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NO. 71621-2-I

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

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STATE OF WASHINGTON,

Respondent,

v.

DALE PERCIVAL,

Appellant.

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

The Honorable John M. Meyer, Judge

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BRIEF OF APPELLANT

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A. INTRODUCTION

The State charged Dale Matthew Percival with two counts of child rape in the first degree, alleging the second count occurred between March 8, 2007 and April 1, 2008. After the close of the State's evidence at a jury trial, the trial court ruled that no rational juror could find a second rape occurred before April 1, 2008 and dismissed this charge. However, the dismissal was without prejudice. This was error. When there is insufficient evidence to support a charged offense, the charge must be dismissed with prejudice. This court must accordingly reverse and remand with instructions to dismiss the second count against Percival with prejudice.

B. ASSIGNMENT OF ERROR

The court erred by declining to dismiss the second charge against Percival with prejudice, despite the trial court's ruling that there was not sufficient evidence to support the charge.

Issues Pertaining to Assignment of Error

1. When a trial court concludes that there is insufficient evidence to support one of the State's charges, must it dismiss the charge in question with prejudice?

2. Does it violate double jeopardy to permit the State to refile a charge dismissed for insufficient evidence?

C. STATEMENT OF THE CASE

The State initially charged Percival with one count of first degree child rape for having sexual intercourse with his daughter, A.S., between January 1, 2005 and December 31, 2005. CP 1. Prior to trial, the State amended its information to include two counts of first degree child rape for having sexual intercourse with A.S. CP 32-33. Both of the charged counts alleged the conduct occurred “[o]n or about and between March 8, 2007 and April 1, 2008.” CP 32-33.

At trial, A.S. testified Percival raped her twice, once when she was six years old and again when she was eight. 2RP<sup>1</sup> 73, 84, 91, 104. A.S.’s date of birth is March 8, 2001. CP 30. A.S. thus did not reach the age of eight until March 8, 2009, which is well outside the charged period of March 8, 2007 and April 1, 2008. CP 32-33. Thus, A.S.’s testimony was that only one of the rapes occurred during the charging period.

In light of A.S.’s testimony, the State moved to amend its information a second time to charge that both counts occurred between March 8, 2007 and April 1, 2010. CP 62-63; 2RP 110. Defense counsel argued that amendment in the middle of trial would prejudice Percival. 2RP 111-13. The court heard additional argument from the parties, but reserved

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<sup>1</sup> This brief will reference the verbatim reports of proceedings as follows: 1RP – January 6, 13, and 14, 2014; 2RP – January 15 and 16, 2014; 3RP – January 17, 2014; 4RP – February 27, 2014.

ruling. 2RP 115. The State rested after the next witness testified. 2RP 118. The court permitted the State to reopen its case to permit additional argument on the State's proposed amendment. 2RP 120. Ultimately, the trial court denied the motion to amend the information. CP 64; 2RP 126. Specifically, the court noted, "I think it's happening much too late in the game. And after all of the testimony has been taken, after all of the cross examination has been done, and it is a very significant amendment; it's not a very short period of time . . . ." 2RP 126.

Following the trial court's ruling, the parties turned to Percival's motion to dismiss the second charge. 2RP 126-27. Percival argued that there was insufficient evidence "based on the testimony that the alleged victim's date of birth was March 8, 2001 and that she was 8 years of age at the time that the second incident occurred, which was well beyond the charging period in the amended information." 2RP 127. The trial court asked the State, "what evidence there is if it were believed that a jury could find that the second incident occurred before April 1st, 2008. What are the facts that you have elicited from the testimony?" 2RP 129-30. The State responded, "I guess there aren't any, Your Honor. I would renew my motion to amend." 2RP 130. The trial court then dismissed the second count. 2RP 130.

When defense counsel later presented an order regarding the dismissal, he indicated, “I think [the State’s] position is that [the dismissal] should be without prejudice in the event [it] wants to file additional charges. But I think double jeopardy would prevent that, and I also think a mandatory joinder would prevent that. I think the dismissal order should indicate prejudice.” 2RP 148. The trial court declined to dismiss the charge with prejudice, ruling, “Well, if that’s a battle we have to fight we’ll fight it down the road. I’m going to dismiss it without prejudice at this time.” 2RP 149. The trial court’s written order thus provides, “The Defense motion to dismiss count II without prejudice is granted. The Court finds no reasonable juror could find beyond a reasonable doubt that the alleged second act of rape occurred within the charging period.” CP 67.

To ensure that the jury only considered the first count (when A.S. was six years old) in determining Percival’s guilt, the trial court provided a Petrich<sup>2</sup> unanimity instruction. CP 78 (Jury Instruction 6); 2RP 143; 3RP 2-4. This instruction read, “In alleging that the defendant committed Rape of a Child in the First Degree, the State relies upon evidence regarding a single act constituting the alleged crime. To convict the defendant, you must unanimously agree that this specific act was proved.” CP 78. The trial court

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<sup>2</sup> State v. Petrich, 101 Wn.2d 566, 683 P.2d 173 (1984), overruled in part on other grounds by State v. Kitchen, 110 Wn.2d 403, 756 P.2d 105 (1988).

also proposed after this instruction to tell the jury “that that single act is the alleged incident, which occurred when she was 6 years old . . .” 3RP 4. The parties also emphasized during closing arguments that the only incident at issue was from when A.S. was six years old. 3RP 7, 15, 19, 24-25, 47-48. The jury found Percival guilty of one count of first degree rape of a child. CP 83.

At sentencing, the trial court imposed a midrange sentence of 108 months to life, community custody for life, and \$800 in legal financial obligations. CP 21-23; 4RP 10. This timely appeal follows. CP 16.

D. ARGUMENT

WHEN A CHARGED OFFENSE IS NOT SUPPORTED BY SUFFICIENT EVIDENCE, IT MUST BE DISMISSED WITH PREJUDICE

“Retrial following reversal for insufficient evidence is ‘unequivocally prohibited’ and *dismissal is the remedy.*” State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1998) (emphasis added) (quoting State v. Hardesty, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996)). “The double jeopardy clause of the Fifth Amendment to the U.S. Constitution protects against a second prosecution for the same offense, after acquittal, conviction, or a reversal for lack of sufficient evidence.” Hardesty, 129 Wn.2d at 309 (citing North Carolina v. Pearce, 395 U.S. 711, 717, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969), overruled in part on other grounds by Alabama v. Smith,

490 U.S. 794, 109 S. Ct. 2201, 104 L. Ed. 2d. 865 (1989)). A trial court's finding of insufficient evidence is the equivalent of an acquittal. Richardson v. United States, 468 U.S. 317, 325 n.5, 104 S. Ct. 3081, 82 L. Ed. 2d 242 (1984); see also Hudson v. Louisiana, 450 U.S. 40, 42-44, 101 S. Ct. 970, 67 L. Ed. 2d 30 (1981) (holding that trial court's ruling that there was insufficient evidence to sustain a verdict precludes retrial). Thus, double jeopardy principles require that a charge be dismissed with prejudice if not supported by sufficient evidence.

The trial court and the State both acknowledged that there was not sufficient evidence to support a conviction based on the second count of first degree child rape, and the trial court thus dismissed this count. 2RP 129-130. When it came time to enter an order dismissing the count, however, the trial court dismissed the charge without prejudice, allowing the State to refile the charge. CP 67; 2RP 149. As discussed, any retrial on a charge that was dismissed because of insufficient evidence would violate double jeopardy. Because the trial court's dismissal without prejudice permits a violation of Percival's rights against being placed twice in jeopardy for the same crime, this court must reverse.

In response, the State might argue that an order dismissing a charge without prejudice is not appealable under State v. Taylor, 150 Wn.2d 599, 80 P.3d 605 (2003). There, the Washington State Supreme Court considered

Taylor's appeal from the State's pretrial dismissal due to the unavailability of one of the State's witnesses. Id. at 600-01. The State dismissed the case not because of insufficient evidence but to avoid the expiration of Taylor's speedy trial date. Id. The court held that the order dismissing the case without prejudice is not a "final judgment" because it "does not bar the State from refileing charges against the defendant within the applicable statute of limitations." Id. at 602. In addition, the Taylor court held that "[b]ecause the legal and substantive issues are generally not resolved when a dismissal without prejudice is ordered, there is a lack of finality" and a dismissal without prejudice "leaves the matter in the same condition in which it was before the commencement of the prosecution." Id. (quoting State v. Corrado, 78 Wn. App. 612, 615, 898 P.2d 860 (1995) (quoting 12 ROYCE A. FERGUSON, JR., WASHINGTON CRIMINAL PRACTICE & PROCEDURE § 2218 (1984))).

In stark contrast to Taylor, a jury had been impaneled in Percival's case and had heard all of the State's evidence when the trial court dismissed one of the charges. Thus, unlike Taylor, jeopardy had attached in Percival's case. See State v. George, 160 Wn.2d 727, 742, 158 P.3d 1169 (2007) ("Generally, jeopardy attaches in a jury trial when the jury is impaneled, and in a bench trial when the first witness is sworn."). Because jeopardy had attached, the State's case against Percival was not in the condition it was

before commencement of the prosecution. Cf. Taylor, 150 Wn.2d at 602. Moreover, the trial court dismissed the charge against Percival because of insufficient evidence, which was a final determination of the charge on the merits. Hudson, 450 U.S. at 44-45. Because the trial court had entered a final determination affecting legal and substantive issues pertaining to one count of child rape, our supreme court's decision in Taylor does not control.

E. CONCLUSION

When the trial court dismissed a count of child rape for insufficient evidence, it should have done so with prejudice to honor Percival's right against double jeopardy. The trial court's failure to do so is a violation of Percival's Fifth Amendment rights. This court must accordingly reverse and remand with instructions to dismiss the second count of child rape with prejudice.

DATED this 21<sup>st</sup> day of August, 2014.

Respectfully submitted;

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

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STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 71621-2-1
	)	
DALE PERCIVAL,	)	
	)	
Appellant.	)	

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**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 21<sup>ST</sup> DAY OF AUGUST 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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SIGNED IN SEATTLE WASHINGTON, THIS 21<sup>ST</sup> DAY OF AUGUST 2014.

X Patrick Mayovsky

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