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RECENT DEVELOPMENT

GIVENS V. STATE: PRESERVATION OF ALLEGEDLY INCONSISTENT JURY VERDICTS IN A CRIMINAL TRIAL MUST BE MADE BY OBJECTION BEFORE THE VERDICTS ARE RENDERED FINAL AND THE JURY IS DISMISSED.

By: Nicholas Mastracci

The Court of Appeals of Maryland held that a defendant waives review of any issue as to allegedly inconsistent verdicts by failing to object before the verdicts become final and the court discharges the jury. *Givens v. State*, 449 Md. 433, 486, 144 A.3d 717, 748 (2016). Although the defendant in this case did not request plain error review, the court stated that the alleged inconsistent verdicts were not clear and obvious; therefore the four-factor plain error test was not met. *Id.* at 482, 144 A.3d at 746.

On November 15, 2011, several people including Dominic Givens (“Givens”), pulled up in a minivan at a playground where five individuals were located. Givens proceeded to rob one victim, taking money and a phone, while the other individuals robbed the additional five victims. The incident escalated when one of the assailants and victim, Marvin Darrell Tomlinson (“Tomlinson”) began fighting over a gun. As the other victims fled, Givens grabbed the gun and shot Tomlinson twice, leaving him mortally wounded. He later succumbed to his injuries at the hospital.

Following a jury trial in the Circuit Court for Prince George’s County, the jury rendered its verdicts on March 14, 2013 at 3:05 p.m. Givens was found guilty of first-degree felony murder, conspiracy to commit robbery with a dangerous weapon, and robbery conspiracy counts for each of the six victims. He was found not guilty of first-degree premeditated murder, various robbery counts, and the inchoate offenses thereof. Upon Givens’ request, the jury was polled and subsequently hearkened, thus affirming the verdicts. The jury was discharged and exited the courtroom at 3:25 p.m.

Later that day, at 4:38 p.m., Givens filed a “Motion to Strike Inconsistent Guilty Verdicts and/or Motion to Dismiss.” Givens asserted that because he was found not guilty of attempted robbery and robbery, there was no basis on which he could be found guilty of felony murder. Five days later, Givens filed a memorandum in support of the motion to strike, arguing that he was not obligated to object to allegedly inconsistent verdicts before the jury was discharged. On March 21, 2013, the State filed a response, arguing that Givens waived the issue by not objecting prior to the jury’s dismissal. The circuit court denied Givens’ motion to strike on May 22, 2013, and Givens filed a notice of appeal on May 27, 2013.

In an unreported opinion on September 22, 2015, the Court of Special Appeals of Maryland affirmed the circuit court’s holding. The court reasoned that by failing to object before the verdicts were final, Givens waived any issue as to the allegedly inconsistent verdicts. Givens filed a *writ*

of certiorari on November 6, 2015. The issues presented to the court were whether the circuit court erred by refusing to strike the guilty felony murder verdict, and whether a motion to strike an inconsistent verdict is waived if not made before dismissal of the jury. This court granted the petition on January 27, 2016.

The Court of Appeals of Maryland began its analysis by examining precedent establishing that a defendant must object to or move to strike allegedly inconsistent verdicts before they are final and the jury is dismissed in order to preserve the issue for review. *Givens*, 449 Md. at 472-473, 144 A.3d at 740. The court stated that if a defendant raises an objection to legally inconsistent verdicts before they are final and the jury is discharged, a trial court may send a jury back to deliberate to resolve the issue. *Id.* at 473, 144 A.3d at 740. When the defendant raises the issue through post-verdict motions, the delay deprives the trial court the opportunity to correct any errors in the verdicts. *Id.*

The court looked at the reasonableness for requiring a defendant to object to inconsistent verdicts before they are final and the jury is discharged. *Givens*, 449 Md. at 474, 144 A.3d at 741. The court stated that legally inconsistent verdicts are often immediately recognizable. *Id.* The court relied on *Price v. State* as an example, stating that a defense attorney would notice the legally inconsistent verdicts without even knowing the facts of the case. *Id.* (citing *Price v. State*, 405 Md. 10, 15, 949 A.2d 619, 622 (2008)). In addition, case law provides notice of the requirement that an objection (or request for a brief recess to examine the verdicts) be submitted before a verdict is final and the jury is sent home. *Id.* at 475, 144 A.3d at 741.

The inconsistent verdicts rule is designed to protect criminal defendants. *Givens*, 449 Md. at 476, 144 A.3d at 742. (citing *Price*, 405 Md. at 41, 949 A.2d at 638 n.10 (Harrell, J., concurring)). Only the defendant may raise the issue at trial. *Id.* As a result, courts will not allow a defendant to exploit an alleged inconsistency by failing to object earlier at trial when it was possible to fix the verdict. *Id.* at 477, 144 A.3d at 742 (citing *Tate II*, 182 Md. App. 114, 136, 957 A.2d 640, 652). Allowing so would be contrary to the concepts of fairness and justice and would usurp the trial court's ability to resolve the issue, thereby eliminating all other avenues of relief but for the disposal of the inconsistent guilty verdict. *Id.* at 477, 144 A.3d at 742-743.

Next, the court looked at the Double Jeopardy Clause of the Fifth Amendment of the U.S. Constitution, which does not allow a second trial for a criminal defendant whose innocence has been confirmed by a final verdict. *Givens*, 449 Md. at 477, 144 A.3d at 743 (citing *State v. Fennell*, 431 Md. 500, 514, 66 A.3d 630, 639 (2013) (citations omitted)). Therefore, it would be unconstitutional to recall a jury to resolve an allegation of legally inconsistent verdicts after the trial court has accepted an acquittal and dismissed the jury. *Id.* at 483, 144 A.3d at 746. However, there is no double jeopardy violation when the defendant objects to legally inconsistent verdicts and the trial court instructs the jury to resume deliberations because the verdict was not yet final. *Id.* at 479, 144 A.3d at 744.

Furthermore, although Givens did not request plain error review, the court concluded that the legally inconsistent verdicts in the present case did not meet the four-factor test. *Givens*, 449 Md. at 480-81, 144 A.3d at 744-745. Under Maryland case law, plain error review requires that (1) there must be a legal error that the defendant did not intentionally waive, (2) the error must be clear and obvious and not subject to reasonable dispute, and (3) the error must have affected the outcome of the trial. *Id.* at 480, 144 A.3d at 745. If these first three factors are met, the appellate court can use its discretion to determine if the error seriously affects the fairness or integrity of the proceedings and cure the error. *Id.* In the current case, the error was not clear and obvious; rather, it was mere speculation by Givens that the attempted robbery charge was the predicate offense in the jury's guilty verdict on the felony murder charge. *Id.* at 482, 144 A.3d at 745. Since the four factors of the plain error review test were not satisfied, the court declined review under this standard.

The dissenting opinion agreed that Givens did not object at the proper time and that this case sets the standard for preserving the issue of inconsistent verdicts for appellate review. *Givens*, 449 Md. at 488-489, 144 A.3d at 749-750. However, the dissent argued that the merits for Givens' appeal should have been reviewed on the basis of the plain error test, or alternatively by exercising discretion in examining the prejudice against Givens. *Id.* at 488-89, 144 A.3d at 749. The dissenting judges argue that when a verdict is so inconsistent, the trial judge has a duty to instruct the jury to resolve the defect. *Id.* Furthermore, to allow a felony murder verdict without the underlying felony is an injustice and prejudicial error to the defendant so significant that the appellate court should have used its discretion to review the unpreserved issue. *Id.* at 491-92, 144 A.3d at 751. Therefore, it reached the conclusion that even though the issue was not timely raised, this court should review the lower court's decision to accept the legally inconsistent verdicts based on plain error. *Id.* at 493, 144 A.3d at 752.

The Court of Appeals of Maryland ultimately affirmed the judgment of the lower appellate court and adopted Judge Harrell's concurring opinion in *Price*. Ultimately, it held that to preserve for review the issue of allegedly inconsistent verdicts, a defendant must object before the inconsistent verdict is final and the jury is dismissed. This case solidifies the court of special appeals' precedent on the issue of allegedly inconsistent verdicts and adopts a concrete rule. Criminal defense lawyers are on notice that if they do not raise the issue in a timely manner, the defendant loses the right to appeal in the absence of plain error. Trial judges also should be on notice so they can send the jury back to deliberate and avoid allegedly inconsistent verdict issues.