IN THE SUPREME COURT OF FLORIDA

CASE NO. SC06-628

DEWARN ANTONIO BROWN,

Appellant,

-vs-

STATE OF FLORIDA,

Appellee.

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

BRIEF OF PETITIONER ON THE MERITS

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INTRODUCTION

This cause is before the Court on petition for discretionary review. The parties will be referred to as they stood in the trial court.

Defendant was charged with armed robbery and felony murder. The jury returned a verdict finding him guilty of petit theft and felony murder. The trial court set the felony murder verdict aside, on the ground that the conviction for petit theft, as a lesser offense of the robbery charged, precluded a felony conviction upon which the felony murder conviction could be could be predicated, so that the verdicts were Atrue@ inconsistent verdicts. The District Court reversed and directed the trial court to enter judgment on the felony murder verdict.

For purposes of this brief, the symbol AR.@ refers to the record on appeal filed in the District Court, and the symbol AT.@ refers to the transcripts filed in the District Court.

STATEMENT OF THE CASE AND FACTS

Originally, by information filed November 2, 2001, the State charged Dewarn Brown (and Tyrone Barbary) with second-degree murder and armed robbery (R. 22-25). Count 1 of the information alleged that Brown had evinced a Adepraved mind@ when he killed Andre Robert Sloate by shooting him (R. 23).

Count 2 of the information alleged that Brown Adid unlawfully, by force violence, assault or putting in fear, take@ more than $300.00 from Sloate, and discharged a firearm in the course of the robbery, causing death or great bodily harm to Sloate (R. 24).

A month later, on December 4, 2001, the information was superceded by an indictment (R. 28-29). Count 1 of the indictment now charged first degree felony murder, alleging that Brown had killed Sloate Awhile engaged in the perpetration of, or in an attempt to perpetrate any robbery,@ by shooting Sloate (R. 29). Count 2 of the indictment charged armed robbery, alleging that Brown Adid unlawfully, by force violence, assault or putting in fear, take@ more than $300.00 from Sloate, and discharged a firearm in the course of the robbery, causing death or great bodily harm to Sloate (R. 28-30).[1]

Sergeant Curtis Hoosier of the City of Miami Police Department testified that on Sunday, October 21, 2001 he heard a radio call concerning a man shot at 1942 NW Second Court, Miami, Florida, and went to that address (T. 261-62, 265-66).

[1] Count 3 of the indictment charged only Barbary with possession of heroin with intent to sell; Barbary was not tried with Brown.

The building at that address is abandoned and is boarded up (T. 266-69). Eventually he found a dead body inside (T. 272).

The medical examiner, Esther Lew, called a witness for the State, testified on cross-examination that she had been told Athat a black male, a Puerto Rican female and a white male@ had been seen entering@ the abandoned building (T. 409). AThe black male and the female were seen walking out@ (T. 410). Sloate, a white male, was found dead in the abandoned building (T. 272). The medical examiner testified that his death had been caused by gunshots and was a homicide (T. 403).

Three baggies containing heroin and a needle containing suspected narcotics were found under or next to Sloate=s body (T. 289, 291, 304, 355). His mother testified that he had been a heroin addict and had purchased narcotics in Overtown (T. 433-34). Sloate=s wallet was found in a dumpster behind a grocery store about a block from the abandoned building (T. 299). There was no money in the wallet, but fingerprints were found on plastic cards in the wallet and on Sloate=s truck; these were identified as the fingerprints of Andrina Lopez, also known as AJackie@ (T. 365, 337, 341, 436). Jackie was identified as a heroin addict, and there was evidence that she and Charles Stroman, also known as AShorty,@ had been living

together in the apartment in the abandoned building where Sloate=s body was found (T. 251, 508, 525).

Tyrone Barbary, also known as Black, was found in Jackson Memorial Hospital, where he was being treated for a gunshot wound to the abdomen (T. 455, 525). The bullet that wounded him was recovered following surgery, and was found to match the bullets recovered at the scene and from Sloate=s body, so that they were likely fired from the same gun (T. 348). Gunshot residue was found both on Sloate=s hand and on Black=s hand, suggesting a struggle for the gun (T. 296, 325, 408, 428-29). Black was known as a seller of heroin (T. 518).

There was no other evidence against 19-year old Dewarn Brown except his own statement to police. Black did not testify, Shorty did not testify, Jackie did not testify and it did not appear that there were any other witnesses. No weapon was recovered, there were no fingerprints except Jackie=s on the wallet found in the dumpster, and there was no other forensic evidence of any kind (no blood, hairs, fibers, etc.) linking Brown to this offense or indicating anything he did.

Brown=s incriminating statement appears at pages 504-25 of the trial transcript. Brown told police he had been walking down the street and saw Black and Shorty. They called him over and told him Athey got a cushion white man in Shorty=s

apartment@ (T. 508). AI asked him how much money does he have@ and the response was A[h]e got like $3,000, $4,000@ (T. 508). AAnd so . . . I=m like >Well, shit let=s go=@ (T. 508).

Brown continued: ASo we all went up in there; Shorty, Black, and his wife Jackie, who was already in the apartment with the white man. We get in there. They asked the white man where the money at or whatever. He gets into a struggle. The revolver goes off. Black was shot. The white man was shot. . . . Black and Shorty is struggle with the white man trying to get the money, whatever he had in his pocket@ (T. 508).

AI=m trying to make my way out of there, out of the apartment cause I panicked. . . . I left and went home@ (T. 508). Brown told police he knew Black and Shorty wanted to Arob the white man, take all his money and whatever@ (T. 509), that Black was holding the gun when it went off (T. 510, 514), and that he never saw anyone pull out the victim=s wallet, never saw the wallet at all, because he was running away (T. 516). Finally, Brown told police he never received any money as a result of this incident (T. 523).

The trial court instructed the jury in part as follows (R. 41; *see also* T. 722-23):

> 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.

With respect to the armed robbery charge the court instructed the jury in part as follows (R. 40-41, T. 724-27):

> Before you can find the defendant guilty of Armed Robbery with a firearm, the State must prove the following four elements beyond a reasonable doubt:
>
> 1. DEWARN ANTONIO BROWN took the money or property described in the charge from the person or custody of ANDRE ROBERT SLOATE.
>
> 2. Force, violence, assault, or putting in fear was used in the course of the taking.
>
> 3. The property taken was of some value.
>
> 4. The taking was with the intent to permanently or temporarily deprive ANDRE ROBERT SLOATE of his right to the property or any benefit from it.

R. 40.

The jury was told that Brown was liable as a principal for the crimes committed if Ahelped@ another person to commit them

and Ahad a conscious intent that the criminal act be done@ and did some act Ato actually commit or attempt to commit the crime@ (R. 54; *see also* T. 723).

The court told the jury, in effect, if not directly, that they were not to consider attempted robbery:

> The lesser included crimes indicated in the definition of Murder First degree are:
>
> (a) Murder Second [Degree][2]
>
> (B) manslaughter
> The lesser included crimes indicated in the definition of Armed Robbery with a firearm are:
>
> (a) Robbery
>
> (b) Theft.

In both its opening (T. 249) and in its closing argument (T. 700-01) the State asked the jury to convict the defendant of armed robbery. The jury rendered a verdict that Brown was guilty of petit theft and felony murder (R. 61, T. 757-59). On motion, the trial court set aside the felony murder conviction and denied rehearing, on the ground that the conviction for petit theft was an acquittal on the robbery charge, and thus inconsistent with the guilty verdict as to felony murder. *See* R. 62-69, 71-79, 80, 83, 95-110).

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[2] *See* T. 727 (Amurder in the second degree@)

The State appealed, and the Third District reversed, and directed the trial court to enter judgment on the jury verdict for first degree murder. *State v. Brown*, 924 So. 2d 86 (Fla. 3d DCA 2006).

The District Court opined that Athere is no true legal inconsistency because of the rational possibility . . . that the guilty verdict as to first degree felony murder was based on a finding that, as the felony statute provides, and as the jury was instructed, the death occurred in the course of an *attempted* robbery, rather than a completed one. Because attempted robbery was not instructed upon as a lesser included offense of the robbery count, **and was thus not rejected by the jury**, the two verdicts logically can be reconciled . . . .@ *State v. Brown*, 924 So. 2d at 87-88 (emphasis added, citations omitted).

Moreover, the District Court found that Athe defendant 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.[3] A finding of guilty or not guilty as to one crime must not affect your verdict as to the other crime(s) charged. Fla. Std. Jury Instr. (Crim.) 3.12(a).@ *State v. Brown*, 924 So. 2d at 87 (case citation omitted).

This Court granted discretionary review.

[3] Defendant=s endorsement of this charge comprised only a failure to object to the standard jury instruction.

SUMMARY OF ARGUMENT

Here the jury **convicted** Brown of petit theft as a lesser of armed robbery. As a matter of law, the petit theft conviction exonerates Brown for all lesser offenses of armed robbery other than petit theft that were or could have been charged as lesser offenses, and precludes a conviction for robbery, attempted robbery or any felony upon which a felony murder conviction could be predicated. Thus the guilty verdict for petit theft exonerates defendant not only for armed robbery, but also for the lesser offense of attempted robbery, and precludes any felony murder conviction.

ARGUMENT

I

BECAUSE DEFENDANT WAS CONVICTED OF PETIT THEFT, A NECESSARILY INCLUDED LESSER OFFENSE OF ROBBERY THAT IS A MISDEMEANOR, THE VERDICT EXONERATES HIM OF ALL OTHER LESSER OFFENSES OF THE ROBBERY CHARGED, AND THUS PRECLUDES A CONVICTION FOR FELONY MURDER

In *State v. Powell*, 674 So. 2d 731 (Fla. 1996) this Court declared A[t]his Court has recognized only 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.@ *Powell*, 674 So. 2d at 733.

AAs Justice Anstead explained when writing for the Fourth District Court of Appeal in [*Gonzalez v. State*, 440 So. 2d 514 (Fla. 4th DCA 1983], true inconsistent verdicts are ›those in which an acquittal on one count negates a necessary element for conviction on another count.‹ 440 So. 2d at 515. For example, this Court has required consistent verdicts when the underlying felony was a part of the crime charged -- without the underlying felony the charge could not stand. The jury is, in all cases, required to return consistent verdicts as to the

guilt of an individual on interlocking charges. *Eaton* [v. State, 438 So. 2d 822, 823 (Fla. 1983)]; *see Mahaun v. State,* 377 So.2d 1158 (Fla. 1979) (verdict of guilty as to felony-murder set aside where jury failed to find defendant guilty of the underlying felony); *Redondo v. State,* 403 So. 2d 954 (Fla. 1981) (defendant could not be convicted of unlawful possession of a firearm during a commission of felony where the jury failed to find the defendant guilty of any felony).@ *Powell*, 674 So. 2d at 733.

AAn exception to the general rule is warranted when the verdicts against a single defendant are truly inconsistent because the possibility of a wrongful conviction in such cases outweighs the rationale for allowing verdicts to stand.@ *Powell*, 674 So. 2d at 733.

The scope of the true inconsistent verdict exception is, as the *Powell* Court indicated, illustrated by *Mahaun v. State*, 377 So. 2d 1158 (Fla. 1979) and *Redondo v. State*, 403 So. 2d 954, 956 (Fla. 1981). In *Mahaun* defendant=s conviction for felony murder was vacated because his conviction for the lesser included misdemeanor of culpable negligence Aeffectively holds [defendant] innocent of the aggravated child abuse charge,@ that was the felony that was Aan essential element of the felony murder@. *Mahaun*, 377 So. 2d at 1161. In *Redondo v.*

State, 403 So. 2d 954, 956 (Fla. 1981) the Court ruled that, by rendering a guilty verdict as to lesser misdemeanor offense, the jury Ain effect acquitted petitioner of the felonies of aggravated battery and attempted aggravated battery;@ since a felony conviction was Aan essential element of the crime of unlawful possession of a firearm during the commission of a felony,@ the Aconviction for unlawful possession of a firearm during the commission of a felony must stand or fall in conjunction with the underlying felony@. *Redondo*, 403 So. 2d at 956.

Here the conviction for petit theft exonerates defendant for any robbery or **attempted** robbery as a result of the transaction with Sloate and makes a felony murder verdict based on attempted robbery wholly inconsistent. The felony murder verdict and the petit theft verdict are true inconsistent verdicts because, as a matter of law, there is no felony for which Brown can be convicted after the jury convicted him of petit theft as a lesser of armed robbery.

It is apparent that the jury here convicted Brown of petit theft because it found that Brown joined in the plan to steal Sloate=s money, but not in any plan to accomplish the larceny by an assault. While there was evidence from which the jury might have found that Brown intended to participate as a

principal in an assault on Sloate, the jury decided not to draw that inference, and convicted Brown of petit theft but not of any robbery.

Both liability as a principal and liability for an attempt require specific intent to commit the offense or have it committed. *See Ellis v. State*, 425 So. 2d 201, 202 (Fla. 5th DCA 1983), *approved*, 442 So. 2d 213 (Fla. 1983) (specific intent required for attempt); *Pack v. State*, 381 So. 2d 1199, 1200 (Fla. 2d DCA 1980) (liability as a principal requires proof of specific intent). The jury thus did not find sufficient evidence that Brown had specific intent that Black and Shorty would assault Sloate; such specific intent would have made Brown liable as a principal for the assault by Black and Shorty. The specific intent found lacking on the principal theory is the very same specific intent required for an attempt. A jury can not consistently find that defendant lacked the requisite state of mind for conviction on one count, but had the necessary state of mind required for conviction on another count arising out of a single, interrupted course of conduct. *See Ayrado v. State*, 431 So. 2d 320 (Fla. 3d DCA 1983).

Where the State did not request an instruction on attempted robbery, and the jury was not told what an attempt

was or that it required proof of specific intent, and the State never argued that the defendant was guilty of attempted robbery, the suggestion that the jury found an attempted robbery is a fiction. Here the effect of the fiction is to supplant the jury=s finding that Brown did not participate in or intend to commit an assault, and substitute a finding of attempted robbery. *See Pratt v. State*, 668 So. 2d 1007, 1008-09 (Fla. 1st DCA 1996) (appellate court may not act Aas the fact-finder and . . . assume the presence of the requisite intent@ where doing so would Aencroach impermissibly upon the province of the jury@), *approved*, 682 So. 2d 1096 (Fla. 1996).

The conviction for felony murder is readily understood. The jury found that Sloate was killed in the course of a petit theft. No one told the jury that petit theft was a misdemeanor, not a felony. Indeed, the prosecutor=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: AThe law in the State of Florida is that if . . . in the commission of a crime, your co-defendant, one of your co-defendants kills someone, you are guilty of felony murder@ (T. 699). Of course the prosecutor subsequently indicated that here the other crime was robbery, and explained

Brown=s potential liability for robbery as a principal, but jurors do not distinguish robberies from burglaries, petit thefts or other possible offenses in which property is taken. *See Eaves v. State*, 730 So. 2d 717, 718 (Fla. 4th DCA 1999) (juror told the court AI have had my house robbed a couple of times@); *see also* T. 89, 90. The jurors were told that a killing in the course of another crime was felony murder, found a killing in the course of a petit theft, and convicted for felony murder.

The jury here did not credit the State=s argument as to what the evidence showed, and convicted only for petit theft, when a finding that Brown was a participant in or responsible for the assault on Sloate would have made him guilty of the robbery for which the jury refused to find him guilty. As the assault on Sloate for which Brown was thus acquitted was an essential element of any murder conviction, and since the jury verdict is conclusive in Brown=s favor as to that element, no murder conviction can be consistent with the acquittal for robbery and attempted robbery.

The verdicts here are true inconsistent verdicts under the applicable cases because the conviction for petit theft as a lesser offense of the robbery charge as a matter of law precludes a conviction for any other lesser offense of robbery.

There is thus no felony of which Brown can be convicted, and the felony murder verdict falls because an essential element of the felony murder charge is that the killing occurred in the course of the commission of another felony.

The indictment here expressly alleged that the murder was committed Awhile engaged in the perpetration of, or in an attempt to perpetrate any robbery.@ *See* R. 29. The jury convicted the defendant of petit theft as a lesser offense of armed robbery. Petit theft is a necessarily included Category One lesser offence of armed robbery. *See* Florida Standard Jury Instructions (Criminal) 15.1. The cases hold that the petit theft conviction exonerates the defendant of both the charged robbery and any attempted robbery.

This case is thus unlike any of the cases relied upon by the Third District in holding that the jury=s felony murder verdict was not inconsistent with the petty theft verdict. The claim here is not merely that the petit theft verdict is factually inconsistent with the felony murder verdict, and not merely that the factual findings implicit in the petty theft verdict negative a factual finding necessary for a felony murder conviction. *See Dial v. State*, 922 So. 2d 1018 (Fla. 4th DCA 2006) (claim of inconsistency waived where jury found defendant guilty of aggravated manslaughter by culpable

negligence and not guilty of felony murder by culpable negligence).

Rather, the claim here is that, as a matter of law, the petit theft verdict precludes a second conviction for any other lesser offense of robbery, and thus precludes conviction for attempted robbery, a permissively included Category Two lesser offense of the armed robbery for which defendant has already been convicted of petit theft. *See* Florida Standard Jury Instructions (Criminal) 15.1; *see also Nurse v. State*, 658 So. 2d 1074, 1077 (Fla. 3d DCA 1995) (attempts are permissively included lesser offenses), *receded from on other grounds, Jones v. State*, 660 So. 2d 960, 965 n.3 (Fla. 3d DCA 1996). Accordingly, there is no felony upon which a felony murder conviction can be rested.

The legal consequence of the petit theft conviction is that defendant cannot be convicted of any felony offense as a result of the episode for which armed robbery was charged. It is not material that the jury was not instructed on attempted robbery; the jury convicted the defendant of petit theft, and could not simultaneously or subsequently convict defendant of armed robbery or of another lesser offense of the armed robbery charged.

The Third District here cited the controlling decisions of this Court, but refused to apply them, instead applying a rule applicable where verdicts are claimed to be inconsistent as a matter of fact, rather than the rule applicable where verdicts can be reconciled only by permitting the State to convict the defendant of two lesser offenses of the crime charged.

It is fundamental that the legislature does not intend two convictions as a result of a single criminal episode where the two convictions would be for Alesser offenses the statutory elements of which are subsumed by the greater offense.@ Section 775.021(4)(b)(3); *see State v. Florida*, 894 So. 2d 941, 947 (Fla. 2005) (Asubsection [775.012 (4)(b)(3)] applies only to necessarily lesser included offenses listed in Category 1 of the Schedule of Lesser Included Offenses . . . . When the commission of one offense always results in the commission of another, then the latter is an inherent component of the former. In other words, the *Blockburger* test by its very nature is designed to distinguish between that group of crimes that are ›necessarily lesser included fi offenses and that group of crimes that are not@); *State v. Weller*, 590 So. 2d 923, 926 (Fla. 1992) (crimes that are necessarily included lessers cannot give rise to multiple punishments); *McCloud v. State*, 577 So. 2d 939, 941 (Fla. 1991) (an offense is a lesser-

included offense if the greater offense necessarily includes the lesser); *see also Chikitus v. Shands*, 373 So. 2d 904, 905 (Fla. 1979) (prior conviction for lesser bars prosecution); *Perkins v. Williams*, 424 so. 2d 990, 991 (Fla. 5th DCA 1983) (reprosecution barred by double jeopardy).

In *Mahaun v. State*, 377 So. 2d 1158 (Fla. 1979), a husband and wife were charged with felony murder and aggravated child abuse in the death of her child from a prior marriage. The husband was found guilty of both charges, but the jury convicted the wife only of a misdemeanor, negligence by exposing the child to injury, as a lesser of aggravated child abuse. The wife argued that Athe jury failed to find her guilty of the underlying felony of aggravated child abuse or attempted aggravated child abuse, instead finding her guilty of the lesser included misdemeanor of culpable negligence.@ The Court ruled that the wife=s Aconviction for culpable negligence effectively holds her innocent of the aggravated child abuse charge. Because the aggravated child abuse felony was an essential element of the felony murder, we hold that Mrs. Mahaun cannot be guilty of third-degree felony murder.@ *Mahaun*, 377 So. 2d at 1161. The decision below is flatly in conflict with *Mahaun*.

Similarly, in *Redondo v. State*, 403 So. 2d 954 (Fla. 1981), defendant was charged with aggravated battery and possession of a firearm during the commission of a felony. On the aggravated battery charge the jury convicted defendant of simple battery, a lesser offense, but also convicted the defendant of possession of a firearm during the commission of a felony. The Court ruled A[i]n the present case the jury in effect acquitted petitioner of the felonies of aggravated battery **and attempted aggravated battery** when it found him guilty of the lesser included offense of simple battery, a misdemeanor. The existence of a felony or an attempted felony is an essential element of the crime of unlawful possession of a firearm during the commission of a felony. . . . Therefore, petitioner may not be convicted of that crime. A conviction for unlawful possession of a firearm during the commission of a felony must stand or fall in conjunction with the underlying felony.@ *Redondo*, 403 So. 2d at 956 (emphasis added). The decision below is flatly in conflict with *Redondo*.

This Court=s use of words like Ainnocent@ and Aacquitted@ in these opinions has apparently led to the mistaken impression that no true inconsistency between verdicts appears if the jury is not instructed as to a lesser offense, such as an attempt. *See Castillo v. State*, 590 So. 2d 458, 459 (Fla. 3d DCA 1991)

(verdicts inconsistent where jury was instructed as to attempt); *Wooten v. State*, 404 So. 2d 1072, 1073 (Fla. 3d DCA 1981) (same). Authority supports that view where the record indicates only an acquittal on the felony charged, and does not indicate that the defendant was exonerated of an attempt or for other lesser offenses, and the jury convicts for an offense for which an underlying felony is Aan essential element@ without convicting for the underlying felony. *See Pitts v. State*, 425 So. 2d 542, 544 (Fla. 1983) (A[h]ere the jury made no such affirmative finding that defendant was guilty of a lesser included offense of the crime of aggravated battery@); *McCray v. State*, 397 So. 2d 1229, 1231 (Fla. 3d DCA 1981), *approved*, 425 So. 2d 1 (Fla. 1983) (A(r)eversible inconsistency will not ordinarily be held to result from contrary verdicts . . . if the offenses of which defendant was acquitted required proof of elements different from or in addition to those of the offense for which he was convicted@); *but see Wainwright v. State*, 528 So. 2d 1329, 1331 (Fla. 5th DCA 1988) (no evidence of attempt); *Ashley v. State*, 493 So. 2d 1079 (Fla. 3d DCA 1986) (no attempt instruction because no evidence of attempt).

But where there is a **conviction** for a necessarily included lesser offense that is a misdemeanor, not a felony, and that involves the same elements, double jeopardy exonerates the

defendant as a matter of law of any attempt or other lesser offense, and precludes a conviction of an offense for which an underlying felony is an essential element. As the Court said in *State v. Powell*, 674 So. 2d 731, 733 (Fla. 1996), such cases involve legally interlocking charges because an act can be done during the course of a felony only if there was a felony, and a misdemeanor verdict on a necessarily included lesser offense negates any felony, and thus negates a necessary element for conviction on another count charging an act during a felony.

In *McCray*, 397 So. 2d at n.4, the Third District suggested that the defendant=s argument was that the jury gave him the appetizer and main course, and that he was therefore also entitled to dessert and coffee. Here, as in *Mahaun* and *Redondo*, the facts are different: the jury exonerated defendant of any felony, and a felony murder conviction is barred. Nothing is more basic than that a felony murder conviction cannot stand without a conviction for an underlying felony. *See Fayson v. State*, 698 So. 2d 825, 826-27 (Fla. 1997); *Eaton v. State*, 438 So. 2d 822, 823 (Fla. 1983); *State v. Cappalo*, 932 So. 2d 331, 334(Fla. 2d DCA 2006); *Cuevas v. State*, 741 So. 2d 1234, 1236 (Fla. 5th DCA 1999); *see also State v. Wheeler*, 468 So. 2d 978, 982 (Fla. 1995); *DeBiasi v. State*, 681 So. 2d 890, 891 (Fla. 4th DCA 1996); *Wainwright v. State*, 528 So. 2d 1339.

II

DEFENDANT=S FAILURE TO OBJECT TO THE STANDARD JURY INSTRUCTIONS DOES NOT BAR RELIEF

Defendant=s mere failure to object to a jury instruction in accordance with Florida Standard Jury Instructions (Criminal) 3.12(a), that the jury could consider the felony murder and armed robbery charges separately, was not a waiver of defendant=s right to object to subsequently rendered inconsistent verdicts or of his right not to be convicted of two lesser offenses of the armed robbery charge.

In *McKee v. State*, 450 So. 2d 563 (Fla. 3d DCA 1984) the court found that it was advantageous to McKee to have the jury consider each charge separately, and that McKee expressly agreed that the trial court should charge the jury, in accordance with Standard Jury Instructions, that each count of the information should be considered separately, and that a separate verdict should be returned as to each count.[4] The court held this estopped McKee to complain that the jury followed that instruction. The *McKee* opinion does not explain why this estoppel barred defendant from complaining that, in

[4] When *McKee* was decided, this instruction was Standard Jury Instruction (Criminal) 2.08(a); the current provision is

following the instructions, the jury had arrived at true inconsistent verdicts, convicting McKee of carrying a firearm during the commission of a second degree murder, and finding him not guilty of that murder.

Prior to *McKee* the Third District had expressly rejected a claim that failure to object to the Standard Jury Instruction waived any objection to a subsequent inconsistent verdict. In *State v. Ayrado*, 431 So. 2d 320, 322 (Fla. 3d DCA 1883), the court said:

> We reject the state's contention that the point has not been preserved for appellate review. There is no requirement, as urged, that the defendant (a) object at trial to a standard jury instruction that each crime charged in the indictment be considered separately and that a finding of guilty or not guilty on one count should not affect the verdict on any other count, or (b) object at trial to the verdict prior to its being recorded and the jury discharged. The *Mahaun-Redondo* line of cases imposes no such requirements in order to preserve for appellate review the point urged herein; it is sufficient if the defendant, as here, files a post-trial motion for arrest of judgment or a post-trial motion for judgment of acquittal in the trial court as to the firearm display conviction urging the point herein involved.

And subsequent to *McKee* the Third District expressly rejected any reading of *McKee* to mean that a mere failure to

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Standard Jury Instruction (Criminal) 3.12(a).

object to the Standard Jury Instructions resulted in a waiver of any inconsistency in the subsequent verdict. In *State v. Jimenez*, 542 So. 2d 430, 431 (Fla. 3d DCA 1989) the court said:

> First, we reject the state=s contention that the defendant waived his right to challenge the inconsistency in the jury verdicts herein by failing to object to a standard jury instruction that each crime charged in the indictment be considered separately and that a finding of guilty or not guilty on one count should not affect the verdict on any other count. Indeed, we have previously rejected this very same argument and have held that the point involving the aforesaid inconsistency in the jury verdict is sufficiently preserved for further review if the defendant, as here, files a post-trial motion for judgment of acquittal notwithstanding the verdict in the trial court. *Ayrado v. State,* 431 So.2d 320, 322 (Fla. 3d DCA 1983). Moreover, the defendant did not expressly agree to the above instruction, and, thus, *McKee v. State,* 450 So.2d 563 (Fla. 3d DCA 1984), relied on by the state, is inapplicable to this case.

See also State v. Barton, 523 So. 2d 152, 153 n.1 (Fla. 1988), where this Court found the verdicts compatible and stated A[b]ecause it is unnecessary to our decision, we do not decide the effect of Florida Standard Jury Instruction (Criminal) 2.08(a) upon the argument against inconsistent verdicts. *See McKee v. State,* 450 So. 2d 563 (Fla. 3d DCA 1984).@

There is no basis for the ruling here that a failure to object to the inclusion of Standard Instruction 3.12(a) when

jury instructions were given bars a subsequent objection, when the jury verdict is thereafter returned, or by subsequent timely motion to set it aside, that the jury, in its effort to return separate verdicts on each count, has improperly returned inconsistent verdicts. The jury is not instructed to render consistent verdicts and cannot determine whether it has done so. Thus the jury is properly told that Aa finding of guilty or not guilty as to one crime must not affect **your verdict** as to another crime.@ *See* Standard Jury Instruction (Criminal) 3.12(a) (emphasis added).

The task of determining whether the verdicts are consistent falls to the court, and must be performed after the verdicts have been rendered, not before, when the jury instructions are given. *See State v. Powell*, 674 So. 2d at 733 (courts must determine whether consistent verdicts required or inconsistent verdicts permitted). The fact that this jury found a killing in the course of a petit theft amply demonstrates why inconsistent verdict questions are for judicial resolution in accordance with law, not for ad hoc resolution by lay jurors.

No Florida court has ever explained why a mere failure to object to the standard instruction given when the jury retires waives the right to object to subsequently rendered true incon-

sistent verdicts as to interlocking charges or waives the right not to be convicted of two lesser offenses of the same charge. The doctrine originates with *McKee*, where defendant apparently acted in such fashion that he was held estopped to object to the fact that the jury thereafter followed the instruction he had agreed to. *McKee*, 450 So. 2d at 564. Surely no estoppel to object as to a subsequent verdict that is inconsistent as to interlocking counts arises from a mere failure to object to a standard instruction that is unobjectionable and does not address verdict consistence.[5]

The legislature has expressly said it does not intend convictions for two lesser offenses of the same charge. Nothing in a failure to object to the Standard Jury Instructions when they are given remotely indicates an intent to acquiesce in

[5] The ruling in *McKee* is perplexing. McKee was charged with five offenses. Four were not interlocking: battery on a law enforcement officer, possession of marijuana, resisting arrest with violence and attempted second degree murder. The fifth offense, possession of a firearm during a felony, to wit, attempted second degree murder, was interlocking with the second degree murder charge. The jury was told that Aa finding of guilty or not guilty as to one crime must not affect your verdict as to another crime.@ This was good law as to the non-interlocking charges, as well as a proper jury instruction. But the jury returned a verdict of not guilty of second degree murder, but guilty of possession of a firearm during the second degree murder of which he had been acquitted. The *McKee* opinion does not explain what defendant did to become estopped to challenge true inconsistent verdicts as to the interlocking counts.

convictions that would violate double jeopardy if they did not violate the statute. And nothing indicates consent in advance to any inconsistency in the verdict the jury subsequently returns as to interlocking counts. The rule properly applicable in this case is the rule set forth in *Ayrado* and in *Jimenez*.

Defendant=s failure to object to the standard jury instruction here that each crime is to be considered separately was not such endorsement and support of the standard instruction as would bar the granting relief on his subsequent motion set aside the true inconsistent verdicts subsequently rendered.

CONCLUSION

The Court should quash the District Court=s ruling and reinstate the ruling of the trial court setting aside the felony murder verdict.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing and of petitioner:s appendix was mailed to Valentina M. Tejera, Assistant Attorney General, Office of the Attorney General, Department of Legal Affairs, 444 Brickell Avenue, Suite 950, Miami, Florida 33131 on August 22, 2006.

_____

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Assistant Public Defender

CERTIFICATE OF COMPLIANCE

I hereby certify that the type font in this brief is Courier New 12 point, except that the headings are set in Times New Roman 14 point.

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