

Circuit Court for Baltimore City
Case No. 119044001

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 906

September Term, 2021

SHAWN CHRISTOPHER MALLEY

v.

STATE OF MARYLAND

Leahy,
Shaw,
Raker, J.,
(Senior Judge, Specially Assigned),

JJ.

Opinion by Raker, J.

Filed: May 3, 2022

* This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of *stare decisis* or as persuasive authority. Md. Rule 1-104.

In this interlocutory appeal in this criminal case, we must decide whether the doctrine of collateral estoppel bars the State from retrying Shawn Malley, appellant, for home invasion and conspiracy to commit home invasion where the jury found him not guilty of first-degree assault. Appellant was convicted in the Circuit Court for Baltimore City of home invasion, conspiracy to commit home invasion, second-degree assault, and possession of a weapon with intent to injure. He presents the following issue for our consideration in this appeal:

“Does the doctrine of collateral estoppel bar retrial on the charges of home invasion and conspiracy to commit home invasion?”

We shall hold that collateral estoppel does not bar retrial on the charges of home invasion and conspiracy to commit home invasion, affirm the trial court, and remand the matter for a trial.

I.

Appellant was indicted by the Grand Jury for Baltimore City for the offenses of home invasion, conspiracy to commit home invasion, first-degree assault of Kevin Graves, second-degree assault of Mr. Graves, possession of a weapon with intent to injure, and related charges. He proceeded to trial before a jury. The jury found appellant not guilty of first-degree assault of Mr. Graves, but convicted him of home invasion, conspiracy to commit home invasion, second-degree assault of Mr. Graves, and possession of a weapon with intent to injure. Appellant noted an appeal to the Court of Special Appeals. *See*

Malley v. State, Unreported, Sept. Term 2019, No. 1804, 2020 WL 6867944 (filed Nov. 23, 2020). This Court reversed the judgments of conviction and remanded the case to the Circuit Court for Baltimore City.

At appellant’s jury trial, (hereinafter “*Malley I*”), the trial court instructed the jury that home invasion could be predicated upon the intent to commit a first-degree assault or second-degree assault. The home invasion statute, Md. Code (2002, 2012 Repl. Vol.), § 6-202(d) of the Criminal Law Article (“Crim. Law”),¹ requires that a defendant enter a dwelling with the intent to commit a crime of violence. Because second-degree assault is not a crime of violence for purposes of the home invasion statute, the Court of Special Appeals held that the trial court’s instruction was legally erroneous and not harmless. This Court reversed and remanded for a new trial. In a footnote, we noted that the question of whether double jeopardy or collateral estoppel barred a new trial was one for the trial court to resolve. *See Malley v. State*, Unreported, Sept. Term 2019, No. 1804, 2020 WL 6867944 at 4 n.3 (filed Nov. 23, 2020).

Following this Court’s remand, appellant filed in the circuit court a motion to dismiss the remanded home invasion and conspiracy charges on the grounds that the State was barred from retrying appellant by the doctrine of collateral estoppel. Defense counsel argued that the jury in *Malley I* had resolved in appellant’s favor the issue of whether he had the requisite intent to commit first-degree assault. The State contended that a retrial

¹ Unless otherwise noted, all subsequent statutory references herein shall be to Md. Code (2002, 2012 Repl. Vol.), § 6-202 of the Criminal Law Article (“Crim. Law”).

was permitted because collateral estoppel was inapplicable in that home invasion and first-degree assault do not involve a common issue of ultimate fact. The State argued as follows:

“A jury could infer from the circumstances and testimony that Defendant intended to commit a First Degree Assault or even Homicide regardless of whether he was successful in doing so, or the severity of the victim’s injuries.”

Appellant argued in that motion as follows:

“The issue on the retrial of Mr. Malley is whether or not he committed a home invasion or conspired to commit a home invasion. A necessary element that the State must prove is the intent to commit a crime of violence. The State charged first-degree assault and second-degree assault and agreed to a jury instruction that second-degree assault was a crime of violence. All along, the State maintained that Mr. Malley intended to commit first-degree assault at the moment he allegedly entered the apartment and then when he allegedly assaulted Graves moments later. By acquitting Mr. Malley of first-degree assault, however, the jury resolved that issue of ‘ultimate fact’ in his favor. In short, the State can’t prove ‘intent to commit a crime of violence’ without proving first degree-assault, but they are precluded from proving this by collateral estoppel.”

The circuit court denied the motion to dismiss, concluding that double jeopardy did not bar retrial on the charges. The court reasoned as follows:

“The issue before the Court is whether there’s double jeopardy . . . if the State were to proceed on the remanded charges of home invasion and conspiracy to commit home invasion, and specifically whether . . . collateral estoppel applies as to the defendant’s acquittal of assault in the first degree.

The Court though is mindful and views collateral estoppel with realism and rationality in this case, which does present a very unusual set of facts which I believe are unique, certainly to this Court.

The Court does find, though, that there's no common issue of ultimate fact in this case.

The ultimate issue in this case is whether the defendant intended to commit a crime of violence, specifically assault in the first degree, and not whether the defendant actually committed a crime of violence, specifically assault in the first degree.

The Court does find that, again, looking at the instruction, it's the intent to commit. The Court does find the jury could infer from the circumstances and testimony that the defendant intended to commit assault in the first degree, a crime of violence, based upon the earlier harassment, the victim's injuries, the defendant's method of entering her apartment, the fact that he was armed with a knife, and the Court is swayed, I guess, by the State's argument that Ms. Starkey's intervention may have been the reason why the jury did not conclude that it was assault in the first degree as opposed to assault in the second degree.

So, for those reasons, respectfully, the Court will deny the defendant's Motion to Dismiss the Remanded Charges.”

We adopt the facts as set out in *Malley v. State*, Unreported, Sept. Term 2019, No. 1804, 2020 WL 6867944 at 1-2:

“The State accused appellant of conspiring with an unidentified individual to break into the residence of his ex-girlfriend, Alissa Starkey, and then assaulting a friend of Ms. Starkey's with whom she had been on a date. Appellant and Ms. Starkey were in a romantic relationship for four months, from June through October of 2018. Ms. Starkey testified that they remained friends after they broke up, but also that appellant's post-breakup behavior veered into harassment. During the incidents relevant to this case, Ms. Starkey was living in an apartment on St. Paul Street in Baltimore, where she had hosted appellant at her home for approximately five visits.

Early in the evening of Monday, December 17, 2018, Ms. Starkey went to a bar with a friend, Katherine Kendall. She received repeated calls and texts from appellant while she was at the bar, asking where she was and with whom. At one point, she replied that she was out with Ms. Kendall. Around 11:30 or 11:45 p.m., her colleague and friend Kevin Graves picked up Ms. Starkey and Ms. Kendall. Mr. Graves dropped off Ms. Kendall, went with Ms. Starkey to her apartment, went back out to another bar with Ms. Starkey, and then returned to Ms. Starkey's apartment with her. During this time, Ms. Starkey continued to receive aggressive texts from appellant asking her to demonstrate that she was only out with her girlfriend, Ms. Kendall.

Around 2 a.m. on December 19, 2018, Baltimore City Police Department Officer Matthew Henry and another officer responded to a call from Ms. Starkey's residence. Ms. Starkey told Officer Henry that an individual would not stop texting and calling her. He advised her not to accept the calls and that she could try to obtain a court restraining order against the individual. During this interaction with Ms. Starkey, Officer Henry recorded the discussion with Ms. Starkey. Officer Henry testified at trial that after leaving the apartment, he received another call for service about fifteen to twenty minutes later. In response to the call, he returned to Ms. Starkey's apartment, where he noted that Mr. Graves was not there, and the apartment was in a state of disarray.

After this first encounter with the police, Ms. Starkey went back inside her apartment, locked the door, and she and Mr. Graves kissed. She testified that while they were kissing, appellant and an unidentified man whom she did not recognize entered the apartment through a bedroom window accessible by a fire escape. Ms. Starkey testified that appellant ran at Mr. Graves with a knife, and that both men proceeded to fight in her bedroom. The second intruder stood back with his arms folded. Ms. Starkey testified that the fight became bloody and that eventually she tackled appellant; Mr. Graves ran down the stairs and out of the building. She testified that she believed that appellant left through her bedroom window although she admitted that she told the police she had seen appellant and Mr.

Graves run out of the apartment together, and that she told police her bedroom window was always locked.

Kevin Graves testified at trial and described the nighttime events and his encounter with appellant. He testified that after he and Ms. Starkey kissed, two men came into the apartment through the window, that one of the men was appellant and that appellant immediately stabbed him. He described the other, unidentified person as ‘just like standing in the background, just looking, just watching.’ Mr. Graves was taken to Sinai hospital by his cousin for treatment for wounds to his back.

The police gathered evidence from the crime scene, including blood swabbed from a door frame inside the apartment. DNA analysis revealed that the blood matched Mr. Graves. Investigation of the crime scene did not turn up DNA evidence linked to appellant at the apartment.

Lieutenant Sean Mahoney testified that he assisted with the arrest of appellant on January 16, 2019. He indicated that there was an outstanding arrest warrant for appellant and that appellant was arrested after attempting to run from the police.

As to the home invasion charge, the court instructed the jury that home invasion could be predicated on intent to commit first-degree or second-degree assault. The court instructed the jury as follows:

‘The defendant is charged with home invasion. Home invasion is the breaking and entering of someone else’s dwelling with intent to commit the assault. In this case, first degree assault, second degree assault. In order to convict the defendant of home invasion, the State must prove that there was a breaking, that there was an entry, that the breaking and entry were into someone else’s dwelling, that the breaking and entering were done with the intent to commit the assaults inside the dwelling and that the defendant was the person who broke and entered.’”

Appellant was convicted and sentenced to an aggregate term of incarceration of sixty years. Appellant noted this interlocutory appeal. *See Kendall v. State*, 429 Md. 476, 484 n.10 (2012) (noting a defendant “has the right to immediate appellate review of an adverse ruling concerning a double jeopardy claim.”).

II.

Before this Court, appellant argues that the circuit court erred in denying his motion to dismiss because the not guilty verdict of first-degree assault resolved in appellant’s favor the critical issue of whether he intended to cause serious physical injury, an essential element of first-degree assault.² According to appellant, where the jury decided that issue of ultimate fact, collateral estoppel principles prohibit the State from retrying appellant for home invasion and conspiracy to commit the same.

The State maintains that the trial court denied the motion to dismiss the charges correctly and that appellant has not met his burden of showing that the jury in *Malley I* actually found as a matter of fact—the ultimate fact—that appellant did not have the intent to commit a crime of violence at the time he broke and entered the apartment. The State highlights the testimony at trial and the closing arguments, pointing out that appellant’s primary defense was disputing criminal agency, by questioning the credibility of the witnesses and the lack of physical evidence tying appellant to the scene, and by attacking

² First-degree assault is proscribed by Crim. Law § 3-202(b)(1), which provides, in pertinent part, that “[a] person may not intentionally cause or attempt to cause serious physical injury to another.”

the quality of the investigation. The subject of the attacker’s intent, in the State’s view, was not a real issue at trial.

III.

Whether double jeopardy principles bar retrial of home invasion and conspiracy to commit home invasion is a question of law. We review the issue *de novo* and grant no deference to the trial court’s resolution of the issue. *Giddins v. State*, 393 Md. 1, 15 (2006).

The Fifth Amendment to the United States Constitution forbids any person from being “twice put in jeopardy of life or limb.” U.S. Const. amend. V. The Fifth Amendment prohibition is applicable to the states through the Fourteenth Amendment. *Benton v. Maryland*, 395 U.S. 784, 794 (1969); *State v. Long*, 405 Md. 527, 535-36 (2008). In addition, Maryland common law protects individuals against being twice put in jeopardy. *Id.* Double jeopardy precludes multiple punishments and trials for the same offense. *United States v. Wilson*, 420 U.S. 332, 343 (1975). Collateral estoppel is an element of the Double Jeopardy Clause, embodied in the Fifth Amendment guarantee against double jeopardy, as well as Maryland common law, and is applicable to criminal prosecutions. *Ashe v. Swenson*, 397 U.S. 436, 443 (1970); *Ford v. State*, 330 Md. 682, 719 (1993); *Mendarte v. State*, 2022 Md. App. LEXIS 83. Judge Howard Chasanow, writing for the Court of Appeals in *Butler v. State*, 335 Md. 238, 253 (1994), explained collateral estoppel as follows:

“When 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. Applying *Ashe* in *Wooten-Bey v. State* . . . this Court explained that, if the verdict ‘must have, by logical necessity, decided a particular fact in favor of a defendant, then the State will be barred by collateral estoppel principles from relitigating that fact.’”

(internal citations omitted). The critical consideration is whether an issue of ultimate fact has been determined previously in favor of the defendant. *Grant v. State*, 318 Md. 672, 679 (1990).

In order for collateral estoppel to apply, the defendant must establish three factors: (1) the earlier proceeding must have ended with a final judgment or final determination of the issue; (2) the defendant must have been a party in both proceedings; and (3) the resolution of the issue in the earlier proceeding must have been a basis of the decision, not “mere dicta,” and must have been an issue of ultimate fact. *Bowling v. State*, 298 Md. 396, 402 (1984). “Decisions have made clear that the rule of collateral estoppel in criminal cases is not to be applied with the hyper technical and archaic approach of a 19th century pleading book, but with realism and rationality.” *Ashe v. Swenson*, 397 U.S. at 444. The Supreme Court explained that in determining whether collateral estoppel is applicable, an appellate court should “examine the record of [the] 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.” *Id.* (quoting Daniel K. Mayers & Fletcher L. Yarbrough, *Bis Vexari: New Trials and Successive Prosecutions*, 74 Harv. L. Rev. 1, 38-39 (1960)). Courts have required that “[u]nless it can be shown with ‘clarity and certainty’

that the identical question was decided in an earlier proceeding, collateral estoppel is improper.” *See, e.g., People v. Pawlaczyk*, 724 N.E.2d 901, 910 (Ill. 2000). In the instant case, the first two necessary factors—a final adjudication and mutuality of parties—were satisfied beyond question. In *Malley I*, the jury found appellant not guilty of first-degree assault. Appellant and the State were parties in that trial. The question remains as to whether the third requirement—the decision of an issue of ultimate fact (whether appellant intended to commit a crime of violence when he broke and entered the apartment)—was decided in the first trial.

The statutory offense of home invasion is set out in Crim. Law § 6-202(b), which provides, in pertinent part, as follows:

“A person may not break and enter the dwelling of another with the intent to commit a crime of violence.”

The burden is upon appellant to establish that the jury actually decided that, *at the time of the breaking and entering*, appellant did not intend to commit a crime of violence. *Butler*, 335 Md. at 254 (stating “[w]hen addressing collateral estoppel challenges, we must always remember that the burden is on the party asserting estoppel to show that ‘the issue whose relitigation he seeks to foreclose was *actually decided* in the first proceeding.’”); *People v. Acevedo*, 508 N.E.2d 665, 671 (N.Y. 1987) (stating “[d]efendant’s burden to show that the jury’s verdict in the prior trial *necessarily* decided a particular factual issue raised in the second prosecution is a heavy one indeed, and as a practical matter severely circumscribes the availability of collateral estoppel in criminal prosecutions.”).

Our primary focus in the instant case is not at the time of any assault; rather, we look at the time of the breaking and entry. The crime of violence alleged here is first-degree assault. Appellant argues that because the jury acquitted appellant of first-degree assault, the jury necessarily found that he did not commit a home invasion based upon the intent to commit a crime of violence.

We hold that the jury verdict acquitting appellant of first-degree assault does not bar the State from retrying appellant for home invasion and conspiracy to commit home invasion. We agree with the motions court that the ultimate issue to be decided is whether appellant intended to commit a crime of violence, *i.e.*, first-degree assault, and not whether he actually committed a crime of violence. We disagree with appellant that the not-guilty verdict on the assault charge was a verdict of the necessary ultimate fact—appellant’s intent when he broke and entered the home. A person could be factually guilty of home invasion but not guilty of first-degree assault. *Cf. Butler*, 335 Md. at 273.

As to first-degree assault, the factfinder was required to focus on appellant’s intent at the time of the battery. As to home invasion, the factfinder was required to focus on appellant’s intent at the time of the breaking and entering of the home. Even if the jury determined that *at the time of the attack*, appellant did not intend to inflict serious injury upon another, the jury could have found from the evidence presented that appellant, *at the time of the breaking and entering*, intended to inflict a serious physical injury. The jury in *Malley I* could rationally have found appellant not guilty of first-degree assault without

actually deciding that he did not intend to commit a crime of violence when he broke and entered the apartment.

Appellant entered the home carrying a chef's knife, no small weapon. The jury was instructed that either first-degree assault or second-degree assault would satisfy the predicate crime for home invasion. It is entirely possible that the jury determined that appellant was guilty of second-degree assault and that based upon the instructions, the intent element of home invasion was satisfied. It may well be that the jury never addressed whether appellant harbored an intent to inflict substantial physical injury when he entered the home. Appellant has failed to satisfy his burden to establish that collateral estoppel bars retrial on the home invasion and conspiracy to commit home invasion counts.

**JUDGMENT OF THE CIRCUIT COURT
FOR BALTIMORE CITY DENYING THE
MOTION TO DISMISS ON COLLATERAL
ESTOPPEL GROUNDS AFFIRMED. CASE
REMANDED TO THAT COURT FOR
TRIAL. COSTS TO BE PAID BY
APPELLANT.**