2015 IL App (2d) 140809-
No. 2-14-0809
Order filed April 27, 2015

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. MARISSA L. BROWN, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Winnebago County. No. 10-CF-543 Honorable Rosemary Collins, Judge, Presiding.

JUSTICE McLAREN delivered the judgment of the court.
Presiding Justice Schostok and Justice Birkett concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly denied defendant's motion to dismiss a charge on double-jeopardy grounds, as she did not support her contention that the acquittal of one charge in a unit of prosecution required the dismissal of another charge in that unit.

¶ 2 Defendant, Marissa L. Brown, appeals, invoking Illinois Supreme Court Rule 604(f) (eff. Feb. 6, 2013), which permits an interlocutory appeal as of right after the denial of a defendant's motion to dismiss based on former jeopardy. Here, defendant's motion to dismiss made arguments based both on double-jeopardy principles and on the one-act, one-crime doctrine. Defendant now advances two sets of arguments as to why the court should have dismissed the

charges, only one set of which is grounded in double-jeopardy principles. We hold that we have jurisdiction to consider only defendant's double-jeopardy-based arguments. We further hold that defendant has failed to establish that double jeopardy requires the dismissal of any of the counts here. We therefore affirm the denial of defendant's motion to dismiss.

¶ 3 I. BACKGROUND

¶ 4 A grand jury indicted defendant on four counts of disorderly conduct (720 ILCS 5/26-1(a)(4) (West 2010)) (making a false report to public employees (false-report disorderly conduct)). Each count charged defendant with, on January 5, 2010, telling a public employee or peace officer that an aggravated assault had occurred when no reasonable basis existed for defendant to believe that the offense had occurred. All counts related to defendant's report that a person had threatened her with a handgun in a restroom of Rockford's Roosevelt School. Each count related to a different person's hearing the report: Roosevelt principal Angela Hite-Carter, Rockford schools employee Ellen Van Horn, law-enforcement officer Patrice Turner, and law-enforcement officer Courtney Tillmon-Listhrop.

¶ 5 Defendant had a jury trial. The State's evidence showed that there were two instances in which defendant made the allegedly false report. The first was by phone call—a speakerphone was used—and was heard at least by Hite-Carter, but not definitely by Van Horn. Defendant made the second report in person to the two law-enforcement officers.

¶ 6 During the evidence phase of the trial, the court allowed the State to exercise a peremptory challenge to remove a juror and seated an alternate. The jury found defendant guilty on three of the counts, but not guilty of count II, the count in which Van Horn was alleged to have heard the telephoned report.

¶ 7 On appeal, we vacated the convictions, holding that the juror's removal "amount[ed] to structural error, requiring automatic reversal." *People v. Brown*, 2013 IL App (2d) 111228, ¶ 30.

¶ 8 On remand, defendant moved to dismiss two or all counts of the indictment, seeking to "dismiss the charges against her because it [*sic*] violates the one-act, one-crime doctrine." Defendant argued that counts I and II (Hite-Carter and Van Horn) related to a single statement of hers, and similarly that counts III and IV (Turner and Tillmon-Listhrop) related to a different single statement of hers. She argued that each statement was a single act for one-act, one-crime purposes. She argued:

> "Here, although Counts 1 and 2 are separately pled, the allegedly false statement was made only once… but overheard by two, separate public employees. The defendant was formerly prosecuted for the alleged *** false statement to a public employee. The jury concluded that the evidence was insufficient to warrant a conviction regarding [count II,] and acquitted the defendant. As such, a re-prosecution is barred on this same act and Count 1 must be dismissed. The defendant cannot be properly convicted of both crimes because they arose from the same act."

As to counts III and IV, she argued that, "although [the two counts] are separately pled, the allegedly false statement was made only once…but overheard by two, separate police officers." She asserted that, "[t]herefore," based on our one-act, one-crime jurisprudence, "Counts 3 and 4 must be dismissed."

¶ 9 The State responded, addressing the request to dismiss count I as being based on a collateral-estoppel argument. It further argued that one-act, one-crime principles never bar the *trial* of a defendant on multiple charges stemming from a single act.

¶ 10 In her reply, defendant clarified that, as to count I, she was claiming that the acquittal on count II implied that the jury had concluded that no offense had been committed. As to counts III and IV, she argued that the "essence of [false-report disorderly conduct] is the making of a statement, not the hearing of it."

¶ 11 The court denied the motion on August 22, 2014. Defendant filed a timely notice of appeal invoking Rule 604(f).

¶ 12 II. ANALYSIS

¶ 13 Initially, we explain the jurisdictional limits of our review. This appeal was brought as an interlocutory appeal under Rule 604(f): "The defendant may appeal to the Appellate Court the denial of a motion to dismiss a criminal proceeding on grounds of former jeopardy." Ill. S. Ct. R. 604(f) (eff. Feb. 6, 2013). Here and in the usual case, "[t]he scope of review of an order in a Rule 604(f) appeal is limited to a former jeopardy analysis and does not extend to a review of alleged errors which could not independently form the basis for appellate jurisdiction under Rule 604(f)." *People ex rel. City of Chicago v. Hollins*, 368 Ill. App. 3d 934, 941 (2006). (The exception to that limitation is that when jurisdiction exists under Rule 604(f) a reviewing court may vacate a void order as such. *City of Naperville v. Mann*, 378 Ill. App. 3d 657, 659 (2008). That exception is not applicable here.) Therefore, our review is limited to the issue of whether any part of the prosecution on remand is barred by double-jeopardy principles.

¶ 14 Where, as here, the facts involved in a court's denial of a motion to dismiss on double-jeopardy grounds are uncontested, the question is purely one of law, and our review is *de novo*. *People v. Taylor*, 2013 IL App (2d) 110577, ¶ 22.

¶ 15 Turning to the merits of the matter, we hold that defendant has failed to show that dismissal of any of the counts here was required.

¶ 16 Defendant argues first that principles of both fairness and statutory interpretation require that the unit of prosecution[1] of false-report disorderly conduct be the utterance or report. This is in contrast to the unit being the completed transmission to a specific individual. Thus, by her argument, a single utterance of a false report cannot be deemed more than one instance of the offense of false-report disorderly conduct, regardless of the number of qualifying auditors. And thus, by defendant's argument, the four counts on which she was indicted charged only two distinct offenses: the telephoned report of counts I and II, and the in-person report of counts III and IV.

¶ 17 Thereafter, her argument is sufficiently unclear that it defies full summarization. However, it is apparent that she contends that, because counts I and II charged the identical offense, her acquittal on count II bars her retrial on count I. In other words, she implies that, because count II was an acquittal as to the telephonic false report, there can be no further prosecution on that entire unit of prosecution. (It is not clear to us that defendant makes any argument for the dismissal of counts III and IV. In her prayer for relief, defendant states her "motion to dismiss should be granted and the matter should be remanded for proceedings." Given that she asks for remand, she must expect at least one of the counts to survive.)

¶ 18 We understand defendant to be arguing from generalized expressions of double-jeopardy principles such as are sometimes found introducing the subject in decisions. For instance, in *People v. Knaff*, 196 Ill. 2d 460, 468 (2001), our supreme court stated that a "verdict of not guilty, whether rendered by the jury or directed by the trial judge, shields the defendant from a retrial for the same offense." On this understanding, defendant's argument thus is that, if

[1] The phrase, "unit of prosecution," which is widely used in one-act, one-crime jurisprudence, is ours, not defendant's.

multiple counts charge the same offense, even if in factually different ways, one acquittal bars a subsequent retrial on those counts on which there were convictions, regardless of whether the State put on sufficient evidence to support the convictions.

¶ 19 From this argument, certain striking results follow.

¶ 20 Consider first that an acquittal that bars further prosecution on a given "offense" can come in the form of a directed verdict. Thus, in *Evans v. Michigan*, 568 U.S. ___, 133 S. Ct. 1069 (2013), when a court ruled that the prosecution had failed to provide adequate evidence of what it erroneously deemed to be an element of the "offense," that ruling stood as an acquittal, barring further prosecution on the "offense." If such acquittals applied not merely to a given charge, but to all charges pertaining to one unit of prosecution, then we would expect to see instances in which the failure to provide sufficient evidence on one count would force the dismissal of other counts for which the prosecution had put on sufficient evidence.

¶ 21 To make this clearer, consider an example derived from *People v. Sedelsky*, 2013 IL App (2d) 111042. In *Sedelsky*, we held that multiple digital copies of a single image of child pornography would support only a single conviction. *Sedelsky*, 2013 IL App (2d) 111042, ¶ 21. In other words, the particular photograph, not its embodiment in a particular copy, is the unit of prosecution. Thus, the existence of multiple copies of a single image is—accepting *arguendo* defendant's position concerning the unit of prosecution for false-report disorderly conduct—equivalent to the existence of extra auditor of each utterance for false-report disorderly conduct. In such circumstances, if we apply defendant's rule, the dismissal of one count based on, for instance, lack of evidence of possession of one particular copy, ought to lead to the dismissal of all of the counts based on the same image.

¶ 22 If defendant is correct in her argument—if, for double-jeopardy cases, an acquittal of one charge that pertains to a given unit of prosecution functions as an acquittal as to all charges that pertain to a given unit of prosecution—then that should be evident in the case law of this State and other United States jurisdictions. Defendant, however, provides no citation to any decision in which anything remotely similar happened. Moreover, we are aware of no such authority.

¶ 23 Defendant, apparently recognizing that her argument proves too much, attempts to argue that the jury, in acquitting defendant of count II, must have decided that defendant did not commit one of the "essential elements" of false-report disorderly conduct, such as "publication" of the false report. This is a puzzling claim given that the only difference between counts I and II is the name of the alleged auditor. Defendant does not attempt to support the claim with anything from the record. Instead, she seems to treat the claim as a necessary inference based on the auditor's name being something that the State did not need to prove, an argument sufficiently incoherent to defy analysis. Alternatively, she argues an enthymeme, wherein the unrelated premise must conclude that if any one auditor fails to recognize or recall the act, or , misidentifies the actor, the act did not occur.

In sum defendant fails to persuade us that, for double-jeopardy purposes, when several charges relate to one identical offense, an acquittal as to one of the charges functions as an acquittal as to all. She fails to provide any indication that existing law requires such a result. Moreover, as defendant's own case shows, the application of such a rule produces manifestly unreasonable results. The difference between count I and count II was the alleged auditor. The trial record supports the conclusion that the count I alleged auditor, Hite-Carter, heard defendant's report, but that the count II alleged auditor, Van Horn, might not have—or may have heard it but did not remember hearing it—and that this was the basis for the different verdicts on

the two counts. Under the circumstances, there is no logic to barring retrial on count I based on the acquittal on count II.[2]

¶ 24 III. CONCLUSION

¶ 25 For the reasons stated, we affirm the denial of defendant's motion in which she sought to dismiss charges against her on the basis of double jeopardy. As part of our judgment, we grant the State's request that defendant be assessed $50 as costs for this appeal. 55 ILCS 5/4-2002(a) (West 2012); see also *People v. Nicholls*, 71 Ill. 2d 166, 179 (1978).

¶ 26 Affirmed.

[2] To the extent that one act, one crime is argued, it is not implicated at this stage of the proceedings.