2019 IL App (5th) 170221-U

NO. 5-17-0221

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	St. Clair County.
	)	
v.	)	No. 11-CF-378
	)	
TRENTON JEFFERSON,	)	Honorable
	)	Randall W. Kelley,
Defendant-Appellee.	)	Judge, presiding.

JUSTICE CATES delivered the judgment of the court.
Justices Welch and Chapman concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court erred in granting defendant's pretrial motion barring the State from presenting evidence supporting a principal liability theory for first degree murder. We reverse and remand for further proceedings.

¶ 2 A jury convicted defendant, Trenton Jefferson, of first degree murder, and the trial court sentenced defendant to 30 years' imprisonment. Defendant appealed his conviction. This court reversed, finding the trial court committed reversible error in admitting portions of a witness's testimony, and remanded the cause for retrial. On remand, defendant filed a pretrial motion seeking to limit the State's evidence on retrial, asserting defendant could not be retried for first degree murder as a principal, and the State was

prohibited from presenting any evidence suggesting that defendant acted as the principal. The trial court granted defendant's motion, and the State appealed pursuant to Illinois Supreme Court Rule 604(a)(1) (eff. Mar. 8, 2016). We reverse and remand.

¶ 3 BACKGROUND

¶ 4 The parties are familiar with the relevant facts, which are set forth in detail in this court's prior order and need not be repeated at length here. Therefore, only those facts relevant to the disposition of this appeal are repeated. On April 11, 2010, Marcus Gosa (Gosa) was shot and killed in an alley in East Saint Louis. Almost a year later, in March 2011, a grand jury indicted defendant for the murder. Approximately one month after defendant was indicted for first degree murder, the other suspect in the Gosa murder, Renaldo Brownlee (Brownlee), was shot and killed by Saint Louis police officers during an armed robbery. Defendant's first trial, in September 2012, resulted in a mistrial due to a hung jury. Defendant's second trial began in February 2013.

¶ 5 At the second trial, Kiyanna Howard (Howard) testified for the State. Howard indicated she began dating Brownlee a few days prior to the shooting and continued dating him until his death in 2011. Howard testified that defendant and Brownlee picked her up around midnight on the night of the incident. Defendant drove the vehicle, while Brownlee rode in the front passenger seat and Howard rode in the back seat. At some point during the ride, Howard fell asleep in the back seat of the car. Howard testified she awoke upon hearing a car door being slammed shut. Howard sat up, observed defendant standing in front of the car, and asked Brownlee what defendant was doing. She lay back down, and seconds later, Howard heard three or four consecutive gunshots. Following the

gunshots, defendant ran back to the car, re-entered the driver's side door, and drove off. According to Howard, as the car sped away, defendant said, "Let's go. Let's go. I think I got that nigger." Howard stated when defendant got back into the car, it appeared as if he was holding something in his hands, but she did not observe a gun.

¶ 6 The State's next witness, Rochelle Davis (Davis), defendant's ex-girlfriend and the mother of his child, testified that she knew the victim. Davis testified that on the night of April 10, 2010, she was picked up in a green Buick that was owned by defendant's brother, Carbitt. Carbitt was driving, Brownlee was in the front passenger seat, and Brownlee's cousin, Leon, and defendant were in the back seat.

¶ 7 Davis also testified that defendant made several statements to her which led Davis to believe that defendant had killed Gosa. Davis testified defendant told her that, on the night of the murder, he saw two boys walking in the alley and that he and Brownlee got out of the car and both started shooting at the boys. Davis testified that defendant told her he heard Gosa scream, and it sounded like he had fallen over something. Davis also testified she eventually stopped dating defendant, and told him that she had started a new relationship with someone else. Defendant responded by saying, "You tell Dude don't end up like Marcus did."[1] Before being dropped off at her aunt's house that evening, Davis noticed that Leon, Brownlee, and defendant all had 9mm guns.

¶ 8 Reshon Farmer (Farmer), defendant's former cellmate at the St. Clair County jail, testified that in May of 2011, defendant spoke about his indictment, and admitted that he

[1]Davis provided additional testimony at trial regarding statements allegedly made by the defendant, as well as testimony that defendant was a violent person and had threatened her. On direct appeal, this court found these statements were inadmissible and unfairly prejudicial to defendant.

"killed the dude" in a drive-by shooting. Farmer testified defendant stated he rode in the passenger seat while his friend, Naldo, drove a green car. According to Farmer, only defendant fired shots. Farmer stated defendant never mentioned the victim's name but stated the victim "was from Washington Park and they were into it with Washington Park. So, he [(the defendant)] felt like he, you know, had to do what he did." In exchange for his testimony against defendant and two codefendants in Farmer's own case, the State offered Farmer a 10-year prison sentence on a charge of armed robbery, of which he would have to serve only 50% of the time.

¶ 9 An autopsy revealed that Gosa died of a single gunshot wound to the back. Police did not recover the bullet that killed Gosa. At the crime scene, police officers recovered two 9mm shell casings, which ballistics testing demonstrated had been fired from the same gun. No fingerprints were found on the casings. The police investigation also showed that the vehicle used in the murder had been facing west, and the area where the shell casings were found corresponded to the passenger side of the vehicle, although the location of the shell casings was not necessarily indicative of exactly where the shots had been fired from. Additionally, it was not known if the shell casings were discharged from the weapon that was used to kill Gosa. Following the presentation of its evidence, the State rested. Defendant did not present any evidence.

¶ 10 The trial court gave the following instruction to the jury:

> "To sustain the charge of First Degree Murder, the State must prove the following propositions:
>
> *First Proposition*: That the defendant, or one for whose conduct he is legally responsible, performed the acts which caused the death of Marcus Gosa; and

Second Proposition: That when the defendant, or one for whose conduct he is legally responsible, did so,

he intended to kill or do great bodily harm to Marcus Gosa;

or

he knew that such acts would cause death to Marcus Gosa;

or

he knew that such acts created a strong probability of death or great bodily harm to Marcus Gosa.

If you find from your consideration of all the evidence that each one of these propositions has been proved beyond a reasonable doubt, you should find the defendant guilty.

If you find from your consideration of all of the evidence that any one of these propositions has not been proved beyond a reasonable doubt, you should find the defendant not guilty."

¶ 11 The State also requested that the trial court give the instructions for a sentencing enhancement[2] pursuant to section 5-8-1(a)(1)(d)(iii) of the Unified Code of Corrections (730 ILCS 5/5-8-1(a)(1)(d)(iii) (West 2010)). Based on this request, the trial court provided the following instructions to the jury:

"The State has also alleged that during the commission of the offense of First Degree Murder that the defendant was armed with a firearm and personally discharged the firearm that proximately caused death to another person.

* * *

To sustain the allegation made in connection with the offense of First Degree Murder, the State must prove the following proposition:

That during the commission of the offense of First Degree Murder, the defendant was armed with a firearm and personally discharged the firearm that proximately caused death to another person. A person is considered to have 'personally discharged a firearm' when he, while armed with a firearm, knowingly and intentionally fires a firearm causing the ammunition projectile to be forcefully expelled from the firearm.

[2]These instructions and corresponding verdict forms were given to the jury in order to comply with *Apprendi v. New Jersey*, 530 U.S. 466 (2000), which requires that any fact, other than a prior conviction, increasing the penalty for an offense beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. These instructions and verdict forms are commonly referred to as a "special interrogatory" in the case law and will be referred to as such in this order.

> If you find from your consideration of all the evidence that the above proposition has been proved beyond a reasonable doubt, then you should sign the verdict form finding the allegation was proven.
>
> If you find from your consideration of all the evidence that the above proposition has not been proved beyond a reasonable doubt, then you should sign the verdict form finding the allegation was not proven.
>
> * * *
>
> If you find the defendant is guilty of First Degree Murder, you should then go on with your deliberation to decide whether the State has proved beyond a reasonable doubt the allegation that the defendant was armed with a firearm and personally discharged the firearm that proximately caused the death to another person.
>
> Accordingly, you will be provided with two verdict forms: 'We, the jury, find the allegation that the defendant was armed with a firearm and personally discharged the firearm that proximately caused death to another person was not proven['] and 'We, the jury, find the allegation that the defendant was armed with a firearm and personally discharged the firearm that proximately caused death to another person was proven'.
>
> From these two verdict forms, you should select the one verdict form that reflects your verdict and sign it as I have stated. Do not write on the other verdict form. Sign only on these verdict forms.
>
> Your agreement on your verdict as to the allegation must also be unanimous. Your verdict must be in writing and signed by all of you, including your foreperson."

¶ 12 The jury found defendant guilty of first degree murder and answered the special interrogatory in the negative. The court sentenced defendant to a term of 30 years in prison, and defendant timely filed his notice of appeal.

¶ 13 On direct appeal, defendant argued, among other things, that (1) the trial court erred in allowing Davis to testify about certain hearsay statements defendant allegedly made, and to testify that defendant was a violent person, even though defendant did not put his own character at issue, and (2) the evidence presented by the prosecution was

insufficient to sustain defendant's conviction.[3] Upon examination, this court determined that portions of Davis's testimony were improperly admitted and were unfairly prejudicial to defendant, and reversed and remanded for a new trial. This court held, although the evidence was closely balanced, the State had presented sufficient evidence to support defendant's conviction for first degree murder. Although this court indicated the belief that defendant had been convicted on an accountability theory, we specifically held that remanding the cause for another trial would not violate principles of double jeopardy, and that this court made "no determination as to defendant's guilt that would be binding on retrial."

¶ 14 On remand, defense counsel filed a pretrial motion asserting the combination of the "personal discharge acquittal" and the appellate court order significantly limited the evidence the State could present on retrial. Defendant argued that (1) double jeopardy precluded the State from retrying the defendant as a principal, (2) the State was barred from presenting any evidence suggesting defendant had acted as a principal, which included all of the testimony of Howard and Farmer, and portions of Davis's testimony, and (3) the appellate court order significantly curbed the testimony of Davis by specifically identifying improperly admitted testimony.

¶ 15 The State filed a response to defendant's motion conceding it was precluded from seeking a firearm enhancement instruction against defendant due to the jury's negative

[3]Defendant also argued the trial court failed to properly question potential jurors regarding the four principles set forth in Illinois Supreme Court Rule 431(b) (eff. May 1, 2007), and that the State committed prosecutorial misconduct during opening statements and closing arguments. These issues, and this court's resolution of these issues in the prior appeal, are not pertinent to the issues presented in the current appeal.

finding on the special interrogatory. The State argued, however, that its theory of the case was not limited by the jury's finding on the firearm enhancement finding because personal discharge of the weapon is not an element of the offense of first degree murder.

¶ 16 On June 1, 2017, the trial court conducted a hearing on defendant's motion and the State's response. At the hearing, defense counsel argued the State could only retry defendant on an accountability theory based on the jury's "acquittal" of defendant of personally discharging the firearm that proximately caused Gosa's death. Defense counsel acknowledged that the appellate court order did not specifically limit the State's theory of liability on retrial, but argued that such limitation could be "inferred" from the appellate court's finding that defendant had been found guilty on an accountability theory. Defense counsel argued that any evidence or testimony implicating defendant as the principal had to be excluded on retrial.

¶ 17 The State again conceded it was not allowed to seek the firearm enhancement but argued that neither the State's theory of the case, nor any evidence supporting its theory, was limited by the jury's inability to find the sentencing enhancement factor beyond a reasonable doubt. The State argued the jury's finding on the special interrogatory was only a sentencing finding and was not an acquittal of principal liability. The State argued the appellate court order included detailed instructions on several issues but did not indicate that the State was prevented from arguing principal liability on retrial.

¶ 18 On June 9, 2017, the trial court issued its order holding that Howard and Farmer were "limited and precluded from offering any testimony alleging or suggesting that defendant *** fired a gun causing [Gosa's death]." The trial court also ruled the

testimony of Davis was limited to exclude statements specifically addressed in the appellate court order, as well as any testimony suggesting or implicating defendant as the principal. The State filed an interlocutory appeal, pursuant to Illinois Supreme Court Rule 604(a)(1).[4]

¶ 19 On appeal, the State argues the trial court improperly relied upon the law of the case doctrine in ruling that this court's prior order barred the State from introducing any evidence that defendant acted as the principal in Gosa's murder. The State argues the appellate court order did not suppress any evidence other than several specifically identified statements made by Davis. The State also contends that the trial court misapplied the law of the case doctrine, and improperly expanded the appellate court order by suppressing all evidence related to the State's theory of principal liability. The State further argues that the only practical legal effect of the jury's negative finding on the firearm enhancement issue is that defendant is not subject to the enhancement provision, not that the finding acts as a double jeopardy bar to some potential future trial theory on the underlying murder charge.

¶ 20 In response, defendant contends the State is incorrect that the trial court's order was premised upon the law of the case doctrine and this court's prior order. Instead, defendant argues the trial court's order was based on the direct or collateral estoppel effect of the jury's verdict. Defendant argues the trial court applied "well-settled law that

[4]Rule 604(a)(1) provides "the State may appeal only from an order or judgment the substantive effect of which results in *** suppressing evidence." Ill. S. Ct. R. 604(a)(1) (eff. Mar. 8, 2016). The substantive effect of the trial court's order, not the label of the order, controls the appealability under the rule. *People v. Drum*, 194 Ill. 2d 485, 489 (2000). The State can appeal from a pretrial order which substantially impairs its ability to prosecute a case, and there is no substantive distinction between evidence that is excluded and evidence that is suppressed. *Drum*, 194 Ill. 2d at 489, 491.

the Fifth Amendment guarantee against double jeopardy embodies the concept of collateral estoppel, *Ashe v. Swenson*, 397 U.S. 436, 445 (1970)—and, in this case, direct estoppel. *People v. Wharton*, 334 Ill. App. 3d 1066, 1078 (4th Dist. 2002)." Defendant asserts that the doctrines of collateral estoppel, direct estoppel, and issue preclusion bar the State from relitigating any issue that has already been decided. In this case, defendant claims the issue of whether defendant personally discharged the firearm that proximately caused the death of Gosa has already been decided in the negative.

¶ 21 In its reply brief, the State argues that defendant is mistaken that double jeopardy applies, and persists in its position that the trial court misapplied the law of the case doctrine in entering its order. The State does not provide any response to defendant's estoppel or issue preclusion arguments.

¶ 22 Law of the Case

¶ 23 On appeal, it appears that the parties are in agreement that the law of the case doctrine does not dictate the outcome in this case, a proposition with which we agree. Defendant, however, did argue in the trial court that certain findings by this court in our prior order suggested that the State's theory of liability, and the evidence in support of that theory, should be limited on retrial. Because the cause is going to be remanded to the trial court for further proceedings, we will briefly address how the law of the case doctrine affects the issues currently on appeal.

¶ 24 The law of the case doctrine bars the parties from relitigating an issue that has already been decided in the same case. *People v. Tenner*, 206 Ill. 2d 381, 395-96 (2002), *as modified on denial of reh'g* (Mar. 31, 2003). Issues decided in a previous appeal are

binding on the trial court on remand, as well as the appellate court on a subsequent appeal. *People v. Cole*, 2016 IL App (1st) 141664, ¶ 27. Issues previously decided encompass issues of both law and fact. *Radwill v. Manor Care of Westmont, IL, LLC*, 2013 IL App (2d) 120957, ¶ 8. One exception to the law of the case doctrine is when a reviewing court finds that its prior decision was palpably erroneous. *Radwill*, 2013 IL App (2d) 120957, ¶ 10. This is a rare exception, invoked only when a court's prior decision was obviously or plainly wrong. *Radwill*, 2013 IL App (2d) 120957, ¶ 12. "[A] court's decision will be considered palpably erroneous only if that decision was clearly erroneous and would work a manifest injustice." *Radwill*, 2013 IL App (2d) 120957, ¶ 12.

¶ 25 In the last appeal, this court made specific findings as to the admissibility of certain testimony offered by Davis and there is no dispute that our rulings on that testimony are the law of the case. Although the parties agree on appeal that the law of the case doctrine does not dictate the outcome of this appeal, one of this court's findings in its prior opinion has apparently contributed to some of the confusion on remand. In our prior order, this court stated several times that defendant was convicted of first degree murder on an accountability theory. Neither party has challenged that finding in this appeal. Upon our review of the law, however, the references to defendant's conviction having been based upon the accountability theory appear to have been in error and were based upon the misapplication of the jury's negative finding on the special interrogatory related to the sentencing enhancement finding.

¶ 26 In *People v. Jackson*, 372 Ill. App. 3d 605 (2007), a factually analogous case to this case, the Fourth District addressed the use and limitations of special interrogatories in criminal cases. The defendant in *Jackson* was charged with first degree murder related to the shooting death of the victim. *Jackson*, 372 Ill. App. 3d at 607. In a single verdict director, the jury was instructed on first degree murder under both principal and accountability theories. *Jackson*, 372 Ill. App. 3d at 609. At the State's request, the trial court submitted a special interrogatory to the jury as to whether the State had proven beyond a reasonable doubt that the defendant had personally discharged a firearm that proximately caused the death of the victim. *Jackson*, 372 Ill. App. 3d at 609. The purpose of the special interrogatory was to comply with the dictates of *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), and enable the State to obtain a sentence enhancement under section 5-8-1(a)(1)(d)(iii). *Jackson*, 372 Ill. App. 3d at 610. The jury convicted defendant of first degree murder but answered the special interrogatory in the negative. *Jackson*, 372 Ill. App. 3d at 610.

¶ 27 On appeal, the defendant sought to use the jury's finding on the special interrogatory to challenge the guilty verdict on first degree murder. *Jackson*, 372 Ill. App. 3d at 610. In challenging the sufficiency of the evidence, defendant argued the court had to disregard all of the evidence that the defendant was the shooter, and determine whether there was sufficient evidence to sustain the conviction solely on an accountability theory. *Jackson*, 372 Ill. App. 3d at 610.

¶ 28 The court rejected defendant's argument and refused "to consider the answer to the 'special interrogatory' beyond the purpose for which it was asked—whether there

could be a sentence enhancement." *Jackson*, 372 Ill. App. 3d at 612. In doing so, the court found that there was no statutory authority for special interrogatories in criminal cases. *Jackson*, 372 Ill. App. 3d at 610. The court noted that, in the civil context, the purpose of an interrogatory is to test the general verdict against the jury's determination as to one or more specific issues of ultimate fact. *Jackson*, 372 Ill. App. 3d at 611. Under the civil rules, where alternative theories are brought against a defendant, a special interrogatory is not in proper form if it only addresses one of those theories because the answer to the special interrogatory would not necessarily be inconsistent with the general verdict. *Jackson*, 372 Ill. App. 3d at 611.

¶ 29 The court found that if the civil rules applied to the case before it, the special interrogatory on the sentencing enhancement was not in proper form because it only addressed one of the alleged alternative theories of liability. *Jackson*, 372 Ill. App. 3d at 611. Further, the court noted that the defendant was not entitled to a unanimous verdict on the theory of liability in order to sustain the murder conviction. *Jackson*, 372 Ill. App. 3d at 611. Instead, "[t]he jury need only be unanimous with respect to the ultimate question of defendant's guilt or innocence of the crime charged, and unanimity is not required concerning alternate ways in which the crime can be committed." *Jackson*, 372 Ill. App. 3d at 611.

¶ 30 In this case, as in *Jackson*, the jury was instructed to first determine whether defendant was guilty of first degree murder as either a principal or as one accountable for the actions of another. In order to convict defendant on the charge, the jury was only required to unanimously agree as to defendant's guilt or innocence of first degree murder,

and there was no requirement that the jury agree on the theory of liability. The jury did precisely this, and there is no way to determine the legal basis for the verdict, as the jury entered a general verdict finding defendant guilty of first degree murder. Due to the form of the special interrogatory given in this case, it cannot be said that the jury's negative finding was inconsistent with the general verdict. Therefore, this court should not have interpreted the jury's verdict with regard to the sentence enhancement as anything more than whether defendant was eligible for the sentence enhancement under section 5-8-1(a)(1)(d)(iii). See *Jackson,* 372 Ill. App. 3d at 612. See also *People v. Reed*, 396 Ill. App. 3d 636, 645-46 (2009).

¶ 31 While this court's prior order discusses the theory of liability and the strength of the evidence, nothing in this court's prior order specifically restricted the State's ability to retry defendant under a principal liability theory, or to present evidence supporting only such a theory. Therefore, the law of the case doctrine is not applicable to the issues currently before this court on appeal.

¶ 32 Direct Estoppel and Issue Preclusion

¶ 33 Defendant also contends that the State is barred from presenting any evidence at his retrial that he acted as the principal in Gosa's death. Only on appeal has defendant, for the first time, identified the legal theory upon which he relies to support this contention. In support of his argument, defendant relies primarily on the cases of *Ashe* and *Wharton.* Defendant asserts that these cases readily support his claim that direct estoppel, or issue preclusion, bar the State from retrying defendant on a principal liability theory or from presenting any evidence suggesting defendant acted as a principal in the murder of Gosa.

¶ 34 In *Ashe v. Swenson*, 397 U.S. 436, 437 (1970), three or four masked men broke into a private home and robbed six men while they were playing poker. The defendant was charged with seven separate offenses related to the one incident, including armed robbery of each of the six poker players. *Ashe*, 397 U.S. at 438. At the first trial, the State proceeded on just one of the robbery charges against a single victim and the jury acquitted the defendant based on insufficient evidence. *Ashe*, 397 U.S. at 438-39. The State then tried the defendant for robbing a second victim, this time shoring up deficiencies in its identification evidence and obtaining a conviction. *Ashe*, 397 U.S. at 439-40.

¶ 35 The United States Supreme Court held that the second prosecution violated the fifth amendment's double jeopardy clause. *Ashe*, 397 U.S. at 446. In doing so, the Court found the concept of collateral estoppel was embodied within the fifth amendment's guarantee against double jeopardy. *Ashe*, 397 U.S. at 444-45. Collateral estoppel provides 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." *Ashe*, 397 U.S. at 443. The Court held that the doctrine, first developed in civil litigation, should be applied in criminal cases with "realism and rationality," as opposed to in a "hypertechnical and archaic approach." *Ashe*, 397 U.S. at 444. The Court held:

> "Where a previous judgment of acquittal was based upon a general verdict, as is usually the case, 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." (Internal quotation marks omitted.) *Ashe*, 397 U.S. at 444.

¶ 36 After a thorough examination of the record, the *Ashe* Court concluded that the first jury necessarily found that the defendant was not one of the robbers and, therefore, a second prosecution for a different victim was impermissible. *Ashe*, 397 U.S. at 445.

¶ 37 In *People v. Wharton*, 334 Ill. App. 3d 1066, 1076 (2002), a jury acquitted the defendant of home invasion and was deadlocked on the additional charges of armed robbery and residential burglary. The State sought to retry defendant on the armed robbery and residential burglary counts, and the defendant filed a motion to bar the prosecution based on collateral estoppel and double jeopardy. *Wharton*, 334 Ill. App. 3d at 1076. Applying the reasoning of *Ashe*, and examining the record in the prior proceeding, the majority opinion concluded that the jury in the first trial must have found that the defendant was not one of the intruders who entered the victims' apartment because it was the " 'single rationally conceivable issue in dispute.' " *Wharton*, 334 Ill. App. 3d at 1078-80 (quoting *Ashe*, 397 U.S. at 445). Based on the jury's acquittal of the defendant for home invasion, the court held that direct estoppel[5] barred the State from retrying the defendant for armed robbery and residential burglary. *Wharton*, 334 Ill. App. 3d at 1081.

[5]Application of the doctrine of issue preclusion within a single claim or cause of action is known as direct estoppel rather than collateral estoppel. *Wharton*, 334 Ill. App. 3d at 1078. Generally, the same rules apply to both collateral and direct estoppel. *Wharton*, 334 Ill. App. 3d at 1078.

¶ 38 In *Ashe* and *Wharton*, the reviewing court concluded that the State was barred from either trying or retrying certain *charges* against the defendant based on the jury's acquittal of the defendant on a different *charge*. In contrast, defendant is seeking to use direct estoppel, or issue preclusion, to prohibit the State from presenting a certain theory of liability and the use of any evidence supporting that theory based on the jury's negative finding with regard to a special interrogatory related to a sentencing enhancement statute. *Ashe* and *Wharton* are both factually and legally distinguishable. Defendant fails to recognize those distinctions or make any argument as to why the law in those cases should be applied to the case before this court.

¶ 39 Although maintaining that this case requires nothing more than the simple application of "well-settled law," defendant fails to cite any authority demonstrating that issue preclusion has been used in the criminal context in the way he posits. Issue preclusion is more commonly applied in the civil law, and its application in the criminal context is more limited. Defendant does not cite any precedent supporting his position that direct estoppel or issue preclusion under the double jeopardy clause can, or should be, used to bar the presentation of certain evidence or a theory of the case, as opposed to barring the prosecution of charges. Similarly, defendant fails to explain how *Ashe* applies to a jury's "acquittal" on a sentencing enhancement verdict form. The State, as already noted, provided no response to defendant's direct estoppel or issue preclusion arguments, other than to assert that there is but one crime of murder, and that defendant's arguments constitute a misuse of sentencing enhancement findings.

¶ 40 Last year, in *Currier v. Virginia*, 585 U.S. ___, 138 S. Ct. 2144 (2018), the United States Supreme Court considered the question of whether the fifth amendment double jeopardy clause prevents the State from retrying an issue or introducing any evidence about an issue that was the subject of a prior criminal trial. The double jeopardy clause, applied to the States through the fourteenth amendment, states, "No person shall *** be subject for the same offense to be twice put in jeopardy of life or limb[.]" U.S. Const., amend. V. Although the defendant's conviction was upheld, the members of the Court divided evenly on the scope of the double jeopardy clause, with four justices answering this question in the negative, four answering in the positive, and one justice electing not to choose a side. In *Currier*, police recovered a safe full of guns which had been stolen from the victim's home. *Currier*, 585 U.S. at ___, 138 S. Ct. at 2148. The victim's nephew confessed to stealing the safe from the victim's home and named the defendant as an accomplice. *Currier*, 585 U.S. at ___, 138 S. Ct. at 2148. Also, a neighbor reported that she saw the defendant leaving the victim's home around the time of the crime. *Currier*, 585 U.S. at ___, 138 S. Ct. at 2148. The defendant was indicted for burglary, grand larceny, and unlawful possession of a firearm by a convicted felon. *Currier*, 585 U.S. at ___, 138 S. Ct. at 2148.

¶ 41 The defendant had prior burglary and larceny convictions at the time he allegedly stole the guns. Concerned that introduction of the defendant's prior burglary and larceny convictions to prove the felon-in-possession charge would prejudice the jury's consideration of the other charges for burglary and grand larceny, the State and defendant agreed to ask the court to try the burglary and larceny charges first, followed by a second

trial on the felon-in-possession charge. *Currier*, 585 U.S. at ___, 138 S. Ct. at 2148. At the first trial, the State produced the victim's nephew and the neighbor, who each testified to defendant's involvement in the burglary and larceny. *Currier*, 585 U.S. at ___, 138 S. Ct. at 2148. The defendant was acquitted on the burglary and grand larceny charges. The defendant then sought to prevent the second trial from going forward, asserting a second trial would amount to double jeopardy. *Currier*, 585 U.S. at ___, 138 S. Ct. at 2148-49. The defendant also sought to prevent the State from relitigating at the second trial any issue resolved in his favor during the first trial, specifically seeking to exclude from admission any evidence about his participation in the burglary and larceny. *Currier*, 585 U.S. at ___, 138 S. Ct. at 2149. The trial court denied defendant's requests, and a jury convicted defendant on the felon-in-possession charge. *Currier*, 585 U.S. at ___, 138 S. Ct. at 2149. On appeal, the state court of appeals rejected the defendant's arguments, and the state supreme court affirmed. *Currier*, 585 U.S. at ___, 138 S. Ct. at 2149.

¶ 42 Justice Gorsuch, writing for a five-member majority, found the defendant's trial and conviction on the felon-in-possession charge did not violate the double jeopardy clause because defendant had consented to the severance. *Currier*, 585 U.S. at ___, 138 S. Ct. at 2149-52. The Court went on to address the defendant's contention that the trial court should have excluded evidence suggesting defendant possessed the guns while in the victim's home, leaving the prosecution to prove only that the defendant possessed the guns at some later point. *Currier*, 585 U.S. at ___, 138 S. Ct. at 2152. The defendant requested that the Court import civil issue preclusion principles into the criminal law, and argued that issue preclusion principles within the double jeopardy clause should do more

than bar a retrial for the same offense, or crimes tantamount to the same offense as under *Ashe*. Defendant argued that the doctrine of issue preclusion in the context of the criminal law should prevent the parties from retrying any issue or introducing any evidence about a previously tried issue. *Currier*, 585 U.S. at ___, 138 S. Ct. at 2152.

¶ 43 Justice Gorsuch, joined by three members of the Court, rejected the defendant's issue preclusion argument. *Currier*, 585 U.S. at ___, 138 S. Ct. at 2152. Justice Gorsuch found the defendant's interpretation inconsistent with the text of the double jeopardy clause, which prohibits the relitigation of offenses and not issues or evidence. Justice Gorsuch also concluded that the defendant's interpretation was inconsistent with precedent interpreting the double jeopardy clause rejecting the notion that the clause barred the relitigation of facts and issues. *Currier*, 585 U.S. at ___, 138 S. Ct. at 2152. Justice Gorsuch further questioned whether civil principles of issue preclusion were appropriate in the criminal context because the State cannot obtain appellate review of acquittals. *Currier*, 585 U.S. at ___, 138 S. Ct. at 2155. Issue preclusion usually does not bar the relitigation of issues when the party against whom preclusion is being sought could not have obtained review of the judgment in the initial action. *Currier*, 585 U.S. at ___, 138 S. Ct. at 2154-55.

¶ 44 Justice Ginsburg, joined by three members of the Court, dissented. Justice Ginsberg found the double jeopardy clause embodies both claim preclusion, which prevents the State from relitigating the same offense or criminal charge, and issue preclusion, which prevents the State from relitigating issues necessarily resolved in the defendant's favor in an earlier trial. *Currier*, 585 U.S. at ___, 138 S. Ct. at 2158. Justice

Ginsburg found that issue preclusion under *Ashe* and other federal precedent prevented "relitigation of a previously rejected theory of criminal liability without necessarily barring a successive trial." *Currier*, 585 U.S. at ___, 138 S. Ct. at 2162. The dissent believed that the prosecution in *Currier* should not be allowed to prove that the defendant participated in the break-in and theft at the victim's house but was limited to presenting evidence that the defendant possessed the firearms at some later point. *Currier*, 585 U.S. at ___, 138 S. Ct. at 2162.

¶ 45 As the *Currier* case demonstrates, the application of issue preclusion in a criminal case is not "well-settled law." Defendant asks this court to rely on the doctrine of issue preclusion to bar a particular theory of liability and/or evidence on retrial, as opposed to barring the relitigation of a charge or offense. Neither party has provided this court with any Illinois precedent accepting or rejecting the application of issue preclusion as suggested by defendant. Nor has either party presented any argument or analysis of why this court should adopt one position over the other.

¶ 46 The case before us includes the additional wrinkle that defendant is attempting to invoke issue preclusion based not upon a jury's acquittal on a charge, but upon the jury's negative finding on a special interrogatory related to a sentencing enhancement statute. Again, neither party has provided this court with any authority accepting or rejecting the proposition that direct estoppel or issue preclusion applies to a jury's finding on such a finding.

¶ 47 Beyond the initial question of whether issue preclusion even applies under the circumstances presented, the parties have failed to adequately apply the doctrine to the

facts of this case. The jury was instructed, consistent with the statute, that the State had to prove whether, during the commission of the offense, defendant was armed with a firearm and discharged the firearm that proximately killed the victim. See 730 ILCS 5/5-8-1(a)(1)(d)(iii) (West 2010). This instruction encompasses three elements: possession of a firearm, discharge of a firearm, and proximate cause. The parties have not clearly identified exactly what evidence the trial court's order excludes on retrial.

¶ 48 In *Ashe* and *Wharton*, after an exhaustive review of the record, the court isolated the defining element supporting the jury's acquittal and examined whether the jury's negative finding on this element prevented trial or retrial on the remaining charges. As those cases indicate, a proper estoppel or issue preclusion analysis requires the parties and the 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." (Internal quotation marks omitted.) *Ashe*, 397 U.S. at 444; *Wharton*, 334 Ill. App. 3d at 1078. While defendant acknowledges this requirement in his brief, he provides only a superficial analysis of issue preclusion, failing to perform an in-depth examination of the prior proceeding to identify " 'the single rationally conceivable issue in dispute.' " *Wharton*, 334 Ill. App. 3d at 1078-80 (quoting *Ashe*, 397 U.S. at 445). If the defendant believes that issue preclusion can truly apply in a criminal proceeding, then it is incumbent on the defendant to identify, with specificity, the issue in dispute, so that the trial court can identify the specific evidence to be barred during the retrial. Here, defendant has not identified such an issue, except to

generally claim that the finding by the jury relative to the enhancement statute somehow bars other evidence at trial. Unlike in *Ashe*, defendant has not endeavored to reach into the record and describe with particularity the basis for his argument.

¶ 49 Reviewing courts are " 'entitled to have issues clearly defined with pertinent authority cited and cohesive arguments presented.' " *Bartlow v. Costigan*, 2014 IL 115152, ¶ 52, *as modified on denial of reh'g* (May 27, 2014) (quoting *Velocity Investments, LLC v. Alston*, 397 Ill. App. 3d 296, 297 (2010)). Here, the parties have failed to adequately identify and analyze the issues presented in this case, providing this court with little or no analysis of the relevant law or how the law should be applied under the facts of the case. In the absence of proper analysis by the parties, we cannot fully consider the merits of the issues raised.

¶ 50 As a general rule, issue preclusion is subject to "guarded application" in criminal cases. *Bravo-Fernandez v. United States*, 580 U.S. ___, ___, 137 S. Ct. 352, 358 (2016). The defendant bears the burden of demonstrating "that the issue whose relitigation he seeks to foreclose was actually decided" by a prior jury's verdict of acquittal. (Internal quotation marks omitted.) *Bravo-Fernandez*, 580 U.S. at ___, 137 S. Ct. at 359; *Wharton*, 334 Ill. App. 3d at 1077-78. While this court expresses no opinion on the eventual outcome, it is evident that defendant has wholly failed to meet his burden of proving that one of the State's theories of liability, and any evidence supporting that theory, should be barred by direct estoppel or issue preclusion. Accordingly, the trial court's order limiting the State's theory of liability and precluding the State from presenting evidence that defendant acted as a principal is reversed and the cause is remanded. Although the State

has "successfully" contested the pretrial order, in the absence of a final determination on the merits by this court, defendant is not prevented from raising and relitigating the application of direct estoppel and issue preclusion as it relates to his case on remand. See *People v. Feagans*, 134 Ill. App. 3d 252, 257 (1985) (where a party successfully contests a pretrial order on appeal, on remand the trial court is not precluded from considering issues originally raised in the pretrial proceedings which were not finally determined by the appellate court on the merits).

¶ 51 Reversed and remanded.