

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 1931

September Term, 2014

MICHAEL PUGH

v.

STATE OF MARYLAND

Eyler, Deborah S.,
Hotten,
Nazarian,

JJ.

Opinion by Nazarian, J.

Filed: July 24, 2015

In September 2014, a jury in the Circuit Court for Baltimore City convicted Michael Pugh of *attempted distribution* of heroin, but acquitted him of *possession* of heroin. He did not object before the jury was released, but shortly thereafter filed a Motion for a New Trial. The circuit court denied the motion. We consider two issues on appeal: *first*, whether Mr. Pugh waived his argument that the verdict was inconsistent by waiting until after the jury was released to object to the inconsistent verdict, and *second*, if this issue is properly before us, whether the conviction and acquittal are legally inconsistent. We conclude that Mr. Pugh failed to preserve the issue, but note that even if he had, the conviction is not legally inconsistent with the acquittal, and, therefore, we affirm.

I. BACKGROUND

On June 30, 2014, Officer Gabriel Rimolo saw a green Honda Civic parked on the 1900 block of West Fayette Street. As Officer Rimolo watched, Mr. Pugh approached the car, spoke briefly with the passenger, walked away, returned quickly, and handed small objects to the passenger in exchange for cash.¹ Mr. Pugh then walked away and the car drove off. After observing the exchange, Officer Rimolo asked his partner, Officer Philip Meadows, to pull the vehicle over. Officer Meadows stopped the car a block later and seized six gel caps filled with heroin from the passenger with whom Mr. Pugh had made the exchange. Officer Rimolo followed Mr. Pugh in a patrol car and arrested him; he searched him and found \$58, but no heroin. When Officer Rimolo was later asked at trial

¹ There were four people in the car. Officer Rimolo saw Mr. Pugh interact with the woman in the passenger seat, but there was also a male driver and two children in car seats.

why, in his opinion, Mr. Pugh did not have any heroin on him at the time of arrest, he explained it in terms of the drug dealers' standard business model:

Because if he was going to be stopped by the police or anything like that, he would—it wouldn't make him, what do you want to call it, he wouldn't be guilty of anything, they usually—they keep it, you know, they don't have it on them that way they have nothing—they don't—it[']s not considered like possession, they don't see it as possession on them.

After a one-day trial on September 17, 2014, the jury convicted Mr. Pugh of attempted distribution of heroin, but acquitted him of possession of heroin. The trial judge then dismissed the jury; Mr. Pugh did not object to the verdict or otherwise react before the court did so. Immediately *after* the jury was released, Mr. Pugh asked the court to postpone sentencing so that he could file a Motion for a New Trial based on his assertion that the verdict was inconsistent:

Your Honor, I'm actually asking for a postponement of disposition so that I can file a motion for a new trial because the jury has reached an inconsistent verdict.

* * *

And, Your Honor, if I could just on the record note my objection to the inconsistency of the jury's verdict.

The circuit court held a hearing on October 8 and denied the motion, finding that the jury's verdict was legally consistent:

[P]ossession of heroin is not a required element of the attempted distribution and is, therefore, not a lesser included crime. Consequently, the verdict as rendered is legally consistent and not prohibited.

* * *

[Mr. Pugh’s] substantial step towards committing distribution in this instance was a testimony [*sic*] by the police officer who was making observations in the building that he observed [Mr. Pugh] go to an area in the alleyway, pick something up, walk over to a car that had stopped, place something in the purchaser’s hand ... , take something of monetary value, and that when the arrest team arrested [Mr. Pugh], he had something of monetary value in his hand.

* * *

[T]he jury could have reasonably concluded that the Defendant, Michael Pugh, was simultaneously guilty of attempted distribution of heroin and not guilty of possession of heroin.

(Emphasis added.)

Mr. Pugh was sentenced and filed a timely appeal.

II. DISCUSSION

We consider two issues on appeal: *first*, whether Mr. Pugh’s inconsistent verdict argument was preserved and is properly before us, and *second*, whether the jury’s verdict convicting Mr. Pugh of distribution but acquitting him of possession is legally or factually inconsistent.²

² Mr. Pugh’s brief offered a single question:

1) Did the lower court err in failing to correct the jury’s legally inconsistent verdict, which found that Mr. Pugh simultaneously was innocent of possession of heroin, but guilty of attempting to distribute that same substance?

A. Mr. Pugh Failed To Make A Timely Objection, And There Was No Plain Error.

Mr. Pugh argues that he properly raised the inconsistency of the verdict in the circuit court, and, even if he did not, that the State waived its right to dispute the failure by not arguing the point when opposing his motion for new trial. He concedes in his brief that “he pursued a disfavored procedural [tack] in challenging the inconsistent verdict in this case,” but argues that “any potential waiver must be excused.” He argues that although the objection came too late for the judge to remedy the error by resubmitting the charges to the jury, the State did not object. The State counters that Mr. Pugh failed to make a timely objection, and that he was required to do so before the jury was released. We conclude that Mr. Pugh failed to properly preserve this issue for appeal.

As a general rule, we will not allow a defendant to pursue relief on appeal when he sat on his hands at the trial level. “The defendant may not stand mute and later complain about the verdicts he did nothing to cure at the only time a cure was still possible . . . A defendant simply may not seek to exploit an alleged inconsistency without taking the necessary step to cure or resolve the inconsistency when it is still possible to do so.” *Tate v. State*, 182 Md. App. 114, 135-36 (2008). Although Mr. Pugh sought a new trial in this case, and so in that regard sought *some* relief from the circuit court, his approach would work the same result, *McNeal v. State*, 426 Md. 455, 466 (2012), and is inconsistent with our holding in *Tate*.

As we said in *Tate*, a defendant must object and seek an immediate remedy, if that’s possible, rather than waiting to exploit the error on appeal. 182 Md. App. at 135. And the Court of Appeals has charted a simple and clear procedural path to challenge inconsistent verdicts: “[t]he objection must be made prior to verdict finality and discharge of the jury.” *McNeal*, 426 Md. at 466. Whether or not the error was intentional, waiting until after the jury was dismissed deprived the court of the opportunity to correct any inconsistency by “instruct[ing] or re-instruct[ing] the jury on the need for consistency and the range of permissible verdicts.” *Id.* at 136 (citation omitted). We agree with the State that Mr. Pugh failed to preserve his objection for appellate review, and that his motion for a new trial could not resurrect it.³

Although Mr. Pugh failed to raise the issue, we could still review for plain error under Md. Rule 8-131(a). But plain error review represents “discretion that appellate courts should rarely exercise,” and where there is no “error, let alone plain error, that justifies the exercise of discretion to overlook the absence of an objection at trial,” we decline to undertake it. *Wiredu v. State*, 222 Md. App. 212, 225 (2015) (citation omitted). And as we discuss next, we disagree that the court committed any error here.

³ We disagree as well that the State’s decision to challenge his Motion for a New Trial on the merits waived its ability to challenge Mr. Pugh’s failure to lodge a timely objection in the first place. Mr. Pugh provides no authority to support this novel proposition, and we see no reason why the State would be precluded from raising a preservation defect.

B. The Verdicts Were Not Inconsistent.

The cases recognize a distinct and important difference between verdicts that are legally inconsistent and verdicts that are factually inconsistent. “The feature distinguishing a factually inconsistent verdict from a legally inconsistent verdict is that a factually inconsistent verdict is merely illogical.” *Price v. State*, 405 Md. 10, 35-36 (2008) (Harrell, J., concurring). Judge Harrell’s concurrence in *Price* made this distinction, and the Court of Appeals adopted it in full in *McNeal*. 426 Md. at 458-59 (“we adopt as our holding here the thrust of the concurring opinion in *Price*, that jury verdicts which are illogical or factually inconsistent are permitted in criminal trials.”). The distinction between the two turns “not on inconsistent factual findings but on inconsistent elements.” *Travis v. State*, 218 Md. App. 410, 459 (2014); *see also Teixeira v. State*, 213 Md. App. 664 (2013).

The distinction in this particular case turns on whether possession of heroin is an essential element of attempted distribution of heroin. If it is, possession is a lesser-included offense in the broader offense of attempted distribution, and, as a result, the convictions would be inconsistent and inherently illegal because the jury was not convinced beyond a reasonable doubt of Mr. Pugh’s guilt regarding an essential element of the greater inclusive offense, yet still found him guilty of it. But although Mr. Pugh contends correctly that possession of heroin is a lesser-included offense in the greater inclusive offense of distribution of heroin, *these* verdicts were not legally inconsistent. In *Anderson v. State*, 385 Md. 123 (2005), the Court of Appeals held that possession is an essential element of *distribution*:

[D]istribution occurs when a controlled dangerous substance is delivered, either actually or constructively...[i]t is not possible...to “distribute” a controlled dangerous substance...unless the distributor has actual or constructive possession (dominion or control) of the substance. Thus, possession of the substance distributed is necessarily an element of the distribution. The crime of distribution obviously contains an element not contained in the crime of possession—the distribution—but there is no element in the crime of possession not contained in the crime of distribution.

385 Md. at 132-33.

But here, Mr. Pugh was convicted of *attempted* distribution—a different offense. Although *Anderson* held that it is not possible to distribute drugs without possessing them, it is not legally inconsistent for a jury to find that Mr. Pugh *intended* to distribute drugs even if he did not *currently possess* the drugs. The trial judge correctly instructed the jury that attempt requires a substantial step toward the commission of the crime, which need not mean real-time possession:

[Mr. Pugh] is charged with the crime of attempted distribution and possession of heroin. Attempt is a substantial step beyond mere preparation toward the commission of a crime. In order to convict [Mr. Pugh] of attempted distribution and possession of heroin, the State must prove the following. That [Mr. Pugh] took a *substantial step beyond mere preparation* toward the commission of the crime of distribution and possession of heroin and that [Mr. Pugh] *intended to commit the crime of distribution and possession* of heroin.

(Emphasis added.) The jury’s verdict, while potentially factually inconsistent, was not legally inconsistent based on these correct and unchallenged jury instructions. The jury reasonably could have found that Mr. Pugh took a substantial step toward distributing

heroin to the passenger of the Honda Civic through his role in the transaction, and that he did not possess additional heroin to distribute. As such, we are not convinced that the circuit court committed any error, let alone plain error, in declining to find these verdicts inconsistent.

**JUDGMENTS OF THE CIRCUIT COURT
FOR BALTIMORE CITY AFFIRMED.
COSTS TO BE PAID BY THE
APPELLANT.**