Circuit Court for Baltimore City
Case No. 114209005

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2210

September Term, 2017

NICOLE WASHINGTON

v.

STATE OF MARYLAND

Graeff,
Shaw Geter,
Ripken, Laura S.
(Specially Assigned),

JJ.

Opinion by Ripken, J.

Filed: August 7, 2019

Nicole Washington, appellant, contends the trial court abused its discretion when it refused to propound *voir dire* questions designed to uncover racial bias of jurors as well as the impact that racial bias had on juror's ability to fairly judge the credibility of witnesses. She further contends her acquittal on charges of felony murder in her initial trial conclusively resolved the question of whether the murder was in furtherance of the attempted robbery and therefore her conviction in the later trial for second degree murder as an accessory violates double jeopardy. We conclude that the issue of double jeopardy was not properly preserved. Notwithstanding that fact, we conclude the trial court properly exercised its discretion on both issues. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On July 4, 2014, the police found Nelson Dakurah at the residence of appellant. Nelson Dakurah was severely injured having suffered sixty-eight (68) "stabbing wounds" and "cutting injuries" to his face, chest and back. Mr. Dakurah was transported to the hospital where he subsequently died from said injuries. An investigation followed, and, as a result, appellant and Kenneth Carter were arrested.

The events of July 3, 2014 unfolded as follows. During the day, appellant and Mr. Dakurah exchanged numerous text messages wherein appellant persuaded Mr. Dakurah to come to appellant's residence that evening. Mr. Dakurah initially resisted appellant's invitation but was eventually persuaded with offers of a sexual rendezvous. Upon Mr. Dakurah's arrival, appellant and her codefendant, Mr. Carter, were at appellant's residence.

On July 4, 2014, at 12:19 a.m., the police were called by appellant's neighbor as a result of raised voices emanating from appellant's residence.

Several police officers responded to the scene. The officers found Mr. Dakurah in the living room. He was conscious but severely injured as a result of the aforementioned "stabbing wounds" and "cutting injuries." Mr. Dakurah was transported to a nearby hospital where he died from his injuries.

A search warrant was secured and executed at appellant's residence. Homicide detectives and crime scene technicians observed the living room to be in disarray, consistent with the occurrence of a violent struggle. There was overturned furniture and blood on the floors, walls and windows. A twelve (12) foot metal spike, covered in blood, was found near the front door. A butcher knife, also covered in blood, was found in the basement stairwell.

On July 29, 2014, appellant was indicted in the Circuit Court for Baltimore City. The charges included murder, conspiracy to commit murder, two (2) counts of wearing or carrying a dangerous weapon, attempted robbery and conspiracy to commit robbery. Appellant's codefendant, Mr. Carter, plead guilty to first degree murder and conspiracy to commit first degree murder.

On October 17, 2016, appellant's first jury trial commenced. In that trial, appellant was found not guilty of first degree murder and the two (2) counts of wearing or carrying a dangerous weapon. The jury was unable to reach a verdict as to second degree murder, conspiracy to commit first degree murder, attempted robbery and conspiracy to commit

robbery. A mistrial was declared. On June 19, 2017 a retrial began. Following deliberations, appellant was convicted by a jury of second degree murder, attempted robbery and conspiracy to commit robbery. She was found not guilty of conspiracy to commit first degree murder.

Evidence admitted during trial provided additional details. In the days leading up to July 3, 2014, appellant and Mr. Carter had been arrested for offenses involving controlled dangerous substances. Appellant was released on her own recognizance. Mr. Carter was unable to post bond. Appellant had sexual intercourse with the bail bondsman to facilitate Mr. Carter's release. She promised the bail bondsman that the outstanding balance of one hundred and fifty dollars ($150.00) would be paid by July 4, 2014.

In a statement to police, Mr. Carter indicated appellant had Mr. Dakurah come over because she needed to pay the bail bondsman and she planned to take the needed money from Mr. Dakurah. Mr. Carter explained that both he and appellant stabbed Mr. Dakurah with the butcher knife. As previously noted, prior to appellant's first trial, Mr. Carter plead guilty to first degree murder and conspiracy to commit murder.

Before jury selection began in appellant's second trial, the following exchange occurred between the court and defense counsel:

> [THE COURT]: Okay. All right, so let me make a note of that. And I did have a chance to go through the proposed *voir dire* from both parties. This is sort of more or less my standard one. There were several questions, Mr. Scott, quite frankly that you wanted asked that I did not include. *Among them being would you as a juror give more credence to a, somebody who was from the community, somebody who was Caucasian, more or less credence I should say. Things along those lines.* You can note their absence in this, this particular *voir dire*

proposed by me, and if, whatever record you need to make in that regard I would allow you to make once --

[MR. SCOTT]: I'd just say to the Court that as I practice in a lot of different jurisdictions the race can become a basis for bias in decision making, the assessment of credibility and I try to put that in just as a request to the Court if the Court believes that there may be a component of race as a basis for bias, and that's the purpose for that.

[THE COURT]: I understand.

[MR. SCOTT]: If this Court ---

[THE COURT]: But there's a catch-all question that I have at the end.

[MR. SCOTT]: Yes.

[THE COURT]: I always include one about the police being given more or less --

[MR. SCOTT]: Yes.

[THE COURT]: -- especially because of our peculiar venue where the police are being indicted seemingly on a monthly basis.

[MR. SCOTT]: Yes.

[THE COURT]: The race, if, usually –

[MR. SCOTT]: And I'll just tell the Court --

[THE COURT]: -- usually in this --

[MR. SCOTT]: I just want the Court to understand where that comes from.

[THE COURT]: No, I --

[MR. SCOTT]: I drill down in responses and I hear things like they and them. And in relationship to officers, I may hear the police officer. In relationship to a business owner witness, I may hear Mr. Stevenson. However, in relationship to others that I have come to find are

> *minority member witnesses* I hear they and them. And so it is on that basis that I just query the Court. *And I defer to the Court's approach to* --
>
> [THE COURT]: Right.
>
> [MR. SCOTT]: -- making sure that those issues are purged.
>
> [THE COURT]: Well I will allow a question along, and I have allowed a question along the following lines, the Defendant in this case is an African American, does any juror, you know, resident of the City of Baltimore, I take it she is a resident of the City of Baltimore.
>
> [MR. SCOTT]: Yes, yes.
>
> [THE COURT]: *Does, and is there any juror out there who, because of the Defendant's race and/or residence, could not be fair and impartial?*
>
> [MR. SCOTT]: Well that's as it relates to the Defendant. *My question is more geared towards witnesses.*
>
> [THE COURT]: I understand.
>
> [MR. SCOTT]: So, yes.
>
> [THE COURT]: *But I will, I believe the catch-all that I have at the end, which reads, excuse me, does any member of the jury panel know of any reason whatsoever not covered in the previous questions that would adversely affect you from sitting as a juror in this matter captures that* --
>
> [MR. SCOTT]: *Right.*

(emphasis added).

During the selection process, the following exchange, initiated by the Assistant State's Attorney, occurred:

> [MS. DURAND]: Your Honor, my only (inaudible 11:56:02 a.m.) I guess for an exception and I want to just have it here on the record. Defense counsel had raised a question and there was some discussion. and I may or may not have missed part of it when I [was] checking the witness list, relating to a race bias concern that was raised by defense counsel. It was more as it related to witnesses but I wanted to make sure that defense was satisfied as to the questioning because if not then racial bias tends to be a question that does need to be asked if defense is raising it. And so I just wanted to make sure that we were covered just in case there was a --
>
> [THE COURT]: As I understand, the lay of the land in that regard is that *the question that's been suggest (inaudible 11:56:43 a.m.) is that if there's a bias as to a juror, potential juror, as to the demographics of the Defendant.*
>
> [MR. SCOTT]: Yes.
>
> [THE COURT]: And that, excuse me, I had intended to ask, before I got caught up in (inaudible 11:57:011 a.m.). That is something you would like asked, is that right, Mr. Scott?
>
> [MR. SCOTT]: Yes, I would, again, Your Honor, extend it to witnesses as well. But I think I've made myself clear on the record.
>
> [THE COURT]: I understand. *So I'll grant it as to the Defendant, and, but not as to the witnesses.*
>
> [MR. SCOTT]: Very good, Your Honor.
>
> …
>
> [THE COURT]: Before we proceed, there's one more question I want to pose to you. Obviously, Ms. Washington is an African American, she is a resident of Baltimore City. *Is there anything about her race, the way she looks, the fact that she resides in Baltimore City, or any other thing, just looking at her, that would prevent you from being fair and impartial if called upon to be a juror in this matter?*

(emphasis added).

In pertinent part, the trial court also asked the following questions during *voir dire*:

> [THE COURT]: [I]s there any member of the jury panel friendly with, associated with or related to anyone who is in the Baltimore City Police Department, the Office of the State's Attorney, the Maryland Division of Corrections, the FBI, the Sheriff's Office, any city or county correction facility or agency, the Federal Bureau of Prisons or any other law enforcement agency?
>
> [THE COURT]: Is there any member of the jury panel who would give more or less weight to the testimony of a police officer merely because that witness is a police officer than they would to any other witness that would appear in this matter?

Several fact witnesses were called by the State, including police officers, crime scene technicians, a medical examiner and Mr. Carter. From the record, it appears the only witness identified as a "minority member" witness was Mr. Carter. However, this is not completely clear. Appellant elected not to testify and did not call any witnesses to testify in her defense. As noted previously, appellant was found guilty of second degree murder, attempted robbery and conspiracy to commit robbery. Additional facts will be provided herein as relevant.

DISCUSSION

I.

Voir Dire

Appellant contends on appeal that the circuit court abused its discretion when it refused to propound *voir dire* questions designed to uncover racial bias of jurors as well as the impact that racial bias had on juror's ability to fairly judge the credibility of witnesses. Of note, the proposed written *voir dire* questions are not included in the record. Despite

not having the precise wording, the record is clear as to the substance of the questions proposed.

The crux of appellant's argument is that racial bias and prejudgment of credibility are mandatory areas of inquiry, which the court did not fairly cover during *voir dire*. The State argues appellant has now broadened the scope of what was requested at trial, specifically as to bias against witnesses, as the purpose of the proposed *voir dire* was not directed towards prejudgment of credibility or bias against witnesses generally but only "minority member witnesses." The State argues that the trial court did not abuse its discretion by declining to ask the question proposed by defense counsel, as the requested inquiry was not directly related to the witnesses who would be testifying and prejudicial error cannot be established because appellant did not call any witnesses to testify.

"We review the trial judge's rulings on the record of the *voir dire* process as a whole for an abuse of discretion […]." *Washington v. State*, 425 Md. 306, 314 (2012); *White v. State*, 374 Md. 232, 243 (2003). We look at "the record as a whole to determine whether the matter has been fairly covered." *Washington*, 425 Md. at 313-14; *State v. Logan*, 394 Md. 378, 396 (2006); *White*, 374 Md. at 243. The standard is "whether the questions posed, and the procedures employed have created a reasonable assurance that prejudice would be discovered if present." *Id.* (citing *White*, 374 Md. at 242). The trial court is provided with broad discretion in the conduct of *voir dire*. *Id.* at 325; *Dingle v. State*, 361 Md. 1, 13-14 (2000). The court "must adapt the questions to the particular circumstance of facts of the case" in order to achieve the ultimate goal that jurors are unbiased. *Moore v. State*, 412

Md. 635, 644-645 (2010). "[O]n appellate review, the exercise of discretion by trial judges with respect to the particular questions to ask and areas to cover in *voir dire* is entitled to considerable deference." *Washington*, 425 Md. at 313 (quoting *Dingle*, 361 Md. at 13-14).

The principles governing *voir dire* are well-settled. The purpose of *voir dire* is to ensure a fair and impartial jury. *Moore*, 412 Md. at 644; *Dingle*, 361 Md. at 9. The process in determining whether prospective jurors have a cause for disqualification protects this right to a fair and impartial jury. *Id.* It follows then, that questions designed to uncover cause for disqualification that would undermine a defendant's right to a fair trial are mandatory inquiries. *Id.* at 654. However, the questions must relate to uncovering bias given the facts of the case. *Id.* Consideration was given to these tenets throughout our analysis.

With respect to appellant's contention that the trial court erred in not propounding a question related to the issue of racial bias, appellant relies on *Hernandez v. State*, 357 Md. 204 (1999). The *Hernandez* Court was asked to determine whether a *voir dire* question regarding racial prejudice *against the defendant* is a required inquiry. There, the trial court rejected defendant's proposed *voir dire* question: "[i]s there any member of the panel who would be prejudiced against a defendant because of any defendant's race, color, religion, sexual orientation, appearance, or sex?" *Id.* at 207. The *Hernandez* Court analyzed the history of federal and Maryland law on *voir dire* concerning racial prejudice. The Court reversed and remanded, holding that a *voir dire* question as to bias against persons of the defendant's race should be asked. *Id.* at 225. Further, the Court held that the questions asked

by the trial court with respect to bias were not sufficient because they were not designed to have the jurors "search their respective consciences as to any bias based on the race which they had subjectively assigned Hernandez." *Id.* at 226.

The trial court did inquire as to whether jurors' harbored bias with respect to appellant's race as well as her physical and demographic features. As noted previously, the question asked was "[i]s there anything about her race, the way she looks, the fact that she resides in Baltimore City, or any other thing, just looking at her, that would prevent you from being fair and impartial if called upon to be a juror in this matter?" The trial court properly asked questions "designed to have the jurors search their respective consciences as to any bias based on race" of appellant. *Id.* Hence, we conclude that the principles construed in *Hernandez* were properly addressed in the case at bar.

With respect to witnesses, appellant contends that *voir dire* questions that relate to racial bias of potential jurors are a mandatory area of inquiry. Appellant further contends that questions regarding prejudgment of credibility of the witnesses is, likewise, a mandatory area of inquiry. Appellant argues that she was seeking to identify witness bias generally, not solely those of minority members. The State argues the purpose of the area of inquiry was to uncover bias towards "minority member" witnesses. We agree that based on review of the transcript that the State correctly articulates the area of inquiry proposed by the defense at trial. As defense counsel and the trial court discussed the *voir dire* questions, defense counsel made the following relevant statement.

> [MR. SCOTT]: I drill down in responses and I hear things like they and them. And in relationship to officers, I may hear the police officer. In relationship

> to a business owner witness, I may hear Mr. Stevenson. However, in relationship to others that I have come to find are *minority member witnesses* I hear they and them. And so it is on that basis that I just query the Court. And I defer to the Court's approach to –

(emphasis added).

It is clear defense counsel was arguing that "minority member" witnesses were the basis of appellant's proposed *voir dire*.

We note that a defendant's right to a fair and impartial trial is jeopardized in the event that a juror has prejudged a case by giving one witness's testimony greater weight than another. *Moore v. State*, 412 Md. 635, 654 (2010). Appellant and the State both rely on *Moore* in support of their respective arguments. There, the Court held that there must be a qualifying witness to trigger the requirement of asking a proposed *voir dire* question. *Id.* at 655. A qualifying witness is one that "because of occupation or category, may be favored, or disfavored, simply on the basis of that status or affiliation." *Id.* In *Moore*, the Court found that the trial court committed reversible error when it failed to ask the following:

> Would any prospective juror be more likely to believe a witness for the prosecution merely because he or she is a prosecution witness?
>
> Would any prospective juror tend to view the testimony of a witness called by the defense with more skepticism than witnesses called by the State, merely because they were called by the defense?

Id. at 642.

Of relevance, in *Moore*, the State called fifteen (15) witnesses during trial. Based on the witnesses' affiliation with the State, the *Moore* Court held that they were considered

qualifying witnesses. *Id.* at 665. The Court further held that the proposed questions were designed to uncover bias and therefore were a mandatory inquiry. *Id.*

The record in the case *sub judice* supports the trial court's decision not to ask the proposed line of inquiry. Distinguishable from *Moore*, here, there is only one witness clearly identified as a "minority member" witness, Mr. Carter. Mr. Carter was the State's witness. Nor did appellant clarify the record as it related to the State's witnesses. Further, appellant never indicated that a "minority member" witness would be testifying for the defense. As previously noted, appellant did not call any witnesses. "If there are no defense witnesses, there will be no need for a Defense–Witness question." *Id.* at 655. Defense counsel did not proffer an intent to nor did he call a qualifying witness. As there were not any defense witnesses called, there was no qualifying defense witness to trigger the necessity to ask the defense's proposed line of inquiry. The line of inquiry proposed by the defense would not reveal jurors' racial bias or their tendency to make prejudgments of credibility as it related to the defense. The trial court did not have reason to believe the question would further the goal of uncovering bias that was related to the factual circumstances of the case or to the defense. We note that the trial court asked questions with respect to qualifying State's witnesses, including police officers and law enforcement. Therefore, the trial court did not abuse its discretion by declining to ask appellant's question.

Thus, upon review of the exchange that took place between counsel and the trial court and review of the *voir dire* questions actually asked, we conclude that the trial court

properly considered the racial bias issue as it related to the facts and circumstances of the case. As such, the proposed area of inquiry was fairly covered by the totality of *voir dire*. The *voir dire* questions did ensure appellant's right to an impartial jury.

II.

Double Jeopardy

Appellant contends that double jeopardy principles precluded her conviction for second degree murder. She argues that her acquittal on the felony murder charge in the first trial resolved the question of whether the murder was in furtherance of the attempted robbery. Specifically, she asserts that, based on this acquittal, her later conviction for second degree murder as an accessory violates collateral estoppel principles imbedded in the Double Jeopardy Clause. At the outset, we must determine whether this question is properly preserved for appellate review.

A.

Preservation

Maryland Rule 8-131(a) specifically provides that an "appellate court will not decide any … issue unless it plainly appears by the record to have been raised in or decided by the trial court." *Conyers v. State*, 354 Md. 132, 148 (1999); *Gaylord v. State*, 2 Md.App. 571, 575 (1967) (holding that an appellate court "will not address claims of error which have not been raised and decided in the trial court" except in limited circumstances). The purpose of the rules governing preservation of issues for appellate review are: (1) to require counsel to bring the position of their client to the attention of the lower court at the trial so

that the trial court can pass upon, and possibly correct any errors in the proceedings, and (2) to prevent the trial of cases in a piecemeal fashion, thus accelerating the termination of litigation. *Handy v. State*, 201 Md.App. 521 (2011). "Maryland Rule 8–131(a) provides the reviewing court with the authority to decide issues not raised below, such power is solely within the court's discretion and is in no way mandatory." *Conyers*, 354 Md. 132 at 148 (quoting *State v. Bell*, 334 Md. 178, 187-88 (1994)).

Based on Maryland Rule 8-131(a) and the *Conyers* standard, we conclude this issue is not properly preserved. Defense counsel did not raise the double jeopardy argument, nor did counsel articulate any grounds for the collateral estoppel claim during the second trial. Hence, the issue was not raised or decided at the trial court level. We conclude that, had the issue been properly preserved, the contention is without merit.

B.

Analysis

As previously noted, appellant was retried on numerous charges after her first trial resulted in a mistrial. "Ordinarily, when a mistrial has been declared as the result of a manifest necessity or with the consent of the defendant, retrial of the same charge is not prohibited by the Double Jeopardy Clause." *State v. Griffiths*, 338 Md. 485, 490 (1995) (quoting *Oregon v. Kennedy*, 456 U.S. 667, 671–72 (1982)). "A hung jury is the 'prototypical example' of manifest necessity for a mistrial." *Id.* at 490 (quoting *Kennedy*, 456 U.S. at 672). When a mistrial is declared it is as if there was no trial held at all. *Cook v. State*, 281 Md. 665 (1978). In appellant's case, a mistrial was declared in the first trial

as to several counts, including second degree murder because the jury was unable to reach a verdict. Under the general rule, retrial of the second degree murder charge was permitted. Notwithstanding that general rule, appellant argues that the retrial on second degree murder under the theory of accomplice liability was precluded because she was found not guilty of felony murder in the first trial. We disagree.

The doctrine of collateral estoppel "is embodied in the Fifth Amendment guarantee against double jeopardy." *Ashe v. Swenson*, 397 U.S. 436, 445 (1970). "Collateral estoppel is concerned, therefore, not with the legal consequences of a judgment but only with the *findings of ultimate fact,* when they can be discovered, that necessarily lay behind that judgment." *Burkett v. State*, 98 Md. App. 459, 465 (1993) (emphasis in original). ". . . [T]he burden is on the party asserting estoppel to show that the issue whose relitigation he seeks to foreclose was actually decided in the first proceeding." *Butler v. State*, 335 Md. 238, 254 (1994). This is a difficult burden for a criminal defendant to overcome as it is hard to determine how a jury determined an issue. *Id.*

Our analysis is focused on what the first jury did find or must have found. *Ferrell v. State*, 318 Md. 235 (1990). Appellant relies on *Ferrell v. State* to support her argument that her retrial on charges of second degree murder was precluded by the resolution of her first trial. In *Ferrell*, the Court considered ". . . whether the offense for which the defendant was earlier acquitted, and the offense for which he is being retried, each involved a common issue of ultimate fact, and whether that issue was resolved in defendant's favor at the earlier trial." *Id.* at 243. "If the fact is a necessary element in two offenses, a finding in

favor of the defendant in the first trial on the issue requires an acquittal in the second trial." *Apostoledes v. State*, 323 Md. 456, 464 (1991); *Swenson*, 397 U.S. 436.

Appellant argues that liability for felony murder and liability as an accomplice for a murder committed by a co-defendant rest on identical legal and factual issues. At the conclusion of appellant's first trial, the jury was given the following instructions in regard to felony murder, second degree murder, attempted robbery and robbery:

> The Defendant is also charged with the crime of first-degree felony murder. In order to convict the Defendant of first-degree felony murder, the State must prove that the Defendant, another participating in the crime with the defendant, committed or attempted to commit a robbery, that the Defendant, another participating in the crime, killed Nelson Mandela Dakurah, *and that the act resulting in the death of Nelson Mandela Dakurah occurred during the commission or attempted commission of the robbery*. Felony murder does not require the State to prove that the Defendant intended to kill Nelson Mandela Dakurah.
>
> . . .
>
> The Defendant is charged with the crime of attempted robbery. Attempt is a substantial step beyond mere preparation towards the commission of a crime. In order to convict the Defendant of attempted robbery, the State must prove that the Defendant took a substantial step beyond mere preparation toward the commission of the crime of robbery and the Defendant intended to commit the crime of robbery.
>
> The Defendant is charged with the crime of robbery. Robbery is the taking and carrying away of property from someone else by force or threat of force with the intent to deprive the victim of the property. In order to convict the Defendant of robbery, *the State must prove that the Defendant took the property from Nelson Mandela Dakurah, that the Defendant took the property by force or threat of force, and that the Defendant intended to deprive Nelson Mandela Dakurah of the property.*
>
> Property means anything of value. Deprive means to withhold property of another permanently or for such a period as to appropriate a portion of its value with the purpose of restoring it only upon payment of a reward or other

> compensation or to dispose of the property and use or deal with the property so as to make it unlikely that the owner will recover it.

(emphasis added)

After deliberating for some time, that jury acquitted appellant of felony murder. It is appellant's contention that because the first jury found her not guilty of felony murder and were unable to reach a verdict on the robbery count, that the jury must have found that the murder did not occur during the robbery. Of note, during the first trial, appellant argued in closing that a robbery was not planned nor did one occur and that the events that took place on July 4, 2016 were not about money. Appellant argued that out of the forty-eight (48) communications between appellant and Mr. Dakurah, not one communication mentioned money, but rather, all communications revolved around an overnight visit. Appellant argued that no money was taken from Mr. Dakurah and that the stabbing was a crime of passion rather than an attempted robbery.

As noted above, the State elected to retry appellant on all counts that were not decided by the first jury. At the conclusion of the second trial, the trial court provided the following instructions in regard to second degree murder and accomplice liability:

> A second degree murder is the killing of another person with either the intent to kill or the intent to inflict such serious bodily harm that death would likely be the result. Second degree murder does not require premeditation or deliberation.
>
> In order to convict the Defendant of a second degree murder the State must prove a) *that the Defendant caused the death of Nelson Mandela Dukurah and that the Defendant engaged in the deadly encounter either with the intent to kill or with the intent to inflict such serious bodily harm that death would likely be the result.*

> The Defendant may be found guilty as an accomplice to a crime that she did not assist in or even intend to commit. In this case in order to convict a defendant of second degree murder *the State must prove beyond a reasonable doubt that the Defendant committed the crime of second degree murder either as a primary actor or as an accomplice, the crime of second degree murder was committed by that accomplice and that the crime of second degree murder was committed by an accomplice in furtherance of or during the escape from the underlying crime of attempted robbery.*
>
> It is not necessarily that the Defendant knew her accomplice was going to commit an additional crime. Furthermore, the Defendant need not have participated in any fashion in the additional crime.
>
> In order for the State to establish accomplice liability for that additional crime, in this case the murder, the State must prove that the Defendant actually committed the planned offense or the Defendant aided and abetted in that offense, and that the additional criminal offense was not within the original plan, it was done in furtherance of the commission of the planned criminal offense or escape thereof.
>
> However, the mere presence of the Defendant at the time and the place of the commission of the crime is not enough to prove that the Defendant is an accomplice. If presence at the scene of the crime is private that fact may be considered along with all of the surrounding circumstances in determining whether the Defendant intended to aid a participant and communicated that willingness to a participant.

(emphasis added).

Appellant asserts that the factual issues presented in the second jury instructions were identical to the issues presented to the first jury and therefore precluded.

In order for the court to determine whether the issues presented to the jury were the same the court must "examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." *Ferrell*, 318 Md. at 245 (quoting *Swenson*, 397

U.S. at 444). The court should review the record realistically. *See Ferrell*, 318 Md. at 245 (citing *United States v. Jacobson*, 547 F.2d 21, 23 (2d Cir. 1976), *cert. denied*, 430 U.S. 946 (1977)).

The State contends that appellant has failed to establish that the jury unanimously and of necessity, made a factual determination that the death did not occur during the attempted robbery. The State concedes that the jury unanimously concluded that the three elements of felony murder were not met. However, the State argues that there is no evidence establishing what element(s) of felony murder the jurors believed were or were not satisfied; some jurors may have acquitted appellant under the theory that there was no attempted robbery committed, whereas other jurors may have acquitted appellant because they determined that the victim's death was not a result of an attempted robbery.

There is also a possibility that some of the jurors never reached the later steps required for a full analysis and therefore did not make a factual determination as to when the murder occurred. The State contends that because each juror's reasoning for the jury's ultimate decision is not known to the court, there can be no finding as to whether the first jury's acquittal of felony murder resulted in a unanimous and necessary finding of fact in appellant's favor. Some jurors may have believed that an attempted robbery was not committed, while other jurors may have believed that an attempted robbery was committed, but that the death did not occur during the attempt. The crux of the State's argument is that there is no single, logical factual finding that is necessarily drawn from the first jury's acquittal. We agree.

There are clearly too many uncertainties for us to conclude that the jury unanimously agreed that the murder was not committed during a robbery. The first jury's acquittal only demonstrates that the jury found at least one of the three elements of felony murder was not met. The jury was not required to agree on which element was lacking to reach a not-guilty verdict. The jury could have reached its decision based on several different conclusions. We are also not persuaded that the jurors relied on appellant's closing argument in the first trial in rendering their decision. There is simply no conclusive factual determination that can be found based on the jury's decision.

As such, appellant has not provided adequate proof that when the first jury acquitted her of felony murder, the jury necessarily made an express factual finding that the act resulting in the victim's death did not occur during the attempted robbery. Appellant has not proven that the jury verdict was unanimous as to whether the murder occurred in furtherance or during the attempted robbery.[1]

Under these facts, we are not persuaded that the first jury made a conclusive determination at the time of deliberation. We conclude that there is insufficient proof the first jury unanimously and necessarily found that the murder did not occur during, or in furtherance of the attempted robbery. Therefore, the second-degree murder conviction based on accomplice liability was not precluded by double jeopardy.

[1] While there is no difference between "furtherance" and "during" in regard to felony murder, Ms. Washington presented no evidence to show that the first jury knew the two terms were analogous. This was not a factual issue decided by the first jury.

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