Circuit Court for Montgomery County
Case No. 133252C

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 52

September Term, 2019

DENZEL GARY RAGLAND

v.

STATE OF MARYLAND

Kehoe,
Berger,
Raker, Irma S.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Raker, J.

Filed: February 18, 2020

Appellant Denzel Gary Ragland was acquitted by a jury in the Circuit Court for Montgomery County of conspiracy to commit armed carjacking and two counts each of armed robbery and conspiracy to commit armed robbery. The jury hung on the charge of armed carjacking, and the court declared a mistrial. Appellant presents the following question for our review:

> "Where the sole disputed issue at trial was the identity of the principal perpetrator of an armed carjacking and armed robbery and, by its verdicts of acquittal to Counts 2–6 [robbery and conspiracy to commit armed robbery], the jury decided that issue in [appellant's] favor, did the Circuit Court err in ruling that collateral estoppel does not bar re-trial of Count 1 [armed carjacking]?"

We shall hold that collateral estoppel bars a retrial on the armed carjacking charge and reverse.

I.

Appellant was indicted by the Grand Jury for Montgomery County on charges of armed carjacking, conspiracy to commit armed carjacking, and two charges each of armed robbery and conspiracy to commit armed robbery. Following a jury trial, appellant was acquitted of conspiracy to commit armed carjacking, armed robbery, and conspiracy to commit armed robbery. Because the jury could not reach a decision on the armed carjacking charge, the court declared a mistrial. The case was set for retrial, and prior to trial, appellant filed a motion to dismiss the armed carjacking charge on the grounds that a retrial was prohibited by the Double Jeopardy Clause of the United States Constitution and by collateral estoppel. The court denied the motion.

The following facts were presented at trial. Around 1:00 a.m. or 2:00 a.m. on September 9, 2016, Julio Cruz-Lemus and Arnold Acosta Alfaro were driving in Mr. Cruz-Lemus's Nissan 350Z from a nightclub in Wheaton, Maryland. The men were hit from behind by a light-colored car with three or four individuals inside.[1] Mr. Cruz-Lemus exited the Nissan. Once outside of the Nissan, an individual described as a tall skinny man whose face was concealed approached Mr. Cruz-Lemus from the rear driver's side of the light-colored car and robbed him at gunpoint. At around the same time that Mr. Cruz-Lemus exited the Nissan, two other individuals from the light-colored car—one of whom had a gun—approached Mr. Alfaro as he opened the passenger side door of the Nissan. These two individuals forced Mr. Alfaro out of the car, robbed him, and forced him to sit on the curb near where the two cars had stopped. It was undisputed at trial that the same man who robbed Mr. Cruz-Lemus entered the driver's side of the Nissan and drove away in it. At least one of Mr. Alfaro's assailants entered the Nissan, too.[2] The light-colored car followed the Nissan from the scene. At 2:50 a.m., Officer John Durham responded but found no physical evidence or witnesses at the scene.

Around 11:15 a.m. on September 9, Detective Vincent Simmel and Detective Stephen Johnson saw appellant driving the Nissan in Northwest Washington, D.C.

[1] Mr. Cruz-Lemus testified that there were "three or four" people in the light-colored car, while Mr. Alfaro testified that there were "like three" people in the car. Mr. Cruz-Lemus also testified, however, that the driver of the light-colored car never exited the car, suggesting that there were four assailants: the driver, the man who robbed Mr. Cruz-Lemus, and the two men who robbed Mr. Alfaro.

[2] It is unclear from Mr. Alfaro's testimony whether the unarmed man who robbed him entered the Nissan or reentered the light-colored car.

Appellant was with another man, Jeffrey Taylor, who lived on Oneida Place in Washington, D.C.

Police arrested Mr. Taylor around 6:30 p.m. and found a weapon in the Nissan. Police arrested appellant around 7:30 p.m. for unauthorized use of another car. Police did not find any physical evidence linking appellant to the Nissan or any stolen goods in appellant's possession. The only evidence linking appellant to the carjacking was his presence in the Nissan—as witnessed by Detectives Simmel and Johnson—and location data from appellant's cell phone showing that appellant's phone was "either in the same location or . . . moving in tandem" with Mr. Taylor's cell phone between the time of the carjacking and the time of Mr. Taylor's arrest. Fingerprints and DNA that police recovered from the car belonged to Mr. Taylor and another man, Niko Young. The parties stipulated at trial, however, that in an unrelated proceeding, appellant failed to correct or contest the assertion that he "was interviewed by detectives and admitted that a gun found in the Nissan 350Z would contain his DNA." The State maintained that appellant was the person who approached the driver's side of the Nissan and robbed and carjacked Mr. Cruz-Lemus at gunpoint. The prosecutor argued to the jury: "And I would submit to you ladies and gentlemen that the man who approached Julio with the small handgun and held him at gunpoint and then got into the driver's side of the [Nissan] and drove off, that that was [appellant]."

The court instructed the jury about inferences which may be drawn from possession of recently stolen properly, stating that it could consider appellant's possession of the Nissan as proof of guilt as follows:

> "Exclusive possession either alone or with others of recently stolen property, unless reasonably explained maybe [sic] evidence of theft. If the stolen property was taken during the armed carjacking, that would be evidence of a carjacking. If you find that the defendant was in possession of the Nissan 350Z shortly after it was stolen during the armed carjacking and the defendant's possession is not otherwise explained by the evidence, you may but are not required to find the defendant guilty of the armed carjacking of the Nissan 350Z.
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> . . . In deciding whether the defendant's possession was sufficiently close in time to the armed carjacking to be evidence of participation in the armed carjacking, you should consider all the surrounding circumstances."

Defense counsel objected to the instruction.

During deliberation, the jury sent a note to the court asking if "the inference of unexplained possession of recently stolen property negate[s] the requirement that the State must prove the listed conditions . . . [for] armed carjacking."[3] The court responded as follows:

> "No, the inference does not negate the requirement of the State to prove all elements of the crimes charged beyond a reasonable doubt.
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> ***

[3] The court instructed the jury on the elements of armed carjacking as follows:

> "[F]irst, that the defendant obtained unauthorized possession or control of a motor vehicle. Two, that the motor vehicle was in the actual possession of another person at the time of the taking. And three, that the defendant used force or violence against that person or put that person in fear through intimidation or threat of force of violence in order to obtain the motor vehicle.
>
> The State must also prove that the defendant committed the carjacking by using a dangerous weapon."

> The State always has the burden of proving all three elements. However, if you find that the defendant was in recent possession of the Nissan 350Z shortly after it was stolen and the recent possession was not otherwise explained, you may but are not required to find the defendant guilty of the armed carjacking of the Nissan 350Z. So, go back and continue your deliberations."

The jury acquitted appellant of five of the six counts and hung on the count of armed carjacking. Appellant then moved to dismiss the armed carjacking count, arguing that the Double Jeopardy Clause of the United States Constitution and collateral estoppel barred a retrial because a retrial would require relitigating the issue of criminal agency that the jury resolved in appellant's favor. After oral argument, the court stated as follows:

> "[T]he State's case was based upon . . . recent possession of the stolen car hours after the robbery, and a description of the person that approached the driver that generally met the description of [appellant]. Based upon that, there was instruction given to the jury [that] the recent possession of stolen property could lead to the evidentiary inference that the recent possessor was in fact the thief, or in the carjacking, the carjacker.
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> So, what's one of the things that was not told to the jury was that . . . inference could also be used to determine that [appellant] was the robber. That instruction was only given in connection with the armed carjacking, so logic would say that if the jury believe that the defendant was in recent possession of a carjacked car, they could infer that he was the carjacker, and if during that carjacking a robbery occurred, then he would also be the robber.
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> So logic would say that they could apply that to all. But the verdict here shows that they found not guilty of armed robbery of both people and conspiracies, but no verdict on armed carjacking. And when you look at that in conjunction with the notes that came out in my view, clearly what happened was or what's likely happened is that the jury determined there was no

direct evidence that [appellant] was there. No in court ID, no show up, no photo array, no video, no fingerprint.

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Therefore, we're going to find him not guilty of these five charges. However, there is this other jury instruction over here that says that in the armed carjacking charge because the defendant was found in a recent possession of that car, we're permitted to but not required to find that if the car was taken during a carjacking, then he was the carjacker.

So, given the resulting verdict and the questions that came out, it's pretty clear what they were doing is that they were considering the recent possession of the stolen car, and deciding whether to leap and take the inference he was the carjacker. And maybe some of them believed that he was in recent possession, maybe some of them didn't. Maybe all of them believed he was in recent possession but not all were willing to take that evidentiary leap.

We don't know from the verdict, but what we do know that is that with the not guilty on the armed robbery that occurred during the carjacking, and a no verdict on the carjacking, that they didn't consider this recent possession of stolen property inference when considering the armed robbery charge. Otherwise, there would have been no verdict on Count No. 3 regarding [the robbery of Mr. Cruz-Lemus] as well.

So it's not inconsistent that they would look at the State's proof in light of the instructions, and say that there is no direct evidence . . . of [appellant] being on the scene to commit the armed robbery and the conspiracies, however, not all 12 of us are convinced beyond reasonable doubt or willing to take the evidentiary inference from reasonable possession of stolen property. That's why there wasn't unanimous verdict.

Those are not inconsistent, and I don't believe that the double jeopardy law would be the basis for a dismissal on the basis that a jury doesn't find direct evidence that [appellant] committed an armed robbery but not all 12 agreed to take the inference on recent [possession] of stolen property. It's two different theories . . . of evidence. So, I don't believe that one

would mandate the dismissal."

The court denied appellant's motion to dismiss and entered a stay of this case pending appeal. This timely appeal followed.

II.

Before this Court, appellant argues that collateral estoppel prevents a retrial on the armed carjacking charge because his acquittal on the conspiracy and armed robbery charges decided in his favor whether he was the person who approached the driver's side of the Nissan. Appellant maintains that the only factual dispute at trial was the identity of the person who approached the driver's side of the Nissan, robbed the driver, and drove away in it. Because appellant was acquitted of the robbery of the driver, he argues, the jury necessarily decided that, because he was not the person who robbed Mr. Cruz-Lemus, he was not the person who drove away in the stolen car. Appellant further argues that the court denied improperly his motion to dismiss by speculating on the jury's rationale for its verdicts and assuming that the jury acted irrationally and contrary to the court's instructions.

In response, the State argues that collateral estoppel does not apply because there is a possibility that the jury acquitted appellant of the conspiracy and robbery charges and hung on the carjacking charge based on separate pieces of evidence. The State argues that evidence *other than* appellant's identity as the assailant could have formed the basis of the jury's acquittal on the robbery and conspiracy charges, and that evidence of appellant's unexplained possession of the car—and the jury's failure to infer from this that appellant

was the assailant—could have formed the basis of the jury's inability to reach a verdict on the carjacking charge. In the State's view, the court's response to the jury's question regarding the unexplained possession inference was unclear and the jury's verdict to acquit appellant of robbery did not necessarily decide that appellant was not the carjacker. Therefore, the State argues that a retrial is not barred.

III.

We reverse the trial court's denial of appellant's motion to dismiss and hold that collateral estoppel bars a retrial on the armed carjacking charge. As a question of law, we review this issue *de novo*, giving no deference to the decision of the trial court. *Giddins v. State*, 393 Md. 1, 15 (2006).

The principle of collateral estoppel stems from the Fifth Amendment to the United States Constitution, which protects criminal defendants from being "subject for the same offense to be put twice in double jeopardy of life or limb." *Ashe v. Swenson*, 397 U.S. 436, 445–46 (1970).[4] Collateral estoppel prevents courts from relitigating "an issue of ultimate fact" after reaching a final judgment on that issue. *Id.* at 443 ("[W]hen an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit."). This provides fairness to

[4] In *Butler v. State*, 91 Md. App. 515, 531 (1992), this Court in *dicta* distinguished between the common law of collateral estoppel and "the common law of double jeopardy" in Maryland. We stated that collateral estoppel and double jeopardy are "distinct bodies of doctrine" and that using the terms interchangeably could create confusion. *Id.* at 530. We will use the term collateral estoppel in our analysis in this case.

defendants by protecting them from "relitigat[ing] an issue which has once been determined in [their] favor by a verdict of acquittal." *Powers v. State*, 285 Md. 269, 283–84 (1979). Collateral estoppel can apply both to a retrial on the same count or to a retrial on a count "having a common issue of ultimate fact" with another count on which the jury acquitted and which would subsequently establish the defendant's innocence on the hung count. *Ferrell v. State*, 318 Md. 235, 248 (1990).

The seminal case on collateral estoppel in criminal proceedings is *Ashe v. Swenson*, 397 U.S. 436 (1970). In this case, the petitioner was charged in the robbery of six men playing poker and acquitted of the robbery of Knight, one of the poker players, because of insufficient evidence that he was one of the assailants who committed the robbery. *Id.* at 438–39. Petitioner's identity was the only real issue at trial. *See id.* at 445. The prosecutor sought a second trial for the robbery of one of the other poker players, and the trial court overruled petitioner's motion to dismiss; a jury convicted petitioner in the second trial. *Id.* at 439–40. The United States Supreme Court reversed the conviction, holding that collateral estoppel is a protection for criminal defendants embodied in the Double Jeopardy Clause of the United States Constitution. *See id.* at 443, 446. The Court held that an inquiry into whether collateral estoppel applies requires a highly factual review of the record and "circumstances of the proceedings." *Id.* at 444 (citation omitted). Because "the record [wa]s utterly devoid of any indication that the first jury could rationally have found that an armed robbery had not occurred, or that Knight had not been a victim of that robbery," the Court concluded that the jury could only have acquitted petitioner on the grounds that he was not the robber. *Id.* at 445. The issue of identity was therefore resolved

in petitioner's favor, barring a second trial. *Id.*

The Maryland Court of Appeals has applied the collateral estoppel inquiry in cases like *Ashe* and the case at bar. In *Ferrell v. State*, 318 Md. 235, 239 (1990), for example, the jury in the defendant's third trial for armed robbery acquitted the defendant of using a handgun in the commission of a crime of violence but hung on the armed robbery count. The only disputed issue at the third trial was whether the defendant was the assailant. *Id.* at 239–40. At the fourth trial, the court denied the defendant's motion to dismiss the armed robbery count on collateral estoppel grounds by surmising that the jury could have acquitted the defendant of the handgun charge based on "some theory other than a determination that the defendant was not the armed robber." *Id.* The defendant was convicted of armed robbery and appealed to this Court, which affirmed the conviction by finding that the jury in the third trial could have based its acquittal on the handgun charge on a theory that the defendant was an accomplice, not the actual robber. *Id.* at 240.

The Court of Appeals reversed, stating as follows:

> "[I]n determining whether the State at a subsequent trial is attempting to relitigate an issue which was resolved in the defendant's favor at an earlier trial, a court must *realistically look at the record of the earlier trial, including the pleadings, the evidence, the prosecution's theory, the disputed issues, and the jury instructions*. A court *should not*, as did the trial court in the instant case, ignore the evidence and disputed issues at the earlier trial and *speculate that the jury's acquittal might have been based on a theory having nothing to do with the evidence and issues presented to the jury*."

Id. at 245 (emphasis added). The Court of Appeals found nothing in the record from the third trial to support the intermediate appellate court's theory of the jury's acquittal on the

handgun charge. *See id.* at 246. It concluded that, because the only issue at the third trial was whether the defendant was the robber, the acquittal on the handgun charge necessarily determined that the defendant was not the robber because the jury determined that he was not holding the handgun. *See id.* at 248.

The Court of Appeals also noted that the presumption that the jury "was aware of all the facts in evidence and that it logically and properly applied the instructions of the court" prevents courts from speculating about the jury's deliberations. *Id.* at 251 (quoting *United States v. Flowers*, 255 F. Supp. 485, 487 (E.D.N.C. 1966)). Because courts cannot speculate about what occurs in the jury room, they cannot consider the effects of hung counts when determining whether the jury has decided an ultimate issue of fact. *Yeager v. United States*, 557 U.S. 110, 122 (2009) ("Courts properly avoid such explorations into the jury's sovereign space, and for good reason. The jury's deliberations are secret and not subject to outside examination." (citations omitted)). Hung counts, unlike verdicts of guilt or acquittal, do not decide facts. *See id.* at 121–22 ("[A] jury speaks only through its verdict . . . . A host of reasons—sharp disagreement, confusion about the issues, exhaustion after a long trial, to name but a few—could work alone or in tandem to cause a jury to hang."). Consequently, a court cannot decide whether an ultimate issue of fact was decided by examining the jury's verdicts in relation to hung counts.

We reject the State's argument that no issue of ultimate fact was decided in this case because of the jury's possible misapplication of the court's instruction regarding the inference of unexplained possession. As the Court of Appeals commanded in *Ferrell*, 318 Md. at 245, we cannot speculate as to how the jury applied the court's instructions absent

an explicit indication in the record. The record provides no evidence that the jury applied incorrectly the court's instruction regarding unexplained possession; the jury asked about applying that inference *in the context of deciding the carjacking charge*, and the court answered the question *in that same context*.

We also reject the State's argument that the jury acquitted appellant of the robbery charge and hung on the carjacking charge based on separate pieces of evidence. The only disputed issue at trial was the identity of the person who (1) robbed the driver of the Nissan and (2) drove away in it. The trial court and State surmised that, if the jury had relied on the inference of unexplained possession to establish appellant's identity as the robber, it would have failed to reach a verdict on armed robbery as it did on armed carjacking. Speculation about what facts the jury decided in its verdicts by referencing the jury's hung counts, however, is prohibited. *See Yeager*, 557 U.S. at 121–22. There is no other evidence in the record besides evidence of identity that the jury could have used to acquit appellant of armed robbery. We cannot reason backwards from the jury's inability to reach a verdict on carjacking to conclude that the jury acquitted appellant of robbery based on other evidence because we cannot know why the jury hung in the first place. We hold that the jury necessarily decided that appellant was not the assailant and that a retrial on the armed carjacking count is barred.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY REVERSED. COSTS TO BE PAID BY MONTGOMERY COUNTY.