

71621-2

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NO. 71621-2-I

IN THE COURT OF APPEALS – STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON
Respondent,

v.

DALE PERCIVAL,
Appellant.

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

The Honorable John M. Meyer, Judge

RESPONDENT'S BRIEF

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COURT OF APPEALS
STATE OF WASHINGTON
DIVISION ONE

ORIGINAL

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I. SUMMARY OF ARGUMENT

Dale Percival was convicted of a single count of Rape of a Child in the First Degree. A second count was dismissed at trial based upon the trial court's determination that the count was amended untimely. The trial court orally and initially in writing indicated the dismissal was without prejudice. Percival contends this Court should direct the dismissal be with prejudice.

However, in the judgment and sentence the second count was dismissed without reference to the dismissal being with or without prejudice. That written dismissal was with prejudice and no further correction of the record is required.

II. ISSUES

1. Where a count was dismissed based upon a finding that the information was untimely amended to correct the time frame and that therefore insufficient evidence was presented at trial, should the dismissal have been with prejudice?
2. Where a count is indicated as dismissed in a judgment and sentence without specifying whether the dismissal was with or without prejudice is the dismissal presumed to be without prejudice?

III. STATEMENT OF THE CASE

On March 12, 2012, Dale Percival was charged with a single count of Rape of a Child in the First Degree of his daughter alleged to have occurred on or about and between January 1, 2005, and December 31, 2005. CP 1. Percival was alleged to have engaged in digital and penile sexual intercourse with a six-year-old female. CP 30. The probable cause declaration only described a single incident in a trailer which Percival acknowledged occurred at the trailer. CP 30.

On November 1, 2013, an amended information was filed alleging two counts of Rape of a Child in the First Degree involving the same victim. CP 32-3. Both counts were alleged to have occurred on or about and between March 8, 2007, and April 1, 2008, and alleged to have been separate and distinct conduct. CP 32-3. The supporting probable cause declaration indicated that the victim disclosed a second incident in an interview occurring October 21, 2013. CP 36.

On January 13, 2014, the case proceeded to trial. 1/13/14 RP 12, 1/14/14 RP 115.¹

¹ 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:

1/6/14 RP	Hearing on Request for New Counsel	Vol 1
1/13/14 RP	Trial Day 1 - 3.5 Hearing	Vol 1
1/14/14 RP	Trial Day 2 - Testimony	Vol 1
1/15/14 RP	Trial Day 2 – Testimony	Vol 2
1/16/14 RP	Trial Day 3 – Testimony	Vol 2

The victim's birthday is March 8, 2001. 1/15/14 RP 72. She lived in Mount Vernon, Washington between ages 6 and 10. 1/15/14 RP 73. The victim testified to two separate incidents. The victim testified about a first incident occurring when she was in the first grade. 1/15/14 RP 75-81. The second incident which was described occurred at a trailer. 1/15/14 RP 81-5. That second incident occurred when the victim was in the second or third grade. 1/15/14 RP 81. Later in cross-examination, she testified she believed she was eight years-old. 1/15/14 RP 101.

After the victim testified, the State filed a second amended information and orally moved to amend the information. CP 62-3, 1/16/14 RP 110. Both counts were alleged to have occurred on or about and between March 8, 2007, and April 1, 2010, and again alleged to have been separate and distinct conduct. CP 62-3. The amendment was based upon the victim's testimony. 10/16/14 RP 110. The court delayed ruling on the motion to complete testimony. 1/16/14 RP 11

The victim's mother testified they moved to Mount Vernon in October of 2007, and that the victim attended Washington Elementary for three years. 1/16/14 RP 116. The mother testified that they moved to the McClean Road address around Mother's Day in 2008. 1/16/14 RP 116.

1/17/14 RP
2/27/14 RP

Trial Day 4 – Closing Argument
Sentencing

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Separate.

The trial court denied the amendment of the information indicating it happened “too late in the game,” that all the testimony had been done and due to the length of the period amended. 1/16/14 RP 126. The trial court indicated the court believed the defendant would be prejudiced, without specifying any particular prejudice in how defense could respond. 1/16/14 RP 126.

The trial court’s written order denying the amendment of the information read:

“The State’s motion to amend the information is denied. The court finds the motion is untimely and the defendant would be prejudiced.”

CP 64. The defendant pursued a motion to dismiss at the close of the State’s case for sufficiency of the evidence as to count 2. 1/16/14 RP 126-9. The trial court questioned the State if, given the denial of the amendment, there were facts supporting the incident occurring during the charging period. 1/16/14 RP 129-30. The State noted there were not any if the court would not grant the amended information or infer the on or about period in the charging document included the events described by the victim. 1/16/14 RP 130. The trial court therefore dismissed count two. 1/16/14 RP 130. The trial court entered a written order dismissing count two. It reads:

The defense motion to dismiss count II without prejudice is granted. The court finds no reasonable jury could find

beyond a reasonable doubt that the alleged second act of rape occurred within the charging period.”

CP 67. Although written as a defense motion, the defendant counsel noted that defense “objects to dismissal without prejudice.” CP 67.

On January 17, 2014, the jury found Percival guilty of Rape of a Child in the First Degree. CP 83.

On February 27, 2014, Percival was sentenced to a sentence of 108 months with potential confinement for up to life pursuant to RCW 9.94A.507. CP 7-8. The judgment and sentence indicated at page 4 as to count 2: “The Court DISMISSES Count II, Rape of a Child in the First Degree.” CP 8. And it also indicated at page 12: “RAPE OF A CHILD IN THE FIRST DEGREE – RCW 9.94A.073 – CLASS A FELONY, COUNT II, DISMISSED.” CP 15.

On March 4, 2014, Percival timely filed a notice of appeal. CP 16-28.

IV. ARGUMENT

1. The dismissal should have been with prejudice.

The State concedes that the dismissal of count two should have been with prejudice. The trial court’s denial of the amendment of the information and ruling that the on or about and between language of the charging document was inadequate, meant the State lacked the facts to prove the offense during the charged time period.

The issue, as framed in *Jackson v. Virginia*, supra, is whether, after viewing the evidence most favorable to the State, any rational trier of fact could have found the essential elements of kidnapping beyond a reasonable doubt.

State v. Green, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980), citing *Jackson v. Virginia*, 443 U.S. 307, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979).

The State conceded that fact at trial. 1/16/14 RP 130.

Insufficiency of the evidence at the close of the State's case means the charge should have been dismissed with prejudice. *State v. Hardesty*, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996), citing, *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S. Ct. 2072, 2076, 23 L. Ed. 2d 656 (1969).²

Thus the trial court's ruling should have been with prejudice.

2. The dismissal in the judgment and sentence is not indicated as being without prejudice so no additional order is required at the trial court.

The question remains: what action should this Court take to address this matter?

The State contends that further dismissal or amendment of the prior order is not required in light of the two separate indications in the judgment

² The State may have intended to preserve the ability to pursue the offense within the correct charging period. Since the jury would not have decided on conduct within the charging period, the State could contend the conduct would not be double jeopardy. Due to the defendant's conviction on the charged offense, his limited claims here, and the potential arguments pertaining to mandatory joinder, the State does not intend to pursue an additional case for the conduct testified to having occurred outside of the charged time frame.

and sentence that count two was dismissed which does not indicate that a dismissal was without prejudice.

Percival contends the State may cite to *State v. Taylor*, 150 Wn.2d 599, 80 P.3d 605 (2003) to argue that Percival cannot appeal the dismissal without prejudice. The State does not so contend. That case is inapplicable here since the *Taylor* was a State's motion to dismiss without prejudice. Here the trial court had reviewed Percival's motion to dismiss prejudice and improperly designated it as a defendant's motion to dismiss without prejudice. CP 67.

V. CONCLUSION

The trial court should have granted the motion to dismiss with prejudice. But the subsequent dismissal in the judgment and sentence which was not without prejudice means this Court need not direct the trial court to take further action.

DATED this 20th day of October, 2014.

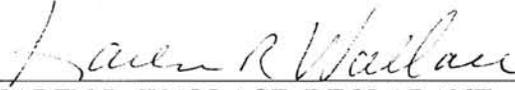
SKAGIT COUNTY PROSECUTING ATTORNEY

By: 
ERIK PEDERSEN, WSBA#20015
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DECLARATION OF DELIVERY

I, Karen R. Wallace, declare as follows:

I sent for delivery by; United States Postal Service; ABC Legal Messenger Service, a true and correct copy of the document to which this declaration is attached, to: Kevin Andrew March, addressed as Nielsen Broman & Koch PLLC, 1908 E. Madison Street, Seattle, WA 98122-2840. 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 30th day of August, 2013.



KAREN R. WALLACE, DECLARANT