from retrying that charge. *Evans v. Michigan*, 133 S. Ct. 1069, 1073-74, 185 L. Ed. 2d 124 (2013). The State cannot appeal the court's ruling on that charge. RAP 2.2(b). There is no relief on the underlying charges that the Appeals Court can provide. Thus the issue is moot. *In re Cross,* 99 Wn.2d 373, 376-77, 662 P.2d 828 (1983).

RAP 2.2(b)(1) and *Evans* preclude appeal of the trial court's dismissal of the perjury charge. Therefore the State does not appeal that

ruling, but only the procedure used by the court. A reviewing court may decide an issue that has otherwise become moot when "matters of continuing and substantial public interest are involved." *Sorenson* v. *City of Bellingham,* 80 Wn.2d 547, 558, 496 P.2d 512 (1972). In evaluating whether a technically moot issue merits review, courts consider "'the desirability of an authoritative determination for the future guidance of public officers, and the likelihood of future recurrence of the question.'" *In re Pers. Restraint of Mattson*, 166 Wn.2d 730, 736, 214 P.3d 141 (2009) (quoting *Sorenson*, 80 Wn.2d at 558). "'[M]ost cases in which appellate courts utilized the exception to the mootness doctrine involved issues of constitutional or statutory interpretation.'" *Mattson,* 166 Wn.2d at 736 (quoting *In re Pers. Restraint of Mines,* 146 Wn.2d 279, 285, 45 P.3d 535 (2002)). The federal standard, occasionally cited by Washington courts, for review of a moot case is whether the issue is "capable of repetition, yet evading review." *Roe v. Wade*, 410 U.S. 113, 161, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973); *In re Dependency of H.*, 71 Wn. App. 524, 528, 859 P.2d 1258 (1993).

Whatever the standard used to decide whether to review a moot issue, that standard is met in this case. As discussed below, significant issues are raised under Article IV of the State Constitution, statutes and

court rules. Midtrial dismissal motions are made in the vast majority of criminal trials. The issue is guaranteed to reoccur. It is extremely desirable to have an authoritative ruling for courts moving forward as to how to handle these motions. It involves issues of statutory and constitutional interpretation. As this case demonstrates, it is capable of evading review.

If the State prevails on the merits, the State is not an aggrieved party. If the State loses the motion on the merits the double jeopardy clause and appellate rules prevent relief. If the trial court accepts the argument that it should delay the court's ruling until after the jury returns a verdict and then dismisses the charge the defense has no reason to appeal the court's procedural ruling, and the State as the winner of the procedural ruling cannot appeal it. A defendant can raise sufficiency of evidence at any time, and does not need to raise it in the trial court in order to preserve the issue for appeal. *State v. Sweany*, 162 Wn. App. 223, 228, 256 P.3d 1230 (2011). Thus a defendant has no incentive to challenge the procedure used by the trial court if she loses in the trial court. Indeed, in this case Ms. Hernandez Martinez challenges the sufficiency of evidence for her arson conviction, not the trial court's denial of her motion at the close of the State's case. Thus the issue is capable of evading review no matter who prevails in the trial court. Because this issue of a defense motion to dismiss for sufficiency arises in the vast majority of cases it is

capable of repetition in any criminal case Ms. Martinez Hernandez faces in the future. Indeed, should the court reverse and remand on the evidentiary issue, it is capable of repetition in this case. No matter what formula is used, this is an issue that calls out for review by an appellate court.

2. Basis for motions at close of the State's evidence.

Defendants routinely bring motions to dismiss at the close of the State's evidence. However, such motion is not authorized by rule and entails considerable cost. The defendant should not be permitted to bring such a motion. A midtrial motion to dismiss is unreviewable under the double jeopardy clauses of both the U.S. and Washington Constitutions. It violates the Washington Constitution and RCW 10.43.050.[2] The defendant may, of course, bring such a motion either pre or post trial in accordance with CrR 8.3(c) or 7.4(a).

In *Evans v. Michigan* all parties agree the trial judge made a mistake. Relying on an incorrect pattern jury instruction he dismissed an arson case at the close of the State's evidence, wrongly requiring the State to prove an element that was not part of the crime charged. *Evans v. Michigan*, 133 S. Ct. 1069, 1073-74, 185 L. Ed. 2d 124 (2013). The State

[2] No order of dismissal or directed verdict of not guilty on the ground of a variance between the indictment or information and the proof, or on the ground of any defect in such indictment or information, shall bar another prosecution for the same offense....

appealed, arguing the judge's misconstruing a statute was an error of law, not fact, and therefore the double jeopardy clause did not apply. In an 8-1 decision the Supreme Court rejected this argument and held that the double jeopardy clause prevented retrial. *Id.* at 1081. However, in making that decision, the court also held:

> Nothing obligates a jurisdiction to afford its trial courts the power to grant a midtrial acquittal, and at least two States disallow the practice. Many jurisdictions, including the federal system, allow or encourage their courts to defer consideration of a motion to acquit until after the jury returns a verdict, which mitigates double jeopardy concerns.

Id.; See e.g. Fed. Rule Crim. Pro. 29(b). Washington, under its criminal rules, also disallows Superior trial courts from granting a midtrial acquittal in Superior Court.

The trial court was correct that by custom courts have routinely heard motions at the close of the State's evidence. However, custom is not precedent, and this custom is harmful and contrary to law. Courts "can reconsider our precedent not only when it is has been shown to be incorrect and harmful but also when the legal underpinnings of our precedent have changed or disappeared altogether." *W.G. Clark Construction Co. v. Pacific Northwest Regional Council of Carpenters*, 180 Wn.2d 54, 66, 322 P.3d 1207 (2014). In addition, no Washington court has actually considered all of the issues involved in midtrial motions

in a precedential decision. "In cases where a legal theory is not discussed in the opinion, that case is not controlling on a future case where the legal theory is properly raised." *Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1*, 124 Wn.2d 816, 824, 881 P.2d 986 (1994); accord *Kucera v. Dep't of Transp.*, 140 Wn.2d 200, 220, 995 P.2d 63 (2000) (quoting *In re Electric Lightwave, Inc.*, 123 Wn.2d 530, 541, 869 P.2d 1045 (1994) (if a case fails to specifically raise or decide an issue, it cannot be controlling precedent for the issue)). "Where the literal words of a court opinion appear to control an issue, but where the court did not in fact address or consider the issue, the ruling is not dispositive and may be reexamined without violating stare decisis in the same court or without violating an intermediate appellate court's duty to accept the rulings of the Supreme Court. An opinion is not authority for what is not mentioned therein and what does not appear to have been suggested to the court by which the opinion was rendered." *In re Pers. Restraint of Stockwell*, 179 Wn.2d 588, 600, 316 P.3d 1007 (2014). All cases that discuss midtrial motions to dismiss take them as a matter of routine, and never analyze their benefits and drawbacks. Thus midtrial motions are not supported by precedent, they are merely custom. The legal foundations upon which a midtrial motion to dismiss in a criminal trial were based have been obliterated,

they are harmful, and have not been upheld under valid precedent. The motions should not be permitted.

An example of the problem can be found in *State v. Underwood*, 33 Wn. App. 833, 658 P.2d 50 (1983). In *Underwood* the jury hung and the court declared a mistrial. The trial court then dismissed, feeling that there was not enough evidence for the State to convince a jury beyond a reasonable doubt. The Court of Appeals reversed, holding there was sufficient evidence to retry the case. If the trial judge, instead of dismissing after declaring a mistrial, dismissed midtrial, there would have been no appeal, and no opportunity for the court to correct this error.

Another example can be found in *State v. Collins*, 112 Wn.2d 303, 771 P.2d 350 (1989). In *Collins* the Court indicated it was dismissing an Assault 3 charge. Then a few minutes later the prosecutor introduced a case on point, and, after discussion, the trial judge reversed himself. A trial outcome should not hinge on the ability of the parties to find relevant precedent on short notice.

An example of how the system should work can be found in *State v. Pearson*, 180 Wn. App. 576, 321 P.3d 1285 (2014). In *Pearson* the trial court expressed skepticism about the State's evidence prior to presenting an instruction on a school bus stop enhancement. However, the court submitted the enhancement to the jury, which found the enhancement.

The court then dismissed the enhancement after the verdict. The State appealed, and the Court of Appeals, exercising its constitutional duties, affirmed the trial court in a published opinion. The defendant was never punished for a crime for which there was insufficient evidence, and the case was fully adjudicated according to the constitution.

3. Criminal Rules and RCW 10.43.050 Prohibit Midtrial Motions to Dismiss

Interpretation of court rules is reviewed de novo. *State v. McEnroe*, 174 Wn.2d 795, 800, 279 P.3d 861 (2012). Court rules are interpreted using the rules of statutory construction. *Id.* While a party challenging the constitutionality of a statute or a court rule faces a beyond a reasonable doubt standard, the State is not challenging a rule or statute. It is challenging a custom of the court. No such burden applies. Indeed, the burden should be on the party invoking the power of the court to demonstrate the court has such power to go beyond the rules and contravene a statute.

CrR 8.3(c)[3] allows a defendant to challenge the State's evidence pretrial. CrR 8.3(a) and (b) do not restrict themselves to pretrial motions, thus 8.3(c), which is limited by its terms to pretrial motions, cannot be expanded to be the basis for such motion. CrR 7.4(a)(3) is a procedure

[3] CrR 8.3(c) is entitled "On Motion of Defendant for *Pretrial* Dismissal." (Emphasis added)

following conviction and allows for arrest of judgment for "insufficiency of the proof of the material element of a crime." Prosecutors are obligated to dismiss charges if they do not believe there is probable cause to support the charges. RPC 3.8(a). Thus the only way the State moves past the close of State's evidence is if the State believes the charge is supported by law and evidence. It is not arbitrary action or mismanagement to disagree with the court on the law or the evidence. Nor is the defendant materially prejudiced by lack of a midtrial motion to dismiss, thus CrR 8.3(b) does not provide a basis for routine dismissals midtrial. There is therefore no Superior Court criminal rule allowing for a midtrial judgment as a matter of law.

A comparison with the other rules governing the various types of trials show that such a rule is necessary to allow such a motion. CrRLJ 6.1.3(d)[4] allows such a motion in courts of limited jurisdiction, however, there is no such rule in Superior Court criminal trials. CR 50(a)(1) allows a midtrial motion in civil trials, and CRLJ 50 provides likewise. The Court cannot use civil rules to fill in for missing criminal rules. *See State v. Bianchi*, 92 Wn.2d 91, 92, 593 P.2d 1330 (1979) (cannot use civil rules regarding interveners in criminal trials). The juvenile court rules allow application of other rules. JuCR 1.4. However, there is no equivalent

[4] The State does not concede the constitutionality of CrRLJ 6.1.3(d), but that is not an issue in this case.

Criminal Rule. Only in Superior Court criminal trials, where the cost of a mistake by the trial judge is greatest, and no appeal may be taken from a midtrial judgment as a matter of law, do the rules not allow for a midtrial dismissal motion by the defense.

RCW 10.46.070 is titled "conduct of trial—*Generally*, (emphasis added) and provides that "The court shall decide all questions of law which shall arise in the course of the trial, and the trial shall be conducted in the same manner as in civil actions." First, CrR 6 superseded this statute in part, and does not provide for a midtrial motion as a matter of law. Comment to CrR 6 (1973). Second, it is clear that a dismissal by the judge was not intended as a bar to appeal. RCW 10.43.050 provides that judicial dismissals shall not bar retrials, and that statute was not superseded by CrR 6. Indeed, the only way to reconcile RCW 10.43.050 and the double jeopardy clause is to disallow midtrial motions. In addition, RCW 10.46.070 does not specify when the court should decide the issues of law, and the last update to this statute was in 1891. LAWS of 1891 c 28 § 70. This was long before the double jeopardy clause was considered to cover judgments as a matter of law, which has not fully recognized in Washington, even up to 2010. *See State v. Matuszewski*, 30 Wn. App. 714, 715, 637 P.2d 994 (1981); *State v. Portee*, 25 Wn.2d 246, 170 P.2d 326 (1946); *State v. Morton*, 83 Wn.2d 863, 870, 523 P.2d 199

(1974) (Supreme Court upheld midtrial dismissal of a count, which would not have been necessary had there be no way to appeal it); *State v. Gallagher*, 15 Wn. App. 267, 549 P.2d 499 (1976) (affirming in part and reversing in part a trial court's dismissal of a case after opening statement to a jury). Apparently it was not clear even up until *Evans* that there was no appeal from a midtrial motion to dismiss. *State v. McPhee*, 156 Wn. App. 44, 65-66, 230 P.3d 284 (2010) (State can retry improperly dismissed charge). In addition it is a rule that governs criminal trials as a general proposition. The specific criminal rules govern when they cover a specific issue or civil rules do not make sense to apply to the case. *See Bianchi,* 92 Wn.2d at 92. Even if the civil rules may make sense to apply, they have not been applied. *See State v. Knapstad*, 107 Wn.2d 346, 729 P.2d 48 (1986). (Pretrial judgment as a matter of law was appropriate as a matter of inherent authority, not under the civil rules.) The criminal rules have occupied the field in judgments as a matter of law with CrR 7.4(a) and 8.3(c). In addition, applying CR 50 to criminal trials carries a significant cost not present in civil trials, thus the rule does have the same underpinnings in a criminal trial as it does in a civil trial.

In *Knapstad* the Washington Supreme Court held that the trial court had inherent power to dismiss *prior to trial* when the State had insufficient evidence to make a prima facia case. In doing so it held:

> the State is correct in its assertion that there should be a clarification of the procedure for ruling on such motions. Several questions we need to address are: (1) *when such a motion should be filed*; (2) whether the State's evidence should be presented by affidavit or by in-person testimony; (3) whether a summary of the State's evidence is sufficient; and (4) whether the State can refile the charge if it obtains new evidence after the case is dismissed.

Id. at 52 (emphasis added). This led to the adoption of Rule 8.3(c). Of note, CrR 8.3(c) by its own terms limits itself to pretrial motions, when the adoption of the rule could have covered any motion as a matter of law up to conviction.

There are basically four sets of procedural rules that govern trials in Washington (CR's, CrR's, CRLJ's and CrRLJ's). All of them have rules for pre and post-trial judgments as a matter of law; all but the CrRs have rules for midtrial judgments as a matter of law. The drafters know how to write these rules, and have chosen not to include a procedure for a midtrial decision as a matter of law in Superior Court criminal cases, particularly when the Supreme Court specified in *Knapstad* that the rule drafters should determine when motions as a matter of law should be filed. "Under expressio unius est exclusio alterius, a canon of statutory construction, to express one thing in a statute implies the exclusion of the other." *Scanlan v. Townsend,* 181 Wn.2d 838, 849, 336 P.3d 1155 (2014). Thus the CrR's do not permit midtrial motions to dismiss.

Also, the court in *Knapstad* held "Trial courts are often asked to decide procedural questions which have not before arisen and for which there exist no formal, written rules. Trial courts must necessarily have some inherent authority to devise appropriate rules in such situations. This [the Supreme] court will later determine whether these actions are a proper exercise of the trial court's authority." Because of the intersection of the double jeopardy clause, midtrial rulings and RAP 2.2(b), the Supreme Court is never able to exercise its supervisory authority in relation to midtrial motions, which was critical to the *Knapstad* decision for pretrial motions.

Even if courts have inherent authority to hear motions as a matter of law despite rules occupying the field, they have inherent authority not to hear them as a matter of public policy. Indeed, in later cases the Supreme Court has strictly limited the trial courts' ability to create procedures where needed, instead relegating that function to the legislative process. *See State v. Pillatos*, 159 Wn.2d 459, 150 P.3d 1130 (2007); *State v. Hughes*, 154 Wn.2d 118, 110 P.3d 192 (2005) (overruled on other grounds *Washington v. Recuenco*, 548 U.S. 212, 126 S. Ct. 2546 (2006)). (Courts do not have authority to create procedures to try aggravators on remand, they must have a statute from the legislature.) The limited

authority to create a procedure includes the authority to consider the policies behind such a procedure and not use it.

1. Midtrial motions to dismiss violate the State Constitution and are not supported by case law.

In addition the Washington State Constitution provides that "[t]he judicial power of the state shall be vested in a supreme court, superior courts, justices of the peace, and such inferior courts as the legislature may provide." Wash Cons't Art IV §1 and "[t]he Supreme Court shall have ... appellate jurisdiction in all actions and proceedings..." Wash Cons't Art IV § 4. Inherent in the idea of a Supreme Court and lower courts is that the Supreme Court supervises the lower courts and harmonizes the law between them.[5] The Supreme Court is unable to do so with motions at the close of the State's case during trial, thus such motions violate the State Constitution. *See State ex rel. Schloss v. Superior Court of Jefferson County*, 3 Wash. 696, 701, 29 P. 202 (1892). (Supreme Court has power to issue writ of prohibition under Art. IV §4 when Superior Court acts to render an appeal nugatory.)

There are some cases that stand for the proposition that it is error to submit a jury instruction to the jury that is not supported by the facts of

[5] For a discussion of trial court behavior when decisions are unreviewable *see* Bennardo, Kevin, *Incentivizing Lawfulness Through Post-Sentencing Appellate Waivers* at 28-31 (May 10, 2013). Available at SSRN: http://ssrn.com/abstract=2263389 or http://dx.doi.org/10.2139/ssrn.2263389 (Last visited September 16, 2015)

the case. *E.g. State v. Fernandez-Medina*, 141 Wn.2d 448, 6 P.3d 1150 (2000) (citing *State v. Hughes*, 106 Wn.2d 176, 191, 721 P.2d 902 (1986)), (citing *Albin v. National Bank of Commerce*, 60 Wn.2d 745, 754, 375 P.2d 487 (1962)); *State v. Heath*, 35 Wn. App. 269, 271-72, 666 P.2d 922 (1983). First it should be noted that jury instructions do not need to be determined until the end of all the evidence, not at the end of the State's case. *State v. Mendes*, 180 Wn.2d 188, 194, 322 P.3d 791 (2014). The cases stating these jury instructions are error rely on authority which tracks back to before 1981, when the double jeopardy clause was first found to prevent the State from appeal dismissals entered when jeopardy was attached. In addition these cases always, to the State's knowledge, arise from the defendant not getting a jury instruction on an affirmative defense or a lesser-included charge, and are obviously subject to review by appellate courts. These cases do not address the issue of dismissal of an independent count. In the case of an independent charge it is not prejudicial error because the court can dismiss post trial, and none of the cases regarding this proposition balance the issue of non-prejudicial jury instructions versus the constitutional problems raised by motions as a matter of law during trial. CrR 7.4(a) makes any error in this regard harmless because the trial court can dismiss the charge after the verdict. "The rule is now definitely established in this state that the verdict of the

jury in a criminal case will be set aside and a new trial granted to the defendant, because of an error occurring during the trial of the case, only when such error may be designated as prejudicial." *State v. Martin*, 73 Wn.2d 616, 627, 440 P.2d 429 (1968).

Jurors are routinely instructed to consider each count separately. WPIC 3.01. Jurors are presumed to follow instructions. *State v. Emery*, 174 Wn.2d 741, 754, 278 P.3d 653 (2012). Thus jurors are able to separate out one count from another. In addition the State is aware of many cases where there were multiple counts charged and the Appellate Courts dismissed one or more counts or separate enhancements for insufficiency of evidence. The State is unaware of a single appellate case where counts that were supported by substantial evidence were dismissed or remanded because they happened to be tried with counts that were not. *See, e.g. State v. Bluehorse*, 159 Wn. App. 410, 248 P.3d 537 (2011) (insufficient evidence to support group aggravator under RCW 9.94A.535(3)(s), case remanded for entry of standard range sentence of underlying drive by shooting charge). The defendant will avoid any prejudice of being convicted of a charge not supported by the evidence. First, if the charge is not supported by the evidence the jury is unlikely to convict. In that case that is the end of the matter in accordance with the double jeopardy clause. If the jury does convict the court can dismiss the

conviction in accordance with CrR 7.4(a)(3), curing any prejudice, and then the appellate courts can exercise their constitutional duty to review the decision.

In *State v. Jackson*, 82 Wn. App. 594, 607-608, 918 P.2d 945 (1996) (citing *State v. Brown*, 55 Wn. App. 738, 742, 780 P.2d 880 (1989)) the court stated, in dicta, "[i]n a criminal case, a defendant may challenge the sufficiency of the evidence (a) before trial, (b) at the end of the State's case in chief, (c) at the end of all the evidence, (d) after verdict, and (e) on appeal." However, *Brown*, which was cited to support propositions b and c, does not analyze the issue of the midtrial motions, but simply took them as a matter of course. Neither *Jackson* or *Brown* analyze this statement in light of the double jeopardy clause. Thus neither *Brown* nor *Jackson* is precedent for this issue. For discussions of how long running dicta and custom can mislead the judicial system, *see e.g. State v. Miller*, 181 Wn. App. 201, 209-14, 324 P.3d 791 (2014); "In this inquiry we keep in mind that where courts and practitioners have uniformly worked under the assumption that a certain principle is the law, no occasion may have arisen for an appellate court to repudiate that principle for a long span of time." *State v. Peltier*, 181 Wn.2d 290, 332 P.3d 457, 459 (2014); *State v. Fort*, __ Wn. App. __, __ P.3d__, 2015 Wash. App. LEXIS 2209 (2015) (Slip op. at 9)(Long running custom of

questioning jurors in chambers on sex cases, which has led to numerous reversals).

2. Costs of motions at the close of the State's case.

a. Significant Costs are Imposed by Midtrial Motions to Dismiss.

In a civil case either side may appeal from such a midtrial motion. A court of limited jurisdiction only deals with minor criminal cases, thus the costs of an unreviewable mistake are not as great as with a Superior trial court. In addition appellate courts only indirectly supervise courts of limited jurisdiction, the cases being generally reviewed by superior court judges, thus the supervisory duties of the appellate court are somewhat limited as to them.

Washington case law does not recognize a due process right to an unreviewable decision of law by a trial judge. In *State v. Portee*, 25 Wn.2d 246, 170 P.2d 326 (1946), the trial judge granted judgment to the defendant at the close of the State's case as a matter of law. The Supreme Court ruled that the State could appeal the trial court's decision. Obviously modern double jeopardy law has overruled the specific facts in *Portee*; *State v. Matuszewski*, 30 Wn. App. 714, 715, 637 P.2d 994 (1981), but it still stands for the proposition that the defendant is not entitled to an unreviewable ruling as a matter of due process, as does

Evans v. Michigan. In addition the Washington constitution does not provide more protection for due process than the federal constitution. *See In re Pers. Restraint of Dyer*, 143 Wn.2d 384, 394, 20 P.3d 907 (2001); *State v. Morgan*, 163 Wn. App. 341, 352, 261 P.3d 167 (2011).

The costs of an error by the trial court judge are apparent in *Evans*. An arsonist probably walked free, the people were denied their day in court and the one clear chance to present their case to a jury and, for the victims involved, their confidence in the justice system was undoubtedly shaken. There are also other costs. Currently a defendant who knows he will have an unreviewable midtrial motion is incentivized to not bring a motion under 8.3(c). Why bring a motion that, even if granted, would allow the State to appeal and/or gather more evidence? Why not take the case to trial and then bring an unreviewable motion? This requires the justice system to bear significant costs in terms of going to trial because defendants do not bring motions testing the State's case under CrR 8.3(c).

b. This case demonstrated that the costs are high and should not be sustained.

The trial judge dismissed a Perjury 2 charge because he believed that a document called a "*Smith Affidavit*" was not a statement subject to the penalty of perjury, even though it conformed with the requirements of

RCW 9.72.085.[6] Whether the trial judge was right or wrong, this is an extremely important issue that cries out for appellate review.

Under ER 801(d)(1)(i) a prior statement of a witness is not hearsay, and thus may be admitted as substantive evidence in a trial if it is, among other things, given under oath. Washington Courts have interpreted this as allowing a statement signed in a manner that meets the requirements of RCW 9.72.085 as qualifying for this exclusion to the hearsay rule. *State v. McComas*, 186 Wn. App. 307, 317-18 345 P.3d 36 (2015) (statement must be given under oath subject to penalty of perjury); *State v. Nelson*, 74 Wn. App. 380, 389-90, 874 P.2d 170 (1994). The court in this case ruled that *Smith affidavits* are not subject to the penalty of perjury.

The potential effects of this ruling cannot be overstated. The admissibility of a *Smith* affidavit may mean the deference between a conviction and insufficient evidence to proceed. *See e.g. State v. Nieto*, 119 Wn. App. 157, 79 P.3d 473 (2003) (Invalid *Smith* affidavit, conviction reversed). *Smith* affidavits are critically important tools in law enforcement's arsenal. They allow prosecution in cases, such as domestic violence or gang cases, where witnesses regularly change their stories.

[6] It should also be noted that a motion for interlocutory review was unavailable, as once the trial court's decision becomes final and subject to review, it is locked in for double jeopardy purposes. *City of Auburn v. Hedlund*, 137 Wn. App. 494, 506, 155 P.3d 149 (2007).

Most cases are resolved by plea bargain. There is now one judge in one county who has called use of *Smith* affidavits into question. Parties no longer have certainty as to what is admissible in their case. If the trial judge is correct, and the Court of Appeals was to affirm the *Smith* affidavit issue, the State could turn to the legislature to solve the problem. If the trial judge is incorrect then an appellate decision reversing would solve the issue. As it is, there can be no appellate decision, and thus no resolution of the issue, all because of the timing of the defendant's motion to dismiss, that could have easily waited until after the jury's verdict, with no cognizable prejudice to the defendant.

A case the trial court relied upon in asking its questions about the perjury charge, *State v. Olson*, 92 Wn.2d 134, 594 P.2d 1337 (1979), was an important case in the development of perjury law in Washington. While *Olson* turned out to be irrelevant in this case, it is still important law. It is cited to in 42 appellate cases and the WPIC comments; *see* WPIC 118.02 comment. In *Olson* the State's case was dismissed at midtrial, the State appealed, the Court of Appeals reversed, and the Supreme Court reversed the Court of Appeals on the merits. If *Olson* had occurred now the State of Washington would never have had the guidance of *Olson*, it simply would not be part of the canon of case law, because the State could have never initiated the appeal.

The issue the trial court dismissed the perjury charge on was present in this case for over a year, from the time the State first filed the perjury charge. There was more than ample time to raise this argument in a CrR8.3(c) motion. Defense counsel declined to do so, most likely because he believed the issue lacked merit, as he failed to endorse the trial court's reasoning when asked to do so. The trial court dismissed a charge sua sponte, on a reason that not even defense counsel would agree with, in a manner completely insulated from appellate review on an issue that has broad repercussions for a number of cases.

The trial court also made its opinion of the arson charge known, calling it complete speculation. There happened to be published cases on point that supported the State's position. However *Clark* was most likely published not because of the sufficiency issue, but because of the other suspect issue in the case. By definition motions to dismiss for sufficiency of evidence are very fact specific. The difference between what is speculation and what is reasonable inference is often a line that eludes precise definition. Unless they accompany another issue or the appellate court reverses the trial court, sufficiency cases are unlikely to meet the requirements of RAP 12.4 and thus not be published. Cases with unusual fact patterns or under uncommon statutes may well not have cases on point as to whether there is sufficient evidence or not. In this case had the

court been left to its own devices it would have dismissed the arson charge, with no recourse for the State, and justice would not have been done. "The defendant's interest is not the only one at stake. We must also consider the societal interest in punishing one whose guilt is clear after he has obtained a fair trial." *United States v. Stauffer*, 922 F.2d 508, 513 (9th Cir., 1990).

c. There are no significant countervailing concerns to justify the costs of midtrial motions to dismiss.

The defendant does not have significant interests in a midtrial motion. There is no doubt the defendant has a substantial interest in not being punished for an offense that is not supported by law. However, that interest can be vindicated by CrR 8.3(c) or 7.4(a). As *Evans* and *Portee* demonstrate the defendant does not have an interest in an unreviewable decision, nor does a defendant have an interest in not seeing the case to completion. While the defendant may gain some tactical advantage in not having to put on a case, this is not a constitutional right, and is no different than the choice a defendant faces when he chooses to talk to the police or not, chooses to testify at trial or not, or any of the other myriad of choices a defendant is required to make under our system. The Washington Supreme Court has explicitly held, in a 9-0 decision, that the defendant's rights are not implicated when a defendant chooses to take the stand in his own trial after the trial judge refuses to inform the defendant as to whether

the evidence is sufficient for a self-defense instruction. *Mendes*, 180 Wn.2d at 195. The costs for the defendant in being denied a motion at the close of the State's evidence are minimal, and not constitutional cognizable.

3. Assuming, arguendo, the trial court has authority to hear midtrial motions to dismiss, it should use the authority sparingly, and abused its discretion in this case.

The State does not believe the Court has authority to hear a motion to dismiss at close of State's evidence based on the authority cited above. However, assuming, arguendo, that it does, the only possible source of that authority is the Court's inherent power. If the Court does have inherent authority to hear the motion it is incumbent upon the moving party, in this case the defendant, to establish that the Court *should* exercise its inherent authority. Where it has discretion a court errors by not at least considering exercising its discretion as a matter of policy. *See State v. Garcia-Martinez*, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997). "Discretion is abused when it is exercised on untenable grounds or for untenable reasons." *State ex rel. Carroll* v. *Junker,* 79 Wn.2d 12, 26, 482 P.2d 775 (1971). Here the only reason given for the trial court's decision was custom. Custom is not the same as precedent. There was no analysis of the State's arguments or reasons. The trial court erred by not

at least considering putting off the motion to dismiss. The State suggests some factors to consider below.

Knapstad provides some guidance. The Supreme Court in *Knapstad* stated: "Trial courts are often asked to decide procedural questions which have not before arisen and for which there exist no formal, written rules. Trial courts must necessarily have some inherent authority to devise appropriate rules in such situations." *Id.* at 353. Motions at the close of the plaintiff's case simply cannot be described as procedurally novel, and are procedurally governed by rule in all types of cases except superior court criminal cases. They date back in the English common law system to basically time immemorial. What does not date back to time immemorial is the recent interpretation of the double jeopardy clause precluding appeals from such motions, thus seriously undermining the rationale for such motions as demonstrated by the court's next line in *Knapstad.* "This [the appellate] court will later determine whether these actions are a proper exercise of the trial court's authority." Because the Court's exercise of inherent authority is supposed to be limited to unusual situations the defendant should be required to establish that his situation is different than the run of the mill midtrial motion.

In deciding that a pretrial motion to dismiss was appropriate the Supreme Court noted that "[f]airness and judicial efficiency both demand

that in such a case a procedure be made available to the trial court to dismiss the prosecution prior to trial for insufficient evidence." *Id.* at 347. While a CrR 8.3(c) motion may promote fairness and judicial efficiency, a midtrial motion does not. As already noted, a midtrial motion comes when the majority of cost and effort for the trial already have been spent, cost and effort that the defendant may have avoided with a CrR 8.3(c) motion, which the defendant is incentivized not to bring under a midtrial motion as of right scheme. In this case several expert witnesses had testified and there had been three days of jury trial before the motion to dismiss. Also a midtrial motion does not promote fairness. In addition to the asymmetry of only one side being able to appeal a midtrial motion, they also typically occur while a jury is waiting and there is significant time pressure. This requires both the parties and the judge to operate somewhat "off the cuff," rather than in a deliberate and researched fashion. *See Association of Administrative Law Judges v. Colvin*, 777 F.3d 402 (7th Cir., 2015) (Administrative Law Judges complaining about the quality of rushed, unreviewable decisions). This does not promote fairness or accurate resolution of the case. Thus the court should consider whether the midtrial motion could have reasonably been brought as a pretrial 8.3(c) motion.

Like other constitutional provisions, Wash Cons't Art IV §§ 1 and 4 must be balanced against other needs. However, the court should consider the fact that a motion at the close of State's evidence usurps the appellate courts' constitutional role in our system, and should weigh this factor appropriately.

Another factor the court may wish to consider is the clarity of the issue. If the issue is one of first impression the trial court should wait until after the jury has made its decision. If the issue is clearly on all fours with a published case then a motion at the close of the State's case may be more appropriate, as long as all parties have had time to review the issue.

Finally the court may consider the prejudice to the defendant on other counts. Juries are routinely instructed to consider each count separately. WPIC 3.01. If the defendant can somehow establish prejudice this might be something for the court to consider.

The State does not assert these are the only factors that should be considered, but believes that these provide good initial guides for trial courts to consider in determining if the defendant has met his burden of convincing the Court to hear a motion at the close of the State's evidence under its inherent authority, should it find such inherent authority exists.

V. CONCLUSION

There was sufficient evidence to support the arson conviction. The gas can, while not overwhelming evidence, was admissible and not unfairly prejudicial. The court should not review legal financial obligations absent an objection in the trial court. The trial court should be sustained on these issues.

Bianchi and *Knapstad* stand for the proposition that civil rules are not to be blindly transported into a criminal case where they do not make sense. The criminal rules provide for judgments as a matter of law both pre and post-trial. They have occupied the field of judgments as a matter of law in a criminal trial and do not allow for a midtrial motion. The costs of an error at a midtrial motion are completely different in a civil and a criminal trial. The U.S. Supreme Court has held there is no requirement to allow a motion for judgment as a matter of law midtrial, and there is no due process right to an unreviewable motion as a matter of law. The midtrial motion as a matter of law violates the supervisory policy expressed in *Knapstad.* Washington Law provides that the double jeopardy should not apply to judicial dismissals or directed verdicts. RCW 10.43.050. The defendant's interests in a ruling as a matter of law are adequately protected by CrR's 8.3(c) and 7.4(a). The court should not allow the defendant to make a motion for dismissal as a matter of law mid

trial. The court should, of course, allow such a motion consistent with criminal rules 7.4(a) and/or 8.3(c).

Dated this 17th day of November 2015.

Respectfully submitted,

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

STATE OF WASHINGTON, Respondent- Cross-Appellant, vs. MARIA HERNANDEZ MARTINEZ, Appellant- Cross-Respondent.	)	No.33109-1-III DECLARATION OF SERVICE

Under penalty of perjury of the laws of the State of Washington, the undersigned declares:

That on this day I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to Thomas M. Kummerow of Washington Appellate Project, Attorney for Appellant – Cross-Respondent, containing a copy of the Brief of Respondent – Cross-Appellant in the above-entitled matter. A copy was also e-mailed to Washington Appellate Project, per agreement.

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Dated: November 17, 2015.

Kaye Burns