Circuit Court for Anne Arundel County
Case No. C-02-CR-17-000082

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 948

September Term, 2019

ERIS MURRAY

v.

STATE OF MARYLAND

Fader, C.J.,
Beachley,
Shaw Geter,

JJ.

Opinion by Shaw Geter, J.

Filed: June 2, 2020

Eris Murray, appellant, was charged, in the Circuit Court for Anne Arundel County, with one count of sex abuse of a minor, two counts of second-degree sex offense, and two counts of sodomy. Following a jury trial, he was found guilty of one count of sex abuse of a minor, one count of second-degree sex offense, and one count of sodomy, but was acquitted of the second count of second-degree sex offense and the second count of sodomy. Appellant noted an appeal, and this Court, in an unreported opinion, reversed his convictions and remanded for a new trial. *Murray v. State*, No. 1648, September Term, 2017 (filed October 26, 2018).

Prior to retrial, appellant filed a motion to dismiss the indictment on double jeopardy grounds. The circuit court denied the motion and appellant then filed this interlocutory appeal, raising a single question:

Did the circuit court err in denying the motion to dismiss?

For reasons to follow, we hold the circuit court did not err in denying appellant's motion. We, therefore, affirm the judgment of the court.

BACKGROUND

The Indictment

In December of 2016, appellant was arrested and charged with having committed various sexual offenses against a minor, "C.M." The indictment read as follows:

INDICTMENT

> THE GRAND JURY, for the State of Maryland, sitting in Anne Arundel County, upon their oaths and affirmations, charge, ERIS MURRAY with having committed the following offenses on or about January 1, 2008 through December 31, 2012 in Anne Arundel County.

COUNT ONE

SEX ABUSE MINOR

THE GRAND JURY charges that the aforesaid defendant on or about the aforesaid date, did cause sexual abuse to [C.M.], a minor, the defendant having temporary care and custody and responsibility for [C.M.], in violation of CR 3-602(b)(1) of the Annotated Code of Maryland. (CR.3.602.(b)(1)) (Penalty – 25 y) (Sex Abuse Minor *1 0322)

COUNT TWO

SEX OFFENSE SECOND DEGREE

THE GRAND JURY charges that the aforesaid defendant on or about the aforesaid date, on the first occasion, did engage in a sexual act; to wit: anal intercourse, with [C.M.], a child under the age of 14 years, and the defendant performing the sexual act was at least 4 years older than [C.M.], in violation of Section 3-306(a)(3) of the Criminal Law Article. (CR.3.306) (Penalty – 20 y) (Sex Offense Second Degree *2 3600)

COUNT THREE

SEX OFFENSE SECOND DEGREE

THE GRAND JURY charges that the aforesaid defendant on or about the aforesaid date, on the second occasion, did engage in a sexual act; to wit: anal intercourse, with [C.M.], a child under the age of 14 years, and the defendant performing the sexual act was at least 4 years older than [C.M.], in violation of Section 3-306(a)(3) of the Criminal Law Article. (CR.3.306) (Penalty – 20 y) (Sex Offense Second Degree *2 3600)

COUNT FOUR

SODOMY – GENERAL

THE GRAND JURY charges that the aforesaid defendant on or about the aforesaid date, on the first occasion, did unlawfully commit sodomy upon [C.M.] (CR.3.321) (Penalty – 10 y) (Sodomy – General *5 3600)

COUNT FIVE

SODOMY – GENERAL

> THE GRAND JURY charges that the aforesaid defendant on or about the aforesaid date, on the second occasion, did unlawfully commit sodomy upon [C.M.] (CR.3.321) (Penalty – 10 y) (Sodomy – General *5 3600)
>
> THE GRAND JURY further avers and alleges that the offenses charged hereinabove were committed contrary to the form and Act of Assembly in such cases made and provided and were against the peace, government and dignity of the State of Maryland.

Trial

At trial, in its opening statement, the State alleged that appellant, a friend of C.M.'s family, had sodomized C.M. on two separate occasions. The first incident occurred when appellant and C.M. were alone in appellant's home, and the second incident occurred when C.M. had gone to appellant's home for a sleepover with appellant's son. Defense counsel, also, during his opening statement, acknowledged that C.M. had made "two allegations:" one involving an incident that occurred at appellant's home while appellant and C.M. were "waiting for [appellant's son] to come home" and the second involving an incident that occurred after C.M. had fallen asleep during a sleepover at appellant's home.

The State's key witness was C.M., who was 17 years old, at the time of trial. He testified that, when he was in elementary school, he lived near appellant and frequently spent time with appellant and his son. During that time period, appellant lived at two different addresses, both of which C.M. visited often. C.M. testified that, during two of those visits, appellant "put his penis inside of [him]."

According to C.M., "the first incident" occurred when appellant was living at the "Russet house," which was a brick house located in Laurel near where C.M. lived. On that

occasion, he and appellant were at appellant's home, alone, when appellant anally penetrated him while the two were sitting on a couch in the living room. C.M. testified that appellant only "put it in once or twice" before C.M., feeling like he needed to "poop," got up and went to the bathroom. After C.M. returned from the bathroom a few minutes later, appellant anally penetrated him again, which again caused C.M. to have to go to the bathroom. C.M. testified that this happened "like two or three times" before appellant was interrupted by an unidentified visitor at his front door. C.M. stated that the entire incident lasted "like 10 minutes."

C.M. testified "the second incident" occurred when appellant was living at "his second house in Hanover." On that occasion, C.M. was watching a movie with appellant and appellant's son when appellant told his son to go to his room and go to sleep. C.M. continued watching the movie but eventually fell asleep. C.M. stated that, when he awoke, he was in appellant's bed and appellant was anally penetrating him. C.M. testified that he quickly got up and ran out of appellant's bedroom. Although C.M. could not recall when the second incident occurred, he did state that it happened after the first incident. C.M. testified that he originally told the police that the two incidents occurred "six months apart," but added that he was unsure as to "the timeframe that elapsed between the first incident and the second incident."

At the conclusion of the evidence, the jury was given a verdict sheet, which listed the five charges as follows:

> 1. Do you the jury find the Defendant not guilty or guilty of Count 1 Sex Abuse of a Minor?

> 2. Do you the jury find the Defendant not guilty or guilty of Count 2 Second Degree Sexual Offense – did engage in anal intercourse with [C.M.], on the first occasion?
>
> 3. Do you the jury find the Defendant not guilty or guilty of Count 3 Second Degree Sexual Offense – did engage in anal intercourse with [C.M.], on the second occasion?
>
> 4. Do you the jury find the Defendant not guilty or guilty of Count 4 Sodomy – on the first occasion placed his penis into the anus of [C.M.]?
>
> 5. Do you the jury find the Defendant not guilty or guilty of Count 5 Sodomy – on the second occasion placed his penis into the anus of [C.M.]?

Following deliberations, the jury returned a verdict of guilty as to Count 1 (sex abuse of a minor), Count 2 (second-degree sexual offense), and Count 4 (sodomy). The jury returned a verdict of not guilty as to Count 3 (second-degree sexual offense) and Count 5 (sodomy).

First Appeal

Appellant filed a timely appeal of his convictions in this Court. *Murray v. State*, No. 1648, September Term, 2017 (filed October 26, 2018). In that appeal, we held that an evidentiary error had occurred during trial. *Id.* We reversed appellant's convictions and remanded the case to the circuit court for a new trial. *Id.*

Motion to Dismiss the Indictment on Double Jeopardy Grounds

Before the State could retry him, appellant filed a motion to dismiss the indictment. At the hearing on that motion, appellant's counsel argued that, because all five charges in the original indictment alleged "the same date, the same victim and the same place," and because the jury ultimately acquitted him of two of those charges, *i.e.* Counts 3 and 5, the

State was barred from retrying him for any acts that occurred during those time frames, including the acts that served as the basis of the charges for which he was found guilty, *i.e.*, Counts 1, 2, and 4. Appellant's counsel maintained that, although the charges of second-degree sexual offense and sodomy for which he was found guilty (Counts 2 and 4), and the charges of second-degree sexual offense and sodomy for which he was acquitted (Counts 3 and 5), were differentiated as "the first occasion" and "the second occasion," respectively, it was unclear from the trial record which "occasion" of sexual offense and sodomy formed the basis of the jury's verdict of guilty on Counts 2 and 4 and which occasion formed the basis of the jury's verdict of not guilty on Counts 3 and 5. The ambiguity, appellant's counsel argued, barred retrial on Counts 2 and 4.

The circuit court denied appellant's motion to dismiss, finding there were "sufficient distinctions" between Counts 2 and 4 and Counts 3 and 5 and that those distinctions were "born out" by the testimony and arguments of counsel at trial. This timely interlocutory appeal followed.

DISCUSSION

Appellant argues the circuit court erred in denying his motion to dismiss the indictment. He asserts that the charges in the indictment, namely, the second-degree sexual offenses outlined in Counts 2 and 3 and the sodomy offenses outlined in Counts 4 and 5, did not specify whether the offenses took place in the same location or different locations, nor did the indictment specify whether the use of the words "first occasion" in Counts 2 and 4 and the words "second occasion" in Counts 3 and 5 referred to events on the same

date or different dates. Appellant argues those "ambiguities" preclude the State from retrying him on Counts 2 and 4 given that he was acquitted of Counts 3 and 5. He further maintains that, because Count 1, sexual abuse of a minor, requires at least one of the underlying sexual offenses contained in the other Counts, the State cannot proceed on Count 1. Therefore, Counts 1, 2, and 4 should have been dismissed by the court.

"Both the Federal Constitution, through the Fifth and Fourteenth Amendments, and Maryland common law prohibit the State from placing a person twice in jeopardy for the same offense." *Anderson v. State*, 385 Md. 123, 130 (2005). Where a defendant has been convicted of a crime and that conviction is later reversed on appeal, double jeopardy principles do not bar a second prosecution for that offense, with the exception of a reversal based upon insufficiency of the evidence. *Scott v. State*, 454 Md. 146, 167 (2017). Whether the principles of double jeopardy bar retrial on a particular charge is a question of law that we review *de novo*. *Giddins v. State*, 393 Md. 1, 15 (2006).

> The broad umbrella term we call 'double jeopardy' today embraces (in its federal manifestation) four distinct species: 1) classic former jeopardy, arising out of the common law pleas at bar of *autrefois convict* and *autrefois acquit*; 2) simultaneous jeopardy, involving largely issues of merger and multiple punishment and lying on the at-times blurred boundary between constitutional law and statutory construction; 3) the problem of retrial following mistrial; and 4) collateral estoppel.

Fields v. State, 96 Md. App 772,775 (1993). In the case at bar, appellant invokes the first and fourth species as grounds for dismissal of the remaining charges.

The common law plea of *autrefois acquit* provides that a defendant cannot "be put in jeopardy . . . of being convicted of a crime for which he had been acquitted[.]" *Huff v.*

State, 325 Md. 55, 74 (1991) (citations and quotations omitted). "The purpose served by the plea of former acquittal is that of preventing a defendant who has once survived his initial jeopardy from being 'twice vexed' by a fresh exposure to the hazard of conviction for that same offense." *Warren v. State*, 226 Md. App. 596, 604 (2016) (citations omitted). Thus, "defendants who have been indicted and acquitted of an offense may interpose the plea of *autrefois acquit*, if later charged with the same offense, to bar re-prosecution." *Giddins v. State*, 393 Md. 1, 19 (2006). Similarly, a defendant who has been convicted of a crime may invoke the protections of double jeopardy under the common law plea of *autrefois convict*, which prohibits the defendant from "being twice convicted and punished for the same crime[.]" *Huff*, 325 Md. at 75 (citations and quotations omitted).

"In order for two charges to represent the same offense for double jeopardy purposes, they must be the same 'in fact' and 'in law.'" *Scriber v. State*, 437 Md. 399, 408 (2014). "To determine whether charges are the same in fact, we look to whether they arise out of the same incident or course of conduct." *Id.* "To determine whether two offenses arising out of the same incident are the same in law, we apply the 'same elements' test set forth by the Supreme Court of the United States in [*Blockburger v. United State*, 284 U.S. 299 (1932)]." *Id.* Under that test, if "only one offense requires proof of an additional fact, so that all elements of one offense are present in the other, the offenses are deemed to be the same for double jeopardy purposes." *Anderson*, 385 Md. at 131–32 (citations and quotations omitted).

In arguing that the first strain of double jeopardy prohibits his retrial, appellant relies on two cases, *Anderson v. State*, 385 Md. 123 (2005) and *Ingram v. State*, 179 Md. App. 485 (2008), both of which are inapposite. In *Anderson*, the defendant, Jesse Anderson, a suspected drug dealer, was the target of a sting operation conducted by the police on October 1, 2002. *Anderson*, 385 Md. at 125–26. In conducting that operation, an undercover police officer approached Anderson at a specified location and purchased heroin from him. *Id.* at 126. Five minutes later, a second undercover officer approached Anderson at the same location and also purchased heroin. *Id.* at 126. Thirty minutes after that, the police arrested Anderson and found a quantity of heroin in his possession. *Id.* Anderson was later charged in the District Court of Maryland with "one count of possession of heroin on October 1, 2002, at 1500 Myrtle Avenue." *Id.* Anderson was found guilty of that charge and sentenced to a term of nine months' imprisonment. *Id.*

Approximately four weeks after the District Court proceeding, the State obtained an indictment charging Anderson, in the circuit court, with possession with intent to distribute heroin and distribution of heroin, both of which were based on the sale of heroin by Anderson to the first undercover police officer on October 1, 2002. *Id.* at 127–28. Approximately one week after that, the State obtained a second indictment charging Anderson with possession with intent to distribute heroin and distribution of heroin, both of which were based on the sale of heroin by Anderson to the second undercover police officer on October 1, 2002. *Id.* Anderson filed a motion to dismiss the indictments, arguing that the State was barred, on double jeopardy grounds, from bringing the new charges

because the underlying offenses arose at the same time and place, and involved the same quantity of drugs, as the District Court charge for which Anderson had already been found guilty. *Id.* at 128. Anderson's motion was denied by the court. *Id.*

The Court of Appeals ultimately held that the circuit court erred in denying Anderson's motion, as the two circuit court indictments were barred by Double Jeopardy. *Id.* at 141. The Court concluded that all of the offenses charged by the State subsequent to Anderson's District Court conviction of possession were "the same in law" because all the elements of the possession conviction were present in each of the subsequent charges. *Id.* at 132–33. As to whether the possession conviction and the subsequent charges were "the same in fact," the Court noted that, "[i]n determining the scope of the former conviction, the court must ordinarily look at the effective charging document upon which judgment was entered, not just the evidence presented in support of that charge." *Id.* at 140. The Court concluded:

> One may never know, unless a transcript is prepared, what evidence was presented, and one could never be certain in any event what evidence a trier of fact (or the court on motion) credited in reaching its verdict. The Supreme Court, for Constitutional purposes, and we, as a matter of common law, have rejected an "actual evidence" test to determine sameness in law, and we see no profit, absent special circumstances not present here, in adopting that test to determine sameness in fact. In most cases, the only sensible and workable criterion for determining the nature and scope of the prior offense is the effective charging document. That states the offense for which the defendant was tried.
>
> Because the Statement of Charges filed in the District Court encompassed all of the heroin that Anderson possessed on October 1, 2002, at 1500 Myrtle Avenue, it necessarily included the heroin that he sold to [the undercover officers]. Having been convicted of that offense, he cannot later be prosecuted for crimes that, in law, constitute the same offense.

Id. at 140–41.

In *Ingram*, the State, by way of an indictment, alleged that, on June 11, 2003, the defendant, Anton Ingram, had possessed cocaine and possessed cocaine with an intent to distribute. *Ingram*, 179 Md. App. at 492–94. Ingram pled guilty to the possession charge and was sentenced to a term of one-year imprisonment. *Id.* at 494. The State, shortly thereafter, indicted Ingram a second time, alleging that, on June 11, 2003, Ingram possessed cocaine and possessed cocaine with an intent to distribute. *Id.* at 494–96. Ingram was ultimately convicted of the charge of possession with intent to distribute and sentenced to a term of 20 years' imprisonment. *Id.* at 496. Several years later, Ingram filed a motion to correct an illegal sentence, arguing that his second conviction was barred by double jeopardy. *Id.* That motion was denied. *Id.*

On appeal, this Court determined that, under *Anderson*, Ingram's first possession conviction and his second possession conviction were the same for double jeopardy purposes.[1] *Id.* at 502. We noted that, although there may have been some factual distinction between the two crimes that was born out at the respective trials, "[a]s the *Anderson* Court made clear, absent special circumstances, the charging documents—not the actual trial evidence—control the analysis of sameness-in-fact for double jeopardy purposes." *Id.* We

[1] This Court ultimately affirmed the judgment on the grounds that Ingram's specific claim was not cognizable via a motion to correct an illegal sentence. *Ingram*, 179 Md. App. at 511. Although we have since indicated that some of the broad language used in *Ingram* was inconsistent with subsequent decisions by the Court of Appeals, none of that language is relevant in the present case. *See Rainey v. State*, 236 Md. App. 368, 380 (2018), *cert. denied*, 460 Md. 23.

concluded that, because the two successive indictments under which Ingram was prosecuted were, on their face, indistinguishable as to time, place, or purpose, "his successive prosecutions were, like Anderson's, for crimes that constitute the same offense for double jeopardy purposes." *Id.*

Here, by contrast, appellant was charged with five offenses pursuant to a single charging document, that delineated that two of the offenses (Counts 2 and 4) were based on "the first occasion" while the other, related offenses (Counts 3 and 5) were based on "the second occasion." Appellant was found guilty of the offenses pertaining to "the first occasion" and acquitted of the offenses pertaining to "the second occasion." Following appellant's successful appeal, the State sought to retry him only on those charges that were reversed.

Appellant's reliance, thus, on *Anderson* and *Ingram* is misplaced. Appellant was not, as in *Anderson* and *Ingram*, subjected to a second prosecution centered on crimes arising out of the same acts that were the bases for his convictions under a prior charging document. Rather, appellant was charged, under a single charging document, with several related, but distinct, offenses stemming from two separate acts or "occasions." We hold the reversal of his convictions on Counts 2 and 4 ("the first occasion") did not bar the State from retrying him on those charges simply because he had been acquitted of the offenses related to the second occasion. The offenses were neither the same "in fact nor the same 'in law.'" *Scriber v. State*, 437 Md. 399, 408 (2014).

Appellant's claim that retrial is barred under the fourth species of double jeopardy principles, collateral estoppel, also fails. Under the doctrine of collateral estoppel, "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." *Scriber*, 437 Md. at 414 (citations and quotations omitted). "In other words, '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.'" *Odum v. State*, 412 Md. 593, 606 (2010) (citing *Butler v. State*, 335 Md. 238, 253 (1994)). "Unlike the plea of *autrefois acquit*, the doctrine of collateral estoppel is 'not based on two offenses being the same;' instead, it is based on two offenses 'having a common necessary factual component.'" *Scott v. State*, 454 Md. 146, 180 (2017) (citing *Apostoledes v. State*, 323 Md. 456, 463 (1991)).

In determining whether the doctrine of collateral estoppel is applicable, the reviewing court must "examine the record of a 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." *Ashe v. Swenson*, 397 U.S. 436, 444 (1970). "In a collateral estoppel challenge, the burden is 'on the defendant to demonstrate that the issue whose relitigation he seeks to foreclose was actually decided in the first proceeding.'" *State v. Woodson*, 338 Md. 322, 331 (1995) (citing *Dowling v. United States*, 493 U.S. 342, 350 (1990)).

A review of the relevant record here refutes appellant's claim that the doctrine of collateral estoppel bars his retrial. In addressing the jury, both the State and defense counsel, referenced two separate incidents. C.M., further testified that the "first occasion" of anal intercourse and sodomy occurred at appellant's home in Laurel, during which appellant penetrated C.M.'s rectum several times over a 10-minute period while the two were alone in appellant's living room. C.M. then testified the "second occasion" of anal intercourse and sodomy, occurred at a later date and at a different location than the first occasion. The verdict sheet expressly stated that Counts 2 and 4 referred to "the first occasion" of anal intercourse and sodomy and that Counts 3 and 5 referred to "the second occasion" of anal intercourse and sodomy. We also note the trial judge, in ruling on the motion to dismiss, made the following observations about the trial:

> This Court counted at least 34 examples where the first occasion is described as an instan(ce) where the defendant was brought over and there were incidents that occurred on the couch and the second occasion is described as a sleep over event. It is replete throughout the entire trial transcripts beginning with opening statements including the testimony of the alleged victim himself."

In our view, it is clear the jury found appellant guilty of "the first occasion" of anal penetration and sodomy and not guilty of "the second occasion" of anal penetration and sodomy. The State is therefore, not precluded from relitigating the offenses related to the first occasion, *i.e.*, Counts 2 and 4. For that reason, the State is also not precluded from retrying appellant on Count 1 (sexual abuse of a minor).

In sum, the circuit court did not err in denying appellant's motion to dismiss the charges on double jeopardy grounds and the State is not barred from retrying appellant on the charges for which he was convicted.

JUDGMENT OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANT.