Circuit Court for Baltimore City
Case No. 112306019-21

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1603

September Term, 2017

DONTA TERRY VAUGHN

v.

STATE OF MARYLAND

Leahy,
Friedman,
Raker, Irma S.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Raker, J.
Concurring opinion by Friedman, J.

Filed: March 14, 2019

On January 29, 2014, a jury for the Circuit Court of Baltimore City convicted appellant Donta Terry Vaughn of first degree felony murder, false imprisonment, conspiracy to commit false imprisonment, extortion, and conspiracy to commit extortion. He appealed, and we reversed his convictions on the basis that he was advised inadequately as to his waiver of his right to counsel under Maryland Rule 4-215. Upon retrial, appellant filed and argued a pretrial motion to dismiss the felony murder charge. The court denied the motion, and appellant presents the following questions for our review, which we have rephrased:

1. Did the circuit court err in denying appellant's motion to dismiss because retrying appellant for felony murder would violate the constitutional prohibition of double jeopardy?

2. Did the circuit court err in denying appellant's motion to dismiss because retrying appellant for felony murder would deny appellant due process of law?

Finding that the circuit court did not err, we shall affirm.

I.

In February 2009, appellant and co-defendant Darryl Nichols planned and executed a kidnapping scheme for profit along with Eric Price and Sherelle Ferguson. While holding the victim, Eric Pendergrass, they collected two ransom payments totaling $40,000. After delivery of the second payment, the police found Mr. Pendergrass's body in the Patapsco River in Baltimore, Maryland. The police arrested appellant and Nichols thereafter.

In November 2012, the State charged appellant with murder, conspiracy to commit murder, kidnapping, conspiracy to commit kidnapping, false imprisonment, conspiracy to

commit false imprisonment, extortion, and conspiracy to commit extortion. On January 29, 2014, following a trial in which appellant appeared pro se, a jury for the Circuit Court of Baltimore City convicted appellant of first degree felony murder, false imprisonment, conspiracy to commit false imprisonment, extortion, and conspiracy to commit extortion, acquitting him of the remaining charges. The conviction for first degree felony murder was based on the predicate felony of extortion; without objection, the court instructed the jury that extortion could serve as the predicate for first degree felony murder.

Appellant and Nichols appealed their convictions. In an unpublished opinion, we vacated the judgments against Nichols for first degree felony murder and conspiracy to commit extortion, and we vacated his sentence for false imprisonment and remanded it for resentencing. *Nichols v. State*, No. 169, Sept. Term 2014 (filed Feb. 4, 2016). As to appellant, this Court held in a separate, unpublished opinion that the circuit court failed to adequately discharge its statutory obligations under Rule 4-215, which sets forth the steps a trial court must take before allowing a defendant to waive the right to an attorney and proceed pro se. We vacated appellant's convictions and remanded the case for a new trial "on all counts for which he was not acquitted." *Vaughn v. State*, No. 03, Sept. Term 2014 (filed Oct. 13, 2015). On remand, appellant filed and argued a pretrial motion to dismiss the charge of felony murder. The circuit court denied appellant's motion, and this interlocutory appeal followed.

II.

Before this Court, appellant advances several related arguments as to why the remanded felony murder charge should be dismissed. First, appellant argues that retrying him for felony murder violates principles of double jeopardy because he was convicted of extortion, the underlying felony for the felony murder charge. Second, appellant discusses several United State Supreme Court decisions on the issue of collateral estoppel, although he does not explain why collateral estoppel prevents his retrial for felony murder.

Third, he turns to due process, arguing that he cannot be retried because this Court did not permit a retrial of his co-defendant Nichols' vacated felony murder conviction. Appellant argues that we "must" follow our due process holding in *Nichols* here. Citing *Nichols*, appellant argues that because the State did not charge him with a predicate felony suitable for a charge of second degree felony murder, he cannot be retried for second degree felony murder. Finally, appellant questions whether he can be retried on the charge of felony murder because the evidence at trial showed that the predicate felony, extortion, occurred on February 4, 2009, three days after Mr. Pendergrass's death on February 1, 2009.

As to appellant's first argument, the State argues that when a defendant's conviction is reversed on grounds other than sufficiency of the evidence, he may be retried for the same offense. Second, the State argues that appellant's collateral estoppel claim is both unpreserved and irrelevant to the charge of felony murder. The State points out that appellant failed to argue collateral estoppel in the pretrial hearing before the circuit court.

As to the merits, it argues that the only issues of fact estopped by the jury's verdicts in the first trial are that appellant did not kill Mr. Pendergrass with premeditation and deliberation and that he did not kidnap or conspire to kidnap Mr. Pendergrass.

Turning to appellant's third argument, the State concedes that appellant cannot be tried for first degree felony murder because he was not charged with a felony listed in Maryland Code, Criminal Law Article § 2-201(a)(4).[1] As to whether he can be retried for second degree felony murder, the State argues first that this Court is not bound to follow or consider a previous unreported opinion. To the extent that we consider it, the State argues that *Nichols* was decided wrongly for two reasons. First, the State argues that the statutory short form used to indict both Nichols and appellant for murder was adequate to try—or retry—the defendants for either degree of felony murder without denying appellant due process. Second, the State argues that the case used as precedent by the *Nichols* Court to hold that Nichols could not be retried for second degree felony murder was factually and legally distinct from the prosecution of Nichols and appellant.

Finally, the State argues that appellant was charged with extortion, an appropriate predicate felony for second degree felony murder. The State's brief does not address appellant's argument regarding the factual basis of appellant's felony-murder conviction.

[1] All subsequent statutory references herein shall be to Maryland Code, Criminal Law Article.

III.

As to appellant's double jeopardy arguments, we hold that the circuit court did not err in denying his motion to dismiss. Appellant's first argument, that he cannot be tried again for felony murder because he was convicted of the underlying felony of extortion, is incorrect. The Double Jeopardy Clause of the 5th Amendment to the United States Constitution provides a defendant with protection from various types of "jeopardy." Among them are prosecution for the same offense after acquittal, prosecution for the same offense after conviction, multiple punishments for the same offense, and collateral estoppel of relitigating factual acquittals by a previous jury. *Whittlesey v. State*, 340 Md. 30, 80 (1995).

Where a defendant is convicted of felony murder and an underlying felony and granted a new trial following an appeal, the Double Jeopardy Clause does not bar retrial for either offense. *State v. Goldsberry*, 419 Md. 100, 117 (2011). The rule "rests on the notion that the original conviction has, at the defendant's behest, been wholly nullified and the slate wiped clean." *Hagez v. State*, 131 Md. App. 402, 423 (2000) (internal citations omitted).

In *Goldsberry*, the defendant appealed convictions of felony murder and attempted armed robbery with a dangerous weapon. *Id.* at 103. The Court of Appeals reversed the defendant's convictions because he was denied the counsel of his choice guaranteed by the 6th Amendment to the United States Constitution. *Id.* at 132. The Court held that the defendant could be retried for all of the charges, including felony murder and the predicate

felony. *Id.* at 117. Here, as in *Goldsberry*, this Court's previous decision vacated all of appellant's convictions on the basis of his right to counsel and remanded them for a new trial. The State is now free to retry appellant for the vacated convictions.

Appellant's second argument appears to be that collateral estoppel bars his retrial for felony murder, though he fails to connect his cited case law to an issue in his case. As an initial matter, appellant's claim is not preserved. Rule 8-131 provides as follows:

> "Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court, but the Court may decide such an issue if necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal."

Id. Here, upon retrial, appellant did not raise a collateral estoppel argument in his pretrial motion or at the hearing before the circuit court, denying the circuit court the ability to rule on it. Thus, appellant failed to preserve the issue for our review.

Even if appellant had preserved the argument, we would hold that collateral estoppel does not bar appellant's retrial for felony murder. Collateral estoppel is embodied in the guarantee that a person shall not "for the same offense . . . be twice put in jeopardy of life and limb" found in the 5th Amendment to the United States Constitution. The doctrine prohibits the State from relitigating any issue of ultimate fact determined by a valid and final judgment in the defendant's case. *State v. Woodson*, 338 Md. 322, 331 (1995). In a typical application of collateral estoppel, the defendant seeks to prove that a factual issue was necessarily decided by a previous acquittal in his or her case.

In *Ashe v. Swenson*, 397 U.S. 436 (1970), a seminal collateral estoppel case, the State of Missouri alleged that the defendant was one of several masked men who robbed a poker game with six players. *Id.* at 437. The State indicted him for robbery of only one of the players. *Id.* Under the applicable law, the defendant was guilty of robbery if he was one of the masked men, all of whom participated in the robbery. *Id.* at 439. Instructed accordingly, the jury made an unprompted statement to the court that it acquitted the defendant due to "insufficient evidence." *Id.* Weeks later, the State indicted the defendant again, this time for the robbery of another player. *Id.* On appeal, the Supreme Court reversed his conviction. *Id.* at 447. The Court held that collateral estoppel barred the defendant's retrial for robbery of any of the men at the poker game—in acquitting the defendant of the first robbery charge, the jury necessarily made the factual determination that the defendant was not present at the robbery. *Id.* at 446.

Here, the jury acquitted appellant of kidnapping, conspiracy to commit kidnapping, first degree murder, and conspiracy to commit first degree murder. It convicted him, however, of first degree felony murder, false imprisonment, conspiracy to commit false imprisonment, extortion, and conspiracy to commit extortion. Collateral estoppel now bars the State from trying appellant for any crime that requires a factual determination that appellant killed the victim with premeditation, conspired to kill him with premeditation, kidnapped the victim, or conspired to kidnap him. The jury need not make such a determination to satisfy the elements of second degree felony murder in this case. Collateral estoppel does not bar appellant's retrial for felony murder.

Regarding appellant's constitutional due process arguments, we hold that the circuit court did not err in denying appellant's motion to dismiss. Appellant's first due process argument is that the State did not indict him for second degree felony murder and cannot now try him for that crime. Maryland divides murder into first and second degree murder. First degree murder includes first degree felony murder, which occurs when a defendant kills another in the course of or in the attempt to commit certain enumerated felonies, such as arson, kidnapping, or robbery. Section 2-201(a)(4). Any murder that is not first degree under § 2-201 is second degree murder. Section 2-204(a). Second degree murder includes second degree felony murder, which is a killing committed in the perpetration or attempt to perpetrate a felony dangerous to human life but not listed in § 2-201(a)(4). *Goldsberry*, 419 Md. at 135–36.

Here, both appellant and the State agree that the court erred in instructing the jury that it could convict appellant of first degree felony murder on the basis of extortion. Extortion is not one of the felonies enumerated in § 2-201 and could only be a predicate for *second* degree felony murder under § 2-204.

We disagree with appellant's contention that his indictment was insufficient to support a second degree felony murder prosecution and that the court must dismiss any prosecution for second degree murder on retrial. In Maryland, an indictment is sufficient for either degree of murder if it substantially states: "(name of defendant) on (date) in (county) feloniously (willfully and with deliberately premeditated malice) killed (and

murdered) (name of victim) against the peace, government, and dignity of the State." Section 2-208(a).

In Maryland, an indictment under the "statutory short form" from § 2-208(a) is constitutionally sufficient for a conviction of first or second degree felony murder. *Ross v. State*, 308 Md. 337, 345 (1987). In *Ross,* the defendant was indicted using the statutory short form and convicted of first degree felony murder. *Id.* at 339. He challenged his conviction as a violation of his constitutional right to due process and fair notice as guaranteed by the 5th and 6th Amendments to the United States Constitution. *Id.* Reasoning that the Constitution required that the defendant knew the charges he faced, the time and place of the alleged crime, and the identity of the alleged victim, but not the particular theory of murder that the State planned to pursue at trial, the Court of Appeals held that the statutory short form provided sufficient notice and detail to convict the defendant of murder in either degree. *Id.* at 345, 347. Here, the State indicted appellant using the permissible statutory short form for murder. Under Maryland law, such an indictment is sufficient for either first or second degree murder. Therefore, on retrial, the State may pursue a second degree felony murder conviction without violating appellant's constitutional rights to due process and fair notice.[2]

Appellant argues also that he cannot be retried for second degree felony murder because he was not indicted for a proper predicate offense for second degree felony murder.

[2] This Court is not bound by its previous opinion in *Nichols v. State*, No. 169, Sept. Term 2014 (filed Feb. 4, 2016), which has no precedential or persuasive value. Md. Rule 1-104(a).

As explained above, second degree felony murder applies to a killing committed in the perpetration of or attempt to perpetrate a felony "sufficiently dangerous to life to justify application of the doctrine." *State v. Jones*, 451 Md. 680, 699 (2017). Whether a crime is sufficiently dangerous to life depends on whether "the felonious conduct, under all of the circumstances, made death a foreseeable consequence." *Id.* Whether extortion is a felony dangerous to life is a question of fact to be decided upon retrial. *See Fisher v. State*, 367 Md. 218, 263 (2001).

Finally, as to appellant's argument that his extortion conviction rested on a factual impossibility, this argument was not raised before the circuit court. His argument is therefore not preserved for our review. Rule 8-131(a). We hold that the circuit court denied appellant's motion to dismiss properly and affirm its order denying the motion.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED; COSTS TO BE PAID BY APPELLANT.

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The current proceedings have brought to my attention the importance of the short form indictment, CR § 2-208(a), in resolving this issue. Therefore, I concur.