CONCUR and Opinion Filed January 5, 2022

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-19-01398-CR
No. 05-19-01399-CR
No. 05-19-01485-CR

DONNELL SLEDGE, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the Criminal District Court No. 2
Dallas County, Texas
Trial Court Cause Nos. F17-56048, F17-56046, F17-56047

OPINION ON DENIAL OF REHEARING

Before Justices Schenck, Reichek, and Carlyle
Opinion by Justice Schenck

The following explains our decision to deny the State's motion for rehearing. In that motion, the State urges the orders granting the motions for new trial either correctly stated the basis as insufficient evidence, which the State argues would require complete acquittal in all three cases, or the orders were printed on incorrect forms and were unintentionally granted on non-sufficiency bases, which the State argues would mean the second trial did not violate the Double Jeopardy Clause.

The State does not cite any authority for the proposition that a jury's actual determination of a material factual question that is legally dispositive of guilt or

punishment is not subject to double jeopardy or is open to redetermination either by the trial court on a motion for new trial or by a second finder of fact. While the Supreme Court has recently clarified that the Double Jeopardy Clause requires examination of the basis for a jury's determination of the facts where the evidence and theories presented by the State potentially overlap, *e.g.*, *Yeager v. United States*, 557 U.S. 110, 119 (2009), it has long recognized that independent factual determinations, such as those at issue here,[1] are barred from re-examination. *Ball v. United States*, 163 U.S. 662, 671 (1896) ("However it may be in England, in this country a verdict of acquittal, although not followed by any judgment, is a bar to a subsequent prosecution for the same offense."); *see also Hudson v. Louisiana*, 450 U.S. 40, 45 (1981) (reversing judgment of conviction after second trial because defendant was granted motion for new trial on evidentiary sufficiency grounds). Instead, the State focuses its argument on dismissing all three convictions. That is not so.

As the State prevailed on the distinct question of whether Sledge was unlawfully in possession of controlled substances and a firearm, there is nothing in the jury's findings that would compel the conclusion that the verdict was a functional

[1] While the first jury found that appellant had in fact unlawfully sold a controlled substance, it also found, as facts, that he did so without a firearm and was not a habitual offender at the time. Whether the jury was correct in these latter findings is beyond the power of this Court or the court below to examine. What controls, however, is that a person may commit the offense of selling a controlled substance without also using a firearm or being a repeat offender. Given that the jury had reached and answered all three questions, only those answered in favor of the State were open to re-examination.

acquittal. In other words, the jury's findings are individual factual determinations, such that its findings on the enhancements are acquittals as to those ultimate facts but have no effect on its findings as to the charged offenses, which are separate ultimate facts. *See Rollerson v. State*, 227 S.W.3d 718, 730 (Tex. Crim. App. 2007).

The portion of the verdict and judgment *adverse* to the defendant is properly understood as the subject of the motions for new trial,[2] thus allowing the defendant and the State to preserve their arguments for reexamination by the trial court, but at that point, only those arguments adverse to the defendant are preserved. *See Ashe v. Swenson*, 397 U.S. 436, 445–46 (1970) ("For whatever else [the double jeopardy] constitutional guarantee may embrace, it surely protects a man who has been acquitted from having to 'run the gantlet' a second time.").

As for the State's argument that the trial court granted the motions on non-sufficiency bases, we are obliged by the presumption of regularity to reject the notion that trial counsel entered into a secret agreement contrary to the record and the premise of this appeal and failed to record it or disclose to this Court.[3]

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[2] Of course, nothing in our record suggests that appellant's counsel sought to set aside favorable answers or could provide any conceivably plausible explanation for doing so without rendering our review standard meaningless. If an unexplained—and indeed inexplicable—failure to claim an automatic, constitutionally guaranteed right to victory on theses factual questions is not within the contemplation of our review at this stage, what would be?

[3] The State's argument presupposes some agreement between trial counsel and the prosecution similar to the one imagined by my colleague in his opinion dissenting to the denial of en banc consideration of this case:

> Trial counsel for appellant may have secured the agreement of the assistant district attorney representing the State to not contest the motion for new trial if she did not raise a collateral estoppel claim on retrial. Or, trial counsel may have also agreed not to waive collateral

Accordingly, we deny the State's motion for rehearing.

/David J. Schenck/
DAVID J. SCHENCK
JUSTICE

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estoppel regarding the enhancement paragraphs because the State gave notice of appellant's numerous prior felony convictions.

See Sledge v. State, No. 05-19-01398-CR, 2021 WL 3782082, at *9 (Tex. App.—Dallas Aug. 26, 2021, no pet. h.). Regardless of whether such an agreement may have taken place or whether it was ever recorded or written, it is not included in the record, and therefore the attorneys before us would be required by their duty of candor to this tribunal to disclose such an agreement. *See* Tex. Disciplinary R. Prof'l Conduct 3.03(a). Separately, given that this would be central to the sole dispositive issue on appeal, both counsel failing to advise the Court would be contrary to the presumptions governing this proceeding and to the implied representation that the signatory of the notice of appeal had a good faith basis for pursuing this appeal and had undertaken a reasonable investigation pursuant to his or her duties under Rule 3.01 of the Texas Disciplinary Rules of Professional Conduct. *See id.* 3.01.