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IN THE COURT OF CRIMINAL APPEALS FILED
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EX PARTE BRANDON JOSEPH ADAMS

**On Appeal from the Court of Appeals
Eleventh Judicial District, Eastland, Texas
Cause Number 11-17-00332-CR
42nd District Court of Taylor County, Texas
Honorable James Eidson, Judge Presiding
Trial Court Cause Number 26,815-A**

STATE'S PETITION FOR DISCRETIONARY REVIEW

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THE STATE REQUESTS ORAL ARGUMENT

EX PARTE BRANDON JOSEPH ADAMS

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Cause Number 11-17-00332-CR
42nd District Court of Taylor County, Texas
Honorable James Eidson, Judge Presiding
Trial Court Cause Number 26,815-A

STATE’S PETITION FOR DISCRTIONARY REVIEW

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

Comes now the State of Texas, by and through her Assistant Criminal District Attorney, Britt Lindsey, and submits this Petition for Discretionary Review pursuant to Tex. R. App. Proc. 68.

STATEMENT REGARDING ORAL ARGUMENT

An analysis of whether the collateral estoppel doctrine applies necessarily involves a thorough examination of the record. A thorough discussion of the facts of the case will be best accomplished in oral argument.

STATEMENT OF PROCEDURAL HISTORY

Appellant was indicted on June 2, 2016 on two charges of aggravated assault with a deadly weapon in cause numbers 26,815-A and 26,816-A, both alleged to have occurred on or about October 18, 2015. (CR: 18) Appellant was acquitted following a jury trial in cause number 26,816-A on September 19, 2017. (RR3: 289)

On November 3, 2017 Appellant filed a pretrial writ of habeas corpus, arguing the acquittal in 26,816-A barred the State from pursuing a conviction in 26,815-A. (CR1: 59-63) (RR2: 6) The trial court heard argument and denied the application at a hearing held on November 27, 2017. (RR2: 6) Appellant proceeded to trial in cause number 26,815-A, which ended in a mistrial on November 28, 2017. (CR1: 77-80) Appellant filed a notice of appeal to the Eleventh Court of Appeals on December 5, 2017. (CR1: 82)

The Eleventh Court of Appeals in Eastland, Texas issued an opinion reversing the trial court on June 14, 2018. *Ex parte Adams*, No. 11-17-00332-CR, 2018 Tex. App. LEXIS 4372 (Tex. App.—Eastland June 14, 2018). *See Opinion of the Court, appendix*. No motion for rehearing was filed.

STATEMENT OF THE CASE

In *York v. State*, 342 S.W.3d 528, 552 fn. 155 (Tex. Crim. App. 2011), Judge Keller anticipated the question as to whether “double-jeopardy protection—via *Ashe*’s ‘ultimate fact’ language—include[s] the application of collateral estoppel to defenses[.]” This case presents such a question.

Appellant was indicted on two charges of aggravated assault with a deadly weapon for allegedly stabbing Joe Jeremy Romero in cause number 26,815-A and Justin Paul Romero in cause number 26,816-A, both alleged to have occurred on the same date. Appellant proceeded to trial in cause number 26,816-A. Appellant’s jury charge contained an instruction on deadly force in defense of a third person pursuant to Tex. Penal Code Ann. § 9.33 (West 2017). Appellant was acquitted for the stabbing of Justin Romero.

Appellant then filed a pretrial writ of habeas corpus, arguing that the jury had found that he was acting in defense of a third person in his trial for the stabbing of Justin Romero and the State was collaterally estopped from re-litigating that issue. The trial court stated that the issue in the first trial was a legal justification for the stabbing of Justin Romero, and that issue had not been resolved as to the stabbing of Joe

Romero. (RR2: 6) The trial court accordingly denied the application. (RR2: 6) Appellant proceeded to trial in cause number 26,815-A for the stabbing of Joe Romero, which ended in a mistrial. (CR1: 77-80) Appellant then appealed the denial of his pretrial writ of habeas corpus. (CR1: 82)

The Eleventh Court of Appeals in Eastland, Texas issued an opinion reversing the trial court on June 14, 2018. *Ex parte Adams*, No. 11-17-00332-CR, 2018 Tex. App. LEXIS 4372 (Tex. App.—Eastland June 14, 2018). *See Opinion of the Court, appendix*. No motion for rehearing was filed.

GROUND FOR REVIEW

- 1. When a defendant is acquitted on a defense of a third person theory after stabbing a person engaged in a fight with a friend, does the collateral estoppel component of the Double Jeopardy Clause as articulated in *Ashe v. Swenson* and this Court's opinions bar his subsequent prosecution for stabbing another person who was not fighting?**

ARGUMENT AND AUTHORITIES

Factual Background

Brandon Joseph Adams (appellant) was indicted in cause number 26,815-A for aggravated assault with a deadly weapon against Joe Jeremy Romero. (CR1: 18) Appellant was also indicted in cause number

26,816-A for an aggravated assault with a deadly weapon against Justin Paul Romero. (DX: 1) Both offenses were alleged to have occurred on or about October 18, 2015. (CR1: 18) (DX: 1)

A jury trial commenced in cause number 26,816-A on September 18, 2017, which ended in appellant's acquittal. (DX: 1, 2, 3) Appellant filed a petition for writ of habeas corpus in the trial court in cause number 26,815-A, alleging that the State was collaterally estopped from pursuing that charge by the Double Jeopardy Clause of the U.S. Constitution due to the acquittal in cause number 26,816-A. (CR1: 59-63) A hearing was set for November 27, 2017. (CR1: 64)

September 18, 2017 trial in cause number 26,816-A

At the November 27 hearing, appellant entered a transcript of the September 18 trial into evidence as defendant's exhibit 1. (DX: 1) (RR3: 1) At that trial, witness Alicia Graves testified that she used to date Joe Romero (a/k/a J.J.), who was the brother of Justin Romero. (RR3: 88) Graves testified that on the early morning of October 18 there was an altercation at her house between an acquaintance named Luke Hisey and Justin Romero. (RR3: 93) Luke Hisey and Justin Romero exchanged words, then began fighting and "rolling around on the ground." (RR3: 93-

94) Joe Romero and appellant were also present; Graves testified that Joe Romero told Appellant that “he needs to stay out of it” and at the same time told Justin Romero and Luke Hisey “[y]’all need to cut it out...it’s over.” (RR3: 93) She testified that she heard Joe Romero tell appellant he “needs to back off” and tell Luke Hisey and Justin Romero that it’s time to cut it out and “y’all are just going to wake up tomorrow and apologize.” (RR3: 95) She testified that “[t]he next thing I see, I just see [appellant] over [Justin Romero] and then I hear someone yelling that there’s a knife. And at this point [Justin Romero] comes out, he’s bleeding, and then I go to call 9-1-1.” (RR3: 95) She saw appellant stab Justin Romero several times in the back while he was on the ground fighting with Hisey and expressed surprise that Hisey did not get stabbed as well. (RR3: 97, 101) Joe Romero was also stabbed in the back or upper shoulder. (RR3: 96) She testified on cross-examination that appellant stabbed Joe Romero first, but that Joe Romero did not touch appellant. (RR3: 109)

Joe Romero also testified and stated that he was attempting to break up the fight between his brother and Luke Hisey. (RR3: 120-121) He said that he was telling the two of them “that’s enough” and attempting to pull his brother when he felt “hot liquid” on him, which was

from being stabbed. (RR3: 121) He said his brother and Hisey were rolling around up against the wall when he was stabbed and were still fighting. (RR3: 124) Justin Romero also testified that he and Hisey were fighting, and that Joe Romero broke them up and stated “that’s enough.” (RR3: 181-182)

Luke Hisey testified that he was attacked by Justin Romero and knocked unconscious. (RR3: 222) Appellant testified that Justin Romero and Luke Hisey were on the ground, that Joe Romero was preventing him from walking to them, and that he was trying to break up the fight when Joe Romero hit him. (RR3: 238-239) Appellant said “Luke was just laying there getting his head turned. And about the time I got to him, like I said, Joe had hit me, and I kind of stepped back, and I started to panic. So I reached for my knife and then I seen Justin come at me, and I just started swinging, but I guess I hit Joe. I don't know how close he was.” (RR3: 239) He said that he was “trying to protect myself and Luke...Luke was just down, and I didn’t – these guys were both coming at me, and I just felt overwhelmed. I mean, he wouldn’t stop pummeling Luke, so I was afraid they wouldn’t be able to stop pummeling me either.” (RR3:

242) Appellant admitted that he stabbed both Joe Romero and Justin Romero. (RR3: 241-242)

A jury charge was prepared that contained an instruction on deadly force in defense of another person: “You have heard evidence that, when the defendant stabbed Justin Paul Romero, he believed his use of deadly force was necessary to defend Luke Hisey from what the defendant believed was Justin Paul Romero’s use or attempted use of unlawful deadly force against Luke Hisey.” (DX: 1) (RR3: 280) The application portions of the charge also discussed appellant’s use or deadly force to protect Luke Hisey from Justin Romero. (DX: 7) (RR3: 282-283, 285-286) After deliberation, the jury found appellant not guilty. (RR3: 272)

Appellant subsequently filed an application for a writ of habeas corpus, arguing that collateral estoppel and the Double Jeopardy Clause barred appellant from being tried for aggravated assault with a deadly weapon for the stabbing of Joe Romero in cause number 26,815-A, as the jury decided the issue of defense of another person in favor of appellant. (CR1: 59-63) A hearing was held on November 27, 2017; appellant argued that the “only issue in the [prior] charge was the issue of defense of another” and that the two assaults were so intertwined that 26,815-A

should be set aside. (RR2: 4-5) The State responded that “in the previous trial and in the Jury Charge that have now been received by the Court, the only question in here was whether or not Justin Paul Romero was threatening Luke Hisey, the third party, that [appellant] I believe to be defending.” (RR2: 5) The State further argued that while appellant had “already been tried for defense of a third party and acquitted on that, the State would afford this is a different victim....[w]e’ve got a different set of circumstances regarding this victim. He was not in a fight. There’s no defending a third party. There’s been no testimony.” (RR2: 6) The trial court agreed that the issue in the first trial was a legal justification for the stabbing of Justin Romero, and that issue had not been resolved as to the stabbing of Joe Romero. (RR2: 6) The trial court accordingly denied the application. (RR2: 6) Following the hearing, trial in cause number 26,815-A took place, which ended in a mistrial. (CR1: 77-80)

Analysis

Ordinarily, in reviewing a trial court's decision on a pretrial application for writ of habeas corpus, the court reviews the facts in the light most favorable to the trial court's ruling and, absent an abuse of discretion, upholds the ruling. *Ex parte Wheeler*, 203 S.W.3d 317, 324

(Tex. Crim. App. 2006). However, if the resolution of those ultimate questions turns on an application of legal standards, the court reviews the determination *de novo*. See *State v. Stevens*, 235 S.W.3d 736, 740 (Tex. Crim. App. 2007) (holding court of appeals erred in applying a deferential standard to trial court's ruling; *de novo* review of the trial court's decision to apply collateral estoppel was appropriate under the facts of that case).

The Fifth Amendment of the United States Constitution protects an accused from a second prosecution after an acquittal or after a conviction for the same offense and multiple punishments for the same offense; embodied within the Fifth Amendment's guarantee against double jeopardy is the related doctrine of collateral estoppel. *Ashe v. Swenson*, 397 U.S. 436, 443 (1970). Collateral estoppel applies to facts necessarily decided in the first proceeding. *York v. State*, 342 S.W.3d 528, 539 (Tex. Crim. App. 2011) (citing *Murphy*, 239 S.W.3d at 795). Collateral estoppel, as embodied in the Fifth Amendment's guarantee against double jeopardy, is a matter of constitutional fact that must be decided through an examination of the entire record. *Ashe v. Swenson*, 397 U.S. at 442-44. To apply the doctrine of 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.” *Watkins*, 73 S.W.3d at 268. Collateral estoppel bars relitigation of a discrete fact if that fact must necessarily have been decided in favor of the defendant in the first trial. *Watkins* at 268. As applied within a double-jeopardy framework, collateral estoppel would prohibit the relitigation of an ultimate issue of fact that has been determined by a valid and final judgment. *Ashe* 397 U.S. at 443. Once determined, that issue cannot again be litigated between the same parties in any future lawsuit. *Id.*

A court must determine (1) exactly what facts were necessarily decided in the first proceeding, and (2) whether those “necessarily decided” facts constitute essential elements of the offense in the second trial. *Murphy v. State*, 239 S.W.3d 791, 795 (Tex. Crim. App. 2007); *Ex parte Taylor*, 101 S.W.3d 434, 440 (Tex. Crim. App. 2002). “In each case, courts must review the entire trial record to determine—‘with realism and rationality’—precisely what fact or combination of facts the jury necessarily decided and which will then bar their relitigation in a second criminal trial.” *Taylor*, 101 S.W.3d at 441 (quoting *Ashe*, 397 U.S. at 444). The defendant must meet the burden of proving that the facts in issue

were necessarily decided in the prior proceeding. *Murphy*, 239 S.W.3d at 795; see also *Guajardo v. State*, 109 S.W.3d 456, 460 (Tex. Crim. App. 2003) (“[t]he burden is ‘on the defendant to demonstrate, by examination of the record of the first proceeding, that the [factual] issue he seeks to foreclose was actually decided in the first proceeding.’”) (quoting *Schiro v. Farley*, 510 U.S. 222, 232 (1994)).

Appellant relied on *Ashe v. Swenson*, 397 U.S. 436 (1970) for the proposition that the State is collaterally estopped by the Double Jeopardy Clause from trying him for the aggravated assault of Joe Romero. In *Ashe*, the defendant was charged with the robbery of six men in a poker game, and was tried and acquitted for the robbery of one of the six. *Id.* at 438-39. At issue was the defendant’s identity and whether he could be positively identified as one of the robbers. *Id.* Six weeks later the defendant was tried again, and again whether the witnesses could identify him as one of the robbers was at issue; however, this time he was convicted. *Id.* The U.S. Supreme Court held that the first jury had decided the issue of appellant’s identification against the State, and the State was barred from relitigating that same issue with a different victim. *Id.*

Ashe does not bar relitigation here, as the issue decided against the State in the first trial is not the same issue that will be presented to the jury in the second. In the first trial, the evidence showed that Luke Hisey and Justin Romero were engaged in a fight, and appellant sought and received an instruction on the use of deadly force in defense of another person. That instruction dealt solely with whether appellant reasonably believed that deadly force was necessary to protect Luke Hisey from the use or attempted use of unlawful deadly force by Justin Romero. (DX: 2) (RR3: 280-282) That issue was decided against the State. However, the issue of appellant's identity was not disputed at that trial; appellant freely admitted that he stabbed both Justin Romero and Joe Romero. Whether appellant was justified in the use of deadly force against Justin Romero in defense of Luke Hisey will not be at issue in the second trial; rather, the issue for the jury to decide will be the separate question of whether appellant was justified in the use of deadly force against Joe Romero, who was not fighting Hisey. The trial court recognized this in ruling: "I agree. I think the issue in the first trial was a legal justification for the stabbing of Justin Romero. And in this trial with Joe Romero being the victim, that issue has not been resolved." (RR2: 6) Because that

question was not before the jury in the first trial it is not collaterally estopped, and appellant does not face double jeopardy by being tried for the stabbing of Joe Romero.

Respectfully, the opinion of the Eastland Court of Appeals misidentifies the “ultimate fact” that was necessarily decided by the jury in the first trial. The Eastland Court states that “the jury found that there was at least a reasonable doubt that Adams acted in defense of Hisey during the altercation that involved both Justin and Joe.” *Court’s opinion at 6*. That is not what the jury was asked to decide, and it is not what the jury found. The jury was asked whether appellant reasonably believed using deadly force against Justin Romero was immediately necessary to protect Hisey. Likewise, the Eastland Court’s statement that in the second trial that “the ultimate issue would again be whether Adams was justified in using deadly force to protect Hisey” ignores that a jury could find that appellant’s belief in the necessity of deadly force was reasonable as to the stabbing of Justin but unreasonable as to the stabbing of Joe. The Eastland Court notes at several points in its opinion that a jury could not reach a verdict after being charged on the question of whether deadly force was justified in the stabbing of Joe, but that has

no place in evaluating the trial court's ruling on appellant's writ; the mistrial did not occur until after the trial court ruled. *See opinion at 5, fn. 12; 6.*

The Eastland Court further errs in comparing the two defensive questions to the single question of the defendant's state of mind in *Ex parte Watkins*, 73 S.W.3d 264 (Tex. Crim. App. 2002). In *Watkins*, the Court found that the question as to whether the defendant acted in "sudden passion" in the attempted murder of his wife's lover had already been decided adversely to the State in the prior trial for the murder of his wife. *Id.* at 265-66. This is because the defendant's state of mind is singular and unchanging; it is what it is and cannot be reasonable as to one person and unreasonable as to the next. A defendant claiming that he stabbed two different people to protect a third may be reasonable in his belief that deadly force is justified in one stabbing and unreasonable in his belief that the second is justified.

The Eastland Court's confusion of what constitutes an ultimate fact under *Ashe*, *Murphy* and *York* confounds this Court's statements of what collateral estoppel requires and should be reviewed. The number of lower court cases interpreting this court's collateral estoppel holding is

relatively small, and a wrong ruling in the area has a disproportionately large impact.

Conclusion

The Eastland Court's error is in treating the question of whether appellant was legally justified in stabbing two differently situated people the same as the question of the assailant's identity in *Ashe*. In *Ashe*, the question of whether the defendant was the same person that robbed the victims was precisely the same issue in both trials. In the instant case, appellant claimed defense of a third person after he stabbed two different people; one was engaged in a fistfight with his friend according to all witnesses present, and one was described as a bystander by at least some witnesses. No witness testified that they saw Joe Romero strike Luke Hisey, and to treat the two stabbings as one and the same is simply wrong.

PRAYER FOR RELIEF

The State respectfully requests that this Court grant review, and further grant oral argument. The State further prays that this Court reverse the judgment of the Eleventh Court of Appeals regarding Appellant's sole issue and remand to the trial court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, Britt Lindsey, affirm that the above petition is in compliance with the Rules of Appellate Procedure. The font size in the petition is 14 point, except for footnotes which are 12 point. The word count is 2992, excluding the exceptions listed in Rule 9.4. The word count of the entire petition is 3971.

/s/ Britt Lindsey
Britt Lindsey

CERTIFICATE OF SERVICE

I certify that on this 31st day of July, 2018, a true copy of the foregoing Petition for Discretionary Review was served on the parties according to the requirements of law by email or efile to:

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APPENDIX: OPINION OF THE 11TH COURT OF APPEALS

Opinion filed June 14, 2018



In The
Eleventh Court of Appeals

No. 11-17-00332-CR

EX PARTE BRANDON JOSEPH ADAMS

On Appeal from the 42nd District Court

Taylor County, Texas

Trial Court Cause No. 26,815-A

OPINION

This is an appeal from the denial of a pretrial application for writ of habeas corpus. Brandon Joseph Adams stands charged by indictment with the offense of aggravated assault of Joe Jeremy Romero. Adams filed an application for writ of habeas corpus in this case based upon a jury's acquittal of Adams for the offense of aggravated assault in a companion case in which Joe's brother, Justin Paul Romero, was the complainant. Adams sought to have the pending indictment dismissed on double jeopardy grounds based on the doctrine of collateral estoppel. The trial court held a hearing and denied the relief requested by Adams. We reverse and remand with instructions to grant habeas relief.

In a single issue on appeal, Adams contends that the trial court erred when it denied habeas relief. Adams argues that the doctrine of collateral estoppel, as embodied in the Double Jeopardy Clause of the Fifth Amendment, bars prosecution in this cause. *See* U.S. CONST. amend V. The Supreme Court determined years ago that the doctrine of collateral estoppel is embodied within the Fifth Amendment’s guarantee against double jeopardy. *Ashe v. Swenson*, 397 U.S. 436, 445 (1970). When “an issue of ultimate fact” has been determined by a valid and final judgment, collateral estoppel prohibits that issue from again being litigated between the same parties in any future lawsuit. *Id.* at 443. At a minimum, collateral estoppel as applied in a criminal case “protects a man who has been acquitted from having to ‘run the gantlet’ a second time.” *Id.* at 446 (quoting *Green v. United States*, 355 U.S. 184, 190 (1957)). Collateral estoppel has been held to require not only that the precise fact litigated in the first prosecution have arisen in the same transaction, occurrence, situation, or criminal episode that gives rise to the second prosecution, but also that the fact previously litigated be an essential element of the subsequent offense. *See* *Murphy v. State*, 239 S.W.3d 791, 795 (Tex. Crim. App. 2007); *Ex parte Taylor*, 101 S.W.3d 434, 441 (Tex. Crim. App. 2002); *see also* *York v. State*, 342 S.W.3d 528, 545–46, 551–52 (Tex. Crim. App. 2011).

In a habeas corpus appeal, we generally review the facts in the light most favorable to the trial court’s ruling and uphold that ruling absent an abuse of discretion. *See Ex parte Martin*, 6 S.W.3d 524, 526 (Tex. Crim. App. 1999) (citing *Guzman v. State*, 955 S.W.2d 85 (Tex. Crim. App. 1997)). We afford almost total deference to a trial court’s determination of historical facts and also to mixed questions of law and fact when the resolution of those questions turn on an evaluation of credibility and demeanor. *Guzman*, 955 S.W.2d at 89. However, if the trial court was “not in an appreciably better position” than this court to make such a determination, a de novo review is appropriate. *Martin*, 6 S.W.3d at 526

(quoting *Guzman*, 955 S.W.2d at 87). Thus, we review de novo any mixed questions of law and fact that do not depend upon credibility and demeanor. *Martin*, 6 S.W.3d at 526; *Guzman*, 955 S.W.2d at 89.

To apply the doctrine of 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). Collateral estoppel bars relitigation of a discrete fact if that fact must necessarily have been decided in favor of the defendant in the first trial. *Id.*; *Kent v. State*, No. 11-12-00308-CR, 2013 WL 6583969, at *1 (Tex. App.—Eastland Dec. 13, 2013, pet. dismissed, untimely filed) (mem. op., not designated for publication). In the case before us, we must review the entire trial record to determine precisely what fact or combination of facts the jury necessarily decided when it acquitted Adams and whether such fact or facts bar relitigation in a second trial. *See Taylor*, 101 S.W.3d at 441.

The reporter’s record from the September 2017 trial that ended in an acquittal was introduced as an exhibit during the hearing on Adams’s habeas application. The record from that trial reveals that various witnesses, including both Romero brothers, testified for the State and that Adams and the other person involved in the altercation, Luke Hisey, testified for the defense. The uncontroverted evidence revealed that Justin and Hisey exchanged words and then engaged in a physical fight with each other. The fight ended when Adams stabbed both Justin and Joe with a knife. Adams readily admitted that he stabbed both Justin and Joe with a knife, but he claimed that he did so to protect himself and Hisey. According to Adams, Hisey was lying on the ground, “out cold,” and “Justin was just on top of him, pummeling him.” Joe interfered with Adams’s attempt to break up the fight and told Adams to “[l]et them fight.” By all accounts, the entire incident did not last very long, and Joe and Justin were stabbed in quick succession.

The jury was charged on the offense of aggravated assault and on the defense of “Defense of Another Person.” *See* TEX. PENAL CODE ANN. § 9.33 (West 2011) (Defense of Third Person). There was no question that Adams stabbed Justin with a knife and that Justin suffered serious bodily injury as a result of being stabbed by Adams. The only issue upon which the jury could have acquitted Adams was on the defensive issue submitted to the jury, which reads in part:

The defendant is not required to prove that defense of another applies to this case. Rather, the state must prove, beyond a reasonable doubt, that defense of another does not apply to the defendant’s conduct.

....

If you have found the state has proved the offense beyond a reasonable doubt, you must next decide whether the state has proved that the defendant’s conduct was not justified by defense of another.

To decide the issue of defense of another, you must determine whether the state has proved, beyond a reasonable doubt, one of the following elements. The elements are that –

1. the defendant did not believe his conduct was immediately necessary to protect Luke Hisey against Justin Paul Romero’s use or attempted use of unlawful deadly force; or
2. the defendant’s belief was not reasonable; or
3. under the circumstances as the defendant reasonably believed them to be, the defendant would not have been permitted to use force or deadly force to protect himself against the unlawful force or unlawful deadly force with which the defendant reasonably believed Justin Paul Romero was threatening Luke Hisey.

You must all agree that the state has proved [one of the above three elements]. You need not agree on which of these elements the state has proved.

If you find that the state has failed to prove, beyond a reasonable doubt, either element 1, 2 or 3 listed above, you must find the defendant “not guilty” of the offense of aggravated assault as alleged in . . . the indictment.

The jury reached a verdict of “not guilty.”

In a jury trial for the aggravated assault of Joe, the ultimate issue would again be whether Adams was justified in using deadly force to protect Hisey.¹ Thus, we are faced squarely with a question posed by Judge Keller in *York v. State*, 342 S.W.3d 528 (Tex. Crim. App. 2011). In a footnote, Judge Keller asked: “Does the double-jeopardy protection—via *Ashe*’s ‘ultimate fact’ language—include the application of collateral estoppel to defenses (e.g. self-defense) and punishment-mitigation issues (e.g. sudden passion), and if not, should preclusive effect be given to jury findings on these types of issues on some other basis?” *York*, 342 S.W.3d at 552 n.155. We note that the Court of Criminal Appeals in *Watkins* concluded that collateral estoppel barred the State from relitigating the issue of “sudden passion” in a situation in which nothing in the record indicated that a rational jury could conclude that the defendant’s state of mind changed during the five minutes between the two shootings at issue. *Watkins*, 73 S.W.3d at 275. Similarly, we conclude that there is nothing in the record before us to indicate that a rational jury could conclude that Adams was acting in defense of Hisey when he stabbed Justin but not when he stabbed Joe. *See id.* The stabbings occurred almost simultaneously.

And, although *Ashe* involved the issue of identity instead of a defensive issue, we believe that the rationale of *Ashe* is applicable to the instant case. *Ashe* was tried and acquitted for the armed robbery of Donald Knight, who was one of six victims that were playing poker when three or four masked men, armed with weapons,

¹We note that, with the exception of the exclusion of Justin’s middle name, the exact language that we quoted above from the jury charge in Adams’s trial for the aggravated assault of Justin was included in the jury charge in a prior trial in this cause. Adams was tried in the present cause in November 2017 for the aggravated assault of Joe; that trial resulted in a mistrial, with eleven jurors voting “not guilty.”

robbed the victims. 397 U.S. at 437–38. In *Ashe*, the Supreme Court applied the doctrine of collateral estoppel and held that the jury’s acquittal of Ashe for the armed robbery of Knight barred the State from prosecuting Ashe for the armed robbery of one of the other victims because the only issue in the first trial was the identity of Ashe as being one of the robbers—an issue that the jury resolved against the State. *Ashe*, 397 U.S. at 439, 445–47. The Supreme Court stated:

Once a jury had determined upon conflicting testimony that there was at least a reasonable doubt that [Ashe] was one of the robbers, the State could not present the same or different identification evidence in a second prosecution for the robbery of Knight in the hope that a different jury might find that evidence more convincing. The situation is constitutionally no different here, even though the second trial related to another victim of the same robbery. For the name of the victim, in the circumstances of this case, had no bearing whatever upon the issue of whether the petitioner was one of the robbers.

Ashe, 397 U.S. at 446. Similar to *Ashe*, the ultimate issue of fact in the State’s prosecution of Adams was decided against the State in the first trial; the jury found that there was at least a reasonable doubt that Adams acted in defense of Hisey during the altercation that involved both Justin and Joe. Defense of a third person would again be an ultimate issue of fact in the State’s prosecution of Adams for stabbing Joe—as reflected by the previous trial that resulted in a mistrial. Therefore, we conclude that Adams should be protected from having to “run the gantlet”² again and that collateral estoppel bars the State from relitigating the issue of defense of a third person under the circumstances present in this case. Accordingly, we sustain Adams’s sole issue on appeal.

²*Ashe*, 397 U.S. at 446 (quoting *Green*, 355 U.S. at 190).

We reverse the order of the trial court and remand this matter to the trial court with instructions to enter an order granting the relief requested in Adams's application for writ of habeas corpus. *See* TEX. R. APP. P. 31.3.

MIKE WILLSON
JUSTICE

June 14, 2018

Publish. *See* TEX. R. APP. P. 47.2(b).

Panel consists of: Willson, J.,
Bailey, J., and Wright, S.C.J.³

³Jim R. Wright, Senior Chief Justice (Retired), Court of Appeals, 11th District of Texas at Eastland, sitting by assignment.