

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

GEORGE MICHAEL SZALMA,

Defendant-Appellee.

UNPUBLISHED

August 11, 2009

No. 285632

Macomb Circuit Court

LC No. 2007-004428-FC

Before: Owens, P.J., and Servitto, and Gleicher, JJ.

PER CURIAM.

The prosecutor appeals as of right from the trial court's order granting defendant's motion for directed verdict. We reverse. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant was charged with criminal sexual conduct in the first degree, MCL 750.520b(1)(a), based upon allegations that he had manually penetrated the anus of his young son. Complainant testified that, when he was four years old, he and defendant were in the bathroom together, both naked, when defendant inserted his "whole hand" into the child's anal cavity, and "moved it" forward and back, causing pain. The child's mother testified that, during the relevant time period, the boy's buttocks appeared "weird," "red," and "gaped open," causing her to call a crisis line, and then take the child to a doctor.

At the close of the prosecutor's presentation of proofs, defense counsel moved the trial court for a directed verdict on the ground that the evidence was insufficient to support a verdict of guilty. In granting the motion, the trial court's ruling addressed the credibility and the possible motivations of the witnesses, and the ambiguities in the medical evidence. In concluding, however, the trial court declared that, "even in the light most favorable to the nonmoving party, I don't find that a reasonable jury could find beyond a reasonable doubt that the crime was committed as charged."

MCL 770.12 provides that "the people" may appeal criminal judgments, where constitutional double jeopardy principles would not be offended. Subsection 12(1)(a) provides for appeal by right from final judgments or orders of the circuit court in original actions.

The Double Jeopardy Clauses of the federal and state constitutions prohibit a criminal defendant from being placed twice in jeopardy for a single offense. *People v Booker (After*

Remand), 208 Mich App 163, 172; 527 NW2d 42 (1994), citing US Const, Ams V, XIV; Const 1963, art 1, § 15. Because of that constitutional protection, a “trial court’s grant of defendant’s motion for directed verdict bars any further proceedings relative to the charges brought against defendant.” *People v Nix*, 453 Mich 619, 626-627; 556 NW2d 866 (1996). This holds even where the verdict of acquittal “was based upon an egregiously erroneous foundation.” *Id.* at 625 (internal quotation marks and citations omitted). Accordingly, a trial court’s ruling, based on its evaluation of all the evidence and its conclusion that it was legally insufficient, “precludes appellate inquiry into its legal correctness.” *Id.* at 627.

Plaintiff argues that the trial court in fact based its decision on a credibility determination. In such instances, retrial is not barred. *People v Mehall*, 454 Mich 1, 6-7; 557 NW2d 110 (1997). This is because a ruling on a motion for directed verdict based on a weighing of the evidence, as opposed to the sufficiency of the evidence, does not result in acquittal. *Id.*

MCR 6.419(A) authorizes a trial court to “direct a verdict of acquittal on any charged offense as to which the evidence is insufficient to support conviction.” In deciding such motions, “it is not permissible for a trial court to determine the credibility of witnesses . . . no matter how inconsistent or vague that testimony might be.” *Mehall, supra* at 6. Instead, a directed verdict of acquittal is proper only if “considering all the evidence in the light most favorable to the prosecution, no rational trier of fact could find that the essential elements of the crime charged were proven beyond a reasonable doubt.” *Id.* Accordingly, where a court granting such a motion gives no indication that it considered all the evidence in the light most favorable to the prosecution, but instead resolves credibility contests, there is no ruling on sufficiency, thus no acquittal, “regardless of how the trial court characterized its decision,” and thus “retrial is not precluded under the Double Jeopardy Clauses of the federal and state constitutions.” *Id.* at 7.

In this case, the trial court engaged in a somewhat lengthy analysis of its empirical, objective, sense of what the evidence showed. In deciding the motion for directed verdict, the trial court unequivocally focused on the credibility of the witnesses. The court stated, for example, that the child’s testimony provided “the inference is it was his dad’s finger went into his anus, and it didn’t feel that great. By the way, I’d still love to see my daddy.”

The court also focused its consideration extensively upon the tumultuous relationship between the biological mother and biological father of the child, noting that they had been in court regarding parenting time issues and that they exchanged custody at the police department and indicating that “this is all significant to someone weighing the decision I’m weighing. You go from having a child together, hopefully in love with each other. . .to, I don’t trust this other person. I’m willing to think the worst that can be thought of this other person.” Clearly the focus was on whether the biological mother and the child’s testimony were credible. The trial court’s concluding statement that, “even in the light most favorable to the nonmoving party, I don’t find that a reasonable jury could find beyond a reasonable doubt that the crime was committed as charged” does not alter the fact that the trial court based its decision on the credibility of the witnesses. Pursuant to *Mehall, supra*, retrial is not precluded under the Double Jeopardy Clauses of the federal and state constitutions.

In granting defendant’s motion, the trial court failed to view all of the evidence in a light most favorable to the prosecution, as was required, and there was sufficient evidence from which

the jury could have found the defendant guilty of the charged crime. The complainant described how defendant manually penetrated his anus while he was bending over, while both were naked in the bathroom. The complainant could not see defendant's hand, but described his pain and discomfort. The accounts of a single witness can suffice to persuade a jury of a defendant's guilt beyond a reasonable doubt. See *People v Jelks*, 33 Mich App 425, 432; 190 NW2d 291 (1971). The child's mother also reported observing the child acting as if recently traumatized, and that the boy's buttocks displayed signs of physical distress. "Credibility is a matter for the trier of fact to ascertain." *People v Vaughn*, 186 Mich App 376, 380; 465 NW2d 365 (1990). The jury in this case might reasonably have come to a conclusion different from that of the trial court, had it been allowed to proceed to a verdict.

Reversed and remanded for a new trial. We do not retain jurisdiction.

/s/ Donald S. Owens

/s/ Deborah A. Servitto

/s/ Elizabeth L. Gleicher