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WA State Court of Appeals, Division III

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

STATE OF WASHINGTON,	)	No. 36046-6-III
Respondent/Cross Appellant,	)	
v.	)	OPINION PUBLISHED IN PART
JAMES PATTON GEARHARD,	)	
Appellant/Cross Respondent.	)	

SIDDOWAY, J. — James Gearhard appeals his conviction for witness tampering on grounds that evidence of a telephone conversation recorded in violation of Washington's "Privacy Act," chapter 9.73 RCW, was admitted in error. The State cross appeals the trial court's entry of a directed verdict on a third degree child molestation charge after a mistrial was declared and the jury was discharged.

In the published portion of this opinion, we reverse the witness tampering conviction. In the unpublished portion, we hold that the State's appeal is barred by the double jeopardy clauses of the federal and state constitutions.

FACTS AND PROCEDURAL BACKGROUND

In the spring of 2016, J.C., who turned 15 at around that time, revealed to a psychiatrist that on the prior July 3 he had been sexually molested by James Gearhard, the 56-year-old neighbor of his grandfather. J.C. reported that he was helping Mr. Gearhard with work on his rural property, had stayed overnight, and awakened to discover Mr. Gearhard standing next to him, with his hand down J.C.'s pants, touching his genitals. J.C. would later testify that he said to Mr. Gearhard, "[S]top, get off me," and Mr. Gearhard backed up and said, "[S]orry, I thought you'd like it." Report of Proceedings (RP) (Trial) at 61-62. The psychiatrist, a mandatory reporter, notified Child Protective Services. Sometime later, Detective Erik Anderson contacted J.C. and his mother.

The detective obtained J.C.'s agreement to participate in a pretext phone call to Mr. Gearhard. As later explained by the trial court, a pretext phone call is a "ruse[,] wherein the alleged victim of a crime would call a suspect . . . to try and get the suspect to make incriminating statements . . . while the suspect is talking to the alleged victim and while law enforcement is listening in." Clerk's Papers (CP) at 84-85. During the call, Detective Anderson sat next to J.C., close enough to hear through the phone's

earpiece, and took notes. A recording device was placed on a table a couple of feet from J.C. and the detective. While allegedly not the detective's intention, the recording device captured not only J.C.'s side of the conversation, but also much of Mr. Gearhard's side of the conversation. Detective Anderson did not have a warrant to record Mr. Gearhard.

During the call, J.C. told Mr. Gearhard he had told a friend about what happened at Mr. Gearhard's house on July 3, the friend told the police, and the police were coming to speak with J.C. about it. J.C. told Mr. Gearhard he was not sure what to do and asked Mr. Gearhard for advice. Although Mr. Gearhard would not talk about what had happened on July 3, he made incriminating statements by asking J.C. to say he had lied to his friend, telling J.C. this could ruin Mr. Gearhard's life, and telling J.C. that if he did him the favor of saying nothing happened, Mr. Gearhard would make it worth his while later.

The State charged Mr. Gearhard with third degree child molestation and tampering with a witness. It later amended the information to add a count of indecent liberties.

Mr. Gearhard moved to suppress the recording and all testimony about the recorded conversation, arguing that the recording violated the Privacy Act. He moved to dismiss the witness tampering count because if the court granted his motion to suppress, there would be no evidence to support the charge.

At the conclusion of the hearing on the motions, the trial court found that the call was a private conversation or communication, the recording captured the voices of J.C.

and Mr. Gearhard, and Detective Anderson violated the Privacy Act. The court nonetheless found that Mr. Gearhard's statements in the conversation fell within an exception to the recording prohibition for "communications or conversations . . . which convey threats of extortion, blackmail, bodily harm, or other unlawful requests or demands." RCW 9.73.030(2). It explained that Mr. Gearhard made "a request to essentially commit a crime to not report these acts to law enforcement in this case." RP (Suppression Hearing) at 26. In written findings and conclusions entered thereafter, the trial court concluded, "The defendant[']s statements in this conversation were clearly an 'unlawful request or demand' when he requested [J.C.] not report the incident to police which would be the crime of Tampering with a Witness[,] a violation of RCW 9.72.120." CP at 75.

In the four-day jury trial that followed, the State did not offer the recording, but did question J.C. and Detective Anderson about statements Mr. Gearhard made during the recorded call. J.C. testified that during the call, Mr. Gearhard

> told me, tell them that you were lying. Tell them you wanted attention. Tell them that it didn't happen and you were just talking crap to your friend, and by the end of the call he even said that—he said, I'll make it worth your while later, which I don't know what that meant.

RP (Trial) at 66.

Detective Anderson provided the following answers to questioning about how Mr. Gearhard responded to J.C.'s report that he had told a friend:

> A . . . [F]irst he said, what was your friend's reaction and [J.C.] said, well, he was pissed and the defendant said, well, that's a really tough thing, especially for me. Hopefully you can deny it completely.
>
> Q And did [J.C.] ask the defendant for direction on what he should do?
>
> A Yeah, he said, what should I do and the defendant said, well, tell them it was stories. Can you just convince them that it didn't happen? Just tell him them you were telling stories.
>
> Q And what did [J.C.] tell him?
>
> A He said, okay, well, then after this call don't text me or call me or anything so that doesn't come up or anything, and the defendant said, yeah, we shouldn't—we probably shouldn't call or email or anything at this point. I'm speechless, scared, please do this favor for me. It would ruin me. I would appreciate it if you said it never really happened, however you can say that. Please do this favor for me. They won't pursue it if you can convince them it didn't happen. I'm trying to think of how you could let me know. Do your best for me.

RP (Trial) at 94.

The jury found Mr. Gearhard not guilty of the indecent liberties count but could not reach verdicts on the counts charging third degree child molestation and tampering with a witness. The court accepted the not guilty verdict on the indecent liberties count and declared a mistrial as to the remaining two counts.

A week after the mistrial was declared and the jurors were excused, Mr. Gearhard moved for a directed verdict on the third degree child molestation charge. He pointed out that the jury's "'to convict'" instruction required the jury to find "*the defendant* was at

least forty-eight months younger than *the defendant*." CP at 102 (emphasis added).[1] Because the State did not submit evidence supporting that impossibility, Mr. Gearhard argued the court must enter a directed verdict of not guilty. The trial court agreed, ruling it was "constrained to grant the defendant's motion." CP at 118. A State motion for reconsideration was denied.

The parties agreed to a stipulated facts trial on the remaining witness tampering charge. The trial court was provided with a report of proceedings and the parties' stipulation that because it had presided over the trial, it "[could] take credibility into account and give whatever weight the court deems fit to the testimony from this trial." CP at 81. A request by Mr. Gearhard that the court exclude evidence of the phone call was denied. The trial court found Mr. Gearhard guilty.

Mr. Gearhard appeals and the State cross appeals.

ANALYSIS

APPEAL

Mr. Gearhard appeals his conviction for witness tampering, arguing that the trial court erred by denying his motion to exclude evidence of the phone call. He argues that it was legal error to treat the recording of the call as coming within the "threats . . . or

[1] The jury instructions were not included in the record on appeal. We rely on Mr. Gearhard's unchallenged representation of the language of the instruction, which conforms to the language as described in the court's written ruling on the motion. *See* CP at 116.

other unlawful requests or demands" exception to the Privacy Act's requirement of all-party consent.

RCW 9.73.030(1)(a) prohibits the interception or recording of any private communication transmitted by telephone or other device between two or more individuals without the consent of all parties to the communication. Moreover, "[a]ny information obtained in violation of RCW 9.73.030 . . . shall be inadmissible in any civil or criminal case in all courts of general or limited jurisdiction in this state." RCW 9.73.050. Our Supreme Court has held this means courts "must exclude any information obtained . . . while . . . violating the statute." *State v. Fjermestad*, 114 Wn.2d 828, 836, 791 P.2d 897 (1990). As the trial court recognized in ruling on Mr. Gearhard's motion to suppress, unless his conversation with J.C. fell within an exception, neither the recording nor any testimony about the recorded conversation was admissible evidence.

RCW 9.73.030(2) establishes three exceptions to the statutory prohibition for recordings made with one-party consent. The second of the three exceptions provides that with one party consent, a recording can be made of conversations "which convey threats of extortion, blackmail, bodily harm, or other unlawful requests or demands." In *State v. Williams*, the Washington Supreme Court held that this second exception "must be interpreted as exempting from the act only communications or conversations 'which convey threats of extortion, blackmail, bodily harm, or other unlawful requests or demands,' *of a similar nature*," lest "an overbroad interpretation of the 'catchall' phrase

. . . negate the privacy act protections whenever a conversation relates in any way to unlawful matters." 94 Wn.2d 531, 548, 617 P.2d 1012 (1980) (quoting RCW 9.73.030(2)(b)). The court observed that the legislature intended to require suppression of recordings "of even conversations relate[d] to unlawful matters if the recordings were obtained in violation of the statutory requirements." *Id.* The "threats . . . or other unlawful requests or demands" exception therefore "must be strictly construed to give effect to this legislative intention." *Id.*

Discussion of the exception in *Williams* was mostly in the context of a defense argument that all three exceptions to the prohibition on recording should be construed to apply only in an emergency situation—an argument the court rejected. *Williams* involved threats of arson and murder and therefore bodily harm, so in its brief discussion of the need to strictly construe the exceptions, the court had no need to explain (and did not explain) the "similar nature" that would qualify conversations as "other unlawful requests or demands." In the 40 years since *Williams* was decided, no published Washington decision has articulated the "similar nature" that will bring unlawful requests or demands within the exception. When the issue presented is whether as a matter of statutory interpretation the facts are encompassed by the Privacy Act's protections, our review is de novo. *State v. Kipp*, 179 Wn.2d 718, 728, 317 P.3d 1029 (2014).

Mr. Gearhard characterizes the exception as requiring the unwittingly recorded speaker to have conveyed some type of threat—arguing that "what *Williams* . . .

essentially require[s] is an 'or else' for the 'unlawful request or demand[ ]' clause to apply." Appellant's Opening Br. at 8. The State responds that *Williams* was wrongly decided, because limiting the "unlawful request or demand" clause to acts similar to threats of extortion, blackmail or bodily harm "thwarts the plain meaning of the statute and is a misapplication of basic rules of statutory construction." Br. of Resp't at 6. The State conceded at oral argument that we are bound by *Williams.*

Once our Supreme Court has decided an issue of state law, that interpretation is binding on this court. *State v. Gore*, 101 Wn.2d 481, 487, 681 P.2d 227 (1984). It was the State's position, evidently accepted by the trial court, that it was enough that Mr. Gearhard made an unlawful request. No consideration was given to whether the request was of a similar nature to a threat of extortion, blackmail or bodily harm. We question Mr. Gearhard's position that a threat is required, given the plainly different terms "request" and "demand." We need not engage in a close examination of the "similar nature" required to conclude that Mr. Gearhard's statements during the conversation do not fall within the exception, however. He did ask J.C. to lie, but in the context of expressing fear and hinting at a reward—considered as a whole, it was in the nature of a request, or more aptly a plea, for a favor. It was not of a similar nature to a threat of extortion, blackmail, or bodily harm.

Mr. Gearhard's motion to suppress evidence of the recorded conversation should have been granted and his objection to its consideration in the stipulated facts trial should

have been sustained. We reverse the witness tampering conviction and for reasons set forth below hold that the State's appeal is barred by constitutional protections against double jeopardy.

The remainder of this opinion has no precedential value. Therefore, it will be filed for public record in accordance with RCW 2.06.040, the rules governing unpublished opinions.

CROSS APPEAL

The State cross appeals the trial court's directed verdict on the child molestation count. It argues that a criminal defendant may challenge the sufficiency of the evidence before trial, at the end of the State's case in chief, at the end of all the evidence, after the verdict, and on appeal. Here, however, there was no verdict and a mistrial had been declared and the jury excused. The State argues that the situation presented was a need for a retrial, at which a correct to-convict instruction could have been given.

Mr. Gearhard defends the procedure followed by the trial court but presents a dispositive threshold argument: procedurally correct or not, the trial court's ruling triggers the protections of the double jeopardy clauses of the state and federal constitutions.

The protections against double jeopardy in the state and federal constitutions prevent a second prosecution for the same offense after acquittal. U.S. CONST. amend. V; WASH. CONST. art. I, § 9. These protections prevent an appellate court from setting aside

a judgment of acquittal. *Fong Foo v. United States*, 369 U.S. 141, 143, 82 S. Ct. 671, 7 L. Ed. 2d 629 (1962). RAP 2.2(a)(b)(1) accounts for this by excluding judgments or verdicts of not guilty from the list of orders appealable by the State and generally prohibiting appeal from any order that would place a defendant in double jeopardy.

A dismissal by a trial judge is a judicial acquittal when it adjudicates the ultimate question of factual guilt or innocence. *State v. Karpov*, ___ Wn.2d ___, 458 P.3d 1182, 1184 (2020) (citing *Evans v. Michigan*, 568 U.S. 313, 319, 133 S. Ct. 1069, 185 L. Ed. 2d 124 (2013)). "Such dismissals 'encompass any ruling that the prosecution's proof is insufficient to establish criminal liability for an offense.'" *Id.* (quoting *Evans*, 568 U.S. at 318-19).

The dissent's analysis makes three points, two preliminary. The first is that in granting the State's motion to dismiss, the trial court incorrectly found *Hickman*[2] error. Whether or not it erred on that score is irrelevant to our disposition. For double jeopardy purposes, what matters is that the charge was dismissed.

Its second point is that the mistrial was effective when the judge orally declared it and discharged the jury, and the unchallenged mistrial was a valid basis for discharging a jury without offending double jeopardy. We do not disagree, and agree that double

[2] *State v. Hickman*, 135 Wn.2d 97, 945 P.2d 900 (1998).

jeopardy would not have prevented Mr. Gearhard from being retried had there not been an intervening dismissal of the charge by the court.

The dissent's concluding point—that the result of the mistrial ruling was to terminate jeopardy and authorize a second trial—conflates termination of the trial with termination of jeopardy. The trial was terminated by the mistrial ruling, but jeopardy was not. Jeopardy continued for Mr. Gearhard following the mistrial ruling and discharge of the jury. Jeopardy was terminated by a judicial acquittal: the dismissal of the charge.

The United States Supreme Court observed in *Evans* that its cases "have applied *Fong Foo*'s principle broadly." 568 U.S. at 318. "'[T]he fact that [an] acquittal may result from erroneous evidentiary rulings or erroneous interpretations of governing legal principles affects the accuracy of that determination, but it does not alter its essential character.'" *Id.* (quoting *United States v. Scott*, 437 U.S. 82, 98, 98 S. Ct. 2187, 57 L. Ed. 2d 65 (1978)). "[R]etrial following an acquittal would upset a defendant's expectation of repose, for it would subject him to additional embarrassment, expense and ordeal, while compelling him to live in a continuing state of anxiety and insecurity." *Id.* at 319 (internal quotation marks omitted) (quoting *Green v. United States*, 335 U.S. 184, 187, 78 S. Ct. 221, 2 L. Ed. 2d 199 (1957)).

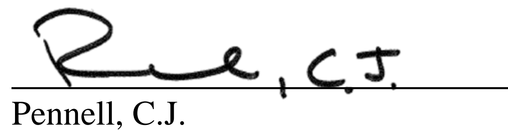
The State has identified no authority and advances no argument why the trial court's order granting Mr. Gearhard's motion for a directed verdict was not a judicial

acquittal. Because it was, the double jeopardy clauses bar retrial for the third degree child molestation charge and should have barred the State's appeal.

We reverse the witness tampering conviction and hold that the State's appeal is barred by constitutional protections against double jeopardy.

Siddoway, J.

I CONCUR:



Pennell, C.J.

No. 36046-6-III

KORSMO, J. (dissenting in part) — I agree with the majority's analysis of the Privacy Act and the disposition of the witness tampering charge.

A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder, having no precedential value, shall be filed for public record pursuant to RCW 2.06.040, it is so ordered

My disagreement with the majority's analysis of the cross appeal is based solely on the timing of the trial court's ruling. The trial court had already declared a mistrial due to a hung jury and discharged the jurors. At that point, the trial had concluded. Directing a verdict a week after the mistrial was not a judicial acquittal because the trial already had ended. Instead, as recognized by the United States Supreme Court authority relied on by the majority, this case presents a posttrial legal error that the State rightly could appeal.[1]

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[1] *See* RAP 2.3(b)(3), (4); *State v. Brand*, 120 Wn.2d 365, 368, 842 P.2d 470 (1992); *State v. Brent*, 30 Wn.2d 286, 288, 191 P.2d 682 (1948). A defendant can appeal from a CrR 7.4(a)(3) ruling. *State v. Ceglowski*, 103 Wn. App. 346, 12 P.3d 160 (2000).

There are a pair of preliminary matters to address before considering the double jeopardy claim. The first involves the mischaracterization of the instructional error. Contrary to defense counsel's argument to the trial court, the instructional mishap did not implicate *State v. Hickman*, 135 Wn.2d 97, 954 P.2d 900 (1998). That case requires the State to prove any *additional* elements that were (unnecessarily) included in the elements instruction. *Id*. at 102-03. Thus, if the State undertakes to prove a specific *additional* fact by way of the elements instruction, the evidence must support that factual determination even if the fact is not an element of the offense. *Id*. at 101-05.[2]

However, this case did not involve the inclusion of an extraneous fact or new element in the elements instruction. Instead, this was a common case of an error in the elements instruction. The Washington Supreme Court has rejected applying *Hickman* in this context. *State v. Teal*, 152 Wn.2d 333, 96 P.3d 974 (2004). In *Teal*, the elements instruction was erroneous because it omitted the phrase "or accomplice" in a case of accomplice liability. *Id*. at 336. The defendant argued that *Hickman* therefore required proof that the defendant alone committed all of the actions involved in the conspiracy since he was the only actor identified by the elements instruction. *Id*. at 337. The court[3]

[2] This is an application of the law of the case doctrine. *Hickman*, 135 Wn.2d at 102.

[3] Only Justice Sanders, the *Hickman* dissent author, believed that dismissal was required. *Teal*, 152 Wn.2d at 340-342 (Sanders, J., dissenting).

rejected the argument, distinguishing *Hickman* because there was no added element. *Id*. at 338. *Hickman* did not require dismissal. *Id*. at 337-38.[4]

Error in an elements instruction can be harmless unless it relieves the State of its burden to prove each element. *State v. Sloan*, 149 Wn.2d 736, 742, 205 P.3d 172 (2009) (elements instruction naming an uncharged second victim harmless error). Even the omission of an element is subject to harmless error analysis. *Neder v. United States*, 527 U.S. 1, 18, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999); *State v. Brown*, 147 Wn.2d 330, 340-41, 58 P.3d 889 (2002). I have belabored this point due to the uncritical acceptance of this argument below. Labeling something "*Hickman* error" does not make it so. Most errors involving the elements instruction do not involve the *Hickman* problem.

The second preliminary point also was not necessary for the majority to address, although it is for my analysis. The mistrial was effective at the point the judge publicly accepted the jury's inability to resolve the case and orally declared the mistrial and discharged the jury. *E.g.*, *State v. Strine*, 176 Wn.2d 742, 293 P.3d 1177 (2013) (mistrial ordered after jury polling established "not guilty" verdicts were not unanimous); *State v. Burdette*, 178 Wn. App. 183, 196, 313 P.3d 1235 (2013) (mistrial motions historically heard on record in courtroom); *State v. Kirk*, 64 Wn. App. 788, 793, 828 P.2d 1128

[4] Long before *Hickman*, error in an elements instruction required a new trial unless the error was harmless. *E.g.*, *State v. Valdobinos*, 122 Wn.2d 270, 858 P.2d 199 (1993).

(1992) (discharge of jury triggers acquittal or mistrial).[5] The parties do not challenge the court's declaration of a mistrial and the discharge of the jury in this appeal, nor did they do so at trial. The mistrial was properly declared—a week before the court considered the belated motion to direct a verdict.

The majority faults the prosecution for not finding any case law addressing the timeliness of a directed verdict. It should not. The cases relied on by the majority both arose from erroneous sufficiency of the evidence rulings by the trial judge *while the cases were still being tried*. *Evans v. Michigan*, 568 U.S. 313, 133 S. Ct. 1069, 185 L. Ed. 2d 124 (2013); *Fong Foo v. United States*, 369 U.S. 141, 82 S. Ct. 671, 7 L. Ed. 2d 629 (1962). That procedural setting was actually the key to both cases, because double jeopardy does not bar a retrial after a proper mistrial has been declared. The seminal case on this aspect of double jeopardy is *Green v. United States*, 355 U.S. 184, 78 S. Ct. 221, 2 L. Ed. 2d 199 (1957). There the jury did not return a verdict on the greater charge of first degree murder, but did find the defendant guilty of the lesser offense of second degree murder; the jury was discharged without inquiry into the first degree murder count. 355 U.S. at 190-91. The court noted that the verdict was both an implied acquittal and a

[5] Under the original formulation of the speedy trial rule, the court's oral declaration of a mistrial started the time period for conducting the second trial. *See* former CrR 3.3(d)(3) (2001). The entry of an order setting the new trial date starts the clock under the current time for trial rule. CrR 3.3(c)(2)(iii).

discharge of the jury without the defendant's consent. *Id*. Each reason independently justified barring retrial due to double jeopardy. *Id*.

The latter rationale, derived from *Wade v. Hunter*, 336 U.S. 684, 688-90, 69 S. Ct. 834, 93 L. Ed. 974 (1949), governs whether a mistrial properly continues jeopardy or ends jeopardy. *Evans*, 568 U.S. at 319-20; *Strine*, 176 Wn.2d at 753. It effectuates the "defendant's valued right to have his trial completed by a particular tribunal." *Wade*, 336 U.S. at 689.[6] It is this particular right that applies when a criminal trial is interrupted short of a jury verdict. *Arizona v. Washington*, 434 U.S. 497, 503-06, 98 S. Ct. 824, 54 L. Ed. 2d 717 (1978). A hung jury is a valid basis for declaring a mistrial and discharging a jury without offending double jeopardy. *Id*. at 505-06; *Green*, 355 U.S. at 188; *Strine*, 176 Wn.2d at 753.

With that overblown introduction, it is finally time to turn to *Evans* and explain why it supports the State's position rather than Gearhard's. *Evans* was the court's most recent discussion of the application of double jeopardy to a judge's dismissal of a case during trial due to insufficient evidence. At issue was a Michigan trial judge's decision to direct a verdict in favor of the defendant due to failure of the State to prove an element of the crime that was not actually an element. 568 U.S. at 315. The Michigan appellate

[6] This idea was refined by Justice Harlan and later adopted as the court's rationale for applying double jeopardy to interrupted trials. The historical development is explained by Justice Stevens in *Arizona v. Washington*, 434 U.S. 497, 503 n.11, 98 S. Ct. 824, 54 L. Ed. 2d 717 (1978).

courts had distinguished *Fong Foo* and other cases on the basis that they had involved errors of fact rather than errors of law. *Id*. at 317. The *Evans* majority favored a bright line rule based on substance rather than cloud its evidentiary insufficiency case law with distinctions based on "labels." *Id*. at 322. Because the trial judge had believed the fictitious element had not been proved, his ruling was predicated on insufficient evidence rather than legal error.[7] *Id*. at 324.

There was nothing novel in *Evans*, and the court maintained the *Wade* distinction between trials terminated prematurely due to procedural problems and those with substantive problems:

> Procedural dismissals include rulings on questions that "are unrelated to factual guilt or innocence," but "which serve other purposes," including "a legal judgment that a defendant, although criminally culpable, may not be punished" because of some problem like an error with the indictment.
>
> Both procedural dismissals and substantive rulings result in an early end to trial, but we explained in *Scott* that the double jeopardy consequences of each differ. . . . In contrast, a "termination of the proceedings against [a defendant] on a basis unrelated to factual guilt or innocence of the offense of which he is accused," . . . *i.e.*, some procedural ground, does not pose the same concerns, because no expectation of finality attaches to a properly granted mistrial.

Id. at 319-20 (citations omitted) (alteration in original).

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[7] The same situation recently was presented by *State v. Karpov*, ___ Wn.2d ___, 458 P.3d 1182 (2020).

That finally brings us to the timing question. There is no question that if the trial judge had ended the jury's deliberations by directing a verdict due to insufficient evidence, *Evans* and its predecessors would bar a second trial. But that is not what happened here. The court declared a mistrial due to the jury's inability to agree and discharged the jury. That was the proper action legally and factually. And the result of that ruling was to terminate jeopardy and authorize a second trial. *Id*. That should be the end of the matter.

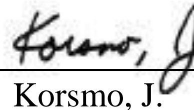
Mr. Gearhard then brought a posttrial motion, styled a "directed verdict," as if the *trial* was still in progress. It was not. The *case* was still alive and pending retrial, with the mistrial ruling resolving the "prized right" to have the original jury decide the case. There was no jury to which the judge could have directed a verdict. Our rules permit a defendant to seek dismissal during trial, after verdict, or after judgment. CrR 7.4; CrR 7.5. Other than a pretrial motion to dismiss without prejudice per *State v. Knapstad*, 107 Wn.2d 346, 729 P.2d 48 (1986) and CrR 8.3(c), no rule contemplates dismissal for insufficient evidence for a case that is pending trial, and no rule applies absent a verdict or judgment to act upon. Entertaining the unauthorized motion was itself a mistake.

Even if we analogize the "directed verdict" to a proper posttrial motion under CrR 7.4 or CrR 7.5, the dismissal order is still one we review de novo because the trial court's ruling did not intrude on a pending jury deliberation. Posttrial motions based on insufficient evidence are permitted and can be appealed. *State v. Ceglowski*, 103 Wn.

App. 346, 12 P.3d 160 (2000). This case was outside the *Evans* fact pattern—the trial judge did not discharge the jury due to his view of the sufficiency of the evidence.[8] The judge dismissed the jury because it could not reach a verdict. The subsequent dismissal order did not deprive—and could not have deprived—Mr. Gearhard of his right to have the original jury resolve the case. It came too late.

As *Evans* itself teaches us, a procedural "dismissal" because of a hung jury is not the equivalent of a substantive dismissal due to insufficient evidence. The latter implicates the double jeopardy protection against retrial following acquittal, while the former involves the right to have the jury decide the case. The trial court's dismissal ruling did not infringe on the jury's function and did not trigger double jeopardy.

The order of dismissal should be reversed. Since the majority concludes otherwise, I respectfully dissent.



Korsmo, J.

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[8] The majority ignores the rationale of *Evans* and its predecessors while extending the rule of those cases outside of the context that generated the rule. After a proper discharge of the jury, the defendant's right to have that body decide the case has been satisfied. The special evidentiary sufficiency rule of the *Evans* case line has never been extended to posttrial proceedings, probably because there is no evidence to weigh when there is no trial. Revisions to RAP 2.2(b) now will be in order.