

Circuit Court for Prince George's County
Case No. CT 17-1308B

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 427

September Term, 2018

DERRICK EDWARD KERRY

v.

STATE OF MARYLAND

Wright,
Berger,
Moylan, Charles E., Jr.
(Senior Judge, Specially Assigned),

JJ.

PER CURIAM

Filed: February 4, 2019

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

Derrick Edward Kerry, appellant, was convicted by a jury in the Circuit Court for Prince George’s County of armed robbery, use of a handgun in the commission of a felony or crime of violence, and related offenses. The same jury acquitted Mr. Kerry of other charges based on the same incident, including carrying a handgun and possession of a handgun by a person under the age of 21. On appeal, Mr. Kerry contends that the circuit court erred in failing to instruct the jury to resume its deliberations and resolve a legal inconsistency in its verdicts. We affirm.

Before the verdict was final, defense counsel noted an objection to the verdicts as inconsistent, and moved for a mistrial, which the court denied.

[DEFENSE COUNSEL]: We object to an inconsistent verdict. . . . They found him not guilty of possession of the handgun, the wear, carry of the handgun and guilty of the armed robbery and not guilty of the conspiracy. In our view that is an inconsistent verdict because they are indicating that he did not have the gun, but yet still somehow found him guilty of the other charges.

THE COURT: All right. What are you asking me to do?

[DEFENSE COUNSEL]: Declare a mistrial.

THE COURT: Motion for mistrial is denied. Thank you.

No other relief was requested, and the jury was then hearkened to the verdict.

Mr. Kerry contends that his objection to the verdicts as inconsistent was not abandoned when the court denied the motion for mistrial, but claims that, after the only relief he requested was denied, “the burden shift[ed] to the judge” to instruct the jury to remedy the inconsistency “either by returning a verdict in [his] favor on use of a handgun and on armed robbery or by convict[ing] [him] of wearing, carrying or transporting a

handgun.” Mr. Kerry asserts that the trial court erred in not taking such action. We disagree.

“[T]he rule against legally inconsistent verdicts is intended to protect the criminal defendant[.]” *Givens v. State*, 449 Md. 433, 476 (2016) (quoting *Price v. State*, 405 Md. 10, 41 n. 10 (2008) (Harrell, J., concurring)). Accordingly, “[t]he choice of whether to object to inconsistent verdicts belongs to the defendant alone.” *Id.* at 476.

“Upon proper and timely objection [to a legally inconsistent verdict] by the defendant, the trial court must instruct the jury to resume deliberations and ‘resolve the inconsistency either by returning verdict in the defendant’s favor, convicting on the implicated counts, or deadlocking on a charge so that no inconsistent finding result[s].” *McNeal v. State*, 426 Md. 455, 466 (2012) (quoting *Price*, 405 Md. at 42 (Harrell, J., concurring)). But “a trial court may not, in the absence of a request from the defendant, advise a jury that its verdicts are inconsistent and send the jury back to resolve the inconsistency.” *Ndunguru v. State*, 233 Md. App. 630, 642 (2017).

As we have observed, when a jury returns inconsistent verdicts of conviction and acquittal, “[t]he verdict of acquittal is frequently returned in the interest of lenity and actually is a windfall for the defendant.” *Travis v. State*, 218 Md. App. 410, 452 (2014). “A defendant, aware of his or her guilt, or the overwhelming evidence of guilt, of all the crimes of which he or she stands charged, may choose to accept the jury’s lenity.” *Tate v. State*, 182 Md. App. 114, 134 (2008) (emphasis deleted) (quoting *Price*, 405 Md. at 40, n. 9 (Harrell, J., concurring)). Accordingly, the trial court “may not, *sua sponte*, send the jury

back to resolve the inconsistency, because it is the defendant who is entitled, should he [or she] so wish, to accept the benefit of the inconsistent acquittal.” *Id.* at 135.

Although Mr. Kerry objected to the verdicts as inconsistent, he specifically limited his request for relief by asking only that the court declare a mistrial. Mr. Kerry did not request the court to advise the jury that its verdicts were inconsistent and send the jury back for further deliberations to resolve the alleged inconsistency. Absent such a request, the court did not err in taking no further action.

**JUDGMENTS OF THE CIRCUIT COURT
FOR PRINCE GEORGE’S COUNTY
AFFIRMED. COSTS TO BE PAID BY
APPELLANT.**