2016 IL App (2d) 151196-U
No. 2-15-1196
Order filed September 28, 2016

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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Kendall County.
Plaintiff-Appellee,	)	
v.	)	No. 12-CF-299
SEAN HEMPHILL,	)	Honorable John F. McAdams,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE SPENCE delivered the judgment of the court.
Justices Hutchinson and Birkett concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err in denying defendant's motion to dismiss the case on double jeopardy grounds, because defendant's original jeopardy had not terminated. Therefore, we affirmed.

¶ 2 Following a jury trial, defendant, Sean Hemphill, was found guilty of four counts of aggravated criminal sexual abuse (720 ILCS 5/11-1.6(b), 11-1.6(c)(1) (West 2012)). The trial court subsequently granted defendant's motion for a new trial, but it denied defendant's motion seeking to dismiss the indictments on double jeopardy grounds. When the case was recalled for a new trial, defendant again moved to dismiss based on double jeopardy, and the trial court again

denied the motion. Defendant appealed under Illinois Supreme Court Rule 604(f) (eff. Dec. 11, 2014) (allowing the appeal of a denial of a motion to dismiss a criminal proceeding on the grounds of former jeopardy). We affirm.

¶ 3 I. BACKGROUND

¶ 4 On October 10, 2012, defendant was charged by indictment with four counts of aggravated criminal sexual abuse. The charges alleged that on or about January 1, 2012, defendant committed an act of sexual conduct with A.P.H., his daughter, who was under 18 years of age, in that he had A.P.H. touch his penis for the purpose of his sexual gratification.

¶ 5 Prior to trial, on March 6, 2013, the State gave notice pursuant to section 115-10 of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-10 (West 2012)) of its intent to introduce out-of-court statements that A.P.H. made to: her mother, Ryan Hemphill (Ryan); Child Advocacy Center personnel on January 11, 2012; and school personnel. A hearing on the motion took place on August 8, 2013, and August 12, 2013. On August 16, 2013, the trial court ruled that the following statements were admissible: statements that A.P.H. made to her mother during A.P.H.'s bath on January 4, 2012; statements made before, during, and after the family visited a Wendy's restaurant on January 5, 2012; statements made during A.P.H.'s interview at the Child Advocacy Center; and statements that A.P.H. made to assistant principal Dawn Marmo at Long Beach Elementary School.

¶ 6 Defendant's trial began on March 17, 2014. A.P.H. was the first witness and testified as follows. She was born on January 4, 2004, and was currently ten years old. In 2012, she lived with both of her parents in a three-bedroom house. She was afraid to sleep in her own bed because she once saw an ant crawling on it. Her parents slept in different bedrooms, so at night A.P.H. would sleep with one of them. One day, she heard from some other children that if a boy

kissed a girl, the girl would get pregnant. That did not make sense to A.P.H. because her parents kissed all the time, and her mother would not become pregnant. On January 5, 2012, she was going to sleep in defendant's bed and asked him about what she had heard. Defendant told her what it meant to be pregnant, and he talked about girls' and boys' "body parts."

¶ 7 The assistant State's Attorney asked A.P.H. at trial, "Did you ask him to do something?," and she replied, "No." He told her not tell anyone, but she told her mom and "Mr. Lipke." When asked, "The thing that you told your mom and the other people, did that really happen?", A.P.H. replied in the affirmative. A.P.H. was asked if she wanted "to tell these people what happened to you in bed with" defendant, and she stated, "He just told me what it meant." The assistant State's Attorney again asked "Now, when he told you what it meant, did you ask him to do anything else?", and A.P.H. replied, "No."

¶ 8 Next, three officers collectively testified that they were dispatched to A.P.H.'s home on the evening of January 5, 2012. A.P.H. alternated between being excited because she had just had a birthday, to being upset and crying. Ryan provided a written statement, and defendant ended up leaving the house voluntarily.

¶ 9 When the trial resumed the next day, defendant orally objected to any of A.P.H.'s out-of-court statements being admitted into evidence; the trial court had previously deemed them admissible after the section 115-10 hearing. Defendant argued that A.P.H. did not testify as to any criminal conduct by him, so the hearsay statements were not admissible under *People v. Learn*, 396 Ill. App. 3d 891 (2009). The trial court denied the motion, stating that it believed that the testimony was sufficient to meet the minimum threshold for the admission of evidence under section 115-10.

¶ 10 Erin Buddy then provided the following testimony. On January 30, 2012, she was substitute teaching at Long Beach Elementary School, as she had been doing every Wednesday. On that particular day, she was working with three second-grade students, including A.P.H., on literacy skills. A.P.H. looked unusually tired, and Buddy asked if she was all right. A.P.H. said that she did not sleep well the previous night, and Buddy asked if she was out doing something fun. A.P.H. replied that she was not sleeping well because her daddy asked her to either come into his bed or asked if he could join her in her bed. Buddy reported the conversation to the school social worker and Assistant Principal Marmo. The rest of the academic year, whenever Buddy asked A.P.H. how she was doing, A.P.H. would say that she was fine.

¶ 11 Marmo testified as follows. On January 30, 2012, A.P.H. came into her office and told her that she was upset and sad because her parents were divorcing and because she really wanted a brother or sister. A.P.H. said that when she and her mother were taking a bath together, she talked to her mom about her father. A.P.H. told Marmo that the divorce was her fault because she had asked her dad about sex and about boys' and girls' "parts," and that he had shown her "his parts." Marmo asked the principal, Mr. Lipke, to come into the room, and A.P.H. repeated the statement. Marmo contacted the Department of Children and Family Services. Later that day, A.P.H. came up to Marmo on the playground at recess. A.P.H. asked if Marmo was married, had children, and knew what it meant to be "hard." Marmo responded in the affirmative, and A.P.H. said that her daddy had showed her what being hard meant. A.P.H. then said that there was "a lot more" but that she did not want to talk about anything else. A.P.H. said that Marmo could tell Mr. Lipke about their conversation, but not her mother.

¶ 12 Ryan provided the following testimony. She and defendant married in 2003, and A.P.H. was their daughter. In January 2012, she worked from home. The household's atmosphere was

"pretty good," though she and defendant would have small arguments every week. Ryan loved defendant and believed that he loved her.

¶ 13 A.P.H.'s room had a twin-size bed, and the master bedroom and guest room each had queen-size beds. Ryan would get up around 4:30 or 5 a.m. to start work so that she could spend more time with her family later in the day. Ryan would sleep in the guest room three or four nights per week because defendant was a light sleeper, and Ryan's alarm would wake him up. Ryan snored, which also interfered with defendant's sleep. A.P.H. did not like to sleep in her bed because one night she saw an ant in her bed, and she was convinced that every time she slept in her bed, an ant would be there. A.P.H. began sleeping in whatever room Ryan was in. However, a few months before January 2012, defendant said that A.P.H. should be able to choose wherever she slept, with the thought that eventually she would choose her own bed.

¶ 14 On January 4, 2012, Ryan and A.P.H. planned to meet defendant for A.P.H.'s birthday dinner. Ryan was helping A.P.H. wash her hair, and A.P.H. said that she knew the difference between girls' and boys' parts. Ryan replied that she knew A.P.H. had seen her baby cousin Caleb's diaper changes. A.P.H. said that she had seen and touched defendant's private parts. Ryan asked if she had seen him after a shower or getting dressed. A.P.H. said no, that she had asked if she could see them, and he let her. A.P.H. said that there was a part with soft skin and hair on it, with two balls inside. A.P.H. asked what the balls were called, and Ryan said testicles. A.P.H. replied, "[Y]eah." During this time, A.P.H. seemed normal and happy. A.P.H. said that there was another part that stuck out in the front, with a hole in it where the pee came out. She asked if that was called the penis, and Ryan responded affirmatively. Ryan had used those words with A.P.H. once or twice when talking about Caleb. At this point, Ryan was "alarmed because what [A.P.H.] had described to [her] was obviously an adult['s] genitals, not a child['s]." Ryan

asked what defendant had showed her, and A.P.H. said that they played a game where they took the testicles' skin and stretched it over the penis to cover it up, A.P.H. would take it off, and "it" would be a present or surprise. Sometimes they pretended "it" was a piece of candy. A.P.H. described another game where they would pretend that the penis was a marker, and if you squeezed one ball, blue ink would come out, and if you squeezed the other ball, green ink would come out. A.P.H. noticed that Ryan had gone quiet, and A.P.H.'s face "dropped." A.P.H. said that Ryan could not tell defendant or anyone else what A.P.H. had said because otherwise, defendant could go to jail. Ryan said that she would not make such a promise because in their family, they did not keep secrets. Ryan asked where and when this had happened. A.P.H. said that they played the game in the master bedroom, before bed. A.P.H. could not provide a date, and when Ryan asked if it happened before or after Christmas, A.P.H. said that it occurred after Christmas. Ryan said that she was glad A.P.H. had told her. They went out to dinner, but Ryan did not confront defendant at that time because she did not want to ruin A.P.H.'s birthday and did not want to talk to him in front of her.

¶ 15 Ryan insisted that A.P.H. sleep with her that night. The next evening, Ryan talked to defendant while A.P.H. was at her tae kwon do class. Ryan repeated what A.P.H. had said, and defendant was very quiet. He asked what she was talking about and why A.P.H. would say those types of things. They picked up A.P.H., and when they were pulling out of the parking lot, A.P.H. must have seen that defendant was upset. She blurted out, "[S]ee, I told you if I told everything that dad could get in trouble." Ryan asked A.P.H. to repeat what A.P.H. had told her, and A.P.H did so. Defendant asked why she was saying this and who had done this. A.P.H. leaned forward and said, "[Y]ou and me." They went to eat at Wendy's. A.P.H. said that she

should not have told Ryan, that defendant was upset, and that he could go to jail. She asked why Ryan could not keep a secret.

¶ 16 They returned to the house, and Ryan told defendant that they should talk to A.P.H. one more time. A.P.H. started to say the same things again, and defendant told her to tell the truth. Defendant asked why she was saying such things, and she replied, "[B]ecause you did." When defendant again asked why she was saying such things, A.P.H. got a "crushed" look on her face. Subsequent to these disclosures, Ryan filed for divorce, and the divorce was now final.

¶ 17 Michelle Hawley testified that she was the mental health assistant director of the Kendall County Health Department. As part of her job, she worked at the Children's Advocacy Center interviewing children who may be victims of physical or sexual abuse. She would meet with the parent before the interview to obtain the parent's consent and learn about the situation, and she would review police reports. On January 11, 2012, she interviewed A.P.H., and the interview was recorded. During the course of the interview, Hawley had A.P.H. identify male and female anatomy on charts; the charts were admitted into evidence.

¶ 18 A video recording of the interview was played for the jury, which was also given transcripts. We summarize the interview's contents. A.P.H. told Hawley that she told her mom that she asked defendant what sex was and if she could see what his private parts looked like. A.P.H. thought sex was when a couple kissed and laid in bed together. Defendant told her the "right thing," that sex was when a boy puts his penis in "her" private parts and then "yucky stuff comes out." This conversation occurred three days before A.P.H.'s birthday, when they were in his bed. Defendant let A.P.H. see his private parts; defendant had his sleep shorts on and took his penis out through the hole in the shorts. A.P.H. asked if she could touch it, and he said, "Yes." This happened only one time.

¶ 19 At this point in the interview, A.P.H. said that she wished that she had never told her mother because then her mom would not have called the police, and defendant would not have left. A.P.H. then said that on the same night, she and defendant played a game two times about changing the color of "pencils." A.P.H. thought up the game because the penis was shaped like a "marker." A.P.H. touched the side of the penis and held it with her hand for one second each time. Defendant then said what "it [was]," which was "a marker." Then A.P.H. dropped it, and they went to bed. The penis was soft, and nothing came out of it. Defendant told A.P.H. not to tell her mom because he could go to jail for it.

¶ 20 Previously, A.P.H. had not seen defendant's penis. She had often felt it on her leg when she was sleeping with him; it would come out when defendant was moving around. At these times, A.P.H.'s mom was working or sleeping in the guest room. A.P.H. never saw defendant's penis during those times because the room was dark, and she would just move away. A.P.H. told defendant once about his penis touching her leg, and he said that he was sorry about that. At times, A.P.H. wore just underwear to bed. Sometimes defendant accidentally touched her on her thighs or on top of her underwear, and then he would move over. Defendant's hand never went inside her underwear.

¶ 21 A.P.H. told her mom about the game and told her not to tell defendant, but her mom did anyway. A.P.H. did not think that it was good that she told her mother, because, otherwise, "[n]one of this would have happened," her dad would still be there, and "[n]o one would be mad."

¶ 22 The State rested, and defendant moved for a directed verdict, primarily on the basis that A.P.H. did not testify in court as to any unlawful conduct by defendant. The trial court denied

the motion. On March 19, 2014, the jury found defendant guilty of all four counts of aggravated criminal sexual abuse.

¶ 23 On April 17, 2014, defendant filed a motion for judgment notwithstanding the verdict, or for a new trial. Defendant argued, among other things, that the trial court erred in allowing into evidence A.P.H.'s hearsay statements to Marmo, Ryan, and Hawley under section 115-10, because A.P.H. failed to testify at trial as to any wrongful or unlawful conduct by him. Defendant argued that the trial court similarly erred in allowing into evidence the recording and transcript of A.P.H.'s interview with Hawley.

¶ 24 On June 18, 2014, the trial court issued a written order. It stated, in relevant part:

> "As a result of my review, I find that the minor, A.[P.]H., did not accuse the Defendant of the actions which form the basis for the charge against him. Therefore, the minor did not testify for the purpose of admission of evidence pursuant to 725 ILCS 5/115-10. I further find that the admission of evidence pursuant to that section was in error. I find that said error was not harmless error and that the Defendant was therefore denied the opportunity to confront and cross-examine the witnesses against him."

The trial court ruled that defendant was entitled to a new trial.

¶ 25 On July 17, 2014, defendant filed a motion to vacate the finding of guilt and dismiss the indictments. He argued that without the admission of the hearsay statements, there was no evidence to support a finding of guilt. According to defendant, by ordering a new trial, the State was being given a second opportunity to supply sufficient evidence, which it had failed to do at the first trial, violating his constitutional right against double jeopardy. On August 18, 2014, the State filed a response to the motion, arguing that a new trial would not violate the double jeopardy clause because the trial verdict was overturned for trial error, rather than insufficiency

of the evidence. On September 4, 2014, the trial court granted defendant's request to vacate the finding of guilt, based on the grant of the new trial. However, it further ruled that defendant had not been placed in double jeopardy because the error in the admission of evidence was procedural.

¶ 26 The case was called for a re-trial over one year later, on December 2, 2015. The same day, defendant filed a motion to dismiss based on double jeopardy, reasserting his prior arguments. The trial court denied the motion based on its interpretation of the double jeopardy clause and *People v. Cordero*, 2012 IL App (2d) 101113.[1] Defendant timely appealed.

¶ 27 II. ANALYSIS

¶ 28 On appeal, defendant argues that the trial court erred in denying his motion to dismiss the case based on double jeopardy. We review *de novo* a trial court's ruling on a motion to dismiss charges on double jeopardy grounds where, as here, neither the facts or witnesses' credibility are at issue. *People v. Ventsias*, 2014 IL App (3d) 130275, ¶ 10.

¶ 29 The fifth amendment's double jeopardy clause states: "No person shall*** be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const., amend. V. The Illinois Constitution similarly provides: "No person shall *** be twice put in jeopardy for the same offense." Ill. Const. 1970, art. 1, § 10. We construe our state constitution's double jeopardy clause in the same manner as the double jeopardy clause in the federal constitution. *People v. Cervantes*, 2013 IL App (2d) 110191, ¶ 44. The double jeopardy clause prohibits: (1) a second prosecution for the identical offense after an acquittal; (2) prosecution for the same

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[1] Defendant argues that in denying his motion to dismiss, the trial court "improperly cite[d] a Rule 23 outlier as the basis for its ruling." However, *Cordero* had been a published opinion of this court years before the hearing.

offense after a conviction; and (3) more than one punishment for the same offense. *People v. Gray*, 214 Ill. 2d 1, 6 (2005).

¶ 30 Defendant cites the United State's Supreme Court's statement that " 'cases have defined an acquittal to encompass any ruling that the prosecution's proof is insufficient to establish criminal liability for an offense.' " *Martinez v. Illinois*, __ U.S. at __, 134 S. Ct. 2070, 2076 (2014) (quoting *Evans v. Michigan*, 568 U.S. __, __, 133 S. Ct. 1069, 1074-75 (2013)). In *Martinez*, after the trial court swore in the jury, the State declined to present any evidence and asked for a continuance. *Id.*, __ U.S. at __, 134 S. Ct. at 2071. The trial court instead granted the defendant's motion for a directed verdict of not guilty. The Supreme Court held that jeopardy attaches when the jury is empanelled and sworn, and because the trial court found the State's evidence insufficient to sustain a conviction, the defendant could not be retried. *Id.*, __ U.S. at __, 134 S. Ct. at 2072. The Court further stated that it had " 'emphasized that what constitutes an "acquittal" is not to be controlled by the form of the judge's action'; it turns on 'whether the ruling of the judge, whatever its label, actually represents a resolution *** of some or all of the factual elements of the offense charged.' " *Id.*, __ U.S. at __, 134 S. Ct. at 2076 (quoting *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977)).

¶ 31 Defendant notes that the trial court ruled that because A.P.H. did not testify as to any specific sexual act by him, the admission of hearsay evidence under section 115-10 was improper. Defendant maintains that based on that ruling, "the Court" cannot consider the testimony of Marmo, Ryan, and Hawley, as well as the victim interview or transcript of the interview as they relate to statements by A.P.H. Defendant maintains that when this evidence is removed from the record, the cumulative testimony of the State's remaining witnesses cannot sustain the required elements of aggravated criminal sexual abuse, most particularly the

allegation here that the conduct was for his sexual gratification. Defendant argues that setting aside the improperly-admitted evidence, as was required under the trial court's ruling, an "acquittal in effect was created" as per *Martinez*, and double jeopardy principles bar a retrial.

¶ 32 The State argues that this case is controlled by *People v. Cordero*, 2012 IL App (2d) 101113. We agree. In *Cordero*, after a bench trial, the defendant was convicted of aggravated criminal sexual assault. *Id.* ¶ 1. Based on trial errors, he moved for either a judgment of acquittal or a new trial. *Id.* The trial court denied the defendant's request for an acquittal but granted him a new trial. *Id.* The defendant then sought to dismiss the charge on the basis that a retrial would subject him to double jeopardy because there was insufficient evidence at his first trial to convict him. *Id.* We stated that the protections of double jeopardy were triggered only if there was an event, such as an acquittal, that terminated the original jeopardy, but that did not occur where the trial court granted a new trial on the basis of reversible error from the exclusion of certain evidence. *Id.* ¶¶ 3-4. We stated, "Retrying [the] defendant could not subject him to double jeopardy, because nothing has terminated his original jeopardy," and that "double jeopardy does not bar a retrial, *regardless of the sufficiency (or insufficiency) of the evidence at the original trial*." (Emphasis added.) *Id.* ¶ 4. We noted that in contrast to a trial court ordering a new trial, when an appellate court reverses a criminal conviction and remands the case for a new trial, the appellate court must decide whether the evidence was sufficient, or double jeopardy will bar a retrial. *Id.* ¶ 6.

¶ 33 In arriving at our conclusion in *Cordero*, we relied extensively on *Richardson v. United States*, 468 U.S. 317 (1984). *Cordero*, 2012 IL App. (2d) 101113, ¶¶ 5-7. In *Richardson*, a federal jury acquitted the defendant on one count but could not reach a verdict on the remaining two counts. *Id.* ¶ 5 (citing *Richardson*, 468 U.S. at 318-19). The trial court declared a mistrial as

to the two counts and ordered a new trial. The defendant then sought to dismiss the charges as barred by double jeopardy. The trial court denied the motion, and the appellate court and Supreme Court affirmed. *Id.* The Supreme Court stated that a mistrial was not an event terminating jeopardy, so " '[r]egardless of the sufficiency of the evidence at [the defendant's] first trial, he ha[d] no valid double jeopardy claim to prevent his retrial.' " (Emphasis omitted.) *Id.* ¶ 6 (quoting *Richardson*, 468 U.S. at 326). In *Cordero*, we stated that although *Richardson* involved a retrial after a hung jury as opposed to a conviction that was reversed for trial error, there was "no reason why a defendant who was found guilty beyond a reasonable doubt should enjoy greater protection than one whose jury could not reach a verdict either way." *Id.* ¶ 7. We noted that several federal appellate court opinions supported our view. *Id.*

¶ 34 Here, as in *Cordero*, following his conviction, defendant moved for either a judgment of acquittal[2] or a new trial. In both cases, the trial courts denied the request for an acquittal but granted a new trial based on trial errors. Thus, in both cases there was no event terminating the original jeopardy, and a retrial is not prohibited, regardless of the sufficiency of the evidence at the first trial. See *id.* ¶ 4.

¶ 35 Defendant argues that the jeopardy in this case terminated when he was found guilty by the jury. We recognize that double jeopardy prohibits the prosecution for the same offense after a conviction. *Gray*, 214 Ill. 2d at 6. However, "[a] well-recognized principle of constitutional jurisprudence is that when a defendant voluntarily seeks to have his original conviction set aside

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[2] Defendant technically sought a judgment notwithstanding the verdict, but the grant of such a motion is essentially an acquittal based on the insufficiency of the evidence. *People v. Leezer*, 385 Ill. App. 3d 446, 448 (2008).

and is successful, it is as though the slate has been wiped clean and the conviction is wholly nullified, and a defendant is not placed in double jeopardy at a retrial." *People v. Crutchfield*, 353 Ill. App. 3d 1014, 1025 (2004). Here, defendant sought to have his convictions set aside and obtain a new trial. When the trial court granted the request, defendant's convictions were nullified, so they would not create a double jeopardy bar to retrial. Thus, any alleged insufficiency of evidence at the first trial would not bar a retrial. *Cordero*, 2012 IL App (2d) 101113, ¶ 4.

¶ 36 Finally, we note that even if cases where the *reviewing court* reverses a conviction due to a trial error, "retrial is permitted even though evidence is insufficient to sustain a verdict once erroneously admitted evidence has been discounted, and for purposes of double jeopardy all evidence submitted at the original trial may be considered when determining the sufficiency of the evidence." *People v. Olivera*, 164 Ill. 2d 382, 393 (1995); see also *People v. Brothers*, 2015 IL App (4th) 130644, ¶ 146 (double jeopardy did not prevent retrial on a particular count even though the State had presented no admissible evidence of that offense). In other words, under *Cordero* we do not look at the sufficiency of the evidence because the *trial court* granted defendant a new trial due to evidentiary errors (*Cordero*, 2012 IL App (2d) 101113, ¶¶ 3-4), but even if we were to do so, under *Olivera* we would consider all of the evidence obtained at the original trial. This would include A.P.H.'s hearsay statements to Marmo, Ryan, and Hawley, meaning that there was clearly sufficient evidence to find defendant guilty beyond a reasonable doubt.

¶ 37 In sum, double jeopardy does not prohibit a retrial of the charges against defendant, so the trial court properly denied defendant's motion to dismiss the case.

¶ 38 III. CONCLUSION

¶ 39 For the reasons stated, we affirm the judgment of the Kendall County circuit court. 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 2014); see also *People v. Nicholls*, 71 Ill. 2d 166, 179 (1978).

¶ 40 Affirmed.