

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

ANDRE GERARD WILSON,

Defendant-Appellee.

UNPUBLISHED

September 17, 2009

No. 286220

Macomb Circuit Court

LC No. 07-000450-FH

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

JAMILA AISHA WILSON,

Defendant-Appellee.

No. 286222

Macomb Circuit Court

LC No. 07-000451-FH

Before: Murphy, P.J., and Meter and Beckering, JJ.

PER CURIAM.

The prosecution appeals by delayed leave granted from two orders in which the circuit court denied the prosecution's motion to amend the information against defendants and granted defendants' motions for a directed verdict, dismissing charges of first-degree child abuse, MCL 750.136b(2), without prejudice. We affirm, except as to the trial court's ruling that dismissal is without prejudice; double jeopardy bars retrial on the child abuse charges. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendants were charged with abusing their one-month-old son. The case was tried before a jury. Following the close of the prosecution's case, defendants moved for directed verdicts of acquittal, which the trial court denied. The case was submitted to the jury, but it was unable to reach a verdict, and the trial court declared a mistrial. Months later, the prosecution moved to amend the information to add a charge of accessory after the fact. Defendants opposed the amendment and again requested dismissal of the charges for the reasons previously argued relative to the motions for a directed verdict.

At the hearing, the court denied the prosecutor's motion to amend because "[t]his matter has already been authorized, it's gone through preliminary exam, it's gone through trial and so forth." However, the court agreed with defendants that the evidence at trial was insufficient to determine whether either defendant was the perpetrator. The court reasoned:

[W]hat we have in this situation was testimony that indicated that both parents were present and that the child was injured. That basically is what it was. Because we have testimony, we have absolutely zero testimony which would indicate a motive of either one of these people to injure this child. In fact, the testimony indicates in this case that these were both very caring parents for this child, having brought the child to the hospital – I mean to the doctor's office I think two or three times before for the shots, for what ever the child needed. In fact, the child was at the doctor three days before it [sic] was brought to the hospital to show the children, the child was brought by the parent's to the doctor's office, and was perfectly – there was nothing the matter with the child at that time, other than being colicky.

Three days later, the parents show up with the child at 7:00 in the morning, and that child, at that time, is critically injured, severe, and there's the allegation that either one or the other parent did it or they both did it, and so forth. So the question in this Court's mind is whether or not there was a sufficiency of the evidence.

I do know that I did rule on that particular matter, and it's not a question as the [*People v Mehall*, 454 Mich 1; 557 NW2d 110 (1997)] case. My ruling is not based on the [*Mehall*] ruling, which was all of a sudden the Court is thinking about credibility of the witnesses. There was no issue on creditability [sic] of these witnesses. There was only the prosecution's witnesses that testified in this case and there was no defense witnesses whatsoever called in this particular matter.

Now, the Court has to determine whether or not there is a sufficiency of the evidence, and what I am doing is I'm not reflecting on [post-trial] discussion with the jury, that has nothing to do with my decision. I have to only reflect on the evidence that was admitted at trial and try to consider whether or not any reasonable jury from that evidence could come back with a verdict on one or the other of these people. That is my duty and my job.

I don't remember why I did not grant the motion at that time. I don't know. And it was not renewed when the People – when the Defendant rested, because immediately after I made my ruling the Defendant rested and the motion was not renewed. I might have reconsidered it at that time. But I am reconsidering it now. I do think there was an insufficiency of evidence. When I think of a criminal case, I think of if there was a motive and there was an opportunity, and then there could be an inference made. But here, I don't have any motive, there is an opportunity, but there are two people there. It's from, it's overnight. The possibility of people sleeping and so forth.

So the Court is going to dismiss both charges in this particular matter based on what the Court is finding is an insufficiency of evidence, that no reasonable jury can come back on either one of these parties with a guilty beyond a reasonable doubt.

Following inquiry by the prosecutor, the trial court stated that the dismissal would be “absolutely without prejudice. Certainly, counsel. But that was a mistrial. So I don’t think jeopardy is ever attached.”¹ The court entered orders granting defendants’ motions for directed verdict, dismissing the prosecution’s case against each defendant without prejudice.

On appeal, the prosecution argues that the trial court’s grant of a directed verdict of acquittal must be reversed because the decision was based on a misunderstanding of the law and a desire to avoid a second trial. According to the prosecution, where the trial court’s decision is not based upon consideration of all the evidence, as in *Mehall, supra*, it is not an acquittal, and double jeopardy does not bar retrial. The prosecution also argues that the court’s ruling focused on a failure to show or prove motive, but motive is not an element of the crime.²

Whether the trial court’s decision was based on the sufficiency of the evidence and constituted an acquittal is determined by a reviewing court de novo. See *Mehall, supra* at 5-7. A double jeopardy challenge presents a question of law that this Court also reviews de novo. *People v Herron*, 464 Mich 593, 599; 628 NW2d 528 (2001).

“A defendant may not be retried after an acquittal that is granted on the basis of insufficient evidence.” *Mehall, supra* at 5 (citation omitted). The trial court’s characterization of its ruling and the form of the motion are not dispositive; rather, the reviewing court “must look to the substance of the decision to determine whether the ruling of the judge, whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged. . . .” *Id.* (citation and internal quotation marks omitted). “Retrial is not permitted if the trial court evaluated the evidence and determined that it was *legally insufficient* to sustain a conviction.” *Id.* at 6.³ In other words, if the court’s ruling actually represents a resolution of some or all of the factual elements of the offense charged, then retrial is precluded, regardless of whether the resolution was correct. *Id.* at 5-6. However, if the trial court’s ruling was not based on the sufficiency of the prosecution’s proofs, then there is no acquittal. *Id.* at 7. This is true regardless of how the trial court characterized its decision. *Id.*

¹ Contrary to the trial court’s comments, jeopardy attached when the jury was selected and sworn. *Mehall, supra* at 4. When a trial court declares a mistrial because of a hung jury, the original jeopardy is not terminated because there has not been an assessment of the sufficiency of the prosecution’s proofs. *Id.* at 4-5. In those circumstances, retrial is not precluded. *Id.* at 5.

² The prosecution does not ask us to visit and reverse the court’s ruling that denied amendment of the information. The prosecution merely cites the denial and claims that it was contrary to law in an effort to show that the court was improperly motivated to dismiss the case in order to avoid a second trial.

³ The prosecutor agrees with this proposition, but does not agree that the court’s ruling here can be accurately characterized as an acquittal for lack of sufficient evidence.

In the present case, the trial court's characterization of its decision comported with its substance. Although the trial court made references to a lack of motive, the overall nature of the court's ruling was that the evidence was simply insufficient to establish beyond a reasonable doubt that either defendant was the perpetrator of the crime. The prosecution must prove a defendant's identity as the perpetrator of a charged offense beyond a reasonable doubt. *People v Oliphant*, 399 Mich 472, 489; 250 NW2d 443 (1976); *People v Kern*, 6 Mich App 406, 409-410; 149 NW2d 216 (1967). The trial court's ruling indicates that the court evaluated the evidence and determined that no reasonable jury could find that either defendant was guilty beyond a reasonable doubt. Unlike in *Mehall*, the court ruled on the sufficiency of the prosecution's proofs, and the ruling was truly an "acquittal." See *Price v Vincent*, 455 Mich 110, 119; 565 NW2d 629 (1997). Whether this Court agrees with the trial court's assessment of the evidence is immaterial because "[a] judgment of acquittal, however erroneous, bars further prosecution on any aspect of the count and hence bars appellate review of the trial court's error." *Sanabria v United States*, 437 US 54, 69; 98 S Ct 2170; 57 L Ed 2d 43 (1978); see also *People v Anderson*, 409 Mich 474, 492-494; 295 NW2d 482 (1980).⁴

Affirmed, except as to the trial court's ruling that dismissal is without prejudice; double jeopardy bars retrial on the child abuse charges, and therefore, that part of the court's ruling is vacated.

/s/ William B. Murphy
/s/ Patrick M. Meter
/s/ Jane M. Beckering

⁴ The prosecutor's contention that the trial court was motivated by a desire to avoid a second trial has no relevance. Whatever the court's motivation, it ultimately dismissed the case on the basis that the evidence was insufficient to support a conviction.