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SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

MIKHAIL G. KARPOV, PETITIONER

DISCRETIONARY REVIEW
FROM THE SUPERIOR COURT
OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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INDEX

I. INTRODUCTION	1
II. ISSUES PRESENTED	1
III. STATEMENT OF THE CASE	1
IV. ARGUMENT	4
A. VENUE.....	6
B. JURISDICTION	9
C. THE “JURISDICTIONAL ELEMENT”	10
D. FINALITY	11
V. CONCLUSION	11
APPENDIX A	13

TABLE OF AUTHORITIES

WASHINGTON CASES

<i>Bacon v. City of Tacoma</i> , 19 Wash. 674, 54 P. 609 (1898).....	9
<i>Bouton-Perkins Lumber Co. v. Huston</i> , 81 Wash. 678, 143 P. 146 (1914).....	9
<i>Schilling v. Territory</i> , 2 Wash. Terr. 283, 5 P. 926 (1884).....	8
<i>State ex rel. Howard v. Sup. Ct. of Pac. Cnty.</i> , 88 Wash. 344, 153 P. 7 (1915).....	6
<i>State v. Boyd</i> , 109 Wn. App. 244, 34 P.3d 912 (2001).....	9
<i>State v. Chin Sam</i> , 76 Wash. 612, 136 P. 1146 (1913).....	6
<i>State v. Dent</i> , 123 Wn.2d 467, 869 P.2d 392 (1994)	6, 7
<i>State v. Escue</i> , 6 Wn. App. 607, 495 P.2d 351 (1972).....	6
<i>State v. Hardamon</i> , 29 Wn.2d 182, 186 P.2d 634 (1947).....	6
<i>State v. Hickman</i> , 135 Wn.2d 97, 954 P.2d 900 (1998).....	5, 11
<i>State v. Hurlbert</i> , 153 Wash. 60, 279 P. 123 (1929).....	6
<i>State v. Jim</i> , 173 Wn.2d 672, 273 P.3d 434 (2012)	9
<i>State v. Johnson</i> , 45 Wn. App. 794, 727 P.2d 693 (1986), <i>review denied</i> , 107 Wn.2d 1035 (1987).....	7
<i>State v. Jubie</i> , 15 Wn. App. 881, 552 P.2d 196 (1976).....	4
<i>State v. Kincaid</i> , 69 Wash. 273, 124 P. 684 (1912)	7
<i>State v. L.J.M.</i> , 129 Wn.2d 386, 918 P.2d 898 (1996).....	9, 10
<i>State v. Lane</i> , 112 Wn.2d 464, 771 P.2d 1150 (1989).....	9
<i>State v. Libby</i> , 89 Wash. 27, 153 P. 1058 (1915).....	6
<i>State v. McCorkell</i> , 63 Wn. App. 798, 822 P.2d 795 (1992)	6

<i>State v. Miller</i> , 59 Wn.2d 27, 365 P.2d 612 (1961)	6
<i>State v. Pejsa</i> , 75 Wn. App.139, 876 P.2d 963 (1994)	7
<i>State v. Smith</i> , 65 Wn.2d 372, 397 P.2d 416 (1964).....	1, 7
<i>State v. Stafford</i> , 44 Wn.2d 353, 267 P.2d 699 (1954)	7
<i>State v. Young</i> , 39 Wn.2d 910, 239 P.2d 858 (1952).....	8

FEDERAL CASES

<i>Green v. United States</i> , 355 U.S. 184, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957).....	4
<i>Sparf v. U.S.</i> , 156 U.S. 51, 15 S.Ct. 273, 39 L.Ed. 343 (1895).....	14
<i>United States v. Ball</i> , 163 U.S. 662, 16 S.Ct. 1192, 41 L.Ed.300 (1896).....	4
<i>United States v. Martin Linen Supply Co.</i> , 430 U.S. 564, 97 S.Ct. 1349, 51 L.Ed.2d 642 (1977)	5
<i>United States v. Scott</i> , 437 U.S. 82, 98 S.Ct. 2197, 57 L.Ed.2d 65 (1978).....	5

OTHER STATE CASES

<i>State v. Beverly</i> , 224 Conn. 372, 618 A.2d 1335 (1993)	10
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CONSTITUTIONAL PROVISIONS

Const. art. 1, § 22	6, 10
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STATUTES

RCW 3.66.060	10
RCW 9A.88.010.....	5

OTHER

WPIC 4.20.....	5
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I. INTRODUCTION

No one said the words, “Spokane County.” The question is routine and easy to ask. So much so, that practitioners forget that these words are not needed. Every decade, this Court is forced to remind attorneys that “it is not essential that some witness testify directly that the offense was committed in a designated county.” *State v. Smith*, 65 Wn.2d 372, 397 P.2d 416 (1964). At Mr. Karpov’s trial, witnesses testified extensively to particular locations in Spokane and Spokane Valley. Despite the evidence and the law, the court dismissed all charges because no one said the words, “Spokane County.” Now the question before this Court is: Can we fix that error?

II. ISSUES PRESENTED

1. Did the dismissal amount to an acquittal so as to bar retrial?
2. Was the superior court correct to reverse that dismissal?

III. STATEMENT OF THE CASE

In November of 2015, Sierra Frank had just gotten off work and was waiting at a bus stop at the corner of Sprague Avenue and Green Street. CP 92. Mikhail Karpov pulled up into a parking lot near her in an SUV. CP 93. He rolled down his passenger window and asked her to approach. *Id.* After a brief conversation, she walked toward the vehicle, only to realize that Mr. Karpov had his penis exposed and was masturbating. CP 94.

Mr. Karpov then asked her if she needed a ride, and stated that he had money. CP 95. She refused and told him to leave. *Id.*

On December 9, 2015, Hannalora Baldwin was waiting at a bus stop on the corner of Empire and Nevada. While she was waiting, Mr. Karpov drove up in an SUV. CP 110. He circled the block, and then stopped in front of her. CP 110-11. While he was stopped there, he stared at Ms. Baldwin and masturbated. CP 111-13. The very next day, Mr. Karpov repeated his performance. CP 155. He stopped at the corner of Maple and Garland, and sat in his vehicle masturbating in front of another young woman, Rachel Napier. CP 156-58. Both Ms. Baldwin and Ms. Napier immediately reported these incidents to the police. CP 114, 159.

On May 3, 2016, 12-year-olds J.C. and H.J. walked home from North Pines Middle School. CP 47, 68. As the two girls left the school, Mr. Karpov was seated in his car near the entrance. CP 49, 68-69. As the two walked down Alki, Mr. Karpov followed them in his car. CP 50, 70-71. They turned the corner onto Bowdish, and when they got to the intersection with Broadway, Mr. Karpov pulled up next to them and stopped. *Id.* He had his penis out, and was stroking it while staring at the girls. CP 51, 54, 71. Shocked and scared by the sight, the girls ran across the street and into Broadway Elementary, where they reported the incident. CP 51-52, 72.

On June 1, 2016, Mr. Karpov went to Cougar Mechanical on East Joseph. CP 134-36. There, he got out of his car and stood close to a window, looking in at Jennifer Ferry while he masturbated. CP 135. In response, she ran to the door of her office and yelled at him as he fled the scene. CP 137-38.

As a result of these incidents, the State charged Mr. Karpov with five counts of indecent exposure in Spokane County District Court. CP 296.¹ The charges proceeded to trial where the two girls and four women recounted the events. *See* CP 45-175. After they testified, Detective Streltsoff of the Spokane County Sheriff's Department detailed his investigation of the incidents. CP 175-208.

After the State rested, Mr. Karpov moved for dismissal of all charges. CP 236. He argued that jurisdiction was an essential element of the crime, and that because none of the witnesses directly stated that any of the events happened in Spokane County, the State failed to establish that element. CP 236. The trial court then dismissed the charges finding that the State failed to prove that the crimes happened in Spokane County. CP 243-44. The Court subsequently clarified its ruling stating that the dismissal was

¹ Mr. Karpov omitted the charging document from the record designated on appeal, but this fact was noted in the superior court's Decision and Order. At no point has Mr. Karpov challenged the adequacy of the complaint.

for a “failure to establish jurisdiction and/or venue,” because no witness testified that these events occurred in Spokane County. CP 251.

The State appealed. CP 1. The superior court determined that the State had presented sufficient evidence to prove the situs of the crime beyond a reasonable doubt. CP 5. That court reversed the dismissal and remanded the case for a new trial. CP 5-6. Mr. Karpov then petitioned for further appellate review on the grounds that protections against double jeopardy would prohibit a retrial.

IV. ARGUMENT

Mr. Karpov argues that the dismissal at trial constitutes an acquittal, which bars any subsequent retrial. When a judge dismisses a case during or after trial for insufficient evidence of some element of the crime, this amounts to a judgment of acquittal and constitutional protections against double jeopardy bar any retrial. *See Green v. United States*, 355 U.S. 184, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957). An acquittal terminates jeopardy, triggering the constitutional protections that prohibit a future trial for the same crime. *United States v. Ball*, 163 U.S. 662, 671, 16 S.Ct. 1192, 41 L.Ed.300 (1896). Even if an acquittal is erroneous, the defendant cannot be retried. *Id*; *see also State v. Jubie*, 15 Wn. App. 881, 552 P.2d 196 (1976). However, where the defendant obtains a termination of trial unrelated to his factual guilt or innocence, the State may reinstate proceedings upon reversal

of that decision on appeal. *United States v. Scott*, 437 U.S. 82, 94-96, 98 S.Ct. 2197, 57 L.Ed.2d 65 (1978).

Here, the trial court dismissed all charges upon finding that the State had failed to prove that the crimes happened in Spokane County. Whether the events happened in Spokane County is wholly unrelated to whether Mr. Karpov committed the crimes of indecent exposure. RCW 9A.88.010 defines that crime without any reference to location in a specific county. For a dismissal to constitute an acquittal, there must be an actual resolution of a factual element of the offense charged. *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571, 97 S.Ct. 1349, 51 L.Ed.2d 642 (1977). Because the trial court did not resolve any of the elements of the crime, its dismissal does not constitute an acquittal. Consequently, there is no constitutional impediment to a second trial.

Mr. Karpov argues that jurisdiction is an element of the crime. This proposition is contrary to case law, and yet, it is a pervasive misconception. The comments to WPIC 4.20 instruct attorneys that a “jurisdictional element” must always be included among the elements of the crime in the jury instructions. Even a quick look at the caselaw belies the notion that this is a true element of the crime. *See State v. Hickman*, 135 Wn.2d 97, 954 P.2d 900 (1998). More fundamentally, though, this idea conflates aspects of venue, jurisdiction, and criminal liability to arrive at

Frankenstein’s monster of a legal proposition. In a criminal matter, each of these three is a distinct question of law, that may share some common factual bases. In order to unwrap this problem, the following sections of this brief will examine venue and jurisdiction in more detail.

A. VENUE

There is a long history of case law detailing the requirement that the State prove at trial that the crime occurred within the particular county. *See e.g. State v. Chin Sam*, 76 Wash. 612, 136 P. 1146 (1913); *State v. Libby*, 89 Wash. 27, 28, 153 P. 1058 (1915); *State v. Hurlbert*, 153 Wash. 60, 61-62, 279 P. 123 (1929); *State v. Hardamon*, 29 Wn.2d 182, 186 P.2d 634 (1947). However, this required proof relates to the proper venue, and is not an element of the crime nor a jurisdictional question. *State v. Dent*, 123 Wn.2d 467, 480-81, 869 P.2d 392 (1994); *Hardamon*, 29 Wn.2d at 188; *State v. Miller*, 59 Wn.2d 27, 365 P.2d 612 (1961); *State v. Escue*, 6 Wn. App. 607, 607-608, 495 P.2d 351 (1972). Instead, it arises from a defendant’s constitutional right to trial in the county where the crime is alleged to have been committed. Const. art. 1, § 22; *see also State ex rel. Howard v. Sup. Ct. of Pac. Cnty.*, 88 Wash. 344, 345, 153 P. 7 (1915); *Dent*, 123 Wn.2d at 479. As with any right, it can be waived. *Hardamon*, 29 Wn.2d at 188. A criminal defendant waives any challenge to venue if it is not timely raised. *Dent*, 123 Wn.2d at 481; *see also State v. McCorkell*,

63 Wn. App. 798, 801, 822 P.2d 795 (1992); *State v. Pejsa*, 75 Wn. App.139, 145, 876 P.2d 963 (1994).

Furthermore, proof of venue need only be shown by a preponderance of the evidence. *Dent*, 123 Wn.2d at 480-81. Crucially, this court has repeatedly held that no witness need testify directly that an offense is committed within the County. *Smith*, 65 Wn.2d at 372; *State v. Stafford*, 44 Wn.2d 353, 356-57, 267 P.2d 699 (1954); *State v. Kincaid*, 69 Wash. 273, 274-75, 124 P. 684 (1912). Rather, it is sufficient if it appears indirectly that venue is properly laid. *Id.* Streets, buildings, or landmarks that the jury would recognize are sufficient to establish venue. *State v. Johnson*, 45 Wn. App. 794, 796, 727 P.2d 693 (1986), *review denied*, 107 Wn.2d 1035 (1987) (*citing Kincaid*, 69 Wn.2d at 273).

At trial, J.C. and H.J. testified to walking from North Pines Middle School to Broadway Elementary, along a combination of Alki, Broadway, Bowdish, and Pines Streets. They testified that they witnessed Mr. Karpov masturbating at the stoplight at Bowdish and Broadway. CP 71. Sierra Frank testified that she lives at a Spokane address and that the events she witnessed happened at a bus stop near the corner of Sprague Avenue and Green Street while she was waiting for the bus home after work. CP 91-92. Hannalora Baldwin testified to witnessing Mr. Karpov masturbate at the corner of Empire and Nevada, and described the surrounding area. CP 110-

111. Jennifer Ferry testified to witnessing Mr. Karpov masturbate at her work address on East Joseph. CP 134-136. Finally, Rachel Napier witnessed Mr. Karpov masturbating at the corner of Garland and Maple. CP 155. Detective Streltsoff then testified that he works for the Spokane County Sheriff's Office. CP 175. He stated that the two incidents from December of 2015 (involving Ms. Napier, and Ms. Baldwin) happened within the City of Spokane. CP 178.

While no one used the words "Spokane County," there was evidence establishing that four out of the five crimes were committed in the City of Spokane. This alone should establish that these locations are in Spokane County. *State v. Young*, 39 Wn.2d 910, 914, 239 P.2d 858 (1952) ("The Superior Court for King County, Washington, holding court in Seattle, may take judicial notice of the fact that Seattle is in King County, Washington"); *Schilling v. Territory*, 2 Wash. Terr. 283, 5 P. 926 (1884). The fifth event was described involving a constellation of streets connecting two specific schools located in Spokane Valley. Based on these facts and the case law, the State more than satisfied its burden of showing proper venue in Spokane County District Court.

B. JURISDICTION

“Jurisdiction is the power of a court to hear and determine a case.” *State v. Lane*, 112 Wn.2d 464, 468, 771 P.2d 1150 (1989). Whether a court possesses jurisdiction to hear a dispute is a question of law. *State v. Jim*, 173 Wn.2d 672, 678, 273 P.3d 434 (2012). It is fundamental to American jurisprudence that questions of law are determined by the court, while questions of fact are submitted to the jury. *See* Appendix A (excerpt from a 1790 lecture given by Justice James Wilson); *see also Bouton-Perkins Lumber Co. v. Huston*, 81 Wash. 678, 681, 143 P. 146 (1914); *Bacon v. City of Tacoma*, 19 Wash. 674, 676-77, 54 P. 609 (1898).

Obviously, the State, as the plaintiff, bears the burden of establishing the trial court’s jurisdiction. However, that principle does not somehow incorporate jurisdiction into the elements of the crime. Rather, the State meets that initial burden by presenting evidence that would establish jurisdiction. *State v. Boyd*, 109 Wn. App. 244, 251, 34 P.3d 912 (2001). If there is no dispute concerning jurisdictional facts, it is appropriate for the court to rule on jurisdiction as a matter of law. *State v. L.J.M.*, 129 Wn.2d 386, 392-94, 918 P.2d 898 (1996). Jurisdictional facts are only determined by the jury where the defense can present some evidence that would defeat jurisdiction. *Id.* Interestingly, some jurisdictions go one step

further and remove jurisdictional questions entirely from the province of the jury. *See e.g. State v. Beverly*, 224 Conn. 372, 378, 618 A.2d 1335 (1993).

Here, there was never any real dispute as to jurisdiction. At no point before or during trial were any facts presented or even suggested that would call into question the trial court's jurisdiction to hear the charges. Spokane County District Court has jurisdiction over misdemeanors and gross misdemeanors committed within the county. RCW 3.66.060. Substantial evidence was presented at trial concerning the location of each event. In the absence of any evidence undermining that jurisdiction, it was not a question for the jury nor an element of the crime.

C. THE "JURISDICTIONAL ELEMENT"

Turning back to Mr. Karpov's argument, jurisdiction is not an element of the crime. The so-called "jurisdictional element" is neither jurisdictional nor an element. This court has rejected the notion that jurisdictional facts must always be submitted to the jury. *L.J.M.*, 129 Wn.2d at 392-97. Rather, this "element" is derived from that historic requirement that the State prove venue at trial to satisfy the defendant's constitutional right under art. 1, § 22.

Crucially, regardless what the basis for this "jurisdictional element," it is not an actual element of the crime. An extraneous locational element only becomes an added element of the crime when included without

objection in the “to-convict” jury instruction. *Hickman*, 135 Wn.2d 97. Importantly here, the jury had not yet been instructed on the law. Because the location is not an element of the crime, the trial court’s erroneous dismissal for failure to prove that the crimes happened in Spokane County does not bar a retrial.

D. FINALITY

Finally, subsection (2) of the Brief of Petitioner is unrelated to the substantive issues presented. In that section of his brief, Mr. Karpov cites cases that explore the timing of when a trial court’s dismissal becomes a final decision so as to implicate double jeopardy protections. Here, there is no dispute that the dismissal was a final judgment. The trial court refused to countenance a motion for reconsideration, and entered an order of dismissal. CP 2, 249-52. Rather, the dispute is whether that dismissal constitutes an acquittal.

V. CONCLUSION

Because the trial court’s dismissal did not resolve any factual issues related to Mr. Karpov’s guilt or innocence, it does not constitute an acquittal so as to terminate jeopardy. Consequently, constitutional protections will

not bar a retrial, and the superior court's decision to remand the case for a new trial should be affirmed.

Dated this 3 day of August, 2018.

LAWRENCE H. HASKELL
Prosecuting Attorney

A handwritten signature in cursive script that reads "Samuel J. Comi". The signature is written in black ink and is positioned above a horizontal line.

Samuel J. Comi #49359
Deputy Prosecuting Attorney
Attorney for Respondent

APPENDIX A

Mr. Justice Wilson, in his lectures on law at the Philadelphia College in 1790 and 1791, discussing the maxim that the judges determine the law and the jury determine the fact, made the following observations:

‘This well-known division between their provinces has been long recognized and established. When the question of law and the question of fact can be decided separately, there is no doubt or difficulty in saying by whom the separate decision shall be made. If, between the parties litigant, there is no contention concerning the facts, but an issue is joined upon a question of law, as is the case in a demurrer, the determination of this question, and the trial of this issue, belongs exclusively to the judges. On the other hand, when there is no question concerning the law, and the controversy between the parties depends entirely upon a matter of fact, the determination of this matter, brought to an issue, belongs exclusively to the jury. But in many cases the question of law is intimately and inseparably blended with the question of fact, and when this is the case the decision of one necessarily involves the decision of the other. When this is the case it is incumbent on the judges to inform the jury concerning the law, and it is incumbent on the jury to pay much regard to the information which they receive from the judges. But now the difficulty in this interesting subject begins to press upon us. Suppose that, after all the precautions taken to avoid it, a difference of sentiment takes place between the judges and the jury with regard to a point of law. Suppose the law and the fact to be so closely interwoven that a determination of one must at the same time embrace the determination of the other. Suppose a matter of this description to come in trial before a jury. What must the jury do? The jury must do their duty, and their whole duty. They must decide the law as well as the fact. This doctrine is peculiarly applicable to criminal cases, and from them, indeed, derives its peculiar importance.’

‘Juries undoubtedly may make mistakes. They may commit errors. They may commit gross ones. But, changed as they constantly are, their errors and mistakes can never grow into a dangerous system. The native uprightness of their sentiments will not be bent under the weight of precedent and authority. The esprit de corps will not be introduced among them, nor will society experience from them those mischiefs of which the esprit de corps, unchecked, is sometimes productive. Besides, their mistakes and their errors, except the venial ones on the side of mercy made by traverse juries, are not without redress. The court, if dissatisfied with their verdict, have the power, and will exercise the power, of granting a new trial. This power, while it prevents or corrects the effects of their errors, preserves the jurisdiction of juries unimpaired. The cause is not evoked before a tribunal of another kind. A jury of the country—an abstract, as it has been called, of the citizens at large—summoned, selected, impaneled, and sworn as the former, must still decide.’

‘One thing, however, must not escape our attention. In the cases and on the principles which we have mentioned, jurors possess the power of determining legal questions. But they must determine them according to law.’ 2 Wilson, Works, 371–374.

The above excerpt is taken from *Sparf v. U.S.*, 156 U.S. 51, 158-160, 15 S.Ct. 273, 39 L.Ed. 343 (1895).

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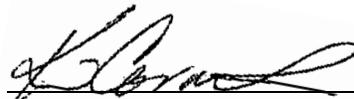
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I certify under penalty of perjury under the laws of the State of Washington, that on August 3, 2018, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

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