

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

BOBBY R. HOWARD,

Defendant-Appellee.

UNPUBLISHED

December 23, 2003

No. 240915

Wayne Circuit Court

LC No. 01-008000-02

Before: Schuette, P.J., and Murphy and Bandstra, JJ.

PER CURIAM.

The trial court granted defendant's motion for a directed verdict with regard to charges of felon in possession of a firearm, MCL 750.224f(2), and possession of a firearm during the commission of a felony, MCL 750.227b, and, accordingly, dismissed those charges. The prosecution appeals as of right, asking this Court to vacate the order of dismissal and remand for trial on those charges.¹ We affirm.

We agree with defendant that constitutional double jeopardy principles bar him from being subjected to further proceedings regarding the charges at issue, because the trial court's order granting a directed verdict as to those charges constituted an acquittal for double jeopardy purposes. Double jeopardy divests this Court of jurisdiction to address the prosecutor's challenge to the trial court's ruling; the prosecutor's appeal of the matter is barred. MCL 770.12.

Contrary to the implication of the parties' arguments, the trial court did not direct a verdict in favor of defendant on the basis of the prosecution's failure to present evidence that defendant's rights with regard to firearms had not been restored pursuant to MCL 28.424. Rather, the trial court directed a verdict on the basis of the prosecution's failure to prove that less than five years had passed since the completion of any payment of fines, term of imprisonment, or term of probation or parole related to defendant's prior felony conviction upon which the felon in possession charge was based.

¹ Defendant was convicted of a separate charge of carrying a concealed weapon, MCL 750.227, but that conviction is not at issue on appeal.

In *People v Nix*, 453 Mich 619, 627; 556 NW2d 866 (1996), our Supreme Court set forth the following standard for determining what constitutes an acquittal for double jeopardy purposes:

“[W]hether 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.” [Quoting *United States v Martin Linen Supply Co*, 430 US 564, 571; 97 S Ct 1349; 51 L Ed 2d 642 (1977)(alteration in original).]

Importantly, “[t]he phrase ‘correct or not’ refers to all aspects of the trial court’s ultimate legal decision, including even cases where the trial court is factually wrong with respect to whether a particular factor is an element of the charged offense.” *Nix, supra* at 628. In *Nix*, the trial court incorrectly concluded that the prosecution had to show that the defendant had a legal duty to aid the victim. *Id.* at 622-623. In the present case, the trial court’s remarks when directing a verdict for defendant reflect that it regarded the prosecution as being required to prove that defendant possessed a firearm within a certain time frame as an element of the charges at issue and that it failed to do so. Under *Nix*, the trial court’s grant of the directed verdict constituted an acquittal of the relevant charges because the court considered the factual evidence presented by the prosecution and concluded, correctly or not, that it was insufficient as a matter of law to allow the jury to convict defendant of those charges. Additionally, in *Sanabria v United States*, 437 US 54, 64; 98 S Ct 2170; 57 L Ed 2d 43 (1978), the United States Supreme Court stated that “when a defendant has been acquitted at trial he may not be retried on the same offense, even if the legal rulings underlying the acquittal were erroneous.” The rulings in *Nix* and *Sanabria* suggest that double jeopardy is implicated where a judge makes an erroneous legal ruling with respect to the elements of a crime that a prosecutor must establish, and where that erroneous determination underlies the finding that insufficient evidence was presented.² The acquittal bars any further proceedings against defendant with regard to the relevant charges.

² We believe that our assessment of the current law in Michigan is correct as further supported by “dissenting” statements by Chief Justice Corrigan in *People v Limmer*, 461 Mich 974; 612 NW2d 395 (2000)(joined by Justices Weaver and Markman), where our Supreme Court denied leave to appeal. The Chief Justice stated:

Under the current governing standards in Michigan, the prosecution’s application cannot succeed. Nonetheless, I would grant leave to appeal to revisit this Court’s conclusion in [*Nix*] that a directed verdict granted on the basis of an error of law is nevertheless an acquittal for purposes of double jeopardy.

* * *

In this case, as in *Nix, supra*, the trial court apparently granted a directed verdict on the basis of an erroneous legal ruling that defendant could not be convicted because he owed no legal duty to the victim. *Nix* improperly characterized such a ruling as a determination that insufficient evidence existed to support a conviction. . . . [T]he trial court’s error of law in this case did not involve an actual element of the crime. Rather, the trial court erroneously

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We note that the trial court's legal analysis in directing a verdict for defendant appears to be plainly incorrect. By its plain language, the felon in possession statute, MCL 750.224f(2), does not merely prohibit a person convicted of a specified felony from possessing a firearm within a certain time period, but rather expressly states that such a person is prohibited from possessing a firearm until "all" of a list of circumstances exist, including the person's rights with regard to firearms having been restored under MCL 28.424. As set forth above, however, under *Nix*, the trial court's legal error with regard to the elements of this charge does not alter the effect of its grant of a directed verdict as an acquittal for double jeopardy purposes that bars retrial on that charge.

We disagree with the prosecution's reliance on *People v Mehall*, 454 Mich 1; 557 NW2d 110 (1997), as supporting its position that double jeopardy principles do not bar retrial with regard to the relevant charges. In *Mehall*, in purporting to grant a directed verdict in favor of the defendant, the trial court "focused almost exclusively on the complainant's testimony, and on its conclusion that her testimony was not credible." *Id.* at 6. Our Supreme Court held that by "concentrating on the complainant, and disregarding her testimony as unbelievable," the trial court "failed altogether to rule on the sufficiency of the prosecution's proofs" and, accordingly, regardless of how the trial court characterized its decision, retrial was not precluded by the federal or state Double Jeopardy Clauses. *Id.* at 6-7. *Mehall* reflects that, where a trial court expresses that it is improperly making credibility decisions in purporting to grant a directed verdict of acquittal, this does not constitute an acquittal for double jeopardy purposes because it does not involve an appropriate effort to evaluate the legal sufficiency of the evidence. But in

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determined that the offense included an additional element – a duty. Because the trial court's legal determination did not involve an essential element of the offense charged, it did not necessarily constitute an acquittal for double jeopardy purposes.

We note that other jurisdictions have ruled consistent with Chief Justice Corrigan's dissenting statements. See *United States v Maker*, 751 F2d 614 (CA 3, 1984); *Idaho v Korsen*, 138 Idaho 706; 69 P3d 126 (2003).

We share Chief Justice Corrigan's view that *Nix* should be reconsidered. Statements in *Nix*, albeit arguably dicta, could be read to mean that the double jeopardy clause applies to acquittals resulting from "egregiously erroneous" determinations that "a particular factor is an element of the charged offense." *Nix*, supra at 625, 628. Thus a double jeopardy bar would prevent retrial of a defendant acquitted by a judge who concluded that the offense charged had as one of its elements that the moon is made of green cheese and that, the prosecutor having failed to prevent any evidence to that effect, a directed verdict was required. To state such a result is to show the deficiencies of the rule that would even arguably allow it. That rule certainly does not assure that the double jeopardy clause operates in a manner that, while preventing the retrial of factual issues properly determined in favor of a defendant, nonetheless allows the public "its valued right to have one complete opportunity to vindicate its laws." *Id.* at 642. (J Boyle, dissenting).

the present case there is no indication that the trial court relied on credibility decisions in granting the directed verdict at issue; the court simply considered the sufficiency of the evidence. Accordingly, *Mehall* does not support a holding that retrial on the relevant charges is permissible. Indeed, the *Mehall* Court expressly stated that “[r]etrial is not permitted if the trial court evaluated the evidence and determined that it was *legally insufficient* to sustain a conviction.” *Id.* at 6 (emphasis in original). In this case, the trial court’s remarks reflect that it evaluated the legal sufficiency of the evidence to support the relevant charges and concluded that it was insufficient. As discussed previously, under *Nix*, this constituted an acquittal for double jeopardy purposes even if the trial court incorrectly regarded the prosecution as having to prove a fact that was not actually an element of the relevant charges.

In light of our determination that double jeopardy principles bar further proceedings against defendant with regard to the relevant charges, we must affirm the trial court’s order dismissing those charges. Thus, we need not reach the statutory construction question that is disputed by the parties.

Affirmed.

/s/ Bill Schuette
/s/ William B. Murphy
/s/ Richard A. Bandstra