IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

Supreme Court No. 98723-8
Court of Appeals No. 36046-6-III
Superior Court No. 16-1-00050-1

STATE OF WASHINGTON,

Petitioner,

v.

JAMES GEARHARD,

Respondent.

RESPONDENT'S ANSWER TO PETITION FOR REVIEW

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B. ISSUE PRESENTED FOR REVIEW

1. Did the Court of Appeals error when it ruled that the trial court's order granting Mr. Gearhard's motion for a directed verdict was a judicial acquittal that bars retrial for the Third Degree Child Molestation charge?

C. STATEMENT OF THE CASE

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

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

Mr. Gearhard filed a motion to suppress the "pretext phone call" because it violated RCW 9.73—Washington State's Privacy Act. CP 6-49. The motion was heard May 15, 2017. CP 71-2. The Court entered its Findings of Fact and Conclusions of Law denying Mr. Gearhard's Motion to Suppress on June 5, 2017. CP 73-75.

Following trial, on October 9, 2017, the jury returned a verdict of not guilty on the Indecent Liberties charge, but was unable to reach a verdict on the Third Degree Child Molestation and Witness Tampering charges. On October 16, 2017, Mr. Gearhard filed a Motion for Directed Verdict on the Third Degree Child Molestation charge. CP 101-5.

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

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

Division III of the Washington State Court of Appeals subsequently reversed the witness tampering conviction, finding that the Superior Court erred when it denied Mr. Gearhard's Motion to Suppress the "pretext phone call" evidence, a decision which the State has not appealed.

The court also held that the State's appeal of the Superior Court's directed verdict on the Third Degree Child Molestation was barred by double jeopardy. The State now asks the Court to accept review of this decision.

D. ARGUMENT

1. THE STATE CANNOT APPEAL THE SUPERIOR COURTS ACQUITTAL ON THE THIRD DEGREE CHILD MOLESTATION CHARGE AS AN APPEAL IS PROHIBITED BY RAP 2.2 AND DOUBLE JEOPARDY.

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

> (b) Appeal by State or a Local Government in Criminal Case. Except as provided in section (c), the State or a local government may appeal in a criminal case only from the following superior court decisions and only ***if the appeal will not place the defendant in double jeopardy***:
>
> (1) Final Decision, Except Not Guilty. A decision that in effect abates, discontinues, or determines the case ***other than by a judgment or verdict of not guilty***, including but not limited to a decision setting aside, quashing, or dismissing an indictment or information, or a decision granting a motion to dismiss under CrR 8.3(c).

(emphasis added)

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

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

> "Since the no (sic) substantial evidence exists nor any reasonable inference can be had from the evidence to prove that the defendant was 48 months younger than himself, the court is constrained to grant the defendant's motion for directed verdict and a ***Not Guilty is entered as to Count 1*** – Child Molestation in the Third Degree."

CP 118 (emphasis added).

Therefore, because there was a finding of Not Guilty based on insufficient evidence, the State is prohibited from appealing and the State's appeal must be summarily rejected.

In addition to being barred from appealing by RAP 2.2, once a finding of Not Guilty has been made based on insufficient evidence, retrial is not permitted by either the Washington State Constitution or the United States Constitution. *Matter of Dowling*, 98 Wn.2d 542, 543-4, 656 P.2d 497 (1983) overruled on different grounds by *State v. Collins*, 112 Wn.2d 303, 771 P.2d 350 (1989). Furthermore, "[a]n acquittal is defined by the Supreme Court as a resolution, correct or not, of some or all of the factual elements of the offense charged." *Matter of Dowling* at 544, citing *Lee v. United States,* 432 U.S. 23, 30 n. 8, 97 S.Ct. 2141, 2145 n. 8, 53 L.Ed.2d 80 (1977); *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571, 97 S.Ct. 1349, 1354, 51 L.Ed.2d 642 (1977).

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

SCOTUS granted certiorari and reversed the First Circuit, holding that allowing a second trial following a directed verdict of not guilty violates

the Fifth Amendment's prohibition that "no person shall 'be subject for the same offense to be twice put in jeopardy of life or limb'". *Id.* Thus SCOTUS has definitively stated that retrial following a directed verdict of not guilty violates the Fifth Amendment prohibition against double jeopardy.

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

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

Consequently, erroneous or not, this Court is legally obligated to reject the State's appeal because Mr. Gearhard was found not guilty based on insufficient evidence and (along with this appeal by the State being

prohibited by RAP 2.2) allowing retrial would violation the Fifth Amendment's Double Jeopardy Clause along with the Washington State Constitution.

Similarly, this Court very recently addressed this issue in *State v. Karpov*. 195 Wn.2d 288, 458 P.3d 1182. In *Karpov*, this court held that "[a] dismissal by a trial judge is a judicial acquittal when it adjudicates the ultimate question of factual guilt or innocence. Such dismissals 'encompass any ruling that the prosecution's proof is insufficient to establish criminal liability for an offense. *Id* at 293, *citing Evans v. Michigan*, 568 U.S. 313 at 318-19 (internal citations omitted).

This Court went even further, however, and held that "[a] judicial acquittal triggers the protections of the double jeopardy clauses even when the judge bases the acquittal on an erroneous understanding of the elements of the crime." *Karpov* at 293.

Here, the State's entire argument in its Petition for Review misses the point. The State focusses on the technical timing of the judicial acquittal, as opposed to the fact that there was a judicial acquittal. As SCOTUS stated in *Evans v. Michigan*,

> "[o]ur cases have applied *Fong Foo's* principle broadly. An ***acquittal is unreviewable*** whether a judge directs a jury to return a verdict of acquittal *e.g.*, *Fong Foo*, 369 U.S., at 143, 82 S.Ct. 671, or forgoes that formality by entering a judgment of acquittal herself. See *Smith v.*

> *Massachusetts,* 543 U.S. 462, 467–468, 125 S.Ct. 1129, 160 L.Ed.2d 914 (2005) (collecting cases). And an ***acquittal precludes retrial*** even if it is premised upon an erroneous decision to exclude evidence, *Sanabria v. United States,* 437 U.S. 54, 68–69, 78, 98 S.Ct. 2170, 57 L.Ed.2d 43 (1978); a mistaken understanding of what evidence would suffice to sustain a conviction, *Smith,* 543 U.S., at 473, 125 S.Ct. 1129; or a "misconstruction of the statute" defining the requirements to convict, *Rumsey,* 467 U.S., at 203, 211, 104 S.Ct. 2305; cf. *Smalis v. Pennsylvania,* 476 U.S. 140, 144–145, n. 7, 106 S.Ct. 1745, 90 L.Ed.2d 116 (1986). In all these circumstances, 'the fact that the acquittal may result from erroneous evidentiary rulings or erroneous interpretations of governing legal principles affects the accuracy of that determination, but it does not alter its essential character.'" 568 U.S. 313 at 318, citing *United States v. Scott,* 437 U.S. 82, 98, 98 S.Ct. 2187, 57 L.Ed.2d 65 (1978).

Thus the mere fact of the acquittal ends the analysis from a constitutional perspective.

However, in support of its theory that appeal is allowed, the State cites *State v. Ceglowski* for the proposition that review of post trial arrest of judgment motions is permitted. 103 Wn. App. 346, 12 P.3d 160 (2000).

Notwithstanding the fact that Mr. Gearhard did not make an arrest of judgment motion as no judgment was entered, *Ceglowski* does not hold what the State asserts it holds. In *Ceglowski*, the Defendant was appealing the trial court's denial of his motion for arrest of judgment. *Id* at 349.

Thus the issue of whether the State could rightfully appeal was not even before the *Ceglowski* court and the State has cited no authority for its

proposition that the finding of Not Guilty in Mr. Gearhard's case is appealable.

Therefore, this Court should deny the State's Petition for Review.

2. EVEN IF THE STATE COULD LEGALLY APPEAL, THE TRIAL COURT DID NOT COMMIT ERROR IN APPLYING THE LAW OF THE CASE DOCTRINE AND FINDING MR. GEARHARD NOT GUILTY OF THE CHARGE OF THIRD DEGREE CHILD MOLESTATION

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

Here, the Superior Court properly followed the Law of the Case doctrine when it found Mr. Gearhard not guilty. The Law of the Case Doctrine is applicable to the Superior Court as this Court made clear in *State v. Hickman*, 135 Wn.2d 97, 101-2, 954 P.2d 900 (1998). In *Hickman*, the Court gave the following synopsis of the Law of the Case doctrine:

> "The law of the case is an established doctrine with roots reaching back to the earliest days of statehood. Under the doctrine jury instructions not objected to become the law of the case. In criminal cases, the State assumes the burden of proving otherwise unnecessary elements of the offense when such added elements are included without objection in the 'to convict' instruction."

Id (internal citations and examples omitted).

In Mr. Gearhard's case, the State included an element in the "to convict" jury instruction that required the State to prove a fact which it is undisputed the State did not prove. Under *Hickman*, the State's failure to object is fatal to the State's argument because the Law of the Case doctrine refers to proof of the elements in the "to convict" jury instruction at all levels of a case, not just on appeal. *Id.*

Thus, the Superior Court did not commit error when it applied the Law of the Case Doctrine and dismissed Mr. Gearhard's case through a finding of Not Guilty.

In addition, the State's argument that a hung jury guarantees the State a new trial is without merit. The State offers no legitimate legal support for this argument. *Id.* Instead the State hinges its entire legal theory on the argument that after a mistrial, the State is allowed to retry a defendant thus foreclosing the possibility of any post-trial motions. *Id.*

The Court should reject this argument because even if the State can legally appeal, the Superior Court's decision was correct.

First, the State's argument assumes that the State's ability to retry a case following a mistrial is absolute and supersedes every possible legal issue and procedure afforded to criminal defendants. The State's position is based on RCW 4.44.340 which states: "[i]n all cases where a jury are discharged or prevented from giving a verdict, by reason of accident or other

cause, during the progress of the trial or after the cause is submitted to them, the action shall thereafter be for trial anew."

RCW 4.44.340 is one of numerous statutes that lay out court procedures and timelines. However, as with every one of these statutes, there are overlapping procedures. In addition, while the State has at no level cited law to support its assertion that the right to retrial following a mistrial is absolute, there is law supporting Mr. Gearhard's contrary position. For example, in *Hollman v. Corcoran*, the trial court granted a motion for judgment as a matter of law following the jury being hung pursuant to RCW 4.44.230. 89 Wn. App. 323, 330, 949 P.2d 386 (1997). In reversing the trial court on the grounds that there was possibly sufficient evidence, the Court of Appeals never asserted that there was any procedural issue with a trial court granting a motion for judgment as a matter of law following a hung jury. *Id* at 334. Counsel for Mr. Gearhard has been unable to find a single case where a Washington State appellate court rejected a directed verdict or judgment as a matter of law motion as improper following a hung jury.

In addition, the State's position violates the constitutional requirements of proof beyond a reasonable doubt as a part of criminal due process. Essentially the State's argument is as follows: *while the State concedes that it did not produce evidence sufficient to prove the elements of*

the crime as presented to the jury beyond a reasonable doubt, the State believes it should get a second bite at the apple because one or more of the jurors ***actually followed the law***.

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

In other words, the State concedes that if the entire jury followed the law Mr. Gearhard would have been acquitted and double jeopardy would attach. However, the State argues that because some jurors didn't follow the law, the State should be allowed a second opportunity to convict Mr. Gearhard.

Thus, the State argues that jurors failing to follow the law provides the State with a loophole around Mr. Gearhard's constitutional right to be proven guilty beyond a reasonable doubt. This argument defies all common sense and undermines the Washington State Constitution and the right to due process as guaranteed by the United States Constitution.

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

For example, in *State v. Longshore*, the court stated, "a directed verdict is appropriate if, when viewing the evidence in the light most favorable to the nonmoving party, the court can say, as a matter of law, that

there is no substantial evidence or reasonable inference to sustain a verdict for the nonmoving party." 97 Wn. App. 144, 147, 982 P.2d 1191 (1999) citing *Hizey v. Carpenter,* 119 Wn.2d 251, 271-72, 830 P.2d 646 (1992) (quoting *Industrial Indem. Co. of the N.W. v. Kallevig,* 114 Wn.2d 907, 915-16, 792 P.2d 520 (1990)).

Whether the jury reached a consensus is irrelevant to whether there was "substantial evidence or reasonable inference to sustain a verdict for the nonmoving party." Thus the issue is whether ***any*** juror could reach a verdict of guilty, not whether all jurors reached an improper guilty verdict. The number of jurors voting each way is irrelevant to the analysis of the sufficiency of the evidence. To decide otherwise would be a truly absurd result.

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

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

E. CONCLUSION

For the above reasons Defendant respectfully requests this Court deny the State's Petition for Review.

RESPECTFULLY SUBMITTED this 29th day of July, 2020.

/s/ Richard D. Gilliland
signed electronically

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