Circuit Court for Baltimore City
Case Nos. 119228002, 119246020

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND

No. 1291

September Term, 2021

DAOIN FINCH

v.

STATE OF MARYLAND

Arthur,
Reed,
Sharer, J. Frederick
(Senior Judge, Specially Assigned),

JJ.

Opinion by Reed, J.

Filed: February 6, 2023

** On December 14, 2022, the name of the Court of Special Appeals was changed to the Appellate Court of Maryland and the name of the Court of Appeals was changed to the Supreme Court of Maryland.

This appeal involves allegations of attempted murder and conspiracy between three individuals—Antwain Partlow ("Partlow"), Matthew Talley ("Talley"), and Daoin Finch, appellant— that spanned two adjacent jurisdictions, Baltimore County and Baltimore City, and which resulted in criminal charges being filed in both jurisdictions. Appellant was charged, in the Circuit Court for Baltimore County, with two counts of conspiracy to commit first-degree murder and two counts of conspiracy to commit first-degree assault. A jury in the Circuit Court for Baltimore County acquitted him of those charges.

Thereafter, Finch was charged, in the Circuit Court for Baltimore City, with two counts of attempted first-degree murder, two counts of attempted second-degree murder, two counts of first-degree assault, and various handgun violations. He moved to dismiss on the ground of double jeopardy and collateral estoppel, relying upon the acquittals in Baltimore County. The Circuit Court for Baltimore City denied that motion in relevant part,[1] and this interlocutory appeal ensued.[2] For the reasons that follow, we affirm and remand for further proceedings.

BACKGROUND

[1] The Baltimore City indictment also charged conspiracy as well as several misdemeanors that are subject to a statute of limitations. The circuit court granted Finch's motion to dismiss as to those charges, and the State does not appeal from those rulings. Therefore, the court's ruling in that regard is not before us in this appeal.

[2] "A defendant has the right to immediate appellate review of an adverse ruling concerning a double jeopardy claim." *Kendall v. State*, 429 Md. 476, 484 n.10 (2011) (citing *Pulley v. State*, 287 Md. 406, 414 (1980)). *Accord Scriber v. State*, 437 Md. 399, 406-07 (2014) (observing that denials of motions to dismiss on the ground of double jeopardy are immediately appealable under the collateral order doctrine).

The Alleged Crimes

Clarence Fossett and Devin Ennis worked as security guards at a McDonald's restaurant near the intersection of McClean Boulevard and Perring Parkway, in Baltimore County, just outside Baltimore City. According to Fossett, he and Ennis regularly[3] had problems with persons who loitered in the parking lot, selling drugs and creating "a lot of commotion[.]" "[W]henever they were told to move," they simply went across the street to a nearby Exxon station and resumed their activities. Nor did it help to notify the police; according to Fossett, when he did so, "[s]ometimes" the police "would run them off and then 20 minutes later, they would come back."

On March 29, 2018, Ennis gave Fossett a ride to work, and the pair arrived "around like 4:12-ish."[4] When they arrived, they observed Antwain Partlow (whom they knew as a regular among the loiterers who sold drugs near the McDonald's "and about five or six other people gathered around the back of the McDonald's." As Ennis and Fossett "pulled

[3] When asked to elaborate, Fossett said that he "had incidents" with loiterers "on a day to day basis," amounting to "probably hundreds" of incidents during the two-month period when he worked at the McDonald's.

[4] Fossett was not asked whether the time was a.m. or p.m., but we infer from the context that it must have been the later of the two times, because he further testified that, upon arriving, he observed Partlow and "about five or six other people gathered around the back of the McDonald's," which was open for business during their shift. Our interpretation was corroborated by subsequent testimony of a police detective who reviewed surveillance videos recovered from the McDonald's restaurant.

up, Devin [Ennis] said something to Timmy."[5] According to Fossett, Ennis declared, "these bitch ass n-----s are out here right now. Why are they still here?" Partlow, apparently, either overheard the comment or read Ennis's lips, but, in any event, he "approached" Ennis's car, stating, according to Fossett, "What did you say to us?"

By then, Fossett had stepped out of Ennis's car and began "ushering" the loiterers away, stating, "It's time to go." According to Fossett, Partlow replied with a threat: "When you come back to pick up your partner, we are going to be here waiting for you[.]" At that time, Partlow's threat seemed unremarkable to Fossett, who noted that "they always threaten[ed] us" and thus, he and Ennis regarded Partlow's threat as "a normal every day thing."

When Fossett and Ennis finished their shift, shortly after 10:00 p.m. that evening, they prepared to leave in Ennis's car. As Fossett walked towards Ennis's waiting car, he noticed a white Honda, with a black bumper, driven by a man he "believe[d]" was Finch,[6] just behind Ennis's car. At that moment, Partlow (a passenger in Finch's car) stepped out and approached Fossett, asking, "Where your partner at?" Ennis overheard Partlow, lowered the window of his car, and asked him, "What are y'all here for? Are y'all ready to fight?" Partlow replied, "no, we are not here to fight," and, at the same time, Finch

[5] "Timmy" is not further identified in the record, but from the context, it appears that he may have been a security guard from the previous shift. Shortly thereafter, Fossett testified that Ennis's comment was directed at *him*.

[6] Police subsequently determined that this vehicle was registered to Finch's mother.

stepped out of his car and appeared to Fossett to have a concealed handgun in the right pocket of the hoodie he was wearing.

Fossett drew his weapon and ordered Finch to "take his hand out of his hoodie." At first, Finch refused to comply, but after Fossett "chambered a round," Finch "stopped." Everyone returned to their vehicles, and Ennis and Fossett drove off, followed by Finch and another, "newer" Honda, which Fossett previously had not observed.

Ennis stopped near the intersection of McClean Boulevard and Perring Parkway[7] when he noticed that he was being followed. After Ennis stopped his car, the other two Hondas drove approximately "50 yards up the road" and "blocked" it. As Ennis attempted to drive past them, the occupants "start[ed] jumping out of the cars." The only person Fossett could identify for certain as stepping out of either car was Partlow.

As soon as Ennis drove past them, according to Fossett, "they started opening fire on [Ennis's] car." As soon as Fossett "heard their gunfire," he "reached out of the window and returned fire." In total, Fossett estimated that Ennis's car was fired upon "[p]robably 8 to 13" times.

Ennis drove south on Perring Parkway into Baltimore City, followed by the two white Hondas, exchanging gunfire with them as they drove. Fossett sustained a gunshot wound in his left arm, and he then began firing his weapon through the back window of Ennis's car, "[s]hooting at the headlights at the other cars chasing" them and "clear[ing]

[7] The intersection of McClean Boulevard and Perring Parkway is in Baltimore County. Md. Rule 5-201(b), (c), (f).

the rest of the magazine," that is, firing seven additional shots. Although Fossett was unsure whether he struck either vehicle with his gunfire, he surmised that he may have, "because they pulled over right before Maravia."[8]

Ennis and Fossett then "proceeded to go to the nearest police station and tell them what happened."[9] Fossett informed the police that he was armed, and he surrendered his weapon to them. He was treated at Johns Hopkins Bayview Hospital for a "through and through" gunshot wound to his left arm. During a subsequent interview with a police detective, Fossett identified Finch, Partlow, and a man he knew as "Ant" from photographic arrays. A police detective later identified "Ant" as Anthony Ferguson, who Fossett believed was driving the newer white Honda.[10]

Baltimore City police further determined that the first volley of gunfire took place "approximately 425 feet into Baltimore City." According to a police detective, the "second grouping of shell casings were located approximately 191 feet away from that first grouping of shell casings also into Baltimore City."

[8] We infer that this is a transcription error and that Fossett was referring to Moravia Road. We further note that Moravia Road does not cross Perring Parkway but that, as it crosses Harford Road in a northwesterly direction towards Perring Parkway, it changes its name to East Cold Spring Lane; moreover, in that same vicinity, Perring Parkway changes its name to Hillen Road. Md. Rule 5-201(b), (c), (f). Thus, it appears that Fossett was describing a location near the intersection of Hillen Road with East Cold Spring Lane, several miles inside Baltimore City.

[9] The nearest police station was the Northeastern District Police Station at 1900 Argonne Drive, less than one mile away. *See* https://www.baltimorepolice.org/find-my-district/northeastern-district (last visited Sep. 11, 2022).

[10] Ferguson was not charged in this case.

Finch was arrested, and a search warrant was issued for his home. When the arrest warrant was executed, Partlow was with Finch. The search of Finch's home yielded "[c]ell phones and numerous jars of CDS," which was determined to be cannabis. Data extracted from Finch's iPhone included photographs depicting him, Partlow, and Talley, several of which were taken in front of the McDonald's.

Charges in Baltimore County

In April 2018, a seventeen-count indictment was returned, by the Grand Jury for Baltimore County, charging Finch with multiple counts of attempted first-degree murder, first-degree assault, conspiracy to commit both of those offenses, and related weapons charges. Similar, albeit not identical, indictments were returned against Talley and Partlow. The State moved for a joint trial, and the Circuit Court for Baltimore County granted that motion. Shortly before trial, two of the defendants filed motions alleging improper venue as to all charges except conspiracy. On the first day of trial, prior to voir dire, the State conceded on that issue, and all the indictments were amended to just four counts as to each defendant: conspiracy to commit first-degree murder of Fossett, conspiracy to commit first-degree murder of Ennis, conspiracy to commit first-degree assault of Fossett, and conspiracy to commit first-degree assault of Ennis.[11] The matter proceeded to a jury trial on just the conspiracy charges.

[11] Each amended/supplemental indictment charged two counts of conspiracy to commit *attempted* first-degree murder and two counts to commit first-degree assault. The State was permitted to amend those indictments by striking the word "attempt" in each count. The remaining substantive offenses in the original indictments all were nolle prossed.

In her opening statement, the prosecutor addressed the jury:

> You are going to hear about a terrifying night. You are going to hear from Clarence Fossett, 27 years old. March 29th of 2018, he worked on security at the McDonald's on McClean Boulevard. Directly across the street from that McDonald's is an Exxon on McClean Boulevard.
>
> Mr. Fossett is going to tell you that while he worked there, there was a persistent and constant problem with individuals at the Exxon and the McDonald's selling drugs and late loitering. And it was for that purpose that he was there at the Exxon armed security.
>
> He worked with a friend Devin Ennis. They were both security. They switched off different locations of McDonald's where they worked, but they often car pooled together.
>
> Mr. Fossett is going to tell you that he had multiple confrontations and run-ins with the Defendants Finch and Partlow. He's going to tell you that when he and Devin Ennis arrived at work on the 29th, it was between 4:12, 4:15 in the afternoon.
>
> They pull up in Mr. Ennis' gray Honda Toyota -- Honda. Gray Honda. Sorry. Mr. Fossett is going to tell you that when Mr. Ennis saw a group of between five, six, seven individuals, particularly Mr. Partlow, that they had run-ins with, Mr. Ennis said something like, oh, these raggedy -- and I'm sorry -- [n-----s] are here again.[12]
>
> He said it just to Mr. Fossett. He didn't say it in a loud voice that it's believed that Partlow overheard it. At this point, Partlow approaches them. He's angry. A confrontation begins with words and words only at this point.
>
> Mr. Fossett is going to tell you that he said, This is over. Leave. We are coming on shift, leave. And that Mr. Partlow said, we will be back. Mr. Ennis leaves. He goes and works at his location. Mr. Fossett stays. He works the entire rest of his shift until 10.
>
> Mr. Ennis returns to pick him up. Mr. Fossett went out. And he's going to tell you again about 10:15 he went to get in Ennis' car. And he sees

[12] As best as we can determine, all parties to this altercation are African-American.

an older model Honda with a black bumper that he knows from all of his experience is Mr. Finch's Honda.

Mr. Fossett is going to tell you at this point Partlow is the passenger. Partlow gets out and he wants Ennis. He wants to fuss with Ennis. And he says to Fossett, Where is your partner?

At this point, Mr. Ennis says to Partlow, What is going on? Are you here to fight? At which time, Finch gets out of the driver's seat, holding something in a sweatshirt that appears to Mr. Fossett to be a handgun.

Mr. Fossett believes his life is at risk. He pulls his own weapon and says, Get out. Stop. This is over. Our shift is done. We are leaving. Get back in your car.

He actually racked a round. Mr. Fossett will say that at this point he believed the older model Honda with the black bumper driven by Finch, passenger Partlow was leaving and that they -- Mr. Fossett and Mr. Ennis -- could leave.

They pull out of the McDonald's. They go onto McClean Boulevard, go to a light to turn on Perring Parkway. **Mr. Fossett is going to tell you that he then sees the Honda with the black bumper with another white Honda that he had not previously seen, that the cars are then following Ennis' Honda as he turns onto Perring Parkway.**

They are concerned that there's a weapon. Ennis stops the car. The two white Hondas on Perring Parkway go around the car, Mr. Ennis' car, block it in, stop.

At which point Mr. Fossett is going to tell you he sees individuals get out of the car and shots are fired at them. Mr. Fossett says, go, go, go, drive. Mr. Ennis drives around the two parked white Hondas.

They start to drive away. The two white Hondas follow them. Mr. Fossett is going to tell you he was the passenger, that he took his handgun and fired out the window, returned fire believing he would be killed on Perring Parkway.

These events now are happening in Baltimore City.

(Emphasis added.)

Defense counsel objected at that point, but the trial court overruled the objection, and the prosecutor continued:

> Mr. Fossett will say that as this chase continues, at some point, he realizes he's been shot in the arm. You are going to see the Ennis' vehicle's bullet holes. You are going to see bullets in that vehicle.
>
> And Mr. Fossett is going to tell you he was so afraid that he turned around and returned fire through the back window of Mr. Ennis' car. Mr. Ennis continues to drive.
>
> **The two white Hondas follow and more shots are fired at the Ennis and Fossett vehicle. This is well into the city.** Mr. Fossett is going to tell you I am returning fire and he believes he hit one of the cars. Can't tell you which one, and that's when the two white cars stop following him.
>
> The two immediately went to a precinct in the city. They said, we have a weapon. Here is our weapon. We have been fired upon. This started at the McDonald's.
>
> Mr. Fossett did not know the names, but he knew the faces. He's going to tell you he saw them hundreds of times. He gives a physical description of the people involved. He very candidly said, I know where that other white Honda came from. I didn't see who was in it. And he's going to tell you he doesn't really know who was firing the shots, that they were just coming from the two cars.
>
> Ladies and gentlemen, you are being called upon to determine if there was a conspiracy to commit first degree murder of Mr. Ennis and Mr. Fossett. The evidence that you will see, ladies and gentlemen, comprises of video evidence, phone records, and phone mapping, and identification evidence.
>
> **Ladies and gentlemen, the Exxon has very good video. And you will see Defendant Talley in a newer white Honda at that Exxon from just after 4 until just before the shooting at 10:15. You will see Finch on the video at 5 and after until 10 just before the shooting. You will see video of Partlow. And, significantly, Partlow has on a shirt with a very distinctive pattern on the shoulders.**
>
> You are going to see video of that white Honda with the black bumper just after 10 pull through the drive-thru at the McDonald's. You are going to see video of Ennis and Fossett leaving the McDonald's.

You will see video of the older Honda with the black bumper pull out behind the Ennis vehicle. You are going to see video of Partlow and that jacket reach out the window and <u>roll his finger</u>.

You are going to see video of the newer Honda laying in wait at the Exxon immediately speeding out and the two white Hondas following the Ennis vehicle.

You will see cell phone mapping that places the individuals -- Partlow, Talley, and Finch -- at the Exxon and at the location of the shooting that Mr. Fossett will describe to you. You are going to see cell phone records that show just prior to the shooting and during Partlow and Talley communication by cell phone.

Ladies and gentlemen, detectives in this case were able to determine who was in the older Honda with the black bumper. Mr. Finch. Showed Mr. Fossett a photograph of him. He positively identified him as the individual driving that vehicle that evening, the individual he saw trying to pull out a weapon.

Ultimately, more investigation, days later, now April 5th, the detectives develop the names Partlow and Talley and get warrants. Mr. Fossett is shown a photograph of Partlow. Positively identifies him as the passenger in that older Honda with the black bumper.

Mr. Fossett will tell you he never saw who was driving that new Honda. Police got a warrant for Mr. Talley. They have tried to arrest him. Very tinted windows on the date they went to arrest him. They couldn't see who was driving, but they kept losing the vehicle.

Ultimately, the police went back to the Defendant Talley and Partlow's address. Next thing they see Mr. Talley is in a different colored Honda. He is arrested.

When he's arrested, he has a key fob. The person driving the different Honda now is his girlfriend. They go to his girlfriend's house with that key fob and they push the emergency.

That newer Honda is now concealed in a garage. A search warrant is obtained. They recover that Honda. And there are bullet holes in that Honda.

> Ladies and gentlemen, at the conclusion of the case, **the State will ask you to find that these Defendants agreed in Baltimore County to conspire together** to commit first degree murder of Mr. Fossett and Mr. Ennis and that, at a minimum, conspiracy to commit a first degree assault. Thank you.

(Emphasis added.)

During their opening statements, defense counsel for two of the three defendants (including Finch) exhorted the jury that, to find their clients guilty, the State had to prove that the agreement was formed in Baltimore County. Counsel for Finch declared:

> The shooting allegedly happened in Baltimore City. So that's not your concern, whether or not these clients actually did the shooting. That's not the issue before you.
>
> The issue before you is, **can the State prove beyond a reasonable doubt that before anybody left Baltimore County, they came to an agreement** that they were going to chase these people down, shoot them, whatever it was, it was an agreement.
>
> **The State is basing their whole case on a wave.** I suggest, ladies and gentlemen, they can't prove who they were waving too. They can't prove what the wave was about.

(Emphasis added.)

Counsel for Talley stated as follows:

> Okay. **Which is you are saying my client entered into a conspiracy because of something that happened in Baltimore City** because of maybe some things that we're going to attempt to try **to describe as we hope the evidence will show what happened in Baltimore County.**
>
> **So your job is to go, okay, I don't care what happened in Baltimore City.** I don't care. I am not deciding this is exactly what happened in Baltimore City.
>
> Your job is to decide what exactly did or did not happen in Baltimore County. Okay. So as you hear about this big, emotional thing that happened

> to somebody as they cross over the city lines and whether or not it did or did not happen, we don't care.
>
> **You are using that information to inform whether something happened in Baltimore County. But that's all you are deciding. What happened in Baltimore County?**
>
> Did anyone enter into an agreement with anybody else to do the crimes that have been charged. That's it. It's that simple.
>
> * * *
>
> Going back to school, taking the exam. Okay, is in Baltimore County, did my client, Mr. Talley, enter into an agreement specifically to try to assault in the first degree someone or murder somebody?
>
> **Did he enter into that kind of agreement in Baltimore County?** The evidence in this case, I still think that the evidence is going to show to you all pretty clear that **you won't be convinced that Matthew Talley was there.**

(Emphasis added.)

During trial, Fossett testified as summarized above, and the State presented evidence generally consistent with the prosecutor's outline during opening statement. Of note, images derived from surveillance video, recovered by police officers from the Exxon station and broadcast to the jury, appeared to depict Partlow, standing in Finch's car, with his head and upper body protruding "either" from "a sunroof or the passenger side window," making a hand gesture, followed by the newer white Honda, driven by Talley, falling in behind Finch's car to join in the chase of Ennis's car.

Following the close of the State's case-in-chief, each defendant moved for judgment of acquittal. Counsel for Finch argued as follows:

> This case comes down to a wave, and how are we supposed to -- and the wave, **they have to prove that that conspiracy existed at the time of**

> **the wave, not at the time the shooting happened in the city, at the exact time that wave happened, and they have no evidence to support it.** It could mean anything. And because it can mean anything, there is not sufficient proof, even in looking at the facts in the light most favorable to the State to prove that there was any conspiracy.

(Emphasis added.)

The prosecutor countered that "the agreement [was] based upon the concert of actions in this case." The prosecutor then explained its theory of concerted action:

> Your Honor, when Mr. Ennis returns in his car at the end of that shift, the black bumpered white Honda immediately follows in. At that same time Talley's Honda is laying in wait in the Exxon parking lot. When that wave happens, both cars immediately follow after the Ennis car actually running a yellow light. The conduct in the City is further evidence of that agreement that they without any hesitation pull around that Ennis vehicle, block it in, and open fire. All circumstantial evidence of this conspiracy with regard to the identity of Mr. Talley, the cell phone records, circumstantial evidence that it's his vehicle, and the gray sweatshirt of the driver all indicate that Talley is, in fact, the person in that vehicle.

Counsel for Talley argued to similar effect, asserting that "it cannot be lost that this incident happened in Baltimore City, and the whole incident happened in Baltimore City." He continued: "And so if my client entered into an agreement to follow somebody that waves at him, that's not a crime. But if I go into Baltimore City and you start shooting at me and then even if you think I start shooting back then that, whatever happened there, even if it rose to the level of conspiracy occurred in Baltimore City not in Baltimore County."

The trial court denied the motions for judgment of acquittal, and the matter proceeded to the instructional phase. The trial court instructed the jury that "the State has the burden of proving beyond a reasonable doubt each and every element of the crime or

crimes charged," and it further explained that the "elements of a crime are the component parts of the crime about which" it would instruct the jury shortly thereafter.

Subsequently, the court instructed the jury as follows:

> Now, a person's presence at the time and place of a crime without more is not enough to prove that the person committed the crime. The fact that a person witnessed a crime, made no objection, or did not notify the police does not make that person guilty of a crime. However, a person's presence at the time and place of the crime is a factor in determining whether the defendant is guilty or not guilty.
>
> You have heard evidence regarding the identification of one or more of the defendants as the persons who committed the crimes. The burden is on the State to prove beyond a reasonable doubt not only that the offenses were committed, but also that Daion Finch, Matthew Talley and Antwain Partlow are the persons who committed them.

The court instructed the jury on conspiracy as follows:

> All right, now these defendants are charged with conspiracy. The defendants are charged with the crimes of conspiracy to commit the crimes of first degree murder and/or first degree assault.
>
> Conspiracy is an agreement between two or more persons to commit a crime. In order to convict the defendants of conspiracy, the State must prove, number one, that the defendants agreed with at least one other person to commit the crimes of first degree murder and/or first degree assault. And number two, that the defendants entered into the agreement with the intent that the crimes of first degree murder and/or first degree assault be committed. The agreement need not be formal or spoken, provided there is a meeting of the minds reflecting a unity of purpose, a unity or purpose and design.
>
> In Maryland the crime is complete when the unlawful agreement is reached, and no overt act in furtherance of the agreement need be shown. The State is required to present facts which would allow the finder of fact, you, the jury, to infer that the parties tacitly agreed to commit the unlawful acts of either first degree murder or first degree assault.

The court then instructed the jury on the substantive offenses that were alleged to be the objects of the conspiracy, first-degree murder and first-degree assault.[13]

In closing argument, the prosecutor exhorted the jury:

> What crimes were committed, and who did it? Those are two questions you have to answer. Ladies and gentlemen, if you believe Clarence Fossett, the crimes committed at a minimum were conspiracy to commit first degree assault against Mr. Fossett and Mr. Ennis.
>
> What is the crime of conspiracy? It's an agreement between two or more people. In order to convict them of the first degree assault, the defendants have to have agreed to commit the crime of first degree assault. That they entered into this agreement with the intent, when they entered the agreement they had the intent to commit that crime.
>
> First degree assault. That they used a firearm to commit the assault. The defendant or his co-conspirators committed an act with the intention to place Ennis and Fossett in fear of immediate physical harm, that they had the apparent ability to bring about that harm. They reasonably feared that harm would result.
>
> * * *
>
> If I agree with somebody else, I'm sick of that doggone security guard, let's scare the crap out of him, and point guns at him, let's scare him, that's conspiracy to commit first degree assault.
>
> Conspiracy to commit first degree murder, again the agreement. They enter into an agreement with one or more persons and that they have the intent to commit the crime of first degree murder at the time they enter into that agreement.

[13] In instructing the jury on first-degree assault, the trial court misspoke and declared that the elements of first-degree assault were required "to convict the defendants of *conspiracy* to commit first degree assault[.]" (Emphasis added.) No objection was lodged, either by the defense or the prosecutor. Arguably, this error favored the defense by suggesting that the elements of the uncharged attempted crimes and not just the conspiracy had to occur in Baltimore County.

The prosecutor then described, at length, the substantive crimes the defendants allegedly committed. Finally, her argument circled back to the conspiracy:

> Conspiracy is the agreement, when you come back we'll be here. Six hours later. Six hours later they're back just as Ennis arrives. They're laying in wait.
>
> * * *
>
> But what you'll see as soon as the Ennis car arrives coming from this area right here, the Finch car comes within moments. Concert of action. Laying in wait.
>
> What you see here, Talley's vehicle at 10:15:25, he waits one minute sitting there. Concert of actions. Evidence of their intent. He waits for the call to arms. Just waiting. One minute. He waits for the signal. The agreement. No confusion. No hesitation. When he gets the wave, he rolls.
>
> What is their plan? To kill Ennis and Fossett. That's Ennis' car with the bullet hole. That's Ennis' car with a bullet strike. That's Ennis' car with a bullet fragment. A bullet strike in the trunk. Bullet holes in the blanket. Bullet fragments in their trunk. A bullet strike at the radio. A bullet hole in Mr. Fossett.
>
> * * *
>
> **Why does Talley change cars and hide that white Honda? Consciousness of guilt. His part in this conspiracy. You see the wave, and he immediately flies off from that Exxon. This is the conspiracy. Mr. Ennis' car is making the turn. There's Finch and Partlow. Partlow waves. The team is assembled. The conspiracy is together acting in concert.** That signal is at 10:16. That's the conspiracy. The plan, the agreement, to shoot these security guards all happened in Baltimore County.
>
> The fact that they executed the agreement, executed the plan in the City matters not. It doesn't change one thing. The crimes are the conspiracies. At a minimum, it was a conspiracy to place these two security guards in fear that they would be shot or seriously physically harmed. And ladies and gentlemen, the evidence is overwhelming that it was a conspiracy to commit first degree murder.

(Emphasis added.)

During defense closing argument, counsel for Partlow stated:

> Now, the Assistant State's Attorney told you there were two questions -- all right, forget about the computer, we're going to go old school. Two questions. There are actually three questions. **Was there a crime? Who, if anybody, committed the crime? And where?**
>
> Baltimore County has no jurisdiction over Cecil County. Baltimore County courts have no jurisdiction over situations that take place in Harford County. Only Baltimore City has jurisdiction over cases, over events, over crimes that occur in Baltimore City.
>
> **And that is a legitimate question, ladies and gentlemen, where, if any crime, where was it committed?** Now you've heard tons of testimony, oodles and oodles of video, and lots of photographs offered to you by the State. None of that evidence shows or proves or suggests any evidence of any kind of a conspiracy.

Partlow's counsel then compared a conspiracy to the meeting of the minds that occurs in the huddle during a football game.

He later said the following about conspiracy:

> **If you think there might have been a conspiracy, and if you think the conspiracy occurred when those two Hondas stopped, they stopped in Baltimore City, not in Baltimore County.** When those two cars came together, that was the huddle -- if that occurred. And that was in Baltimore City.
>
> And I have it written down here again, and I'm going to repeat it, if there was a conspiracy, it was not at the McDonald's at 10. It was not at McDonald's at 4:00. **It was not when the Hondas entered McClean Boulevard. It was nowhere in Baltimore County, it was all in the City where those two Hondas stopped** -- if you accept that, because I submit that's not a reasonable interpretation of the evidence, because you have to look at that video that Detective Markel refers to when she says, oh, that's Mr. Partlow waving.

(Emphasis added.)

Counsel for Finch then took up the baton:

> Is the shooting really a result of a plan to get even with the security guard who has not disrupted -- if they are dealers -- has not disrupted their dealing, has not disrupted their earnings, has not resulted in any arrests, or is it more likely it's a shooting over run-of-the-mill every-day road rage?
>
> If it's 50/50, tie those to the Defendant. **The only way you'd get to guilty is if she, Ms. [prosecutor], has been able to prove to you beyond a reasonable doubt that this was a plan and not a reaction to a road rage. There's no evidence to show that there was a plan.**

(Emphasis added.)

She continued:

> **What evidence did Mr. Fossett have to offer about the conspiracy? Nothing.** What the State has tried to do, again playing with the words, Mr. Partlow is the only one who made any statement according to the evidence that I heard. Yet when the State does her lovely little presentation and her little blips and bops, she changes Partlow to they, they didn't say anything. If anybody said anything, it was Partlow. But again, it's a subtle -- maybe not so subtle shift in the word usage. And so now whatever is going on between Partlow and Fossett, the State is trying to make it into Fossett/Partlow/Finch and Talley by changing it to they. They didn't do anything.

(Emphasis added.)

And finally:

> **The only crimes charged are conspiracy.** The State has to prove beyond a reasonable doubt that when that wave came that that was, we're going to go get Mr. Fossett. It couldn't be, hey, I'm leaving. Hey, see you later. Hey, whatever. What proof have they offered that it's some kind -- I love that, Detective Markel, well, he had to be waving at the car over at Exxon. Really? All we saw all day long were people in and out of that Exxon. I don't know who he was waving at. Maybe he was waving at the car, maybe, but that's not proof beyond a reasonable doubt.
>
> * * *
>
> **The State presented absolutely no evidence of conspiracy other than that wave.**

* * *

Was the shooting because of the wave, or was the shooting because of road rage? It's a toss up. You don't know. If you don't know, it's not guilty.

* * *

Whatever happened in the City, that's for the City to prosecute. You got to decide that the State proved beyond a reasonable doubt, not maybe, not more likely than not, not clear and convincing, beyond a reasonable doubt that there was a plot to go after these men. And why would they go after them? No drugs have ever been seized. Nobody has ever been arrested. Their business has never been interrupted. **It's just, it was road rage.** It was road rage, and they're trying to make it something else.

(Emphasis added.)

Counsel for Talley struck a similar note:

This is the crime, conspiracy, all right. In order to convict Matthew Talley, the most important element is that you be convinced that it was Matthew Talley for the first element, agreeing with other people. And two, that Matthew Talley entered into that agreement to do something specific. You have to be convinced that Matthew Talley was even there or even a part of this. That is an element of the crime. My client is an element. Matthew Talley.

And later:

If you remember, this was supposed to be the wave. There's our wave. Apparently, as was pointed out by another attorney, we don't even know what they're waving to. That's supposed to be Matthew Talley's car, and that's it.

Hopefully you are all so eagle-eyed you saw the part in that video, as the State would tell you apparently, where in that wave what was actually mouthed was, hey, we're going to go kill these guys right now, and you're in on it if you follow. If you're out, don't follow us, and it's going to be Devin Ennis and it's going to be Clarence Fossett and you're in or you're out. All of that was said. You saw it, right? That's the State's case. Because remember, again, I don't, I don't have, like, problems

with the other defenses case, but they're not my clients. All I do is I care about Matthew Talley, okay. And the fact of the matter is when I look at that video, here is what I know, and here's what you know. There's something going on on the other side over at the McDonald's and Matthew Talley's vehicle at the time is at the Exxon. And no one has told you in this trial -- and you can see everything that's going on from there, okay. We also, as [Finch's counsel] pointed out, painstakingly went through all this video of hours of these people just sitting there at that Exxon all day long, and they said that's supposed to be -- that's definitely Matthew Talley, and that's supposed to be the other two boys, okay. And we watched this for hours, okay. We didn't watch it for hours, even though it felt like a lifetime, but they were there for hours. And they're just doing their thing, okay. I don't remember any part of that that's supposed to be the this is we think now they're really planning it out, okay. This is -- no, Officer Canning goes that really looked like some real green was going on, okay. I didn't hear that at all, okay. I'm not taking the leap and neither should you. You need this to be proven to you all, all right.

So again, I have no idea what's going on there, but what I do know is this, your non-emotional job here today is to find the elements, okay, and decide if Matthew Talley entered into an agreement not just to do anything but to specifically be okay with being a part of murdering specific people, okay. And that he had the intent to carry out that agreement. Again, he is separate from these two. We are not doing guilt by association in this trial.

So then what do we have left? **So then the State's evidence is, you know it had to have happened because of everything that happened in Baltimore City.** And I thought [Partlow's counsel] made a really great observation about that, which is that there's this allegation that even if you sort of want to believe Mr. Fossett, okay, there's this time when they've crossed in the City where the car stops and then apparently there's some shootout that happens, okay. And then at that point -- because that is so sudden and so crazy, that apparently at that point, maybe at that point, maybe there's a decision to do this thing. But again, that's Baltimore City. That is a different jurisdiction. **And if you go back in there and you decide, I think they cooked this up in Baltimore City, if that's your whole-hearted belief, this was planned in Baltimore City, then you have to not guilty in Baltimore County, okay.**

(Emphasis added.)

In rebuttal, the prosecutor declared:

> Not a damn thing to do with the wave? Well, that wave, that wave, ladies and gentlemen, that concert of action, that is the evidence of the agreement. You, you don't conspire on camera, but what you do see is the evidence. This is evidence of the conspiracy.

The jury began deliberations shortly before 4 p.m. After a brief deliberation (the duration of which was not specified in the transcript), they returned with the verdicts, finding all three defendants not guilty of all charges.

Charges in Baltimore City

Four months later, an eighteen-count indictment was returned, by the Grand Jury for Baltimore City, charging Finch with attempted first- and second-degree murder of both Fossett and Ennis, as well as related offenses. Similar indictments were returned against co-defendants Partlow and Talley. Several weeks later, superseding indictments were filed against all three co-defendants.[14]

The cases had been specially set for joint trial in April 2020, but by that time, courts were shut down throughout Maryland in response to the COVID pandemic, and jury trials

[14] The superseding indictment in Finch's case charged as follows: Count 1, attempted first-degree murder of Fossett; Count 2, attempted first-degree murder of Ennis; Count 3, attempted second-degree murder of Fossett; Count 4, attempted second-degree murder of Ennis; Count 5, first-degree assault of Fossett; Count 6, first-degree assault of Ennis; Count 7, use of a firearm in the commission of a felony or crime of violence; Count 8, conspiracy to use a handgun in the commission of a felony or crime of violence; Count 9, second-degree assault of Fossett; Count 10, second-degree assault of Ennis; Count 11, reckless endangerment of Fossett; Count 12, reckless endangerment of Ennis; Count 13, possession of a regulated firearm by a person under the age of 21 years; Count 14, wear, carry, and transport a handgun on or about the person; Count 15, conspiracy to wear, carry, and transport a handgun on or about the person; Count 16, wear, carry, and knowingly transport a handgun in a vehicle; Count 17, conspiracy to wear, carry, and knowingly transport a handgun in a vehicle; and Count 18, discharge a firearm within the city limits of Baltimore.

were suspended. When courts reopened, the cases were rescheduled to February 2022, and two motions hearings were held in the fall of 2021 to address claims of speedy trial violations, collateral estoppel, and statute of limitations (because a number of the charges filed against each co-defendant were misdemeanors, subject to a one-year statute of limitations[15]), as well as suppression motions.

During the first hearing, the circuit court, after hearing argument of the parties, denied the speedy trial motions, and the court then turned its attention to the motions to dismiss on the ground of collateral estoppel. After hearing further argument of the parties, the circuit court granted the motions to dismiss on the ground of collateral estoppel in part, ruling that none of the conspiracy counts could go forward but that "the other counts alleging substantive crimes . . . are not precluded by the finding in the County." The court further explained that what the Baltimore County jury "necessarily had to find was that there was no meeting of the minds ahead of time to commit these particular criminal acts but again that does not preclude a trial on the substantive charges because they have never faced trial on that and the Baltimore County jury did not necessarily reach any

[15] Maryland Code (1974, 2013 Repl. Vol., 2017 Supp.), Courts & Judicial Proceedings Article ("CJ"), § 5-106(a), provided: "Except as provided by this section, § 1-303 of the Environment Article, and § 8-1815 of the Natural Resources Article, a prosecution for a misdemeanor shall be instituted within 1 year after the offense was committed." An identical version of this subsection is currently codified at the 2021 Replacement Volume.

determinative facts regarding the substantive crime."[16] Finch then filed a timely notice of appeal.[17]

DISCUSSION

Governing Legal Principles

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb[.]" "The Fifth Amendment prohibition 'against making a defendant twice accountable for the same offense' is applicable to the states through the Fourteenth Amendment." *Scriber v. State*, 437 Md. 399, 407 (2014) (quoting *State v. Long*, 405 Md. 527, 535-36 (2008)). *See Benton v. Maryland*, 395 U.S. 784, 794 (1969) (holding that the Double Jeopardy Clause is incorporated through the Fourteenth Amendment and is therefore enforceable against the states). Furthermore, although Maryland has no express constitutional prohibition against double jeopardy, "Maryland common law provides well-established protections for individuals against being twice put in jeopardy." *Scriber*, 437 Md. at 408 (quoting *Long*, 405 Md. at 536).

[16] At the ensuing motions hearing, held October 22, 2021, the circuit court dismissed, on the ground of limitations, Counts 9, 10, 11, 12, 13, 14, and 16 of Finch's indictment, and it made analogous rulings as to the other co-defendants.

[17] Finch's counsel filed separate notices of appeal in Case Nos. 119228002 and 119246020, although the case will proceed only on Indictment No. 119246020. Both notices of appeal incorrectly state that the date of the order from which it is appealing is September 20, 2021. If that had been true, the appeal would have been untimely, but in fact, the date of the order was September 21, 2021, and the notices of appeal are timely.

"The origin and history of the Double Jeopardy Clause are hardly a matter of dispute." *Scott v. United States*, 437 U.S. 82, 87 (1978) (citations omitted). "The constitutional provision had its origin in the three common-law pleas of *autrefois acquit*, *autrefois convict*, and pardon." *Id.* Those three pleas "prevented the retrial of a person who had previously been acquitted, convicted, or pardoned for the same offense." *Id.*

The collateral estoppel form of double jeopardy is a relative latecomer, having only been clearly established in *Ashe v. Swenson*, 397 U.S. 436 (1970). It is perhaps a departure from, or at least an extension of, traditional theories of double jeopardy, based upon autrefois acquit, autrefois convict, and pardon. *See, e.g.*, *Currier v. Virginia*, 585 U.S. __, 138 S. Ct. 2144, 2149-50 (2018) (declaring that "*Ashe*'s suggestion that the relitigation of an issue can sometimes amount to the impermissible relitigation of an offense represented a significant innovation in our jurisprudence," which "[s]ome have argued" sits "uneasily" with Supreme Court precedent and "the Constitution's original meaning") (citations omitted); *Butler v. State*, 91 Md. App. 515, 525-30 (1992) ("*Butler I*") (tracing the development of the doctrine of collateral estoppel in criminal law and emphasizing its stand-alone pedigree), *aff'd*, 335 Md. 238 (1994) ("*Butler II*"). But in any event, the collateral estoppel form of double jeopardy is now also part of Maryland common law as well as federal constitutional law. *See, e.g.*, *Scriber*, 437 Md. at 414-15 (stating that "[m]uch like the Supreme Court has done in recognizing collateral estoppel as a form of constitutionally based double jeopardy, we recognize the collateral estoppel form of double jeopardy as a part of Maryland common law") (quoting *Odum v. State*, 412 Md. 593, 606 (2010)).

"In criminal prosecutions, as in civil litigation, the issue-preclusion principle means 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.'" *Bravo-Fernandez v. United States*, 580 U.S. 5, 7-8 (2016) (quoting *Ashe*, 397 U.S. at 443). "But whatever else may be said about *Ashe*," its "test is a demanding one," and a second trial is barred "only 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." *Currier*, 585 U.S. at __, 138 S. Ct. at 2150 (citations omitted). Thus, it is not enough that "it is unlikely—or even very unlikely—that the original jury acquitted without finding the fact in question." *Id.* (quoting *Yeager v. United States*, 557 U.S. 110, 133-34 (2009) (Alito, J., dissenting)). Rather, "[t]o say that the second trial is tantamount to a trial of the same offense as the first and thus forbidden by the Double Jeopardy Clause," a reviewing court "must be able to say that 'it would have been *irrational* for the jury' in the first trial to acquit without finding in the defendant's favor on a fact essential to a conviction in the second." *Id.* (quoting *Yeager*, 557 U.S. at 127 (Kennedy, J., concurring in the judgment)).

"To identify what a jury in a previous trial necessarily decided, . . . a court must 'examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter.'" *Bravo-Fernandez*, 580 U.S. at 12 (quoting *Ashe*, 397 U.S. at 444).[18] The inquiry "'must be set in a practical frame and viewed with an eye to

[18] The Supreme Court of Maryland has further elaborated: "A court must realistically look at the record of the earlier trial, including the pleadings, the evidence, the (continued)

all the circumstances of the proceedings.'" *Id.* (quoting *Ashe*, 397 U.S. at 444). "'The burden is on the defendant to demonstrate that the issue whose relitigation he seeks to foreclose was actually decided' by a prior jury's verdict of acquittal." *Id.* (quoting *Schiro v. Farley*, 510 U. S. 222, 233 (1994)) (cleaned up). Thus, "[i]f the court is uncertain as to what unstated, implied factual findings the jury made, the defendant has not met the burden of proof." *Butler II*, 335 Md. at 266. In reviewing a circuit court's ruling on a double jeopardy claim, we give "no deference to the lower court's resolution of the matter." *Scriber*, 437 Md. at 407 (2014) (citing *Giddins v. State*, 393 Md. 1, 15 (2006)); *Tubaya v. State*, 210 Md. App. 46, 49 (2013).

Analysis

In the Baltimore County case, Finch successfully challenged venue on all "completed acts" alleged, which resulted in him being charged only with two counts of conspiracy to commit murder and two counts of conspiracy to commit first-degree assault. The jury acquitted him of all those charges. In the Baltimore City case, he currently faces charges on the substantive offenses: attempted first- and second-degree murder, first-degree assault, use of a firearm in the commission of a felony or crime of violence, and discharging a firearm within the Baltimore city limits, based upon the same factual predicate as the Baltimore County case. At bottom, his claim before us is that the acquittals in the Baltimore County case necessarily imply that the jury found that the State failed to

prosecution's theory, the disputed issues, and the jury instructions." *Ferrell v. State*, 318 Md. 235, 245 (1990).

prove his criminal agency and that, under authority of decisions such as *Ashe*, *Sealfon v. United States*, 332 U.S. 575 (1948), and *Ferrell v. State*, 318 Md. 235 (1990), the State is estopped from proceeding in the Baltimore City case. We disagree.

In *Ashe*, the prosecution alleged that "three or four masked men, armed with a shotgun and pistols, broke into the basement" of a home in Missouri, where six men were playing poker, and "robbed each of the poker players of money and various articles of personal property." 397 U.S. at 437. The assailants then drove off in a car belonging to one of the poker players. *Id.* "Shortly thereafter the stolen car was discovered in a field, and later that morning three men were arrested by a state trooper while they were walking on a highway not far from where the abandoned car had been found." *Id.* Ashe was "arrested by another officer some distance away." *Id.*

Each of the four suspects was charged with robbery of each poker player and of automobile theft. *Id.* at 438. Several months later, Ashe was tried for robbery of Donald Knight, one of the poker players. *Id.* The prosecution called Knight and several of the other poker players, who testified as to the circumstances of the home invasion and the value of the property that had been stolen from them. *Id.* In the words of the Court, the "proof that an armed robbery had occurred and that personal property had been taken from Knight as well as from each of the others was unassailable." *Id.* The proof of Ashe's criminal agency, however, was thin, and the jury acquitted him. *Id.* at 439.

"Six weeks later," Ashe "was brought to trial again, this time for the robbery of another participant in the poker game, a man named Roberts." *Id.* Ashe filed a motion to dismiss on the basis of the prior acquittal, but the trial court denied his motion. *Id.* At the

second trial, the quality of the prosecution's evidence of Ashe's identity was considerably better, and the jury found him guilty. *Id.* at 440. His conviction was affirmed by the Supreme Court of Missouri, and his subsequent state collateral proceeding was unsuccessful. *Id.* Ashe then filed a habeas petition in the United States District Court for the Western District of Missouri, claiming a double jeopardy violation. *Id.* The District Court denied his petition, and the United States Court of Appeals for the Eighth Circuit affirmed. *Id.* at 440-41. The Supreme Court subsequently granted Ashe's petition for writ of certiorari. *Id.* at 441.

The Supreme Court reversed, holding that collateral estoppel barred the second state court trial. The Court reasoned that "the record is utterly devoid of any indication that the first jury could rationally have found that an armed robbery had not occurred, or that Knight had not been a victim of that robbery." *Id.* at 445. Rather, the "single rationally conceivable issue in dispute before the jury was whether [Ashe] had been one of the robbers," and "the jury by its verdict found that he had not." *Id.*

Ashe is not at all like this case. In *Ashe*, the only issue in controversy at the first trial was the defendant's criminal agency, and the Court could infer that the jury's not guilty verdict conclusively established that issue favorably to Ashe. Here, in contrast, the Baltimore County jury could have reached its verdicts on any of a number of grounds: the jury could have found that Finch, Partlow, and Talley engaged in the gun battle with Fossett and Ennis but did not enter into a conspiracy to do so; or it could have found that the conspiracy did not form until they had entered Baltimore City; or it could have been confused because so much evidence of the substantive crimes was required in an attempt

to prove the conspiracy charges, and yet no substantive offenses were charged. In any event, as the motions court in Baltimore City observed, an acquittal of conspiracy and a conviction of the substantive offense would not have been legally inconsistent verdicts.

In *Sealfon*, *supra*, 332 U.S. 575, two indictments were issued against Sealfon and others. *Id.* at 576. "One charged a conspiracy to defraud the United States of its governmental function of conserving and rationing sugar by presenting false invoices and making false representations to a ration board to the effect that certain sales of sugar products were made to exempt agencies." *Id.* (footnote omitted). "The other indictment charged petitioner and Greenberg with the commission of the substantive offense, viz., uttering and publishing as true the false invoices." *Id.* (footnote omitted). Sealfon was tried first on the conspiracy charge, and the jury acquitted him. *Id.* at 577. A second trial was held on the substantive offense, and Sealfon sought to quash the second indictment on the ground of res judicata. *Id.* at 578. The trial court rejected that effort, and a jury found him guilty. *Id.* The United States Court of Appeals for the Third Circuit affirmed, 161 F.2d 481 (1947), and the Supreme Court subsequently granted Sealfon's petition for writ of certiorari.

The Supreme Court reversed. Although it recognized that the conspiracy and the substantive offense "are separate and distinct offenses," it further noted that res judicata "may be a defense in a second prosecution." *Sealfon*, 332 U.S. at 578. The Court then turned to "whether the jury's verdict in the conspiracy trial was a determination favorable to [Sealfon] of the facts essential to conviction of the substantive offense." *Id.* at 578-79. After reviewing the evidence, the prosecutor's theory of the case, and the jury instructions

given at the first trial, the Court concluded that the jury necessarily found that Sealfon had not entered into an agreement with Greenberg to defraud the government. *Id.* at 579-80. Because the government relied, in both trials, upon a letter that Sealfon had written to Greenberg, in the first trial to infer that the two had conspired, and in the second trial, as proof that Sealfon had aided and abetted Greenberg in defrauding the government, the Court held that "the earlier verdict precludes a later conviction of the substantive offense" because the second trial was, in effect, "a second attempt to prove the agreement which at each trial was crucial to the prosecution's case[.]" *Id.* at 580.

Here, unlike in *Sealfon*, we cannot draw the inference Finch urges from the Baltimore County acquittals. As we previously explained, the acquittals do not necessarily imply that the Baltimore County jury found a lack of criminal agency.

In *Ferrell, supra*, 318 Md. 235, "three women and a school girl were robbed at gunpoint by a lone man carrying a handgun and wearing a ski mask, a blue hooded sweatshirt, a long gray coat and tennis shoes." *Id.* at 237. Ferrell was charged, in four charging documents, with armed robbery and use of a handgun in the commission of a felony or crime of violence. *Id.* at 238-39. A jury acquitted him of the handgun charges and was unable to reach a verdict on the armed robbery charges. *Id.* at 239.

The State sought to retry Ferrell on the armed robbery charges. *Id.* He filed a motion to dismiss on the grounds of collateral estoppel and double jeopardy. *Id.* He contended that, "as the only issue before the jury at the [prior] trial on both the handgun counts and the armed robbery counts was the identity of the robber, his acquittal on the handgun charges necessarily determined the identity issue in his favor, thus precluding the

State from relitigating that issue." *Id.* The trial court denied that motion, and Ferrell subsequently was found guilty of all four armed robbery charges. *Id.* at 240. On appeal, we affirmed in a reported opinion, reasoning that the jury that acquitted Ferrell of the handgun charges could have determined that he was an accomplice rather than the gunman. *Ferrell v. State*, 73 Md. App. 627 (1988), *rev'd*, 318 Md. 235. The Supreme Court subsequently granted Ferrell's petition for writ of certiorari.

The Supreme Court reversed, holding that, under the circumstances of that case, the acquittals of the handgun use charges precluded the retrial on the armed robbery charges. The Court reasoned that the record was "devoid of any indication that the jury at the [prior] trial could have rationally based its acquittal on the handgun charges upon the accomplice theory suggested by the [Appellate Court of Maryland] or upon any issue other than the identity of the lone robber."[19] *Ferrell*, 318 Md. at 246.

Ferrell is distinguishable from this case. In *Ferrell*, the jury could have rationally based its acquittals only on the issue of "the identity of the lone robber." *Id.* Here, as we previously explained, the Baltimore County acquittals do not necessarily imply that the jury found that Finch did not commit the substantive offenses. This is not a case where the acquittals necessarily establish a failure to prove the defendant's identity.

[19] In *Yeager v. United States*, 557 U.S. 110 (2009), the Supreme Court held that "an apparent inconsistency between a jury's verdict of acquittal on some counts and its failure to return a verdict on other counts" does not affect "the preclusive force of the acquittals under the Double Jeopardy Clause of the Fifth Amendment." *Id.* at 112. Thus, *Ferrell* remains good law under both Maryland common law and federal double jeopardy principles.

In sum, we hold that the Baltimore County acquittals do not conclusively establish a failure to prove Finch's criminal agency. The Circuit Court for Baltimore City correctly ruled that Finch may be tried for the substantive offenses.

ORDER OF THE CIRCUIT COURT FOR BALTIMORE CITY DENYING APPELLANT'S MOTION TO DISMISS AFFIRMED. CASE REMANDED TO THAT COURT FOR FURTHER PROCEEDINGS. COSTS ASSESSED TO APPELLANT.