Circuit Court for Cecil County
Case No. C-07-CR-18-001360

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1282

September Term, 2021

DAVID EMMONS STONE

v.

STATE OF MARYLAND

Zic,
Ripken,
Meredith, Timothy E.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Ripken, J.

Filed: June 14, 2022

David Stone ("Stone") was charged by way of an indictment with ten counts of burglary, larceny, conspiracy, and related offenses occurring "on or about August 1, 2018, through October 24, 2018." He was tried before a jury in the Circuit Court for Cecil County. The court granted Stone's motion for judgment of acquittal on the conspiracy counts, and the jury acquitted Stone of second-degree burglary, malicious destruction of property, and theft of property valued at over $100,000. The basis of that theft count was unauthorized control as defined in Maryland Criminal Law Article ("CL") § 7-104. The jury convicted Stone of one count of theft of property valued between $25,000 and $100,000. The basis of that theft count was continuing course of conduct as defined in CL § 7-103(f). The jury was unable to reach a verdict on fourth-degree burglary. The State entered a *nolle prosequi* as to that count. Stone appealed to this Court, which vacated the conviction based on trial court error and remanded to the circuit court for a new trial. Stone filed a pre-trial motion to dismiss the charge contending that a retrial would violate double jeopardy principles. The circuit court denied his motion. Stone now appeals to this Court. For the reasons to follow, we hold that the circuit court did not err in denying the motion.

FACTUAL AND PROCEDURAL BACKGROUND

We set forth the underlying facts in *Stone v. State*, No. 1192 Sept. Term 2019, slip op. at 2–6 (Md. Ct. Spec. App. Feb. 11, 2021), Stone's first appeal to this Court:

> Danilo Cabahug, a former owner of a sports memorabilia store, kept a large supply of collectible sports cards and comic books at Whalen's Storage in Elkton, Maryland. He discovered that the memorabilia had been stolen on October 24, 2018 when he visited the storage facility for the first time since July 2018. His rental unit, #16, had a large circular hole cut out from where the lock had been, which enabled anyone to enter the unit.

Upon discovering the theft, Mr. Cabahug reported it to the Elkton Police Department. Officer Andrew Tuer would later testify that while investigating the break-in, he noticed that another unit, #35, was left open. Mr. Cabahug identified some of the items in unit #35 as being his property.

Officer Tuer and Cabahug also looked into locker #15, which was an open locker next to Cabahug's and found more of his stolen property. Locker #15 belonged to [Stone]. Officer Tuer had been patrolling the unit weeks earlier on October 3, 2018, and found that locker, #15, had been "forced open." [Stone] met the police at the storage facility and told Officer Tuer that he was abandoning the locker because of the burglary. Later, on October 15, 2018, Officer Tuer was patrolling another Elkton storage facility, Cecil Mini Storage, when he encountered [Stone] with a cart of baseball cards "in booklets" as used by "collectors."

On October 29, 2018, locker #9 at the Whalen facility was the subject of a police search warrant. Cabahug identified several items found in the storage locker as being his stolen property. This locker belonged to Miguel Small. Later that day, the police executed a search warrant on the locker that [Stone] had rented at the Cecil Mini Storage facility and Cabahug identified more items as being stolen from his storage locker.

Officer Joshua Leffew interviewed [Stone] after executing the search warrant on [Stone's] locker. [Stone] said he moved his items to the Cecil Mini Storage because of the break-in at his Whalen locker. [Stone] claimed that he saw a box of baseball cards when moving his items out of the Whalen facility and took them. Leffew asked [Stone] to unlock his phone so he could look at it and [Stone] refused, saying that he would "shoot himself in the foot" if he did so and that he "didn't want to incriminate himself."

[Stone] and Small were indicted for various counts of burglary, malicious destruction of property and theft. At trial, the State called co-defendant Small as a witness pursuant to a plea agreement. Small testified that he rented locker #9 at the Whalen facility and that he did not know that the items found in his locker were stolen. He had seen Cabahug's locker left open for at least a month with many people rummaging through it. He did not see [Stone] in that locker, but he did at one point help [Stone] move 60 to 100 containers of baseball cards and comic books from [Stone's] locker at Whalen's to a vehicle "in exchange for drugs."

Cabahug testified that his property found in [Stone's] possession was worth "over $50,000" and that his total loss was "more than $1.5 million." The evidence showed that [] he had previously told officers different amounts

for his total loss: $7,880 to the responding officer and later $250,000 to Officer Leffew.

[Stone] testified that he had only rented his locker at Whalen's for a month in September 2018 before moving out because of it being burglarized repeatedly. He denied stealing any of Cabahug's property or burglarizing his locker. He further testified that the baseball cards and comic books found in his Cecil Mini Storage locker were all his and that he had collected those since he was a child. Neither [Stone] nor Cabahug had receipts for any of the stolen items.

The jury was instructed to consider five charges in the indictment: Second-Degree Burglary, Fourth-Degree Burglary, Malicious Destruction of Property, Felony Theft ($100,000 or more) and Theft in a Continuing Course of Conduct ($100,000 or more). On five counts of conspiracy to commit these same charges with Miguel Small, [Stone] was granted a judgment of acquittal by the court.[1]

The judge instructed the jury concerning the theft charges:

> Then lastly there is a charge of theft, two different versions. The first version or definition is theft, unauthorized control. The defendant, Mr. Stone, is charged with the crime of theft. In order to convict the defendant of theft, the State must prove that the defendant willfully or knowingly obtained or exerted unauthorized control over the property of the owner, and that the defendant had the purpose of depriving the owner of the property, and the value of the property was over $100,000.

After the court instructed the jury on the definitions of "property," "owner," "deprive," "exert control," and "value" from Maryland Pattern Jury Instruction 4:32, it instructed the jury on a second theft charge:

> Mr. Stone is also charged with the crime of theft greater than $100,000 pursuant to a continuing course of conduct. In order to convict the defendant under this charge of theft pursuant to a continuing course of conduct, the State must prove all the elements of theft. Course of conduct means a persistent pattern composed of a series of acts over time that shows a continuity of purpose.

[1] Defense counsel did not move for judgment of acquittal on the theft counts.

Defense counsel objected to the instruction, insisting that the State had to pick one or the other of the theft charges. The prosecutor disagreed, arguing that "it's a question of fact for the jury to determine if it was one act of theft or if it was pursuant to a continuing course." Defense counsel suggested in his closing argument that the State had failed to prove that his client committed the theft but spent the bulk of his argument insisting that "there is no indication whatsoever that this property was worth over $100,000."

During deliberations, the jury sent a note to the trial judge asking whether the course of conduct count would "also include the element of value of $100,000?" While both the State and defense counsel believed that the question should be answered in the affirmative, the court disagreed, stating that "value is not an element of the offense. The value only deals with the punishment."

In response to the jury's question, the court answered, "No, see attached verdict sheet for Question 5." In response, defense counsel told the court, "Well, I would note that both the State and the defense are objecting." The new verdict sheet sent to the jury in response to their question read in the pertinent part:

> How do you find with regard to Theft – unauthorized control?
> Not Guilty _____ Guilty _____
>
> **If your answer to 4 is not guilty go to question 5. If your answer to question 4 is guilty contact the bailiff.**
>
> 5. How do you find with regard to Theft?
> Not Guilty _____ Guilty _____
> **If your verdict is guilty please also answer the following:**
>
> _____ theft – having a value of at least $1,500 but less than $25,000
> _____ theft – having a value of at least $25,000 but less than $100,000
> _____ theft – having a value of $100,000 or more

The jury acquitted [Stone] of Second-Degree Burglary, Malicious Destruction of Property and Theft- unauthorized control. The jury was unable to reach a verdict on the Fourth-Degree Burglary and convicted [Stone] of the Theft in a Continuing Course of Conduct ($25,000–$100,000). The State entered the Fourth-Degree Burglary charge nolle prosequi. [Stone] was

> sentenced to eight years of incarceration and ordered to pay restitution in the amount of $50,000.

(footnotes omitted).

Stone appealed his conviction to this Court asserting, in part, that the court erred in giving the instruction on a lesser-included theft offense that was not requested by either party.[2] We agreed and held that the court's allowing the jury to consider a lesser-included charge in the absence of either party's request mandated vacating Stone's conviction and remanding for a new trial. Specifically, we held that though a defendant charged with a greater offense may be convicted of an uncharged, lesser-included offense, an exception to that general rule prohibits a trial court from instructing on an uncharged lesser-included offense where neither party has requested the instruction.

On remand, Stone filed a pre-trial motion alleging that the case should be dismissed because retrial of the continuous course of action theft charge would violate double jeopardy principles.[3] The court held a hearing on the motion, during which the State opposed the motion. The State argued that retrial did not put Stone in double jeopardy, and that "the only reason this case is back before the court is because [the State] made the mistake of not agreeing or requesting that instruction." The State further asserted that

[2] Stone also asserted that his convictions must be reversed because he was convicted of a "non-existent" charge, and his counsel's assistance was ineffective. We held that Stone was not convicted of a "non-existent" offense, and we declined to address his ineffective assistance of counsel claim on direct appeal.

[3] Prior to this motion, Stone filed a federal petition for habeas corpus with the U.S. District Court alleging violation of double jeopardy, and the district court dismissed his petition finding that he had not yet exhausted state court remedies.

"[n]ow [it] know[s] the correct thing to do is charge that top count and then ask that all of the other elements be included in the jury instruction and let [the jury] decide."

Stone argued that a retrial on any theft offense for any valuation would violate the prohibitions against double jeopardy in the Fifth Amendment and Maryland common law. He further argued that the State is not permitted "a second bite at the apple" to relitigate the case for a lesser charge. The circuit court denied his motion, and Stone filed this interlocutory appeal.

ISSUES PRESENTED

Stone argues that the circuit court erred in denying his motion to dismiss. He presents three issues for our review:

I. Whether subjecting [Stone] to a retrial on Count Nine would violate the Fifth Amendment's Double Jeopardy Clause and Maryland's common law prohibition against double jeopardy because, as admitted by the trial prosecutor in his closing argument at [Stone's] first trial, there was no evidence of continuing-course-of-conduct theft.

II. Whether subjecting [Stone] to a retrial on the lesser-included charge of continuous-course-of-conduct theft of property valued less than $100,000 would violate the Fifth Amendment's Double Jeopardy Clause and Maryland's common law prohibition against double jeopardy under estoppel principles.

III. Whether a jury's outright acquittal of [Stone] on Count Seven, including of all lesser-included offenses contained therein, prohibits a retrial of [Stone] on Count Nine.

For the reasons that follow, we hold that retrial on the unauthorized access theft, in any valuation, and on course of conduct theft greater than $100,000 are barred by the prohibitions on double jeopardy in the Fifth Amendment and in Maryland common law. We further hold that retrial of course of conduct theft less than $100,000 does not violate

the prohibitions on double jeopardy, is not barred by estoppel principles, and is not otherwise improper. We affirm the circuit court's denial of Stone's Motion to Dismiss and direct the circuit court to proceed with the new trial in accordance with this opinion.

DISCUSSION

The Fifth Amendment precludes any person from being "twice put in jeopardy of life or limb." U.S. Cont. amend. V. The Double Jeopardy Clause and Maryland common law "bar multiple punishments and trials for the same offense." *State v. Long*, 405 Md. 527, 536 (2008). Once a trier of fact in a criminal case renders a verdict of "not guilty," that verdict is "final and the defendant cannot later be retried on or found guilty of the same charge." *Pugh v. State*, 271 Md. 701, 706 (1974).

A circuit court's denial of a motion to dismiss on the grounds of double jeopardy is an immediately appealable order. *Neal v. State*, 272 Md. 323, (1974). In conducting our review, we give "no deference to the lower court's resolution of the matter." *Jones v. State*, 222 Md. App. 600, 608 (2015), *rev'd on other grounds*, 451 Md. 680 (2017). Whether principles of double jeopardy bar a retrial is a question of law reviewed de novo. *Giddins v. State*, 393 Md. 1, 15 (2006).

I. RETRIAL OF STONE FOR CONTINUOUS COURSE OF CONDUCT THEFT UNDER $100,000 IS NOT BARRED BY THE DOUBLE JEOPARDY CLAUSE OR MARYLAND COMMON LAW'S PROHIBITION ON DOUBLE JEOPARDY.

Stone argues that retrial under any theory of theft runs afoul of the Double Jeopardy Clause and Maryland common law. He first argues that his acquittal of unauthorized access theft (Count 7) and absence of any lesser charge of that count precludes retrial of that count in any valuation. Second, he argues that by virtue of the jury convicting him of theft in the

valuation of greater than $25,000 but less than $100,000, it necessarily acquitted him of theft greater than $100,000 and he cannot be retried for continuous course of conduct theft (Count 9) in that amount. Third, he argues that the State is prohibited from retrying continuous course of conduct theft (Count 9) in any lesser amount as well. To this end, Stone argues that there was insufficient evidence for the jury to convict him of continuous course of conduct theft, and that acquittal of unauthorized control theft prohibits retrial of continuing course of conduct theft.

A. Stone May Be Retried for Continuing Course of Conduct Theft Valued Under $100,000.

The Double Jeopardy Clause and Maryland common law protect against three separate government encroachments: (1) "a second prosecution for the same offense after acquittal"; (2) "a second prosecution for the same offense after conviction"; and (3) "multiple punishments for the same offense." *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969); *Mansfield v. State*, 422 Md. 269, 281 n.7 (2011). The prohibitions on double jeopardy do not preclude the State from reinstituting criminal proceedings against a defendant who sought an appeal and was successful in setting his conviction aside. *United States v. Ball*, 163 U.S. 662, 672 (1896); *see Scott v. State*, 454 Md. 146, 167 (2017) ("Generally, the double jeopardy clause does not bar a second prosecution for the same offense after an appellate court reverses a conviction."). Rather, retrial following an appellate court's setting aside a conviction for trial court error is a single instance of "continuous jeopardy." *Price v. Georgia*, 398 U.S. 323, 326–27 (1970).

In *Huffington v. Stat*e, a jury found Huffington guilty of two counts of felony murder, among other offenses, and specifically acquitted him through a special verdict form of charges that the two murders were premeditated. 302 Md. 184, 186 (1983). On appeal, his convictions were reversed, and the case was remanded for a new trial. *Id.* Prior to his retrial, Huffington filed a motion to dismiss the charges on the ground that retrial under any theory of murder would violate the Double Jeopardy Clause. *Id.* The circuit court denied his motion, and he appealed. *Id.* at 187.

During argument before the Court of Appeals, the State stipulated that Huffington had been acquitted of premeditated murder and would not be retried for those offenses, but otherwise maintained that retrial of the felony murder charges would not run afoul of the Double Jeopardy Clause. *Id*. Huffington argued that his acquittal of first-degree murder necessarily meant that the jury found the elements of murder to be lacking. *Id.* at 187. The Court noted that felony murder and premeditated murder have different elements but are nonetheless "deemed the same offense for purposes of the double jeopardy prohibition against successive trials." *Id.* at 188–89.

The Court recognized that "if a defendant had been prosecuted solely on a theory of premeditated murder, had been convicted or acquitted, and there had been no appeal, the prosecution would not be permitted to prosecute him a second time for the same homicide on a theory of felony murder." *Id.* at 189. However, the Court continued, Huffington was tried on both first-degree and felony murder charges, sought an appeal of his conviction of the latter, and the new trial resulted directly from his appeal. *Id.* Relying on the principle that "the Fifth Amendment's double jeopardy clause does not preclude a retrial of the

defendant on the same charges" where the defendant has succeeded on appeal having his convictions reversed, the Court held that Huffington could be retried for the felony murder charges. *Id.*

Turning back to our case, we first hold that retrial of Count 7 is barred by the prohibition on double jeopardy. To be sure, the jury acquitted Stone of unauthorized access theft greater than $100,000 charged in Count 7. The State may not seek to retry Stone on Count 7 as the jury's acquittal terminated jeopardy on that count. *See Green v. United States*, 355 U.S. 184, 188 (1957) ("[A] verdict of acquittal is final, ending a defendant's jeopardy, and . . . is a bar to subsequent prosecution for the same offense.").

Second, we hold that retrial of the charge of continuous course of conduct theft (Count 9) in an amount greater than $100,000 is also barred by the Double Jeopardy Clause. We agree with Stone, as does the State, that by virtue of the jury finding him guilty of theft in an amount greater than $25,000 and less than $100,000, Stone was necessarily acquitted of theft with any valuation over $100,000. *See State v. Prue*, 414 Md. 531, 537 (2010) ("Unless one of a few well-established exceptions apply, when rendering verdicts in a multicount charging document, silence by a trial judge or jury on one count is equivalent to an acquittal on that count."). Therefore, the State may not retry Stone for continuous course of conduct theft greater than $100,000. *Green*, 355 U.S. at 190 (declining to permit a retrial on a greater murder charge after reversal on appeal of a convicted lesser charge because "the original jury had refused to find [Green] guilty of [the greater] charge").

Third, we hold that retrial of the charge of continuous course of conduct theft (Count 9) less than $100,000 does not violate the Double Jeopardy Clause or Maryland common

law. Stone's conviction on the lesser valuation of Count 9 was overturned on appeal, and he remains in continuing jeopardy for that offense. Retrying him for that offense does not place him in jeopardy a second time because the initial jeopardy never terminated. *See Price*, 398 U.S. at 326–27. As was the case in *Huffington*, Stone succeeded in having his conviction set aside on appeal. The jury's resolution of the other charges contained in the same multicount indictment does not raise a double jeopardy issue, and Stone may be retried. *See Huffington*, 302 Md. at 189. In the following sections, we address Stone's arguments and explain that neither our prior holding nor the jury's acquittal on Count 7 resolved the factual elements underlying the offense in Count 9.

B. Stone's Challenge to the Sufficiency of the Evidence Supporting His Conviction Is Not Properly Before This Court.

Stone urges us to review the sufficiency of the evidence supporting his prior conviction and apply the exception annunciated by the Supreme Court in *Burks v. United States*, 437 U.S. 1 (1978). He argues that he attempted to challenge the sufficiency of the evidence underlying the continuous course of conduct conviction in his first appeal and that this Court should have addressed the claim then. The State argues that Stone waived his evidentiary argument because his counsel did not move for a judgment of acquittal on Counts 7 and 9 during the trial. Stone responds that the State has, in turn, waived its preservation arguments by failing to oppose his motion to dismiss in writing and by failing to raise preservation during the hearing on the motion to dismiss.

In *Burks*, the Court held that an appellate court's conclusion that the trial evidence was insufficient to support a conviction functionally served as an acquittal because it

represented "resolution, correct or not, of some or all of the factual elements of the offense charged." *Id.* at 10. The Court reasoned that the purpose of the Double Jeopardy Clause is to "deny the government another opportunity to supply evidence which it failed to muster in the first proceeding." *Id.* at 11. It makes "no difference that the reviewing court, rather than the trial court, determined the evidence to be insufficient." *Id.* (emphasis omitted).

The Court noted however that its decision did not undermine the general rule permitting a second prosecution following reversal for trial court error because such an error "does not constitute a decision to the effect that the government has failed to prove its case." *Id.* at 15. Rather, reversal for trial error, the Court reasoned, "is a determination that a defendant has been convicted through a judicial process which is defective in some fundamental respect, *e.g.*, incorrect receipt or rejection of evidence, incorrect instructions, or prosecutorial misconduct." *Id.* "When this occurs, the accused has a strong interest in obtaining a fair readjudication of his guilt free from error, just as society maintains a valid concern for insuring that the guilty are punished." *Id.* at 15–16.

In his first appeal, as in this appeal, Stone acknowledged that his trial counsel failed to move for a judgment of acquittal and accordingly did not preserve an appellate challenge to the sufficiency of the evidence. *See State v. Smith*, 244 Md. App. 354, 380 (2020) (noting that Rule 4-324 permits a motion for a judgment of acquittal "to be made or considered only at two specific times: (1) at the conclusion of the State's evidence or (2) at the close of all the evidence"); *Ennis v. State*, 306 Md. 579, 589 (1986) ("[F]ailure to renew the requisite motion [at the close of evidence] effectively withdraws our authority to consider an insufficiency contention."). He nonetheless argued that the evidence was insufficient

and his trial counsel's failure to move for a judgment of acquittal constituted ineffective assistance of counsel. Without addressing his insufficiency argument, this Court declined to address Stone's "threshold"[4] ineffective assistance of counsel argument. The plain implication of Stone's failure to prevail on the threshold argument was that the conceded forfeiture of the insufficiency argument would stand. Stone correctly notes that this Court "must address [challenges to the sufficiency of the evidence], if only to find them waived, when we reverse or vacate and remand for further proceedings[.]" *Bircher v. State*, 221 Md. App. 376, 397–98 (2015), *rev'd on other grounds*, 446 Md. 458 (2016). To the extent that our prior opinion was ambiguous, we shall now state explicitly that Stone's sufficiency argument was waived.

Stone points out that our conclusion that this argument was waived effectively forecloses appellate review of the evidence supporting his (now vacated) conviction. That may well be the result, but that is the straightforward application of our procedural rules. "Even errors of a Constitutional dimension may be waived by failure to interpose a timely objection at trial." *Robinson v. State*, 410 Md. 91, 106 (2009) (quoting *Taylor v. State*, 381 Md. 602, 614 (2004)). "The rules for preservation . . . must be followed in all cases[.]"

[4] Stone asked this Court to excuse the procedural default and directly review the sufficiency of the evidence. We previously declined to address Stone's ineffective assistance claim because his trial counsel's alleged omission was not so "blatant and egregious" that the claim could be resolved on direct review without further development of the record. *See Mosely v. State*, 378 Md. 548, n.8 (2003) (noting that ineffective assistance of counsel claims may be heard on direct review where the trial court has conducted an evidentiary hearing on a motion for new trial raising ineffective assistance or is otherwise presented with an adequate record); Md. Rule 8-131(a).

Conyers v. State, 354 Md. 132, 150 (1999). We rarely depart from these rules because "considerations of both fairness and judicial efficiency require that all challenges that a party desires to make to a trial court's ruling, action, or conduct be presented in the first instance to the trial court so that (1) a proper record can be made with respect to the challenge, and (2) the other parties and the trial judge are given an opportunity to consider and respond to the challenge." *Ray v. State*, 435 Md. 1, 23 (2013) (quoting *Chaney v. State*, 397 Md. 460, 468 (2007)).

Relatedly, to the extent that Stone asks us to revisit his ineffective assistance claim, we cannot do so. In his first appeal, this Court determined that Stone's ineffective assistance claim was not directly reviewable. Because that holding was not "out of keeping with controlling principles announced by a higher court," we are bound by the law of the case. *Holloway v. State*, 232 Md. App. 272, 279 (2017). Stone has not offered any authority to indicate that this Court must address a claim for ineffective assistance of counsel on direct appeal, where we would not otherwise, to potentially excuse a lack of preservation.[5]

Last, the posture of the present appeal does not excuse the prior forfeiture nor otherwise permit us to rule on the quality of evidence that might be adduced at retrial. The motion for a judgment of acquittal cannot be made after the verdict is entered, an appeal is taken, and the case is set for retrial. *See Ennis*, 306 Md. at 589. The trial court was not permitted to rule on the sufficiency of the evidence in a pretrial motion to dismiss. *Smith*,

[5] Our earlier opinion did not suggest that a failure to move for a judgment of acquittal could never be cognizable as ineffective assistance on direct appeal. Rather, we are not convinced that we erred in Stone's first appeal by concluding that Stone's ineffective assistance claim was not directly reviewable.

244 Md. App. at 378–81. In sum, Stone's arguments about the sufficiency of the evidence were not preserved, and retrial following our earlier reversal for trial error does not pose any issue under *Burks*.[6] Our earlier holding did not resolve any factual element or conclude that the government failed to prove its case.

C. Stone's Acquittal on Count 7 Does Not Bar Retrial on Count 9.

Stone next argues that the unauthorized control theft, of which he was acquitted, was "effectively" a lesser-included offense of continuous course of conduct theft. He argues that continuing course of conduct theft, defined under CL § 7-103(f), is not a stand-alone theft offense; rather, it is a means of aggregating the value of property taken through theft offenses provided in CL § 7-104. Therefore, according to Stone, "there is no way that a jury at a retrial could convict [Stone] of a continuing-course-of-conduct theft offense as charged in Count Nine of the indictment without necessarily convicting [Stone] of the theft of [the] same property of which he already has been acquitted in a factually-related, lesser-included theft count."[7] To do so, he argues, would violate well-settled Supreme Court

[6] Stone also argues that, as a matter of fundamental fairness, Maryland common law prohibits a retrial where insufficient evidence was offered at the first trial. Whether Stone's challenge to the sufficiency of the evidence is based on the U.S. Constitution or Maryland common law, the claim has been waived.

[7] We presume for purposes of this analysis, that continuing course of conduct theft contained in CL § 7-103(f) is predicated on an underlying offense provided in § 7-104. *See Dyson v. State*, 163 Md. App. 363, 383 (2005) ("[T]heft is an element of the more complex crime of theft by continuing scheme." (quoting *Painter* v. State, 157 Md. App. 1, 14–15 (2004))). As we previously held, valuation is also a discrete element of a theft offense. *Stone*, No. 1192, Sept. Term 2019, slip op. at 6, n.2.

precedent on double jeopardy.[8] The State contends that Stone may be retried following the jury's specific verdict of guilt on course of conduct theft valued under $100,000. The State argues that the valuation of $100,000 was a necessary element of Count 7 but not Count 9, such that Count 7 was not a lesser-included offense of Count 9 and the verdicts were not inconsistent. We agree.

As previously noted, the Double Jeopardy Clause and Maryland common law bar a second prosecution for the same offense. *Brown v. Ohio*, 432 U.S. 161, 168–69 (1977); *Scriber v. State*, 437 Md. 399, 408 (2014). "[W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." *Blockburger v. U.S.*, 284 U.S. 299, 304 (1932); *see State v. Lancaster*, 332 Md. 385, 393 n.8 (1993) (noting that the *Blockburger* test is used to determine whether an offense is the same for double jeopardy purposes under the U.S. Constitution and Maryland common law). "[T]he Fifth Amendment forbids successive prosecution and cumulative punishment for a greater and lesser included offense." *Brown*, 432 U.S. at 169. The prohibition on double jeopardy does not ordinarily operate to bar retrial after appellate reversal of a conviction for a reason other than sufficiency of the evidence. *Huffington*, 302 Md. at 189.

[8] The State suggests that this argument appears to assert that the verdicts were legally inconsistent or that the indictment was subject to a multiplicity challenge. In his reply brief, Stone rejects these characterizations of his argument. In any event, as we shall explain, Stone's conviction does not implicate the prohibition on double jeopardy.

Stone's argument here depends upon an additional proposition regarding double jeopardy jurisprudence—one which we find unsupported in the case law and decline to follow. Stone contends that double jeopardy prohibits a criminal defendant from being retried for an offense following an acquittal, in the same prosecution, of a lesser included offense. In *Wilson v. Czerniak*, which Stone cites for this proposition, a jury was unable to reach a verdict on counts of aggravated felony murder resulting in a mistrial as to those counts. The jury acquitted Wilson of the lesser-included offense of intentional murder. 355 F.3d 1151, 1152 (2004).[9] Wilson sought a writ of habeas corpus to bar prosecution of the greater aggravated felony murder offenses in a retrial. *Id.* at 1153. On review of the district court's refusal to grant the writ, the Ninth Circuit held that double jeopardy principles barred retrial on the greater offenses. *Id.* at 1157. The Ninth Circuit applied the *Blockburger* test and concluded that intentional murder was a lesser-included offense of aggravated felony murder. *Id.* at 1155. The Court reasoned that the acquittal terminated jeopardy on the lesser offense, and that retrial on the greater offenses would subject Wilson to double jeopardy. *Id*. at 1156.

We decline to apply the analysis in *Wilson* as the Ninth Circuit has since recognized that the holding in *Wilson* conflicts with prior and subsequent circuit precedent. *Lemke v. Ryan*, 719 F.3d 1093, 1102–03 (2013). The Ninth Circuit subsequently held, for example, that the termination of jeopardy as to a lesser offense does not bar retrial of a greater offense "originally charged under the *same* indictment in the *same* trial." *Id.* at 1102 (quoting

[9] Stone also cites to *Yeager v. United States*, 557 U.S. 110 (2009), a holding based on collateral estoppel principles. We consider collateral estoppel arguments in Section II.A.

United States v. Jose, 425 F.3d 1237, 1248 (9th Cir. 2005)). There is a difference for double jeopardy purposes "between separate, successive trials of greater and lesser offenses, and the different situation in which both are tried together." *Id.* We can find no binding precedent endorsing the reasoning in *Wilson* nor has any such authority been cited. A number of Maryland cases take the contrary view as described in *Jose*, 425. F.3d at 1248, and like cases. *See Huff v. State*, 325 Md. 55, 75–76 (1991) (concluding that prosecution was allowed to proceed on greater offense following conviction of lesser offense in same prosecution); *State v. Griffiths*, 338 Md. 485, 492 (1995) (holding that there was no constitutional or common law bar to retrial on greater offenses that ended in mistrial despite conviction on lesser offenses in the same prosecution); *see also Ohio v. Johnson*, 467 U.S. 493, 501 (1984) (rejecting the argument "that a determination of guilt and punishment on one count of a multicount indictment immediately raises a double jeopardy bar to continued prosecution on any remaining counts that are greater or lesser included offenses[.]").

Even if we were to apply *Wilson*, we would hold that Count 7 was not a lesser-included offense of Count 9 as submitted to the jury. Count 7 had a necessary element of a valuation over $100,000, and Count 9 had as a necessary element that the takings occurred pursuant to a "continuous intent, scheme, or plan[.]" *Painter*, 157 Md. App. at 15 (2004). As to Count 9, the jury found Stone guilty of theft under $100,000 pursuant to continuous course of conduct. Therefore, each count required proof of an additional fact which the other did not, and Stone's acquittal on Count 7 would not give rise to a double jeopardy issue. *See Blockburger*, 284 U.S. at 304 ("The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be

applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not.").[10]

Stone's argument continues that his acquittal on Count 7 implicitly acquitted him, for double jeopardy purposes, of any unsubmitted theft offense, including of any theft underlying Count 9. This argument draws upon the rule that "an acquittal on the crime explicitly charged necessarily implies an acquittal on all lesser offenses included within that charge." *U.S. v. Gooday*, 714 F.2d 80, 82 (9th Cir. 1983). The preclusive effect of implied acquittal on unsubmitted offenses is limited, however, to barring "*subsequent indictment*" on those offenses." *Id.* (emphasis added). We see no reason that an implicit acquittal on an unsubmitted offense would affect other explicit counts in the same indictment. *See id.* ("If no instructions are given on lesser included offenses, the jury's verdict is limited to whether the defendant committed the crime explicitly charged in the indictment."); *State v. Woodson*, 338 Md. 322, 334 (1995) (explaining that an acquittal for double jeopardy purposes, in the case of a *nolle prosequi*, "is not an adjudication of not guilty or an actual acquittal" and therefore "has no carryover effect on other counts—even other counts charging the same offense.").

The fact that the jury acquitted Stone of unauthorized control theft greater than $100,000 does not render its conviction of continuous course of conduct theft less than $100,000 constitutionally deficient.

[10] Although the valuations submitted to the jury meant that each had a different element, we agree with Stone that Count 9 and Count 7 are the same offense such that if only one had been tried in the initial prosecution, double jeopardy would preclude a second prosecution on the other count. *See Huffington v. State*, 302 Md. 184, 189 (1983).

II. RETRIAL OF STONE FOR CONTINUOUS COURSE OF CONDUCT THEFT LESS THAN $100,000 IS NOT BARRED BY ESTOPPEL PRINCIPLES.

Stone next argues that the State should be estopped from pursuing charges on a lesser valuation of continuous course of conduct theft because the State did not elect to request the court to submit a verdict form with a lesser valuation at Stone's first trial, and in fact objected to the court's supplemented form containing valuations less than $100,000. Stone maintains that he detrimentally relied on the charge being greater than $100,000 because his counsel argued at length in closing that the State had not proven that the stolen property was worth $100,000. Therefore, according to Stone, estoppel principles embodied in the double jeopardy clause and Maryland common law bar a retrial on the lesser valuations. In response, the State argues that Stone did not offer any authority for the proposition that equitable estoppel may bar retrial for an offense that a defendant was convicted of committing. The State acknowledges that the doctrine of collateral estoppel is recognized within the scope of the double jeopardy clause, but maintains it is nonetheless inapplicable. We conclude that estoppel does not support Stone's requested relief.

A. Collateral Estoppel

"Under the doctrine of collateral estoppel, which applies to both civil and criminal cases, '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.'" *Scott*, 454 Md. at 179–80 (quoting *Odum v. State*, 412 Md. 593, 603 (2010)). The doctrine "is not based on two offenses being the same; instead, it is based on two offenses having a common necessary factual component." *Id.* at 180 (internal quotation

marks omitted). Where a court or jury has resolved a factual component in a defendant's favor at trial, the State is prohibited from relitigating the same factual issue at a subsequent trial. *Id.* Put differently, "if to secure a conviction the prosecution must prevail on an issue the jury necessarily resolved in the defendant's favor in the first trial," a second trial is forbidden. *Currier v. Virginia*, 138 S. Ct. 2144, 2150 (2018); *Ashe v. Swenson*, 397 U.S. 436, 445–47 (1970) (holding collateral estoppel barred relitigation of an issue that was decided in the defendant's favor). The "defendant has a difficult burden to overcome in establishing that the issue was actually decided in the first proceeding." *Woodson*, 338 Md. at 331.

The doctrine of collateral estoppel has no application to this case. The State may retry Stone for an offense for which he has been convicted: continuous course of conduct theft less than $100,000. Moreover, there is no factual inconsistency between acquittal on a single act of theft above $100,000 and retrial on a continuing course of conduct theft below $100,000.

B. Equitable Estoppel

Stone next relies on equitable estoppel as a basis for precluding his retrial. Equitable estoppel is defined in Maryland as:

> the effect of the voluntary conduct of a party whereby he is absolutely precluded both at law and in equity, from asserting rights which might perhaps have otherwise existed, either of property, of contract, or of remedy, as against another person, who has in good faith relied upon such conduct, and has been led thereby to change his position for the worse and who on his part acquires some corresponding right, either of property, of contract, or of remedy.

Lipitz v. Hurwitz, 435 Md. 273, 291 (2013). It therefore "essentially consists of three

elements: voluntary conduct or representation, reliance, and detriment." *Id.* at 291–92 (internal quotation marks omitted). "Ordinarily, the doctrine of estoppel does not apply against the State." *ARA Health Servs., Inc. v. Dep't of Pub. Safety & Corr. Servs.*, 344 Md. 85, 96 (1996); *Agnew v. State*, 51 Md. App. 614, 657 (1982) ("It is well settled that the doctrine of estoppel will not be applied against the State in the performance of its governmental, public, or enforcement capacity.").

Stone has cited no criminal case(s) in Maryland where the doctrine of equitable estoppel precluded further prosecution by the State.[11] Wisconsin's Court of Appeals addressed the issue and held that equitable estoppel cannot be applied to prevent the government from prosecuting a criminal charge in *State v. Drown*, 332 Wis. 2d 765 (2011). In addressing a defendant's argument that the State should be equitably estopped from a second prosecution, the Wisconsin court noted that there were no Wisconsin cases applying equitable estoppel to bar a criminal prosecution. *Id.* at 772. It reasoned that Wisconsin had limited instances in which an estoppel argument may be pursued against the government:

> [T]he public interest would be unduly harmed if the State were equitably estopped from prosecuting criminal charges. There is a compelling societal interest in convicting and punishing criminal offenders. On balance, the public interests at stake will always outweigh any potential injustice to a criminal defendant where he or she seeks to evade prosecution via equitable estoppel . . . Thus, extension of the equitable estoppel doctrine is unnecessary.

Id. at 773.

[11] Stone cites *United States v. Shenberg*, 828 F. Supp. 968, 970 (S.D. Fla. 1993), for the rule that "estoppel principles are embodied in the Fifth Amendment's prohibition against double jeopardy." However, as the State noted, *Shenberg* addressed collateral estoppel. *Id.*

As did the Wisconsin Court of Appeals, we decline to apply equitable estoppel to preclude the State from retrying Stone. *See U.S. v. Anderson*, 637 F. Supp. 1106, 1109 (Conn. 1986) (finding no authority for allowing the doctrine of equitable estoppel to defeat a criminal prosecution, reasoning that "the doctrines of equity, which typically can be invoked only by persons who have demonstrated their own 'clean hands,' seem unsuitable for general incorporation into the criminal law.").[12]

For the reasons we discussed above, we hold that retrial of Count 9 is not precluded by the Fifth Amendment's Double Jeopardy Clause or Maryland common law. By way of guidance going forward, we hold that the sole count on which Stone may be retried is continuous course of conduct theft less than $100,000.

JUDGMENTS OF THE CIRCUIT COURT FOR CECIL COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.

[12] Finally, Stone argues that Maryland common law precludes retrial because it would be fundamentally unfair to permit the State to retry Stone after he relied to his detriment on the State's all-or-nothing strategy. The State notes that Stone, in making his common law argument, does not include "any citation to a Maryland case applying any particular common law principle," but rather made "wholesale references" to Maryland common law, to which it cannot meaningfully respond. Stone responds that he invoked the common law to expand this Court's options and deal with issues of first impression. We can find no common law basis for the relief that Stone requests.