93430-4

SUPREME COURT NO.

COURT OF APPEALS NO. 33109-1-III

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

MARIA HERNANDEZ MARTINEZ,

Respondent.

ON APPEAL FOR THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR GRANT COUNTY

The Honorable John D. Knodell

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

The State of Washington asks this court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition.

B. COURT OF APPEALS DECISION

The State designates that part of the Court of Appeals decision relating to the granting of the defendant's motion to dismiss at the close of the State's evidence, dated June 21, 2016. A copy of that decision is in the Appendix at pages A 1 through A 17.

C. ISSUES PRESENTED FOR REVIEW

1. May a trial court dismiss charges mid trial without a court rule allowing it to do so? If so must it entertain a motion to dismiss, or is such a decision discretionary with the trial court such that the standards for exercise of discretion apply?

2. Do the Rules of Appellate Procedure allow an appellate court to review an issue that is common in the Superior Courts, procedural in nature and will otherwise completely and permanently evade review? If not, are the Rules constitutional as applied?

D. STATEMENT OF THE CASE

1. *Substantive Facts*

At about 9:15 in the morning of August 29, 2012 Grant County Deputy Fire Marshal 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 Marshal 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 Marshal Gribble checked his records and noted a fire at the same location in May, 2009, after which Ms. Hernandez Martinez 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. RP 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. RP 170. He noted the fire did not start in the kitchen. RP 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 TVs 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 Marshal Gribble, along with Grant County Sheriff's 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 Marshal Gribble. 2RP 322. After the interview Ms. Hernandez Martinez gave Marshal 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.

2. ***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 State's case as to Ms. Hernandez Martinez's involvement in the arson. 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

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

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 and ER 801(d)(i). 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.

The State cross appealed the procedure used to dismiss the perjury count. In its argument the State acknowledged it could not appeal the substantive dismissal under the Double Jeopardy Clause and RAP 2.2, so the procedural issue was moot. However the State argued that the issue met the requirements for review of a moot issue. The State's brief and reply brief to the Court of Appeals are attached as Appendices B and C for the convenience of the reader. The Court of Appeals declined to review the issue, citing only RAP 2.2.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

The State appeals a procedural ruling that raises serious questions about separation of powers, the jurisdiction of the Appellate Courts, interpretation of the Rules of Criminal and Appellate Procedure and the fundamental fairness of trials and appeals. This issue clearly meets three out of the four requirements under RAP 13.4(b) governing the acceptance of review. While it does not meet the literal language of RAP 13.4(b)(2), it does meet the spirit and intent of that rule, in that it involves a conflict between Superior Courts on the procedures to apply to a midtrial motion to dismiss that the Court of Appeals refuses to address.

1. *The decision of the Court of Appeals is in conflict with a decision of the Supreme Court.*

The Court of Appeals decision conflicts with *State v. Knapstad,* 107 Wn.2d 346, 353, 729 P.2d 48 (1986). *Knapstad* dealt with a somewhat similar situation, a pretrial motion to dismiss when there was no criminal rule to support that motion. The Supreme Court ruled that trial courts have inherent authority to create procedures to deal with unusual situations not covered by the criminal rules. However, the Supreme Court also ruled that "This court will later determine whether these actions are a proper exercise of the trial court's authority." *Id.* at 353. This has not been a blank check to the trial courts. In *State v. Pillatos,* 159 Wn.2d 459, 150 P.3d 1130 (2007), and *State v. Hughes,* 154 Wn.2d 118, 110 P.3d 192 (2005), the Washington Supreme Court expressly rejected the trial court's authority to create a procedure to deal with aggravating circumstances after *Blakely v. Washington,* 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). Because the Court of Appeals refused to review this issue, despite the fact that *Knapstad* held that appellate courts would review trial court procedures that go beyond the criminal rules, the Court of Appeals decision conflicts with *Knapstad* and the Supreme Court should accept review.

2. *The decision of the Court of Appeals is in conflict with another decision of the Court of Appeals.*

Because the Court of Appeals refused to review this issue on the merits there is no conflict in the Court of Appeals. Therefore this part of the rule does not literally apply. However, the intent of this part of the rule is that the Supreme Court resolves conflicts in the lower courts, including the Superior Courts. Usually that is done through the intermediate step of the Court of Appeals. However, in this case there is a clear conflict in the Superior Courts that the Court of Appeals is unwilling or unable to resolve. The Court should apply the intent of this rule and grant review.

The trial court in this case acted as if a midtrial motion to dismiss existed as a matter of right, and even came up with the grounds for dismissal sua sponte. It did not even consider delaying the motion until after the jury had returned. However, in other cases trial courts have decided to delay midtrial motions to dismiss until after the jury came back, providing the appellate courts the opportunity to review the decision and provide guidance. In *State v. Tasker*, 193 Wn. App. 575, 579-80, __ P.3d __ (2016), the trial court recognized the issue of whether the State had provided sufficient evidence to prove a firearm enhancement was 'razor thin' and delayed a midtrial motion to dismiss until after the jury had returned a verdict. After the jury returned a verdict the trial court considered the issue and decided it for the State. The Court of Appeals

then reviewed the issue and affirmed. In *State v. Pearson*, 180 Wn. App. 576, 321 P.3d 1285 (2014), 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.

While no conflict exists in the Court of Appeals, a clear conflict exists in the trial courts. The appellate courts exist to ensure uniform laws and standards are provided across the State. As of now there is no standard for midtrial motions to dismiss. The Supreme Courts should grant review to reconcile this conflict between the Superior Courts.

3. ***A significant question of law under the Constitution of the State of Washington or of the United States is involved.***

a. ***This case involves a significant question of the constitutional separation of powers between the Appellate Courts and the Superior Courts.***

Since territorial days, by statute, a judicial acquittal based on variance between the information and the proof has not been a bar to retrial. RCW 10.43.050. (First codified Code of 1881 §769). Article IV of the State constitution sets up appellate courts. Art IV §4 gives the Supreme Court appellate jurisdiction in all actions and proceedings (with

exceptions not relevant here). Appellate jurisdiction exists to clarify and harmonize the law across the State. A midtrial motion to dismiss robs the Supreme Court of its appellate jurisdiction over the issue. *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). Because criminal midtrial motions to dismiss divest the appellate courts of jurisdiction over certain issues they involve a significant question under the Washington Constitution.

b. *The Court of Appeals' invocation of RAP 2.2 to evade review of this question also involves a significant question of law regarding whether certain questions are essentially unreviewable by the Appellate Courts.*

RAP 2.2 provides:

> 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)...

Because of this rule the State is not appealing the substantive ruling of the trial court. Instead it is appealing the procedure the trial court used to

arrive at this ruling. The procedure used inheres in the final decision of the court, but is not a judgment or verdict. In addition the double jeopardy clause is concerned with additional trials based on the same set of facts, not the procedure used to arrive at the decision. So while the double jeopardy clause makes this appeal moot, it does not forbid review under RAP 2.2. The appellate courts have developed doctrine as to when they will review a moot issue. This case falls squarely under that doctrine. The Court of Appeals declined to analyze the issue under the mootness doctrine, however the State fully addressed this issue in its opening and reply briefs to the Court of Appeals (Appendices B and C).

The State's narrower reading of RAP 2.2 is compelled by the State Constitution and RAP 1.2(a).

> Interpretation. These rules will be liberally interpreted to promote justice and facilitate the decision of cases on the merits. Cases and issues will not be determined on the basis of compliance or noncompliance with these rules except in compelling circumstances where justice demands, subject to the restrictions in rule 18.8(b).[2]

In order to decide issues on the merits in compliance with RAP 1.2(a) the court must either adopt the narrower interpretation of RAP 2.2, or not determine the case based on RAP 2.2. Neither the Court of Appeals nor Ms. Hernandez Martinez identified the compelling circumstances required

[2] Rule 18.8(b) has to do with timeliness and is not an issue in this appeal.

under RAP 1.2(a) to make RAP 2.2 the determining factor in the State's appeal of this issue.

In addition the Court of Appeals interpretation of RAP 2.2 raises a significant question under the State Constitution. A midtrial motion to dismiss occurs in almost every criminal trial. Superior Courts are using different procedures to adjudicate them. If RAP 2.2 is interpreted to forever bar review of those procedures, as the Court of Appeals has done, then it is clearly unconstitutional as applied. Because the State Constitution provides that the Supreme Court has appellate jurisdiction in all cases, the court rules cannot remove that appellate jurisdiction. Therefore RAP 2.2 must either not control, or must be interpreted not to reach this issue.

The proper analysis of whether the court should decide this procedural issue regarding midtrial motions to dismiss rests in the mootness doctrine, not RAP 2.2. In addition the appellate court may waive the RAPs pursuant to RAP 1.2(c). While the issue is moot, as discussed in the State's Court of Appeals brief, the issue merits review under that doctrine. Whether RAP 2.2 can divest the appellate courts of jurisdiction to hear legitimate appeals is a significant question under the Washington Constitution.

4. *The petition involves an issue of substantial public interest that should be determined by the Supreme Court.*

The ability of a Superior Court judge to unilaterally dismiss a case with no possibility of appellate review is an issue of substantial public interest that should be determined by the Supreme Court. When the State was founded the paradigm of unreviewable judicial decisions did not exist. The founders of our State felt the principle was important enough to codify at RCW 10.43.050 a statute that still exists today. See also *State v. Portee*, 25 Wn.2d 246, 170 P.2d 326 (1946). The State did not start moving away from that paradigm until it was forced to under the federal constitution in the late 1970s and early 1980s. Compare *State v. Olson*, 92 Wn.2d 134, 594 P.2d 1337 (1979) (State's appeal of midtrial dismissal of perjury charge); *State v. Matuszewski*, 30 Wn. App. 714, 715, 637 P.2d 994 (1981) (No State's appeal allowed). However up until 2010 the Court of Appeals was distinguishing these cases to allow review and reversal in certain cases. *State v. McPhee*, 156 Wn. App. 44, 65-66, 230 P.3d 284 (2010).

The trial judge in this case has stated, in a published concurrence, that courts need to better police the legislative and executive branches, particularly the use of prosecutorial discretion. *State v. DeLeon*, 185 Wn. App. 171, 221-22, 341 P.3d 315 (2014) (Knodell, J.P.T. Concurring). He

is entitled to express his opinion. What he is not entitled to do under our constitutional system is become the sole arbiter of this issue. In this case the damage was not that great. The charge dismissed was a secondary charge. However, the trial court clearly wished to dismiss the arson charge, but was prevented from doing so only by case law closely on point. Such case law does not always exist. The Court of Appeals then found sufficient evidence for the charge, evidence the trial judge felt was mere speculation. Had the trial judge dismissed the arson charge midtrial, an arsonist would have walked free after a fair trial in front of a jury of her peers with no possibility of review.

The United States Supreme Court has recognized the State's interest in preventing this from happening, and endorsed restricting trial courts' ability to decide motions to dismiss while jeopardy is attached. *Evans v. Michigan*, 133 S. Ct. 1069, 1073-74, 185 L. Ed. 2d 124 (2013). Historically trial judges could not dismiss cases with no possibility of review. The ability to do so is an unintended side effect of changing federal double jeopardy jurisprudence, not a well thought out policy supported by reasoned opinion or debate in the legislative or rule making process. The ability of a trial judge to unilaterally dismiss a case with no possibility of review is clearly an issue of substantial public interest that should be determined by the Supreme Court.

F. CONCLUSION

The Supreme Court should accept review of this case and hold that trial courts should not hear midtrial motions to dismiss absent compelling circumstances. In the alternative the Court should find that trial courts have discretion in hearing midtrial motions to dismiss, and provide factors to guide that discretion.

Dated this 18th day of July 2016.

GARTH DANO
Grant County Prosecuting Attorney

By: _____
KEVIN J. MCCRAE
Deputy Prosecuting Attorney
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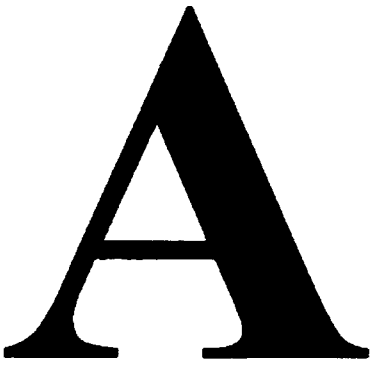
Attorney for Petitioner



FILED

JUNE 21, 2016

In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON,	)	
	)	No. 33109-1-III
Respondent,	)	
	)	
v.	)	
	)	
MARIA H. HERNANDEZ MARTINEZ,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	

FEARING, C.J. — Maria Hernandez Martinez appeals her convictions of arson in the first degree, making a misleading statement to a public servant, and filing a false insurance claim. The State cross appeals the trial court's dismissal of a perjury charge. We affirm.

FACTS

Maria Hernandez Martinez purchased a Foremost Insurance Company policy, with an effective date of August 9, 2012, insuring her Moses Lake mobile home. Farmers Insurance Company owns Foremost Insurance and the latter company specializes in coverage for mobile homes.

On the morning of August 29, 2012, Maria Martinez's mobile home caught fire. The fire likely began in or near a window air conditioning unit in the home's family room. The fire was a low heat burn. We do not know when or who first noticed the fire or when or who notified firefighters of the fire. Firefighters extinguished the fire by 9:15 a.m., on August 29. Martinez and her children left their residence at 6:30 a.m., on August 29, to travel to Spokane for a 9:30 a.m. doctor's appointment.

At 8:15 a.m., on August 29, Grant County Chief Deputy Fire Marshal Bruce Gribble learned of the Hernandez Martinez mobile home fire. Gribble arrived at the mobile home at 9:15 a.m. Gribble entered the home. He found no residue from burned cash on the home's living room couch. He saw no television in the master bedroom.

In early September 2012, Jonathan Hull, a Farmers Insurance Company adjuster, met with Maria Martinez at the latter's Moses Lake mobile home. Hull directed Martinez to complete an inventory of property damaged or destroyed by the August 29 fire. Hull assisted by writing the list of property on a four-page undated and unsigned claim form. Martinez claimed that two televisions were lost or damaged in the fire and the claim form listed the televisions on the first page. Martinez claimed one television sat in the family room and one in her bedroom at the time of the fire.

During her first meeting with Jonathan Hull, Maria Hernandez Martinez did not mention the loss of any cash. A day or two later, Martinez notified Hull that the fire

destroyed $3,800 in cash that lay on or near the living room couch at the time of the fire.

On September 7, 2012, adjuster Jonathan Hull prepared an eighteen-page contents valuation report. The report listed a loss of two televisions and $3,800 in cash. The valuation report totaled the cash value of the loss as $22,343.66. No one signed the contents valuation report.

Barry Kerth, a fire investigator hired by Foremost Insurance Company, examined Maria Martinez's mobile home on September 3, 2012 and September 8, 2012. On September 3, he saw no televisions in the home; on September 8, he noticed two sets inside the mobile home. Kerth observed no damage to the televisions. When investigating the fire on September 3, Barry Kerth identified an irregular burn pattern on a table outside the mobile home, but near a window where some of the fire escaped the home. The window had held the air conditioner that likely was the source of the fire. We do not know if the table was inside at the time of the fire.

When Barry Kerth examined the table on September 3, the air conditioner rested thereon. The burn pattern signaled the earlier presence of an ignitable liquid. Kerth observed an electrical outlet inside the home and near the air conditioner's window. The outlet contained no evidence of a melted electrical plug such that Kerth concluded no appliance was plugged into the outlet at the time of the fire.

During his second inspection of the mobile home on September 8, 2012, Barry Kerth moved a severely burned couch, resting in the family room near the origin of the fire, to search for cash residue. He found no residue. On relocating the couch, Kerth did not smell any accelerants, but, after sifting through debris on the floor, he smelled a strong odor of accelerants. Based on the smell, he recommended to Foremost Insurance Company that it bring an accelerant detection dog to the mobile home.

Dog handler Eileen Porter, at the request of Foremost Insurance Company, investigated the fire with an accelerant dog. The dog detected accelerants at four locations on Maria Martinez's property, one inside the home and three outside the residence. Porter collected samples from each location. While investigating, Porter took photographs, including a picture of a gas can in front of another trailer located on the Martinez property. Scientist Dale Mann analyzed the samples collected by Porter and found the presence of automotive gasoline in all samples.

On September 25, 2012, Grant County Sheriff Deputy Jon Melvin and Fire Marshal Bruce Gribble interviewed Maria Martinez at the county sheriff station for many hours. During the interview, Martinez, through an interpreter, claimed that two televisions and $3,800 burned in the fire. Deputy Melvin wrote notes from Martinez's answers to questions and placed the notes on a six-page document entitled "Written Statement." Ex. 48. On the completion of the interview, the translator translated the

statement for Martinez, and Martinez signed the document. The statement contained language, above Martinez's signature, stating that she signed under penalty of perjury.

On September 25, 2012, Bruce Gribble found, in the unburned trailer on Maria Martinez's property, boxes of jewelry. During trial, Leovigildo Mendoza Flores, the father of Maria Martinez's children, identified the jewelry as belonging to Martinez. According to Flores, Martinez usually stored her jewelry in the mobile home in which she resided.

In 2012, Maria Martinez supported three children on an income of $660 a month. She monthly paid $500 on the mortgage. She possessed a working cell phone. Martinez's mobile home previously suffered a fire on May 1, 2009.

PROCEDURE

The State of Washington charged Maria Hernandez Martinez with arson in the first degree, perjury in the second degree, and filing a false insurance claim for property exceeding $1,500. The State alleged alternate theories for the first degree arson charge: (1) a damaged dwelling, and (2) insurance fraud in an amount exceeding $10,000.

During trial, the State sought to admit as exhibit 46, the photo of the gas can taken by Eileen Porter. The trial court admitted the exhibit over the objection of Maria Martinez.

Maria Martinez moved to dismiss both the arson and perjury charges at the close

of the State's case and at the end of trial. The trial court denied the motion to dismiss at the close of the State's case. The court, at the conclusion of trial, denied the motion to dismiss the arson charge, but granted the motion to dismiss the perjury charge. The trial court reasoned that the oath found above Maria Martinez's signature on the written statement given to law enforcement was not authorized or required by law. Thus, the State could not sustain perjury charges. The trial court instead instructed the jury on a lesser included crime of making a false or misleading statement to a public servant.

The jury found Maria Martinez guilty of arson in the first degree, making a false or misleading statement to a public servant, and filing a false insurance claim. Special verdict form 1 directed the jury to place a checkmark next to the ground or grounds on which it found Martinez guilty of first degree arson. The verdict form read:

> We, the jury, having found the defendant guilty of the crime of arson in the first degree, unanimously find the defendant committed the arson knowingly and maliciously to: (check any or all that apply)
> [ ] 2(a) cause a fire or explosion which damages a dwelling;
> [ ] 2(b) cause a fire or explosion on property valued at ten thousand dollars or more with intent to collect insurance proceeds.
> [ ] None of the arson first degree elements 2(a) or 2(b) were found unanimously.

Clerk's Papers at 108. The jury did not enter any checkmark on special verdict form 1, although the jury foreperson signed the form. The trial court imposed a $500 victim assessment fee, a $200 criminal filing fee, and a $100 deoxyribonucleic acid (DNA) collection fee.

LAW AND ANALYSIS

On appeal, Maria Hernandez Martinez contends the trial court erred in admitting, as an exhibit, the photograph of the gas can in front of her other trailer. Martinez also challenges the sufficiency of the evidence to convict her of arson and the failure of the trial court to require jury unanimity with regard to the alternative means of committing first degree arson. Finally, she contests the imposition of legal financial obligations. The State cross appeals the trial court's dismissal, at the close of the trial, of the perjury charge. We affirm the trial court's evidentiary ruling, the convictions of Maria Martinez, and the imposition of financial obligations. We decline entertainment of the State's cross appeal.

Gas Can Photograph

Maria Martinez argues that the trial court erred by admitting a picture that showed a gas can on her property and in front of the second trailer. In the alternative, she contends that, if relevant, the evidence was more prejudicial than probative. This court reviews evidentiary rulings for manifest abuse of discretion. *State v. Russell*, 125 Wn.2d 24, 78, 882 P.2d 747 (1994). The trial court abuses its discretion only when no reasonable person would have decided the issue as the trial court did. *State v. Rice*, 110 Wn.2d 577, 600, 757 P.2d 889 (1988).

> "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. Relevance is a very low bar. *Mut. of Enumclaw Ins. Co. v. Gregg Roofing, Inc.*, 178 Wn. App. 702, 729, 315 P.3d 1143 (2013). Even minimally relevant evidence is admissible. *State v. Darden*, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002). Relevancy means a logical relation between evidence and the fact to be established. *State v. Whalon*, 1 Wn. App. 785, 791, 464 P.2d 730 (1970).

In an arson case, the presence of a gas can near the scene possesses relevance. The relevance increases when an expert opines at trial that someone used gasoline to accelerate the fire. Maria Martinez emphasizes that Eileen Porter took the photograph after the fire, no evidence tied Martinez to the can other than its presence on her property, the State presented no testimony that the can contained gasoline, and the State never investigated the role the gas can might have played in the fire. Martinez's criticisms of the importance of the gas can is well taken, but goes to the weight, not admissibility, of the photograph.

Maria Hernandez Martinez also contends that the picture was substantially more prejudicial than it was probative.

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

ER 403. A danger of unfair prejudice exists when evidence is likely to stimulate an emotional response rather than a rational decision. *State v. Beadle*, 173 Wn.2d 97, 120, 265 P.3d 863 (2011); *State v. Barry*, 184 Wn. App. 790, 801, 339 P.3d 200 (2014). The burden of demonstrating unfair prejudice is on the party seeking to exclude the evidence. *State v. Burkins*, 94 Wn. App. 677, 692, 973 P.2d 15 (1999).

When administering ER 403, we recognize that nearly all evidence worth offering in a contested case will prejudice one side or the other. *Carson v. Fine*, 123 Wn.2d 206, 224, 867 P.2d 610 (1994). Evidence is not rendered inadmissible under ER 403 just because it may be prejudicial. *Carson v. Fine*, 123 Wn.2d at 224. Under ER 403, the court is not concerned with this ordinary prejudice. *Carson v. Fine*, 123 Wn.2d at 224. Because of the trial court's considerable discretion in administering ER 403, reversible error is found only in the exceptional circumstance of a manifest abuse of discretion. *State v. Gould*, 58 Wn. App. 175, 180, 791 P.2d 569 (1990).

Maria Hernandez Martinez argues that the gas can picture improperly allowed the jury to speculate. Nevertheless, as reasoned by the trial court, a picture of a gas can is not likely to elicit an emotional response. The picture may posit little probative value, but it also creates little prejudicial effect. The trial court did not abuse its discretion in admitting the photograph as an exhibit.

Sufficiency of Evidence

Maria Hernandez Martinez challenges the sufficiency of the evidence to convict her of arson. She underscores that the State presented no evidence that she set or assisted in setting the fire.

Evidence is sufficient if a rational trier of fact could find each element of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980). Both direct and indirect evidence may support the jury's verdict. *State v. Brooks*, 45 Wn. App. 824, 826, 727 P.2d 988 (1986). This court draws all reasonable inferences in favor of the State. *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977). Only the trier of fact weighs the evidence and judges the credibility of witnesses. *State v. Carver*, 113 Wn.2d 591, 604, 781 P.2d 1308, 789 P.2d 306 (1989).

The jury convicted Maria Hernandez Martinez of first degree arson under RCW 9A.48.020. The statute declares, in part:

> (1) A person is guilty of arson in the first degree if he or she knowingly and maliciously: . . . (b) Causes a fire or explosion which damages a dwelling; or . . . (d) Causes a fire or explosion on property valued at ten thousand dollars or more with intent to collect insurance proceeds.

The absence of direct evidence is no bar to conviction in an arson case. *State v. Evans*, 32 Wn.2d 278, 280, 201 P.2d 513 (1949); *State v. McLain*, 43 Wash. 267, 269, 86 P. 390 (1906); *State v. Deaver*, 6 Wn. App. 216, 218, 491 P.2d 1363 (1971). The verdict

must stand if substantial evidence supports it, even though that evidence might not be the most convincing kind. *State v. Despain*, 152 Wash. 488, 491, 278 P. 173 (1929); *State v. Deaver*, 6 Wn. App. at 218. Arson is a crime most often proved by circumstantial evidence. *State v. Plewak*, 46 Wn. App. 757, 764-65, 732 P.2d 999 (1987).

The Washington Supreme Court places a high premium on "convincing proof of motive" in arson cases including interest in the collection of insurance. *State v. Pfeuller*, 167 Wash. 485, 490, 9 P.2d 785 (1932). In *Pfeuller*, the Supreme Court reversed Fred Pfeuller's conviction for arson in the second degree. Evidence established that Pfeuller's shoes were wet and muddy and another pair of shoes, which appeared to belong to the arsonist, echoed Pfeuller's shoe size. No evidence showed a feud or monetary motive for Pfeuller to set the fire. The state high court stated that, when evidence of motive is lacking and the remainder of the evidence is circumstantial, the court is less likely to find the evidence sufficient.

The State relies on two cases to argue that the evidence is sufficient: *State v. Clark*, 78 Wn. App. 471, 898 P.2d 854 (1995) and *State v. Wood*, 44 Wn. App. 139, 721 P.2d 541 (1986). In *Clark*, the State charged Garith Clark with first degree arson for a fire at his office. This court reversed the trial court because of the exclusion of relevant evidence exculpatory to Clark, but remanded for a new trial because of sufficient evidence to convict. At trial, the State presented evidence of arson and testimony that

Clark filed an insurance claim for the fire loss. Clark conceded that he had reached the maximum amount on his credit cards and his business was slow. Clark entered his office during the night of the fire and removed a fish tank.

In *State v. Wood*, the jury found Clara Wood guilty of first degree arson. The State presented evidence that fire destroyed a vacant home owned by Wood. Wood rested in Reno at the time of the fire. An investigation showed arson. Witness Charles Blinkenderfer saw a suspicious silver Toyota parked on the street near the home and later a man running from the vacant home. Blinkenderfer chased the man. Fire Marshal Richard Carman researched the Toyota license plate submitted by Blinkenderfer and found that David Curtindale owned the vehicle. Blinkenderfer picked Curtindale out of a line up as the man he chased. Curtindale was Wood's brother. Wood submitted a claim for loss to her insurance. The State discovered that Wood telephoned Curtindale multiple times before the fire. This court held that sufficient evidence supported Wood's arson conviction.

We hold that the State provided sufficient evidence to support Maria Martinez's conviction. The State presented evidence of Martinez's financial need. The State presented evidence that Martinez had a motive to collect insurance proceeds. The evidence about motive is arguably stronger than in *State v. Clark* because the State showed that Martinez purchased insurance on her mobile home weeks before the fire and

she forwarded a claim for fire loss on the policy. Martinez sustained loss in a fire in 2009 and received insurance proceeds to cover those losses. Martinez removed jewelry and may have removed television sets from the home before the fire.

Jury Unanimity

Maria Hernandez Martinez also argues that the trial court improperly instructed the jury regarding a unanimous verdict. The State argues that there was adequate evidence to support either of the alternative circumstances charged. Therefore, no error occurred. We agree with the State.

While jury unanimity as to the underlying crime is required, there is no such unanimity requirement for alternative circumstances. *State v. Flowers*, 30 Wn. App. 718, 722-23, 637 P.2d 1009 (1981). A conviction of a crime with alternate means of committing may be affirmed if the alternative ways are not repugnant to each other and substantial evidence supports a conviction on each of the alternative means. *State v. Richardson*, 24 Wn. App. 302, 304, 600 P.2d 696 (1979). The first prong is satisfied so long as proof of one does not disprove the other. *Richardson*, 24 Wn. App. at 305. The second prong is satisfied if there is sufficient evidence from which the trier of fact can reasonably infer the existence of a fact. *Richardson*, 24 Wn. App. at 305.

Maria Martinez's jury convicted her of first degree arson. The State charged two alternate circumstances: fire that damaged a dwelling or fire set for insurance proceeds.

RCW 9A.48.020(1)(b), (1)(d). The alternate means are not antagonistic to one another. An arson may both burn a dwelling and burn property worth more than $10,000 in order to receive insurance proceeds.

Testimony and exhibits showed that Maria Martinez and at least three of her children lived in the mobile home that burned. The insurance documents admitted in evidence established that the mobile home and its contents exceeded $10,000 in value. Martinez filed an insurance claim. A reasonable trier of fact could find the mobile home was a dwelling and that property worth more than $10,000 was set on fire in order to receive insurance proceeds.

Legal Financial Obligations

Maria Hernandez Martinez contends that the trial court erroneously imposed a $200 criminal filing fee as a financial obligation without considering, under RCW 10.01.160(3), her financial resources. Martinez, who did not object to the imposition of these costs at sentencing, argues that she may raise this issue for the first time on appeal, citing *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015).

The record does not show that the trial court inquired into Maria Martinez's ability to pay legal financial obligations. Nevertheless, the criminal filing fee is a mandatory, not discretionary, obligation. *State v. Lundy*, 176 Wn. App. 96, 110, 308 P.3d 755

(2013); *State v. Clark*, 191 Wn. App. 369, 374, 362 P.2d 309 (2015). Despite the lack of inquiry into Martinez's financial capability, we affirm the imposition of the obligation.

Cross Appeal

The State of Washington challenges the trial court's dismissal of the perjury charge at the close of the case. The State mentions that dismissal as a matter of law after jeopardy attaches unfairly precludes the State from challenging a legal ruling of the trial court.

The Rules of Appellate Procedure curtail the State's ability to appeal decisions in criminal prosecutions. RAP 2.2 declares:

> (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).
>
> (2) Pretrial Order Suppressing Evidence. A pretrial order suppressing evidence, if the trial court expressly finds that the practical effect of the order is to terminate the case.
>
> . . . .
>
> (6) Sentence in Criminal Case. A sentence in a criminal case that (A) is outside the standard range for the offense, (B) the state or local government believes involves a miscalculation of the standard range, (C) includes provisions that are unauthorized by law, or (D) omits a provision that is required by law.

RAP 2.2 (emphasis added) (boldface and italics omitted).

RAP 2.2(b) articulates that the State may only appeal if the appeal will not subject the defendant to double jeopardy. As a general rule, if the trial court weighed the evidence in entering an order terminating the prosecution, the prohibition against double jeopardy precludes a retrial. 12 ROYCE A. FERGUSON, JR., WASHINGTON: PRACTICE, CRIMINAL PRACTICE & PROCEDURE § 2110, at 474 (3d ed. 2004). "It makes no difference that the ruling of the court may have resulted from an erroneous interpretation of governing legal principles. Such an error affects the accuracy of a determination, but it does not alter its essential character as a judgment of acquittal." *State v. Bundy*, 21 Wn. App. 697, 702-03, 587 P.2d 562 (1978).

The State concedes that jeopardy attached to Maria Martinez's prosecution, and thus it cannot appeal the judgment dismissing the perjury charge. The State astutely claims it is appealing the process used to dismiss the charge, not the dismissal itself. Nevertheless, RAP 2.2 offers a comprehensive list of rulings or orders the State can appeal. Use of a procedure is not listed. We discern no practical difference between appealing the dismissal procedure and the end result of the procedure. Therefore, we refuse to entertain the cross appeal.

CONCLUSION

We affirm Maria Hernandez Martinez's convictions for arson, a misleading statement, and filing a false insurance claim. We also affirm the imposition of legal financial obligations on Martinez. We deny review of the State's cross appeal.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Fearing, J.
Fearing, C.J.

WE CONCUR:

Siddoway, J.
Siddoway, J.

Pennell, J.
Pennell, J.

B

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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I. ASSIGNMENTS OF ERROR

A. *Appellant's Assignments of Error*

1. There was not sufficient evidence to prove Ms. Martinez was culpable for the arson fire that destroyed her residence. (Appellant's Assignment of Error No. 1).

2. The trial court erred in admitting a photograph of a gas can, and the error was not harmless. (Appellant's Assignment of Error No. 2).

3. Remand is necessary to hear the defendant's arguments regarding legal financial obligations. (Appellant's Assignment of Error No. 3).

B. *State's Assignments of Error*

1. The trial court erred in hearing the defendant's motion to dismiss while jeopardy attached. (State's Assignment of Error No. 1).

II. ISSUES RELATING TO ASSIGNMENTS OF ERROR

A. Issues relating to Appellant's Assignments of Error

1. Sufficiency of Evidence–Arson

a. Was there sufficient evidence to support the guilty verdict on the arson count when the defendant set up the conditions precedent for the arson fire and attempted to benefit from the fire through fraudulent means? (Appellant's Assignment of Error No. 1).

b. Was there sufficient evidence to support each of the alternate means charged? (Appellant's Assignment of Error No. 1).

c. Do other cases with similar fact patterns finding sufficient evidence support the guilty verdict? (Appellant's Assignment of Error No. 1).

2. **Was it prejudicial error to admit the photo of a gas can?**

   a. Did the trial court err in admitting a photograph of a gasoline can when its relevance was minor and admission created no possibility of unfair prejudice? (Appellant's Assignment of Error No. 2).

   b. If the trial court did error, was such an error harmless? (Appellant's Assignment of Error No. 2).

3. **Should the court remand for consideration of legal financial obligations when there was no objection below? (Appellant's Assignment of Error No. 3).**

B. Issues relating to the State's Assignment of Error

1. **Should the appellate court review a moot issue when all exceptions to the mootness doctrine are met? (Assignment of Error No. 1).**

2. **Did the trial court have the authority to hear a motion to dismiss at the close of the State's case despite the absence of any rule, precedential case or other authority to do so, when doing so violates the State Constitution and a statute, and the United States Supreme Court has expressly held it is not required to hear the motion? (Assignment of Error No. 1).**

3. **Assuming, arguendo, that the court did have the discretion to hear the motion, did the court abuse its discretion when it never considered not hearing the motion? (Assignment of Error No. 1).**

4. **Who has the burden to convince the court to exercise its inherent authority, the moving or non-moving party? (Assignment of Error No. 1).**

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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C

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.

RESPONDENT – CROSS-APPELLANT'S RESPONSE TO BRIEF OF CROSS-RESPONDENT

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I. STATEMENT OF THE CASE

Relevant facts have been previously laid out in prior briefing.

II. ARGUMENT

In order to make her argument against review of this issue Ms. Hernandez Martinez misconstrues both the double jeopardy clause and the 'likely to reoccur' prong of the exception to the mootness doctrine. She does not address the merits of the State's argument. While the State agrees that retrial of the perjury charges is barred by double jeopardy, the double jeopardy clause does not protect a judicial (as opposed to a finder of fact) acquittal, except by undesirable side effect, and whether an issue is likely to be repeated is not decided by focusing on the appellate court level. The crux of the defendant's argument is summarized as:

> Other than a blanket statement without any support, the State makes no attempt to show that this issue will reoccur or whether it is an issue at all. Anecdotally, counsel has been practicing for 21 years in all three divisions of the Court of Appeals and the Supreme Court of Washington and has never seen this issue arise. The reason this issue will not reoccur, and why it has not arisen before, is it is barred by the Double Jeopardy Clauses of the United States and Washington Constitutions. Once again, it matters not how the trial court, or a jury, comes to its conclusion regarding the acquittal of the charged offense, the fact of the acquittal is all that matters.

Brief of Cross-Respondent at 6. The State addressed many of the issues raised in its opening brief. It will address this argument here.

A. **It does matter how an acquittal is obtained.**

A judicial acquittal as a matter of law is not protected by the double jeopardy clause. If it were then the State could not appeal from a pre or post trial dismissal of the charges. Clearly it can, so the double jeopardy clause does not protect a judicial acquittal. Instead what the double jeopardy clause protects is the right of the defendant to only face one trier of fact. In a pretrial dismissal the defendant has not yet faced a trier of fact, so the State can appeal, and if successful, try the case. In a post-trial dismissal the trial court dismisses the jury's verdict, the state can appeal and the verdict will be reinstated if the State is successful. The defendant never faces a second trier of fact. In a midtrial acquittal, however, the right to have that particular trier of fact has vested. However, there is no decision from that trier of fact, therefore there is no verdict to reinstate on appeal, and because the jury would have been dismissed, there is no way to place the case back before the same trier of fact. An unreviewable judicial acquittal during trial is an undesirable side effect of the double jeopardy clause, not a feature. This is why the U.S. Supreme Court has said there is no constitutional requirement to permit them. *Evans v. Michigan*, 133 S. Ct. 1069, 1082, 185 L. Ed. 2d 124 (2013).

A jury is the conscious and voice of the people. A single judge, subject to no review, is not a legitimate system of justice. "[T]he 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). The State Constitution recognizes that persons other than the defendants have rights and interests in criminal proceedings. *See* Wash. Const. Art 1 § 35. Appellate courts in this State reverse trial courts on sufficiency of evidence claims on a regular basis. There is no reason to conclude that trial courts are any better making the opposite rulings, that is incorrectly dismissing for sufficiency of evidence. There are reasons to believe the trial courts are worse at sufficiency rulings when they know there is no one able to review them. *See Association of Administrative Law Judges v. Colvin*, 777 F.3d 402 (7th Cir, 2015). Doubtless some judges are affected by the unavailability of review more than others, but it would be naive to think that the lack of review does not have an effect on some rulings.

B. Midtrial dismissal motions are not rare in the trial courts.

While this issue is rare in the appellate courts, it is certainly not unheard of, and it is common in the trial courts. Anecdotally the Deputy Prosecutor in this case has been practicing in the Grant County trial and Washington appellate courts for five and a half years, and has conducted

38 trials. At least 80 percent of those trials involved midtrial motions to dismiss. In one the State prevailed in a CrR 8.3(c) motion in front of one judge, but lost a midtrial motion on the same evidence in front of another. In another the State adopted a theory of the case from an unpublished case, meaning at least four judges (a trial court judge and three appellate court judges) approved of it, but had the charge dismissed by the trial court judge when he refused to adopt the legal theory. In another trial the trial court agreed to delay a midtrial ruling, and later stated he was convinced by closing arguments as to the issue of law. That case and issue are now subject to appellate review.

Numerous appellate decisions also revolve around, or at least involve, midtrial motions to dismiss. *See e.g., Evans v. Michigan,* 133 S. Ct. 1069; *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); *State v. Gallagher*, 15 Wn. App. 267, 549 P.2d 499 (1976); *State v. Olson*, 92 Wn.2d 134, 594 P.2d 1337 (1979); *State v. Matuszewski*, 30 Wn. App. 714, 715, 637 P.2d 994 (1981); *State v. Collins*, 112 Wn.2d 303, 771 P.2d 350 (1989); *City of Auburn v. Hedlund*, 137 Wn. App. 494, 506, 155 P.3d 149 (2007); *State v. McPhee*, 156 Wn. App. 44, 65-66, 230 P.3d 284 (2010). A Lexis search of Washington State cases using the search string 'dismiss w/s close w/s "state's evidence"' reveals 33 cases in which such a motion was discussed.

That search is grossly under inclusive, as it does not capture any of the named cases listed. To say that they are rare at the trial court level is just ignoring reality. Up until about 1980 the State could appeal midtrial motions to dismiss. In 1981, the Court of Appeals in *Matuszewski* applied federal double jeopardy law and held that the State could not appeal.

Apparently that was not the end of the issue. In *People v. Evans*, 491 Mich. 1, 4, 810 N.W.2d 535 (2012), the Michigan Supreme Court said that errors of law do not implicate the double jeopardy clause, just when the court weighs facts. This argument was rejected by *Matuszewski*, and was also rejected by the U.S. Supreme Court in *Evans*. However, not all Washington cases followed *Matuszewski*. In *McPhee* the court of appeals adopted the same logic as the Michigan Supreme Court and reversed the trial court's midtrial dismissal and allowed retrial. Thus there was considerable confusion and conflicting case law as to whether the State could appeal midtrial motions. This confusion has obviously been resolved by the U.S. Supreme Court decision in *Evans*, but it also explains the relative lack of State's appeals of midtrial dismissals. However, it was in *Evans* in 2013 that the Supreme Court suggested that jurisdictions did not have to allow midtrial motions to dismiss. *Evans*, 133 S. Ct. at 1082. "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. Miller*, 181 Wn. App. 201, 209-14, 324 P.3d 791 (2014).

Hernandez Martinez misidentified the relevant issue in mootness analysis. She argues the issue is unlikely to reoccur at the appellate court level, and offers an appellate court practitioner's experience of 21 years as evidence. The question is not the likelihood of repetition at a particular level of the court system. The exception to the mootness doctrine exists to enable review of issues that would not normally make it to the appellate court because they are usually moot by the time the appellate court is able to review them. According to Ms. Hernandez Martinez the appellate courts would never review moot issues, because their mootness would keep them from repeating in the appellate court. That would defeat the whole point of the exception. Because the State cannot appeal the merits of a midtrial motion to dismiss it is unlikely that the issue will repeat in appellate courts. However, it is likely to repeat in almost all trial cases at the trial court level. The relevant question is 'is the question likely to repeat itself in other cases' not 'is the question likely to repeat in other appeals?' Indeed if the procedural issue is actually resolved in this case, it is unlikely to reappear because it is resolved.

C. Mootness is not jurisdictional.

Ms. Hernandez Martinez contends "Mootness is jurisdictional," citing *State v. Deskins*, 180 Wn.2d 68, 80, 122 P.3d 780 (2014). Actually what *Desikins* says is that mootness is a jurisdictional concern and may be raised at any time. *Id.* Thus what *Desikins* is concerned with is when mootness may be raised, not the power of the court to hear the issue. Other cases recognize the imprecise use of the word "jurisdiction" in case law. "Generally speaking, jurisdiction is the power of a court to hear and determine a case. Beyond this basic definition, however, Washington courts have been inconsistent in their understanding and application of jurisdiction." *In re Marriage of Buecking*, 179 Wn.2d 438, 316 P.3d 999 (2013). "Subject matter jurisdiction refers to a court's ability to entertain a type of case, not to its authority to enter an order in a particular case." *Id.* at 448. The legislature cannot restrict the court's jurisdiction where the constitution has specifically granted the court jurisdiction. *Id.* Mootness is prudential concern, not a constitutional one. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992). This is apparent from the fact that the court can look at certain factors in order to decide a moot issue. If there was a constitutional jurisdictional bar to deciding a moot issue, rather than a prudential bar, there would be no exception to the doctrine.

D. An indefensible action should not forever hide behind the mootness doctrine.

The State is prohibited from appealing the dismissal of the perjury charge by double jeopardy and RAP 2.2(b). Therefore the State only appeals the procedure used. That issue is moot, but not barred by double jeopardy. It is also bound to reoccur in other trials, and possibly this one. Ms. Hernandez Martinez does not defend the trial court's actions on the merits, she only argues that the court's actions are shielded from review. *State v. Ward*, 125 Wn. App. 138, 143-44, 104 P.3d 61 (2005). (A lack of response concedes the issue.) The only defense to this practice appears to be 'we have always done it that way.' But the practice of midtrial motions evolved under different conditions, specifically the State could appeal from them. We have always done it that way is not precedent, because stare decisis requires a reasoned judicial opinion, and one does not exist on this procedure under current conditions. Even if RAP 2.2 is considered to bar this appeal, the court should exercise its discretion under RAP 1.2(c) and waive that rule in order to serve the ends of justice and decide this issue.

The need for this review can clearly be found in *State v. DeLeon*, 185 Wn. App. 171, 341 P.3d 315 (2014). In *Deleon* one appellate judge argued the courts need to more aggressively police prosecutor's charging

decisions and the legislator's power to define crimes and punishments. *Deleon*, 185 Wn. App. at 221-22 (Knodell, JPT. Concurring). The descent responds "These are age old debates that likely will last as long as our structure of government." *Id.* at 224 n. 5 (Korsmo, J. Dissenting). The problem with midtrial motions to dismiss is there is only one voice in that debate, the trial judge's. Our constitutional structure is set up to avoid one voice having the only say in any debate. Even the president or governor is not above the law, and even a Supreme Court Justice, who can declare what the law is in the final instance, must convince four of his or her colleges to go along with them.

Exceptions to the mootness rule exist to prevent situations such as this. An indefensible[1] action by the trial court should not be able to hide behind mootness rules, allowed to be repeated over and over again.

[1] The State does not mean to say dismissing the perjury charge was indefensible. Whether the perjury charge should have been dismissed is something that might be defended, although the State is not sure how. The indefensible act was taking the issue away from the debate that occurs in the appellate courts. This was indefensible, as evidenced by the fact that the cross respondent does not even try to defend it.

III. CONCLUSION

The court should review this issue and find that the trial court overstepped its bounds by refusing to delay its decision until after the jury returned.

Dated this 3rd day of March 2016.

Respectfully submitted,

GARTH DANO
Grant County Prosecuting Attorney

By: _____
Kevin J. McCrae – WSBA #43087
Deputy Prosecuting Attorney

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 served a copy of the Respondent – Cross-Appellant's Response to Brief of Cross-Respondent in this matter by e-mail on the following party, receipt confirmed, pursuant to the parties' agreement:

Thomas M. Kummerow
Washington Appellate Project
wapofficemail@washapp.org

Dated: March 3, 2016.

Kaye Burns

DECLARATION OF SERVICE

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

That on this day I served a copy of the Petition for Review in this matter by e-mail on the following party, receipt confirmed, pursuant to the parties' agreement:

Thomas M. Kummerow
Washington Appellate Project
wapofficemail@washapp.org

Dated: July 15, 2016.

Kaye Burns