

[Cite as *State v. Ferricci*, 2019-Ohio-994.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION  
No. 107279

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

MICHAEL FERRICCI

DEFENDANT-APPELLANT

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**JUDGMENT:**  
AFFIRMED AND REMANDED

Criminal Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CR-16-607929-A

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**BEFORE:** Blackmon, P.J., Laster Mays, J., and Headen, J.

**RELEASED AND JOURNALIZED:** March 21, 2019

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PATRICIA ANN BLACKMON, P.J.:

{¶1} Defendant-appellant, Michael Ferricci, appeals from the denial of his motion to dismiss a rape charge on double jeopardy grounds where a jury previously acquitted him of kidnapping with a sexual motivation specification based on the same incident. He assigns the following error for our review:

[T]he double jeopardy clause bars re-prosecution in this case for the rape charge when [Ferricci] was acquitted of the kidnapping charge which arose and is based upon the same conduct as the rape charge.

{¶2} Having reviewed the record and pertinent law, we conclude that the trial court properly denied the motion to dismiss. The apposite facts follow.

{¶3} In July 2016, Ferricci was indicted for rape and kidnapping with a sexual motivation specification, all in connection with allegations that he assaulted a minor at the daycare center where he worked. The state dismissed the sexual battery, unlawful sexual conduct with a minor, and public indecency charges prior to trial. The matter proceeded to a jury trial on the charge of rape in violation of R.C. 2907.02(A)(1)(b) (sexual conduct with a child under the age of 13), and kidnapping in violation of R.C. 2905.01(A)(4) (removal or restraint of a child under 13 for the purpose of engaging in sexual activity) with a sexual motivation specification under R.C. 2941.147(A). The jury acquitted Ferricci of kidnapping, but could not reach a verdict on the rape charge.

{¶4} The trial court subsequently scheduled the rape charge for retrial, and the defense filed a motion to dismiss on the basis of double jeopardy. Ferricci argued that the acquittal of kidnapping for the purpose of engaging in sexual activity with a sexual motivation specification established that the jury ultimately decided facts that preclude relitigation of the rape charge. The trial court denied the motion.

### **Double Jeopardy**

{¶5} Ferricci asserts that the jury's ultimate factual determinations in the acquittal for kidnapping for the purpose of engaging in sexual activity with a sexual motivation specification preclude retrial on the rape charge. In opposition, the state argues that issue preclusion bars only what a jury actually decided in the prior acquittal and that the jury did not actually decide facts

that preclude relitigation of the rape charge. The state maintains that the jury acquitted Ferricci of kidnapping due to failure of evidence of restraint or removal.

{¶6} The denial of a motion to dismiss on double jeopardy grounds is a final appealable order subject to immediate appellate review. *State v. Anderson*, 138 Ohio St.3d 264, 2014-Ohio-542, 6 N.E.3d 23, ¶ 26. We apply a de novo standard of review when reviewing a trial court's decision to deny a motion to dismiss on double jeopardy grounds. *State v. Mutter*, 150 Ohio St.3d 429, 2017-Ohio-2928, 82 N.E.3d 1141, ¶ 13; *State v. Jordan*, 10th Dist. Franklin No. 14AP-978, 2015-Ohio-4457, ¶ 10.

{¶7} The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution guarantees that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." The Ohio Constitution also provides that "[n]o person shall be twice put in jeopardy for the same offense." Ohio Constitution, Article I, Section 10. The protections afforded by the Ohio and United States Constitutions are coextensive. *State v. Martello*, 97 Ohio St.3d 398, 2002-Ohio-6661, 780 N.E.2d 250, ¶ 7. The double jeopardy guarantees establish a constitutional policy of finality for defendants. *State v. Mutter*, 150 Ohio St.3d 429, 2017-Ohio-2928, 82 N.E.3d 1141, ¶ 14. Among these protections, the Double Jeopardy Clauses prohibit a second prosecution for the same offense following an acquittal or conviction. *See Brown v. Ohio*, 432 U.S. 161, 165, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977). Additionally, "successive prosecutions will be barred in some circumstances where the second prosecution requires the relitigation of factual issues already resolved by the first." *Id.* at 166-167; *State v. Edwards*, 8th Dist. Cuyahoga Nos. 94568 and 94929, 2011-Ohio-95, ¶ 19. *See also Ashe v. Swenson*, 397 U.S. 436, 443, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970).

#### **Failure to Reach a Verdict**

{¶8} The failure of the jury to reach a verdict is not an event that terminates jeopardy. *Richardson v. United States*, 468 U.S. 317, 325, 104 S.Ct. 3081, 82 L.Ed.2d 242 (1984). See also *Oregon v. Kennedy*, 456 U.S. 667, 672, 102 S.Ct. 2083, 72 L.Ed. 416 (1982); *State v. Smith*, 8th Dist. Cuyahoga No. 105662, 2018-Ohio-1756, ¶ 19. The *Smith* Court explained:

It is well-established that a mistrial as a result of a deadlocked jury does not invoke double jeopardy implications because “a hung jury is not an event that terminates the original jeopardy to which [the defendant] was subjected.” *Richardson* 468 U.S. at 326, 104 S.Ct. 3081, 82 L.Ed.2d 242. “In other words, a hung jury is not the equivalent of an acquittal.” *Id.* at 325. Accordingly, “a retrial following a ‘hung jury’ does not violate the Double Jeopardy Clause.” *Id.* at 324.

In this case, because the jury was unable to agree on a verdict on the abduction count charged in Count 2, the Double Jeopardy Clause did not bar the state from retrying appellant on this count. Accordingly, the trial court’s judgment permitting the state to proceed on the abduction count is affirmed.

*Id.*

{¶9} In the instant case, the jury was unable to agree on a verdict on the offense of rape and the jury reached a hung verdict on this charge. Accordingly, this aspect of the Double Jeopardy Clause does not bar the state from retrying appellant on this count.

#### **“Same Offense” Analysis**

{¶10} We next consider whether the acquittal for kidnapping purpose of engaging in sexual activity under R.C. 2905.01(A)(4) with a sexual motivation specification implicates the “same offense” as the rape charge. Ferricci maintains that the offenses are allied offenses of similar import.

{¶11} We note that in *State v. Ladson*, 8th Dist. Cuyahoga No. 104642, 2017-Ohio-7715, this court rejected the defendant’s argument that the trial court erred in refusing to dismiss a

charge of grand theft because this charge impermissibly subjected him to successive prosecutions for an “allied offense of similar import,” where he had previously been convicted receiving stolen property and having weapons under disability in a prior conviction involving the same firearm. This court noted double jeopardy claims relating to the protection against successive prosecutions are evaluated under the test set forth in *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932), not the allied offenses statute, although this presents an “anomaly” as compared to the analysis applied for sentencing. *Id.* at ¶ 46, citing *State v. Zima*, 102 Ohio St.3d 61, 2004-Ohio-1807, 806 N.E.2d 542, ¶ 40, fn. 3 (Stewart, J., concurring).

Under the *Blockburger* analysis, the relevant question is:

“whether each offense contains an element not contained in the other; if not, they are the “same offense” and double jeopardy bars additional punishment and successive prosecution.” *State v. Mutter*, Slip Opinion No. 2017-Ohio-2928, ¶ 17, 82 N.E.3d 1141, 150 Ohio St. 3d 429, quoting *United States v. Dixon*, 509 U.S. 688, 696, 113 S.Ct. 2849, 125 L.Ed.2d 556 (1993).

*Id.* at ¶ 46 (Stewart, J., concurring).

{¶12} In determining whether the prior acquittal for kidnapping in violation of R.C. 2905.01(A)(4) (removal or restraint of a child under 13 for the purpose of engaging in sexual activity), with a sexual motivation specification, bars retrial for rape in violation of R.C. 2907.02(A)(1)(b) (sexual conduct with a child under the age of 13), we apply the *Blockburger* test. We note that each offense contains an element not contained in the other, so the “same offense” aspect of double jeopardy does not bar retrial of the rape charge.

### **Relitigation of Factual Issues**

{¶13} We next consider the double jeopardy claim in terms of whether retrial on the rape charge involves relitigation of an issue of ultimate fact that has already been determined by the prior acquittal, in accordance with *Ashe v. Swenson*, 397 U.S. 436, 443, 90 S.Ct. 1189, 25

L.Ed.2d 469 (1970). *Accord State v. Edwards*, 8th Dist. Cuyahoga Nos. 94568 and 94929, 2011-Ohio-95, ¶ 17. However, we recognize that “‘a mere overlap in proof between two prosecutions does not establish a double jeopardy violation.’” *In re Burton*, 160 Ohio App.3d 750, 2005-Ohio-2210, 828 N.E.2d 719, ¶ 10 (1st Dist.), quoting *United States v. Felix*, 503 U.S. 378, 386, 112 S.Ct. 1377, 118 L.Ed.2d 25 (1992).

{¶14} In *Ashe*, a group of armed assailants robbed six poker players. *Ashe* was tried for robbing one of the poker players and was acquitted. He was then tried for robbing another poker player and was convicted. The United States Supreme Court held that in order to conduct the collateral estoppel analysis, a court must “‘examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.” (Citations omitted.) *Id.* at 444. Applying that analysis, the court concluded that *Ashe*’s second prosecution was precluded by the earlier acquittal, explaining:

The single rationally conceivable issue in dispute before the jury was whether the petitioner had been one of the robbers. And the jury by its verdict found that he had not. The federal rule of law, therefore, would make a second prosecution for the robbery of Roberts wholly impermissible.

*Id.* at 445. *Accord Dowling v. United States*, 493 U.S. 342, 348, 110 S.Ct. 668, 107 L.Ed.2d 708 (1990).

{¶15} Later, in *Yeager v. United States*, 557 U.S. 110, 129 S. Ct. 2360, 174 L.Ed.2d 78 (2009), the court addressed the issue of collateral estoppel arising from a jury’s acquittal on some counts and its failure to return a verdict on other counts. The *Yeager* court held where a jury verdict that “necessarily decided” “a critical issue of ultimate fact” in the favor of the defendant,

then this protects the defendant from prosecution for any charge for which that is an essential element. *Id.* at 123. In order to conduct this analysis, courts should examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, but that hung counts are not relevant to the determination. *Id.* at 120-121.

{¶16} In *State v. Buzanowski*, 8th Dist. Cuyahoga No. 99854, 2014-Ohio-1947, ¶ 32, the defendant was charged in a multicount indictment for various offenses in connection with his conduct at a party. As is relevant herein, he was acquitted of sexual battery, but the jury was deadlocked as to charges of gross sexual imposition and unlawful sexual conduct with a minor. On retrial, Buzanowski was convicted of both counts. On appeal, this court noted that both gross sexual imposition and sexual battery require evidence that the victim was substantially impaired and that the defendant knew or had cause to reasonably believe the victim was substantially impaired. Therefore, the court concluded that retrial on the charge of gross sexual imposition was precluded, due to the prior acquittal for sexual battery. This court stated:

We are left with the inescapable conclusion that the jury in Buzanowski's first trial concluded that either H.K. was not substantially impaired or at the very least Buzanowski lacked knowledge of such impairment. Because the jury resolved this factual issue in favor of Buzanowski when it acquitted him of sexual battery in violation of R.C. 2907.05(A)(2) at his first trial, pursuant to *Yeager* the state was precluded from retrying him on the hung count of gross sexual imposition for which that fact was an essential element.

*Id.* at ¶ 42.

{¶17} Turning to the offenses at issue, we note that R.C. 2905.01(A) defines kidnapping as follows:

(A) No person, by force, threat, or deception, or, in the case of a victim under the age of thirteen or mentally incompetent, by any means, shall remove another from the place where the other person is found or restrain the liberty of the other person, for any of the following purposes:



\* \* \*

(4) To engage in sexual activity, as defined in section 2907.01 of the Revised Code, with the victim against the victim's will[.]

This offense also contained a sexual motivation specification under R.C. 2941.147(A).

{¶18} R.C. 2907.02(A)(1)(b) defines rape as follows:

No person shall engage in sexual conduct with another who is not the spouse of the offender or who is the spouse of the offender but is living separate and apart from the offender, when any of the following applies:

\* \* \*

(b) The other person is less than thirteen years of age, whether or not the offender knows the age of the other person.

{¶19} Applying the foregoing, we begin by noting that the transcript from the trial that produced the kidnapping acquittal contains evidence that the young child crawled on the floor and into the locked stall while Ferricci was using the restroom. We also acknowledge that the child was five years-old when he testified and there were numerous inconsistencies with the child's testimony, including who was present, and what transpired. The child also failed to disclose the alleged abuse during multiple interviews, and also indicated that Ferricci was "just going tinkle." Ferricci testified and denied the allegations, but due to "overbearing, coercive tactics, provided a false confession."

{¶20} From the foregoing, we conclude that a rational jury could have grounded its kidnapping acquittal upon an issue other than that which Ferricci seeks to foreclose from consideration. Kidnapping as charged required the state to show that Ferricci removed or restrained the child (who is under the age of 13) for the purpose of engaging in sexual activity. A sexual motivation specification was included for sentencing. Ferricci was entitled to an

acquittal upon failure of proof of removal or restraint, or failure of proof of purpose to engage in sexual activity. Therefore, we conclude that in acquitting Ferricci of kidnapping, it was not essential for the jury to have concluded that no sexual conduct occurred. The occurrence or nonoccurrence of sexual conduct was not “necessarily decided” and was not “a critical issue of ultimate fact” in light of the kidnapping acquittal. Unlike the scenario presented in *Buzanowski*, the rape charge does not require proof of an element that has already been resolved in Ferricci’s favor in the kidnapping acquittal. In short, there is no basis upon which we may conclude that the kidnapping and rape charges are subject to merger, or that the jury in any way resolved the rape charge in Ferricci’s favor in the first trial.

{¶21} Ferricci argues that retrial of the rape charge is barred by *Madsen v. McFaul*, 643 F. Supp.2d 962 (N.D. Ohio 2009). However, due to its unique procedural history, *Madsen* is inapposite to this matter. In *Madsen*, the defendant was indicted for eight carbon-copy counts of rape, one count of kidnapping, one count of domestic violence, and one count of aggravated robbery. The trial court dismissed the domestic violence charge, the jury acquitted him of two of the rape charges, but he was convicted of six rape counts and the kidnapping counts. At sentencing, the trial court merged the rape and kidnapping convictions, concluding that “there was no separate restraint.” *Id.* at 970. Later, the convictions were vacated and the state was given 120 days in which to retry Madsen. Madsen filed a motion to dismiss, arguing that retrial was barred by double jeopardy. The court ruled that the carbon-copy nature of the rape charges resulted in an effective acquittal on all eight rape charges. The court also held that double jeopardy barred retrial on the kidnapping charge, in light of the prior merger and absence of other evidence pertaining to restraint. This case, however, does not include the prior merger of any offenses and does not involve “carbon copy” allegations among the charges.

{¶22} In accordance with all of the foregoing, the assigned error is without merit.

{¶23} Judgment is affirmed and remanded for further proceedings consistent with this opinion. The trial court is ordered to carry this judgment into execution.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

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PATRICIA ANN BLACKMON, PRESIDING JUDGE

ANITA LASTER MAYS, J., and  
RAYMOND C. HEADEN, J., CONCUR