

**COURT OF APPEALS
DECISION
DATED AND FILED**

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Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2005AP512-CR

Cir. Ct. No. 2003CF2591

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TYWON NATHANIEL BARBER,

DEFENDANT-PETITIONER.

APPEAL from an order of the circuit court for Rock County:
JAMES P. DALEY, Judge. *Reversed.*

Before Lundsten, P.J., Deininger and Higginbotham, JJ.

¶1 HIGGINBOTHAM, J. Tywon Nathaniel Barber was charged with first-degree intentional homicide but was acquitted by a jury. The State then charged him with armed robbery and armed burglary arising out of the same incident on which the first-degree intentional homicide prosecution was based.

Barber appeals a circuit court order denying his motion to dismiss these charges. Barber argues that the State is barred from bringing the instant charges by application of the issue preclusion¹ doctrine as embodied by the Fifth Amendment's guarantee against double jeopardy, as explained in *Ashe v. Swenson*, 397 U.S. 436, 445-46 (1970). We agree and reverse the order denying Barber's motion to dismiss.

FACTS

¶2 On April 15, 2001, three men entered the home where victim Michael Sims was temporarily living and killed him. Undisputed testimony established that three black men kicked in the door at 1018 Keeler Avenue in Beloit, Wisconsin, ran upstairs, gunshots were fired, and the three men, carrying boxes, ran down the stairs and then out the back door. Sims died from five gunshot wounds. Barber was charged and tried for first-degree intentional homicide as a party to a crime for his alleged participation in this murder. After a five-day trial, the jury found Barber not guilty.

¶3 Thirteen months later, the State charged Barber with armed robbery by use of force as a party to a crime and armed burglary as a party to a crime; these charges were based on the same incident from which the earlier homicide prosecution arose. Barber moved to dismiss the armed robbery and burglary prosecution, arguing it was barred by application of the issue preclusion doctrine as embodied in the Fifth Amendment's guarantee against double jeopardy. The

¹ In Wisconsin, the term "collateral estoppel" has been replaced by the less confusing term "issue preclusion." *Northern States Power Co. v. Bugher*, 189 Wis. 2d 541, 549-50, 525 N.W.2d 723 (1995). Consequently, in this case, we use the phrase "issue preclusion," including, we note, where federal cases cited herein may use the phrase "collateral estoppel."

circuit court denied Barber's motion. Barber filed a petition for leave to appeal a nonfinal order in this case; we grant his petition. Further facts will be discussed in detail later in this decision.

DISCUSSION

¶4 The question we are asked to resolve in this appeal is whether the State is barred from prosecuting Barber for armed robbery and armed burglary under the theory of issue preclusion, a doctrine embodied in double jeopardy jurisprudence. Barber contends that the sole and dispositive issue in both the first and second cases brought against him is identification; in other words, whether he was present at the scene of the crime. Barber asserts that by acquitting him of the murder charge, the jury necessarily resolved this fact against the State, and therefore the State is precluded from prosecuting him for the instant charges. We agree.

¶5 Interpretation of the double jeopardy clause is an issue of law, which we review de novo. *State v. Jacobs*, 186 Wis. 2d 219, 223, 519 N.W.2d 746 (Ct. App. 1994). Whether a subsequent prosecution violates a defendant's constitutional guarantee against double jeopardy is also a question of law we review de novo. *Id.*

¶6 The double jeopardy clause of the U.S. Constitution bars the State from repeated attempts to convict an individual for the same offense. U.S. Const. amend. V; *see also State v. Canon*, 2001 WI 11, ¶8, 241 Wis. 2d 164, 622 N.W.2d 270. One of the ways by which the double jeopardy clause is invoked is by applying the principles of issue preclusion. *See Northern States Power Co. v. Bugher*, 189 Wis. 2d 541, 549-51, 525 N.W.2d 723 (1995). This doctrine in the context of criminal cases was given constitutional status in *Ashe*, where the U.S.

Supreme Court held that issue preclusion is embodied in the Fifth Amendment guarantee against double jeopardy. *Ashe*, 397 U.S. at 445-46. “The Fifth Amendment protects an accused ‘who has been acquitted from having to ‘run the gantlet’ a second time.’” *State v. Vassos*, 218 Wis. 2d 330, 342, 579 N.W.2d 35 (1998) (citing *Ashe*, 397 U.S. at 446; *Green v. United States*, 355 U.S. 184, 190 (1957)).

¶7 The U.S. Supreme Court has explained that issue preclusion

stands for an extremely important principle in our adversary system of justice. It 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. Although first developed in civil litigation, [issue preclusion] has been an established rule of federal criminal law at least since this Court’s decision more than 50 years ago

Ashe, 397 U.S. at 443. The doctrine of issue preclusion is not to be applied in criminal cases “with the hypertechnical and archaic approach of a 19th century pleading book but with realism and rationality.” *Id.* at 444.

¶8 Where an acquittal is based upon a general verdict, as is typical, “this approach 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.” *Id.* (citation omitted). The query must be set in a practical construction and “viewed with an eye to all the circumstances of the proceedings.” *Id.* (citation omitted). A more technically restrictive test would be tantamount to a rejection of the rule of issue preclusion in criminal proceedings, particularly where the first judgment was based on a general verdict of acquittal. *Id.* The defendant bears the burden of

demonstrating that the issue about which he or she seeks to foreclose relitigation was decided in the first proceeding. *Vassos*, 218 Wis. 2d at 343.

¶9 After reviewing the record of the previous prosecution for first-degree murder, we conclude that the jury acquitted Barber of the murder because it found that the State failed to prove beyond a reasonable doubt that Barber was present at the scene of the murder. The key issue in the murder trial was whether Barber was one of the three men who broke into the house and killed Sims. The trial court described the issue in these terms:

And basically as I say, there is no question about the death of Mr. Sims. There is no question that the cause of death was five bullet wounds or combination thereto. There is no question that the individuals who did the murder in the court's mind were in the Pontiac vehicle. The only question is who were the individuals in the Pontiac vehicle.

¶10 This conclusion is supported by the criminal complaint, the evidence adduced at trial, the opening statements and closing arguments of counsel, and the exclusion of certain language in the party-to-a-crime jury instruction. The State explained in its opening statements that it would prove that Barber organized Sims' murder and did in fact kill Sims. However, during the trial, the State's star witness, Jason Smith, a former jail cellmate of Barber's who was expected to testify about conversations he had with Barber about how and why he killed Sims, ultimately refused to testify. Thus, the only remaining evidence placing Barber at the murder scene and supporting the State's theory that Barber was the one who murdered Sims was a blue latex glove, which contained both Barber's DNA evidence and Sims' blood. In its closing arguments, the State reiterated that as blood was "spurt[ing] all over the ceiling the guy holding the gun is going to catch some of it on the glove he's holding." The State argued that because Barber's DNA evidence was found inside a glove that had Sims' blood on the outside, and

because the evidence demonstrates that the person holding the gun would be splattered by Sims' blood, Barber was the person holding the gun. The success of the State's argument on this point required a finding that Barber was at the murder scene.

¶11 There are other indicators demonstrating that Barber's identity as one of the three men present at the crime scene was the core issue tried. Both parties stipulated that the bystander portion of the party-to-a-crime jury instruction could be excluded, conceding that the main issue of Barber's alibi defense was not that he was merely a bystander, but that he was not there at all, especially in light of the alibi defense. An alibi defense is inexorably linked to the issue of identity because the alibi defense, if believed by the jury, exonerates the defendant on the very issue of identity because a person cannot be in two places at the same time. In addition, the jury submitted a number of requests during its deliberations demonstrating that it was concerned about whether Barber was one of the three men at the murder scene. For example, the jury requested a map of Beloit and the transcript of pretrial testimony from Officer Smith regarding the timing of when he followed the speeding Grand Prix and radioed in the car's license plate after hearing a dispatch of shots fired. A reasonable inference arising from these requests is that the jury was concerned about the timing of the crime, which indicates the jury was considering Barber's alibi defense. Similarly, the jury requested to examine the blue latex glove, which is the strongest evidence the State introduced supporting its theory that Barber was Sims' killer. It was also the only evidence potentially placing Barber at the crime scene. The jury asked to see other evidence along these same lines.

¶12 We are satisfied, after reviewing the record, that the dispositive issue resolved at Barber's first trial was whether Barber was one of the men who

participated in Sims' murder. We are also persuaded that the jury necessarily rejected the State's attempts to identify Barber as one of the three men who killed Sims in order to find Barber not guilty of murdering Sims. *See Jacobs v. Marathon County*, 73 F.3d 164, 168 (7th Cir. 1996) (issue preclusion applied to those issues *necessarily* decided in previous proceeding). Because the dispositive issue of Barber's identity as one of the men present at the crime scene has already been tried, the State is precluded from re-trying Barber on different charges for the same incident. *See Ashe*, 397 U.S. at 443, 445-46; *see also Turner v. Arkansas*, 407 U.S. 366, 369 (1972).

¶13 The State argues, based on the jury instructions, that it is possible that the jurors may have believed that Barber was present during the homicide, but acquitted him because they were not persuaded that Barber aided or abetted the homicide. This view leaves open the possibility that the jury did not *necessarily* reject the proposition that Barber was present. We agree with the State that the party-to-a-crime jury instruction focused attention on whether Barber aided and abetted the *homicide*, rather than on whether Barber may have aided and abetted a robbery or burglary. Thus, if we viewed the instruction in isolation, we might agree with the State that Barber may still be tried on robbery or burglary charges. However, the applicable test requires that we review the proceeding with "realism and rationality." *Ashe*, 397 U.S. at 444. As we have explained, the prosecution's entire case and closing argument was based on the theory that the evidence showed beyond a reasonable doubt that Barber was present at the time of the homicide because his DNA was located inside a rubber glove and the victim's blood was found on the outside of that glove. There was nothing about the evidence or arguments of counsel suggesting that if Barber was present, he was not guilty of the homicide crime charged. Considering the trial as a whole, the

only reasonable inference from the verdict is that the jury rejected the prosecution's argument that it proved beyond a reasonable doubt that Barber was the third man at the crime scene. Our conclusion precludes the State from bringing robbery and burglary charges against Barber.

By the Court.—Order reversed.

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