

Supreme Court No. _____

Court of Appeals No. 352048-III

IN THE SUPREME COURT
OF THE
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MIKHAIL G. KARPOV

Appellant/Petitioner.

MOTION FOR DISCRETIONARY REVIEW FOLLOWING
APPEAL FROM THE DISTRICT COURT OF THE
STATE OF WASHINGTON FOR SPOKANE COUNTY

The Honorable Judge Vance Peterson

MOTION FOR DISCRETIONARY REVIEW

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TABLE OF CONTENTS

A. IDENTITY OF PETITIONER 1

B. COURT OF APPEALS DECISION..... 1

C. ISSUE PRESENTED FOR REVIEW 1

D. STATEMENT OF THE CASE 2

E. ARGUMENT..... 5

Issue 1: THE COURT OF APPEALS DENIAL TO MODIFY THE
COMMISSIONER’S RULING PUTS MR. KARPOV IN DOUBLE
JEOPARDY, WHICH CONSTITUTES OBVIOUS ERROR AND
RENDERS FURTHER PROCEEDINGS USELESS, THEREFORE
NECESSITATING REVIEW UNDER RAP 13.5(b)(1)..... 3-9

F. CONCLUSION 10

TABLE OF AUTHORITIES

United States Supreme Court

Green v. United States, 355 U.S. 184
78 S.Ct. 221 (1957)..... 8

Tibbs v. Florida, 457 U.S. 31
102 S.Ct. 2211 9

United States v. Scott, 437 U.S. 82
98 S.Ct. 2187 (1978)..... 8

Washington Supreme Court

J.A. v. State Dept. of Social and Health Svcs.,
120 Wn.App. 654, 86 P.3d 202 (2004) 7

State v. Mateszewski, 30 Wash.App. 714, 637 P.2d 994 (1981) 7

State v. Ridgley, 70 Wn.2d 555, 424 P.2d 632 (1967)..... 9

State v. Rhinehart, 92 Wn.2d 923, 602 P.2d 1188 (1967)..... 8

State v. Squally, 132 Wn.2d 333, 937 P.2d 1069 (1997)..... 6

State v Svenson, 104 Wn.2d 533, 707 P.2d 120 (1985)..... 6

Washington Courts of Appeal

Bartusch v. Oregon State Bd. Of Higher Educ.,
131 Wash.App. 298, 126 P.3d 840 (2006) 4

Shannon v. State, 110 Wash.App. 336, 40 P.3d 1200 (2002) 4

Washington Statutes

RCW 9A.04.030 6

RCW 4.92.100 4

Court Rules

RAP 2.2(a) 4
RAP 2.3(b)(1) 3
RAP 13.5(b)(1) 3, 5

Constitutional Provisions

U.S. Const. amend. V 7
Wash. Const. art. I, § 9 7

A. IDENTITY OF PARTY

Mikhail Karpov is the Petitioner. The State of Washington is the Respondent.

B. DECISION

Under RAP 13.5, Mr. Karpov seeks review of the Court of Appeal's denial of a motion to modify the commissioner's ruling denying discretionary review filed on September 8, 2017 and June 6, 2017, respectively. Appendices A and B.

C. ISSUE PRESENTED FOR REVIEW

Did the Court of Appeals' denial to modify the Commissioner's ruling put Mr. Karpov in double jeopardy, which constituted obvious error and rendered further proceedings useless, therefore necessitating review under RAP 13.5?

D. STATEMENT OF THE CASE

Mr. Karpov was charged with five counts of indecent exposure. The matter proceeded to trial. Various witnesses testified that they saw Mr. Karpov masturbating in front of them. The witnesses were not directly asked nor did they directly testify that these events occurred in Spokane County. After the state rested, the defendant moved to dismissed on the basis that the state failed to prove jurisdiction. RPT 218. The defense noted:

Jurisdiction is a necessary element. It has to be proven. If we look at the testimony of the witnesses, count one relating to Hailey Jacobson, the only location evidence we have is a—is North Pines Middle School statement. We have a Bowdish and Broadway statement. We've got no indication that this is in Spokane, Spokane County, Stevens County, Washington, Idaho or nothing. And it's the same throughout. Jesslyn Current testified North Pines Middle school and gave at one point, my notes show, the street of Alki. Hannalora Baldwin, the extent of her testimony was Empire and Nevada. That was it. Rachel Napier, the extent of her testimony was Garland and Maple. That's it. Sierra Frank, the extent of her testimony was Sprague and Green Street. Jennifer Ferry had indicated that she was at 3818 East Joseph and that this occurred at her work. That's it. There's been no indication of any evidence establishing jurisdiction. We've got street names, but that's insufficient, Your Honor. The court cannot take judicial notice of a necessary element.

RPT 218-219. The court granted the motion to dismiss.

The court noted:

Well, there is no muddling in this particular instance. I have to consider all of the evidence in light most favorable to the nonmoving party. In every instance, here before the court, and even on review of the Ferry matter, on not one occasion was it established or inferred or even indicated that this occurred in Spokane County.

I am a Spokane County District Court judge. What is my jurisdiction, folks? I have considered all of the evidence in the light most favorable to the nonmoving party, the state. I have reviewed my notes. We have reviewed at least one portion of the tape for which I was uncertain, but now I'm quite certain. And under the circumstances, in the matter of State of Washington vs. Mikhail Karpov: Count 1 is dismissed. Count 2 is dismissed. Count 3 is dismissed Count 4 is dismissed, and Count 5 is dismissed. We're in recess.

RPT, 225-226. The matter was dismissed with prejudice. RPT, 231-232. The State appealed the dismissal order to superior court.

The superior court reversed the conviction on the basis that there was sufficient evidence that these acts occurred in Spokane County. Furthermore, the Superior Court determined that double jeopardy did not apply to Mr. Karpov because the dismissal was not based on factual guilt or innocence and ordered that Mr. Karpov face trial again. Appendix C. Mr. Karpov made a motion for discretionary review and such review was denied. Mr. Karpov made a motion to modify the commissioner's ruling and the motion was denied.

E. ARGUMENT

1. THE COURT OF APPEALS DENIAL TO MODIFY THE COMMISSIONER'S RULING PUTS MR. KARPOV IN DOUBLE JEOPARDY, WHICH CONSTITUTES OBVIOUS ERROR AND RENDERS FURTHER PROCEEDINGS USELESS, THEREFORE NECESSITATING REVIEW UNDER RAP 13.5(b)(1).

Discretionary review of an interlocutory decision will be accepted if the Court of Appeals has committed an obvious error which would render further proceedings useless. RAP 13.5(b)(1). The fact that Mr. Karpov is being placed in jeopardy after his matter was dismissed for lack of evidence qualifies for review under RAP 13.5(b)(1), because of a matter law he cannot be retired. This standard of review is not clearly defined by case law, but the Court of Appeals have granted review under a similar rule - RAP 2.3(b)(1), which states a party may seek discretionary review of any act by the superior court not appealable as a matter of right.

Under RAP 2.3(b)(1) review may be granted if, “The superior court has committed an obvious error which would render further proceedings useless.” The Court of Appeals have applied the “render further proceedings useless” standard for cases involving questions of jurisdiction, where it was alleged the trial court lacked personal jurisdiction over the defendant. The court determined that in the absence of jurisdiction, further proceedings would have been useless. *Bartusch v. Oregon State Bd. Of Higher Educ.*, 131 Wash.App. 298, 126 P.3d 840 (2006). In *Bartusch*, the court sought to remedy the issue immediately, rather than wait for a trial and proceed through the appeal process.

In *Shannon v. State*, the Court of Appeals granted review of a denial of summary judgment motion, which is not normally appealable under RAP 2.2(a). 110 Wash.App. 336, 386, 40 P.3d 1200, 1202 (2002). The issue in *Shannon* was whether the plaintiffs properly executed a pre-claim notice against the state. RCW 4.92.100 requires the claimant to verify the claim by signing the claim form. However, the plaintiff’s attorney signed the document. In reversing and remanding, the court noted “We ordinarily will not review a denial of a motion for summary judgment. But an appellate court will accept discretionary review if the trial court ‘committed an obvious error which would render further proceedings useless.’” *Id.* at 369. The acceptance of review makes sense.

The Court of Appeals did not want to waste time, money and judicial resources on a proceeding that would have been useless.

Another example of the “rendering further proceedings useless” provision can be found in *State v. Mateszewski*. In that case, the trial judge dismissed the charges of the defendant at trial due to insufficient evidence. The state appealed and the Court of Appeals reversed. Mr. Mateszewski was tried again and convicted. The Court of Appeals reversed the conviction due to the defendant being placed twice in jeopardy. 30 Wash.App. 714, 715, 637 P.2d 994, 995 (1981). It is unclear if the issue of double jeopardy was raised in the first appeal, however, this case illustrates why review in this case is appropriate under RAP 13.5(b)(1). The second trial in *Mateszewski* was a useless proceeding and should have never been ordered. It was a waste of judicial resources, time and money. The defendant was subject to the anxiety, uncertainty and public ridicule of a criminal trial once again. In this case, if Mr. Karpov were to prevail on his double jeopardy claim, then a second trial would be unnecessary and useless. It is entirely possible that Mr. Karpov would face a similar situation found in *Mateszewski*. He could be retried and appeal a conviction on double jeopardy grounds once again. This Court has an opportunity to exercise its discretion and address the double jeopardy issue at this juncture.

The error committed by the trial court and Court of Appeals is also obvious on two grounds; 1) that jurisdiction is required to be proven beyond a reasonable doubt, which requires a factual determination by the trial court or jury; and 2) the double jeopardy applies in Mr. Karpov's case, thus barring retrial.

a. Proof of jurisdiction beyond a reasonable doubt is required.

Proof of jurisdiction beyond a reasonable doubt is an integral component of the State's burden in every criminal prosecution." *State v. Squally*, 132 Wash.2d 333, 340, 937 P.2d 1069, 1071 (1997) (citing *State v. Svenson*, 104 Wash.2d 533, 542 (1985)). Generally, proof that the crime was committed in the state satisfies the jurisdictional element. *Id.* Here, it was clear that the district court made a determination that an essential element was not proven, mainly that the crime was committed within the State of Washington, and more specifically that the crime occurred in Spokane County.

Proof that the crime occurred in the State of Washington is required under RCW 9A.04.030 and must be proven beyond a reasonable doubt. The state presented insufficient evidence to prove the essential element of jurisdiction. The district court had to make a factual determination that the required element was proven. The trial court reviewed its notes and even replayed to the testimony of Ms. Ferry. RPT

225-226. The trial court stated that it looked at such evidence in the light most favorable to the nonmoving party and determined evidence was insufficient. RPT 225-226. Such review of the evidence was insufficient to prove jurisdiction. Clearly there was a factual determination by the trial court and equivalent of an acquittal of all charges.

Both the State, and the Commissioner characterized the issue of jurisdiction and venue as one in the same. However, jurisdiction and venue are two distinct legal theories. Jurisdiction relates to a court's authority to adjudicate a case before them. *J.A. v. State Dept. of Social and Health Svcs.*, 120 Wn. App. 654, 657 (2004). Venue relates to whether a locality is the proper place for suit to be brought. *Id.* The State improperly conflated the two legal theories by stating that Johnson stands for the proposition that if proof of venue does not relate to the defendant's factual guilt, then proof of jurisdiction must also stand for that proposition. Appendix B. A judgment entered into by a court lacking jurisdiction is void. *J.A.* at 657. If there is no jurisdiction, then there is no guilt. Proof of jurisdiction is an essential element of a defendant's factual guilt.

b. Double Jeopardy bars subsequent retrial of Mr. Karpov.

Furthermore, the Superior Court and Court of Appeals committed obvious error when it determined double jeopardy did not apply to Mr. Karpov. The Fifth Amendment provides that no person shall "be subject

for the same offense to be twice put in jeopardy of life or limb.” U.S. Const. amend. V. Article I, section 9 of the Washington Constitution similarly provides, “No person shall be compelled in any criminal case to give evidence against himself, or be twice put in jeopardy for the same offense.” When a trial court dismisses a criminal case for insufficient evidence at the close of the State's case, no matter how erroneous that ruling may be, retrial of the defendant is precluded by the rule that one may not be twice placed in jeopardy for the same offense. *State v. Rhinehart*, 92 Wn.2d 923, 929, 602 P.2d 1188, 1191 (1979). Under *United States v. Scott*, acquittal occurs when the ruling of the judge, whatever its label, actually represents a resolution (in the defendant's favor), correct or not, of some or all of the factual elements of the offense charged there must be a factual determination made. 437 U.S. 82, 98 S.Ct. 2187 (1978). Furthermore, the United States Supreme Court, in construing the constitutional bar against double jeopardy held: ‘Thus it is one of the elemental principles of our criminal law that the Government cannot secure a new trial by means of an appeal even though an acquittal may appear to be erroneous.’ *Green v. United States*, 355 U.S. 184, 188, 78 S.Ct. 221, 224 (1957).

Since a factual resolution was made by the trial court, the order of dismissal is the legal equivalent of an acquittal and the double jeopardy

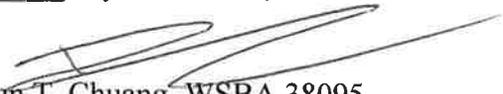
clause of the United States Constitution and also of the Constitution of the State of Washington bars this appeal under the authority not only of *United States v. Scott, supra; State v. Ridgley*, 70 Wn.2d 555, 424 P.2d 632 (1967). In fact, the trial court and Court of Appeals preformed a in depth fact analysis of the trial transcript to determine whether factual evidence was sufficient to sustain a conviction only confirms that a factual inquiry was made.

Such a review by the trial court and Court of Appeals is prohibited by Federal and Washington State case law. The superior court's reversal of the trial court's dismissal is unsupported by the record and applicable case law. In *State v. Ridgley*, the Supreme Court prohibited a review by an appellate court when the trial court dismissed for insufficient evidence. 70 Wn.2d 555, 424 P.2d 632 (1967). In *Tibbs v. Florida*, United States Supreme Court noted that reversal for insufficient evidence is deemed equivalent to an acquittal, for double jeopardy purposes, because it means "no rational factfinder could have voted to convict" on the evidence presented. 457 U.S. 31, 40-41, 102 S.Ct. 2211, 2218 (1982). The decision of the superior court and Court of Appeals conflicts with both State and Federal decisions regarding the constitutional double jeopardy clauses.

F. CONCLUSION

Mr. Karpov respectfully requests that this Court grant Petitioner's Motion for Discretionary Review.

Dated this 9th day of October, 2017.


Dean T. Chuang, WSBA 38095
Crary, Clark, Domanico & Chuang, P.S.

APPENDIX A

FILED
SEPTEMBER 8, 2017
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

STATE OF WASHINGTON,)	No. 35204-8-III
)	
Respondent,)	
)	
v.)	ORDER DENYING
)	MOTION TO MODIFY
MIKHAIL G. KARPOV,)	COMMISSIONER'S RULING
)	
Appellant.)	

THE COURT has considered Appellant's motion to modify the Commissioner's Ruling of June 6, 2017, and the response and reply thereto, and is of the opinion the motion should be denied. Therefore,

IT IS ORDERED, the motion to modify is hereby denied.

PANEL: Judges Siddoway, Pennell, Lawrence-Berrey

FOR THE COURT:



GEORGE B. FEARING, Chief Judge

APPENDIX B

The Court of Appeals

of the

State of Washington

Division III

FILED

Jun 06, 2017

Court of Appeals

Division III

State of Washington

STATE OF WASHINGTON,)
)
Respondent,)
)
v.)
)
MIKHAIL G. KARPOV,)
)
Appellant.)
_____)

No. 35204-8-III

COMMISSIONER'S RULING

On the State's appeal from the district court's mid-trial dismissal of indecent exposure charges against Mikhail G. Karpov, the superior court reversed and remanded for further proceedings. The superior court held that the State had presented sufficient evidence Mr. Karpov had committed the crimes in Spokane County, for venue purposes, and in the State of Washington, for jurisdiction purposes. Mr. Karpov now seeks discretionary review of the superior court's decision.

Mr. Karpov contends that the superior court's remand of his case for further proceedings violated the Double Jeopardy Clause and Wa. Const., Art. 1, §9. And, therefore, this Court should grant discretionary review under RAP 2.3(d)(1) and (2).

The State counters that the testimony of the witnesses at Mr. Karpov's trial was sufficient to establish venue in Spokane County and jurisdiction in the State of Washington. I.e., the witnesses testified that the alleged indecent exposures occurred at specific street or neighborhood locations, and the investigating officer testified that he worked for and investigated these cases in Spokane County. Further, a determination of venue and/or jurisdiction is unrelated to a defendant's factual guilt or innocence, and, therefore, a remand for further proceedings does not violate constitutional double jeopardy provisions. *See State v. Johnson*, 45 Wn. App. 794, 796, 727 P.2d 693 (1986).

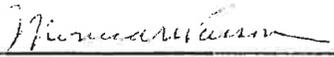
This Court agrees with the State. The trial record of the State's case contains circumstantial evidence that, combined with the reasonable inferences therefrom, established that Mr. Karpov committed the indecent exposures in Spokane County and in the State of Washington, both by a preponderance and beyond a reasonable doubt. *See State v. McCorkell*, 63 Wn. App 798, 800, 822 P.2d 795 (1992). And, under *Johnson*,¹ a

¹ Although *Johnson* involved a question of venue, the rationale that proof of venue does not relate to the defendant's factual guilt is just as apt to proof of jurisdiction when the jurisdictional question is whether the crime occurred within the State.

No.35204-8-III

remand does not implicate Mr. Karpov's right to be free of double jeopardy.²

Accordingly, IT IS ORDERED, Mr. Karpov's motion for discretionary review is denied.



Monica Wasson
Commissioner

² Because the State's appeal from the district court did not place Mr. Karpov at risk of double jeopardy, it had a right of appeal under RAP 2.2(b)(1). *See also United States v. Scott*, 437 U.S. 82, 57 L. Ed.2d 65, 98 S. Ct. 2187, 2193-94 (1978).

APPENDIX C

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FILED
MAR 15 2017
Timothy W. Fitzgerald
SPOKANE COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SPOKANE

STATE OF WASHINGTON,	}	Case No.: 16-1-03814-1
Plaintiff-Appellant,	}	(Dist. Ct.# CR0169882)
vs.	}	DECISION AND ORDER
MIKHAIL G. KARPOV,	}	Reversing Dismissal
Defendant-Respondent	}	

FENNESSY, J. – The State of Washington appeals the trial court’s dismissal of all charges in Spokane County District Court Cause No.: CR 0169882 based on a conclusion that the State failed to establish jurisdiction and/or venue. This Court reviewed the Verbatim Report of Proceedings (Volumes I and II) from hearings held September 7, 8 and 9, 2016, the Appellant’s Brief filed December 29, 2016, Respondent’s Brief filed January 13, 2017, the Appellant’s Reply Brief filed on January 20, 2017, and heard argument of counsel on January 27, 2017. This Court reverses the dismissals below and remands the case to the Spokane County District Court for further proceedings consistent with this opinion.

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FACTS

Mikhail Karpov was charged with five (5) counts of indecent exposure and the matter proceeded to trial on September 7, 2016. *See Respondent's Brief at page 1.* J.C. was the first witness and testified that she was twelve (12) years old and attended North Pines Middle School. She indicated that she lived on North University Road and that the events about which she testified occurred while she was walking on Alki with a friend, on the way to meet/pick up their younger sisters at Broadway Elementary before walking home. J.C. also recalled meeting with a detective and reviewing several photos with that individual to see if she could identify the person that had exposed himself to J.C. and her friend. *See Report of Proceedings (hereinafter RP), Volume I at pages 27-37.*

The next witness was H.J. and she testified that she walked with J.C. on May 3, 2016, from North Pines Middle School to a stoplight at Broadway and Bowdish. The girls were on the way to pick up their siblings at Elementary School and reported the events at issue to a principal, who called the police. H.J. spoke to the responding police officer on that day in May and later met with a detective to identify the perpetrator. *RP at pages 50-58.* H.J.'s mailing address is an apartment on 6th Avenue in Spokane, WA. *RP at page 89.*

The State's third witness was S.F. and she testified that her address is on West Dalton in Spokane, Washington 99205. She further indicated that while waiting for a bus to take her home from work, at the intersection of Sprague and Green Street, in November of 2015, a man offered her a ride home. She observed that he was masturbating while speaking with her and told her that he had money before driving away from the bus stop. Upon seeing a news article, S.F. reported the incident to the police and met with a detective to identify a

1 photograph of the man if possible. *RP at pages 73-80.* The incident occurred at approximately
2 2:45 p.m. *RP at page 84.*

3
4 H.B. provided sworn testimony about a call she made to Crime Check on
5 December 9, 2015, because of an incident that occurred at the bus stop on the corner of Empire
6 and Nevada. *RP at page 92.* She indicated that while she was waiting for a bus and talking with
7 a friend on her cell phone, a vehicle came past her on three occasions and on the last pass it was
8 apparent that the driver was masturbating. *RP at pages 93-94.* She spoke with Detective
9 Streltsoff sometime following the event in December of 2015 and was shown a group of photos
10 from which she identified the driver. *RP pages 97 – 99.*

11
12 J.F. was called and testified that she works at 3818 E. Joseph for a
13 company called Cougar Mechanical. *RP at page 116.* On June 1, 2016, while at work, J.F.
14 observed a man standing outside her work window with his penis in his hand and he was
15 stroking it. *RP at pages 117-118.* She texted her boss and they then called Crime Check to
16 report the incident. *RP at page 120.* That evening, her boss texted a picture from the evening
17 news and J.F. called Detective Streltsoff. *RP at pages 121 – 122.* She was shown a group of
18 photos by Detective Streltsoff and identified the man that she had seen in her window. *RP at*
19 *pages 122 -124.*

20
21 R.N. then testified that she works on North Loma Drive in Spokane, WA.
22 *RP at page 136.* On December 10, 2015, just as she got off work and was walking to the bus
23 stop on Garland and Maple, a man she identified as defendant exposed himself and she called the
24 police. *RP at page 137.* This occurred in an area she knew very well. *RP at page 138.* She was
25 later contacted by a policeman [Strasslov (phonetic)] and identified the defendant during a photo
26 layout. *RP at page 143.*

1 The final trial witness was Detective Streltsoff who testified that he works
2 for the Spokane County Sheriff's Office at 1100 West Mallon, Spokane, WA 99260. *RP at*
3 *page 157*. This case was assigned to Detective Streltsoff on May 17 of 2016 and involved cases
4 that involved common occurrences. Some of the investigation targeted allegations made
5 December of 2015 involving women in the City of Spokane. *RP at pages 158 – 160*. Officer
6 Streltsoff participated in the arrest of defendant at the 7-Eleven downtown, near 3rd and Division.
7 *RP at pages 178-179*. He showed photo montages to H.J., J.C., H.B., R.C., J.F. and S.F., all of
8 which were admitted into evidence without objection.
9

10
11 Once the State rested, Counsel for the Defendant sought dismissal and
12 contended that there was "no indication of any evidence establishing jurisdiction." *RP at page*
13 *219*. The State resisted the Motion and indicated that its burden was only to "show a prima facie
14 case" that the events occurred within the Court's jurisdiction, which it contended was
15 accomplished. The State insisted that it was then up to the defendant to provide evidence with
16 which to rebut the State's proof and support the "half-time motion" at issue. *RP at page 221*.
17

18 The trial court acknowledged its duty to consider the evidence in the light
19 most favorable to the nonmoving party and concluded that the evidence was insufficient to
20 establish, infer or even to indicate that the alleged instances of indecent exposure occurred in
21 Spokane County. *RP at pages 225 – 226*. The State appealed that decision.
22

23 LAW AND ANALYSIS

24 Superior Courts in Washington are empowered to review decisions made
25 by courts of limited jurisdiction to determine if an error of law was committed. RALJ 9.1.
26 Jurisdiction is generally a question of law for judicial determination. *State v. Jim*, 173 Wn.2d
27 672, 273 P. 3d 434 (2012). If there is a disputed fact underlying the jurisdictional question to be
28

1 determined in the matter, that may make the issue ripe for determination by a jury. *State v.*
2 *L.J.M.*, 129 Wn.2d 386, 918 P.2d 898 (1998). Although the situs of an alleged crime must be
3 proved beyond a reasonable doubt (See RCW 9A.04.030), circumstantial evidence is sufficient.
4 *State v. Johnson*, 45 Wash.App. 794, 727 P.2d 693 (1986). Additionally, RCW 3.66.060
5 provides jurisdiction over misdemeanors and gross misdemeanors to the District Court within the
6 County.
7

8 In the case at issue, the State presented sufficient circumstantial evidence
9 as outlined above for a reasonable fact finder to determine beyond a reasonable doubt that the
10 alleged crimes were committed in the State of Washington and more particularly within Spokane
11 County. Several of the witnesses testified that they lived or worked in Spokane AND the
12 Detective that investigated the matter was employed with the Spokane County Sheriff's
13 Department. Detective Streltsoff testified that he investigated matters involving common
14 occurrences which occurred within the City of Spokane and it is reasonable to infer that his
15 investigation involved crimes within Spokane County. There were no factual disputes related to
16 any of that evidence and the trial court made an error of law in dismissing the charges on
17 Defendant's "half-time" motion.
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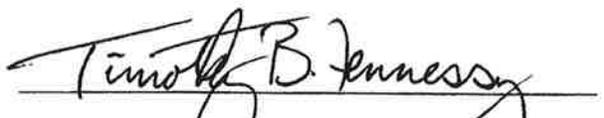
19 Constitutional prohibitions against double jeopardy do not apply in
20 circumstances such as are presented here. The trial court's decision was based upon a mistaken
21 application of law to undisputed facts unrelated to the guilt or innocence of Mr. Karpov.
22 Therefore, there is nothing to bar retrial. *State v. Johnson*, 45 Wn.App. 794, 727 P.2d 693
23 (1986).
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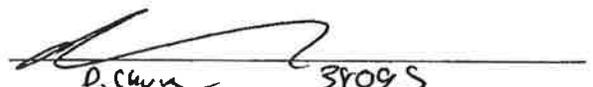
CONCLUSION

The trial court's decision to dismiss CR 0169882 is reversed and the matter is remanded to Spokane County District Court for further proceedings consistent with this opinion.

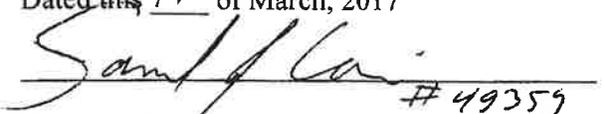
15th
DATED this *14th* day of March, 2017.


THE HONORABLE TIMOTHY B. FENNESSY
Superior Court Judge, Department 11

Dated this *15* of March, 2017


D. Chung 37095
Attorney for Appellant

Dated this *14th* of March, 2017


49359
Attorney for Respondent

CRARY CLARK & DOMANICO PS

October 09, 2017 - 12:30 PM

Filing Motion for Discretionary Review of Court of Appeals

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