IN THE SUPREME COURT OF FLORIDA

CASE NO. SC06-628

DCA NO. 3D04-941

DEWARN ANTONIO BROWN,
Appellant,

vs.

THE STATE OF FLORIDA,
Appellee.

BRIEF OF RESPONDENT ON THE MERITS

ON PETITION FOR DISCRETIONARY REVIEW
FROM THE DISTRICT COURT OF APPEAL
OF FLORIDA, THIRD DISTRICT

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INTRODUCTION

Appellant/Petitioner, DEWARN ANTONIO BROWN, was the Appellee in the Third District Court of Appeal, and the Defendant in the trial court. Appellee/Respondent, THE STATE OF FLORIDA, was the Appellant below, and the prosecution in the trial court. The parties will be referred to herein as they stood in the trial court. All references to the Record on Appeal and the transcripts from the trial court proceedings will be denoted by the symbols, "R." and "T." followed by an appropriate page number, respectively.

STATEMENT OF THE CASE

Defendant was charged by Grand Jury indictment with: (1) Murder in the First Degree pursuant to sections 782.04(1), 775.087 and 777.011, Florida Statutes; (2) Armed Robbery pursuant to sections 812.13(2)(A), 775.087 & 777.011, Florida Statutes; and (3) Possession of Heroin with the Intent to Distribute pursuant to section 893.13(1)(A)(1), Florida Statutes. (R. 28-9). Specifically, the indictment alleged that defendant and co-defendant, Tyrone Barbary, killed Andre Robert Sloate while engaged in the perpetration of, or in an attempt to perpetrate, any robbery, by shooting Mr. Sloate. (R. 28).

On February 3, 2004, a jury found defendant guilty of Murder in the First Degree and Petit Theft as a lesser included offense of armed robbery. (R. 61).

Defendant moved to vacate the felony murder conviction on the ground that it was inconsistent with the petit theft conviction. (R. 64-6). Following a hearing, the trial court orally granted Defendant's motion to vacate the first degree murder conviction. (R. 106-08). The State moved for rehearing on March 11, 2004, which the trial court denied by written order dated March 24, 2004, and vacated Defendant's felony murder conviction. (R. 71-80). On May 6, 2004, the trial court acquitted Defendant of first degree felony murder and vacated the jury's judgment as to that count. (R. 83-4). On April 2, 2004, the State appealed the trial court's order which vacated the Defendant's felony murder conviction. (R. 88-92).

On March 8, 2006, the Third District Court of Appeal, in case number 3D04-941, reversed the decision of the trial court, and remanded with instructions to enter judgment on the jury verdict for first degree murder and for appropriate sentencing thereafter. (R. 113-116). This Court granted Defendant's motion to invoke the discretionary jurisdiction of this Court. The State's Answer follows.

STATEMENT OF THE FACTS

During trial, the State told the jury in its opening statement that, on October 21, 2001, the victim, a twenty-five year old male with a heroin addiction, drove from Deerfield Beach to an abandoned building in Miami to purchase heroin. (T. 241-46). While the victim was there, the Defendant, and his three co-defendants robbed him of $3000 from his wallet, and killed him. (T. 241-46).

In its case in chief, the state introduced two taped statements that Defendant provided to the police on November 5, 2001. (T. 467-89, 503-25). In the second tape, defendant confessed to his involvement in the alleged crimes. (T. 503-25). He stated that he was walking down the street when he saw Mr. Barbary, a/k/a "Black," who sells heroin, and Mr. Stroman, a/k/a "Shorty." (T. 508, 519, 525-26). Black and Shorty told Defendant that there was a "cushion white man" in Shorty's apartment, which was located in an abandoned building. (T. 508). Defendant asked how much money the victim had, and when Black and Shorty said $3,000 to $4,000, Defendant responded, "Well, shit let's go." (T. 508-9). Defendant indicated that "originally" there was a gun and that "[t]he gun came from Black." (T. 510). Defendant stated that he never held the gun and that he had not seen it before the incident. (T. 522).

Knowing that Black and Shorty intended to rob the victim, all three proceeded into the abandoned building to where the victim was waiting with Andrina Lopez, a/k/a "Jackie," and demanded that the victim give them his money. (T. 508-09). A struggle ensued between the victim and the three perpetrators, Black, Shorty, and Defendant. (T. 508-14). While Black was hitting the victim in the head with his elbow, Shorty and Defendant searched the victim for money. (T. 513-15). The gun that Black had went off and, as a result, Defendant panicked and left the abandoned apartment, even though Black and Shorty were still struggling

to get the money from the victim. (T. 514-15). Black then told Defendant he was hit and Defendant asked "How you got shot?" (T. 514). Even though the gun went off, Black and Shorty continued to try to get the victim's money. (T. 515).

Defendant stated that he did not know who took the wallet or who got the money. (T. 516). The victim's wallet was found a short distance away in a dumpster behind a market. (T. 249, 315-20). Defendant knew that the victim drove a black pick-up truck. (T. 517-18). Defendant admitted that he made a big mistake and claimed that he "was forced into it, something that was very violent." (T. 524).

The victim's mother, Irene Margarita Sloate, testified that her son was addicted to heroin and was carrying $3,000 in his wallet because he had just received a tax return check. (T. 434). Ms. Sloate stated that the victim drove to Miami to purchase heroin. (T. 434). Ms. Sloate identified the black pick-up truck parked outside the abandoned building as her son's. (T. 436).

The State also presented the testimony of the medical examiner, Doctor Emma Lew. Dr. Lew testified that witnesses at the scene said they saw a black male, a Puerto Rican female and a white male entering the abandoned building. (T. 409). Dr. Lew stated that the witnesses told her that the black male and female were then seen walking out of the building and that the black male was later seen at Jackson Memorial Hospital. (T. 410). The black male was later identified as Mr. Barbary, a/k/a Black. (T. 324-29). In addition, the State introduced evidence from

various experts of fingerprints, bullets and gunshot residue which linked Black and Ms. Lopez to the victim's death. (T. 281-313, 315-20, 324-29, 330-42, 423-30).

The defense moved for a mistrial and to suppress on the ground that there was no physical evidence which placed the defendant at the scene of the crime and that defendant's confession obtained by the police was coerced and involuntary. (T. 250-59, 541). In addition, the defense argued that there was no evidence to support a finding that the victim was killed as a result of a robbery or first degree felony murder. (T. 439-40). The trial court denied defense counsel's motions. (T. 442-45, 541, 546, 609). At the close of the State's case, defense counsel moved for acquittal arguing that the state presented no evidence that Defendant was at the scene of the murder. (T. 609-12). The court reserved ruling on the motion. (T. 614). Thereafter, the defense rested. (T. 631).

The trial court evaluated counsels' requests for jury instructions and verdict form. (T. 365-67, 632-54, 717-18). The State sought to include instructions for first degree felony murder with second degree murder and manslaughter as lesser included offenses and armed robbery with robbery and grand theft as lesser included offenses. (T. 366-67). Neither party objected to the felony murder instructions which based the underlying felony on either a robbery or an attempted robbery. (T. 362-67, 632-54, 717-19).

As to the armed robbery charge, defense counsel opposed the inclusion of instructions for armed robbery on the basis that there was no evidence that showed that defendant had a weapon. (T. 636, 640). The State argued that, as a principal, Defendant could be convicted for armed robbery. (T. 637, 647). Defense counsel argued that the State's case against Defendant was based on inferences, and that "the truthful statement is he leaves. He doesn't take the money or the wallet" and that "there is no place to check mark based on the facts of the case." (T. 647, 718). Neither party, however, sought to add an instruction for attempted robbery as a secondary lesser included offense to armed robbery. (T. 362-67, 632-54, 717-19). In addition, defense counsel objected to the instruction for grand theft because there was no proof that the victim had more than $300 in his wallet. (T. 644-45). The parties agreed to an instruction for petit theft. (T. 653). The parties had no objection to the verdict form. (T. 719).

During closing argument, the defense argued that the State failed to prove the charges against Defendant and that Defendant's statements to the police were involuntary and coerced. (T. 655-76, 701-12). The State argued that Defendant was present during the commission of the offenses and that his confession was voluntary. (T. 676-700). In addition, the State acknowledged that Defendant's prints were not found on the victim's wallet and that although Defendant tried to get the wallet, he left the room before doing so because he got scared when Black's

gun went off. (T. 686-92). The State explained, however, that to prove that Defendant committed a first degree felony murder, it was required to prove: one, that the victim died, and two, that the victim was killed while the Defendant was either in the commission of a robbery or attempting to commit a robbery.[2] (T. 698-99). Further, the State explained that Defendant could be found guilty of first degree felony murder as a principal to the crime. (T. 700).

Following closing arguments, the trial court read the following instructions to the jury in relevant part:

> PETIT THEFT
>
> F.S. 812.014
>
> Before you can find the defendant guilty of petit theft as a lesser included offense, the State must prove the following two elements beyond a reasonable doubt:
>
> 1. DEWARN ANTONIO BROWN knowingly and unlawfully obtained, used, endeavored to obtain, or endeavored to use the property of ANDRE ROBERT SLOATE.

[2] Defendant's assertion, in his Initial Brief on the Merits at page 14, that the State's "closing argument expressly invited the jury to convict for first degree murder if Sloate was killed in the course of the commission of any crime, without regard for whether the other crime was a misdemeanor or a felony," is factually incorrect and belied by the Record. In actuality, the State specifically informed the jury: "In order for this defendant to be guilty of felony murder, the only thing the State has to prove other than the two elements that I just pointed out **are that Andre died and was killed while this defendant was either attempting to commit a robbery or in the commission of a robbery."** (T. 698-99)

2. DEWARN ANTONIO BROWN did so with intent to, either temporarily or permanently, deprive ANDRE ROBERT SLOATE of his right to the property or any benefit from it

“Obtains or uses” means any manner of:

(a) Taking or exercising control over property.

“Endeavor” means to attempt or try.

* * *

FELONY MURDER - FIRST DEGREE

F.S. 782.04(1)(a)

Before you can find the defendant guilty of First Degree Felony Murder, the State must prove the following three elements beyond a reasonable doubt:

1. ANDRE ROBERT SLOATE is dead.

2. (a) The death occurred as a consequence of and while DEWARN ANTONIO BROWN was engaged in the commission of a Robbery or

   (b) The death occurred as a consequence of and while DEWARN ANTONIO BROWN was attempting to commit a Robbery.

3. ANDRE ROBERT SLOATE was killed by a person other than DEWARN ANTONIO BROWN but both DEWARN ANTONIO BROWN and the person who killed ANDRE ROBERT SLOATE were principals in the commission of a Robbery.

In order to convict of First Degree Felony Murder, it is not necessary for the State to prove that the defendant had a premeditated design or intent to kill.

* * *

WHEN THERE ARE LESSER INCLUDED CRIMES OR ATTEMPTS

2.02(a)

In considering the evidence, you should consider the possibility that although the evidence may not convince you that the defendant committed the main crimes of which he is accused, there may be evidence that he committed other acts that would constitute a lesser included crime. Therefore, if you decide that the main accusation has not be proven beyond a reasonable doubt, you will next need to decide if the defendant is guilty of any lesser included crime. The lesser included crimes in the definition of Murder First Degree are:

(a) Murder Second Murder (sic)

(b) Manslaughter

The lesser included crimes indicated in the definition of Armed Robbery with a Firearm are:

(a) Robbery

(b) Theft

* * *

VERDICT

2.08

You may find the defendant guilty as charged in the Indictment or guilty of such lesser included crime as the evidence may justify or not guilty.

If you return a verdict of guilty, it should be for the highest offense which has been proven beyond a reasonable doubt. If you

find that no offense has been proven beyond a reasonable doubt, then, of course, your verdict must be not guilty.

Only one verdict may be returned as to each crime charged. This verdict must be unanimous, that is, all of you must agree to the same verdict. The verdict must be in writing and for your convenience the necessary forms of verdict have been prepared for you. . . .

SINGLE DEFENDANT, MULTIPLE COUNTS OR INFORMATIONS

2.08(a)

A separate crime is charged in each count of the Indictment 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 crimes charged.

PRINCIPALS

3.01

If the defendant helped another person or persons commit or attempt to commit a crime, the defendant is a principal and must be treated as if he had done all the things the other person or persons did if

1. The defendant had a conscious intent that the criminal act be done

and

2. The defendant did some act or said some word which was intended to and which did incite, cause, encourage, assist or advise the other person or persons to actually commit or attempt to commit the crime.

To be a principal, the defendant does not have to be present when the crime is committed or attempted.

MANSLAUGHTER

F.S. 782.07

Before you can find the defendant guilty of Manslaughter, as a lesser included offense, the State must prove the following two elements beyond a reasonable doubt:

1. ANDRE ROBERT SLOATE is dead.

2. (a) DEWARN ANTONIO BROWN intentionally caused the death of ANDRE ROBERT SLOATE or

3. (b) DEWARN ANTONIO BROWN intentionally procured the death of ANDRE ROBERT SLOATE or

(c) The death of ANDRE ROBERT SLOATE was caused by the culpable negligence of DEWARN ANTONIO BROWN.

* * *

To "procure" means to persuade, induce, prevail upon or cause a person to do something.

I will now define "culpable negligence" for you. Each of us has a duty to act reasonably toward others. If there is a violation of that duty, without any conscious intention to harm, that violation is negligence. But culpable negligence is more than a failure to use ordinary care toward others. In order for negligence in to be culpable, it must be gross and flagrant. Culpable negligence is a course of conduct showing reckless disregard of human life, or of the safety of persons exposed to its dangerous effects, or such an entire want of care as to raise a presumption of a conscious indifference to consequences, or which shows wantonness or recklessness, or a grossly careless disregard of the safety and welfare of the public, or

such an indifference to the rights of others as is equivalent to an intentional violation of such rights.

The negligence act or omission must have been committed with an utter disregard for the safety of others. Culpable negligence is consciously doing an act or following a course of conduct that the defendant must have known, or reasonably should have known, was likely to cause death or great bodily injury.

In order to convict of manslaughter by intentional act, it is not necessary for the State to prove that defendant had a premeditated intent to cause death.

(R. 35-60; T. 720-41). The verdict form provided as follows:

VERDICT

I.

____ a. The defendant is Guilty of Murder in the First Degree

or

____ b. The defendant is Guilty of Second Degree Murder as a lesser included offense

or

____ c. The defendant is Guilty of Manslaughter as a lesser included offense

or

____ d. The defendant is Not Guilty

II.

____ a. The defendant is Guilty of Armed Robbery with a Firearm

or

____ b. The defendant is Guilty of Robbery as a lesser included offense

or

____ c. The defendant is Guilty of Petit Theft as a lesser included offense

or

____ d. The defendant is Not Guilty

(R. 61).

During deliberations, the jury asked to listen to the tapes of Defendant's confession, and posed the following question to the court: "We need the definition of robbery as a lesser included offense and petit theft." (T. 743-51). The trial court answered:

> Well, without getting into any explanation, we have four choices on count two: Guilty of armed robbery with a firearm; okay? That's A. B, the defendant is guilty of robbery a lesser included offense. That's without a firearm and then petit theft, a third lesser included on the main charge.

(T. 755).

The jury returned a verdict finding Defendant guilty of first degree felony murder and petit theft. (R. 61; T. 757-58). After the trial court discharged the jury, defense counsel argued that petit theft cannot be a basis for felony murder and renewed Defendant's motions for mistrial and judgment notwithstanding the

verdict. (T. 761-62). Defendant requested ten days to file written motions. (T. 761-62).

On February 11, 2004, Defendant's written motion sought, inter alia, to vacate the felony murder conviction on the ground that the verdict was inconsistent because the jury acquitted Defendant of armed robbery and yet found Defendant guilty of felony murder. (T. 64-66). During the hearing on Defendant's motion to vacate, defense counsel argued that the State failed to ask for an attempted robbery instruction, that the facts of the case did not support attempted robbery and that the jury found Defendant guilty of petit theft. (R. 98). Relying on *Fayson v. State*, 698 So.2d 825 (Fla. 1997), defense counsel argued that when charges legally interlock, as when there is a felony murder charge without an underlying felony, a true inconsistent verdict exists. (R. 99). Defense counsel argued that the jury found that Defendant did not commit a robbery and, as such, he could not have caused or been a principal in the death of the victim. (R. 99).

The State agreed that true inconsistent verdicts cannot stand. (R. 101). "However, in analyzing what is a truly inconsistent verdict, the Court every time looks at the facts of the cases and in this case [there is no true] inconsistent verdict." (R. 102). The State argued that, in this case, the jurors were instructed that they could find felony murder if the Defendant was engaged in a robbery or in an attempt to commit a robbery. (R. 102). The state reasoned as follows:

> . . ., since attempted robbery was a second category two, it was not read to the jury because [defense counsel] did not ask for it. Because of that, the jury could have found that he was engaged in an attempted robbery, therefore guilty of first degree felony murder, and when they got to the armed robbery charge, the boxes that were provided to them were armed robbery, robbery, petit theft, and not guilty.
>
> * * *
>
> They did not have the choice of attempted robbery. They did exactly what the law tells them to do.

(R. 102-03).

The State explained that the law in this case instructed the jury that their verdict on one count cannot affect their verdict on another count, and that they can render a verdict of guilty for the highest offense charged which has been proven beyond a reasonable doubt. (R. 103). The State argued that the jury came back on the highest offense they could, petit theft, as the facts of the case showed that Defendant left before the other perpetrators completed the crime. (R. 103-04). Relying on *Pitts v. State*, 425 So. 2d 542 (Fla. 1983), the State argued that it was logical for a jury to believe that Defendant did not complete the crime of robbery and to find him guilty of attempted robbery even though the jury was not given the option on the verdict form to convict the Defendant for the attempted felony. (R. 104-6).

As an alternative to reinstating Defendant's conviction for first degree felony murder, the State requested that the trial court enter a judgment of guilt for manslaughter. (R. 74). The State submitted that the evidence was sufficient to sustain a conviction for manslaughter and requested that the court consider the evidence at trial and determine whether the State proved the crime. (R. 74). The trial court denied the State's motion and vacated Defendant's first degree felony murder conviction. (R. 80).

SUMMARY OF THE ARGUMENT

The Third District Court of Appeal properly reversed the trial court's order vacating the jury's conviction for first degree felony murder on the ground that it was inconsistent with its conviction for petit theft. Although the jury, by finding that Defendant committed petit theft, may have acquitted Defendant of armed robbery and robbery, it did not acquit Defendant of attempted robbery. The jury was not instructed on attempted robbery, and thus, did not have the option to convict or acquit defendant for that felony.

The instructions for first degree felony murder provided that the jury could find the Defendant guilty if the he committed either a robbery or an attempted robbery which caused the victim's death. Under these instructions, the jury could have determined that Defendant committed a felony murder by way of attempted robbery. In addition, the jury's verdict may have been the result of jury pardon. The jury may have decided not to convict Defendant for robbery where it convicted Defendant for first degree felony murder. Therefore, the jury's conviction for petit theft does not render the jury's conviction for first degree felony murder inconsistent, and thus, the jury's verdict must be reinstated.

Even if this Court determines that the verdicts are inconsistent, the trial court erred by allowing Defendant to complain about invited error. Defendant did not object to the jury instruction requiring the jury to consider each count separately.

He received the benefit of the jury's consideration of each count separately, as evidenced by the petit theft conviction. Although Defendant did not object to instructions requiring the jury to enter a separate verdict as to each count without regard to its findings on other counts, following entry of the verdict, Defendant essentially argued the opposite: that the jury should have rendered a verdict as a whole by taking into account its findings of guilt or no guilt on the other counts. The trial court should not have allowed Defendant to maintain such inconsistent positions during the course of litigation. Defendant waived any error.

ARGUMENT

I. THE JURY'S VERDICT OF FIRST DEGREE FELONY MURDER AND PETIT THEFT IS NOT LEGALLY INCONSISTENT, AND THUS, THE DECISION OF THE THIRD DISTRICT COURT OF APPEAL SHOULD BE AFFIRMED.

Defendant argues that his conviction of petit theft necessarily absolves him of any greater offense, including attempted robbery, and therefore, there is no felony upon which a felony murder conviction could be based. Contrary to Defendant's assertion, and consistent with Florida law, the Third District Court of Appeal correctly reversed the trial court's order vacating the felony murder conviction, because the jury was instructed to consider the two crimes separately, and the jury could have found that Defendant committed an attempted robbery when considering the felony murder charge. The jury was never given the option to convict Defendant of attempted robbery, and since the record in this case supports an attempted robbery, the verdicts are, therefore, consistent.

As a general rule, inconsistent verdicts are permitted in Florida. *Eaton v. State*, 438 So. 2d 822 (Fla. 1983). 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 a defendant. *Fayson v. State*, 698 So. 2d 825, 826-7 (Fla. 1997). "Moreover, defendants have adequate procedural and constitutional protections to ensure that their convictions are not erroneous, whereas the State does not have the

benefit of any reciprocal protections." *State v. Powell*, 674 So. 2d 731, 733 (Fla. 1996).

Whether a verdict is inconsistent is a question of law subject to de novo review on appeal. *See, e.g., Republic Services of Florida, L.P. v. Poucher*, 851 So. 2d 866 (Fla. 1st DCA 2003). "Where the verdicts . . . may be explained on any rational basis, inconsistency furnishes no ground for reversal." *McCray v. State*, 397 So. 2d 1229, 1231 (Fla. 3d DCA 1981). Courts must presume that the jury acted in accordance with the law and affirm its conclusions if at all possible. *McCray*, 397 So. 2d at 1231 (citation omitted).

Along with a minority of states, Florida has recognized an exception for "true" inconsistent verdicts that applies when verdicts on legally interlocking charges are truly inconsistent. *See Powell*, 674 So. 2d at 733. When a jury acquits a defendant of an underlying felony, a separate conviction on a charge based on such felony usually fails and the verdict must be vacated. *Mahaun v. State*, 377 So. 2d 1158 (Fla. 1979). Where, however, there is an acquittal of a completed felony a jury's verdict on a charge based on such felony can be reconciled by determining that the jury could have found the commission of an attempted felony. *See Pitts v. State*, 425 So. 2d 542 (Fla. 1983) (defendant not acquitted of attempted felony where jury was not charged on attempted felony); *McCray*, 397 So. 2d 1229 at 1230-31 (same). Therefore, at issue is whether the jury's verdict which convicts

Defendant of first degree felony murder and petit theft, as a lesser included offense of robbery, can be reconciled and deemed consistent.

Contrary to Defendant's argument, the jury did not acquit Defendant of attempted robbery when it found defendant guilty of petit theft because there was no instruction or verdict option for attempted robbery as a lesser included offense of robbery with a firearm. By finding Defendant guilty of petit theft, the jury followed the instructions that a verdict of guilty, "should be for the highest offense which has been proven beyond a reasonable doubt." Based on the evidence at trial, the jury could reasonably believe that a robbery was attempted, but not completed, and therefore, the petit theft conviction as a lesser included offense only demonstrates that the jury did not find that the robbery had been completed. This is especially true in light of the instructions given, that petit theft is proven by Defendant's obtaining *or endeavoring to obtain* the victim's property. This is completely consistent with the jury's subsequent finding that Defendant committed an attempted robbery as to the first degree felony murder count.

Attempted robbery requires proof of two elements: (1) Defendant did some act toward committing the crime that went beyond just thinking or talking about it; and (2) Defendant would have committed the crime except that he was prevented from doing so or he failed. *See* §777.04(1), Fla. Stat. Petit theft requires proof that Defendant obtained or endeavored (to attempt or to try) to obtain the property of

the victim with the intent to deprive the victim of his right to the property. The jury's finding of petit theft, that defendant tried to obtain the victim's property with an intent to deprive the victim of its use, is complimentary to a finding that defendant tried but failed to commit a robbery.

In support of his argument that the jury acquitted Defendant of attempted robbery when it found a petit theft, Defendant argues that the jury found that he joined in the plan to steal Sloate's money, but not in any plan to accomplish the larceny by an assault; the jury thus convicted him of petit theft but not of robbery. (Appellant's Initial Brief on the Merits at 12). While this may be one explanation for the jury's verdict, another more plausible explanation is that Defendant intended to rob the victim, but gave up when Black's gun went off and Defendant got scared. The facts support the latter interpretation where the evidence at trial indicated that Defendant joined the other perpetrators in using force to get the money. (T. 508-14).

According to Defendant's taped statement, Defendant participated in the struggle for the money, and was searching the victim while Black was hitting the victim on the head. (T. 508-15). While doing this, Black's gun went off, and Defendant panicked and left even though his two co-defendants were still struggling with the victim for the money. (T. 514-15). Defendant's interpretation that the jury thought he did not want to commit a larceny by assault is without

factual support. Based on these facts, the simple answer for explaining the jury's verdict is that Defendant did not complete the robbery that he intended to commit and that the jury believed that there was an attempted robbery.

The evidence supports a finding of attempted robbery because Defendant tried to take the victim's wallet and money, but failed when he got scared and left. Here, the jury simply did not have a choice under count II to find an attempted robbery. Both the jury, by its question to the court during deliberations asking for a definition of robbery and petit theft, and defense counsel, by his comment that "(Defendant) doesn't take the money or the wallet," recognized that Defendant did not complete the crime of robbery. (T. 647, 750-51). Furthermore, during closing argument, the State acknowledged that Defendant's fingerprints were not on the victim's wallet and that although Defendant tried to get the wallet from the victim, he left the room before doing so. (T. 689-92, 698-99). The State argued that the jury could find first degree felony murder if it found an attempted robbery. (T. 698-99). Furthermore, the jury was specifically instructed in the text of the felony murder instruction, that it could convict for felony murder if the death occurred "as a consequence of and while DEWARN ANTONIO BROWN was attempting to commit a robbery." (R. 41). Thus, it is plausible that the jury found that Defendant committed an attempted robbery. Since attempted robbery is sufficient to support

the first degree felony murder conviction, there is no inconsistency and this Court must affirm the Third District's opinion reinstating the jury's verdict.

This case is like *Pitts v. State*. In *Pitts*, the defendant was charged with aggravated battery and possession of a firearm during the commission of an aggravated battery. *Pitts*, 425 So. 2d at 543. The jury found the defendant not guilty of the aggravated battery charge and guilty of the possession charge. *Id*. The trial court vacated the judgment on a finding that the verdicts were legally inconsistent. *Id*. The Third District reversed the trial court and this Court affirmed the decision, reasoning that the essential elements of the possession charge required a finding of either an aggravated battery or an attempted aggravated battery. *Id*. This Court explained that "while the jury made no explicit finding of an attempted aggravated battery, it is a logical and plausible inference on their part based on the evidence before them" to find that the Defendant committed an attempted aggravated battery. *Id*. This Court distinguished *Mahaun*, and *Redondo v. State*, 403 So. 2d 954 (Fla. 1981), in that the verdict in *Pitts* was consistent with the jury's ultimate finding of fact. *Id*.

McCray is also directly on point. This Court affirmed the Third District's opinion in *McCray* on the authority of *Pitts*. *McCray v. State*, 425 So. 2d 1, 2 (Fla. 1983)("Based on Pitts, we approve the decision of the district court in this case.") In *McCray* a jury found a defendant not guilty of aggravated assault and simple

assault, as a lesser included offense, and guilty of possession of a firearm while engaged in a felony, aggravated assault. *McCray*, 397 So. 2d at 1230. The instructions provided that the defendant was guilty of the possession charge if "while committing or attempting to commit (the) felony of aggravated assault," the defendant displayed a gun. *Id*. at 1230. The verdict form for the aggravated assault count did not include attempted aggravated assault as a lesser included charge. *Id*.

The Third District, in *McCray*, held that *Mahaun* did not control because the jury's verdict could be reconciled by assuming that the jury found the defendant guilty of the attempted aggravated assault. *Id*. The court explained that the jury did not reject a finding that the defendant committed an attempted felony because such an option was not included in the instructions or verdict form. *Id*. at 1230, n. 3. Moreover, the jury's determination that the defendant did not commit an aggravated assault or simple assault did not preclude the possibility that the jury found that there was an attempted commission of the crime, which lacked the element of fear that violence was imminent. *Id*. at 1230. The Third District wrote: "(T)here is therefore a perfectly reasonable explanation, in accordance with the supposed requirements of *Mahaun* . . . : the jury found only that (defendant) had committed an attempted aggravated assault with a firearm." *Id*. at 1231. *Cf. Castillo v. State*, 590 So. 2d 458, 459-60 (Fla. 3d DCA 1991) (no felony conviction

to support possession of firearm during felony where defendant was acquitted of both completed and attempted felonies); *Wooten v. State*, 404 So. 2d 1972, 1074 n.3 (Fla. 3d DCA 1981) (impossible to reconcile verdict of possession of firearm during a felony where jury acquitted defendant of both completed and attempted felony); *Palacio v. State*, 402 So. 2d 500, 501 n.2 (Fla. 3d DCA 1981) (same).

Application of *McCray* to this case negates Defendant's argument that the jury's petit theft verdict automatically results in an acquittal of attempted robbery. Although the jury found that *McCray* was not guilty of both aggravated assault and simple assault, the district court held that the verdict was not inconsistent on the reasoning that the jury found an attempted assault. Thus, even though the jury acquitted *McCray* of the completed felony assault and all necessarily included lesser offenses, such acquittal did not preclude the jury determination that *McCray* committed an attempted assault to support the possession verdict.

The present case cannot be distinguished from *McCray*. A petit theft verdict does not preclude the possibility that the jury believed Defendant committed an attempted robbery when considering the felony murder charge. A finding of petit theft is consistent with a finding of attempted robbery where a petit theft can be found if the Defendant "endeavored to obtain" the victim's property. As defined in the jury instructions, "'Endeavor' means to attempt or try." (R. 38).

"Reversible inconsistency will not ordinarily be held to result from contrary verdicts on the several counts of a multicount indictment or information if the offense of which defendant was acquitted required proof of elements different from or in addition to those of the offense for which he was convicted." *McCray*, 397 So. 2d at 1231. Here, for the armed robbery charge, the jury was only given the opportunity to find a completed robbery, as opposed to an attempt. A completed robbery clearly requires "proof of elements different from or in addition to" those of the offense for which he was convicted (felony murder based on an attempted robbery). Therefore, pursuant to *McCray*, the verdicts do not yield reversible inconsistency. Here, the jury believed that Defendant attempted to rob the victim, but failed when Black's gun went off. Therefore, the verdicts of felony murder based on attempted robbery and petit theft are consistent, and do not violate double jeopardy. *See Pitts*, 425 So. 2d 542; *McCray*, 397 So. 2d at 1230-31 (same).

Just as *Mahaun* did not apply to *Pitts* and *McCray*, it is likewise inapplicable the present case. In *Mahaun*, a defendant was charged with third degree felony murder and aggravated child abuse. *Mahaun,* 377 So. 2d at 1159. The jury found the defendant guilty of third degree murder and guilty of culpable negligence as a lesser included offense to aggravated child abuse *or attempted aggravated child abuse*. *Id*. at 1161 (emphasis added). This Court found the jury's verdict was inconsistent as it effectively held the defendant innocent of the aggravated child

abuse charge, and vacated defendant's conviction. *Id*. The *Mahaun* Court wrote that "the jury failed to find (the defendant) guilty of the underlying felony of aggravated child abuse *or attempted aggravated child abuse*, ..." *Id*. (emphasis added). Implicit in this statement is that the jury was given the option to convict the defendant for attempted aggravated child abuse. *See id*. As explained in *McCray*, "(i)t clearly appears, therefore, that *Mahaun* involved a situation in which it was entirely impossible to reconcile the two verdicts." *McCray,* 397 So. 2d 1230.

Redondo is likewise inapplicable to the present case, although its opinion is not as clear as *Mahaun's*. *Redondo,* 403 So.2d 954. In *Redondo*, the defendant was convicted of simple battery as a lesser included offense of aggravated battery and unlawful possession of a firearm while engaged in the commission of a felony, aggravated battery. *Id*. at 955. The *Redondo* Court reasoned that the conviction for simple battery rendered defendant not guilty of aggravated battery and attempted aggravated battery, essential elements of the crime of possession of a firearm during the commission of an aggravated battery. *Id*. at 956. Therefore, the defendant could not be convicted of that crime. *See id*. What the *Redondo* opinion does not make clear, however, is whether the verdict offered the jury a choice to convict the defendant for attempted aggravated battery for which the defendant was acquitted and whether the facts of the case would have supported a finding of

the attempted felony. Therefore, *Redondo* is not dispositive of the present issue, where there is specific precedent for the State's position, directly on point. *See Puryear v. State*, 810 So. 2d 901 (Fla. 2002).

Additionally, *Wainwright v. State*, 528 So. 2d 1329, 1331 (Fla. 5th DCA 1988), cited by Defendant, purports to find that this Court receded from *Pitts sub silentio* by its reaffirmation of *Redondo* in *State v. Wheeler*, 468 So. 2d 978, 982 (Fla. 1985). Contrary to the statement in *Wainwright*, this Court has repeatedly held that it does not overrule itself *sub silentio* and that where a court encounters an express holding from the Supreme Court on a specific issue, the court is to apply the express holding until such time as the Supreme Court recedes from its express holding. *See Puryear*, 810 So. 2d 901. This Court has not receded from *Pitts*. Therefore, *Pitts* is controlling precedent and applies to the present case to provide that the jury's verdict must be reinstated.

Furthermore, *Wheeler* can be reconciled with *Pitts.* In *Wheeler* there was no possibility for a finding of a lesser or attempted offense during which a firearm could be possessed. *Wheeler,* 468 So. 2d at 979-80. The defendant's successful affirmative entrapment defense precluded any finding of true lesser offenses and/or attempted offenses. *Id*. In the case *sub judice*, by contrast, the verdict can be reconciled as the jury could have found that Defendant committed an attempted robbery.

Finally, the jury's verdict can also be reconciled under the doctrine of juror lenity. Recently, this Court has intimated that jury lenity is an important factor in the consideration of whether a verdict is inconsistent. *See State v. Connelly*, 748 So. 2d 248, 250-53 (Fla. 1999) (upholding a jury's convictions of guilty to introducing contraband to a correctional institution and not guilty for possession of cannabis on the ground that factually inconsistent verdicts are not truly inconsistent verdicts). The *Connelly* Court criticized *Redondo's* failure to address the possibility that the felony count may have been reduced to a misdemeanor because of lenity. *Id.*, at 250-53. The Court explained:

> At first blush, it appears only logical that if the predicate felony is rejected, then the compound charge of possession of a firearm during the felony must fail. But the jury in convicting on the possession of a firearm during the commission of a felony count must have found that a felony existed for that count. . . . .
>
> . . . , Florida seems to stand in the minority in not recognizing that a jury's acquittal on one count should not affect the jury's conviction on another count even in compound charge cases in which the predicate offense is charged as a separate count. But even in Florida the jury is instructed that "(a) finding of guilty or not guilty as to one count must not affect your verdict as to the other crimes charged." In the case before us, it is almost certain that the jury exercised lenity.

Id. at 250-51.

Other district courts have also cited the doctrine of lenity to explain inconsistent verdicts. *See State v. Perez*, 718 So. 2d 912, 914-17 (Fla. 5th DCA

1998), *rev. denied*, 727 So. 2d 909 (Fla. 1999) (doctrine of lenity was applicable to uphold inconsistent verdict of conviction for vehicular homicide and acquittal for reckless driving); *Gonzalez v. State*, 440 So. 2d 514, 516 (Fla. 4th DCA 1983) ("since juries have the inherent authority to acquit a defendant of all or any of the charges, it is impossible to determine whether verdicts convicting a defendant of some charges and acquitting him of others are 'truly' inconsistent," and not just the result of lenity). The doctrine of lenity is especially applicable where the jury has been instructed to consider each count separately without regard as to what was done in another count. *See Perez,* 718 So. 2d at 914-17.

Here, the court instructed the jury that the evidence applicable to each count must be "considered separately and a separate verdict returned as to each (such that) a finding of guilty or not guilty as to one crime must not affect (the) verdict as to the other crimes charged." The jury followed these instructions, and thus, the jury's convictions for first degree felony murder and petit theft may have been the product of lenity. The jury may have found defendant guilty of armed robbery or robbery, but elected to convict only on the felony via the first degree felony murder charge. Having received a benefit from the jury, defendant is not entitled to use that action to set aside the felony murder conviction. *See, e.g., Gonzalez*, 440 So. 2d at 516; *McCray*, 397 So. 2d at 1231 at n.4. Therefore, as the verdict can be reconciled as consistent, this Court must reinstate the jury's verdict.

It is important to remember that "[w]here the verdicts . . . may be explained on any rational basis, inconsistency furnishes no ground for reversal." *McCray*, 397 So. 2d at 1231. Since the present verdict can be reconciled, not only as argued above, but also on the presumption that there was juror lenity, the Third District properly instructed the trial court to reinstate the felony murder conviction. *See State v. Cappalo*, 2006 Fla. App. LEXIS 1686 at * 5 (Fla. 2d DCA Feb. 10, 2006). The trial court's disposal of the felony murder conviction resulted "in wholesale judicial interference with [a verdict] on the grounds of subjectively perceived improprieties." *McCray* at 1231, n. 4. Therefore, this Court should affirm the Third District's opinion and reinstate the felony murder conviction.

II. THE THIRD DISTRICT COURT OF APPEAL CORRECTLY HELD THAT DEFENDANT WAIVED ANY OBJECTION TO INCONSISTENT VERDICTS WHERE HE ACQUIESED IN THE JURY INSTRUCTION THAT THE JURY SHOULD CONSIDER EACH COUNT SEPARATELY.

Defendant argues that he did not waive the issue of inconsistent verdicts when he acquiesced in the standard jury instructions. However, in the Briefs on Jurisdiction this issue was not raised as a point of inter-district conflict upon which discretionary review could be granted. Defendant mentioned the issue in his Brief on Jurisdiction at page 5, n. 2, however, Defendant did not argue that conflict exists among the other district courts or this Court on the same point of law relied upon by the Third District Court of Appeal in support of this issue. Rather, Defendant asserted that the holding conflicted with one of the Third District's own prior decisions. As such, this can not form an independent basis for this Court's granting of discretionary review. *See* Art. V, sec. 3(b)(3), Fla. Const.; *see also* Fla. R. App. P. 9.030(a)(2)(iv).

The State acknowledges the ancillary jurisdiction of this Court. "Once this Court has jurisdiction of a cause, it has jurisdiction to consider all issues appropriately raised in the appellate process, as though the case had originally come to this Court on appeal." *Savoie v. State*, 422 So. 2d 308, 312 (Fla. 1982); *see also Feller v. State*, 637 So. 2d 911 (Fla. 1994). However, this jurisdiction is

discretionary and should only be exercised when the issue is dispositive of the matter. *Savoie*, 422 So. 2d at 312. Therefore, just as this Court did in the case of *State v. Barton*, 523 So. 2d 152, 153 n.2 (Fla. 1988), this Court should decline to reach this issue in the present case because it is not dispositive of the matter under review.

Even if this Court addresses the issue, the decision of the Third District should be affirmed, as the issue is without merit. The Third District correctly found that Defendant had waived any objection to the inconsistent verdicts:

> . . . is precluded even from claiming a fatal inconsistency between the verdicts on the two counts because he endorsed and supported the trial judge's charge to the jury, in accordance with the standard jury instruction, that the evidence as to each of the counts 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(s) charged.

(R. 114).

In making this ruling, the Third District relied, in part, upon *McKee v. State*, 450 So. 2d 563, 564 (Fla. 3d DCA 1984). In *McKee*, the Third District held that a defendant who did not object to instructions that a jury should enter a verdict as to each count separately without regard to the other verdicts, was not entitled to complain that the verdict was inconsistent. *Id*. at 564; *Cf. State v. Jiminez*, 542 So. 2d 430 (Fla. 3d DCA 1989). The court explained that "(h)aving fully received the

benefits of the jury considering and weighing the evidence against the defendant on each count as if it were contained in a separate information, the defendant (cannot) complain that the jury erred in returning a verdict of guilt on one charge and no guilt on another." *Id*. at 564. The Third District further held that a party may not be allowed to maintain inconsistent positions during the course of litigation and affirmed an acquittal of second degree murder and conviction of possession of a firearm committed during such second degree murder. *See id*. at 563-64.

Like in *McKee*, Defendant here did not object to instructions that the jury return separate verdicts as to each count and to not let a finding of guilt or no guilt as to one count affect another count. Nevertheless, Defendant's argument below was premised on the inconsistent position that the jury should have rendered its verdicts as a consistent whole. Like in *McKee*, this Court should find that any resulting error was waived.

Defendant's argument that *McKee* only applies to situations in which the defendant affirmatively endorses this jury instruction is incorrect. In *Dial v. State*, 922 So. 2d 1018, 1021 n. 1 (Fla. 4th DCA 2006), *rev. denied,* 2006 Fla. LEXIS 1835 (Fla. August 21, 2006), the Fourth District held, "the defendant's *failure to object* to the instructions estops him from arguing an inconsistent verdict."

(emphasis added). Similarly, in *State v. Cleare*, 591 So. 2d 1019, 1021 (Fla. 3d DCA 1991), the Third District, relying on *McKee,* held:

> We reverse the order arresting judgment on Count Two, pursuant to the authority of *McKee v. State*, 450 So. 2d 563 (Fla. 3d DCA 1984). In view of *defendant's acquiescence to the instruction* that the jury consider and weigh each count separately, the trial court improperly arrested judgment. On remand, the verdict of guilty as to Count Two shall be reinstated.

Id. at 1021 (emphasis added).

Such application of *McKee*, *Dial*, and *Cleare*, is particularly appropriate in the instant case, where Defendant did in fact receive a benefit from the jury's consideration of each of the charges separately, as evidenced by the petit theft conviction. The rationale of *McKee*, is therefore applicable, regardless of whether Defendant affirmatively endorsed the instruction, or merely failed to object to it.

Accordingly, this Court should reinstate the defendant's conviction for first degree felony murder.

CONCLUSION

Based upon the foregoing argument and authority, the Appellee, THE STATE OF FLORIDA, respectfully requests this Court to affirm the decision of the Third District Court of Appeal and enter an order reinstating the jury's verdict against defendant for first degree felony murder.

Respectfully Submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Respondent's Brief on Jurisdiction was provided by U.S. Mail to Roy A. Heimlich, Assistant Public Defender, 1320 NW 14th St., Miami, FL 33125, on this 18th day of October, 2006.

____
JENNIFER FALCONE MOORE
Assistant Attorney General

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the font utilized herein is proportionally spaced 14 point Times New Roman in compliance with Fla. R. App. Pro. 9.210(a)(2).

____
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Assistant Attorney General