COURT OF APPEALS
DECISION
DATED AND FILED

January 12, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-1419-CR

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

JEFFREY LEVASSEUR,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Forest County: ROBERT E. KINNEY, Judge. *Reversed and cause remanded.*

Before Cane, C.J., Myse, P.J., and Hoover, J.

PER CURIAM. The State appeals a trial court order dismissing with prejudice two of the four counts charging Jeffrey Levasseur with first-degree sexual assault. Initially, the jury found Levasseur guilty on all four counts, but on postverdict motions the trial court concluded there was ineffective assistance of counsel and ordered a new trial on the first two counts. It, however, dismissed the

third and fourth counts with prejudice. The State does not dispute the trial court's holding on ineffective assistance of counsel. It contends the trial court erred by dismissing counts three and four with prejudice, thereby barring it from retrying Levasseur on those charges.

The trial court ruled that the guilty verdict on the third count rested on erroneously admitted hearsay and that the guilty verdict on the fourth count rested on a complaint and information insufficient to give fair notice of the charge. While the trial court gave no grounds for dismissing the charges with prejudice, apparently it relied on the double jeopardy clause of the United States Constitution; both parties argue the appeal in that posture. The State argues that the double jeopardy clause did not bar a new trial on the third and fourth counts. Levasseur disagrees and points out that trial courts may also dismiss with prejudice for bad-faith violations of due process. Because we agree with the State, we reverse the trial court's order and remand the matter for further proceedings consistent with this opinion.

We first conclude that there is no basis meriting dismissal of count three with prejudice under the double jeopardy clause. The double jeopardy clause does not bar the State from reprosecuting defendants who have their convictions set aside because of improperly admitted evidence. *See* ***Lockhart v. Nelson***, 488 U.S. 33, 38 (1988). This is true regardless of whether the remaining evidence would have been sufficient to prove guilt beyond a reasonable doubt. ***Id***. at 40. Levasseur finds himself in that position, and the trial court should have granted a new trial on this count. Additionally, the double jeopardy clause does not bar the State from reprosecuting defendants who have their convictions set aside for pretrial errors, such as defects in the charging instruments. *See* ***Montana v. Hall***, 481 U.S. 400, 404 (1987) (citing ***United States v. Ball***, 163 U.S. 662, 672

(1896)). The double jeopardy clause bars reprosecution only of those defendants who have their convictions set aside for insufficient evidence. *See* ***Hall***, 481 U.S. at 402. Although the trial court may dismiss count four because it does not give fair notice of the time of the alleged act, it may not do so with prejudice. As a result, Levasseur cannot avoid reprosecution on the ground the criminal complaint and information were insufficient to give him fair notice of the charges.

We also reject Levasseur's argument that the trial court properly dismissed the charges with prejudice upon a bad-faith violation of due process. In extraordinary instances, Wisconsin courts have permitted dismissals with prejudice for bad-faith violations of due process. *See, e.g.,* ***State v. Golden***, 185 Wis.2d 763, 519 N.W.2d 659 (Ct. App. 1994); ***State v. Greenwold***, 181 Wis.2d 881, 512 N.W.2d 337 (Ct. App. 1994). This case, however, does not give cause for such a dismissal. First, there is no evidence that the trial court relied on this rationale. Second, Lavasseur has not shown the requisite bad faith. There is no evidence that the prosecution had bad-faith motives for offering inadmissible hearsay into evidence or for filing pleadings giving Lavasseur inadequate notice of the charges. Therefore, the order dismissing counts three and four with prejudice is reversed.[1]

[1] On December 21, 1998, Lavasseur moved for a remand to permit his retrial on the first two counts pending this appeal. The appeal's resolution moots the need for a remand pending appeal.

By the Court.—Order reversed and cause remanded for further proceedings.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.