IN THE SUPREME COURT OF FLORIDA

RALPH FAYSON,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. 89,554

RESPONDENT'S ANSWER BRIEF ON THE MERITS

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

JAMES W. ROGERS
TALLAHASSEE BUREAU CHIEF,
CRIMINAL APPEALS
FLORIDA BAR NO. 325791

TRISHA E. MEGGS
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 045489

OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(904) 488-0600

COUNSEL FOR RESPONDENT

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PRELIMINARY STATEMENT

Respondent, the State of Florida, the appellee in the District Court of Appeal (DCA) and the prosecuting authority in the trial court, will be referenced in this brief as respondent, the prosecution, or the State. Petitioner, Ralph Fayson, the appellant in the DCA and the defendant in the trial court, will be referenced in this brief as petitioner or by proper name.

The symbol "R" will refer to the record on appeal, and the symbol "T" will refer to the transcript of the trial court's proceedings; "IB" will designate the Initial Brief of Petitioner. Each symbol will be followed by the appropriate volume and page number in parentheses.

All emphasis through bold lettering is supplied unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

The State agrees with petitioner's statement of the case and facts.

SUMMARY OF ARGUMENT

Petitioner argues that this Court should vacate his conviction for aggravated battery because it is inconsistent with the jury's verdict finding him guilty of burglary of a dwelling which was a lesser included offense of burglary of a dwelling with a battery. Inconsistent verdicts are generally permitted in Florida. However, a legally inconsistent verdict cannot stand. Legally inconsistent verdicts occur when a defendant is convicted of a greater offense but acquitted of a necessarily lesser included offense without which the greater offense cannot stand. Burglary of a dwelling with a battery is not a necessarily lesser included offense of aggravated battery, nor must the offense of burglary of a dwelling with a battery be established as a predicate to finding that an aggravated battery occurred. Thus, the verdict was not be legally inconsistent. Therefore, the jury's verdict was proper, and this Court should affirm petitioner's convictions.

ARGUMENT

ISSUE I

WHETHER THE JURY'S VERDICT FINDING PETITIONER GUILTY OF BURGLARY OF A DWELLING, A LESSER INCLUDED OFFENSE OF BURGLARY OF A DWELLING WITH A BATTERY, AND AGGRAVATED BATTERY WAS LEGALLY INCONSISTENT? (Restated)

Petitioner was charged with burglary of a dwelling committing a battery therein, false imprisonment, aggravated assault, and aggravated battery. (V.l R.3-4). The jury found petitioner guilty of burglary'of a dwelling, a lesser included offense of burglary of a dwelling with a battery, false imprisonment,' aggravated assault, and aggravated battery. (R.45-46). Petitioner argued that his conviction for aggravated battery should be vacated because it is legally inconsistent with his acquittal of the charge of burglary of a dwelling with a battery. The First District affirmed petitioner's convictions finding that the convictions were not legally inconsistent. Favson v. State, 21 Fla. L. Weekly D2572 (Fla. 1st DCA December 5, 1996). However, the First District certified conflict with the Fourth District's decision in Saroi v. State, 634 So. 2d 280 (Fla. 4th DCA 1994).

Inconsistent jury verdicts are generally permitted in Florida. State v. Powell, 674 So. 2d 731 (Fla. 1996). "Inconsistent

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'The trial court granted a judgment of acquittal notwithstanding the verdict as to the false imprisonment charge. (V.l R.54).

verdicts are allowed because jury verdicts can be the result of lenity and therefore do not always speak to the guilt or innocence of the defendant." Id. at 733. In fact, the United States Supreme Court stated in United States v. Powell, 469 U.S. 57, 105 S.Ct. 471, 83 L.Ed.2d 461 (1984), that:

> As the Dunn[2] Court noted, where truly inconsistent verdicts have been reached, "[t]he most that can be said ... is that the verdict shows that either in the acquittal or 'the conviction the jury did not speak their real conclusions, but that does not show that they were not convinced of the defendant's guilt." Dunn, supra, 284 U.S., at 393, 52 S.Ct., at 190. The rule that the defendant may not upset such a verdict embodies a prudent acknowledgment of a number of factors. First, as the above quote suggests, inconsistent verdicts--even verdicts that acquit on a predicate offense while convicting on the compound offense--should not necessarily be interpreted as a windfall to the Government at the defendant's expense. **It is euuallv possible that the iurv, convinced of cruilt, properlv reached its conclusion on the compound offense, and then throuah mistake. compromise, of: lenitv, arrived at an anconsastent conclusion on the lesser offense.** But in such situations the Government has no recourse if it wishes to correct the jury's error; the Government is precluded from appealing or otherwise upsetting such an acquittal by the Constitution's Double Jeopardy Clause.

469 U.S. at 64-65; 105 S.Ct. at 476-477 (emphasis added). Furthermore, inconsistent verdicts are acceptable because defendants are not harmed. A defendant's case is reviewed by the trial and appellate courts. As this Court stated "defendants have adequate procedural and constitutional protections to ensure that their convictions are not erroneous, whereas the State does not

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[2] Dunn v. United States, 284 U.S. 390, 52 S.Ct. 189, 76 L.Ed. 356 (1932).

have the benefit of any reciprocal protections." State v. Powell, 674 So. 2d at 733.

Moreover, "the power to return an inconsistent verdict, on which the jury was instructed, is necessarily included in its power of lenity, i.e., the power to dispense mercy." Naumowicz v. State, 562 So.2d 710, 713 (Fla. 1st DCA 1990), rev. denied, 576 So. 2d 289 (Fla. 1991). Thus, Naumowicz court held that "[i]f the jury decides upon a partial 'pardon' and returns a verdict of guilty on one count and not guilty on another, it is certainly unwise to have a procedure which requires the judge to enter verdicts of acquittal on both counts if the verdict is found to be inconsistent." Id. (citing Damon v. State, 397 So.2d 1224, 1228 n. 10 (Fla. 3d DCA 1981)). The United States Supreme Court also rejected "a rule that would allow criminal defendants to challenge inconsistent verdicts on the ground that in their case the verdict was not the product of lenity, but of some error that worked against them." United States v. Powell, 469 U.S. at 66; 105 S.Ct. at 477. The Court held that "[s]uch an individualized assessment of the reason for the inconsistency would be based either on pure speculation, or would require inquiries into the jury's deliberations that courts generally will not undertake." Id.

However, there is one exception to the general rule allowing inconsistent verdicts. "This exception, referred to as the "true" inconsistent verdict exception, comes into play when verdicts

against one defendant on legally interlocking charges are truly inconsistent." State v. Powell, 674 So.2d at 733. "True inconsistent verdicts, those in which an acquittal on one count negates a necessary element for conviction on another count, are rare." Gonzalez v. State, 440 So.2d 514, 515 (Fla. 4th DCA 1983), rev. dismissed, 444 So. 2d 417 (Fla. 1983).

True inconsistent verdicts are also referred to as legally inconsistent verdicts. A legally inconsistent verdict occurs when the jury finds a defendant guilty of the greater offense but acquits him or her of a necessarily lesser included predicate offense. See Mahaun v. State, 377 So. 2d 1158, 1161 (Fla. 1979)(Mahaun was convicted of third-degree felony murder based on aggravated child abuse and culpable negligence, which was a lesser included offense of aggravated child abuse. However, this Court reversed Mahaun's conviction because "the aggravated child abuse felony was an essential element of felony murder."); Redondo v. State, 403 So, 2d 954, 956 (Fla. 1981)(This Court vacated Redondo's conviction for possession of a firearm in the commission of a felony when the jury had acquitted him of the underlying felony.).

In the case at bar, the verdicts may have been logically or factually inconsistent; however, the verdicts were not legally inconsistent. "Logical inconsistencies, as distinguished from legal inconsistencies, are acceptable." Gonzalez v. State, 449 So.2d 882, 887-888 (Fla. 3d DCA 1984). Burglary of a dwelling with

a battery is not a necessarily lesser included offense of aggravated battery, nor must the offense of burglary of a dwelling with a battery be established as a predicate to finding that an aggravated battery occurred. Thus, the offenses cannot be legally inconsistent.

The present case is similar to Gonzalez v. State, 449, So. 2d 882 (Fla. 1984). Gonzalez was charged with two counts of felony murder and one count of attempted felony murder of which robbery of marijuana was the underlying felony. Id. at 887. He was also charged with robbery and trafficking. Id. The jury found Gonzalez guilty of third degree murder, attempted third degree murder, and robbery. Id. Gonzalez argued that his conviction for third degree murder was an acquittal for first degree felony murder of which robbery was an essential element. He therefore contended that the verdict was legally inconsistent and his robbery conviction should be vacated. Id. However, the Third District held that:

> An exception to the general rule which permits inconsistent verdicts is recognized where an acquittal of the underlying felony effectively holds the defendant innocent of a greater offense involving that same felony. The classic legal inconsistency would be presented here if the defendant had been acquitted of trafficking in narcotics (as charged in Count 5) while being found guilty as to third-degree murder while trafficking in narcotics.

Id. at 887. Thus, the Third District found that the jury's verdict was proper. Likewise, the jury's verdict in this case was not legally inconsistent because a conviction for burglary of a

dwelling with a battery was not necessary to finding that petitioner committed an aggravated battery.

The First District certified conflict with Sgroi v. State. 634 so. 2d 280 (Fla. 4th DCA 1994). In Sgroi, Sgroi was likewise convicted of aggravated battery along with burglary of a dwelling, a lesser included of the charged offense of burglary of a dwelling with a battery. Id. at 282-283. The Fourth District held that verdicts were inconsistent and vacated one of his convictions. Id. at 283. However, the Fourth District made its decision in Suroi without the benefit of this Court's opinion in State v. Powell, which effectively limited legally inconsistent verdicts to cases in which a jury finds a defendant guilty of the greater offense of felony murder or possession of a firearm during the commission of felony, but acquits the defendant of the underlying predicate felony offense. See Favson v. State, 21 Fla. L. Weekly D2573 (Fla. 1st DCA Dec. 5, 1996) (Allen, J. concurring) ("I understand from the supreme court's recent opinion in State v. Powell, 674 So. 2d 731 (Fla. 1996), that the court has little inclination to extend the concept of 'true' inconsistent verdicts beyond the specific situations presented in Redondo v. State, 403 So. 2d 954 (Fla. 1981), and Mahaun v. State, 377 So. 2d 1158 (Fla. 1979)[.]").

Petitioner further argues that the charges in this case are interlocking charges relying on Debiasi v. State, 681 So. 2d 890

(Fla. 4th DCA 1996). In a footnote, the Fourth District, attempting to explain its opinion in Sgroi, stated:

> Footnote 5 in Sgroi states, '[w]e are not persuaded by the state's argument that the jury was simply exercising its pardon power in acquitting appellant of the charge of burglary with *a battery* in Count I.' We now clarify that because the charges of battery and aggravated battery were interlocking charges, consistent verdicts were required under the Eaton exception, regardless of whether the jury was exercising its pardon power.

Id. at 891 n.2. The Fourth District is incorrect because the crimes of burglary of a dwelling with a battery and aggravated battery are not interlocking offenses. In Eaton v. State, 438 so. 2d 822 (Fla. 1983), this Court citing Mahaun and Redondo, stated, that "in the cited cases the underlying felony was a part of the crime charged **-- without the underlying felony the charged could not stand**." Id. at 822 (emphasis added). Thus, this Court held that a jury was required to return consistent verdicts in cases which involved interlocking charges. Id. However, as stated previously, the charges in this case were not interlocking because the offense of burglary of a dwelling with a battery does not have to be established in order to find that a defendant committed an aggravated battery. Further, unlike cases involving a charge of felony murder and the predicate felony, the particular battery charged in Count I does not have to be established to prove the charge of aggravated battery in Count II.

Thus, the offenses in this case may be logically inconsistent; however, they are not legally inconsistent verdicts. In fact, there

are several possible explanations for the jury's decision in finding petitioner guilty of aggravated battery in Count VI, yet finding him guilty of burglary without the aggravating factor of battery in Count I. The jury could have made a distinction between the simple battery charged as a part of Count I and the aggravated battery charged in Count IV. The victim's testimony that petitioner cut her throat with a knife and broke a beer bottle over her head, (V.3 T.43,49-50), was corroborated by Officer Groves testimony describing the victim's physical condition, and the knives and broken beer bottle found in the victim's apartment. (V.3 T.73,82,85). Thus, the jury could have concluded that the evidence was sufficient to establish the aggravated battery, yet found the evidence of the simple battery insufficient. Moreover, the jury could have found that petitioner's actions constituted an aggravated battery not a simple battery.

Beyond the factual distinction the jury could have made, the jury could have simply been exercising its power of lenity. The jury, having determined to find petitioner guilty of the aggravated battery, as the evidence clearly supported, could have decided to exercise its mercy by not, again, punishing petitioner for the battery in Count I. Additionally, the'verdict could also have been the result of compromise among the jurors in the decision making process. However, as pointed out by the cases cited above, this Court should not now try to speculate as the actual basis of the

decision. See Dunn v. United States, 284 U.S. 390, 394, 52 S.Ct. 189, 191, 76 L.Ed. 356 (1932) ("That the verdict may have been the result of compromise, or of a mistake on the part of the jury, is possible. But verdicts cannot be upset by speculation or inquiry into such matters.").

In any event, it is clear from the record that there was sufficient evidence that petitioner committed the aggravated battery. Fayson v. State, at D2572 ("the evidence overwhelmingly supports the verdicts of burglary and aggravated battery"). Thus, although the verdict may have been logically inconsistent, it was not legally inconsistent. Accordingly, this Court should affirm the decision of the First District.

CONCLUSION

Based on the foregoing, the State respectfully submits that the decision of the First District in Favson v. State, 21 Fla. L. Weekly D2572 (Fla. 1st DCA Dec. 5, 1996) should be approved.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

JAMES W. ROGERS
TALLAHASSEE BUREAU CHIEF,
CRIMINAL APPEALS
FLORIDA BAR NO. 325791

TRISHA E. MEGGS
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 045489

OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(904) 488-0600

COUNSEL FOR RESPONDENT
[AGO# L96-1-9180]

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing RESPONDENT'S ANSWER BRIEF ON THE MERITS has been furnished by U.S. Mail to Howard Lidsky, Esq., 824 E. University, Gainesville, Florida, 32601, this 11th day of February, 1997.

Trisha E. Meggs
Assistant Attorney General

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