

IN THE SUPREME COURT OF THE STATE OF NEVADA

CHERYL BOTZET A/K/A CHERYL
LYNN MUSSO,

Petitioners,

vs.

THE EIGHTH JUDICIAL DISTRICT
COURT OF THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF

CLARK; AND THE HONORABLE
STEFANY MILEY, DISTRICT JUDGE,

Respondents,

and

THE STATE OF NEVADA,

Real Party in Interest.

No. 67196

FILED

MAR 11 2015

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER DENYING PETITION

This original petition for a writ of mandamus challenges a district court ruling denying a motion to dismiss an indictment on double jeopardy grounds. Petitioner Cheryl Botzet was charged with murder in connection with the death of her 11-year-old daughter and was convicted of second-degree murder. She subsequently filed a motion for a new trial, which the district court granted on the ground that prior-bad-act evidence related to Botzet's care of her daughter in Colorado was erroneously admitted.¹ Thereafter, the State secured an indictment against Botzet for the murder of her daughter, alleging the same conduct that was alleged in the original indictment. The indictment differed from the information in

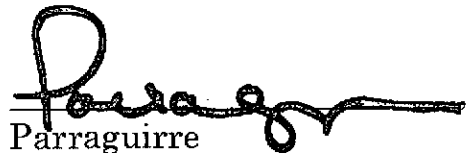
¹The State appealed the district court's order granting the motion for new trial, and this court affirmed the judgment. *State v. Botzet*, Docket No. 46511 (Order of Affirmance, September 7, 2007).

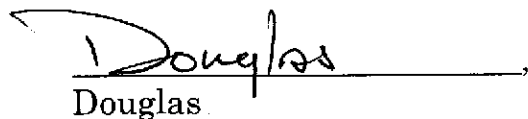
that the indictment expanded the time frame for the commission of the murder to include conduct by Botzet that occurred in Colorado. Botzet filed a motion to compel the State to choose to proceed on the original information or the indictment. The district court granted the motion. The State elected to proceed on the indictment and the original information was dismissed. On July 28, 2014, Botzet filed a motion to dismiss the indictment based on double jeopardy principles. The State opposed. After hearing argument, the district court denied the motion to dismiss, concluding that the granting of a new trial, placed Botzet in the same position had a trial not been held; therefore jeopardy had not attached and she could be retried for murder. This original writ petition followed.

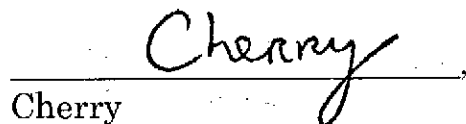
Botzet contends that double jeopardy principles preclude prosecuting her for murder because “[o]nce the Prosecutor’s Information was dismissed, it no longer existed and therefore no trial could be held thereunder. To now try the same charges (sic) under a new Indictment with a new case file number” would violate double jeopardy. This argument is unavailing. It is well settled that where a defendant secures a reversal of her conviction based on trial error, she may be retried for the same offense without violating double jeopardy principles. *See, e.g., North Carolina v. Pearce*, 395 U.S. 711, 720 (1969), *overruled on other grounds by Alabama v. Smith*, 490 U.S. 794 (1989); *Ball v. United States*, 163 U.S. 662, 672 (1896); *Williams v. State*, 93 Nev. 405, 406, 566 P.2d 417, 419 (1977); *Gibson v. Somers*, 31 Nev. 531, 533, 103 P. 1073, 1075 (1909). Here, Botzet successfully challenged the erroneous admission of certain evidence in a motion for a new trial and was granted a new trial. It is of no consequence that Botzet’s subsequent prosecution is proceeding upon a new indictment that alleges the same offense. *See Ball*, 163 U.S. at 672

(observing that a defendant “who procures a judgment against him upon an indictment to be set aside may be tried anew upon the same indictment, or upon another indictment, for the same offense of which he had been convicted”); *Thompson v. State*, 125 Nev. 807, 812-13, 221 P.3d 708, 711-12 (2009) (holding that State’s election to proceed on indictment and dismissing pending information charging same offense was not bar to prosecution). Because Botzet has not demonstrated that the district court manifestly abused its discretion or exercised its discretion in an arbitrary or capricious manner by denying her motion to dismiss the indictment, see NRS 34.160; *State v. Eighth Judicial Dist. Court (Armstrong)*, 127 Nev. ___, ___ 267 P.3d 777, 780 (2011) (defining manifest abuse of discretion and arbitrary or capricious exercise of discretion in context of mandamus), we

ORDER the petition DENIED.


Parraguirre J.


Douglas J.


Cherry J.

cc: Hon. Stefany Miley, District Judge
Herbert Sachs
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk