IN THE COURT OF APPEALS OF IOWA

No. 0-163 / 09-0647
Filed April 8, 2010

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DAVID JOHN HALSTEAD,
Defendant-Appellant.

Appeal from the Iowa District Court for Woodbury County, Gary E. Wenell, Judge.

A defendant appeals his judgment and sentence on a charge of assault while participating in a felony, contending that insufficient evidence supports his conviction. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Stephan J. Japuntich, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Sharon K. Hall, Assistant Attorney General, Patrick Jennings, County Attorney, and Drew H. Bockenstedt, Assistant County Attorney, for appellee.

Considered by Vaitheswaran, P.J., and Potterfield and Mansfield, JJ.

VAITHESWARAN, P.J.

David Halstead appeals his judgment and sentence on a charge of assault while participating in a felony. He argues that insufficient evidence supports his conviction.

I. Background Facts and Proceedings

Lester Recinos lived in a group home in Sioux City, Iowa. He liked to wear gold jewelry, including several rings.

One night, when he did not return to the home by curfew, medication manager Jennifer Clipfel called the police to file a missing person report. Meanwhile, she went outside and noticed a gray van in front of the facility. She saw someone pulling Recinos from the van. Recinos fell to the ground, where he was kicked and punched by one of the van's occupants.

Police officers arrived while the van was still at the scene. They apprehended three men, including David Halstead. Several rings and cash were found in the van, and rings were found on one of the occupants.

The State charged Halstead with (1) second-degree robbery, (2) first-degree theft, (3) conspiracy to commit a forcible felony, and (4) assault while participating in a felony. The State later amended the trial information to specify that the predicate felony on the assault charge was first-degree theft.

The case proceeded to verdict on all but the conspiracy count, on which the court granted Halstead's motion for directed verdict of acquittal. The jury (1) found him guilty on the second-degree robbery count, (2) did not find him guilty of first-degree theft but instead found him guilty of the lesser-included offense of

fifth-degree theft, which is not a felony,[1] and (3) found him guilty of assault while participating in a felony notwithstanding the absence of a finding of guilt on the predicate felony of first-degree theft. Halstead appealed following imposition of sentence and denial of his new trial motion.

II. Sufficiency of the Evidence on the Assault Count

Halstead contends the evidence is insufficient to support a finding of guilt on the assault while participating in a felony count given that the jury failed to find him guilty of the predicate felony of first-degree theft. Halstead concedes that inconsistent verdicts are generally not reviewable on appeal, but contends that we should review the finding of guilt here because the State was obligated to prove the predicate felony as an element of assault while participating in a felony.

Halstead's argument in favor of reviewability is appealing at first blush, as the jury was instructed that the State would have to prove "[a]t the time of the assault, the defendant was participating in the crime of theft in the first degree, as defined in [the marshalling instruction for first-degree theft]." However, precedent does not support him.

In *Dunn v. United States*, 284 U.S. 390, 391, 52 S. Ct. 189, 190, 76 L. Ed. 356, 358 (1932), James Dunn was found guilty of "maintaining a common nuisance by keeping for sale at a specified place intoxicating liquor." At the same time, he was acquitted of "unlawful possession of intoxicating liquor" and

[1] The State charged theft in the first degree on the alternative of a theft "from the person of another" rather than the value of the property taken. Iowa Code section 714.2 (2007). The court's marshalling instruction to the jury on theft in the first degree listed theft "from the person" as element number four, and directed the jury to return a verdict of guilty to theft in the fifth degree if the State failed to prove element number four.

"the unlawful sale of such liquor." *Dunn*, 284 U.S. at 391–92, 52 S. Ct. at 190, 76 L. Ed. at 358. On appeal, Dunn maintained the verdicts were inconsistent. *Id.* at 392, 52 S. Ct. at 190, 76 L. Ed. at 358. The Court held, "Consistency in the verdict is not necessary. Each count in an indictment is regarded as if it was a separate indictment." *Id.* at 393, 52 S. Ct. at 190, 76 L. Ed. at 358–59. The Court reasoned that the verdict could have been "the result of compromise, or of a mistake on the part of the jury." *Id.* at 394, 52 S. Ct. at 191, 76 L. Ed. at 359.

The United States Supreme Court forcefully reaffirmed *Dunn* in *United States v. Powell*, 469 U.S. 57, 105 S. Ct. 471, 83 L. Ed. 2d 461 (1984). There, the defendant made the precise argument raised here. She asserted "that an exception to the *Dunn* rule should be made where the jury acquits a defendant of a predicate felony, but convicts on the compound felony." *Id.* at 67, 105 S. Ct. at 478, 83 L. Ed. 2d at 470. The Court stated, "Such an 'exception' falls almost of its own weight." *Id.* Noting that *Dunn* contained a similar fact pattern, the Court stated that the proposed exception to the *Dunn* holding "threatens to swallow the rule." *Id.* at 68, 105 S. Ct. at 478, 83 L. Ed. 2d at 470. In the Court's view, the proposed exception "simply misunderstands the nature of the inconsistent verdict problem." *Id.*

> Whether presented as an insufficient evidence argument, or as an argument that the acquittal on the predicate offense should collaterally estop the Government on the compound offense, the argument necessarily assumes that the acquittal on the predicate offense was proper—the one the jury "really meant." This, of course, is not necessarily correct; all we know is that the verdicts are inconsistent. The Government could just as easily—and erroneously—argue that since the jury convicted on the compound offense the evidence on the predicate offense must have been sufficient. The problem is that the same jury reached inconsistent results; once that is established principles of collateral estoppel—

> which are predicated on the assumption that the jury acted rationally and found certain facts in reaching its verdict—are no longer useful.

Id. at 68, 105 S. Ct. at 478, 83 L. Ed. 2d at 470–71. Notably, the Court declined to reach a contrary conclusion based on a jury instruction similar to the one used here. The Court stated:

> This problem is not altered when the trial judge instructs the jury that it must find the defendant guilty of the predicate offense to convict on the compound offense. Although such an instruction might indicate that the counts are no longer independent, if inconsistent verdicts are nevertheless reached those verdicts still are likely to be the result of mistake, or lenity, and therefore are subject to the *Dunn* rationale. Given this impasse, the factors detailed above—the Government's inability to invoke review, the general reluctance to inquire into the workings of the jury, and the possible exercise of lenity—suggest that the best course to take is simply to insulate jury verdicts from review on this ground.

Id. at 68–69, 105 S. Ct. at 478–79, 83 L. Ed. 2d at 471.

This court reached a similar conclusion in *State v. Hernandez*, 538 N.W.2d 884, 888–89 (Iowa Ct. App. 1995). Like Halstead, Hernandez argued that "the felony which he was convicted of participating in was the burglary or attempted burglary of which he was acquitted, and an acquittal of the predicate felony logically mandates an acquittal of the compound offense." *Hernandez*, 538 N.W.2d at 888. The court rejected this contention based on the holdings of *Dunn* and *Powell*, reasoning as follows:

> The Court in *Dunn* and *Powell* recognized that although inconsistent verdicts reveal the jury did not speak its real conclusions, they do not necessarily show the jury was not convinced of the defendant's guilt. Thus, considering the historic reluctance of courts to inquire into the internal workings of the jury, the inability to determine whether the prosecutor or the defendant actually benefited by the inconsistency, and the prosecutor's inability to invoke review of inconsistent verdicts, the most desirable course of action to follow when confronted with inconsistent

> verdicts is to simply insulate the verdict from review. Instead, appellate review should be limited to whether sufficient evidence exists to support the verdict returned by the jury. This approval is the most sensible under the circumstances and adequately protects defendants from irrational verdicts.

Id. at 889 (citations omitted). Halstead's argument must be rejected for the same reasons.

Halstead nonetheless maintains that the Iowa Supreme Court's decision in *State v. Abrahamson*, 746 N.W.2d 270 (Iowa 2008), mandates a different result. We disagree. That opinion addressed "whether a charge is barred by a previous speedy trial dismissal" of a charge alleging an alternative method of committing the same offense. *Abrahamson*, 746 N.W.2d at 273, 276. It did not address the issue of inconsistent verdicts.

Nor does *State v. Fintel*, 689 N.W.2d 95 (Iowa 2004), also cited by Halstead, require a different conclusion, as the court there reaffirmed the holding of *Dunn*. *Fintel*, 689 N.W.2d at 101. While the court also stated that "[i]f jury verdicts are to be examined for inconsistency, the test to be applied is whether the verdict is so logically and legally inconsistent as to be irreconcilable within the context of the case," the court concluded that the verdicts in that case did not satisfy this test. *Id.* We conclude that Halstead cannot rely on the inconsistent verdicts to support his challenge to the sufficiency of the evidence.

We turn to the evidence supporting the jury's finding of guilt on the assault while participating in a felony count. The only challenged element is whether

"[t]he property was taken from the person of Lester Recinos."[2] On this element, one of the individuals in the van testified that Halstead grabbed Recinos from behind and put him in a choke hold. At the same time, Halstead's brother tried to pull the rings off Recinos's fingers. Rings were later found in Halstead's brother's possession. This evidence amounts to substantial evidence in support of the jury's finding of guilt on the count of assault while participating in a felony.

We affirm Halstead's judgment and sentence for assault while participating in a felony.

AFFIRMED.

[2] This was the fourth element of the first-degree theft instruction, incorporated by reference into the assault while participating in a felony instruction. *See* Iowa Code § 714.2.