71028-1

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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 David R. Needy

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

WASHINGTON CASES

A. ARGUMENT

1. THE TRIAL COURT'S ORDER AT THE CLOSE OF EVIDENCE THAT THE EVIDENCE ON THE DISPUTED COUNTS WAS INSUFFICIENT WAS A FINAL ORDER

The State's argument in response suffers from two fatal flaws: the State ignores the fact the trial court's ruling was a final order, and the State relies solely on the decision in *State v. Collins*, 112 Wn.2d 303, 771 P.2d 350 (1989).

The State contends the trial court dismissal was a "prospective dismissal" because it was never reduced to writing, and the subsequent motion to amend was a *de facto* motion to reconsider. Response Brief at 20-22. Both arguments ignore the plain language as well of the timing of the court's ruling. In addition, the Response Brief completely ignores the subsequent clarifying 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).

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. *United States v. Martin Linen Supply Co.,* 430 U.S. 564, 571, 97 S.Ct. 1349, 51 L.Ed.2d 642 (1977).

Here, the State did not conditionally rest, the State *rested.* After the defense rested, the trial court noted that the parties had *rested.* This occurred after the discussion by the parties on the State amending the information, and the State noting its intention to amend. Thus, it would have behooved the State to *conditionally* rest, which it did not.

In addition, and which distinguishes this case from *Collins*, the State never moved for reconsideration of the court's ruling. It merely pointed out that it now wished to amend the information, which was all well and good, but it was *too late*, the parties had already rested and the court had already dismissed the counts for insufficiency. This Court should reverse the trial court's amendment of the information and order the original counts ruled insufficient by the trial court dismissed.

2. THE STATE'S ARGUMENT ON SAME CRIMINAL CONDUCT IGNORES THE LANGUAGE OF THE DECISIONS IN *CALLE* AND *BOBENHOUSE*

The State contends that decisions in *State v. Bobenhouse*, 166 Wn.2d 881, 214 P.3d 907 (2009), and *State v. Calle*, 124 Wn.2d 769, 888 P.2d 155 (1995), state that incest and child rape are to be punished separately. Response Brief at 22-24. But the State engages in the same incorrect analysis as the trial court, conflating the tests for double jeopardy and same criminal conduct.

As noted in the Brief of Appellant, 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 in *Calle* 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 State's argument is simply wrong since neither the *Bobenhouse* nor *Calle* decisions held that rape and incest could never be the same criminal conduct. The cases merely held that for *double jeopardy* purposes, the offenses must be punished separately. Further, the decision in *Calle* supports the argument the offenses can indeed be the same criminal conduct.

3. THE USE OF THE CONJUNCTIVE "AND" IN THE JURY INSTRUCTIONS REQUIRED THE STATE TO PROVE ACTS THAT OCCURRED ON *BOTH* DATES

The State commendably admits that it would "have been more precise by using the word 'between' or change the 'and' to 'to[.]'" Response Brief at 24. But, while the State agrees that the date of the offense is an element of the offense, the State argues the use of the conjunctive "and" did not add an element to the offense. *Id.* at 25.

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). Because the State proposed the "to convict" instructions, and the trial court agreed to give them, the instructions became the law of the case and the State bore the burden of proving the additional elements beyond a reasonable doubt. *Hickman,* 135 Wn.2d at 102.

Initially, the State argues each count was a separate act of rape. Response Brief at 25. The jury was never instructed that this was so. Further, the State argues that it would defy logic that a single act of rape could occur on dates that are a year apart. Response Brief. The State is absolutely right in that regard and that is why the conjunctive "and" added an additional element; the proof of an additional act of

rape on the additional date. The State failed to prove this additional element.

B. CONCLUSION

For the reasons stated in this reply brief as well as the previously filed Brief of Appellant, Mr. Chenoweth asks this Court to reverse his convictions and order them dismissed.

DATED this 10th day of October 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. 71520-8-I

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 10TH DAY OF OCTOBER, 2014, I CAUSED THE ORIGINAL **REPLY 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:

[X]	ERIK PEDERSEN, DPA SKAGIT COUNTY PROSECUTOR'S OFFICE COURTHOUSE ANNEX 605 S THIRD ST. MOUNT VERNON, WA 98273	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
[X]	CHAD CHENOWETH 365992 STAFFORD CREEK CORRECTIONS CENTER 191 CONSTANTINE WAY ABERDEEN, WA 98520	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 10TH DAY OF OCTOBER, 2014.

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