TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-19-00633-CR

The State of Texas, Appellant

v.

Daniel Heredia, Appellee

FROM THE 22ND DISTRICT COURT OF COMAL COUNTY
NO. CR2016-751, THE HONORABLE R. BRUCE BOYER, JUDGE PRESIDING

O P I N I O N

The State of Texas appeals from the district court's order granting Daniel Heredia's pretrial application for writ of habeas corpus. In four issues on appeal, the State asserts that (1) Heredia should be barred from obtaining habeas relief based on the doctrine of judicial estoppel and (2)–(4) the district court erred in granting habeas relief on the merits. We will affirm.

BACKGROUND

The State charged Heredia in an eight-count indictment with the offenses of murder (Count I), tampering with a human corpse (Count II), and tampering with physical evidence (Counts III, IV, V, VI, VII, and VIII). However, the State proceeded to trial only on the murder charge. At the conclusion of trial, the jury acquitted Heredia of murder but convicted

him of the lesser-included offense of manslaughter and assessed punishment at 20 years' imprisonment. The district court rendered judgment on the jury's verdict.[1]

The State is now attempting to try Heredia for the tampering charges in the indictment. Prior to trial for those charges, Heredia filed an application for writ of habeas corpus, asserting that his prosecution for the tampering offenses is barred by the Double Jeopardy Clauses of the United States and Texas Constitutions. *See* U.S. Const. amend. V; Tex. Const. art. I, §14; *see also* Tex. Code Crim. Proc. art. 1.10. Specifically, he argued that the State, in order to prosecute the tampering charges in a later trial, was required to waive, abandon, or dismiss the tampering counts prior to jeopardy attaching in the murder trial, and Heredia claimed that the State failed to do so. Heredia acknowledged that the State had informed the district court and counsel in chambers, prior to jeopardy attaching, that the State planned to proceed only on the murder charge. However, the conference in chambers was not transcribed, and Heredia claimed that because the State had failed to abandon or reserve the tampering charges "on the record," the State was prohibited from prosecuting those charges in a later trial.

The district court held a hearing on the application. At the hearing, an assistant district attorney who had participated in the murder trial testified as to his recollection of the conversation that occurred in chambers regarding the charges:

> Q. And specifically drawing your attention to the Monday of jury selection, which I believe would have been March 4th of 2019, were you present in Judge Boyer's chambers prior to jury selection for a conversation between defense counsel, the State, and the Judge?
>
> A. Yes, I was.

[1] Heredia's appeal of his manslaughter conviction is currently pending before this Court in cause number 03-19-00311-CR.

Q. And could you briefly explain for the record what the subject of that particular conference was.

A. Prior to qualifications and picking of the jury, the conversation was had in regards to the State moving forward solely on the murder charge, which was Count I. And furthermore, we had a conversation that Count II, Count III, Count IV, Count V, Count VI, Count VII, and Count VIII we would be holding and not moving forward with; that we would only present the murder charge to the jury on that trial date and reserve these for a later date.

Q. And did defense counsel appear to understand that that was what the State intended to do?

A. Yes, [he] did.

Q. And did Judge Boyer appear to understand that that's what the State intended to do?

A. Yes.

Q. And did he indicate—or do or say anything that indicated his agreement with that proceeding?

A. The conversation was had that we would present the murder charge, that we would hold these, and only the murder charge would be going forward.

Q. And during the course of voir dire, was any mention made by either side of any charge or any count other than Count I, the charge of Murder?

A. No.

Q. At any point, was the defendant ever arraigned on any of the other counts?

A. Not a single one was read other than Count I.

Q. And was that all based upon the conversation that was had in chambers and everybody's understanding as far as what was going to occur going forward?

A. Yes.

On cross-examination, the prosecutor acknowledged that during the conference, defense counsel had not agreed to the severance of the counts and had instead argued that all the counts should be tried together. The district court then summarized its understanding of the conference as follows: "I'm going to go on the record as my interpretation of the proceedings we had in chambers is that I did not make a ruling. However, I did understand that was the parties' intent. I want to make sure that's clear to everybody."

At the conclusion of the hearing, the district court granted Heredia's application for writ of habeas corpus. The district court subsequently made findings of fact and conclusions of law, including the following:

> The witness for the State—[the assistant district attorney]—at Defendant's writ hearing on August 26, 2019 was truthful and credible, and the facts were as he testified.
>
> Prior to the jury being sworn for Defendant's initial trial, in an in-chambers conference with the parties' counsel—but without a court reporter—the State informed this Court and Defendant that it wished to pursue only Count I (the Murder Count) in Defendant's initial trial, and expressly indicated that it wished to hold Counts II through VIII in reserve so that it could later try Defendant on said counts if it so chose.
>
> Over the Defendant's objection, and prior to jeopardy attaching, the State was allowed by the Court to proceed solely on Count I in Defendant's initial trial—before the jury was empaneled and sworn. There was no formal request or ruling on severance on the record. There was no written motion to sever the counts filed by either party.

> Voir dire was conducted on Count I, the Murder charge.
>
> The attorney for the State only read Count I of the indictment for the formal arraignment before the jury.
>
> The Trial Court's charge to the jury only referenced Count I.
>
> After his initial trial and conviction under Count I's Murder charge for the lesser-included offense of Manslaughter, the State decided to pursue the aforementioned withheld Counts II through VIII, and Defendant filed a writ alleging a Double Jeopardy violation for Counts II through VIII.
>
> Defendant cited *Ex parte Preston*, which includes the following statement: "…in order to preserve a portion of a charging instrument for a subsequent trial, the State must, before jeopardy attaches . . . [1] take some affirmative action, [2] on the record, [3] to dismiss, waive or abandon that portion of the charging instrument and [4] the State must obtain permission from the trial judge to dismiss, waive or abandon that portion of the charging instrument." *Ex parte Preston*, 833 S.W.2d 515, 518 (Tex. Crim. App. 1992).
>
> The State met the first, third and fourth parts ([1] and [3], *supra*) of the aforementioned *Preston* statement regarding Counts II through VIII.
>
> The basis for Court's decision to grant Defendant's writ is the second part of *Preston*'s statement (*supra*, "[2] on the record") since the State's affirmative action to sever, dismiss, waive or abandon Counts II through VIII and this Court's allowance for the State to proceed only on Count I took place in an unrecord[ed] in-chambers conference with the parties.

This appeal by the State followed.

STANDARD OF REVIEW

We generally review a trial court's ruling on a habeas-corpus application for abuse of discretion, viewing the evidence in the light most favorable to the trial court's ruling and deferring to the trial court's resolution of factual disputes. *Ex parte Wheeler*, 203 S.W.3d

317, 324 (Tex. Crim. App. 2006); *Ex parte Alvarez*, 570 S.W.3d 442, 444 (Tex. App.—Austin 2019, pet. ref'd). However, when the facts are undisputed and the resolution of the ultimate question turns on an application of legal standards, as is the case here with Heredia's double-jeopardy claim, we review the ruling de novo. *Ex parte Martin*, 6 S.W.3d 524, 526 (Tex. Crim. App. 1999); *Alvarez*, 570 S.W.3d at 444; *see also State v. Donaldson*, 557 S.W.3d 33, 39–40 (Tex. App.—Austin 2017, no pet.) (applying de novo standard to trial court's ruling on motion to quash indictment on double-jeopardy grounds).

ANALYSIS

Merits of the district court's ruling

We first address the State's second, third, and fourth issues, in which it asserts that the district court erred on the merits in granting Heredia's application for writ of habeas corpus. In its second issue, the State contends that the district court improperly "elevated form over substance" by requiring an "on the record" election by the State regarding the tampering charges. In its third and fourth issues, the State asserts that the "complete record" in the case, including both the record of Heredia's murder trial and the habeas proceeding, demonstrate that, prior to jeopardy attaching in Heredia's murder trial, the State made a proper election reserving the tampering charges for prosecution in a later trial.

The Double Jeopardy Clause of the United States Constitution provides that "[n]o person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. amend. V. Similarly, the Double Jeopardy Clause of the Texas Constitution provides that "no person, for the same offense, shall be twice put in jeopardy of life or liberty, nor shall a person be again put upon trial for the same offense, after a verdict of not guilty in a court of

competent jurisdiction." Tex. Const. art. I, § 14. It is well established that in a jury trial, jeopardy attaches at the time when the jury is impaneled or sworn. *Crist v. Bretz*, 437 U.S. 28, 38 (1978); *Hill v. State*, 90 S.W.3d 308, 313 (Tex. Crim. App. 2002); *McElwee v. State*, 589 S.W.2d 455, 457 (Tex. Crim. App. 1979); *State v. Schaefer*, 981 S.W.2d 515, 517 (Tex. App.—Austin 1998, no pet.). "After jeopardy attaches, any charge which is dismissed, waived, abandoned or on which the jury returns an acquittal, may not be retried." *Preston*, 833 S.W.2d at 517. "[T]he State may, with the consent of the court dismiss, waive or abandon a portion of the indictment." *Id*. (citing *Johnson v. State*, 436 S.W.2d 906, 908 (Tex. Crim. App. 1968); *Woods v. State*, 211 S.W.2d 210, 211 (Tex. Crim. App. 1948); *Wallace v. State*, 170 S.W.2d 762, 764 (Tex. Crim. App. 1943)). "However, if the dismissal, waiver or abandonment occurs after jeopardy attaches, the State is barred from later litigating those allegations." *Id*. (citing *McElwee*, 589 S.W.2d at 460; *Black v. State*, 158 S.W.2d 795 (Tex. Crim. App. 1942)).

The legal basis for the district court's ruling was the Court of Criminal Appeals's decision in *Ex parte Preston*, *supra*. In that case, Preston was charged in a single indictment with three counts of aggravated robbery. 833 S.W.2d at 516. The State proceeded to trial on the second count only, and Preston was convicted of that offense. *Id*. Later, a grand jury re-indicted Preston for the offenses alleged in the first and third counts of the original indictment, and Preston filed a pretrial application for writ of habeas corpus arguing that the subsequent prosecution violated the constitutional prohibition against double jeopardy. *Id*.

The trial court denied relief, and the intermediate court of appeals affirmed. *Id*. The intermediate court held that when the jury was impaneled and sworn for the trial of the offense alleged in the second count of the indictment, jeopardy attached for that offense only; jeopardy did not attach for the offenses alleged in the other counts of the indictment. *Ex parte*

Preston, 801 S.W.2d 604, 607 (Tex. App.—Houston [1st Dist.] 1990), *rev'd*, 833 S.W.2d 515 (Tex. Crim. App. 1992). The intermediate court reached this conclusion after reviewing the record of Preston's first trial, which made it appear "as if" the State had abandoned the first and third counts of the indictment prior to the jury being empaneled and sworn:

> Here, the State never proceeded on counts I and III during the proceedings in the first prosecution. Count II is the only count that was presented to the jury during voir dire examination, and the only count the State proceeded on in any way. It is as if the State abandoned or dismissed counts I and III early in the proceedings in the first prosecution, before the jury was voir dired, impaneled, and sworn, and proceeded only on count II.

Id. at 606.

On discretionary review, the Court of Criminal Appeals reversed, rejecting the above analysis of the intermediate court. *See Preston*, 833 S.W.2d at 518. The court explained its holding as follows:

> [W]e hold that in order to preserve a portion of a charging instrument for a subsequent trial, the State must, before jeopardy attaches (i.e., prior to the jury being impaneled and sworn or for bench trials, when both sides have announced ready and the defendant has pled to the charging instrument), take some affirmative action, on the record, to dismiss, waive or abandon that portion of the charging instrument and the State must obtain permission from the trial judge to dismiss, waive or abandon that portion of the charging instrument. Because this was not done, jeopardy attached to the offenses alleged in the first and third counts in the original indictment when the jury was impaneled and sworn at appellant's trial. In short, we hold that the Constitutional guarantee against Double Jeopardy does not permit a constructive abandonment of a portion of the charging instrument.

Id. (emphases in original) (internal citation omitted).[2] Having found a double-jeopardy violation, the court remanded the case to the trial court "with orders to dismiss the prosecution." *Id*.

The State takes a different view of *Preston*, arguing that so long as there is some evidence "in" the record showing that the State made its election prior to jeopardy attaching, such evidence is sufficient to satisfy *Preston*. Thus, according to the State, the conduct of the parties during Heredia's murder trial (which we discuss in more detail below when addressing the State's first issue) and the prosecutor's testimony at the habeas hearing regarding the off-the-record discussion in the judge's chambers provide "ample evidence" that the State intended to reserve the tampering charges for a later prosecution. However, the holding in *Preston* is clear—"in order to preserve a portion of a charging instrument for a subsequent trial, the State must, before jeopardy attaches . . , take some affirmative action, *on the record*, to dismiss, waive or abandon that portion of the charging instrument . . . ." *Id*. (emphasis added). The State failed to do so here.

Moreover, *Preston* is not the only case in which the Court of Criminal Appeals applied the "on the record" reasoning to determine if jeopardy had attached. In *Proctor v. State*, two defendants were charged in a five-paragraph indictment alleging one count of capital murder, two counts of murder, and two counts of aggravated robbery. 841 S.W.2d 1, 2 (Tex. Crim. App. 1992). Prior to trial, the State abandoned four of the five paragraphs and proceeded

[2] The State asserts in its reply brief that the "on the record" statement in *Preston* was not essential to the court's holding and was merely dicta. We disagree. As stated by the court in its opinion, "the issue [was] whether jeopardy attached to the offenses alleged in the first and third counts in the original indictment barring the instant prosecution." *Ex parte Preston*, 833 S.W.2d 515, 518 (Tex. Crim. App. 1992). The court's holding was that jeopardy had attached to those offenses because the State had failed to "take some affirmative action, *on the record*, to dismiss, waive or abandon that portion of the charging instrument." *Id*. at 518 (emphasis added).

to trial on a single aggravated-robbery charge against each defendant. *Id*. The jury convicted each defendant of that charge, but the convictions were reversed on appeal. *Id*. at 3. Later, the defendants were re-indicted, and this time the State proceeded on the other aggravated-robbery charge that it had abandoned before the first trial. *Id*. The defendants were convicted of that charge, and they argued on appeal that their convictions were barred by double jeopardy. *Id*.

The Court of Criminal Appeals disagreed, holding that "[t]he charge pressed at the [second] trial was adequately abandoned before jeopardy attached at the [first] trial and was, therefore, properly preserved for future prosecution." *Id*. at 4. In reviewing the evidence of abandonment, the court placed significance on the record of a pretrial hearing in open court at which the defendants were present with their counsel. *Id*. The court quoted the transcript of the hearing at length, including a statement by the prosecutor that "at this time the State is going to move to abandon all paragraphs in the indictments except the fourth one"; an explanation by the trial court to the defendants that "[w]hat [the prosecutor] has done is abandon all paragraphs in the indictment except the paragraph alleging aggravated robbery"; and a ruling by the trial court granting the State's motion to abandon the charges. *Id*. at 2. The court considered other evidence, including testimony by the prosecutor at a later hearing, but observed that the prosecutor at that hearing "confirmed under oath what the record of the [first] trial *already showed*, i.e., that before the [first] trial he abandoned the first, second, third, and fifth paragraphs of each of the [original] indictments." *Id*. at 3 (emphasis added).

Additionally, the *Proctor* court cited with approval *Patterson v. State*, 581 S.W.2d 696 (Tex. Crim. App. 1979), another double-jeopardy case involving a multiple-count indictment. In that case, the defendant had been charged with the offenses of possession of marijuana and possession of a firearm by a felon. *Id*. at 697. "Before a jury was impaneled and

sworn the State elected to proceed on the count for possession of marihuana; the appellant was convicted of that offense." *Id*. Later, Patterson was re-indicted for possession of a firearm and claimed that his prosecution was barred by double jeopardy. *Id*. The Court of Criminal Appeals disagreed, holding that "[t]he State elected to proceed only on the count charging possession of marijuana prior to the time that the jury was sworn; jeopardy did not attach insofar as the count charging possession of a firearm by a felon was concerned." *Id*. The *Proctor* court observed that "the record of Patterson's first trial showed that the abandonment of the firearm count was done *in open court* with defense counsel present." *Proctor*, 841 S.W.2d at 4 (emphasis added).

The *Proctor* court noted that it did not matter whether the State's election was formal or informal, written or verbal. *Id*. at 4 n.1. However, "[w]hat is essential is that the State, on the record with the permission of the trial judge, abandon, dismiss, sever, or take some other affirmative action *before jeopardy attaches* to preserve the charge for future prosecution." *Id*. (emphasis in original); *see also State v. Florio*, 845 S.W.2d 849, 852 (Tex. Crim. App. 1992) (concluding that jeopardy did not attach as to one count of indictment because "before the jury selection voir dire questioning began, the State properly took affirmative action on the record and received the consent of the trial court to preserve" that count; specifically, defendant had "sought for the State to elect as to what it was proceeding to trial upon" and "prosecutor explicitly stated into the record that 'count 2 is what we will proceed on'"); *Taylor v. State*, 74 S.W.3d 457, 459–60 (Tex. App.—Corpus Christi 2002) (concluding that jeopardy had not attached to charge because prior to voir dire, prosecutor stated, "Let me say this for the record, I am abandoning the second paragraph of aggravated [robbery]" and trial court responded, "Okay"; "[t]he State's announcement was an affirmative act, on the record, and the judge's response was her permission for the abandonment"), *rev'd on other grounds*, 109 S.W.3d 443

(Tex. Crim. App. 2003); *Brown v. State*, 900 S.W.2d 805, 807 (Tex. App.—San Antonio 1995, writ ref'd) ("While the law is clear that the State may orally waive, abandon or dismiss a charge or portion of the indictment, such waiver is only effective to preserve the count for further prosecution *if the State obtains the trial judge's permission to waive the count, on the record, before jeopardy attaches*." (internal citation omitted) (emphasis in original)); *cf. Guzman v. State*, 732 S.W.2d 683, 686–87 (Tex. App.—Corpus Christi 1987, no pet.) (State argued on appeal that it had agreement with defendant to have separate trial for each count of indictment; although court ruled against defendant on other grounds, it faulted State for failing to record that agreement—"[t]his controversy could have been avoided had the State filed and been granted a motion to sever the counts, or had the asserted agreement been made on the record").

We do not disagree with the State that both the trial record and the habeas record can be considered in determining whether the State took any action "on the record" prior to jeopardy attaching. *See Jackson v. State*, 973 S.W.2d 954, 957 (Tex. Crim. App. 1998) (explaining that in determining whether to grant habeas relief, courts may consider evidence from trial and any "additional evidence gathered in habeas-corpus proceeding"). However, in this case, nothing in either the trial record or the habeas record shows that the State took any affirmative action "on the record" to preserve the tampering charges for a later prosecution. In fact, it is undisputed that the parties' discussion of the charges and the trial court's informal grant of permission for the State to proceed only on the murder charge took place off the record, in chambers, without the defendant present.

Finally, we reject the State's contention that the "on the record" requirement is a "hyper-technical" application of the law that "exalts form over substance." *See Hill* 90 S.W.3d at 311–12 (explaining that certain double-jeopardy procedural requirements may be relaxed in

certain cases where their enforcement "would serve no purpose"). Requiring the State to take affirmative action "on the record" to preserve a portion of a charging instrument for a subsequent trial serves at least three purposes: (1) it ensures that the defendant is aware of the status of each charge brought against him; (2) it provides the State with proof of its election as to each charge and the trial court's ruling, if any, on that election, and (3) it enables a reviewing court to readily ascertain which charges, if any, the State dismissed, waived, or abandoned prior to jeopardy attaching. To the extent that those purposes could be fulfilled in some other, less formal manner, this Court is bound to follow the "on the record" requirement unless and until the Court of Criminal Appeals instructs us otherwise. *See Villarreal v. State*, 504 S.W.3d 494, 509 (Tex. App.—Corpus Christi 2016, pet. ref'd) ("[A]s an intermediate appellate court, we must follow the binding precedent of the Court of Criminal Appeals.").

In this case, the district court did not err in granting Heredia's application for writ of habeas corpus. We overrule the State's second, third, and fourth issues.

Judicial Estoppel

During Heredia's murder trial, the State presented extraneous-offense evidence related to the tampering charges to prove Heredia's state of mind during the alleged murder. *See* Tex. R. Evid. 404(b) (providing that extraneous-offense evidence may be admissible for certain purposes, "such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident"). Defense counsel responded to this evidence by eliciting testimony and arguing to the jury that Heredia could be prosecuted for tampering at a later trial. For example, during his cross-examination of a Texas Ranger who had investigated the case, Heredia elicited the following testimony:

Q. Oh, one last thing. There was some talk about tampering with evidence. You're aware that Daniel Heredia is also charged with multiple counts of tampering with evidence, correct?

A. Yes.

Q. But the State elected not to go forward on those counts in this jury trial. Is that right?

. . . .

A. To my knowledge, that's my – that's correct.

Q. All right. So some other time, some other jury, some other court, he's still subject to prosecution for that, correct?

A. He's subject to it.

During his closing argument, defense counsel addressed the tampering evidence as follows:

> He can be and will be held criminally accountable for tampering with evidence. But as you heard, that's not the case that's in front of you. So please don't let your anger, which I understand and I share, about the fact that he did not immediately report this—those are all things that he could be held accountable for in another trial since the State has chosen to go forward only on murder.

Additionally, during the punishment phase of trial, defense counsel argued to the jury for the imposition of a minimal sentence, including probation, in part by claiming that the jury need not punish Heredia for the tampering charges because Heredia "will have a day in court" and "can be held responsible" for those offenses in a later trial.[3]

[3] Defense counsel's argument was unsuccessful, as Heredia received the maximum sentence of twenty years' imprisonment for his manslaughter conviction. *See* Tex. Penal Code §§ 12.33(a), 19.04(b).

In its first issue, the State asserts that based on the above conduct by defense counsel, Heredia should be barred from obtaining habeas relief under the doctrine of judicial estoppel. The doctrine of judicial estoppel prohibits, in certain cases, a party who has taken a position in an earlier proceeding from taking a contrary position in a later proceeding. *See Hall v. State*, 283 S.W.3d 137, 156 (Tex. App.—Austin 2009, pet. ref'd). In the State's view, because Heredia took the position in his murder trial that he could be prosecuted for tampering, Heredia should not be allowed to take the position in this habeas proceeding that his prosecution is prohibited by double jeopardy.

Judicial estoppel is an "equitable doctrine invoked by a court at its discretion" to prevent "'a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase.'" *New Hampshire v. Maine*, 532 U.S. 742, 749–50 (2001) (quoting *Pegram v. Herdrich*, 530 U.S. 211, 227 n.8 (2000)). Courts consider at least three factors when deciding whether to invoke the doctrine in a particular case:

> First, a party's later position must be "clearly inconsistent" with its earlier position. Second, courts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create "the perception that either the first or the second court was misled." Absent success in a prior proceeding, a party's later inconsistent position introduces no "risk of inconsistent court determinations," and thus poses little threat to judicial integrity. A third consideration is whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.

Id. at 750–51 (internal citations omitted); *see Schmidt v. State*, 278 S.W.3d 353, 358 & n.9 (Tex. Crim. App. 2009) (applying doctrine of judicial estoppel to prevent State from taking contrary positions in two separate appeals from defendant's conviction); *Ahmad v. State*, 295 S.W.3d 731,

741 (Tex. App.—Fort Worth 2009, pet. ref'd) ("The doctrine is not intended to punish inadvertent omissions or inconsistencies but rather to prevent parties from playing fast and loose with the judicial system for their own benefit."); *Hall*, 283 S.W.3d at 156 ("The doctrine is not, strictly speaking, estoppel, but rather 'arises from positive rules of procedure based on justice and sound public policy.'" (quoting *Davidson v. State*, 737 S.W.2d 942, 948 (Tex. App.—Amarillo 1987, pet. ref'd))).

As an initial matter, Heredia argues that the State waived its judicial-estoppel argument by failing to raise it in the court below. In civil proceedings, judicial estoppel is considered an affirmative defense that must be pleaded and proved in the trial court before it may be considered on appeal, absent extraordinary or "especially egregious" circumstances. *See Perryman v. Spartan Tex. Six Capital Partners, Ltd.*, 546 S.W.3d 110, 117 (Tex. 2018); *see also Huffman v. Union Pac. R.R.*, 675 F.3d 412, 418 (5th Cir. 2012); *Beall v. United States*, 467 F.3d 864, 870 (5th Cir. 2006); *cf. RBC Capital Mkts., LLC v. Highland Capital Mgmt., L.P.*, No. 05-13-00948-CV, 2015 Tex. App. LEXIS 12364, at *16–20 (Tex. App.—Dallas Dec. 4, 2015, pet. denied) (mem. op.) (explaining differences between state and federal law on doctrine of judicial estoppel and declining to invoke doctrine in that case). However, in criminal proceedings, judicial estoppel may be raised for the first time on appeal, at least in some cases. *See Schmidt*, 278 S.W.3d at 358 (applying judicial-estoppel doctrine for first time on discretionary review); *Arroyo v. State,* 117 S.W.3d 795, 798 (Tex. Crim. App. 2003) (same); *Ahmad*, 295 S.W.3d at 741 (addressing judicial-estoppel argument for first time on appeal but rejecting merits of argument). *But see United States v. McCaskey*, 9 F.3d 368, 378–79 (5th Cir. 1993) (refusing to apply judicial estoppel in case where appellant failed to preserve argument in court below).

Assuming without deciding that the State may raise judicial estoppel for the first time on appeal here, we decline to invoke that doctrine on the record in this case. We cannot conclude on this record that Heredia's jury arguments at his murder trial were successful or gave him an "unfair advantage" over the State. The State asserts that Heredia "prevailed" in the court below by persuading the jury to acquit him of murder and convict him of the lesser-included offense of manslaughter, but nothing in the record suggests that the jury's decision was influenced by Heredia's arguments regarding the tampering charges. As the State acknowledges in its brief, throughout trial, both parties focused primarily on the evidence related to the alleged murder. Moreover, Heredia received the maximum sentence for manslaughter, despite defense counsel's arguments to the jury, so it does not appear that Heredia benefited in any way by arguing to the jury that he could be convicted later for tampering.

Furthermore, as we explained above, the prohibition against double jeopardy is a constitutional right. Judicial estoppel, on the other hand, is an "equitable doctrine invoked by a court at its discretion," *New Hampshire*, 532 U.S at 750, to promote "justice and sound public policy," *Hall*, 283 S.W.3d at 156. It would be neither just nor sound public policy to allow that doctrine to override Heredia's constitutional right to be free from double jeopardy, particularly absent any evidence that defense counsel's conduct in the murder trial benefited Heredia or gave him an "unfair advantage" over the State.

We overrule the State's first issue.

CONCLUSION

We affirm the district court's order granting habeas relief.

Gisela D. Triana, Justice

Before Chief Justice Rose, Justices Baker and Triana

Affirmed

Filed: May 28, 2020

Publish