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71028-0

No. 71028-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

CHAD CURTIS CHENOWETH,

Appellant.

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

The Honorable Dave Needy

BRIEF OF APPELLANT

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A. SUMMARY OF ARGUMENT

Chad Chenoweth was charged with second and third degree rape of a child and first degree incest for having sexual intercourse with his daughter. At the close of the State's case, the court dismissed counts 1 through 4 for a lack of proof that the daughter was less than 14 years old. The court then allowed the State to amend those counts to charge third degree child rape. In addition, the to-convict instructions, proposed by the State, required proof of two acts for each offense, yet the State only proved one. Mr. Chenoweth was convicted of all 12 of the charged offenses.

At sentencing, despite finding the incest and rape counts involved the same victim, occurred at the same time and shared the same intent, the trial court refused to find the offenses to be the same criminal conduct.

Mr. Chenoweth submits all of his convictions must be reversed and dismissed under the law of the case doctrine. Alternatively, counts 1 through 4 should be reversed and dismissed for a violation of double jeopardy. Finally, Mr. Chenoweth's sentence must be reversed and remanded for the court to find the incest and rape counts to be the same criminal conduct and impose the correct sentence.

B. ASSIGNMENTS OF ERROR

1. The court erred in failing to vacate counts 1 through 4 when it had previously dismissed these counts for insufficiency of the evidence.

2. Imposition of convictions for counts 1 through 4, which the trial court had dismissed for insufficient evidence, violated double jeopardy.

3. The trial court erred in failing to find the incest convictions and rape of a child convictions based upon the same acts to be the same criminal conduct.

4. The State failed to prove all of the elements of the offenses it assumed the burden to prove in the to-convict jury instructions.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. 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. Did the trial court violate Mr. Chenoweth's double jeopardy rights when it subsequently imposed convictions for these counts?

2. 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 Mr. Chenoweth entitled to reversal of his sentence and remand for resentencing?

3. 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. Under the law of the case doctrine, is Mr. Chenoweth entitled to reversal of his convictions with instructions to dismiss where the State failed to prove the charged offenses?

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).

Mr. Chenoweth appeals.

E. ARGUMENT

1. THE TRIAL COURT VIOLATED DOUBLE JEOPARDY WHEN IT IMPOSED CONVICTIONS FOR COUNTS IT HAD DISMISSED FOR INSUFFICIENCY OF THE EVIDENCE

a. Double jeopardy bars resurrection of a count dismissed on insufficient 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).

By its own terms, the Double Jeopardy Clause only applies if "there has been some event, such as an acquittal, which terminates the original jeopardy." *Richardson v. Unites States,* 468 U.S. 317, 325, 104 S.Ct. 3081, 82 L.Ed.2d 242 (1984). 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). A retrial of a defendant whose initial prosecution was dismissed for insufficient evidence during his jury trial at the close of the State's case violates the constitutional double jeopardy prohibition. *State v. Matuszewski*, 30 Wn.App. 714, 717-18, 637 P.2d 994 (1981).

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. *Accord, Sanabria v. United States*, 437 U.S. 54, 64, 98 S.Ct. 2170, 57 L.Ed.2d 43 (1978) ("Thus when a defendant has been acquitted at trial he may not be retried on the same offense, even if the legal rulings underlying the acquittal were erroneous."); *Fong Foo,* 369 U.S. at 141-42 (directed verdict after seven days of trial barred reprosecution for the same offense). The Court has also applied this same rule to bar a retrial in a *state* criminal prosecution following the trial court's decision that the evidence was legally insufficient to sustain a conviction. *Hudson v. Louisiana*, 450 U.S. 40, 45, 101 S.Ct. 970, 67 L.Ed.2d 30 (1981).

b. The trial court dismissed counts 1 through 4 for insufficiency of the evidence at the conclusion of the State's case. Here, 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.

It may be argued that the court's ruling was not "final," since it was an oral ruling. In *State v. Collins*, the Supreme 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 was reversed on double jeopardy grounds by this Court. *Id.* at 506. This 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 must reverse counts 1 through 4 and order them dismissed.

2. THE INCEST AND RAPE CONVICTIONS WERE THE SAME CRIMINAL CONDUCT

a. Convictions that share the same victim, same time, and same intent constitute the same criminal conduct for sentencing. 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.

b. The trial court erred in conflating double jeopardy analysis with same criminal conduct analysis. Despite finding the incest and rape of a child counts to the same acts, the trial court ruled that the two offenses did not constitute the same criminal conduct because the legislature sought 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 *Bobenhouse*, the trial court refused to find

counts of first degree incest and first degree child rape constituted the same criminal conduct. The Supreme Court refused to reach the same criminal conduct issue because the offender score for each offense *before* any same criminal conduct analysis was a "20." Thus, the Court ruled any error in refusing to find the incest and child rape counts were the same criminal conduct was harmless. *Id.* at 914.

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 the Supreme Court was whether these two offenses violated double jeopardy. The 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.

Thus, the trial court's reliance on *Calle* and *Bobenhouse* to refuse to find the third degree rape of a child and first degree incest the same criminal conduct was misplaced. In fact, neither decision held that rape and incest could never be the same criminal conduct, and the decision in *Calle* supports the argument the offenses can indeed be the same criminal conduct. The trial court conflated the double jeopardy

analysis with the same criminal conduct analysis, which the Supreme Court clearly did not

c. Remand for resentencing is required. Where the trial court incorrectly concludes a series of crimes were not the same criminal conduct, the remedy is reversal of the sentence and remand to the trial court for resentencing with a corrected offender score. *State v. Williams*, 135 Wn.2d 365, 366-67, 957 P.2d 216 (1998).

Here, the trial court incorrectly found the incest convictions were not the same criminal conduct as the rape of a child convictions. Accordingly, this Court must reverse Mr. Chenoweth's sentence and remand for resentencing.

3. UNDER THE "LAW OF THE CASE" DOCTRINE, THE STATE FAILED TO PROVE ALL OF THE ELEMENTS AS STATED IN THE JURY INSTRUCTIONS

a. The State must prove *all* of the elements included in the to-convict instruction whether statutory or not. 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 an 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." *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.

b. The State assumed the burden of proving two acts for each to convict instruction. Here, 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. Based upon these instructions, the jury was required 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 must be dismissed.

c. The remedy for the State's failure to prove all of the elements of the offense as stated in the to-convict instructions is reversal with instructions to dismiss. Here, the State failed to prove all of the elements of the incest and child rape counts. Thus, all of the counts must be dismissed with prejudice. *Hickman*, 135 Wn.2d at 103

F. CONCLUSION

For the reasons stated, Mr. Chenoweth asks this Court to reverse his convictions and order them dismissed.

DATED this 7th day of May 2014.

Respectfully submitted,

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

STATE OF WASHINGTON, Respondent, v. CHAD CHENOWETH, Appellant.	)))))))))	NO. 71028-1-I

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 7TH DAY OF MAY, 2014, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON THIS 7TH DAY OF MAY, 2014.

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