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Division I
State of Washington

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STATE OF WASHINGTON
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No.
COA No. 71028-1-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

91366-8

STATE OF WASHINGTON,

Respondent,

v.

CHAD CHENOWETH

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF
THE STATE OF WASHINGTON FOR SKAGIT COUNTY

The Honorable David Needy

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Chad Chenoweth 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

Pursuant to RAP 13.4(b), petitioner seeks review of the unpublished Court of Appeals decision in *State v. Chad Chenoweth*, No. 71028-1-I (February 2, 2015). A copy of the decision is in the Appendix at pages A-1 to A-9.

C. ISSUES PRESENTED FOR REVIEW

1. Due process requires the State to prove all of the elements of the charged offense beyond a reasonable doubt. Under the law of the case doctrine, where the State adds additional elements in the to-convict instruction, the State bears the burden of proving those elements beyond a reasonable doubt. Here, the State proposed, and the court agree to give, to-convict instructions that required the State to prove two acts for each charged offense, but the State proved only one. Is a significant question of law under the United States and Washington Constitutions involved where, under the law of the case doctrine, Mr. Chenoweth would be entitled to reversal of his convictions with

instructions to dismiss where the State failed to prove the charged offenses?

2. Multiple prosecutions for the same offense violate the federal and state constitutional protections against double jeopardy. Where an offense is dismissed at the close of the State's case for a lack of sufficient evidence, imposition of a conviction for that offense violates double jeopardy. Here, the trial court dismissed counts 1 through 4 at the close of the State's case for a lack of sufficient evidence. Is a significant question of law under the United States and Washington Constitutions involved where the trial court violated Mr. Chenoweth's double jeopardy rights when it subsequently imposed convictions for these counts?

3. Offenses that involve the same victim, occur at the same time, and share the same intent are the same criminal conduct for sentencing purposes. The trial court here found the incest and child rape convictions involved the same victim, occurred at the same time, and shared the same intent, but refused to find them to be the same criminal conduct. Is an issue of substantial public interest involved entitling Mr. Chenoweth to reversal of his sentence and remand for resentencing?

D. STATEMENT OF THE CASE

Chad Chenoweth was originally charged with three counts of second degree child rape, three counts of third degree child rape, and six counts of first degree incest, for acts he was alleged to have committed against his daughter L.C. CP 1-5. During a break in the trial, an informal discussion occurred between the court and counsel regarding scheduling:

> THE COURT: I guess we will finish testimony this afternoon very easily.
>
> MR. RICHARDS [defense counsel]: Yes, and I don't anticipate calling any witnesses, your Honor. What I would like to do is maybe we could discuss jury instructions. I anticipate some motions at the conclusion of the evidence, and then I would still ask that we come back for closing arguments tomorrow morning.
>
> THE COURT: I assume you don't object to that?
>
> MS. DYER [prosecuting attorney]: Yeah, closing arguments tomorrow morning would be fine. And I'm just – I'm just trying to figure out, there could potentially be an amendment based on how the testimony came in, and I need to do that before I rest, so I don't know how your Honor would prefer to handle that –
>
> THE COURT: I can reserve that. I mean, we can finish the testimony; you don't have to formally rest –
>
> MS. DYER: Okay.
>
> THE COURT: And we can leave that window open so that at whatever time we discuss instructions any

amendments will have been ruled on and then we can
instruct accordingly.

4/24/2013RP 91-92.

At the close of evidence, and before the jury, the State formally rested:

THE COURT: Does the State at this time rest?

MS. DYER: Yes, your Honor.

. . .

THE COURT: And does the defense wish to call any witnesses?

MR. RICHARDS: No, your Honor. The defense would also rest.

4/24/2013RP 129.

A short discussion then took place where the defense noted it would be arguing motions to dismiss, and the following occurred:

THE COURT: Okay. Motions then. And by the way, on the sidebar, out of the presence of the jury, we discussed *that both parties have rested*, but the state is not formally rested if they need to file any amendments based on the rulings from any of the motions we're about to hear.

MS. DYER: Okay, thank you, your Honor.

4/24/2013RP 131 (emphasis added).

Mr. Chenoweth subsequently moved to dismiss counts 1 through 4, which charged two counts of second degree child rape and two counts of first degree incest based upon the same acts, on the basis

that L.C.'s testimony established that all sexual contact occurred *after* her 14th birthday. 4/24/2013RP 131. The State contended there was some evidence that indicated the sexual contact happened before L.C.'s fourteenth birthday. 4/24/2013RP 131-33. The court then issued the following ruling:

> The question before the Court is, given all of this evidence, is there proof such that a reasonable trier of fact could find beyond a reasonable doubt that certain events occurred during her age thirteen or her thirteenth year? *And in light of all of the evidence presented, the Court will find, in my opinion, no reasonable trier of fact could make that conclusion beyond a reasonable doubt.*
>
> There simply isn't accurate and solid enough evidence for someone to make that finding, especially in light of [L.C.]'s very clear recollection, even though she has been inconsistent, that she was fourteen, and it wasn't possible that she was thirteen.
>
> So, under those circumstances, *those charges*, because of the timing, dates listed on the charge, *would be dismissed*. But, I will allow, based on our understanding that the state has not formally rested, if the state wishes to amend those charges to be included in acts that certainly a reasonable trier of fact could find occurred while she was fourteen.

4/24/2013RP 135-36 (emphasis added).

The following day, the prosecutor filed an amended information replacing the two dismissed second degree rape of a child counts with

two counts of third degree rape of a child and adding two counts of first degree incest based upon the same incidents:

> MS. DYER: And only other thing [sic], your Honor, is I did file an amended information yesterday, officially I had that filed with the clerk's office. I had delivered a judge's copy I think Wednesday night with a -- I sent a copy to Mr. Richards yesterday, and I believe we need to arraign Mr. Chenoweth on the amended [sic] at this time.
>
> THE COURT: There are fourteen counts and now there are twelve. So two have not been --
>
> MS. DYER: *If the state hadn't amended, they would be dismissed.* That's because there are only six offenses going to the jury.
>
> THE COURT: Right. And we've also taken away the Second Degree Rape of a Child.
>
> MS. DYER: Right.

4/25/2013RP 8-9 (emphasis added).

Each of the "to-convict" instructions submitted to the jury contained identical language. The to-convict instructions for third degree rape of a child stated in relevant part:

> To convict the defendant of the crime of rape of a child in the third degree as charged in count 1, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That *on or about July 24, 2009* ***and*** *July 24, 2010*, the defendant had sexual intercourse with L.C.;

> (2) That L.C. was at least fourteen years old but was less than sixteen years old at the time of the sexual intercourse and was not married to the defendant;
>
> (3) That L.C. was at least forty-eight months younger than the defendant; and
>
> (4) That this act occurred in the State of Washington.

CP 135, 137, 139, 141, 143, 145 (emphasis added).

Similarly, the to-convict instructions for first degree incest stated in relevant part:

> To convict the defendant of the crime of incest in the first degree in count 2, each of the following elements must be proved beyond a reasonable doubt:
>
> (1) That *on or about July 24, 2009* ***and*** *July 24, 2010*, the defendant engaged in sexual intercourse with L.C.;
>
> (2) That L.C. was related to the defendant as a daughter, of either whole or half blood;
>
> (3) That at the time the defendant knew the person with whom he was having sexual intercourse was so related to him; and
>
> (4) That any of these acts occurred in the State of Washington.

CP 136, 138, 140, 142, 144, 146 (emphasis added).

At the conclusion of the jury trial, Mr. Chenoweth was convicted on all counts. CP 152-63; 4/25/2013RP 82-85.

Prior to sentencing, Mr. Chenoweth filed a Motion to Vacate or Arrest Judgment pursuant to CrR 7.8 and CrR 7.4. CP 164-79. Mr. Chenoweth challenged the trial court's allowing the State to amend the information after dismissing counts for insufficient evidence; under the law of the case doctrine, and the State's failure to prove all of the acts it assumed in the to-convict instructions. *Id.* Following extensive argument, the trial court denied the motion. 7/10/2013RP 129-35.

At sentencing, Mr. Chenoweth moved the court to find the incest counts were the same criminal conduct as the corresponding rape of a child counts. 10/11/2013RP 146-47. Conflating the analysis for same criminal conduct with the analysis for double jeopardy, the court refused to find the counts to be the same criminal conduct. CP 181-85; 10/11//2013RP 149-50. The court agreed that the incest counts and rape of a child counts were the exact same act; the same victim, the same time, the same intent. 10/11/2013RP 150. But, the court ruled the two offenses were intended to be punished separately, relying on the decision in *State v. Bobenhouse*, 166 Wn.2d 881, 896-97, 214 P.3d 907 (2009).

The Court of Appeals rejected Mr. Chenoweth's arguments and affirmed his convictions and sentence. Decision at 4-9.

E. ARGUMENT ON WHY REVIEW SHOULD BE GRANTED

1. *Under The "Law Of The Case" Doctrine, The State Failed To Prove All Of The Elements As Stated In The Jury Instructions*

Under the law of the case doctrine, elements added to the "to convict" jury instructions without objection must be proved beyond a reasonable doubt. *State v. Hickman,* 135 Wn.2d 97, 102, 954 P.2d 900 (1998). This includes any unnecessary elements, statutory or not, that are included in the to-convict instructions and to which there is no objection. *Id.* at 102.

On appeal, a defendant may appeal the sufficiency of the evidence supporting the added elements. *Hickman,* 135 Wn.2d at 102. Whether the evidence is sufficient to sustain a verdict under the jury instructions issued by the court is determined by the law as set forth in the instructions. *Hickman,* 135 Wn.2d at102-03; *State v. Nam,* 136 Wn.App. 698, 705-06, 150 P.3d 617 (2007).

> It is the approved rule in this state that the parties are bound by the law laid down by the court in its instructions[.] In such case, the sufficiency of the evidence to sustain the verdict is to be determined by the application of the instructions and rules of law laid down in the charge.

Tonkovich v. Dep't of Labor & Indus., 31 Wn.2d 220, 225, 195 P .2d 638 (1948). The standard the reviewing court uses in analyzing a claim

of insufficiency of the evidence is "[w]hether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." U.S. Const. amend XIV; *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

Because the State proposed the "to convict" instructions, and the trial court agreed to give them, the instructions became the law of the case. *Hickman,* 135 Wn.2d at 102.

The Court of Appeals correctly labeled the charging period in the to-convict instruction "poorly articulated." Decision at 7-8. Nevertheless, the Court determined the use of the conjunctive "and" did not add an element to the offense that the State was required to prove. Decision at 8. But, the jury was never instructed by the trial court to find a single act of sexual intercourse occurring between the charged dates. Rather, the "to-convict" instructions told the jury it must find that sexual intercourse occurred "on or about July 24, 2009 *and* July 24, 2010." *See e.g.*, CP 135-36 (emphasis added). Based upon these instructions, the instruction required the jury to find that sexual intercourse occurred on *two* occasions for *each* count: one on July 24, 2009, and one on July 24, 2010. The State proved only a *single* act of

intercourse occurring between the two dates. Thus, the State failed to prove the required two acts for each count as required by the law as stated in the to-convict instructions. As a consequence, the convictions were not supported by sufficient evidence and should have been dismissed.

This Court should accept review to find that the State's proposed to convict instructions, which the trial court gave, added an element which the State failed to prove beyond a reasonable doubt. This Court should then reverse Mr. Chenoweth's convictions with instructions to dismiss.

2. *The Trial Court Violated Double Jeopardy When It Imposed Convictions For Counts It Had Dismissed For Insufficiency Of The Evidence*

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." These provisions are "'identical in thought, substance, and purpose.'" *State v. Ervin,* 158 Wn.2d 746, 752, 147 P.3d 567 (2006) (internal quotation marks omitted), *quoting In re Pers. Restraint*

of Davis, 142 Wn.2d 165, 171, 12 P.3d 603 (2000). The double jeopardy clause protects individuals from three distinct governmental abuses: a second prosecution for the same offense after acquittal, a second prosecution for the same offense after conviction, and multiple punishments for the same offense. *State v. Gocken,* 127 Wn.2d 95, 100, 896 P.2d 1267 (1995).

That a person may not be retried for the same offense following an acquittal is "the most fundamental rule in the history of double jeopardy jurisprudence." *United States v. Martin Linen Supply Co.,* 430 U.S. 564, 571, 97 S.Ct. 1349, 51 L.Ed.2d 642 (1977). An acquittal is an absolute bar to retrial, regardless of how erroneous. *Arizona v. Washington,* 434 U.S. 497, 503, 98 S.Ct. 824, 54 L.Ed.2d 717 (1978), *citing Fong Foo v. United States,* 369 U.S. 141, 143, 82 S.Ct. 671, 7 L.Ed.2d 629 (1962).

Insufficient evidence is treated as an acquittal barring retrial on the same offense "because no rational trier of fact could find all essential elements of the crime charged." *Tibbs v. Florida,* 457 U.S. 31, 41, 102 S.Ct. 2211, 72 L.Ed.2d 652 (1982).

An 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." ' " *State v. Bundy,* 21 Wn.App. 697, 701, 587 P.2d 562 (1978) (alteration in original), *quoting United States v. Scott,* 437 U.S. 82, 97, 98 S.Ct. 2187, 57 L.Ed.2d 65 (1978).

In *Martin Linen Supply Co.*, the Supreme Court held that a conclusion by the trial court that the evidence was legally insufficient to sustain a conviction was an acquittal that the government could not appeal even if the decision was egregiously erroneous. 430 U.S. 571.

Here, it is undisputed that the court specifically found counts 1 through 4 were not supported by sufficient evidence and ordered them dismissed. Thus, allowing the State to then resurrect these counts and subsequently impose convictions for them violated double jeopardy. The fact the court believed the State had not formally rested is of no moment. Instead of taking the cue from the court and delaying its formal resting, the prosecutor specifically and unequivocally formally rested in front of the jury.

The Court of Appeals held that the court's ruling was not "final," since it was an oral ruling. Decision at 5-6. In *State v. Collins*, this Court ruled that a trial court's oral ruling of dismissal for a failure to prove an offense and subsequent reinstatement did not violate double

jeopardy because the order of dismissal was oral and not a formal journal entry or formal court order. 112 Wn.2d 303, 308, 771 P.2d 350 (1989). In *Collins*, the trial court granted the defendant's motion to dismiss for insufficiency of the evidence at the close of the State's case. The State moved for reconsideration and the court reversed its prior decision. *Id.* at 304.

Subsequently, this Court distinguished the *Collins* decision in *Auburn v. Hedlund*, 137 Wn.App. 494, 155 P.3d 149 (2007), *aff'd*, 165 Wn.2d 645, 201 P.3d 315 (2009). In *Hedlund,* the trial court orally granted the defendant's motion to dismiss. 137 Wn.App. at 498. The City sought a writ of review, which was granted and the charges reinstated. *Id.* The defendant was convicted, but that conviction was reversed on double jeopardy grounds by this Court. *Id.* at 506. The Court distinguished the decision in *Collins*, noting that in its application for the writ of review, the City characterized the trial court's dismissal as final. *Id.* Thus, since the ruling was final, *Collins* held that in light of this formal ruling, reinstatement of the dismissed charge violated double jeopardy. *Id.*

Here, the court's order of dismissal was a final order. The State did not seek reconsideration of the court's order as it did in *Collins*,

rather here the State immediately moved to amend the information and amend the jury's instructions. Allowing the State to amend the information to, in essence, resurrect the dismissed counts violated double jeopardy. This Court should accept review to determine whether double jeopardy barred conviction, and if not, reverse counts 1 through 4 and order them dismissed.

3. *The Incest And Rape Convictions Were The Same Criminal Conduct*

When imposing a sentence for multiple current offenses, the sentencing court determines the offender score by considering all other current and prior convictions as if they were prior convictions. RCW 9.94A.589(1)(a). However, if the sentencing court finds that some or all of the current convictions encompass the same criminal conduct, then those offenses are counted as a single crime. RCW 9.94A.589(1)(a).

Crimes constitute the "same criminal conduct" when they "require the same criminal intent, are committed at the same time and place, and involve the same victim." *Id.* Deciding whether crimes involve the same time, place, and victim often involves determinations of fact. *State v. Graciano*, 176 Wn.2d 531, 535-36, 295 P.3d 219 (2013). The trial court's determination of same criminal conduct is reviewed for an abuse of discretion or misapplication of the law. *Id.*

Crimes constitute the "same criminal conduct" when they "require the same criminal intent, are committed at the same time and place, and involve the same victim." RCW 9.94A.589(1)(a). The offenses must be counted separately unless all three elements are present. *State v. Porter,* 133 Wn.2d 177, 181, 942 P.2d 974 (1997). In construing the intent element, the standard is the extent to which the criminal intent, objectively viewed, changed from one crime to the next. *State v. Vike,* 125 Wn.2d 407, 411, 885 P.2d 824 (1994). Whether one crime furthered the other is relevant. *Vike,* 125 Wn.2d at 411. The defendant bears the burden of production and persuasion as to same criminal conduct. *Graciano,* 176 Wn.2d at 540.

Here, the trial court ruled the same acts constituted the incest and rape of a child counts. The counts involved the same victim, and each rape count and corresponding incest count were committed at the same time and same place. Further, Mr. Chenoweth's criminal intent was the same; have sex with his daughter. Thus, the incest and rape of a child counts were the same criminal conduct.

Despite finding the incest and rape of a child counts to the same acts, the trial court ruled, and the Court of Appeals agreed, that the two offenses did not constitute the same criminal conduct because the

legislature sought to punish the two offenses separately, citing *State v. Bobenhouse,* and *State v. Calle*, 124 Wn.2d 769, 888P.2d 155 (1995). 10/11/2013RP 149.

In *Calle*, the trial court found convictions for second degree rape and first degree incest to be the same criminal conduct. 125 Wn.2d at 772. The issue before this Court was whether these two offenses violated double jeopardy. This Court ruled the legislature intended the two offenses to be punished separately for *double jeopardy* purposes, but left the same criminal conduct analysis alone. *Id.* at 781.

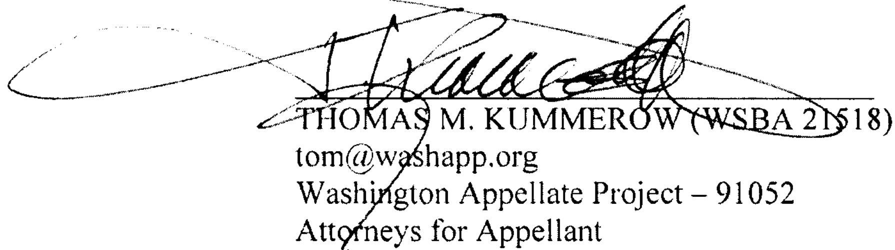
In *Bobenhouse*, without any analysis, the Court relied upon *Calle* to rule incest and rape do not constitute the same criminal conduct. 166 Wn.2d at 913. Yet this analysis conflated the test for double jeopardy and same criminal conduct. This Court should accept review to determine whether rape and incest can constitute the same criminal conduct irrespective of *Calle*.

F. CONCLUSION

For the reasons stated, Mr. Chenoweth asks this Court to grant review and either reverse his convictions or reverse his sentence and remand for resentencing.

DATED this 27th day of February 2015.

Respectfully submitted,



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APPENDIX

STATE OF WASHINGTON
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IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	No. 71028-1-I
Respondent,	)	
	)	DIVISION ONE
v.	)	
	)	
CHAD CHENOWETH,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	FILED: February 2, 2015

SPEARMAN, C.J. — Chad Chenoweth was charged with second and third degree child rape and first degree incest for seven alleged incidents involving his daughter, with two of the incidents occurring before she turned fourteen. At trial, the daughter testified about only six incidents and indicated they all took place after her fourteenth birthday. At the close of the evidence the State amended the information to conform to the testimony, dropping two of the charges and charging Chenoweth with lesser offenses based on the daughter's age. Chenoweth was convicted on all counts. He appeals, claiming that the convictions for the amended charges violated double jeopardy and/or due process. He also claims that the "to convict" instructions required the State to prove two acts for each charged offense, which it failed to do, and that the trial court should have considered the rape and incest counts to be the same criminal conduct for sentencing purposes. Finding no error, we affirm.

FACTS

On May 4, 2012, Chad Chenoweth was charged with fourteen counts of rape and incest, for incidents involving his daughter L.C. occurring between July 2008 and July 2010. The original charges were as follows:

- two counts of rape of a child in the second degree on or about and between July 24, 2008, and July 24, 2009;
- one count of rape of a child in the second degree, on or about and between July 24,2009, and July 24, 2010;[1]
- two counts of incest in the first degree on or about and between July 24, 2008, and July 24, 2009;
- five counts of incest in the first degree on or about and between July 24, 2009, and July 24, 2010; and
- four counts of rape of a child in the third degree on or about and between July 24, 2009, and July 24, 2010.

The first two counts of rape of a child in the second degree resulted from two of the incidents alleged to have occurred before the daughter turned fourteen years old. At trial on April 23, 2013, the daughter testified that only six incidents had taken place, and all happened after her fourteenth birthday. The State therefore sought to amend the information to conform to the testimony.

The parties agreed to rest before the jury, noting that the State had reserved its right to amend the information after the trial court heard Chenoweth's motion to dismiss. Chenoweth moved to dismiss Counts I-IV, the two counts of rape of a child in the second degree and two counts of incest in the first degree based on incidents alleged to

[1]This count should have been for rape of a child in the third degree. The State pointed out in its brief that the higher charge appears to have been a scrivener's error. The alleged victim was fourteen years old during the time frame indicated and Chenoweth could only have been charged with rape of a child in the third degree for the conduct.

have occurred before L.C.'s fourteenth birthday. The trial court indicated that it would dismiss those counts because of the timing, but that it would allow the State to amend the charges to reflect the different charging period. The trial court's ruling indicating it would dismiss the counts was only oral, and not reduced to writing. Chenoweth also moved to dismiss one count of rape in the third degree and incest in the first degree because L.C. testified to only six acts. The State agreed that the testimony only supported six incidents and indicated that it would "move to dismiss, or make part of an amendment to the information by dropping a count." Verbatim Report of Proceedings (VRP) (04/24/13) at 137:5-6. The State filed an amended information on April 25, 2013, and sought to arraign Chenoweth on the amended information at that time.[2] The revised charges were explained to Chenoweth on the record and the court indicated that it would explain the amended information and the revised counts to the jury.

The amended information reduced the counts to twelve total, consisting of six counts of rape of a child in the third degree and six counts of incest in the first degree. All were alleged to have occurred on or about and between July 24, 2009, and July 24, 2010, and in acts separate and distinct from any other charge.

The jury was given instructions that included the following:

Instructions 9, 11, 13, 15, 17, and 19:

> To convict the defendant of the crime of rape of a child in the third degree as charged in count [1, 3, 5, 7, 9, and 11], each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about July 24, 2009 and July 24, 2010, the defendant engaged in sexual intercourse with L.C.;

[2] Based on the State's understanding that the parties had agreed to amend the information, it did not file a formal motion to amend and Chenoweth did not object to the amended information at that time.

Instructions 10, 12, 14, 16, 18, and 20:

> To convict the defendant of the crime of incest in the first degree as charged in count [2, 4, 6, 8, 10, and 12], each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about July 24, 2009 and July 24, 2010, the defendant engaged in sexual intercourse with L.C.;

Clerk's Papers (CP) at 135-148. The jury returned verdicts finding Chenoweth guilty of all counts.

On July 10, 2013, the trial court heard and denied Chenoweth's motions to arrest judgment. On October 11, 2013, the case proceeded to sentencing. Chenoweth argued that the counts of rape and incest should have been considered the same criminal conduct for sentencing purposes because they were based on the same incident. The trial court disagreed and found that the counts were to be punished separately under State v. Bobenhouse, 166 Wn.2d 881, 897, 214 P.3d 907 (2009). The trial court sentenced Chenoweth to 102 months on the charges of incest in the first degree and 60 months on the charges of rape of a child in the third degree. Chenoweth appeals.

DISCUSSION

Chenoweth argues that the trial court violated double jeopardy when it dismissed Counts I-IV for insufficiency of evidence but later allowed the State to amend these counts. Chenoweth argues the court's oral ruling was a final order and that the State was required to seek reconsideration in order to amend the charges. The State contends that the trial court's dismissal was prospective only with the understanding

that the State would be allowed to amend the information after the trial court ruled on Chenoweth's motion to dismiss.

The constitutional guaranty against double jeopardy protects a defendant against multiple punishments for the same offense. U.S. Const. Amend. V; Wash. Const. art. I, § 9; State v. Mutch, 171 Wn.2d 646, 661, 254 P.3d 803 (2011). A double jeopardy claim is of constitutional proportions and may be raised for the first time on appeal. State v. Land, 172 Wn. App. 593, 599, 295 P.3d 782, review denied, 177 Wn.2d 1016, 304 P.3d 114 (2013). We review the issue of double jeopardy de novo. City of Auburn v. Hedlund, 137 Wn. App. 494, 503, 155 P.3d 149 (2007).

An order of dismissal for insufficiency of evidence is the legal equivalent of an acquittal, and an appeal or retrial would violate double jeopardy. State v. Bundy, 21 Wn. App. 697, 702, 587 P.2d 562 (1978); State v. Matuszewski, 30 Wn. App. 714, 716, 637 P.2d 994 (1981). Protections against double jeopardy will attach, however, only if a court's ruling is final. State v. Collins, 112 Wn.2d 303, 308, 771 P.2d 350 (1989)[3] "[A] ruling is final only after it is signed by the trial judge in the journal entry or is issued in formal court orders." Id., (citing State v. Aleshire, 89 Wn.2d 67, 70, 568 P.2d 799 (1977)). The trial court's oral indication that it would dismiss the original charges against Chenoweth had no final or binding effect. Double jeopardy issues did not arise because there was no order or final ruling dismissing the charges.

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[3]Chenoweth argues that the trial court should have considered this court's decision in Hedlund, 137 Wn. App. at 494, claiming that it modifies the Collins rule, but fails to indicate how Hedlund applies to his case. Id. Hedlund is distinguishable from both Collins and from this case, because in that case the City filed a writ of review to the superior court, presenting the trial court's ruling as final and requesting review. Hedlund, 137 Wn. App. at 506.

Chenoweth argues that the trial judge violated his constitutional due process rights by allowing the State to amend the information after it had clearly rested. The State argues that all parties understood that the State was resting provisionally and that it had permission to amend the charges to conform to the testimony.

A trial court's decision to allow the State to amend the charge is reviewed for an abuse of discretion. State v. Haner, 95 Wn.2d 858, 864, 631 P.2d 381 (1981). It is fundamental that an accused must be informed of the charge he is to meet at trial and cannot be tried for an offense not charged. State v. Carr, 97 Wn.2d 436, 439, 645 P.2d 1098 (1982); State v. Lutman, 26 Wn. App. 766, 767, 614 P.2d 224 (1980). Under the criminal court rules, a trial court may allow the amendment of the information at any time before the verdict as long as the "substantial rights of the defendant are not prejudiced." CrR 2.1(d). While the rule permits liberal amendment, it is tempered by article 1, section 22 of the Washington Constitution which requires that the accused be adequately informed of the charge to be met at trial. State v. Pelkey, 109 Wn.2d 484, 487, 745 P.2d 854 (1987).

Here, the record demonstrates that the State had been permitted to rest before the jury only; there are multiple instances during the trial where the State indicated that it would be amending the charges and would not formally rest. The trial court granted the request to reserve the right to amend and Chenoweth did not object.[4] The parties understood that the State had preserved the right to amend the charges. Chenoweth received sufficient notice of the nature and cause of the amended charges. The trial court's decision to allow amendment of the charges was well within its discretion.

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[4] Regardless of whether Chenoweth objected at trial, double jeopardy is a constitutional matter that may be raised for the first time on appeal. State v. Bobic, 140 Wn.2d 250, 257, 996 P.2d 610 (2000).

Chenoweth argues that his convictions must be overturned because the jury instructions proposed by the State required two violations for each of the counts, and those instructions became the law of the case. The jury instructions for each count stated, "(1) [t]hat on or about July 24, 2009 and July 24, 2010, the defendant engaged in sexual intercourse with L.C. . . ." CP at 135-148. Chenoweth argues that the State failed to prove that separate violations occurred on each of the two dates. The State argues that while the instructions could have been more precise, they sufficed to define the period of time for the jury to consider. The State also argues that any error in the instructions was harmless; based on the information, directions, and evidence presented at trial no reasonable jury could have considered that the State had to prove two offenses.

We review jury instructions de novo in the context of the instructions as a whole. State v. Jackman, 156 Wn.2d 736, 743, 132 P.3d 136 (2006). Jury instructions must make the relevant legal standard manifestly apparent to the average juror. State v. Borsheim, 140 Wn. App. 357, 366, 165 P.3d 417 (2007).

Chenoweth relies on State v. Hickman, 135 Wn.2d 97, 954 P.2d 900 (1998), to support his argument. In that case, the State agreed to jury instructions that included venue, and then failed to prove that additional element. Id. at 101. The "to convict" instructions in Hickman listed "**[t]hat the act occurred in Snohomish County, Washington,**" as a separately numbered, additional element of the crime to be proved beyond a reasonable doubt. Id. The instructions in Hickman are distinguishable from the instructions in this case. Here, the charging period was poorly articulated but the

phrasing served to indicate a period of time during which the incidents were alleged to have occurred.

Furthermore, the presentation of evidence and argument at trial can reduce any possibility that instructions will be misconstrued. See State v. Corbett, 158 Wn. App. 576, 592-3, 242 P.3d 52 (2010) (totality of instructions, evidence, and arguments made it clear that the jury had to find separate and distinct acts for each of the guilty verdicts). Here, nothing in the way the case was tried, the testimony presented, or the jury instructed, suggested that the jurors were required to find two separate acts for each count. Both parties emphasized that there were six discrete incidents, one for each count, which occurred after the daughter's fourteenth birthday, July 24, 2009. In fact, Chenoweth's counsel told the jury specifically that the State had to prove incest occurred during the charging period represented by the two dates. He argued in closing that "the state has to prove that – the witness, that during this charging period, that is to say, you know, when she was – actually, when she was fourteen, between July 24th, 2009, and July 24th, 2010...." VRP (4/26/13) at 51. Based on a review of the jury instructions, the evidence presented at trial, and the closing arguments, any reasonable jury would have known that it had to find that only one distinct act occurred between July 24, 2009 through July 24, 2010, for each count of rape and incest.

Chenoweth claims that the convictions for incest and rape should have been considered the same criminal conduct and counted as a single crime.[5] He argues that

[5]Both the State and the trial court noted that even if the court had considered rape and incest to be the same criminal conduct in this case, Chenoweth's standard range would not be affected. Because a prior or other current sex offense scores a three, under either calculation, Chenoweth's Offender Score exceeds nine, the maximum offender score available. Both offenses are also seriousness level VI. Thus, his sentencing range is 77-102 months in any event.

the separate counts for incest and rape involved the same acts, the same victim, and occurred at the same time and place, and the case law supports this notion.

Determinations of same criminal conduct for sentencing purposes are reviewed for abuse of discretion or misapplication of law. State v. Graciano, 176 Wn.2d 531, 535, 295 P.3d 219 (2013). In Bobenhouse, 166 Wn.2d at 897, the Washington Supreme Court held that the legislative intent to punish rape and incest as separate offenses, even though committed by a single act, extends to the same criminal conduct analysis for the purposes of sentencing.[6] We find no error in the trial court's consideration of the two offenses as separate and its sentencing of Chenoweth accordingly.

Affirmed.

Spearman, C.J.

WE CONCUR:

Trickey, J

Dwyer, J.

[6] Chenoweth misinterprets Bobenhouse, claiming that the Supreme Court declined to find that the counts of first degree rape and first degree incest were not the same criminal conduct, even though they arose from the same acts. This is incorrect. Chenoweth disregards the salient portion of the Bobenhouse decision and focuses only on the alternative harmless error analysis.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 71028-1-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

☒ respondent Erik Pedersen, DPA
Skagit County Prosecutor's Office

☒ petitioner

☐ Attorney for other party

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Washington Appellate Project

Date: February 27, 2015