In the Court of Criminal Appeals of Texas

No. PD-0284-21

EX PARTE CEDRIC RICHARDSON,

Appellant

On State's Petition for Discretionary Review
From the Second Court of Appeals
Tarrant County

YEARY, J., delivered the unanimous opinion of the Court.

This case involves the doctrine of collateral estoppel, which the United States Supreme Court has said is embodied within the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution. *Ashe v. Swenson*, 397 U.S. 436 (1970). We must decide whether that doctrine precludes the State from prosecuting Appellant for the aggravated assault of one victim, Jkeiston Levi, after a jury

acquitted him of capital murder, murder, and aggravated robbery of a different victim, Breon Robinson. Both Levi and Robinson were shot by co-defendant Keoddrick Polk on the same day—and Appellant was present at the scene of both shootings. We conclude that collateral estoppel does not apply in this case. We will therefore reverse the judgment of the court of appeals.

I. COLLATERAL ESTOPPEL: *ASHE V. SWENSON*

The Fifth Amendment's Double Jeopardy Clause provides that no person shall be "subject for the same offence to be twice put in jeopardy of life or limb." U.S. CONST. amend. V. The Double Jeopardy Clause protects against: "(1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments for the same offense." *Ex parte Adams*, 586, S.W.3d 1, 4 (Tex. Crim. App. 2019).

In *Ashe*, the United States Supreme Court held that the Double Jeopardy Clause also includes the principle of collateral estoppel, 397 U.S. at 445–46, which "means simply 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." *Id.* at 443.[1] Under collateral estoppel, "the government may not litigate a specific elemental fact to a competent factfinder (judge or

[1] The Comal County Criminal District Attorney's Office tendered an *Amicus Curiae Letter*, supporting the State's position and suggesting that the United States Supreme Court might be poised to overrule *Ashe*. *See Bravo-Fernandez v. United States*, 137 S. Ct. 352, 367 (2016) (Thomas, J., concurring); *Currier v. Virginia*, 138 S. Ct. 2144, 2156 (2018) (plurality opinion). Because we hold that collateral estoppel does not apply in this case in any event, we need not address that issue.

jury), receive an adverse finding by that factfinder on that specific fact, learn from its mistakes, hone its prosecutorial performance, and relitigate that same factual element that the original factfinder had already decided against the government." *Adams*, 586 S.W.3d at 5 (quoting *Rollerson v. State*, 227 S.W.3d 718, 730 (Tex. Crim. App. 2007)).

Collateral estoppel is applied in criminal cases "with realism and rationality." *Ashe*, 397 U.S. at 444. When applying collateral estoppel, "courts must first determine whether the jury determined a specific fact, and if so, how broad—in terms of time, space and content—was the scope of its finding." *Ex parte Watkins*, 73 S.W.3d 264, 268 (Tex. Crim. App. 2002). When the first trial concludes in a general-verdict judgment of acquittal, the *Ashe* test "requires a court to examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." *Ashe*, 397 U.S. at 444.

The *Ashe* test "is a demanding one." *Currier v. Virginia*, 138 S. Ct. 2144, 2150 (2018); *Adams*, 586 S.W.3d at 5. A second trial "is not precluded simply because it is unlikely—or even very unlikely—that the original jury acquitted without finding the fact in question." *Currier*, 138 S. Ct. at 2150 (quoting *Yeager v. United States*, 557 U.S. 110, 133–34 (2009) (Alito, J., dissenting)); *Adams*, 586 S.W.3d at 5 (citing the same); *see also Watkins*, 73 S.W.3d at 268 ("The mere possibility that a fact *may* have been determined in a former trial is insufficient to bar relitigation of that same fact in a second trial."). The burden is "on the defendant to demonstrate that the issue whose relitigation he seeks to foreclose was

actually decided in the first proceeding." *Schiro v. Farley*, 510 U.S. 222, 233 (1994) (quoting *Dowling v. United States*, 493 U.S. 342, 350 (1990)).

II. BACKGROUND

The following facts are gleaned from the record of Applicant's trial for the capital murder, murder, and aggravated robbery, of Robinson.

On January 16, 2017, Appellant contacted Levi with an offer to sell him a firearm, specifically a pistol.[2] Levi, who was on probation for theft of a motor vehicle and did not want to be discovered as a felon in possession of a firearm, was not interested in buying the pistol. But Levi's friend, Robinson, who commonly carried a firearm, was interested. Levi and Robinson agreed to meet Appellant and Polk later at a Conoco gas station/convenience store to complete the sale for $200. But before that meeting, and unbeknownst to Levi and Robinson, Appellant and Polk had already sold the pistol to someone else. The subsequent events, which happened later in the evening and led to the eventual shootings of Levi and Robinson, span across two locations: the Conoco station on Miller Avenue, and a nearby residential neighborhood on Childress Street, in Fort Worth.

A. Miller Avenue: The First Shooting

Two surveillance cameras at the Conoco station, located on Miller Avenue, captured most of the events surrounding the first shooting. Levi and Robinson arrived first and parked Levi's Chrysler Sebring ("Sebring") at a gas pump nearest the gas station's convenience store

[2] Appellant and Levi were acquaintances from middle school and had recently reconnected through Facebook. Levi and Robinson were, according to Levi, "close" and they were together "every day." But Levi and Polk had never met before January 16, 2017.

façade. Polk and Appellant arrived a short time thereafter in Polk's Volkswagen Jetta ("Jetta"), parking in an empty parking space at the front of the store. The driver, Polk, exited the Jetta and walked to the side of the store to speak with someone.

When Polk returned, he walked around to the passenger side of the Jetta, and Appellant exited that vehicle. At that point, Appellant apparently handed Polk a firearm.[3] Polk and Appellant then walked over to Levi's Sebring and got into the back seat. Levi, who had been standing outside his car, also got into the driver's seat of his car. Levi had $200 cash in his possession, which he was going to use to buy the pistol on Robinson's behalf, since he actually knew Appellant. Robinson was already seated in the front passenger seat of the Sebring, with a firearm in his lap.[4] Polk sat in the back driver-side seat behind Levi, and Appellant sat in the back passenger-side seat behind Robinson.[5]

Once in the Sebring, Polk immediately ordered Levi and Robinson: "Give me y'alls shit." In response, Levi threw the $200 cash

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[3] At trial, two detectives testified that, after watching the gas station surveillance video, it appeared to them that Appellant handed Polk a firearm. During closing argument, Appellant's counsel seems to have conceded that there was at least some evidence in the record to show that: "The only action they can attribute anything to with regard to capital murder for which y'all are here is handing that gun. That's the only action of Cedric Richardson."

[4] The firearm in Robinson's lap was a Glock pistol with an extended magazine. Levi testified that the reason Robinson had a pistol was that he "felt like they w[ere] going to rob us." But according to Levi's trial testimony, despite his apprehension, Robinson never pointed his pistol at Polk or Appellant.

[5] It appears from the surveillance camera that, as Richardson sat in the back seat of the Sebring, he left the back passenger door partially open, with his right leg sticking out.

into the back seat. Polk then fired his pistol at Robinson, shooting him through his back. Apparently surprised by this, Appellant exclaimed: "What the fuck, what the fuck?" Levi, Robinson, and Appellant then fled the Sebring, with Robinson clutching at his back with his arm as he ran. At some point, he dropped his firearm on the ground, and then collapsed on the corner of the lot on which the convenience store sat, but outside of the view of the surveillance cameras. Meanwhile, Polk remained in the Sebring, appearing to search the back and front seats of that car. Appellant returned to the Sebring and briefly leaned into the open back passenger side door. He then returned to Polk's Jetta and got into the driver's seat.

Levi yelled for someone to call 911, but when no one responded, he ran back to the Sebring to get his phone and drive to where Robinson was lying. During that same time, Appellant, at Polk's direction, drove the Jetta over to where Robinson was lying. Polk retrieved Robinson's dropped firearm and went over to Robinson. Once Levi arrived at Robinson's location in the Sebring, Polk helped Levi put Robinson into the back seat of that car—an act that Levi understandably described as "awkward." According to Levi, Robinson was still alive at that point, but Levi also later told detectives that he thought Robinson "breathed one of his last breaths there on the pavement at the Conoco."[6]

Levi did not know where to find the nearest hospital. Appellant,

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[6] Levi admitted to this out-of-court statement to the detectives during his cross-examination by Appellant. The State lodged no objection to it. *See* TEX. R. EVID. 802 ("Inadmissible hearsay admitted without objection may not be denied probative value merely because it is hearsay.").

who was then driving the Jetta with Polk in the passenger seat, told Levi to follow him, in the Sebring, to the hospital. Levi then set out following them, hoping they would help him find it.

B. Childress Street: The Second Shooting

The second shooting occurred in a nearby residential neighborhood, on Childress Street, approximately a mile and a half from the Conoco station.[7] The record is not nearly as well developed here as it is for the Miller Avenue location, which benefitted from surveillance footage. The details of what transpired on Childress Street come almost exclusively from Levi's testimony and from what was found at the scene by first responders.

Levi, driving the Sebring with Robinson lying across the backseat, followed Appellant and Polk in the Jetta, to the hospital. On the way, Levi called 911. Levi testified that, at some point while he was on the phone with 911, the Jetta slowed down. Then, while Appellant continued to drive the Jetta, Polk began shooting at the Sebring. Levi and Robinson were each shot several times. Levi's phone call with 911 went dead, and he eventually blacked out.

The Sebring came to a halt over a sidewalk and into a portion of a lawn bordered by a retaining wall. The vehicle was at a 45-degree angle, "facing the wrong way . . . on the wrong side of the road." Officers

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[7] At trial, there was differing testimony as to how far away the Childress Street shooting was from the Miller Avenue shooting. The court of appeals described the distance to the second shooting, at Childress, as "about a mile and a half away from the gas station." *Ex parte Richardson*, No. 02-19-00478-CR, 2021 WL 1134458, at *3 (Tex. App.—Fort Worth Mar. 25, 2021) (mem. op., not designated for publication).

and first responders found Levi behind the wheel, bleeding and struggling to breathe, and administered first aid. They also found Robinson, face-down in the backseat, with no signs of life. He was subsequently pronounced dead at the Childress Street scene.

At Childress Street, Levi was shot in the face, left arm, hand, chest, and neck. Robinson, in the back seat, was found to have been shot again, this time in the head and thigh. Levi was eventually taken to the hospital, survived, and later spoke with detectives about the two shootings. He identified both Appellant and Polk in photo lineups, but he explained that Polk was the shooter at both the Miller and Childress street locations. Notably, Levi told the detectives, and later testified, that Appellant had just been present at both locations and was "not down for that type of stuff." Overall, Robinson received two gunshot wounds that would have proved fatal independently: one shot through his back, which exited his chest (presumably inflicted at Miller Avenue), and another shot to his head (presumably inflicted at Childress Street).

C. The First Trial

The State indicted both Polk and Appellant for capital murder, murder, and aggravated robbery with a deadly weapon, of Robinson. They were tried separately. A jury convicted Polk of capital murder; his punishment was assessed at life without parole. *Polk v. State*, No. 01-18-00450-CR, 2019 WL 1442180, at *1 (Tex. App.—Houston [1st Dist.] Apr. 2, 2019, pet. ref'd) (mem. op., not designated for publication). But a different jury acquitted Appellant of all three of the charges—capital murder, murder, and aggravated robbery—by a general verdict.[8]

[8] The jury charge at Appellant's first trial contained the following

application paragraphs:

COUNT ONE

Now, if you find from the evidence beyond a reasonable doubt that Cedric Ladarius Richardson, acting either alone or as a party, on or about the 16th day of January 2017, in the County of Tarrant, State of Texas, did intentionally cause the death of Breon Robinson, by shooting Breon Robinson with a firearm, and the said defendant was in the course of committing or attempting to commit the offense of robbery, then you will find the defendant guilty of capital murder as charged in count one of the indictment.

Unless you so find from the evidence beyond a reasonable doubt, or if you have a reasonable doubt thereof, or if you're unable to agree, then you will acquit the defendant of capital murder as charged in the indictment, and you will next consider whether the defendant is guilty of the lesser offense of aggravated robbery.

Now, if you find from the evidence beyond a reasonable doubt that Cedric Ladarius Richardson, acting either alone or as a party, in the County of Tarrant, State of Texas, on or about the 16th day of January, 2017, did intentionally or knowingly, while in the course of committing theft of property and with intent to obtain or maintain control of said property, cause bodily injury to another, Breon Robinson, by shooting Breon Robinson with a firearm; or threatened or placed Breon Robinson in fear of imminent bodily injury or death; and the defendant used or exhibited a deadly weapon, namely a firearm, then you will find the defendant guilty of aggravated robbery with a deadly weapon.

Unless you so find from the evidence beyond a reasonable doubt, or if you have a reasonable doubt thereof, then you will acquit the defendant of aggravated robbery with a deadly weapon and say by your verdict "not guilty."

If you have acquitted the defendant of capital murder as charged in count one of the indictment, then you will next consider whether the defendant is guilty of murder as charged in count two of the indictment.

COUNT TWO

Now, if you find from the evidence beyond a reasonable doubt that Cedric Ladarius Richardson, acting either alone or as

> a party, in the County of Tarrant, State of Texas, on or about the 16th day of January, 2017, did then and there intentionally or knowingly cause the death of an individual, Breon Robinson, by shooting Breon Robinson with a deadly weapon, to-wit: a firearm, then you will find the defendant guilty of murder as charged in count two, paragraph one of the indictment, or;
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> If you find from the evidence beyond a reasonable doubt that Cedric Ladarius Richardson, acting either alone or as a party, in the County of Tarrant, State of Texas, on or about the 16th day of January, 2017, did intentionally, with intent to cause serious bodily injury to Breon Robinson, commit an act clearly dangerous to human life, namely, by shooting Breon Robinson with a deadly weapon, to-wit: a firearm, and thereby caused the death of Breon Robinson, then you will find the defendant guilty of murder as charged in count two, paragraph two of the indictment.
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> Unless you so find from the evidence beyond a reasonable doubt, or if you have a reasonable doubt thereof, then you will acquit the defendant of murder and say by your verdict "not guilty."

The jury charge also included an instruction on the law of parties, in accordance with the language of Section 7.01 (a) and (b), and Section 7.02 (a)(2) and (b) of the Texas Penal Code:

> All persons are parties to an offense who are guilty of acting together in the commission of an offense. A person is criminally responsible as a party to an offense if the offense is committed by his own conduct, by the conduct of another for which he is criminally responsible, or by both.
>
> Each party to an offense may be charged with commission of the offense.
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> A person is criminally responsible for an offense committed by the conduct of another if, acting with intent to promote or assist the commission of the offense, he solicits, encourages, directs, aids, or attempts to aid the other person to commit the offense. Mere presence alone will not constitute one a party to an offense.
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> If, in the attempt to carry out a conspiracy to commit one felony, another felony is committed by one of the conspirators, all conspirators are guilty of the felony actually committed, though having no intent to commit it, if the offense was

D. The Subsequent Prosecution, Habeas Corpus, and Appeal

The State subsequently indicted Appellant for aggravated robbery and aggravated assault of the second victim, Levi.[9] Appellant filed a pretrial application for writ of habeas corpus, based on the doctrine of collateral estoppel. The trial court, following a hearing, granted relief as to the aggravated robbery charge, but not the aggravated assault charge.

Appealing the trial court's partial denial of relief, Appellant

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> committed in furtherance of the unlawful purpose and was one that should have been anticipated as a result of the carrying out of the conspiracy.

TEX. PENAL CODE §§ 7.01(a) & (b), 7.02(a)(2) & (b).

[9] The indictment from the subsequent prosecution of Appellant for aggravated robbery and aggravated assault of Levi, No. 1503620D, alleged—in two counts—that:

> [Count One:] Cedric Ladarius Richardson, hereinafter called Defendant, on or about the 16th day of January 2017, in the County of Tarrant, State of Texas, did intentionally or knowingly, while in the course of committing theft of property and with intent to obtain or maintain control of said property, cause bodily injury to another, Jkeiston Levi, by shooting Jkeiston Levi with a firearm and the Defendant used or exhibited a deadly weapon, namely a firearm,
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> Count Two: And it is further presented in and to said court that the Defendant in the County of Tarrant and State aforesaid on or about the 16th day of January 2017, did intentionally or knowingly cause bodily injury to Jkeiston Levi by shooting Jkeiston Levi with a firearm, and the defendant did use or exhibit a deadly weapon during the commission of the assault, namely a firearm[.]

See TEX. PENAL CODE §§ 29.02(a)(1), 29.03(a)(2), 22.01(a)(1) & 22.02(a)(2).

argued that collateral estoppel prevented the State from relitigating an issue that he claims the jury in his first trial already decided: that he was not a party to the shootings. The court of appeals agreed with him, and it remanded the case to the trial court to enter an order dismissing the aggravated assault charge. *Ex parte Richardson*, No. 02-19-00478-CR, 2021 WL 1134458, at *9–10 (Tex. App.—Ft. Worth Mar. 25, 2021) (mem. op., not designated for publication).

Ruling in favor of Appellant, the court of appeals observed that "[b]ecause Robinson received fatal gunshot wounds during both shootings, to acquit, the jury must have found that [Appellant] was neither a shooter nor a party to either of the shootings." *Id*, at *9. The State was barred by collateral estoppel, the court reasoned, because in order to convict Appellant of aggravated assault of Levi, under the second count of the indictment in the second trial, "the jury would have to find that [Appellant] was a party to the second shooting." *Id*. The court of appeals concluded that, "[b]ecause the jury had already acquitted [Appellant] of murder *by shooting* with the requisite mental state, either as the actual shooter or as a party, the question of whether [Appellant] was the shooter was decided in the first trial." *Id*.

E. On Discretionary Review

The State, on discretionary review, now argues that the conduct involved in the aggravated assault allegation against Levi involves conduct that occurred only at Childress Street, which is "temporally and geographically separate from the Conoco Fuel Station [Miller Avenue] murder/robbery." State's Brief, at 8. Because there was temporal and geographic separation between the two locations, the State contends,

the jury in the first trial did not necessarily decide that Appellant was not a party to the conduct that occurred at Childress Street when it acquitted him of the capital murder, murder, and aggravated robbery of Robinson.

The State contends that *Ashe* is factually different from this case. It argues that, in *Ashe*, "there was no temporal or geographic separation between the offenses being prosecuted." *Id.* at 16. In the present case, however, the State maintains, there is.

In response, Appellant argues that the discrete fact necessarily decided in his favor at the first trial—that the State is now barred from relitigating—is that he "was merely present and not an accomplice to either shooting" that took place. Appellant's Brief, at 17. Appellant contends that, by acquitting him, the jury in the first trial must have found him not to be a party *either* to the assaultive conduct that occurred at the Miller Avenue Conoco station *or* to the assaultive conduct that subsequently occurred in the Childress Street neighborhood, since Robinson received an independently fatal gunshot wound for which Appellant *could* have been convicted at each location.

Essentially, Appellant argues that "party to the shootings" is, to his case, what "identity" of the robber was in *Ashe*. It was, he contends, *the issue of fact* resolved in his favor at the first trial that absolutely bars the second prosecution. We granted the State's petition for discretionary review, and we now reverse the court of appeals' judgment.

III. ANALYSIS

In *Ashe*, the defendant was charged with robbing six poker players during a private game at the home of one the players. 397 U.S.

at 437. At the first trial, the defendant was acquitted of robbing one of the players. *Id*. at 445. The "single rationally conceivable issue in dispute before the jury was whether [Ashe] had been one of the robbers." *See id*. at 438 ("The proof that an armed robbery had occurred and that personal property had been taken . . . was unassailable.").

The defendant in *Ashe* was later tried for robbing one of the other players at the same poker game and was found guilty. *Id.* at 439. The central question, after deciding that collateral estoppel was in fact a double-jeopardy guarantee, was "whether, after a jury determined by its verdict that the petitioner was not one of the robbers, the State could constitutionally hale him before a new jury to litigate that issue again." *Id*. at 446. The United States Supreme Court held that the state was barred from prosecuting Ashe in the second trial. *Id*. Relitigating the issue of identity would violate the collateral estoppel component of double jeopardy, and "whatever else that constitutional guarantee may embrace, it surely protects a man who has been acquitted from having to 'run the gauntlet' a second time." *Id*. at 445–46.

What is certainly unique about the present case, and what makes applying collateral estoppel tricky, is the two separate shooting incidents at two separate locations, all involving the same four individuals. It seems clear enough from the first trial that a robbery took place *only* at the Miller Avenue location.[10] For that reason, Appellant's

[10] The trial court judge in the present case determined that the aggravated robbery charge against Levi was collaterally estopped. That determination seems defensible, given that the evidence in the first trial supported a robbery at only one location, the Miller Avenue Conoco station, and the jury acquitted Appellant of aggravated robbery of Robinson at the first trial. The State practically concedes as much in its brief on the merits before

acquittal for both capital murder (murder in the course of a robbery) and aggravated robbery at Miller Avenue do not themselves set up a collateral estoppel bar for the later occurring aggravated assault against Levi; the subsequent prosecution focuses exclusively on the aggravated assault on Levi which occurred at Childress.

But Appellant's acquittal for murder at the first trial presents a closer question. What complicates matters with regard to the murder charge is the fact that Robinson received two independently fatal gunshot wounds, either one of which could have caused his death: one at Miller Avenue (in the back) and one at Childress Street (in the head). Both Appellant and the court of appeals are absolutely correct about one thing: The jury charge in Appellant's first trial authorized the jury to *convict* him for the murder of Robinson on the basis of *any* conduct that occurred "on or about" January 16, 2017—so, for any conduct that might have occurred at *either* Miller Avenue *or* Childress Street. If the first jury failed to convict Appellant of murder for the assaultive conduct against Robinson at Childress Street, the court of appeals essentially reasoned, then a second jury may not convict him of the assaultive conduct against Levi at Childress Street either,[11] since the first jury already found that Appellant was not guilty, either as the primary actor or as a party, for that conduct.

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this Court. State's Brief at 14–15 ("[E]ven under its limitations, collateral estoppel bars prosecuting the appellant for allegedly robbing Mr. Levi inside the parked car at the Conoco Fuel Station."). That question is, in any event, not before us.

[11] The evidence is undisputed that Levi, the victim in the present case, was not shot until the assault at the Childress Street location.

But it is not quite as simple as that. The fact that Appellant could have been *convicted* of Robinson's murder based on the Childress Street assault does not mean that the only way that the first jury could have *acquitted* Appellant of that offense was to reject his liability for the Childress Street assault. On the peculiar facts of this case, the first jury could have *acquitted* Appellant of murdering Robinson without *necessarily* even having to *pass* on the question of whether Appellant was guilty (either as the primary actor or as a party) of the assaultive conduct that occurred at Childress Street—*at all*. The reason is simple: The jury at the first trial might have concluded that Robinson was already dead by the time the assaultive conduct occurred at the Childress Street location.

The evidence was certainly sufficient to support the conclusion that Robinson was already dead by the time the conduct on Childress Street occurred, if that was indeed what the first jury believed.[12] Under that theory, it could have acquitted Appellant of murder based solely on its belief that Appellant was not guilty of murdering Robinson (either as the primary actor or as a party) based upon the shooting at the Miller Avenue location. It would not have had to resolve the question of

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[12] The medical examiner testified that the two different gunshot wounds were independently fatal, but he could not say which gunshot wound came first. But we know from Levi's testimony and from the surveillance video that Robinson was shot in the back at Miller Avenue and in the head at Childress Street. Levi told investigators that he thought Robinson took his last breath while still on the pavement at the Conoco station. First responders at Childress Street testified to providing CPR and aid to Robinson, but all signs (no eye dilation, no neurological response, delayed capillary refill, cold to the touch, and no electrical activity on the EKG) suggested that he was already dead before they got to him.

whether he was guilty of any offense that later occurred at the Childress Street location.

It is certainly also true that the jury *could* have believed that Robinson survived the gunshot at Miller Avenue long enough to receive what proved to be the gunshot that killed him, at Childress, and that Appellant was guilty based on the conduct at that location. If the jury at the first trial in fact determined that Robinson survived until the second shooting at Childress, then by *acquitting* Appellant, the jury would necessarily have determined that Appellant was not guilty as the primary actor or as a party based on the shootings that occurred at *either* location. And if *that* was the basis for the jury's acquittal, then a straightforward application of collateral estoppel now might very well have applied to bar the State from prosecuting Appellant for the aggravated assault of Levi, as the court of appeals held. But we need not decide that question, because we cannot say from the record before us that the jury *necessarily* viewed the facts in this way. As we have explained, just because the jury in the first trial *could* have found Appellant guilty based on either shooting does not necessarily mean that, in order to *acquit* Appellant, the jurors had to decide the extent of Appellant's liability at both locations. *See Watkins*, 73 S.W.3d at 268 ("Before collateral estoppel will apply to bar relitigation of a discrete fact, that fact must *necessarily* have been decided in favor of the defendant in the first trial.").

The court of appeals held that, because Robinson received two fatal gunshot wounds, "to acquit, the jury must have found that [Appellant] was neither a shooter nor a party to either of the shootings."

Richardson, 2021 WL 1134458, at *9. The problem here is that the court of appeals appears not to have considered whether the jury could have acquitted Appellant of murder based solely on the conduct that occurred at Miller Avenue. Such a jury would not have needed to consider Appellant's liability for the conduct that occurred at Childress Street, which forms the basis of the aggravated assault charge against Levi.

"We must be able to say that it would be irrational for the jury in the first trial to acquit without finding in the [Appellant's] favor on a fact essential to a conviction in the second." *Currier*, 138 S. Ct. at 2150. It would not have been irrational for the jury, in the first trial, to have acquitted Appellant without ever considering whether he was liable for any offense that occurred at Childress Street, if in fact the jury did not believe that Robinson's *murder* could have taken place there.

The State argues that the separation of time and location, by itself, is the determinative factor to consider here because Appellant's mental state might have changed in the time between the Miller Avenue and Childress Street shootings. Indeed, the evidence at trial suggests that Appellant may well have started out at Miller Avenue as merely a bystander, not a party; Levi testified that Appellant was evidently startled ("[W]hat the fuck, what the fuck?") when Polk shot Robinson in the back. That intervening circumstance—Polk unexpectedly shooting Robinson—could have been the very event that caused Appellant's mental state to change by the time of the Childress Street shooting, causing him to believe he must abet Polk in killing the witness, Levi.[13]

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[13] The evidence showed that the Jetta, being driven by Appellant, slowed down before Polk began shooting at Levi and Robinson in the Sebring. The jury might have found that by slowing down the Jetta, Appellant caused

But the State's argument fails to acknowledge that the jury could have convicted Appellant of Robinson's murder based upon either shooting. If we knew the jury believed that the fatal gunshot to Robinson at Miller did, in fact, kill him, then the State's argument could have merit, for the reasons we have already developed. In that instance, a change in Appellant's mental state between Miller Avenue and Childress Street would be an issue of ultimate fact that the jury in the first trial did not have to decide since, if Robinson was already dead by the time they arrived at Childress Street, then the jury could have acquitted Appellant even if it believed his mental state had changed by then.

But if the jury did consider the Childress Street shooting as contributing to Robinson's death, then by acquitting Appellant they necessarily would have had to consider Appellant's mental state, including any change due to the difference in time and location, in reaching that verdict. In this scenario, the State's "separation-of-time-and-location" argument would not, by itself, be enough. The Appellant's problem, for purposes of applying his theory of the doctrine of collateral estoppel in *this* case, however, is that we simply cannot know what the jury *necessarily* decided, if anything, with respect to his liability at Childress Street.

A jury rationally could have acquitted Appellant of the charges brought against him in his first trial on the basis that Appellant could not have anticipated the harm to Robinson at the Miller Avenue

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the distance between the Jetta and the Sebring to be reduced, which might have made it easier for Polk to shoot Levi.

location, while also believing that Appellant at least *should* have anticipated the harm to Levi at Childress Street. Under that scenario, acquittal at that first trial was *still* possible if the jury believed that Robinson was already dead before the Childress Street shootings even occurred. Appellant could not be convicted of murder for the acts that took place at the Childress Street location if Robinson was already dead by that time, regardless of any change in Appellant's mental state.

To bar the State from litigating the aggravated assault of Levi, it must be clear that the jurors in the first trial necessarily determined that Robinson was still alive at the time that the shooting occurred at Childress Street.[14] We simply cannot be certain that they did, and that is reason enough to justify reversal of the court of appeals' judgment.

IV. CONCLUSION

The *Ashe* test "is a demanding one." *Currier*, 138 S. Ct. at 2150. Because we cannot tell whether the jury's verdict at the first trial *necessarily* determined that he was neither the primary actor, nor at least a party to, the Childress Street assault, we cannot conclude that the State is precluded from litigating his liability for assaulting Levi at the Childress Street location. The judgment of the court of appeals is reversed, and the matter is remanded to the trial court for further proceedings consistent with this opinion.

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[14] Perhaps Appellant's defense counsel said it best during his closing argument at the first trial: "Y'all are not here to answer the question did Keoddrick Polk or did [Appellant] commit a crime against Jkeiston Levi? . . . That's for another jury for another day."