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NO. 71028-1-I

IN THE COURT OF APPEALS – 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 David R. Needy, Judge

RESPONDENT'S BRIEF

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I. SUMMARY OF ARGUMENT

Chad Chenoweth was convicted of six counts of incest and six counts of child rape committed against his daughter when she was fourteen. Chenoweth had been charged with fourteen counts, four of which were for acts when she was thirteen. However at trial, the daughter testified to six acts occurring when she was fourteen. Afterwards the State indicated it was going to amend the information and the trial court said it would permit the amendment. Chenoweth then moved to dismiss two counts of incest and two counts of child rape, contending there was insufficient evidence of acts at age thirteen. The State agreed that two of the counts should be dismissed because she only testified to six incidents. The trial court ruled on the motion indicating it would dismiss the charges but permitted the State to amend the information to conform to the testimony. The trial court denied post-trial motions of this and related issues Chenoweth raises on appeal.

On appeal, Chenoweth raises double jeopardy and due process violations, for the permitted amendment contending the four counts of the remaining twelve counts should be dismissed. However, the State had removed two of the counts in the amended information reducing the counts from fourteen to twelve. And furthermore the amendment was properly permitted to conform to the testimony at trial.

Chenoweth further contends the trial court improperly held that incest and rape were not same criminal conduct. However, *State v. Bobenhouse,* holds that they do not carry the same criminal intent and the legislature intended they be punished separately.

Finally, Chenoweth contends the charging period in the jury instruction which did not include the word "between" in the time frame in the "to convict" instruction required the State to prove two separate acts. However as ruled by the trial court, given the language of the instructions, the testimony was presented and the argument of the parties, it was clear to the jury that each act was alleged to be in the period rather than on two dates.

II. ISSUES

1. Did the trial court err in permitting the State to amend the information to conform to the evidence presented at trial?
2. Was the intended dismissal by the trial court, followed by permitting the State to amend the information to conform to the testimony a double jeopardy or due process violation?
3. Where the Supreme Court held in *Bobenhouse*, that the legislature intended rape and incest for the same act to be punished separately, did the trial court err in determining the offenses were not same criminal conduct?

4. Where the time period in the "to convict" instructions indicated the date range of the day the victim turned fourteen and the day she turned fifteen, was the jury required to find the acts on two separate dates, or was it clear that the jury was to find one act during the time period?

III. STATEMENT OF THE CASE

1. Statement of Procedural History

On May 4, 2012, Chad Chenoweth was charged with fourteen sexual offenses involving child rape and incest of his daughter between July of 2008 and July of 2010. CP 1-5, 42-3. The offenses were 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. CP 1-5.

[1] This count appears to have been a scrivener's error which was not previously noticed. The alleged victim was age fourteen in that time frame and thus Chenoweth could only have been charged with Rape of a Child in the Third Degree for the conduct.

Each offense alleged that it was in an act separate and distinct from any other charge. CP 1-5.

On April 22, 2013, the case proceeded to trial. 4/22/13 RP 2. [2] During the course of the trial, the defendant's daughter testified to a different time frame of the events. 4/23/13 RP 27-8, 4/24/13 RP 91. 4/23/13 RP 98. As a result the State amended the information. 4/24/13 RP 92,130-1, 137-9. The amended information reduced the counts to twelve total counts consisting of six counts of Rape of a Child in the Third Degree and six counts of Incest in the First Degree. CP 120-3. All were alleged to have occurred on or about and between July 24, 2009, and July 24, 2010, and in an act separate and distinct from any other charge. CP 120-3.

The jury returned verdicts finding Chenoweth guilty of all counts. CP 152-163, 4/26/14 RP 82-87.

On July 10, 2013, the trial court heard and denied defense motions to arrest judgment. 7/10/13 RP 129-36.

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[2] The State will refer to the verbatim report of proceedings by using the date followed by "RP" and the page number. The report of proceedings in this case are as follows:

4/18/13 RP	Trial Confirmation and ER 404(b) argument
4/22/13 RP	Motions in Limine and Jury Selection (not transcribed) (in volume with 4/23/13 RP)
4/23/13 RP	Jury Selection (not transcribed), Motions in Limine, Opening (not transcribed) and Testimony (with 4/22/13 RP)
4/24/13 RP	Testimony and Motions
4/26/13 RP	Motions, Closing Argument and Verdicts (in volume with 4/26/13 and 7/10/13)
7/10/13 RP	Post-Trial Motion (in volume with 4/26/13 and 10/11/13)
10/11/13 RP	Sentencing (in volume with 4/26/13 and 7/10/13).

On October 11, 2013, the case proceeded to sentencing. 10/11/13 RP 138. The defense raised a claim that same criminal conduct should be found for each of the alleged acts of incest and rape given there were six acts described by the alleged victim. 10/11/13 RP 146-9. The trial court determined that the offenses of rape and incest were based upon the same acts, with the same victim at the same time, but that under *State v. Bobenhouse,* the acts of rape and incest are to be punished separately. 10/11/13 RP 150.

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. CP 10, 18, 10/11/13 RP 160-1.

On October 14, 2013, Chenoweth timely filed a notice of appeal. CP 23-40.

2. Statement of Facts

The statement of facts below presents mention in the record of the time frame of the offenses. Those occurred prior to trial in motions in limine, at trial in the testimony of the victim and other witnesses, in motions and trial and finally in post-trial motions.

i. Discussion of Counts in Motions in Limine.

Prior to testimony, the parties were aware the time-frame of the incidents was an issue. Defense sought a motion in limine pursuant to the

rape-shield statute, RCW 9A.44.020, to be permitted to question the victim about when she became sexually active with her boyfriend. 4/23/13 RP 25-6. The defense contended that the date of the offenses with the father could be clarified based upon the victim's first sexual experience with her boyfriend. 4/23/13 RP 31-2. The defense contended that she had told the boyfriend around the time of the first sexual encounter with him that she had been sexually abused by her father. 4/23/13 RP 32.

The prosecutor noted that up to that time, in interviews with detective and defense counsel, the victim had described some events occurred before age fourteen and some after age fourteen. 4/23/13 RP 27.

> And what -- what is very clear from the discovery, your Honor, both in Ms. [L.C.'s] interview with Detective Pierce and through the interviewing process with Counsel is that there are clearly incidences that happened over -- there's like a marker in between, which is things that happened before she was fourteen and things that happened after she was fourteen. **She's always been very clear on that fact. That's why we have the two charges of Rape of a Child Two and the rest are Rape of a Child Three. She has always said that the first two incidences, the oral copulation and the digital penetration on the couch incident, all happened before she was fourteen.**
>
> Now, she can't sit here and tell anybody how many days it was before she was fourteen, but in her mind she knows that those preceded her fourteenth birthday. She kind of typically describes it as, well, a few days before. She can't tell you how many days.

4/23/13 RP 27 (bold emphasis added).

> What she is very clear in her report to Detective Pierce is, two things happened before she turned fourteen. She is very clear she was thirteen at the time. Whether the boyfriend had come first or not yet at this point in time, I don't know. But she's very clear that when she was thirteen, there was the -- what she called fellatio, and Detective Pierce clarified with her what she meant by that, and she said it was his tongue and mouth on her vaginal area.
>
> Then she went on to tell me about a second time that something happened again. She was thirteen and had been depressed, she had consumed alcohol, and that was the digital penetration on the couch. Then they're talking, talking, talking. Then she says, you know, it seemed like it happened every weekend, but I can remember specific incidences. She started off with telling me that all the sex took place after her fourteenth birthday, because she knows this, or she knows that she had sex for the first time with her boyfriend just a couple of days before her fourteenth birthday.

4/23/13 RP 33-4

ii. Trial Testimony

Despite the interviews in which the defendant's daughter had indicated some acts occurred before age fourteen, at trial, she testified differently.

The defendant's daughter, L.C., was seventeen as the time of trial. 4/23/13 RP 76-7. She testified as to her birthday and that the defendant, Chad Chenoweth was her father. 4/23/13 RP 76-7. L.C. didn't live with her father until around age six when he moved into their house in Boise, Idaho. 4/23/13 RP 79. She considered her relationship with her father as normal. 4/23/13 RP 79.

Around age eleven or twelve, she moved to Skagit County to a residence on Calkin Place in Sedro Woolley. 4/23/13 RP 79-80. L.C. lived in the house from age thirteen to fifteen. 4/23/13 RP 85. She was home schooled at the time. 4/23/13 RP 85-6.

L.C. testified her relationship with her father changed. 4/23/13 RP 87.

> Q. Okay. And when did that change?
> A. A couple days before my fourteenth -- or -- it was a little bit after fourteen when I told him I was sexually active.

4/23/13 RP 87. L.C. described that Chenoweth became "creepy." 4/23/13 RP 88. She went on to describe the first sexual encounter with him. 4/23/13 RP 88.

Chenoweth supplied her liquor that they drank in an RV on the side of the house. 4/23/13 RP 88. They drank for a couple of hours and she had at least ten beers. 4/23/13 RP 89. After they left the RV around midnight, they walked to the back porch where they sat down. 4/23/13 RP 90-1, 93. Chenoweth pulled L.C. on to his lap. 4/23/13 RP 91. Chenoweth wanted to take her pants off, but she told him no. 4/23/13 RP 91. Chenoweth pulled her across his lap and took off her pants. 4/23/13 RP 92. He then licked her vagina for several minutes. 4/23/13 RP 92. She told him no and was

eventually able to pull her pants back up. 4/23/13 RP 92. Chenoweth later apologized when he was sober. 4/23/13 RP 94.

A second incident occurred, when L.C. was depressed, drank 151 proof rum and passing out on a couch. 4/23/13 RP 95. She woke up to Chenoweth rubbing her clitoris and fingering her. 4/23/13 RP 96. L.C. testified that her uncle went toward the kitchen and she felt Chenoweth's hand slipping out of her pants. 4/23/13 RP 97. Chenoweth told the uncle that L.C. had passed out on the couch and then told L.C. to go to her room. 4/23/13 RP 97.

The prosecutor questioned her about her age at the time.

> Q. Okay. With respect to those two incidents that you just talked about, do you recall whether those -- what age you were when those happened?
> A. Fourteen.
> Q. Okay. Now, have you previously told law enforcement and others that it happened when you were thirteen?
> A. No.
> Q. You haven't? Okay. And what makes you think that you were fourteen when this happened?
> A. Because it was right after my fourteenth birthday.
> Q. Okay. And so you don't remember telling law enforcement it was before you were fourteen?
> MR. RICHARDS: I will object. I think that's already been asked and answered, your Honor.
> THE COURT: It has, but I will allow the question.
> THE WITNESS: No.

4/23/13 RP 98.

Chenoweth next pulled L.C. into his bedroom and bargained with L.C. to pay her a hundred dollars to have sex. 4/23/13 RP 99-100. The incident occurred around 5:00 in the afternoon and L.C.'s brother was in the other room on the computer at the time. 4/23/13 RP 100. After first refusing, L.C. relented and agreed, lying on her back on Chenoweth's bed. 4/23/13 RP 100. Chenoweth pulled off her pants, put on a condom and penetrated her vagina with his penis. 4/23/13 RP 101. The intercourse lasted no more than five minutes. 4/23/13 RP 102. L.C. was paid afterward in twenty dollar increments until fully paid. 4/23/13 RP 102.

Another incident L.C. recalled was when she was fell asleep in her parent's room while watching a movie. 4/23/13 RP 107. While she was sleeping on her side, Chenoweth pulled down her pants and put his penis in her vagina. 4/23/13 RP 106, 110. L.C. was awakened by it and Chenoweth then proceeded to insert his penis in her anus. 4/23/13 RP 106-7. The pain caused L.C. to pull away, pull up her pants and tell Chenoweth it hurt. 4/23/13 RP 106.

Another incident occurred when Chenoweth led L.C. to her room, laid her down on her bed, removed her pants, put her legs in the air and penetrated her vagina with his penis. 4/23/13 RP 110-1. L.C. recalled that Chenoweth was wearing a robe and did not use a condom on that occasion. 4/23/13 RP 112-3.

The last incident that L.C. testified to occurred when Chenoweth gave her a back rub in his room. 4/23/13 RP 113. L.C. had really bad cramps. 4/23/13 RP 114. Chenoweth laid her down on his bed and started giving her a back rub. 4/23/13 RP 113. Chenoweth then pulled down her pajama pants and started to rub her butt and fingered her vagina with his thumb. 4/23/13 RP 113. L.C. told Chenoweth "no" and slapped his hands. 4/23/13 RP 113-4. Chenoweth stopped and walked away. 4/23/13 RP 114.

L.C. was unable to recall the order of the events. 4/23/13 RP 114. The incidents occurred every five to seven days over about a month. 4/23/13 RP 114-5. All the incidents occurred at the Calkin Place house. 4/23/13 RP 122. The incidents ended when L.C. told Chenoweth no. 4/23/13 RP 118.

L.C. told two of her boyfriends and later her cousin Rachel. 4/23/13 RP 115. They tried to convince her to tell police. 4/23/13 RP 118. But L.C. was protecting her mother because Chenoweth earned the money in the family and her mother was unable to take care of herself. 4/23/13 RP 118. L.C. reported to law enforcement the day after telling her sister what happened. 4/23/13 RP 119.

Other witnesses testified as to circumstances which suggested the time frame.

L.C.'s cousin, Rachel Wilber, testified. 4/24/13 RP 14-6. She recalled L.C. living at the Calkin Place address in May of 2009, when they

spread the ashes of her grandfather. 4/24/13 RP 17. Rachel was close in age and shared a room with L.C. 4/24/13 RP 18. Rachel testified that L.C. disclosed that Chenoweth was doing things to L.C. about a month after L.C.'s grandfather died. 4/24/13 RP 33. Rachel testified that on one occasion when they were watching a movie in Chenoweth's bedroom, Chenoweth began rubbing her leg sensually. 4/24/13 RP 31-2.

Evelyn Peacock testified that L.C. dated her son, Robert Rushin, when L.C. was fourteen or fifteen years-old. 4/24/13 RP 36-7. Robert testified that L.C. was fourteen and a half when they began dating. 4/24/13 RP 43. They dated for a year and a half. 4/24/13 RP 43-4. About three months before they started dating, L.C. disclosed to Robert that she was sexually abused by her father. 4/24/13 RP 46.

Laura Lind, L.C.'s older sister, testified that L.C. disclosed she was being sexually abused by her father about a year before trial. 4/24/13 RP 55, 67-8. Laura persuaded L.C. to tell the authorities. 4/24/13 RP 68-9. About two days later, Laura took L.C. to the police station to talk to a detective. 4/24/13 RP 69. Detective David Pierce took L.C.'s statement. 4/24/13 RP 99-100, 102. Pierce testified that L.C. told him that two incidents occurred before L.C.'s fourteenth birthday. 4/24/13 RP 108-9. The testimony was offered for impeachment. 4/24/13 RP 108. Pierce also testified about the arrest of Chenoweth. 4/24/13 RP 115-6. Pierce's interview of Chenoweth

was admitted at trial. 4/24/13 RP 116, 119-20. Chenoweth did not admit the sexual abuse of his daughter. 4/24/13 RP 125.

Chenoweth did not testify. 4/24/13 RP 129.

iii. Post-testimony Discussion.

Toward the end of testimony the State indicated its intent to amend the information.

> MS. DYER: 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 being offered of the information 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.

4/24/13 RP 91-2. The parties rested before the jury. 4/24/13 RP 128-9. The trial court then noted the State's permission to amend the information at a later time.

> 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.

> MR. RICHARDS: Thank you. So my motion would be to dismiss Counts 1 through 4. Those would be two counts of Rape of a Child in the Second Degree and two counts of Incest in the First Degree alleged to have occurred based on the charging period before [L.C.'s] 14th birthday. There is no substantive evidence to support those charges. She very clearly testified that she was fourteen at the time that all of the incidents that she testified about occurred.

4/24/13 RP 130-1. The trial court ended up indicating it would dismiss the counts.

> 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.

4/24/13 RP 135-6. The trial court's oral ruling to dismiss the counts was not rendered to writing.

Chenoweth moved to dismiss two counts since there were only six acts testified to by L.C. 4/24/13 RP 136-7. The State agreed there was only

testimony as to six incidents. 4/24/13 RP 137. The trial court granted the motion. 4/24/13 RP 137.

iv. Post-trial Proceedings

On July 10, 2013, the trial court heard a defense motion to arrest judgment. 7/10/14 RP 91-136. The first motion was to vacate the conviction based upon the law of the case doctrine contending the prosecutor was required to prove two counts of intercourse on specific dates based upon the language of the jury instructions. 7/10/14 RP 91-2. The next motion was to vacate the incest convictions contending the State failed to prove twelve separate and distinct acts as alleged in the information. 7/10/14 RP 93-4. The third defense motion was to vacate two of the incest counts based upon the amendment of the information after the State had rested. 7/10/14 RP 95. Finally, the defense moved to dismiss the first four counts of the original information based upon a claim of double jeopardy and for violation of due process, contending the Court had dismissed those counts prior to the State amending the information. 7/10/13 RP 101-2.

The trial court denied the motions. 7/10/13 RP 129-36. Regarding the contention that the instructions required the State to prove two acts of intercourse on separate dates, rather than one occasion between the time frame, the trial court found the instruction should have included the term between. 7/10/13 RP 130. However, the trial court concluded that based

upon the way the testimony was presented, the charging documents read to the jury at the start of the case, and the way the case was argued, there was not enough basis to believe that there was the requirement to prove two acts for each of the charges. 7/10/13 RP 130-1.

As to the motion to dismiss either all the rape or incest charges based upon the contention of separate and distinct conduct alleged for each act, the trial court concluded that given the way the case was argued and presented to the jury, it was clear that the jury was determining whether there was one act for each of the counts during the time frame, which is how the jury interpreted the instruction. 7/10/13 RP 131-2.

As to the motion to dismiss counts 1 through 4 of the original information, based upon the claimed dismissal prior to the State amending the information to the lesser charge, the Court denied the motion ruling it had left open the State's ability to pursue the amendment of the information, and the amendment was to a lesser charge based upon the timing of the acts described by the victim. 7/10/13 RP 134-5.

IV. ARGUMENT

1. The trial court properly permitted the amendment of the information to conform to the testimony.

Chenoweth contends the trial court had dismissed four of the counts and as a result, the State's amendment of the information of the time frame during trial did not keep those counts active.

The State dismissed two of those counts under the amended information and the trial court allowed the amended information as to the other two counts effectively reconsidering the dismissal order.

i. The State dropped two of the counts to be dismissed counts in the amended information.

Chenoweth had been charged with fourteen sexual offenses prior to trial, with four of those offenses occurring when his daughter was age thirteen. CP 1-5. During the trial, his daughter testified to six separate acts constituting rape of a child and incest but that all acts occurred after she was fourteen. 4/23/13 RP 88-114, 4/23/13 RP 98. Thus, as a result the State amended the information to reduce the number of counts to twelve total counts. CP 120-3.

Thus, two of the counts dismissed by the trial court was by the State's amended information. 4/24/14 RP 137. So the remaining issue is whether the trial court had already dismissed those counts when the State

amended the information, or whether the trial court effectively reconsidered the dismissal.

ii. The incest charge which remained would have been improperly dismissed by the trial court.

The State contends the dismissal of the count of Incest in the First Degree would have been improper by the trial court where the victim testified to the event, but the charging document indicated the offense occurred on or about the time she was age fourteen. By her testimony being unable to identify the specific dates when the events occurred, but describing them by the physical acts and locations instead, the testimony was adequate to allow the count to go forward.

As it turns out, the trial court did allow the count to go forward based upon the trial court's understanding and the agreement the trial court believed that the parties had approved, that the State would be permitted to amend the information. 4/24/13 RP 130-1, 138-9. No objection was made by defense to the procedure. 4/24/14 RP 130-1, 138-9.

iii. The remaining rape in the third degree count was properly permitted to be reduced from the charge of rape in the second degree.

Thus, the count from the amended information remaining at issue, is the single count of Rape in the Third Degree, which was initially filed as a count of Rape in the Second Degree. The trial court had orally dismissed that count. 4/24/140 RP 137. But prior to doing so had indicated it was

permitting the State to amend the information to conform to the evidence at trial. 4/24/14 RP 130-1, 138, 7/10/13 RP 128-9.

When the trial court denied the motion to dismiss that charge, the trial court described its understanding and that it believed it had from the parties that it was permitting the State to amend the information despite having the State rest before the jury.

> THE COURT: But we understood that we were telling the jury that both sides had rested, and we had a sidebar and put it on the record that the state had not rested until after the amendment was filed, and that was clarified both at the sidebar and on the record and agreed to by both sides. So we created a legal fiction, if you will. So I'm asking, for purposes of this argument, are you claiming that the state rested prior to the amendment?
>
> MR. RICHARDS: That's -- well, I guess not technically, but what the state did was, and what the Court indicated was going to happen, is that depending on the outcome of the motions to dismiss that I was going to make, that the state would be permitted to amend the information because it had not formally rested. And I guess I see that as a flawed procedure in the first place.
>
> THE COURT: One that you didn't object to at the time.

7/10/13 RP 96. In ruling on the post-trial motion on the issue, the trial court found the parties knew the information was to be amended because the victim did not testify the incidents occurred before she turned age fourteen.

> THE COURT: And then the others we knew had to be amended, because she testified very differently than apparently her previous issues about these happening prior to her fourteenth birthday, so there was never

> any doubt that acts alleged at age thirteen or younger were going to go forward to the jury.

7/10/13 RP 99. And in denying the defense motion on the issue, the trial court found it had not intended to not permit the State to dismiss the amended information. 7/10/13 RP 128-9.

The State contends that pursuant to the trial court's ruling, the dismissal was a prospective dismissal with the understanding the State was going to be permitted to amend the information. Thus, the trial court's ruling did not implicate double jeopardy or due process considerations.

This is a proper application of the rule in accord with the Supreme Court decision in *Collins*, that written orders are the final order of the trial judge.

> In this vein, our reference in Mallory to the trial court's oral opinion as "no more than an expression of its informal opinion at the time it is rendered" is relevant here. Individual trial judges' styles of ruling vary. Many judges will think out loud along the way to reaching the final result. It is only proper that this thinking process not have final or binding effect until formally incorporated into the findings, conclusions, and judgment.
>
> For this reason, we overrule the standard developed in *Dowling* and followed in *LeFever* for determining the finality of a trial judge's oral ruling. We return to the rule long followed in this state that a ruling is final only after it is signed by the trial judge in the journal entry or is issued in formal court orders. *See State v. Aleshire, supra; State v. Mallory, supra; Chandler v. Doran Co., supra; State v. McClelland, supra.*
>
> The trial judge in the present case did not even approach signing a journal entry or issuing a formal signed

> order. The record indicates that he stated one position, albeit in language that reflected a ruling, in light of the authority presented by counsel. The argument of counsel, however, did not end there. The prosecutor introduced new, contrary authority, further argument followed, and the judge reversed his original position. Although the "reversal" took place within a very short time -- probably 10 minutes -- the lapse of time is irrelevant to the rule we follow. Only after the signed journal entry is made or the signed order is issued will the ruling be final.

State v. Collins, 112 Wn.2d 303, 308-09, 771 P.2d 350 (1989).

In the present case, there was no ruling reduced to writing. Instead, the trial court had actually indicated before the dismissal, that it was permitting the State to amend. So, there was even less of a delay as it was clear to the parties that the counts were going forward under the amendment which cured the alleged defect to the remaining count. Furthermore consistent with the "individual styles" noted by *Collins*, here the trial court expressed frustration that his prospective dismissal was being treated as a final ruling.

> THE COURT: But it doesn't say "are dismissed." We're arguing over semantics. And I can't give myself credit for being that precise all of the time, but when you read the following sentence, I will allow, based on our understanding that the state has not formally rested, which is to amend -- so to me, that takes on a great deal of importance, "would be dismissed if they weren't amended," as opposed to "are now dismissed," and now that I've dismissed them, do you wish to amend something that will -- that is dismissed. They would be, if they weren't going to be amended. So it really is a future "would be," not a current, "are dismissed," but I have

> created the procedural confusion that we're in, so go right ahead.

7/10/13 RP 128-9.

Here there was no written dismissal and the trial court had not issued a final ruling. Chenoweth's challenge to the "dismissed" counts must be denied.

2. Child rape and incest are to be punished separately.

Chenoweth contends the trial court erred in finding the acts of rape of a child and incest on the same physical acts were not same criminal under RCW 9.94A.589(1)(a). Brief of Appellant at page 15. Chenoweth contends the trial court improperly relied on *State v. Bobenhouse,* 166 Wn.2d 881, 214 P.3d 907 (2009). The State contends the Supreme Court rather clearly stated in that case that rape and incest on the same physical acts are to be punished separately.

> Bobenhouse further argues the trial court abused its discretion when it did not find that the underlying rape and incest charges (stemming from forcing the children to have sexual intercourse with each other) constituted the "same criminal conduct" for purposes of sentencing. **Bobenhouse would have this court hold that first degree child rape and first degree incest involve the same criminal intent: sexual intercourse. But this argument has no merit. We have previously held that "the Legislature intended to punish incest and rape as separate offenses, even though committed by a single act."** *State v. Calle*, 125 Wn.2d 769, 780, 888 P.2d 155 (1995). Bobenhouse's argument must fail in light of the precedent set by our decision in *Calle*.

State v. Bobenhouse, 166 Wn.2d 881, 896, 214 P.3d 907, 913 (2009) (bold emphasis added).

Chenoweth examines the two paragraphs following the above-listed quotation where the Supreme Court evaluated a trial court's imposition of the exceptional sentence based upon the offender scoring which was caused by the determination the offenses were not same criminal conduct. Brief of Appellant at pages 16-17. However, the State contends the Supreme Court did not "leave the same criminal conduct analysis alone." The quotation above rather clearly establishes the offense does not have the same criminal intent and thus cannot be same criminal conduct under RCW 9.94A.589.

State v. Calle, cited by *Bobenhouse* supports that position.

> In examining the legislative history of the rape and incest statutes we see no such evidence. Rather, we find only support for our conclusion that the Legislature intended to punish incest and rape as separate offenses, even though committed by a single act. As the Court of Appeals noted, the differing purposes served by the incest and rape statutes, as well as their location in different chapters of the criminal code, are evidence of the Legislature's intent to punish them as separate offenses. Incest and rape have been regarded as separate crimes in Washington since before statehood. *See* Laws of 1873, ch. 7, § 127, p. 209 (grouping incest with offenses such as seduction, adultery, polygamy, and lewdness). Today, the offenses are defined in two separate sections of the criminal code. Incest and bigamy now constitute RCW 9A.64, Family Offenses, while second degree rape is defined in RCW 9A.44, Sex Offenses.
>
> *State v. Calle*, 125 Wn.2d 769, 780, 888 P.2d 155 (1995).

The trial court properly sentenced the incest and rape as separate criminal conduct.[3]

3. The jury instruction indicating a time range by listing the start and end date of the year the victim was age fourteen did not require the State to prove two separate acts for each count.

Chenoweth contends the jury instruction required the State to prove two acts of intercourse for each count occurring a year apart. The trial court ruled on Chenoweth's motion denying the contention. The trial court concluded that based upon the way the testimony was presented, the charging documents read to the jury at the start of the case, and the way the case was argued, there was not enough basis to believe that there was the requirement to prove two acts for each of the charges. 7/10/13 RP130-1.

Each jury instruction read "on or about July 24, 2009, and July 24, 2010." CP 135-6 (one of the elements instructions). The State contends that although it could have been more precise by using the word "between" or change the "and" to "to," the jury instructions adequately defined for the jury that period of time. The time frame for each act was "on or about" a date occurring between the two listed dates defined by L.C.'s birthday.

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[3] Interestingly enough, as in *Bobenhouse*, Chenoweth's standard range would not be affected by the scoring of both the rape and incest. The incest convictions would triple score and upon a sentence of six counts, Chenoweth's offender score would still be fifteen and his range 77 to 102. RCW 9.94A.525(17), RCW 9.94A.030(46)(a)(ii), RCW 9.94A.515 - (VI), RCW 9.94A.510 - (VI).

> Because of the way the case was argued to the jury, the way the testimony was presented, the reading of the charging documents to the jury at the beginning of the jury selection process, very little room to believe that it was ever the intent to prove two acts for each of the charges brought.

7/10/13 RP 131. The trial court also ruled that any error was harmless. 7/10/13 RP 130-1. The State agrees with the trial court that in the case as a whole the instruction was harmless beyond a reasonable doubt. *State v. DeRyke*, 149 Wn.2d 906, 912-3, 73 P.3d 1000 (2003).

Chenoweth cites to *State v. Hickman* to support his contention that the two dates became separate elements which the State was required to prove.

In *Hickman,* the State had added an element to the charge that the offense occurred in Snohomish County. *State v. Hickman,* 135 Wn.2d 97, 101, 954 P.2d 900 (1998). The Supreme Court held that the additional element of venue required to be proven by the State even though not an element of the charge under the law of the case doctrine. *State v. Hickman,* 135 Wn.2d at 105.

As opposed to an added element, the date of the offense is an element of each offense. It protects against a defendant from being convicted of incidents occurring outside the statute of limitations. Here, the offenses alleged were acts of child rape and incest when the child was age fourteen. Each count was a separate act of rape. Logic determines that a

single act of rape could not occur on dates which were a year apart. Thus, as the trial court determined, the error in omission of the word between did not affect the jury's determination of each act of rape or about a date within that period of time.

V. CONCLUSION

For the foregoing reasons Chenoweth's convictions and sentence must be affirmed.

DATED this 5th day of August, 2014.

SKAGIT COUNTY PROSECUTING ATTORNEY

By: _____ 34437
ERIK PEDERSEN, WSBA#20015
Deputy Prosecuting Attorney
Skagit County Prosecutor's Office #91059

DECLARATION OF DELIVERY

I, Karen R. Wallace, declare as follows:

I sent for delivery by; [X]United States Postal Service; [ ]ABC Legal Messenger Service, a true and correct copy of the document to which this declaration is attached, to: Thomas M. Kummerow, addressed as Washington Appellate Project, 1511 Third Avenue, Suite 701, Seattle, WA 98101 . I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Executed at Mount Vernon, Washington this 5th day of August, 2014.

_____
KAREN R. WALLACE, DECLARANT