



**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

STATE OF MISSOURI,	)	WD83394
	)	
Appellant,	)	OPINION FILED:
v.	)	
	)	December 8, 2020
DORSEY JACOB BASNIGHT,	)	
	)	
Respondent.	)	

**Appeal from the Circuit Court of Cass County, Missouri
Honorable R. Michael Wagner, Judge**

**Before Division Two: Lisa White Hardwick, P.J.,
Thomas H. Newton and Karen King Mitchell, JJ.**

The State appeals a Cass County Circuit Court conviction and sentence entered on a jury verdict finding Mr. Dorsey Jacob Basnight guilty of fourth-degree assault. The State alleges that the trial court plainly erred by entering judgment on an inconsistent verdict. We dismiss the appeal as barred by section 547.200.2.¹

Officer Garret Pinion of the Pleasant Hill, Missouri Police Department, was dispatched to Webster Street in August 2018 on a report of shots fired. When Officer Pinion arrived at the scene, he observed silver bullet casings on the ground and a large group of people. Witnesses told Officer Pinion that the suspects drove away in a white Ford Mustang with a black convertible top. The driver of the vehicle was located, and

¹ Statutory references are to RSMo. (2016), unless otherwise indicated.

he implicated Mr. Basnight in the shooting. Mr. Basnight was arrested and interviewed; he admitted to the shooting, and the police found the gun.

The State charged Mr. Basnight with Count I, the class B felony of unlawful use of a weapon; Count II, the class D felony of stealing; and Count III, armed criminal action. The State later dismissed the stealing charge and re-numbered the counts submitted to the jury as Count I, unlawful use of a weapon, and Count II, armed criminal action. The trial court agreed to submit to the jury lesser-included offenses as to Count I—second-degree and fourth-degree assault.

The jury's three signed verdict forms, C, D, and G, read as follows:

As to Count I, we, the jury, find Defendant Dorsey Basnight guilty of assault in the fourth degree as submitted in Instruction No. 8.

As to Count I, we, the jury, find Defendant Dorsey Basnight not guilty.²

As to Count II, we, the jury, find Defendant Dorsey Basnight not guilty.

The trial court read the verdicts into the record:

Okay. Would the defendant please stand. As to Count I, we, the jury, find the defendant Dorsey Basnight not guilty. As to Count I, we, the jury, find the defendant Dorsey Basnight guilty of assault in the fourth degree as submitted in Instruction No. 8. As to Count II, we, the jury, find the defendant Dorsey Basnight not guilty. Does either side wish to have the jury polled?

The trial court polled each juror at the State's request and asked "are these your verdicts?", and each juror responded "yes." Before discharging the jury, the trial court announced for the record that it accepted the verdicts and also scheduled a date and time for sentencing. Neither party objected to the verdicts before the jury was discharged.

² The State had submitted this verdict form, which made no reference to any instruction or charges.

Nearly a month after trial, the State filed an objection to the judgment on Count I, the conviction for fourth-degree assault, arguing that it was an inconsistent verdict. At the sentencing hearing, the trial court overruled the State's objection and stated, in relevant part:

THE COURT: Now, I read the three verdict forms in open court, the State did not object. The State had every opportunity. The defendant did not object, the defendant had every opportunity. The time to object was the time before the jury was discharged. So with no objection I polled the jury and they were discharged and in this Court's opinion it is too late to complain now. It would not be fair for the State to have a second bite at the apple. We can't have one verdict saying not guilty and another verdict saying guilty of a misdemeanor and saying, Okay, I am going to make this guy face 15 years again. That would violate due process and would violate double jeopardy. I held this defendant without bond awaiting trial. The jury had -- the jury heard the evidence and they found him guilty of a misdemeanor and that is the way it needs to be, so the State's motion is overruled.

The trial court sentenced Mr. Basnight to time served (or approximately eight months) on the fourth-degree assault conviction. The State appeals.

Legal Analysis

The State alleges that the trial court plainly erred in entering judgment on Count I, fourth-degree assault, because the jury returned inconsistent verdicts of guilty and not guilty on Count I contrary to the direction of MAI-CR 4th 404.12, which instructs the jury to return only one verdict for each charge. It seeks remand for a new trial. Mr. Basnight contends that because the State failed to object, the issue is subject to plain-error review. He argues that manifest injustice cannot be established because the trial court resolved the apparent inconsistency in favor of entering conviction, the option most prejudicial to Mr. Basnight, rather than acquittal.

The State asserts that section 547.200.2 gives it the authority to appeal to this Court. That section allows the State to appeal “in the cases and under the circumstances mentioned in section 547.210 and in all other criminal cases *except in those cases where the possible outcome of such an appeal would result in double jeopardy for the defendant.*” § 547.200.2 (emphasis added). For the statute to bar this appeal, Mr. Basnight must have already been once placed in jeopardy. The State also argues that double jeopardy has not attached because it only attaches when there is a final verdict of acquittal. We disagree.

“Jeopardy attaches when the defendant has been put to trial before the trier of fact, whether the trier of fact be a jury or a judge.” *State v. Seuferling*, 238 S.W.3d 217, 219 (Mo. App. W.D. 2007) (citation omitted). “The constitutional protection provided by the double jeopardy clause prohibits (1) second prosecution for the same offense after acquittal; (2) second prosecution for the same offense after conviction; and (3) multiple punishments for the same offense.” *Id.* at 220 (citation omitted).

The jury both acquitted and convicted Mr. Basnight under Count I and the court accepted those verdicts, so a retrial on that count would result in two of the circumstances prohibited under the Double Jeopardy Clause. The State, however, relies on *State v. Zimmerman*, 941 S.W.2d 821, 826 (Mo. App. W.D. 1997), where, under remarkably similar circumstances, the trial court entered a judgment of acquittal, rather than conviction, following the jury’s return of inconsistent verdicts. This Court held that “without further deliberations, there is no final verdict of the jury.” *Id.* And, without a final verdict for the trial court to accept, “the only alternative is to reverse and remand for a new trial as to Count I.” *Id.* The defendant in *Zimmerman* raised the

prospect of double jeopardy, but this Court rejected it, stating, “[w]here there is no final verdict of acquittal, double jeopardy does not prevent the case from being retried.” *Id.* In this regard, the Court inaptly analogized the circumstances to cases involving a mistrial for a hung jury or a mistrial consented to or requested by the defense, which are recognized double-jeopardy exceptions. *Id.*

Zimmerman relies on caselaw applying the Missouri Constitution. *Id.* at 825-26. The concept that double jeopardy is implicated following a *final* verdict of acquittal arises under the Missouri Constitution. Here, in addressing double jeopardy, Mr. Basnight raised both the Missouri and U.S. constitutions, and the U.S. Constitution establishes a stricter standard for when double jeopardy applies. *See State v. Tolliver*, 839 S.W.2d 296, 298-99 (Mo. banc 1992) (“Though defendant relies on Article I, § 19 of the Missouri Constitution, that provision, by its plain language, prevents retrial only after an acquittal[, but] . . . [t]he double jeopardy clause of the Fifth Amendment to the United States Constitution applies to state trials,” and its language is absolute: ‘nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb.’”); *State v. Urban*, 796 S.W.2d 599, 601 (Mo. banc 1990) (“Our state constitutional provision (Article I, Section 19) is more limited than the federal [provision].”).³

“Jeopardy means exposure to danger and it was a principle of the common law that a man should not be brought into danger of his life or limb for one and the same offense more than once.” *State v. Morton*, 971 S.W.2d 335, 339 (Mo. App. E.D. 1998).

³ To the extent that the court in *State v. Urban*, 796 S.W.2d 599 (Mo. banc 1990), relied on *Grady v. Corbin*, 495 U.S. 508 (1990), for its adoption of a “same-conduct” test to avoid the double jeopardy bar, note that the U.S. Supreme Court overruled *Grady* in *U.S. v. Dixon*, 509 U.S. 688 (1993).

“Generally, in a jury trial, jeopardy attaches when the jury is impaneled and sworn[.]” *Id.*; see also *State v. Miller*, 56 S.W.2d 92, 94 (Mo. 1932) (“It is a well-settled rule of law that, when a person is placed on trial and a jury is sworn to try the case, jeopardy attaches.”). There can be no doubt here that jeopardy attached.

Further, “[w]hen a successful post-acquittal appeal by the prosecution would lead to proceedings that violate the Double Jeopardy Clause, the appeal itself has no proper purpose. Allowing such an appeal would frustrate the interest of the accused in having an end to the proceedings against him.” *Smalis v. Pennsylvania*, 476 U.S. 140, 145 (1986). “[T]he Double Jeopardy Clause bars a post-acquittal appeal by the prosecution not only when it might result in a second trial, *but also if reversal would translate into ‘further proceedings of some sort, devoted to the resolution of factual issues going to the elements of the offense charged.’*” *Id.* at 145-46 (quoting *U.S. v. Martin Linen Supply Co.*, 430 U.S. 564, 570 (1977)) (emphasis added).

We acknowledge that “[t]he circuit court has an obligation to examine the verdicts returned by the jury for defects, ambiguities, and inconsistencies,” and, “[w]hen a jury attempts to return verdicts that are inconsistent, the circuit court should reject the jury’s verdict and send it back to the jury for further deliberation to resolve the inconsistency[,] . . . [S]till, a] verdict is binding when the circuit court *accepts* it and discharges the jury.” *State v. Flemons*, 144 S.W.3d 877, 883 (Mo. App. W.D. 2004) (emphasis added). Once the trial court accepts the verdict, even if inconsistent, and discharges the jury (thereby precluding possible resolution of the inconsistency), “that verdict is binding and jeopardy attaches,” barring any retrial of the defendant. *Id.*

Here, any remand for retrial would risk placing Mr. Basnight in jeopardy for a second time. Accordingly, this appeal is barred by section 547.200.2.

Conclusion

Because double jeopardy attached when Mr. Basnight was tried by a jury and the trial court accepted its verdicts, the case cannot be remanded for retrial. The State lacked the authority to appeal the conviction under section 547.200.2. Accordingly, we dismiss the appeal.

/s/ *Thomas H. Newton*
Thomas H. Newton, Judge

Lisa White Hardwick, P.J. and Karen King Mitchell, J. concur.