UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2269

September Term, 2013

ERIC LAMONT COPELAND

v.

STATE OF MARYLAND

Wright,
Graeff,
Moylan, Charles E., Jr.
(Retired, Specially Assigned),

JJ.

Opinion by Graeff, J.

Filed: July 8, 2016

In June 2012, Eric Lamont Copeland, appellant, was tried by a jury in the Circuit Court for Prince George's County on charges of murdering the driver of a vehicle and assaulting two passengers, along with related weapons charges. After a five-day trial, the jury acquitted appellant of first-degree premeditated murder and felony murder. It failed to reach a verdict on the remaining charges, and the court granted a mistrial on those counts.

After a second jury trial, in December 2013, the jury acquitted appellant of the assault charges against the passengers, as well as the handgun charges related to the assaults. It failed to reach a verdict on the charges of second-degree murder of the driver, as well as the related charge of use of a handgun in the commission of a crime of violence, and the court declared a mistrial on those counts.

Defense counsel subsequently moved to dismiss those charges under the doctrine of collateral estoppel. The circuit court denied the motion.

On appeal, appellant presents one question for this Court's review:

> Does the doctrine of collateral estoppel apply to this case, requiring the dismissal of the remaining charges in the indictment?

For the reasons set forth below, we answer this question in the negative, and we shall affirm the judgment of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

The First Trial

The State's theory was that appellant confronted Devon Jackson, who was seated in the driver's seat of a car, with a gun when Mr. Jackson attempted to take appellant's "property," a prostitute named Lisa Beckwith, formerly known as "Goldie." The encounter

evolved when appellant decided to rob Mr. Jackson and his two passengers. Appellant fired the gun when Mr. Jackson drove away.

Ms. Beckwith was the State's primary witness. She testified that she met appellant in 1999, when she was 16 years old. He became her pimp. In 2001, she gave birth to appellant's son. Thereafter, she engaged in "on again, off again" prostitution activity with appellant.

Ms. Beckwith testified that, in the early morning hours of November 12, 2006, she left a bar after it closed and was approached on the street by Mr. Jackson and another man. They surrounded her, and Mr. Jackson threatened to kill her if she did not "go with him." She assumed that meant work with him as a prostitute. Although she did not see a gun, she testified that she agreed to go with him because he had a gun, and she was "very frightened." Mr. Jackson and the other man drove her to the Howard Johnson's hotel where she was staying. She got out of the car alone and went to her room, telling Mr. Jackson she would get her things and come back.

When she got to her room, Ms. Beckwith immediately called appellant and told him that Mr. Jackson was trying to get her to work with him, and she was "afraid of those two guys." Appellant said he would come pick her up. Ms. Beckwith called appellant "quite a bit" after that because she had not heard from him and she was afraid. Ms. Beckwith eventually fell asleep in her hotel room.

Ms. Beckwith did not see or speak to appellant until approximately 1:00 the next afternoon, when he came to pick her up at the hotel. While waiting for him, Ms. Beckwith

noticed crime scene tape in the hotel parking lot. Ms. Beckwith later asked appellant what had happened. Although she could not recall appellant's exact words, he told her that "there was a struggle and the gun went off." He explained that "he was trying to get the gun," "the driver went to pull off and the gun accidently went off," and the "dark skinned," "taller" one got hurt. Appellant told Ms. Beckwith that there also was a woman in the car.

Ms. Beckwith admitted that she did not report what appellant had told her about the shooting until three months later, when she was held for questioning about the murder after being released from jail after posting bail for a traffic violation. She denied that she negotiated her release from jail or obtained favorable treatment on outstanding warrants by promising information about the murder.

Jerome Donelson testified that, on the evening of the shooting, he was riding with Mr. Jackson in Mr. Jackson's Cadillac "El Dorado Biarritz." They went to the Howard Johnson's hotel to drop off Ms. Beckwith, whom they had run into earlier in the evening. Mr. Jackson and Ms. Beckwith were engaged in "idle chitchat," but Mr. Donelson did not pay attention to their conversation. Mr. Donelson denied hearing Mr. Jackson threaten Ms. Beckwith.

After dropping Ms. Beckwith off at the hotel, they drove to a 7-11 where they picked up a woman whose name Mr. Donelson did not recall. They then drove back to the Howard Johnson's and waited in the parked car for at least an hour.

Mr. Donelson noticed someone approaching the driver's side of the car. An individual wearing a hoodie "snatched" open the door and said: "[W]here them guns at? I

know you'll got [sic] heat in here." The individual held a gun to Mr. Jackson's neck, reached into the car and patted down all three occupants in search of weapons, and took a black pouch containing $300-400 belonging to Mr. Donelson. The assailant took Mr. Jackson's phone, tried to call someone, and then ordered Mr. Jackson out of the car. Mr. Jackson refused and shifted the car into drive, at which point the assailant struck Mr. Jackson in the mouth with the gun. Mr. Jackson stepped on the gas and the gun went off. As they drove away, Mr. Donelson heard three or four more shots and bullets hitting the car. The car crashed into a pole, and everyone got out of the car and "scattered." Mr. Donelson saw the assailant jump over a fence and leave. Mr. Donelson then flagged down a passing police car and told him that someone had tried to rob them.

Wendy Spence testified that she worked for Mr. Jackson, and "he used to take [her] to clubs." On November 12, 2006, she left "Sinsaytionals" strip club and met Mr. Jackson at a 7-11 down the street. She got into the car with Mr. Jackson and Mr. Donelson.[1] They drove to the Howard Johnson's hotel because Mr. Jackson said he had to pick up his friend, Goldie. Ms. Spence fell asleep in the parked car while they waited.

Ms. Spence woke up to "voices exchanging words." Mr. Jackson's car door was open, and a man holding a gun to Mr. Jackson was patting him down. The man leaned over and patted Mr. Donelson and Ms. Spence down. Mr. Jackson then "took off," and she heard a gunshot "right away." A couple of additional shots were fired and the car crashed

[1] Ms. Spence referred to Mr. Donelson only as "Rome," which is Mr. Donelson's nickname.

into a barrier. She got out of the car and ran, trying to stay out of sight. She went to the hotel lobby and said they had been shot at and robbed.

Both Mr. Donelson and Ms. Spence testified that they thought the incident was a carjacking. At trial, Mr. Donelson described the assailant as being between 5′10″ and 6′ tall, with a thin to medium build. He stated that he thought the assailant had a hood on, and that he only got a "quick glance" at the assailant's face. He explained that, as the assailant leaned over Mr. Jackson and into the car to pat him down, Mr. Jackson's body was pushed on top of him, obscuring his view of the assailant's face. Mr. Donelson had not been able to pick anyone out of a photo array of possible suspects.

Ms. Spence also put the assailant's height at 5′10,″ and she described him as a black male with light skin. The assailant was wearing a hoodie that covered his head, and she could see only his nose and lips. At trial, neither Mr. Donelson nor Ms. Spence identified appellant as the assailant.

All the bullets recovered from the scene and from inside the vehicle were fired from a single weapon. Mr. Jackson's cause of death was homicide by gunshot wound to the torso.

The court instructed the jury, *inter alia*, on the elements of first-degree, second-degree and felony murder. Although appellant had not been charged with armed robbery, the jury was instructed that, "[f]or felony murder, the alleged felony is armed robbery," and it instructed the jury on the elements of armed robbery.

In closing argument, the State focused on motive, arguing that the evidence proved that the incident was not a random carjacking or robbery, as suggested in the defense opening statement, but that appellant went to the Howard Johnson hotel after Ms. Beckwith called him, and he killed Mr. Jackson in order to "avenge his prostitute, his baby's mother." The State noted that the assailant never demanded money and valuables, but his only concern was to find the guns he thought they might have. The prosecutor questioned why someone who intended to commit robbery would have failed to take $341 in cash that Mr. Jackson had in his pocket, and he maintained that appellant simply happened upon an opportunity to commit robbery when he noticed the money on the seat next to Mr. Donelson in the course of searching for weapons.

The State urged that the jury could convict appellant of first-degree murder because he went to the motel intending to kill Mr. Jackson. The State also asserted that appellant committed felony murder because he took money from Mr. Donelson while he held everyone at gunpoint, and then shot and killed Mr. Jackson in the course of that robbery. Although the jury was instructed on the elements of second-degree murder, the State did not discuss that charge with the jury. Finally, the State argued that appellant was guilty of first-degree assault of Mr. Donelson and Ms. Spence because they both had testified that they were in fear for their lives during the encounter, and that the use of a handgun during the incident supported convictions on the weapons charges.

The State urged the jury to believe Ms. Beckwith's testimony that appellant had confessed to shooting Mr. Jackson, pointing out that hotel and phone records corroborated

her testimony that she had stayed at the Howard Johnson's hotel that night and had called appellant early that morning and several times thereafter. The State also stressed that, because Ms. Spence did not get into Mr. Jackson's car until after Ms. Beckwith had been dropped off at the hotel, the only way Ms. Beckwith would have learned that there was a woman in the car at the time of the shooting was if appellant had told her, and therefore, appellant must have been there. In addition, the State suggested to the jury that appellant had facial features similar to police composite sketches of the suspect that were prepared based on information from Mr. Donelson and Ms. Spence.

The defense argued in closing that appellant had nothing to do with the crime, but rather, someone else had attempted a carjacking of a "very nice" car in a "crime ridden area." The defense pointed out the lack of fingerprint evidence on or in Mr. Jackson's car that tied appellant to the crime, and it argued that the descriptions of the assailant given by Mr. Donelson and Ms. Spence did not match appellant, who was much taller than 5′10,″ older than they had estimated, and had a distinguishing mark on his face that neither witness had mentioned. Ms. Beckwith's credibility was called into question by the defense, based on her prior criminal convictions for theft and prostitution, and the fact that she did not report appellant's confession to the crime until she had been locked up for an unrelated matter, and perhaps made up the story to get out of jail. Defense counsel also argued that the phone records showed that appellant was talking on the phone at the time the murder allegedly occurred, and therefore, he could not have committed the crime.

On the second day of deliberations, the jury sent out a note stating: "We are hopelessly in disagreement." After confirming that the jury had agreed on some of the questions, the court took a partial verdict. As indicated, the jury found appellant not guilty of first-degree premeditated murder and felony murder. The jury failed to reach a verdict on the remainder of the charges, and a mistrial was declared on those counts.

The Second Trial

Prior to the start of the second trial, defense counsel made an oral motion to dismiss the remaining charges on collateral estoppel grounds, arguing that the first jury had resolved the issue of the identity of the sole perpetrator of all the charged crimes in favor of appellant. Defense counsel argued that, in order to find appellant not guilty of felony murder, where the robbery of Mr. Donelson was the underlying felony, the first jury had to have found that appellant was not the person who committed the robbery. The court reserved its ruling on the motion.

The evidence presented by the State in the second trial was essentially the same as it had been in the first trial, except that Ms. Spence identified appellant in court as the assailant, where she had not done so in the first trial. The State argued in closing that appellant was guilty of second-degree murder because, in shooting at Mr. Jackson, he had "engaged in deadly conduct with the intent to kill or hurt someone so badly that it would cause someone to die." The State also argued that appellant committed first-degree assault "[w]hen he leaned in and touched [Mr. Donelson], when he touched [Ms. Spence] and when he shot at them." As in the first trial, the State suggested to the jury that if this had

been just a robbery, the assailant would have taken the money that was found on Mr. Jackson's body, as well as any money Ms. Spence had on her, but he had not done so. Defense counsel argued, as in the first trial, that the incident was simply a robbery, and there was insufficient evidence tying appellant to the crime.

The second jury acquitted appellant of first degree assault and handgun charges relating to Mr. Donelson and Ms. Spence. It failed to reach a verdict, however, on the charges relating to Mr. Jackson, second-degree murder and use of a handgun in the commission of a crime of violence.

Defense counsel renewed the motion to dismiss these charges under the doctrine of collateral estoppel, asserting that the second jury, in acquitting appellant of assault, had determined the issue of identity in his favor. The court denied the motion, and this appeal followed.[2]

DISCUSSION

The Doctrine of Collateral Estoppel

"Both the Fifth Amendment to the United States Constitution and Maryland common law provide that no person shall be put in jeopardy twice for the same offense." *Ferrell v. State*, 318 Md. 235, 241, *cert. denied sub nom.*, *Maryland v. Ferrell*, 497 U.S. 1038 (1990). The prohibition against double jeopardy in criminal proceedings incorporates

[2] A third trial of the remaining charges of second-degree murder and use of a handgun in the commission of same was scheduled for March 23, 2015. Prior to trial, the court granted a consent motion to stay the proceedings indefinitely, pending the outcome of this interlocutory appeal.

the doctrine of collateral estoppel, which provides "that 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." *Ashe v. Swenson*, 397 U.S. 436, 443, 445-46 n.10 (1970).

In a collateral estoppel challenge, "[t]he 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." *Butler v. State*, 335 Md. 238, 254 (1994) (citation and quotations omitted).[3] As the Court of Appeals has explained:

> [T]he critical questions in applying collateral estoppel are not whether the victim is the same or whether each offense is the same. The important questions are whether the offense for which the defendant was earlier acquitted, and the offense for which he is being retried, each involved a common issue of ultimate fact, *and whether that issue was resolved in the defendant's favor at the earlier trial*.

Ferrell, 318 Md. at 243 (emphasis added).

In *Ferrell*, the Court of Appeals also explained the approach that a court must take in addressing a collateral estoppel challenge:

> [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 . . . 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.

[3] In *Butler v. State*, 335 Md. 238 (1994), the Court of Appeals affirmed the decision of this Court in *Butler v. State*, 91 Md. App. 515 (1992). We cite both decisions in this opinion.

> Moreover, in reviewing the earlier trial to determine the jury's basis for the acquittal, a court should not strain to dream up hypertechnical and unrealistic grounds on which the previous verdict might conceivably have rested.

318 Md. at 245 (citations and quotations omitted). We review a trial court's denial of a motion to dismiss on grounds of collateral estoppel *de novo*. *Tubaya v. State*, 210 Md. App. 46, 49 (2013).

The Parties' Contentions

Appellant contends that there was no dispute that the crimes with which he had been charged had been committed, and because the State's theory was that the gunman acted alone, the only disputed issue before the jury was the identity of the gunman. He argues, therefore, that by acquitting him of first-degree murder and felony murder (where the underlying felony was the robbery of Mr. Donelson), the first jury necessarily resolved the issue of identity in his favor.

Similarly, appellant claims that the second jury, by acquitting him of the charges of first-degree assault upon Mr. Donelson and Ms. Spence (as well as the related handgun violations), necessarily determined that he was not the gunman because the fact that the assaults occurred was not disputed. Appellant submits that the State is barred by the doctrine of collateral estoppel from trying him a third time for the remaining counts (second-degree murder of Mr. Jackson and use of a handgun in a crime of violence) because the issue of identity of the sole perpetrator has already been litigated and resolved in his favor.

The State responds that appellant has not satisfied his burden of demonstrating that the jury made a factual determination that he was not the person who shot and killed Mr. Jackson. With respect to the first trial, the State submits that the verdict, acquitting appellant of first-degree felony murder and failing to render a verdict on the other charges, shows that "it credited testimony that [appellant] had attacked the occupants of the car but was not persuaded that there was a qualifying underlying felony." With respect to the second trial, the State asserts that the jury determined that appellant committed no criminal offense against Mr. Donelson or Ms. Spence, and acquitted him of the offenses involving the passengers, but it could not reach a verdict regarding the charges involving Mr. Jackson. It argues that the jury verdicts did not exclude the possibility that appellant committed crimes relating to Mr. Jackson, and therefore, the circuit court properly denied appellant's motion to dismiss these charges.

Analysis

The Court of Appeals has 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.'" *Wooten-Bey v. State*, 308 Md. 534, 544 (quoting R. GILBERT & C. MOYLAN, MARYLAND CRIMINAL LAW: PRACTICE AND PROCEDURE § 37.8 at 450 (1983)), *cert. denied*, 481 U.S. 1057 (1987) (emphasis added). After reviewing the entire record of both trials, we are unable to conclude that the verdicts of acquittal, by "logical necessity," establish that either jury actually decided that appellant was not the person involved in the incident resulting in the charges.

Appellant cites *Powers v. State*, 285 Md. 269, *cert. denied*, 444 U.S. 937 (1979), *Ashe*, *supra*, and *Ferrell*, *supra*, in support of his argument that the doctrine of collateral estoppel bars the State from prosecuting him on the remaining charges of second-degree murder and the related handgun violation. In each of these cases, however, the court concluded that, based on the record, the jury could not have decided the case on a ground other than the identity of the perpetrator. *See Ashe*, 397 U.S. at 445; *Ferrell*, 318 Md. at 246; *Powers*, 285 Md. at 289.

That is not the case here. The evidence presented to the first jury did not amount to "unassailable" proof of an armed robbery. Although the defense did not challenge the State's evidence regarding the robbery (electing instead to concentrate on advancing the defense theory of the case that appellant was not the assailant), it is possible that the first jury was not persuaded that an armed robbery had occurred, and therefore, it concluded that there was insufficient evidence to support a conviction for felony murder.

The court instructed the jury that, to prove armed robbery, "the State must prove all of the elements of robbery and must also prove that the defendant committed the robbery by using a dangerous weapon." In closing argument, the State told the jury that the robbery supporting the felony murder count was taking Mr. Donelson's money "while he held everyone at gunpoint." Based on the evidence, the jury could have concluded that, because Mr. Donelson and Ms. Spence testified that the assailant held the gun on Mr. Jackson only, taking money that was on the seat as he leaned into the car to pat them down, and there was no evidence that the gun was pointed at Mr. Donelson at any time during the robbery,

the State would not be able to prove an *armed* robbery of Mr. Donelson. Indeed, for reasons not apparent in the record, appellant was not charged with armed robbery, which the jury may have assumed was due to insufficient evidence.

Likewise, there is an alternative explanation for the second jury's acquittal on first-degree assault and related weapons charges.[4] The jury was instructed on the assault charges as follows:

> In order to convict the defendant of first degree assault, the State must prove all the elements of second degree assault.
>
> So, what is second degree assault? That is battery. Assault is causing offensive physical contact with another person. In other words, to convict the defendant of assault the State must prove that the defendant caused offensive physical contact or physical harm to [Mr. Donelson and Ms. Spence].
>
> That the conduct was the result of an intentional or reckless act of the defendant and was not accidental and that the contact was not consented to . . . and not legally justified.
>
> So, the State has to prove those elements and then, there is other elements that the State must prove.
>
> The defendant used a firearm to commit an assault or the defendant intended to cause serious physical injury in the commission of the assault.

In closing argument, the prosecutor explained the State's theory of first-degree assault to the jury as follows:

> Now, what crimes were committed by the defendant? We have second degree murder, first degree assault, and use of a handgun. . . . First degree assault. Offensive touching. When he leaned in and touched

[4] The second jury was not asked to make a finding of guilty or not guilty of second-degree assault on Mr. Donelson and Ms. Spence.

> [Mr. Donelson], when he touched [Ms. Spence], offensive touching. And then, you add in the shooting. He shot at them.

Thus, although the court instructed the jury that first-degree assault was offensive physical contact committed with a firearm, the State argued that the offensive physical contact was the act of patting Mr. Donelson and Ms. Spence down for weapons, which he did with his hand and not with a gun. The State also argued that the act of shooting at the car was first-degree assault, but the court had only instructed the jury on the consummated battery form of assault, and neither Mr. Donelson nor Ms. Spence had been hit by bullets. The court did not instruct the jury that an attempt to cause offensive physical contact could also support a conviction for assault. The jury could have determined, based on the court's instructions on the law and the State's closing argument, that appellant had not caused offensive physical contact to Mr. Donelson or Ms. Spence with a firearm, resulting in its decision to acquit appellant of first-degree assault.

Moreover, because it was undisputed there was only one assailant, if the first jury found that appellant was not involved at all in the criminal incident, the jury logically would have acquitted appellant of all charges, and would not have been "hopelessly in disagreement" on a verdict on the second-degree murder and assault charges. *See Butler v. State*, 91 Md. App. 515, 547 (1992), *aff'd*, 335 Md. 238 (1994) ("Hung juries on six of eight charges . . . attest to that absence of any factual determination as to the 'issue of ultimate fact' that the appellant claims was decided."). Similarly, if the second jury acquitted appellant of the first-degree assault and related weapons offenses because it had found that appellant was not the person who committed those offenses, it would have

applied this finding on the issue of identity to the other charges, which logically would have led to an acquittal on the charge of second-degree murder.[5]

In sum, appellant has not met his burden of demonstrating that either the first or second jury actually decided the issue of identity in his favor or that a rational jury could only have grounded its verdict by resolving identity in his favor. As we stated in *Butler*, *supra*, "[w]hen [ ] the circumstances themselves are too ambiguous or the record itself too inadequate to permit an accurate assessment of what factual findings the jury must have made, it is the defendant, as moving party, who necessarily loses." 91 Md. App. at 545.

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY DENYING APPELLANT'S MOTION TO DISMISS AFFIRMED. COSTS TO BE PAID BY APPELLANT.

[5] In his brief, appellant cites a comment in *Powers v. State*, 285 Md. 269, 285, *cert. denied*, 444 U.S. 937 (1979) that "a mistrial is equivalent to no trial at all." That does not mean that the mistrials granted in appellant's two trials are without relevance. As we explained in *Butler v. State*, 91 Md. App. 515 (1992), *aff'd*, 335 Md. 238 (1994), while a nonverdict "does not affirmatively establish one of the opposing poles for a set of inconsistent verdicts[,]" the fact of a mistrial may "lend[] substantial circumstantial insight into what [the] jury probably did and probably did not decide." In *Butler*, the appellant attempted to establish that the first jury had decided that he was not an aider or abettor, and we concluded that "[t]he six mistrials are strong factual evidence that they decided no such thing." *Id.* at 548. Similarly, in the case before us, the juries' failure to reach a verdict on some of the charges are strong evidence that they did not resolve the issue of identity in appellant's favor.