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Minn. Stat. § 480A.08, subd. 3 (2016).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0736**

State of Minnesota,
Respondent,

vs.

Russell Lynn Norton,
Appellant.

**Filed May 7, 2018
Affirmed
Peterson, Judge**

Carlton County District Court
File No. 09-CR-10-1484

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Thomas H. Pertler, Carlton County Attorney, Benjamin J. Ranallo, Assistant County Attorney, Carlton, Minnesota (for respondent)

Charles F. Clippert, St. Paul, Minnesota (for appellant)

Considered and decided by Worke, Presiding Judge; Peterson, Judge; and Ross, Judge.

UNPUBLISHED OPINION

PETERSON, Judge

This court reversed appellant's conviction of escape from custody and remanded for further proceedings. On remand, appellant was convicted of attempted escape. In this appeal from the second conviction, appellant argues that (1) his retrial was barred by the

statute of limitations for escape, (2) the double jeopardy clauses of the state and federal constitutions barred his retrial because this court's reversal of the first conviction was based on the insufficiency of the evidence, and (3) his retrial was barred by the statutory prohibition against serial prosecution in Minn. Stat. § 609.035 (2016). We affirm.

FACTS

Appellant Russell Lynn Norton is a civilly committed patient at the Minnesota Sex Offender Program (MSOP). On June 19, 2010, Norton and three other patients left their unit. Security counselors were alerted, and Norton was stopped when he was between interior and exterior perimeter fences. Norton was charged with escape from custody in violation of Minn. Stat. § 609.485, subd. 2(5) (Supp. 2009). The complaint alleged that Norton “did wrongfully, unlawfully, intentionally and feloniously escape or attempt to escape,” but it did not include a reference to Minn. Stat. § 609.17 (2008), which sets forth the elements of attempt.

Before trial, Norton filed notice under Minn. R. Crim. P. 9.02, subd. 1(5), that he intended to assert a necessity defense, and the state filed a motion requesting that the district court preclude Norton from raising the defense. The district court granted the state's motion. Norton then waived his right to a jury trial, stipulated to the prosecution's evidence, and submitted the case to the district court for decision under Minn. R. Crim. P. 26.01, subd. 4. This procedure is used to preserve an issue for appellate review when the district court's ruling on a “pretrial issue is dispositive of the case.” *Id.*, subd. 4(a).

The district court found that Norton “attempted to escape the facility by leaving without lawful authority” and concluded that Minn. Stat. § 609.485, subd. 2(5), “makes it

a crime to attempt to escape from [MSOP].” The district court found appellant guilty of violating Minn. Stat. § 609.485, subd. 2(5). Norton was sentenced for committing escape from custody, rather than for attempted escape.

Norton appealed. On appeal, the state conceded that the record did not support Norton’s escape conviction and that the district court made an error of law by failing to refer to Minn. Stat. § 609.17. This court determined that, because the district court’s ruling on the necessity defense was not dispositive of the case, the stipulation under Minn. R. Crim. P. 26.01, subd. 4, was invalid. Then, because it is not proper for this court to consider a pretrial issue when a stipulation under Minn. R. Crim. P. 26.01, subd. 4, is invalid, this court reversed Norton’s conviction and remanded for further proceedings without expressing an opinion about the district court’s pretrial ruling on the necessity defense. *State v. Norton*, No. A14-0296 (Minn. App. May 4, 2015) (order opinion).

On September 15, 2015, an amended complaint was filed charging Norton with one count of attempted escape from custody in violation of Minn. Stat. § 609.485, subd. 2(5), with reference to Minn. Stat. § 609.17, subd. 1. Norton moved to dismiss on the ground that the amendment was barred by the statute of limitations. The district court denied the motion, and the case was tried to a jury, which found Norton guilty of attempted escape from custody. This appeal followed sentencing.

D E C I S I O N

I.

The statute of limitations for attempted escape from custody is three years. Minn. Stat. § 628.26(k) (2008). Norton argues that attempted escape is a crime that is separate

and distinct from a completed escape, and, therefore, the amended complaint was barred by the statute of limitations. The supreme court has stated that an attempted offense is separate and distinct from the offense that was attempted, but that statement was made in the context of explaining that an attempted offense is not a violation of the statute defining the offense that was attempted. *State v. Noggle*, 881 N.W.2d 545, 549 (Minn. 2016).

When a defendant is prosecuted for a crime, he may be convicted of the crime charged or an included offense, and “[a]n attempt to commit the crime charged” is an included offense. Minn. Stat. § 609.04, subd. 1(2) (2008). Because attempted escape is an included offense of escape, the original complaint included attempted escape. The September 15, 2015 complaint, which added a reference to Minn. Stat. § 609.17, subd. 1, did not add any crime that was not included in the original complaint, and, therefore, did not violate the statute of limitations. *See State v. Heffelfinger*, 197 Minn. 173, 178, 266 N.W. 751, 745 (1936) (stating that an amended complaint that does not change the cause of action relates back to the original complaint for purposes of the statute of limitations).

II.

The Double Jeopardy Clause precludes retrial where a conviction is set aside because the evidence supporting it is legally insufficient. Legally insufficient means that the government’s case was so lacking that it should not have even been submitted to the jury. A reviewing court considers all of the evidence admitted by the trial court, whether erroneously admitted or not, in deciding whether retrial is permissible under the Double Jeopardy Clause.

State v. Cox, 779 N.W.2d 844, 853 (Minn. 2010) (quotations and citations omitted).

Citing *Evans v. Michigan*, Norton argues that the jury trial on remand was barred by double jeopardy because this court concluded in his first appeal that the facts supported only an attempt to escape. 568 U.S. 313, 133 S. Ct. 1069 (2013). In *Evans*, the Supreme Court stated:

[O]ur cases have defined an acquittal to encompass any ruling that the prosecution’s proof is insufficient to establish criminal liability for an offense. Thus an acquittal includes a ruling by the court that the evidence is insufficient to convict, a factual finding that necessarily establishes the criminal defendant’s lack of criminal culpability, and any other ruling which relates to the ultimate question of guilt or innocence.

Id. at 318–19, 133 S. Ct. at 1074–75 (quotation and citations omitted). The *Evans* Court held that the defendant was acquitted and double jeopardy barred retrial when the district court ruled that the evidence was insufficient to prove an element of the offense even though “the unproven ‘element’ was not actually a required element” of the offense. *Id.* at 315, 330, 133 S. Ct. at 1073, 1081.

But the Supreme Court explained “that labels do not control [the] analysis in this context; rather, the substance of a court’s decision, does.” *Id.* at 322, 133 S. Ct. at 1076.

[T]he relevant distinction is between judicial determinations that go to the criminal defendant’s lack of criminal culpability, and those that hold that a defendant, although criminally culpable, may not be punished because of a supposed procedural error. Culpability (i.e., the ultimate question of guilt or innocence) is the touchstone, not whether any particular elements were resolved or whether the determination of nonculpability was legally correct.

Id. at 323–24, 133 S. Ct. at 1077 (quotations and citations omitted).

Unlike in *Evans*, Norton was found guilty by the district court. But, in submitting the case for decision under Minn. R. Crim. P. 26.01, subd. 4, the parties incorrectly agreed that the district court's ruling on the necessity defense was dispositive of the case. Although this court noted the state's concession that the district court made an error of law by not referencing the attempt statute because the facts in the record did not support a conviction of escape, this court's reversal of Norton's first conviction was not based on insufficiency of the evidence or the district court's failure to reference the attempt statute. Rather, this court reversed Norton's first conviction because presentation of a necessity defense was not dispositive of the case, which made the stipulation under Minn. R. Crim. P. 26.01 invalid. Because this court reversed the first conviction due to the parties' procedural error, without determining whether Norton was criminally culpable, Norton's retrial was not barred by double jeopardy.

III.

Minn. Stat. § 609.035, subd. 1 (2008), states:

[I]f a person's conduct constitutes more than one offense under the laws of this state, the person may be punished for only one of the offenses and a conviction or acquittal of any one of them is a bar to prosecution for any other of them. All the offenses, if prosecuted, shall be included in one prosecution which shall be stated in separate counts.

This statute protects criminal defendants from both multiple prosecutions and multiple sentences for offenses resulting from the same behavioral incident. See *State v. Johnson*, 273 Minn. 394, 397, 141 N.W.2d 517, 520–21 (1966). This provision is intended to

broaden the protection afforded by double jeopardy. *State v. Schmidt*, 612 N.W.2d 871, 876 (Minn. 2000).

Like Norton's double-jeopardy argument, his argument that his retrial was barred by Minn. Stat. § 609.035 turns on whether this court's reversal of his first conviction operated as an acquittal based on insufficiency of the evidence. Because Norton's first conviction was reversed due to a legal error and the reversal did not operate as an acquittal, his retrial was not barred by Minn. Stat. § 609.035.

Affirmed.