IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, Respondent on Review, v. DARRON DUANE DODGE, Defendant-Appellant, Petitioner on Review.	Clackamas County Circuit Court No. CR1301852 CA A174232 SC S069859

BRIEF ON THE MERITS OF RESPONDENT ON REVIEW, STATE OF OREGON

Review of the Decision of the Court of Appeals
on Appeal from a Judgment
of the Circuit Court for Clackamas County
Honorable SUSIE L. NORBY, Judge

Opinion Filed: September 14, 2022
Author of Opinion: POWERS, J.
Before Judges: Ortega, P. J., and Powers, J., and Hellman, J.

Continued…

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INTRODUCTION

Defendant sexually assaulted a girl who lived in his home when she was 8 to 13 years old. The victim was a vulnerable individual who has difficulty remembering and testifying to the details of the numerous charged sexual assaults, which occurred over several years. This case was tried twice. At the first trial, the jury found defendant guilty on 6 counts and acquitted him on 40 counts. On appeal, defendant's convictions were reversed because of evidentiary error. At the second trial, the jury found him guilty on the same original 6 counts of conviction. The question is whether that retrial violated the constitutional prohibitions against successive prosecution for the same offense.

Defendant frames the issue as whether the state bears the burden for a successive-prosecution claim in this context—that is, whether the state must prove that the retrial is not for an offense of which the defendant had been acquitted. But that issue is not before this court procedurally or substantively. Procedurally, it is not before this court because defendant did not raise it in the Court of Appeals. Rather, as the Court of Appeals held, he raised a different double-jeopardy claim, one that was unpreserved and that he does not reassert in this court. Substantively, the burden issue is not before this court because this was the continuation of the original trial, not a successive prosecution. A

retrial after a defendant's successful appeal does not implicate the constitutional protections against successive prosecutions.

In all events, even if the retrial could have given rise to a successive-prosecution claim, the burden of proof for the claim should remain where it is, which is on the defense. That has long been the rule for double-jeopardy claims, and there is no reason for a different rule in this context.

QUESTIONS PRESENTED AND PROPOSED RULES OF LAW

First question: On review, defendant contends that retrial violated the constitutional jeopardy protections against successive prosecutions for the same offense. The Court of Appeals did not address that question because defendant did not raise it before that court. Is the question properly before this court?

First proposed rule: No, a question is properly before this court only if it was raised in the Court of Appeals. The Court of Appeals correctly concluded that defendant raised only an unpreserved claim that retrial violated the issue-preclusion-jeopardy protection. Consequently, defendant's sole claim on review is not properly before this court.

Second question: Do the state and federal constitutional jeopardy bans on successive prosecutions bar retrial of reversed convictions based on other verdicts in the same case?

Second proposed rule: No, successive-prosecution principles do not apply because a retrial involves continuing jeopardy of counts that previously resulted in a conviction. The termination of jeopardy on one count does not terminate jeopardy on other counts in the same case. Consequently, the fact of conviction or acquittal on one count does not preclude continuing the prosecution on the other counts and that is so even if they amount to the "same" offense.

Third question: If retrials implicate the successive-prosecution protections, does a defendant bear the burden of proving that the retrial is for an offense of which they were already acquitted?

Third proposed rule: Yes, a defendant bears the burden of proving a jeopardy claim. A defendant can meet that burden by filing a demurrer or seeking an election at the first trial. If the defendant does neither, the defendant may be unable to meet the burden of proof.

BACKGROUND

A. Defendant was convicted of several counts of child sex crimes but the Court of Appeals reversed and remanded for a new trial.

Defendant was convicted of sexually assaulting a young girl. This was a "resident child abuser" case—a case that involved repeated sexual assaults on a child by a perpetrator "who either lives with his victim or has continuous access to him or her." *People v. Jones*, 792 P2d 643, 645 (Cal 1990) (discussing "resident child molester" cases). "In such cases, the victim typically testifies to repeated acts of molestation occurring over a substantial period of time but, lacking any meaningful point of reference, is unable to furnish many specific details, dates, or distinguishing characteristics as to individual acts or assaults." *Id*. The cases normally reduce to a "'basic credibility issue'" whereby "'the victim testifies to a long series of molestations and the defendant denies that any wrongful touching occurred'" and the defense is "'general and designed to show that none of the incidents occurred, rather than providing an

individualized defense aimed at discrete alleged instances.'" *State v. Ashkins*, 357 Or 642, 661-62, 357 P3d 490 (2015).

In this case, the victim—who suffered from epilepsy and cerebral palsy and had learning disabilities and struggled with basic skills—was from Colombia and was adopted when she was four years old by defendant's brother and his wife. (5/16/15 Tr 109-13; 5/28/20 Tr 295). When the victim was eight, she moved out of her parents' home and went to live with her grandmother (defendant's mother), with whom defendant also lived. (5/16/15 Tr 111-12). Defendant, the victim, and defendant's mother lived together for the next several years. (5/16/15 Tr 113, 149-51).

The victim later disclosed that defendant had sexually assaulted her when they lived together, beginning when she was about 8 or 10 years old. (5/16/15 Tr 107-08, 159-62). In her interview with the police, the victim estimated that defendant sexually assaulted her 40 times. (TCF, State's Response to Jeopardy Motion, Attachment A, Interview Transcript, p 29).

A grand jury charged defendant with 46 counts of sexual assault, some of which were based on the same incidents. The indictment alleged 5 counts of second-degree rape (ORS 163.365), 10 counts of second-degree sodomy (ORS 163.395), 3 counts of second-degree unlawful sexual penetration (ORS 163.408), 18 counts of second-degree sexual abuse (ORS 163.425), and 10 counts of first-degree sexual abuse (ORS 163.427). (TCF, Indictment).

Each offense was alleged to have occurred "on or between November 20, 1999, to November 20, 2007," (*Id*.), which spanned the time from when the victim was eight years old until she turned 16. (5/16/15 Tr 94).

Although the indictment generally alleged the offenses in the language of the pertinent statute, the indictment for many counts provided additional specificity by identifying the body part touched. The ten sodomy counts alleged two different forms of sodomy: 5 counts alleged that defendant touched his mouth to the victim's vagina, and 5 counts alleged that he caused the victim's mouth to touch his penis. (TCF, Indictment). The 10 counts of first-degree sexual abuse alleged two different types of sexual touching: 5 counts for touching her genital area, and 5 counts for touching her breasts. (*Id*.). And the 18 second-degree sexual-abuse counts alleged four different forms of touchings, each of which corresponded to one of the forms of rape, sodomy, and unlawful sexual penetration—specifically, five counts of second-degree sexual abuse alleged that defendant had sexual intercourse with the victim, five counts alleged that he touched his mouth to the victim's vagina, five counts alleged that he caused the victim's mouth to touch his penis, and three counts alleged that he penetrated the victim's vagina with his finger. (*Id*.).

The offenses also involved distinctions based on the victim's age at the time of the offense. The 18 second-degree sexual-abuse charges were based on the same conduct as the 18 rape, sodomy, and sexual-penetration charges. The

latter charges required proof that the victim was under age 14. The second-degree sexual-abuse charges provided a basis for conviction if the jury found that the victim was 14 years of age or older at the time of the offense.

In summary, the indictment contained 10 different types of charges: five counts of second-degree rape (sexual intercourse); five counts of second-degree sexual abuse based on that same conduct (sexual intercourse); five counts of second-degree sodomy (mouth to vagina); five counts of second-degree sexual abuse based on that same conduct (mouth to vagina); five counts of second-degree sodomy (mouth to penis); five counts of second-degree sexual abuse based on that same conduct (mouth to penis); three counts of second-degree unlawful sexual penetration (finger penetrate vagina); three counts of second-degree sexual abuse based on that same conduct (finger penetrate vagina); five counts of first-degree sexual abuse (touching victim's genital area); and five counts of first-degree sexual abuse (touching breasts).

Despite the generalized nature of the pleading, defendant did not demur to the indictment. Defendant's first trial was in 2015. The victim testified about the offenses and the number of times they occurred—estimating that defendant sexually assaulted her 40 times over the years, including touching her breasts more than 10 times, touching her vagina more than five times, having sexual intercourse with her at least five times, engaging in sodomy multiple times, and digitally penetrating her multiple times. (5/16/15 Tr 117-149, 176-

208; 5/17/15 Tr 220-44). But she had difficulty remembering details of the offenses. (*Id*). She was traumatized, stressed, and confused during cross examination and was vague in some of her answers. (5/16/15 Tr 176-208; 5/17/15 Tr 220-44). Defendant questioned her about the generalized nature of her testimony and about the number of times. (*See e.g.*, 5/17/15 Tr 226-27).

Defendant did not ask for an election that would specify the factual basis for each count. The state therefore did not make an election. The prosecutor used a chart in closing argument to identify the bases for the counts and explained that the jury would have to determine whether each type of offense occurred and, if it occurred, how many times it occurred. (*See* 5/18/15 Tr 480, prosecutor explaining he would use chart; 5/18/15 Tr 508-13, 524-25, prosecutor's closing argument discussing charges).

The jury found defendant guilty of second-degree unlawful sexual penetration (count 31) and second-degree sexual abuse (count 34) based on a single incident in which he digitally penetrated the victim's vagina, and four counts of first-degree sexual abuse based on incidents in which he touched the victim's genital area (counts 37 and 38) and breasts (counts 42 and 43). The jury acquitted defendant on the remaining 40 counts. The trial court merged the second-degree sexual-abuse guilty verdict into the second-degree unlawful-sexual-penetration conviction.

Defendant appealed. The Court of Appeals reversed defendant's convictions and remanded for a new trial, holding that the trial court committed reversible error by admitting defendant's statements to the police. *State v. Dodge*, 297 Or App 30, 441 P3d 599, *rev den*, 365 Or 533 (2019).

B. On remand, defendant was retried on the counts that had resulted in convictions and was convicted again.

On remand, defendant moved to dismiss the case, arguing that retrial would violate the jeopardy ban on successive prosecutions for an offense following acquittal. (TCF, Defendant's Motion & Memorandum). He argued that, because of the generalized pleading and lack of an election, the factual bases for the acquittals and convictions were unclear and that there thus was a risk that he would be retried for offenses for which he had been acquitted. (*Id*.; 5/15/20 Tr 16, 47-49). The prosecutor stressed that the victim had difficulty at trial testifying to details but had testified with specificity to a limited number of incidents, which would have been the basis for the convictions. (TCF, State's Response 1-7; 5/15/20 Tr 17-20, 28-47). The trial court denied defendant's motion. (TCF, Order).

The jury found defendant guilty on the same six counts that the original jury found guilt, resulting in the same five convictions.

C. The Court of Appeals affirmed, holding that defendant had switched theories from the successive-prosecution claim that he raised below to an unpreserved issue-preclusion claim.

Defendant appealed but shifted his claim, arguing that retrial violated the issue-preclusion component of the constitutional jeopardy doctrine. Specifically, he argued that the jury could have grounded its verdict in the second trial on factual issues that the jury in the first trial may have rejected by rendering the acquittals. (ACF, App Br 15-23). In its answering brief, the state argued that defendant's claim was unreviewable because he failed to preserve his issue-preclusion claim; the state also emphasized the fact that defendant had abandoned his successive-prosecution claim. (ACF, Resp Br 5-6). Defendant did not file a reply brief, and the case was submitted without oral argument.

The Court of Appeals affirmed, holding that defendant's claim was not reviewable. *State v. Dodge*, 321 Or App 775 (2023) (Nonprecedential Memorandum Opinion). The court noted that defendant had not filed a reply brief "responding to the state's preservation argument." *Id*. at 776. The court held that defendant failed to preserve his issue-preclusion claim and had abandoned his successive-prosecution claim:

> After reviewing the record and the arguments advanced on appeal, we conclude that defendant raises a new theory for why the trial court should have dismissed the indictment on double jeopardy grounds.
>
> * * * Defendant has not pursued on appeal the double jeopardy theory that he raised before the trial court; rather, his

> argument has shifted to rely on principles of issue preclusion. Defendant failed to preserve the theory that he raised on appeal, and we do not understand him to pursue on appeal the theory that he raised before the trial court.

Id. at 776-77.

Defendant petitioned for review, raising his issue-preclusion claim and contending that he had, in fact, preserved that claim in the trial court. (ACF, Petition, 1-11). He argued that "under the issue preclusion doctrine that is part of the state and federal double jeopardy protections, a second prosecution was barred because it risked a re-trial on factual issues that the jury in the first trial already rejected." (*Id*. at 10).

This court granted review but reframed the issue as whether defendant was "entitled to dismissal of the indictment on former or double jeopardy grounds under the state or federal constitution, because the indictment's allegations were not specific enough to enable him to plead 'prior acquittal' as a bar to retrial and, therefore, a risk existed that he would be retried for conduct of which he already had been acquitted." (ACF, Order Granting Review). The court also asked the parties to address the issue of preservation. (*Id*.).

On review, defendant reverts to a claim that his retrial violated the successive-prosecution ban, contending that his retrial presented an impermissible risk of prosecution for an offense for which he was acquitted in the first trial. He has abandoned his issue-preclusion claim—which was not

preserved—and instead only indirectly relies on the fact that, unlike the successive-prosecution ban, the issue-preclusion-jeopardy doctrine can apply in the context of a single prosecution. (Pet Br 41, 46).

SUMMARY OF ARGUMENT

The issues are: (1) whether the Court of Appeals correctly concluded that defendant did not present a successive-prosecution claim in the Court of Appeals; (2) whether successive-prosecution principles could have precluded the retrial given that this was the continuation of a trial and not a subsequent prosecution; and (3) even if they could, whether defendant had the burden of proving a jeopardy violation. Defendant's claim fails at each turn.

As a threshold matter, defendant's sole claim, which is a successive-prosecution claim, is not properly before this court because defendant failed to present it to the Court of Appeals. It is well established that this court will not reverse a Court of Appeals' decision based on a claim not presented to that court. Yet the Court of Appeals correctly concluded that the only claim that defendant raised before it was an unpreserved issue-preclusion claim and that defendant had abandoned any successive-prosecution claim. As a result, defendant's successive-prosecution claim is not reviewable, and for that reason alone this court should affirm the Court of Appeals' decision.

Regardless, defendant's claim fails on the merits. Defendant's retrial did not implicate the issue-preclusion-jeopardy doctrine because that doctrine does

not apply when the jury acquits on some counts and convicts on others. The acquittal on some counts does not prevent relitigation of the same facts when retrying counts of conviction in a single case. Consequently, defendant has wisely abandoned his issue-preclusion claim, which was not preserved.

Successive-prosecution principles were not implicated either. Defendant contends that the factual basis for the offenses was unclear, and it was conceivable that acquittals and retried convictions were for the same offense. Nothing shows that the acquittals and retrial convictions were for the same offense. But even if they were, that did not implicate successive-prosecution principles because this was the continuation of a trial, not a successive prosecution. The state can prosecute the same offense in separate counts. And the termination of jeopardy on one count does not affect the continuing jeopardy on other counts in the same case, and thus the acquittals here could not have impacted the counts of conviction. Accordingly, defendant's retrial could not have violated the successive-prosecution ban.

Because this was not a successive prosecution, this case does not present the issue that defendant raises about which party bears the burden of proof as to the successive-prosecution ban. Nor does it present an issue about the sufficiency of the indictment. In his first trial, defendant did not demur to the indictment or seek an election to establish the factual basis for each count. Had he done so, perhaps the prosecution would have been limited at a retrial to the

same factual basis that was established at the first trial. But that is not because of successive-prosecution principles but rather because of other principles. Regardless, the only issue here is whether the retrial violated successive-prosecution principles, and the answer is that it did not.

Finally, even if the retrial of reversed convictions implicated the successive-prosecution ban, the burden of proof would be on the defense. A defendant generally bears the burden of proving a jeopardy claim, and there is no reason for a different rule in this context. Before or at his first trial, defendant could have sought and obtained greater specificity as to the factual basis for the charges on which he ultimately was acquitted, but he failed to do so. Defendant therefore failed to prove that he was retried for the same offenses for which he had been acquitted.

ARGUMENT

A. Constitutional jeopardy protections implicate two separate doctrines, successive prosecutions and issue preclusion.

Defendant relies on the constitutional jeopardy provisions in the state and federal constitutions. Both "provide, in somewhat different terms, that a defendant in a criminal case has a right not to be put in jeopardy twice for the same offense." *State v. Cole*, 286 Or 411, 419, 595 P2d 466 (1979); *see* Or Const, Art I, § 12 ("[n]o person shall be put in jeopardy twice for the same offence"); US Const, Amend V (no person "shall * * * be subject for the same offence to be twice put in jeopardy of life or limb").

Defendant argues that the result is the same under both constitutions. Further, this court often relies on case law interpreting the federal constitutional Double Jeopardy Clause in interpreting its state constitutional counterpart, *State v. Moore*, 361 Or 205, 213, 390 P3d 1010 (2017), the federal constitutional case law is much more developed on these issues than the state constitutional case law, and there is no indication that the analysis is different. As a result, the state draws heavily from case law involving the federal jeopardy protection.

At various points in this case, defendant has relied on the successive-prosecution ban, and the issue-preclusion-jeopardy doctrine. The state begins with an overview of those constitutional rules.[1]

1. The protection against successive prosecutions is implicated only once jeopardy has both attached and terminated.

The state and the federal constitutional jeopardy provisions prohibit a successive prosecution for the same offense following conviction or acquittal. *State v. Brown*, 262 Or 442, 457-58, 497 P2d 1191 (1972); *Brown v. Ohio*, 432 US 161, 165, 97 S Ct 2221, 53 L Ed 2d 187 (1977). The state constitutional jeopardy protection takes a broad view of the "offense," generally prohibiting a

[1] This case does not involve the Fifth Amendment's double jeopardy protection against multiple punishments for the same offense. *See Missouri v. Hunter*, 459 US 359, 103 S Ct 673, 74 L Ed 2d 535 (1983) (discussing rule). It is an open question whether the Article I, section 12, former jeopardy protection includes an analogous rule. *See, e.g.*, *State v. Brown*, 262 Or 442, 459, 497 P2d 1191 (1972); *State v. Lhasawa*, 334 Or 543, 548, 548 n 6, 55 P3d 477 (2002).

successive prosecution for offenses arising out of the same criminal episode and thus acting as a rule of compulsory joinder. *Brown*, 262 Or at 457-58; *State v. Boyd*, 271 Or 558, 565-66, 533 P2d 795 (1975). In contrast, offenses are not the "same" under the federal constitution unless the offenses have identical elements or the elements of one are subsumed by the elements of the other. *United States v. Dixon*, 509 US 688, 696-711, 113 S Ct 2849, 125 L Ed 2d 556 (1993). The federal Double Jeopardy Clause thus "forbids successive prosecution" for the same offense and "for a greater [or] lesser included offense." *Brown*, 432 US at 169.[2]

Under both constitutions, the essential ingredients for a successive-prosecution claim are: (1) the attachment of jeopardy; (2) the termination of the original jeopardy; and (3) a successive prosecution for the "same offense." Notably, as explained below, when a conviction is reversed on appeal, a retrial is not a successive prosecution but instead a continuation of the original trial.

2. The issue-preclusion-jeopardy doctrine occasionally bars relitigation of an issue that was necessarily decided after a jury acquitted the defendant of some crimes.

The federal Double Jeopardy Clause has a separate issue-preclusion component. *Ashe v. Swenson*, 397 US 436, 90 S Ct 1189, 25 L Ed 2d 469

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[2] Defendant interchangeably uses the term "offenses," "conduct," and "factual occurrences" in characterizing the subject of acquittals. (*See e.g.*, Pet Br 1-5). But although a jury may render an acquittal on an "offense," a jury does not render an acquittal on "conduct" or "factual occurrences."

(1970). Issue preclusion means 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." *Id*. at 443. The critical issue is "whether a rational jury could have grounded its verdict [of acquittal] upon an issue other than that which the defendant seeks to foreclose from consideration." *Id*. at 444.

Ashe illustrates the rule. In *Ashe*, six poker players were robbed by a group of masked men. The defendant was charged with and acquitted of robbing one of the players and then subsequently tried for and convicted of robbing another one of the players; the second trial had "substantially stronger" testimony from "witnesses [who] were for the most part the same." 397 US at 438-40. The Court held that the second prosecution was constitutionally barred because a review of the record from the first trial revealed that "[t]he single rationally conceivable issue in dispute before the jury was whether the [defendant] had been one of the robbers" and that "the jury by its verdict found that he had not." *Id*. at 445. After the first "jury determined by its verdict that the [defendant] was not one of the robbers, the state could [not] constitutionally hale him before a new jury to litigate that issue again." *Id*. at 446.

But *Ashe* is a "demanding" test as it "forbids a second trial only if to secure a conviction the prosecution must prevail on an issue the jury necessarily resolved in the defendant's favor in the first trial." *Currier v. Virginia*, ___ US

___, 138 S Ct 2144, 2150, 201 L Ed 2d 650 (2018). It is well established that a defendant has the burden "to demonstrate that the issue whose relitigation he seeks to foreclose was actually decided in the first proceeding." *Dowling v. United States*, 493 US 342, 350, 110 S Ct 668, 107 L Ed 2d 708 (1990). That is a "factual predicate for the application of the doctrine." *Schiro v. Farley*, 510 US 222, 232, 114 S Ct 783, 127 L Ed 47 (1994).

It is unclear whether the state constitutional former jeopardy protection also incorporates issue-preclusion principles but, to the extent it does, the rule is "essentially [] the same." *See State v. Mozorosky*, 277 Or 493, 497-98, 561 P2d 588 (1977) (applying *Ashe* under federal constitution and noting that it was an open question whether issue preclusion was component of the state constitutional protection); *State v. Guyton*, 286 Or 815, 817-19, 596 P2d 569 (1979) (applying *Ashe* and *Mozorosky* without delineating constitutional source); *State v. Rogers*, 313 Or 356, 375, 836 P2d 1308 (1992) (stating rule of issue preclusion from *Ashe* "is essentially the same in Oregon" and then citing Oregon cases that were not constitutional decisions).

3. Acquittals do not have preclusive effect on counts of convictions, even if the convictions are remanded for retrial.

In the Court of Appeals, defendant's sole argument was that issue-preclusion principles barred his retrial because the record did not establish the factual basis for the offenses on which he had been acquitted and because "the

jury could have grounded its verdict in the second trial on factual issues that the jury in the first trial already rejected." (ACF, App Br 15-23). That claim is not before this court because defendant failed to preserve it in the trial court (as the Court of Appeals held) and because defendant has abandoned that claim on review. That claim also was flawed because a defendant has the burden of proving an issue-preclusion claim—that is, "to demonstrate that the issue whose relitigation he seeks to foreclose was actually decided in the first proceeding." *Dowling*, 493 US at 350. As defendant acknowledges, the ambiguity here would, by itself, mean that he could not meet that burden. (*See* Pet Br 48, containing defendant's acknowledgment that "[t]he verdict's ambiguity limit[ed] [his] ability to affirmatively preclude the state from relitigating certain facts in the issue-preclusion sense").

But it also bears emphasis that defendant's abandoned, unpreserved issue-preclusion claim was without merit because—as a matter of law—issue-preclusion principles do not apply within a single prosecution when the jury acquits on some counts and convicts on others.

It is true that, unlike the successive-prosecution ban, the issue-preclusion jeopardy rule can apply to charges within a single prosecution. In *Yeager v. United States*, 557 US 110, 129 S Ct 2360, 174 L Ed 2d 78 (2009), the Court held that acquittals can preclude retrials on counts on which the same jury could not reach a verdict—and thus resulted in a mistrial—when it was clear from the

acquittals that the jury necessarily resolved in the defendant's favor an ultimate fact that the government must prove in the retrial of the hung counts. *Yeager* "extended double jeopardy for the first time to apply internally—within a single indictment." Lissa Griffin, *Untangling Double Jeopardy in Mixed-Verdicts Cases*, 63 SMU L Rev 1033, 1061 (2010); *see also Ashe*, 397 US at 457 (Brennan J, concurring opinion) (explaining that the first and second trials in *Ashe* were based on separate charging instruments).[3]

But the same rule does not apply when a jury's mixed verdicts are acquittals and convictions. A jury's verdicts do not have to be consistent, and defendants are unable to establish that a jury necessarily decided an issue in their favor when the same jury returns irreconcilably inconsistent verdicts on the issue they seek to shield from reconsideration. *United States v. Powell*, 469 US 57, 105 S Ct 471, 83 L Ed 2d 461 (1984). Issue preclusion is "predicated on the assumption that the jury acted rationally and found certain facts in reaching its verdict." *Id*. at 68. When a jury returns irreconcilably inconsistent

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[3] The common-law issue-preclusion doctrine "does not apply to claims within the same case," *Hayes Oyster Co v. Dulcich*, 199 Or App 43, 51, 110 P3d 615, *rev den*, 339 Or 544 (2005), and hence "does not bar relitigation of an issue common to separate claims *when those claims are litigated as part of a single action or lawsuit*." *Westwood Construction Co v. Hallmark Inns*, 182 Or App 624, 631-32, 50 P3d 238, *rev den*, 335 Or 42 (2002) (emphasis original). The rule announced in *Yeager* is broader than the common law because it extended issue-preclusion principles to apply within the same case.

verdicts, the Court can glean only that "'either in the acquittal or the conviction the jury did not speak their real conclusions.'" *Id*. at 64. The acquittal does not establish that the jury was "'not convinced of the defendant's guilt'" because it is just as likely that "the jury, convinced of guilt, properly reached its conclusion on [one count], and then through mistake, compromise, or lenity, arrived at an inconsistent conclusion on the [related count]." *Id*. at 64-65.

Thus, if a jury returns inconsistent acquittals and convictions and the convictions are later vacated on appeal, the prosecution may retry the original counts of conviction without violating issue-preclusion-jeopardy principles. *Bravo-Fernandez v. United States*, 580 US 5, 137 S Ct 352, 196 L Ed 2d 242 (2016). Generally, double-jeopardy principles do not preclude retrial when a conviction is overturned on appeal because the original jeopardy continues through the retrial. *Id*. at 18. The reversal on appeal does not alter the rule that acquittals cannot demonstrate that the jury decided an issue of ultimate fact against the state, if those acquittals are returned at the same time as inconsistent convictions. *Id*. at 19-21. The reversal "does not erase or reconcile th[e] inconsistency" in those verdicts: "[i]t does not bear on 'the factual determinations actually and necessarily made by the jury,' nor does it 'serv[e] to turn the jury's otherwise inconsistent and irrational verdict into a consistent and rational verdict.'" *Id*. at 21. Hence, the same underlying problem with applying issue-preclusion principles is still present (*viz*., a defendant cannot

show that a jury who returned inconsistent acquittals and convictions necessarily found facts in the defendant's favor), and the retrial is permissible regardless of whether the guilty verdicts were inconsistent with the acquittals.

The rule from *Ashe* thus does not apply to acquittals and convictions rendered in a single trial. And that is true even when it is clear that the jury acquitted the defendant of the very same conduct on the counts of acquittal. *See Bravo-Fernandez*, 580 US at 8 ("the jury returned irreconcilably inconsistent verdicts of conviction and acquittal"). Therefore, issue-preclusion principles did not preclude the retrial in this case, and defendant wisely has not attempted to press his unpreserved issue-preclusion claim on review.[4]

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[4] Although defendant discusses this court's application of *Ashe* in *Guyton*, (Pet Br 45-46), that application appears to have been superseded in a few respects. First, *Guyton* applied *Ashe* to an acquittal and conviction rendered in a single trial. 286 Or at 817. But the court did not consider the issue raised here. And that case conceivably is distinguishable because the factfinder was a *judge* and because the analysis in *Powell* and *Bravo-Fernandez* is framed in terms of inconsistent *jury* verdicts. If that distinction is immaterial, then *Guyton*, which merely purported to apply *Ashe*, has been superseded by *Powell* and *Bravo-Fernandez*, which establish that *Ashe* does not apply when the same jury returns acquittals and convictions. Second, *Ashe* precluded relitigation of "an issue of ultimate fact," 397 US at 443, whereas *Guyton* precluded relitigation of an issue of basic fact, which appears to be an untenable application of *Ashe*. *See Dowling*, 493 US at 348-50 (refusing to extend *Ashe* in that manner); *Currier*, 138 S Ct at 2154 (plurality opinion) (discussing point); *State v. Glenn*, 9 A3d 161, 171 (NH 2010) (distinguishing evidentiary facts from ultimate facts that must be proven beyond a reasonable doubt).

B. Defendant abandoned his successive-prosecution claim in the Court of Appeals.

On review, defendant reverts to a claim that his retrial violated the successive-prosecution ban. He argues that he preserved that argument in the trial court. (Pet Br 68-74). The state agrees. But the problem is that he failed to raise that claim in the Court of Appeals. *See* ORAP 9.20(2) ("the questions before [this court] include all questions properly before the Court of Appeals"); *State v. Wyatt*, 331 Or 335, 344-47, 15 P3d 22 (2000) (this court may not reach issue that was not "properly before" the Court of Appeals); *Tarwater v. Cupp*, 304 Or 639, 644 n 5, 748 P2d 125 (1988) (petitioner in this court "cannot shift or change his position and argue or raise an issue that was not before the Court of Appeals"). The Court of Appeals correctly held that defendant presented only an issue-preclusion claim to that court and thus effectively abandoned the successive-prosecution claim that he had advanced in the trial court.

This court will not consider arguments that were not presented to the Court of Appeals. *State v. Link*, 367 Or 625, 638, 482 P3d 28 (2020). Hence, a party "cannot ask" this court "to reverse the Court of Appeals decision on a ground that the party did not raise in that court." *State v. Ghim*, 360 Or 425, 442-43, 381 P3d 789 (2016) (refusing to consider series of contentions that were not raised in the Court of Appeals); *Fountaincourt Homeowners' Association v. Fountaincourt Development, LLC*, 360 Or 341, 352, 380 P3d 916

(2016) (refusing to consider issue not raised in Court of Appeals); *State v. Burgess*, 352 Or 499, 508-09, 287 P3d 1093 (2012) (same). In other words, the party must have raised the claim in his opening brief in the Court of Appeals and presented argument on that issue. *See* ORAP 5.45(1) (requiring assignment of error); ORAP 5.45(6) (requiring argument); *Outdoor Media Dimensions Inc. v. State of Oregon*, 331 Or 634, 643-44, 643 n 5, 652-53, 20 P3d 180 (2001) (must present argument in argument section). And preservation principles are useful to determine whether the party raised a particular issue and whether the party did so with the sufficient specificity. *See, e.g.*, *Link*, 367 Or at 638-40 (using those principles).

Link illustrates the rule. In that case, the defendant preserved a state constitutional claim in the trial court, did not raise that claim in the Court of Appeals, and then attempted to revive the claim on review. *Id*. at 633-36. The Court of Appeals held that the defendant had abandoned the claim by not presenting that issue to it. *Id*. at 636. On review, this court agreed and refused to consider the issue. *Id*. at 636-42. This court drew on preservation principles and concluded that the defendant presented only a federal constitutional claim to the Court of Appeals, even though his brief had referenced the pertinent state constitutional provision, because the reference was part of a federal constitutional claim and "did not put the state or the Court of Appeals on notice that defendant was asserting a claim under the state constitution." *Id*. at 639-40.

This court also stressed that the state had flagged, in its answering brief in the Court of Appeals and at oral argument, that the defendant had abandoned the state constitutional issue and that the defendant had neither "file[d] a reply brief contesting that point" or "contest[ed] that point" at oral argument. *Id*. at 640.

In this case, the Court of Appeals correctly concluded that defendant did not present a successive-prosecution claim in that court. Defendant's opening brief raised only an issue-preclusion claim: defendant's question presented was whether "[t]he doctrine of issue preclusion" barred retrial, his summary of argument asserted that "the doctrine of issue preclusion prohibited [his] reprosecution," his standard-of-review section referenced only issue-preclusion principles, and the only argument in his argument section was an issue-preclusion claim. (ACF, App Br 3, 14-23). Moreover, defendant did not dispute the state's assertion in its answering brief that he was not raising a successive-prosecution claim—he did not file a reply or request oral argument. As a result, defendant abandoned any successive-prosecution claim that he had by failing to present that claim to the Court of Appeals.[5]

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[5] Notably, in his petition for review, defendant's claim was *not* that the Court of Appeals had wrongly concluded that he abandoned his successive-prosecution claim. He instead *sought review on his issue-preclusion claim*, contending that he had preserved that claim in the trial court, and that retrial was barred "under the issue preclusion doctrine that is part of the state and federal double jeopardy protections" "because it risked a re-trial on factual issues that the jury in the first trial already rejected." (ACF, Petition, 1-11).

Defendant remonstrates that his core argument "has always been that retrial was barred because it was unclear on what basis the jury had acquitted him," and that the successive-prosecution and issue-preclusion doctrines are close analogs. (Pet Br 74). To be sure, the doctrines stem from the same constitutional provisions. But that does not make them the same claim. They are different doctrines with different legal tests and rest on different precedents. And the issue-preclusion claim that defendant presented to the Court of Appeals was easily answered: the United States Supreme Court has squarely held that, as a matter of law, the issue-preclusion-jeopardy doctrine does not apply to acquittals and convictions returned in a single trial.

Defendant thus needed to actually raise a successive-prosecution claim in the Court of Appeals. But he failed to do so. Nor did he respond to the state's argument in the Court of Appeals that he had abandoned his successive-prosecution claim. Instead, he presented only an issue-preclusion claim, which was insufficient because that was a different issue. *See State v. KJB*, 362 Or 777, 789-93, 416 P3d 291 (2018) (illustrating that, regardless of whether general issue was raised, specificity often required and one argument does not preserve another); *State v. Amaya*, 336 Or 616, 629, 89 P3d 1163 (2004) (requiring preservation of "discrete legal theories"); *State v. Lotches*, 331 Or 455, 493, 17 P3d 1045 (2000) (objection on one ground does not

preserve another objection); *State v. Stevens*, 328 Or 116, 121-24, 970 P2d 215 (1998) (requiring specific arguments for preservation purposes).

In applying the preservation requirement, the court considers the purposes of the preservation rule. *Stevens*, 328 Or at 122. The same is true for the requirement that a party raise an issue to the Court of Appeals. That rule exists not only "to ensure that parties have fair opportunities to raise and respond to arguments at earlier stages of litigation" but also because it assists this court's resolution of legal issues because of the "consideration given to those issues by the Court of Appeals in its own opinions." *Link*, 367 Or at 638.

Review of defendant's successive-prosecution claim would undermine those purposes. Defendant failed to raise that claim in the Court of Appeals and stood silent when the state emphasized that he had abandoned his successive-prosecution claim. This court granted review in January and set the case for argument in May, leaving less than 7 weeks for each side to prepare its merits brief. Defendant filed an overlength brief of nearly 18,000 words, raising novel, complicated successive-prosecution claims for the first time on appeal. The state was deprived of the opportunity to litigate those matters in the Court of Appeals and is disadvantaged by having to do so now and under these circumstances. And this court does not have the benefit of a decision from the Court of Appeals on these matters, which is especially problematic given how complicated these issues are by nature. "Double jeopardy principles are often

difficult to apply, and this difficulty is magnified when, on appeal, the issues involve multi-count indictments that produce different results on different charges." *State v. Henning*, 681 NW 2d 871, 882 (Wi 2004) (footnote omitted).

A comparison of defendant's brief in the Court of Appeals and his opening brief in this court underscores how defendant is asking this court to reverse the Court of Appeals based on an issue that was not presented to that court. Defendant devotes a large portion of his brief to arguing that the state should bear the burden of proof for the successive-prosecution context even though he did not raise a successive-prosecution claim *at all* in the Court of Appeals, much less present any argument whatsoever about the burden. Indeed, the only portion of defendant's brief on review that resembles his Court of Appeals' brief are the narrow portions in which he indirectly relies on issue-preclusion principles. But he has abandoned his issue-preclusion claim.

This court has long held that the Court of Appeals commits error when it decides a case "on an issue" that was not "raised in [the] appellant's opening brief on appeal." *Ailes v. Portland Meadows, Inc*, 312 Or 376, 378, 823 P3d 956 (1991); *see e.g.*, *Evans v. Nooth*, 368 Or 159, 165-67, 487 P3d 42 (2021) (Court of Appeals erred by *sua sponte* raising and deciding case on issue not raised on appeal). The Court of Appeals would have committed error if it had granted relief on successive-prosecution grounds even though defendant had not presented a successive-prosecution claim to that court. Hence, that issue is not

before this court either. This court should affirm the Court of Appeals' decision because that court was correct in its assessment of what was before it.

Because defendant did not raise, much less properly develop, his successive-prosecution claim in the Court of Appeals, this court should not address that issue. And because defendant's successive-prosecution claim is his only claim on review, this court should end its analysis at that point and affirm the Court of Appeals' decision and the trial court's judgment.

C. The successive-prosecution ban did not apply because the retrial was not a successive prosecution.

In all events, defendant's claim fails on the merits because the retrial did not violate the successive-prosecution ban. This was a continued prosecution, not a successive one. Because the jeopardy for the retried counts—the counts of conviction—had not terminated, the state could retry them.

1. The state may retry convictions reversed on appeal because the second trial is a continuation of the original jeopardy.

"It has long been settled" that the successive-prosecution ban "does not prevent the government from retrying a defendant who succeeds in getting his first conviction set aside, through direct appeal or collateral attack, because of some error in the proceedings leading to conviction." *Lockhart v. Nelson*, 488 US 33, 38, 109 S Ct 285, 102 L Ed 2d 265 (1988). The second trial is a continuation of the original jeopardy, and that—as a matter of law—makes successive-prosecution principles inapplicable to the retrial.

The seminal case establishing that the Double Jeopardy Clause generally does not prohibit the retrial of a defendant who obtains reversal of a conviction on appeal is *United States v. Ball*, 163 US 662, 16 S Ct 1192, 41 L Ed 300 (1896). If "the first trial has ended in a conviction, the double jeopardy guarantee 'imposes no limitations whatever upon the power to *retry* a defendant who has succeeded in getting his first conviction set aside.'" *United States v. DiFrancesco*, 449 US 117, 131, 101 S Ct 426, 66 L Ed 2d 328 (1980) (emphasis original). The only exception is that double jeopardy principles prevent a defendant from being retried when a court overturns a conviction due to insufficient evidence. *Burks v. United States*, 437 US 1, 98 S Ct 2141, 57 L Ed 2d 1 (1978).

The concept of "continuing jeopardy" is implicit in that general rule. *Justices of Boston Mun Court v. Lydon*, 466 US 294, 308, 104 S Ct 1805, 80 L Ed 2d 311 (1984). *Ball* "effectively formulated a concept of continuing jeopardy that has application where criminal proceedings against an accused have not run their full course." *Price v. Georgia*, 398 US 323, 326, 90 S Ct 1757, 26 L Ed 2d 300 (1970). The defendant is in "continuing jeopardy" while the challenge plays out, and a retrial is considered as part of the same, ongoing jeopardy, not a successive prosecution for the same offense. *Id*. at 326-29.

Continuing jeopardy "reflects the reality that the 'criminal proceedings against the accused have not run their full course.'" *Bravo-Fernandez*, 580 US

at 18. Moreover, the rule allowing a retrial following appellate reversal "serves both society's and criminal defendants' interests in the fair administration of justice." *Id*. "It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction." *United States v. Tateo*, 377 US 463, 466, 84 S Ct 1587, 12 L Ed 2d 448 (1964). And such a rule would likely harm criminal defendants as well because "it is at least doubtful that appellate courts would be as zealous as they now are in protecting against the effects of improprieties at the trial or pretrial stage if they knew that reversal of a conviction would put the accused irrevocably beyond the reach of further prosecution." *Id*.[6]

The rule for Article I, section 12, is the same. In *State v. Verdune*, 290 Or 554, 560-61, 624 P2d 580 (1981), this court held that, under *United States v. Ball*, the Fifth Amendment's Double Jeopardy Clause did not preclude a retrial and that Article I, section 12, did not preclude a retrial for the same reasons.

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[6] The concept of limited waiver also has been invoked to justify the continuing-jeopardy principle. *See Lydon*, 466 US at 308; Mayers & Yarbrough, *Bis Vexari: New Trials and Successive Prosecutions*, 74 Harv L Rev 1, 5-6 (1960). Relatedly, requiring a retrial after a defendant has "'successfully invoked a statutory right of appeal to upset his first conviction is not an act of governmental oppression of the sort against which the Double Jeopardy Clause was intended to protect.'" *DiFrancesco*, 449 US at 131.

And in *State v. Boots*, 315 Or 572, 578, 848 P2d 76 (1993), this court characterized the state and federal constitutional rules as the same:

> It is well settled that, where a defendant appeals a conviction and error is found by the appellate court, retrial on the original charge for which the defendant was convicted does not violate the state or federal prohibition against double jeopardy. *See, e.g., Lockhart v. Nelson*, 488 US 33, 109 S Ct 285, 102 L Ed 2d 265 (1988) (the general prohibition against successive prosecutions found in the Double Jeopardy Clause of the Fifth Amendment to the Constitution of the United States does not prevent the government from retrying a defendant whose first conviction is set aside on the defendant's appeal, due to trial error); *State v. Verdine*, 290 Or 553, 560-61, 624 P2d 580 (1981) (for the same reasons that the Fifth Amendment does not bar a second trial, neither does Article I, section 12, of the Oregon Constitution). *See also* ORS 131.525(1)(a) (previous prosecution is not a bar to a subsequent prosecution where the defendant has appealed a judgment of conviction resulting from the former).

This court thus has adopted the *Ball* rule—which includes the implicit concept of continuing jeopardy—for purposes of Article I, section 12.[7]

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[7] In other contexts, this court has characterized jeopardy as being "annulled" when events occur and retrial is allowed, including when the case is dismissed because of a variance (*State v. Jones*, 240 Or 546, 547-48, 402 P2d 738 (1965)), dismissed because of a defective indictment (*State v. Wolfs*, 312 Or 646, 652-54, 826 P2d 623 (1992)), or ends in mistrial (*State v. Rathbun*, 287 Or 421, 432, 600 P2d 392 (1979)). In *Jones*, this court explained that "if jeopardy is properly annulled for any reason," "the proceedings stand upon the same footing as if the defendant had never been in jeopardy." 240 Or at 548. The United States Supreme Court has characterized continuing jeopardy in similar terms. *See North Carolina v. Pearce*, 395 US 711, 720, 89 S Ct 2072, 23 L Ed 2d 656 (1969) (for continuing-jeopardy purposes, reversed conviction has "been wholly nullified and the slate wiped clean"). The state believes that the phrase "continuing jeopardy" more clearly describes the underlying *reason* why retrials are allowed, particularly for multi-count cases that involve

Footnote continued…

In sum, the state may retry convictions that are reversed on appeal because the second trial is not a successive prosecution but instead the continuation of the original trial.

2. The successive-prosecution ban does not apply within the context of a single prosecution.

Defendant does not dispute the general rule that the state may retry convictions reversed on appeal. But he contends that here there was an impermissible risk that the retrial violated the successive-prosecution ban given his acquittal on other counts. The issue thus is whether the successive-prosecution ban applies internally within a single prosecution. The answer is that it does not because that is not a successive prosecution.

Defendant invokes the state and federal constitutional protections against *successive* prosecutions for the same offense. *Brown*, 432 US at 162-70; *Brown*, 262 Or at 457-58. But as a matter of logic, that requires *at least two* prosecutions—a *single* prosecution is not enough. Events that transpire within a single prosecution cannot place a criminal defendant in jeopardy more than one time because the "'criminal proceedings against [the] accused have not run their full course.'" *Lydon*, 466 US at 308. The retrial is the continuation of the

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jeopardy terminating at different points on different counts. Nevertheless, to the extent that the concept of annulment also applies in this context, it means the same thing as continuing jeopardy. The retrial is a continuation of the original proceedings, not a successive prosecution with a sequential jeopardy.

original jeopardy, not a new jeopardy. And that is so even though jeopardy may have terminated on other counts with an acquittal or conviction. The termination of jeopardy is count-specific—that is, "jeopardy may terminate on some counts even as it continues on others." *Smith v. Massachusetts*, 543 US 462, 469 n 3, 125 S Ct 1129, 160 L Ed 2d 914 (2005).

Ohio v. Johnson, 467 US 493, 104 S Ct 2536, 81 L Ed 2d 425 (1984), is the lead case establishing that the termination of jeopardy is count-specific, and that the termination of jeopardy on one count does not affect other counts in the same prosecution. In *Johnson*, the defendant was charged with murder, robbery, and the respective lesser-included offenses of manslaughter and theft. 467 US at 494-96. Over the state's objection, the trial court accepted the defendant's guilty pleas to the lesser-included offenses, which the defendant entered at the same time he entered not-guilty pleas on the greater offenses. The court then dismissed the greater offenses on double-jeopardy grounds, ruling that the guilty pleas on some charges precluded the defendant from being tried on the charges to which he had entered not-guilty pleas. The United States Supreme Court reversed and rejected the argument that a continued prosecution would violate the successive-prosecution ban, explaining:

> The answer to this contention seems obvious to us. [Defendant] was indicted on four related charges growing out of a murder and robbery. The grand jury returned a single indictment, and all four charges were embraced within a single prosecution. [Defendant's] argument is apparently based on the assumption that

> trial proceedings, like amoebae, are capable of being infinitely subdivided, so *that a determination of guilt and punishment on one count of a multicount indictment immediately raises a double jeopardy bar to continued prosecution on any remaining counts that are greater or lesser included offenses of the charge just concluded. We have never held that, and decline to hold it now.*

Id. at 500-01 (emphasis added).

The Court distinguished *Brown v. Ohio*, 432 US 161—in which the state charged the defendant for a greater offense after it had already convicted him in a separate case for the lesser-included offense—as a case involving a successive prosecution. *Johnson*, 467 US at 501. In contrast, in *Johnson*, "no interest of [the defendant] protected by the Double Jeopardy Clause [was] implicated by continuing prosecution on the remaining charges in the indictment." *Id*. The Court also stressed that the defendant had not been acquitted on the counts that charged the greater offenses, distinguishing the "implied acquittal" rule from *Price v. Georgia*, 398 US 323, and *Green v. United State*s, 355 US 184, 78 S Ct 221, 2 L Ed 2d 199 (1957), which establishes that, if a jury returns a verdict for a lesser-included offense on a count, that is an acquittal on the greater offense for that count, and a retrial on that count is limited to the lesser-included offense. *Johnson*, 467 US at 501-02.

Although *Johnson* involved the termination of jeopardy following a conviction rather than acquittal, that is immaterial because the successive-prosecution bar applies equally following both. *See e,g,, Currier*, 138 S Ct at

2151 (because the Double Jeopardy Clause "applies equally in both situations [following a conviction or acquittal], consent to a second trial should in general have equal effect in both situations"). *Johnson* has been understood to establish that the termination of jeopardy on one count does not have any crossover effect on other, already charged counts. *Henning*, 681 NW 2d at 885.

Richardson v. United States, 468 US 317, 104 S Ct 3081, 82 L Ed 2d 242 (1984), further supports that understanding. There, the jury acquitted on one count but was unable to reach a verdict on two others counts, and the trial court declared a mistrial on those two counts. 468 US at 318-19. The defendant sought to prevent a retrial, claiming that the case should not have even gone to the jury because the evidence was insufficient and relying on *Burks v. United States*, 437 US 1, which establishes that an appellate reversal of a conviction for insufficient evidence is an acquittal that precludes retrial.

The Court rejected the claim, concluding that the retrial did not pose a sequence ripe for a double-jeopardy claim because the original jeopardy continued and never terminated. *Richardson*, 468 US at 322-26. "[T]he protection of the Double Jeopardy Clause by its terms applies only if there has been some event, such as an acquittal, which terminates the original jeopardy." *Id*. at 325. "Regardless of the sufficiency of the evidence" at the defendant's first trial, he "ha[d] no valid double jeopardy claim to prevent his retrial" because "the failure of the jury to reach a verdict is not an event which

terminates jeopardy." *Id*. at 325-26. And the Court did not even mention the acquittal on the third count, presumably because it was understood that that did not affect the continuing jeopardy on the other two counts, and that a retrial is not a successive prosecution. *See Henning*, 681 NW 2d at 885-86 (discussing point).

Federal and state courts have applied *Johnson* and *Richardson* to reject claims that an acquittal or conviction on one count precluded retrial on other counts *within* the same prosecution. *See Lemke v. Ryan*, 719 F3d 1093, 1095, 1099-1104 (9th Cir 2013) (retrial on reversed greater offense after acquittal on lesser-included offense); *United States v. Jose*, 425 F3d 1237, 1239-48 (9th Cir 2005) (retrial on reversed greater offense after conviction of lesser-included offenses); *Grimes v. State*, 188 A3d 824, 825-28 (Del 2018) (retrial on reversed greater offense after acquittal on lesser-included offense); *Henning*, 681 NW 2d at 876-83 (retrial on reversed lesser-included offenses after acquittal on greater offense). It thus "'makes all the difference'" that the case is a retrial rather than a successive prosecution. *Grimes*, 188 A3d at 828.

As the Wisconsin Supreme Court explained, in dealing with a multi-count indictment with different results and different charges, the court should view "each different charge [as if it] proceeds along a parallel track." *Henning*, 681 NW 2d at 882. And the critical point is that "[t]he termination of jeopardy on one track does not directly impact charges on the different parallel tracks."

Id. at 882-83. "In other words, when jeopardy on one count of a multi-count complaint terminates, this does not mean that other counts brought simultaneously become subject to successive prosecution analysis." *Id*. at 883. Hence, "where multiple offenses are consolidated in one trial, termination of jeopardy on one count does not directly impact the proceeding on other counts, even if the offenses are the 'same' for double jeopardy purposes." *Id*. at 884.

There thus is an "essential difference between constitutionally forbidden successive prosecutions, on the one hand, and the patient wrapping up of a single prosecutorial effort whose constituent charges have along the way become fragmented, on the other hand." *State v. Garner*, 601 A2d 142, 147 (Md App 1992). The successive-prosecution protection "applies in a sequential setting" and its purpose is "to prevent the initiation of new and sequential jeopardy following the termination of an earlier jeopardy." *Id*. at 145. "By sharp contrast, it is not designated to interfere with the continuation of simultaneous or parallel jeopardy." *Id*. Its purpose is not "to terminate an existing jeopardy but only to bar the attachment of a new jeopardy." *Id*.

Hence, in the successive-prosecution context, for there to be a possibility of double jeopardy, the initial jeopardy first must end. In that regard, the characterization in Oregon case law of the jeopardy concept as "former jeopardy" is clearer than the term "double jeopardy." *See id*. (noting that "[t]he very possibility of confusion on this score might never have arisen if Sir

William Blackstone had not, perhaps inadvertently, substituted the confusingly broad term 'double jeopardy' for the original and clear usage 'former jeopardy'").[8]

In sum, the state and federal constitutional bans against successive prosecution apply only in the context of sequential jeopardy but do not apply in the context of continuing jeopardy. Consequently, those protections were not implicated by the course of events here and could not have been violated.

3. This was not a successive prosecution.

Defendant's claim hinges on the law governing *successive* prosecutions and the possibility that the termination of jeopardy on the counts of acquittal could bar retrial on counts of conviction. (*See, e.g.*, Pet Br at 20, 36 (invoking doctrines governing "successive prosecutions"); *id.* at 32 (same for "multiple trials"); *id.* at 34 (same for "multiple prosecutions")). But as was just shown, that is incorrect. This was not a successive prosecution and the termination of jeopardy on one count does not terminate the jeopardy on another count. That is a complete answer to defendant's claim.

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[8] The principle that the successive-prosecution ban does not apply within the context of a single prosecution is especially important given the way that this court has interpreted the Article I, section 12, successive-prosecution rule. This court has held that it generally requires the prosecution to join at one trial all the charges arising out of a criminal episode. *Brown*, 262 Or at 457-58. Hence, it is a compulsory-joinder rule, which means that the state will frequently be charging multiple offenses together with the potential for jeopardy terminating on some count and not others.

None of the cases that defendant invokes involved the issue that is presented here, which is whether, in applying successive-prosecution principles in the context of a single prosecution, the termination of jeopardy on one count could have any crossover effect on other counts. Instead, he draws on case law involving three different scenarios, none of which are implicated here.

First, he relies on cases that either were successive prosecutions or for which the issue was whether a successive prosecution would be barred. *State v. McCormack*, 8 Or 236, 236-40 (1880), was an appeal from a successive prosecution and the issue was whether the defendant was charged with the same offense as the prior prosecution. (Pet Br 27-28). And defendant draws on analysis from *Weinzorpflin v. State*, 7 BlackF 186, 189-94 (Ind 1844), about whether the jury's silence on two counts amounted to "implied acquittals" on those counts, which would bar a successive prosecution for those offenses. (Pet Br 24-26). Both cases are inapposite on their face. This was not a successive prosecution, and defendant was not acquitted—much less impliedly acquitted—on the counts of conviction but instead was convicted on those counts.[9]

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[9] *Weinzorpflin* does not inform the meaning of Article I, section 12, in any event. Oregon modeled Article I, section 12, after a similar provision in the Indiana Constitution of 1851, *State v. Selness*, 334 Or 515, 527, 54 P3d 1025 (2002). Thus, case law between 1851 and 1857 addressing the meaning of the Indiana former jeopardy provision could be pertinent. But *Weinzorpflin*—an 1844 decision—predated that provision. Defendant points to the fact that the Indiana Supreme Court later deemed *Weinzorpflin* consistent with the Indiana

Footnote continued…

Second, defendant relies on cases about the effect of an acquittal on a *particular* count on the prosecution's ability to retry that *same* count. (Pet Br 38-40). He relies on *Price* and *Green*, which are discussed above, and which establish that a post-appeal retrial on a *single, particular* count on which the jury acquitted on the greater offense and convicted on the lesser offense must be limited to retrying the lesser offense. But as discussed above, the *Johnson* court distinguished that scenario from that of a continued prosecution of a case involving multiple counts where jeopardy terminates on some counts but not others. And defendant relies on *Sanabria v. United States*, 437 US 54, 56-78, 98 S Ct 2170, 57 L Ed 2d 43 (1978), which held that the verdict of an acquittal on a *single* count that encompassed multiple theories amounted to an acquittal on the *entire* count and precluded any retrial of any portion of *that* count. Nothing in those cases suggests that the termination of jeopardy on one count has a crossover effect on other counts in the same case.

Third, defendant invokes the principles that issue preclusion can sometimes apply within the context of a single case, and that an acquittal on one count can affect the state's ability to retry another count on which the jury did

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Constitution. (Pet Br 25 n 9). But that case law came too late to inform the meaning of Article I, section 12. "[D]ecisions made after Oregon's statehood do not establish the meaning of the earlier-adopted language in the Oregon Constitution." *Priest v. Pearce*, 314 Or 411, 418-19, 840 P2d 65 (1992).

not reach a verdict. (Pet Br 41-47). But, as shown above, issue-preclusion principles do not apply here because that rule does not apply when the mixed verdicts are convictions and acquittals. And nothing in the issue-preclusion doctrine suggests that the successive-prosecution principles can apply across counts in the course of a single prosecution, and they do not.

Defendant remonstrates that a handful of state courts have adopted the burden rule that he proposed for successive-prosecution claims in this context. (*See* Pet Br 48-56, 50 n 13, *citing Dunn v. Maze*, 485 SW 3d 735 (Ky 2016); *State v. Salter*, 42 A 3d 196 (NJ Super 2012); *State v. Heaven*, 110 P3d 835 (Wash App 2005); and *Goforth v. State*, 70 So 3d 174 (Mi 2011)). But this court should not find those decisions persuasive because the courts in those cases have overlooked the same thing that defendant has overlooked, which is that this is a continuation of a single prosecution, not a successive prosecution.[10]

Defendant also relies on *Valentine v. Konteh*, 395 F3d 626 (6th Cir 2005), but case is distinguishable as well. (Pet Br 56-58). There, the defendant sought habeas relief after he was convicted of 20 counts of rape and 15 counts

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[10] Defendant also relies on *Brown v. Superior Court*, 187 Cal App 4th 1511, 114 Cal Rptr 3d 804 (Cal App 2 Dist 2010), but that case is inapposite because it was based on the issue-preclusion component of double jeopardy—which, as explained above, can bar retrial of counts during a single prosecution but only counts as to which the jury hung, not counts of conviction. The issue was whether the jury necessarily found facts in rendering acquittals on some counts that precluded retrial of counts on which the jury had hung.

of sexual penetration. 395 F3d at 628-29. The prosecution had not distinguished the factual basis of these charges in the indictment or made an election at trial. *Id*. at 628-29, 634. Although the Sixth Circuit Court of Appeals made comments about the defendant's inability to protect himself against a successive prosecution, *Id*. at 634-36, that was not the issue because there was no successive prosecution. Rather, the court held that the generic nature of the prosecution violated due process, and that the proper remedy was to vacate all but two convictions, one for each type of sexual assault. *Id*. at 630-39. That case is distinguishable because it did not involve a retrial, because it involved a due process claim, and because the remedy was to limit the number of convictions (whereas defendant seeks to preclude any conviction here).

Defendant ultimately attempts to reconcile his position with the fact that this was a retrial of reversed convictions by arguing that the application of continuing-jeopardy principles—discussed at length above—hinges on the state being able to prove that it is retrying the same offense on which the jury returned a conviction in the first trial. (Pet Br 48). That is incorrect. This is not a successive prosecution, and the termination of jeopardy on one count does not have any crossover effect on other counts.

In this case, nothing shows that the acquittals in the first trial and the convictions on retrial were for the same offense. But even if they were, that did not implicate successive-prosecution principles because this was the

continuation of a trial, not a successive prosecution. The state can prosecute the "same" offense in separate counts (including, for example, greater and lesser-included offenses and multiple statutory violations for which guilty verdicts would result in merger). And the termination of jeopardy on one count does not affect the continuing jeopardy on other counts in the same case. Consequently, acquittals cannot have any impact on counts of conviction. As a result, defendant's retrial could not have violated the successive-prosecution ban.

It follows that this case does not present the burden issue that defendant has raised. Defendant argues that "[t]he interest against successive prosecutions for acquitted offenses requires" placing the burden on the state. (Pet Br 49). But that is wrong because this was not a successive prosecution on the counts as to which he had originally been convicted. If defendant wanted to make an issue of the lack of specificity, he needed to do so in other ways and the appropriate time, which was the original trial. As discussed in the next section, he could have obtained specificity by filing a demurrer to the indictment or by seeking an election at trial but he failed to do so.

Defendant emphasis that the state should be precluded from completely switching the factual basis for a count between the original trial and a retrial, pointing to grand-jury-indictment and variance principles. (Pet Br 62-64). That is, he argues that if the indictment and an election by the state identifies a factual basis for the first trial, the state should not be able to make a different

election in the second trial. Perhaps. But not because of successive-prosecution principles but because of those other principles—principles that would need to be invoked by the defendant after the factual basis is established in the first trial. The only issue here is whether the retrial violated successive-prosecution principles. And the answer is that it did not. Successive-prosecution principles are not implicated by completing the trial on the original indictment. *See Jose*, 425 F3d at 1241 (although "the Double Jeopardy Clause does not bar retrial after reversal of a conviction, it does bar a successive trial on an offense not charged in the original indictment once jeopardy as already terminated on, what is for double jeopardy purposes, the 'same offense'"; emphasis omitted).[11]

D. If defendant's retrial implicated the successive-prosecution bar, he had the burden to prove a violation and failed to do so.

Finally, even if retrials on reversed convictions implicate the successive-prosecution ban, this court should leave the burden on defendants to prove that they are being retried for an offense for which they have been acquitted. A

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[11] Defendant alludes to principles from other areas of the law, including principles about grand jury indictment, variance, due process, jury trial, and jury concurrence. None of those principles bear on the successive-prosecution issue here. Defendant does not separately claim that any of those other principles were violated—a claim that would have had to be preserved at trial, raised in the Court of Appeals, and then properly presented on review. As a result, the state does not attempt to explain why each of those principles, many of which are themselves complicated areas of the law, do not apply here.

defendant generally bears the burden of proving a jeopardy claim, and there is no reason for a different rule in this context. Defendant could have obtained greater specificity as to the basis for each charge but failed to do so.

It is well settled under Oregon law that defendants have the burden of persuasion to demonstrate that the offense for which they are charged is the "same offense" as one for which they already have been prosecuted. *See State v. Newlin*, 92 Or 597, 599, 182 P 135 (1919) (affirming rejection of double-jeopardy plea because "[t]he plea was not sustained by any evidence"); *State v. Holloway*, 57 Or 162, 168-69, 110 P 791 (1910) (recognizing that testimony, and bill of exceptions, may be necessary to establish factual basis for jeopardy offense); *State v. Howe*, 27 Or 138, 142-45, 44 P 672 (1895) (rejecting defendant's double jeopardy argument because he had failed to prove that wo charges of embezzlement were for the same act); *State v. Sly*, 4 Or 277, 278 (1872) ("before a defendant can avail himself of the plea of autrefois convict, he must show the identity of the offense and of the person").

In *Newlin*, for example, the defendant was first convicted of selling intoxicating liquors to Ed Johnson. 92 Or at 597-98. He was then tried for selling intoxicating liquor to John Smith, and contended that he was being tried for the same offense for which he had already been convicted. *Id.* This court held that "[t]here was no evidence to justify the submission to the jury of the question of former conviction" and that the sale of liquor to each individual was

"separate and complete in itself." *Id*. at 599. Because "[t]he plea [of former conviction] was not sustained by any evidence," this court rejected the defendant's claim of double jeopardy. *Id*. By requiring "evidence" to sustain the double jeopardy claim, the court placed the burden of proof on the party raising that claim—the defendant.

That burden is consistent with the burden for other forms of jeopardy claims. A defendant has the burden of proving an issue-preclusion jeopardy claim. *See Dowling*, 493 US at 350 (the defendant had the burden "to demonstrate that the issue whose relitigation he seeks to foreclose was actually decided in the first proceeding"). And a defendant has the burden of proving a jeopardy claim under Oregon's former jeopardy statutes—that is, a claim under ORS 131.515(1), which prohibits successive prosecutions for the same offense, or under ORS 131.515(2), which generally prohibits successive prosecutions for offenses that arose out of the same criminal episode. *See State v. Knowles*, 289 Or 813, 822, 618 P2d 1245 (1980) (if any of the elements necessary for claim "are not established, the claim of former jeopardy under ORS 131.515(2) must fail"); *see also State v. Cantrell*, 223 Or App 9, 195 P3d 451 (2008) (the defendant has burden of proving same offense under ORS 131.515(1)).

Defendant nonetheless asks this court to flip the burden of proof so that "[o]nly if the state can prove by a preponderance of the evidence that it is retrying only the original counts of conviction may the trial court allow the

prosecution to proceed." (Pet Br 18). But there is no doctrinal justification for doing so, and there is nothing unfair about leaving the burden on the defendant.

Oregon law provides means by which defendants can obtain greater specificity as to the basis for charges. A defendant may object to the indictment as not sufficiently definite and certain (ORS 135.630(2), (6); ORS 132.550(7)), obtain pretrial discovery, or move for an election or clarifying jury instructions, which satisfies any need for notice and specificity. *See State v. Reinke*, 354 Or 98, 114, 309 P3d 1059 (2013) (demurrer procedure sufficient to protect right to notice); *State v. Nussbaum*, 261 Or 87, 92-94, 491 P2d 1013 (1971) (same); *State v. Hale*, 335 Or 612, 621, 75 P3d 612 (2003) (discussing role of elections and clarifying instructions); *State v. Wright*, 167 Or App 297, 306-11, 999 P2d 1220, *on recons*, 169 Or App 78, 7 P3d 738, *rev den*, 331 Or 334 (2000) (discussing role of discovery).

The first tool is a demurrer to the indictment. This court has explained that the purposes of an indictment are:

> (1) to inform the accused of the nature and character of the criminal offense with which he is charged with sufficient particularity to enable him to make his defense; (2) *to identify the offense so as to enable the accused to avail himself of his conviction or acquittal thereof in the event that he should be prosecuted further for the same cause*; and (3) to inform the court of the facts charged so that it may determine whether or not they are sufficient to support a conviction.

State v. Smith, 182 Or 497, 500-01, 188 P2d 998 (1947) (emphasis added). Hence, one purpose is to enable defendants to meet their burden to prove any subsequent successive-prosecution claim.

To be sure, a demurrer will not always result in more specificity because an indictment generally is sufficient if it is in the language of the statute that defines the offense. *See Hale*, 335 Or at 621 ("we now confirm that, as this court so many times has held, an indictment generally is sufficient if it charges an offense in the words of the statute"). But even if the filing of a demurrer or the discovery does not lead to greater specificity (though it often will), a defendant can obtain any needed specificity by moving for an election at trial. *See id*. (explaining point). And an election at trial can provide a defendant with the specificity necessary to raise a jeopardy claim in a successive prosecution because it will establish the factual basis for the offense. *See State v. Antoine*, 269 Or App 66, 86, 344 P3d 69, *rev den*, 357 Or 324 (2015) (explaining that election "clarified the charges against [the] defendant and thereby increased the level of notice and protection against double jeopardy afforded to him").

It is well established that defendants must take steps to seek specificity if they so desire and waive the right to specificity by failing to avail themselves of those tools. A defendant waives any challenge to the indictment by failing to follow the demurrer procedure. *See State v. Holland*, 202 Or 656, 667, 277 P2d 386 (1954) (by failing to file demurer, a defendant waives "all objections

concerning the sufficiency of the indictment as to definiteness and certainty"). And a defendant waives any challenge to the lack of an election by not asking for one. *See Hale*, 335 Or at 617-21 (rejecting challenge to indictment and stressing that the defendant could have sought specificity by asking for an election at trial); *Antoine*, 269 Or App at 76 (explaining that, under *Hale*, a defendant must seek greater specificity).

Because defendants have those tools to obtain greater specificity if they want it, it is fair to leave the burden of proof for a jeopardy claim where it always is—on a defendant. Defendants waive the right to greater specificity by not seeking it, and that can affect their ability to prevail on jeopardy claims. *See e.g.*, *State v. Selness*, 334 Or 515, 525 n 9, 54 P3d 1025 (2002) (for purposes of Article I, section 12, jeopardy claim, by failing to invoke statutory mitigation procedure for forfeiture, the defendants waived any claim based on "the outcome and effects of the forfeiture in their particular case").

Defendant's proposal to flip the burden of proof in this one context would destabilize this area of the law. Although defendant suggests that his proposed rule would rarely apply (Pet Br 63 n 18), he has not explained why that would be so. The state generally is required to join all charges arising out of the same criminal episode, *Brown*, 262 Or at 457-58, juries commonly returned mixed verdicts of guilt and acquittal, and guilty verdicts often must be retried because of an appellate reversal or because of a grant of post-conviction

relief. Indeed, recent case law from this court means that many guilty verdicts obtained over the past several decades will need to be retried. *See Watkins v. Ackley*, 370 Or 604, 523 P3d 86 (2022) (holding that the Sixth Amendment right to unanimous verdicts announced in *Ramos* can provide the basis for state post-conviction relief, and recognizing that the decision would "likely lead to the reexamination of many judgments that became final years or decades ago").

Moreover, it is common for there to be at least some lack of specificity in the litigation of charges. There are many instances in which a lack of specificity does not affect the parties' theories of the case, and neither party takes step to inject more specificity into the case. And that is especially so for resident-child-abuser cases, for which the victims often testify to "'a long series of molestations'" and defendants deny "'that any wrongful touching occurred'" and advance all-or-nothing defenses. *See Ashkins*, 357 Or at 661-62 (discussing characteristics of resident-child-abuser cases).

The potential scope of defendant's proposed rule also is unclear. At one point, defendant proposes that the state demonstrate the "factual occurrences" underlying each count. (Pet Br 4). But the logical implications of his jeopardy claim would seem to require more precision than that. As explained, acquittals are on offenses, not factual occurrences, and the scope of an "offense" is difficult to discern at times, because the state can charge multiple counts for the

same conduct and let the rules governing merger determine how many convictions are authorized.

Nor is defendant's rule needed to discourage overcharging. (Pet Br 63, n 18). Although there were many charges in this case and the jury acquitted on the bulk of them, that does not mean that the case was overcharged. It is appropriate for a prosecutor to charge as many separate crimes as the available evidence gives probable cause to believe that the defendant committed. Sometimes, especially with a vulnerable victim like the one here, it will turn out that the victims at trial cannot present a convincing account to the jury of each crime they previously disclosed. But that does not mean that a prosecutor should preemptively charge fewer counts. The alternative would be for prosecutors to systematically *under*charge cases involving individuals who were repeatedly victimized out of fear that they might not remember exactly the same number of incidents when testifying at trial.

In this case, even if the retrial potentially implicated the successive-prosecution ban, defendant failed to carry his burden of proving that he was prosecuted for offenses on which he was acquitted. Defendant could have sought and obtained greater specificity in his first trial but did not. He therefore did not establish that the factual basis for the acquittals was the same as that underlying the charges that were retried. For that final reason, defendant's claim fails, and this court should affirm.

CONCLUSION

This court should affirm the Court of Appeals' decision and affirm the trial court's judgment.

Respectfully submitted,

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that on April 18, 2023, I directed the original Brief on the Merits of Respondent on Review, State of Oregon to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Ernest Lannet and Stacy M. Du Clos, attorneys for petitioner on review, by using the court's electronic filing system.

CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(1)(d)

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(1)(b) and (2) the word-count of this brief (as described in ORAP 5.05(1)(a)) is 13,298 words. I further certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(3)(b).

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