

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant,

UNPUBLISHED
November 15, 2012

v

DWAYNE E. WILSON,
Defendant-Appellee.

No. 311253
Macomb Circuit Court
LC No. 2009-002637-FC

Before: MURPHY, C.J., and O'CONNELL and WHITBECK, JJ.

PER CURIAM.

The prosecution appeals by leave granted¹ the trial court's order dismissing a felony-murder charge against defendant. The trial court dismissed the charge on the ground that a jury had acquitted defendant in a prior trial of the predicate offense for the felony-murder charge. We reverse the trial court's decision, reinstate the felony-murder charge against defendant, and remand.

In the prior trial, a jury found defendant guilty of felony-murder, MCL 750.316(1)(b), second-degree murder, MCL 750.317, possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, assault with intent to do great bodily harm less than murder, MCL 750.84, and two counts of unlawful imprisonment, MCL 750.349b. In the same trial, the jury acquitted defendant of first-degree murder and first-degree home invasion. Defendant appealed his convictions and sentences to this Court. The Court vacated defendant's convictions and sentences and remanded because the trial court erred in summarily denying defendant's request to represent himself. See *People v Wilson*, unpublished opinion per curiam of the Court of Appeals, issued May 10, 2011 (Docket No. 296693).

On remand, the prosecution filed an amended information, again charging defendant with felony-murder and other charges. For the felony-murder charge, the amended information identified the predicate felony as first-degree home invasion. Defendant argued that because the prior jury had acquitted him of first-degree home invasion, the constitutional double jeopardy

¹ See *People v Wilson*, unpublished order of the Court of Appeals, entered July 16, 2012 (Docket No. 311253).

protections barred the amended felony-murder charge. The trial court agreed with defendant and dismissed the felony-murder charge.

On appeal, the prosecution argues that double jeopardy does not bar a retrial of defendant for felony-murder. We agree. “A double jeopardy challenge presents a question of constitutional law that this Court reviews de novo.” *People v Nutt*, 469 Mich 565, 573; 677 NW2d 1 (2004).

Both the United States and Michigan Constitutions protect an individual from being placed in jeopardy twice for the same offense. US Const, Am V; Const 1963, art 1, § 15; *Nutt*, 469 Mich at 574. The Double Jeopardy Clause advances two significant interests. *Yeager v United States*, 557 US 110, 117-118; 129 S Ct 2360; 174 L Ed 2d 78 (2009). The first is to prevent the prosecution from making “repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.” *Id.*, quoting *Green v United States*, 355 US 184, 187-188; 78 S Ct 221; 2 L Ed 2d 199 (1957). “The second interest is the preservation of the ‘finality of judgments.’” *Id.*, quoting *Crist v Bretz*, 437 US 28, 33; 98 S Ct 2156; 57 L Ed 2d 24 (1978).

The double jeopardy interest of preserving the finality of judgments includes the principle of collateral estoppel. *Ashe v Swenson*, 397 US 436, 443-446; 90 S Ct 1189; 25 L Ed 2d 469 (1970). This principle prevents relitigation of an issue of ultimate fact “that was necessarily decided by a jury’s acquittal in a prior trial.” *Yeager*, 557 US at 119; see also *Ashe*, 397 US at 443. To determine what factual issues were necessarily decided by a jury’s acquittal, “courts should ‘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.’” *Yeager*, 557 US at 120, quoting *Ashe*, 397 US at 444.

In this case, the prior jury returned inconsistent verdicts on the felony-murder and first-degree home invasion counts. This inconsistency negates the applicability of the double jeopardy collateral estoppel principle. The collateral estoppel principle is predicated “on the assumption that the jury acted rationally and found certain facts in reaching its verdict.” *United States v Powell*, 469 US 57, 68; 105 S Ct 471; 83 L Ed 2d 461 (1984). Here, the prior jury cannot be deemed to have found an ultimate fact regarding the first-degree home invasion. The trial court specifically instructed the jury that to convict defendant of felony-murder, the jury had to conclude, in part, “that when he did the act that caused the death of [the victim], the defendant was committing the crime of first-degree home invasion” The jury found defendant guilty of felony-murder, thereby apparently concluding that defendant committed the crime of first-degree home invasion. However, the jury acquitted defendant of first-degree home invasion. Although the jury had the prerogative of returning inconsistent verdicts, those inconsistencies preclude this Court from identifying which facts, if any, the jury necessarily found with regard to the first-degree home invasion. Absent an indication in the record of a necessarily decided ultimate fact, the double jeopardy collateral estoppel principle does not apply. See *Powell*, 469 US at 68 (the principles of collateral estoppel are no longer useful when a jury has reached inconsistent results).

Reversed, felony-murder charge reinstated, and remanded. We do not retain jurisdiction.

/s/ William B. Murphy

/s/ Peter D. O'Connell

/s/ William C. Whitbeck