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IN THE SUPREME COURT OF FLORIDA

RALPH FAYSON
Petitioner

vs.

THE STATE OF FLORIDA
Respondent,

_____/

Case No. 89,554

District Court of Appeal
1st District- No. 95-4085

PETITIONER'S INITIAL BRIEF

APPEAL FROM THE FIRST DISTRICT COURT OF APPEALS

FOR PETITIONER

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STATEMENT OF THE CASE AND OF THE FACTS

Note- The following system of abbreviation is used in the brief: R refers to the Record, Tr. I refers to the transcript labeled "Jury Voir Dire-and- Pre-trial Motions", Tr. II refers to the transcript labeled "Transcript of Jury Trial Proceeding", and Tr. III refers to the transcript labeled "Motion for New Trial and Sentencing". The brief utilizes the court reporters hand written numbering at the bottom of the pages of Tr. I and Tr. III. The court reporters numbering method is located on the second page of the table of contents in the Record.

On December 21, 1994, petitioner was formally charged by information with four felony counts (R. 3-4). The four counts in order were burglary of a dwelling with a battery, false imprisonment, aggravated assault, and aggravated battery. A jury was chosen and sworn to try petitioner's case on September 25, 1995. The remainder of the trial was held on September 29, 1995. The jury found petitioner guilty of the following four felonies: 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 and Tr. 183-184). On October 9, 1995, petitioner filed a motion for a new trial under Florida Rule of Criminal Procedure 3.600 (R, 47-48). On November 7, 1995, the trial court heard the motion far new trial and pronounced judgment and sentence upon petitioner. The trial court granted the motion for judgment of acquittal as to count two, false imprisonment, and denied the motion as to the three other counts (R. 54 and Tr. 1269). Petitioner was adjudicated guilty as to the three other

counts and sentenced to a guideline sentence of 70.25 months (R. 51–58). Petitioner filed a timely notice of appeal. (R. 60).

On December 5, 1996, the First District Court of Appeal affirmed petitioner's convictions and sentences. Fayson v. State, 21 Fla. L. Weekly D2572 (Fla. 1st DCA December 13, 1996). However, the First District Court of Appeal certified their opinion to be in conflict with the decision of the Fourth District Court of Appeal in Sgroi v. State, 634 So.2d 280 (Fla. 4th DCA 1994).

Petitioner filed a timely notice to invoke the discretionary jurisdiction of the supreme court.

At trial the State of Florida called two witnesses: Lanu Perosi, the victim, and Officer Sonya Groves, one of the first police officers who responded to the crime scene. The petitioner called three witnesses: himself; his mother, Helen Fayson; and Officer Corey Dahlsn, one the first officers who responded to the crime scene.

The victim, Lanu Perosi, testified that she and petitioner had been lovers. (Tr. II. 32). The romantic relationship ended in July, 1994. (Tr. II. 33). The victim testified that on August 26, 1994 at 10:30 pm she was preparing to spend an evening with friends and waiting for a ride. (Tr. II 34-36 and 57–58). When she opened the door, the petitioner was in the doorway. (Tr. II 36). He forced his way into the apartment. (Tr. II 36-37).

The victim, Lanu Perosi, testified to numerous acts of brutality by petitioner against her. She testified that petitioner choked her (Tr. II 38), dragged her by the hair (Tr. II 38), held a knife to her neck (Tr. II 40), punched her (Tr. II

42), and smashed a beer bottle on her head. (Tr. II 49–51). The petitioner moved the victim among a few rooms during the episode. (Tr. II 38, 40- 41, and 48). There is no indication that anyone else was present during the attack. The victim testified that her child was spending the evening elsewhere. (Tr. II. 31). There is no indication that the victim and petitioner had any contact that evening outside of her apartment.

The victim testified that, when petitioner was able to see the extent of her injuries, he dropped the knife in his hand. (Tr. II 54). She took this opportunity to escape him. (Tr. II 54). She immediately went to a neighbor's apartment. (Tr. II 55). Within fifteen minutes of her escape, she made contact with the police. (Tr. 11 *56).* Officer Graves testified that she first mads contact with the victim at approximately 1:00 am (Tr. II 74).

Appellant testified that he was at the movies the night of the attack, (Tr. If 110). Appellant and Appellant's mother testified that the victim gave prior statements inconsistent with hex trial testimony about the identity of her assailant and that the victim wanted to drop the charges. (Tr. II 102-103, 112, and 118).

SUMMARY OF ARGUMENT

FIRST ISSUE ON APPEAL

DID THE JURY RENDER A LEGALLY INCONSISTENT VERDICT AS TO COUNT I, BURGLARY OF A DWELLING, A LESSER INCLUDED OFFENSE OF BURGLARY WITH A BATTERY AND, COUNT IV, AGGRAVATED BATTERY?

The jury's verdict as to counts I and IV are legally inconsistent. Although inconsistent jury verdicts are generally permitted, an exception to this rule exists when a verdict is inconsistent as to guilt of an individual on interlocking charges. A legally inconsistent verdict has been also defined as when what a jury fails to find in one count precludes a guilty verdict on a separate count. Thus, Florida distinguishes between logically inconsistent verdicts which are permitted and legally inconsistent verdicts which are not permitted.

In count I, Appellant was charged with burglary of a dwelling with a battery. The Jury found Appellant guilty of burglary af a dwelling which is a lesser included offense of burglary of a dwelling with a battery. The verdict acquitted Appellant of the offense of battery within the dwelling. However, the jury found the Appellant guilty as charged in count IV, aggravated battery. There is no evidence that the victim and Appellant had any contact an the date in the information outside of the victim's dwelling.

Because the jury failed to find petitioner guilty of battery in count I, the jury is precluded from finding the petitioner guilty of count IV, aggregated battery, because battery is a necessary element *of* aggravated battery,

ARGUMENT

FIRST ISSUE ON APPEAL

DID THE JURY RENDER A LEGALLY INCONSISTENT VERDICT AS TO COUNT I, BURGLARY OF A DWELLING, A LESSER INCLUDED OFFENSE OF BURGLARY WITH A BATTERY AND, COUNT IV, AGGRAVATED BATTERY?

The State of Florida formally charged by information the petitioner with four felony counts (R. 3-4). The four counts in order were burglary of a dwelling with a battery, false imprisonment, aggravated assault, and aggravated battery. All four counts allege the same, single victim, Lanu Perosi, and are alleged to have occurred on the same day, August 27, 1994. Petitioner pled not guilty to the information, and his case went to jury trial (R 8).

The jury found petitioner not guilty of the charge of burglary of the victim's dwelling and while committing that burglary also committing a battery upon the victim. The jury did find petitioner guilty of a lesser included offense of burglary of the victim's dwelling. In essence, the jury found that the petitioner did not commit a battery upon the victim on August 27, 1994 while in her dwelling.

The jury further found petitioner guilty of count 11, false imprisonment, count III, aggravated assault, and count IV, aggravated battery.

This verdict is in part logically inconsistent which is permissible and in past legally inconsistent which is

impermissible. The jury's verdict is logically inconsistent in that petitioner was convicted *of* false imprisonment as well as aggravated assault and aggravated battery. The instruction which the jury received from the trial court stated that the third element of false imprisonment is that the petitioner "acted for any purpose *other than to:* ... (b) inflict bodily harm upon ox to terrorize the victim or another person." (R. 29)(Italics added). Thus, the jury's finding petitioner guilty of committing both aggravated assault and aggravated battery upon the victim is logically inconsistent with a conviction for false imprisonment.

In spite *of* this logical inconsistency, this aspect of the jury's verdict was permissible because inconsistent jury verdicts are generally permitted in Florida. State v. Powell, 674 So.2d 731, 732 (Fla. 1996). The verdict in each count is considered separately and therefore inconsistency is lawful. Streeter v. State, 416 So. 2d 1203, 1206 (Fla.3d DCA 1982). This policy is explained to the jury in Standard Jury Instruction 2.08(a) which states:

> A separate crime is charged in each count of the information and while they have been tried together each crime and the evidence applicable to it must be considered separately and a separate verdict returned as to each. A finding of guilty or not guilty as to one crime must not affect your verdict as to the other crime charged.

Unfortunately, the trial court failed to give the jury this instruction. (R. 42-43 and Tr. If. 176).

Although juries are not instructed in their pardon power, this Court recently reasoned that inconsistent 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." Powell, at 733. The United States Supreme Court, in concluding that inconsistent jury verdicts are permitted, similarly reasoned that "it is equally possible that the jury, convinced of guilt, properly reached its conclusion on the compound offense, and then through mistake, compromise, or lenity, arrived at an inconsistent conclusion..." United States v. Powell, 469 U.S. 57, 105 S.Ct. 471, 83 L.Ed.2d 461 (1984).

Although the apparent source of the logical inconsistency, between count II and counts III and IV, is an incoherent charging decision on the part of the Office of the State Attorney, there is not currently any legal doctrine which disallows such a verdict. Although current precedent did not mandate a judgment of acquittal, the trial court, upon motion of the petitioner, set aside the jury's verdict in count II, false imprisonment. (R. 54). Because the State of Florida did not pursue its appellate rights, this issue was not before the First District Court of Appeal. See, Fla. R. App. P. 9.140(c)(H).

The jury's verdict is legally inconsistent and thus impermissible in counts I and IV. The law that permits inconsistent verdicts has a single exception into which this case falls. This exception has been labeled as either a "legally inconsistent" verdict, Pitts v. State, 425 So.2d 542, 544 (Fla. 1983), or "truly inconsistent" verdict, State v. Powell, 674 So.2d 731, 733 (1996).

This Court first recognized this exception in Mahaun v. State, 377 So. 2d 1158 (Fla. 1979). In Mahaun, Patricia Mahaun was tried on third-degree felony murder and aggravated child abuse. The jury convicted her of felony murder but on the aggravated child abuse count found her guilty of the lesser included misdemeanor of culpable negligence. Because the aggravated child abuse felony was the predicate offense and an essential element of felony murder, her conviction for third-degree felony murder was reversed and vacated. Mahaun at 1161. This Court furthered this exception in Redondo v State, 403 So. 2d 954 (Fla. 1981). In Redondo, Ricardo Redondo was tried for aggravated battery and possession of a firearm during the commission of a felony. The jury found Redondo guilty of battery, a lesser included misdemeanor of aggravated battery, and possession of a firearm during the commission of a felony. Because the jury in effect acquitted Redondo of the predicate felony, this Court reversed and vacated the conviction for possession of a firearm during the commission of a felony. Redondo, at 956.

The rule which results from Mahaun and Redondo has been variously expounded. In Eaton v. State, 438 So.2d 822, 823 (Fla. 1983), this Court explained that the verdicts in Mahaun and Redondo were legally inconsistent because "the jury is, in all cases, required to return consistent verdicts as to the guilt of an individual on interlocking charges." Previously in that same year, this Court explained that a verdict is legally inconsistent when "an essential element of the crime for which the jury found

defendant guilty was missing by virtue of its other verdict." Pitts v. State, 425 So.2d 542, 544 (Fla. 1983). Recently, this Court cited Justice Anstead, writing for the Fourth District Court of Appeal in Gonzalez v. State, 440 So.2d 524, 515 (Fla. 4th DCA 1983), review dismissed, 444 So.2d 417 (Fla. 1983), as explaining that true inconsistent verdicts are "those in which an acquittal on one count negates a necessary element for conviction on another count." &well, at 33.

Pitts and Gonzalez are very similar in their definitions of a truly inconsistent verdict though on careful scrutiny Pitts has a potentially broader application. The Gonzalez definition specifies that an acquittal on one count can cause a true inconsistency with another count. The Pitts definition does not specify that the inconsistency must arise from an acquittal in one of the counts. In the instant case for example, the jury's guilty verdict in the false imprisonment count implies that petitioner did not inflict bodily harm upon or to terrorize the victim. A potential application of the Pitts definition could exploit this guilty verdict to attack the guilty verdicts for aggravated assault and aggravated battery. Pitts arguably requires the aggravated assault and aggravated battery counts to be vacated since an essential element of both aggravated battery and aggravated assault would be missing by virtue of the other count, false imprisonment. When this Court in Powell adopted the Gonzalez definition of a truly inconsistent verdict, this Court rejected though not explicitly this potentially broader application of the inconsistent verdict doctrine.

In the instant case, the aggravated battery verdict in count IV is truly inconsistent with the jury's verdict in count I within the analysis of both Eaton and Gonzalez. The jury returned an inconsistent verdict as to the guilt of the petitioner on interlocking charges. Aggravated battery and burglary with a battery are interlocking charges. Debiasi v. State, 681 So.2d 890, 891 n. 1 (Fla. 4th DCA 1996), and see, Crawford v. State, 662 So.2d 1016 (Fla. 5th DCA 1995). Burglary with a battery and aggravated battery share the essential, common element of battery. Florida Statute 810.02(2) provides that, if an offender makes an assault or battery upon any person during the course of a burglary, the burglary constitutes a first degree felony punishable by life. This offense is the highest or first degree of three separate degrees of the offense of burglary. Bradley v. State, 540 So.2d 185 (Fla. 5th DCA 1989). Florida Statute 784.045(1)(a) provides that a person who, in committing battery, uses a deadly weapon commits the offense of aggravated battery. A battery is a necessarily lesser included offense of aggravated battery. Foster v. State, 448 So.2d 1239 (Fla. 5th DCA 1984); and Arnold v. State, 514 So.2d 419 (Fla. 2d DCA 1987). In order to commit an aggravated battery, the offender must commit a battery because the first element of an aggravated battery is the definition of battery. Fla. Std. Jury Instr. (Crim.) [p. 88].

Neither Mahaun nor Redondo uses the term interlocking charges. Interlocking charges enters the truly inconsistent verdict doctrine in this Court's opinion in Eaton. Eaton does not define interlocking charges, This Court did not mention

interlocking charges again until its recent decision in Powell. Powell defines interlocking charges by reference to Justice Anstead's opinion for the Fourth District Court of Appeal in Gonzalez. Gonzalez, which cites the interlocking charges language from Baton but does not employ that language in its reasoning, establishes the true inconsistent verdict doctrine as an inquiry into whether the acquittal on one count negated a necessary element in another.

This inquiry requires further analysis into the breadth of the definition of interlocking charges. Certainly, counts are interlocking when one count is in its entirety an element of a second count. One entire count is subsumed in the other count like the smaller of two concentric circles. This was the example of interlocking charges employed in Eaton and the specific facts of Mahaun and Redondo. In Mahaun for example, the aggravated child abuse count was in its entirety an element of third degree felony murder.

A second example of interlocking charges exists when counts overlap or link in one element. The instant case is a prime example of overlapping rather than subsumed interlocking charges. The offenses of burglary with a battery and aggravated battery share the element of a battery. Neither offense is wholly subsumed in the other rather they lie apart but overlapping in the element of battery like a Venn diagram.

This Court has never and did not in Powell limit the scope of interlocking charges to subsumed interlocking charges. In fact the express language of Powell, and Eaton states that subsumed

interlocking charges are an example of interlocking charges rather than the sole example. In Eaton, this Court wrote that "in the cited cases [Mahaun and Redondo] the underlying felony was a part of the crime charged-without the underlying felony the charge could not stand." Eaton, at 823. This Court is here specifying that consistency is required in subsumed interlocking charges. But this Court continues that, "the jury is, in all cases, required to return consistent verdicts as to the guilt of an individual on interlocking charges." Id. (Italics added). If this Court in Eaton intended to limit interlocking charges to subsumed interlocking charges, this Court would have written that the jury is, in such cases, required to return consistent verdicts . ..This Court's use of the more expansive phrase, "in all cases", implies that the limited view of interlocking charges was not intended.

This Court, again, in Powell, implies that subsumed interlocking charges are only one example of a broader category. As previously stated, this Court cited to Gonzalez as providing insight into the definition of interlocking. Powell, at 733. Gonzalez focuses on the negation of a necessary element, Id. Gonzalez does not specify that the necessary element is a subsumed separate count. Rather, the Gonzalez element test is equally apposite to overlapped elements. This Court, in Powell, immediately after citing Gonzalez provides the previously discussed passage from Eaton as an example when it has required consistent verdicts. As in Eaton itself, this Court cites the subsumed interlocking charges as an example of interlocking

charges but the language assumes that it is but one example.

The lower tribunal, the First District Court of Appeal, limited interlocking charges to subsumed interlocking charges, Fayson v. State, 21 Fla. L. Weekly D2572, 2573 (Fla. 1st DCA December 13, 1996). This decision conflicted with the Fourth District Court of Appeals which has recognized overlapping charges as an example interlocking charges. Sgroi v. State, 634 So.2d 280 (Fla. 4th DCA 1994), and Debiasi v. State, 681 So.2d 890, 891 n. 1 (Fla. 4th DCA 1996). The Fourth District Court of Appeals' position is consistent with the position of the Fifth District Court of Appeals in that the Fifth District has held that a defendant is not lawfully convicted for both burglary with a battery and aggravated battery. Crawford v. State, 662 So.2d 1016 (Fla. 5th DCA 1995).

The position of the Fourth District Court of Appeals is also consistent with the Court of Appeals of New York. In New York, "whether verdicts are repugnant or inconsistent (the difference is inconsequential) is determined by examining the charge to see the essential elements of each count, as described by the trial court, and determine whether the jury's findings on these elements can be reconciled. The critical concern is that a defendant should not be convicted of a crime when the jury has found that he did not commit one or more of its essential elements." People v Loughlin, 559 N.Y.S. 2d 962, 76 N.Y. 2d 804, 559 N.E. 2d 656, 658; also see, People v. Trappier, 637 N.Y.S. 2d 352, 87 N.Y. 2d 55, 660 N.E. 2d 1131, on remand 639 N.Y.S. 2d 880.

Because the jury failed to find petitioner guilty of battery

in count I, the jury is precluded from finding the petitioner guilty of count IV, aggregated battery. Incidentally, this result would not have been mandated if the jury had entirely acquitted petitioner in count I. In that event, the verdict would not clearly indicate which element of burglary with a battery the jury believed the State did not prove. Since the verdict in this case does clearly manifest the jury's acquittal of the petitioner of the single element of battery, the verdict is unquestionably truly inconsistent. This Court's precedent holds that truly inconsistent verdicts are not permitted, and in keeping with that precedent, this Court should vacate the petitioner's conviction for aggravated battery.

CONCLUSION

Wherefore, petitioner prays that this Honorable Court vacate his conviction for aggravated battery. Petitioner prays that this Honorable Court remand this case to the trial court for resentencing with a new guideline sco esheet that would not reflect a conviction for aggravated b 4ttery.

CERTIFICATION

I HEREBY CERTIFY that a true and correct copy of the foregoing has been sent by U.S. Mail to the Office of the Attorney General, Legal Section-Suite 1502, The Capitol, Tallahassee, Fl 32399, this 17 of January, 1997.

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