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MEMORANDUM

CR-15-0602

Lauderdale Circuit Court CC-15-194

Stephen Dewayne Parker v. State of Alabama

WELCH, Judge.

Stephen Dewayne Parker was indicted on one count of criminally negligent homicide, § 13A-6-4, Ala. Code 1975, and one count of first-degree assault, § 13A-6-20(a)(5), Ala. Code 1975. The indictment charged that Parker had been driving a vehicle while under the influence of marijuana and/or hydrocodone, and that he had struck two bicyclists; James Keith Green died from his injuries, and Mannon Heath Rogers was seriously injured. The case was tried before a jury and on January 13, 2016, the jury found Parker guilty of criminally negligent homicide without impairment as to Green.

As to Rogers, the jury found Parker guilty of the lesser-included offense of second-degree assault without impairment. See § 13A-6-21(a)(3), Ala. Code 1975. On February 25, 2016, the trial court sentenced Parker to one year in jail on the conviction for criminally negligent homicide, and to serve ten years on the conviction for assault. The sentences were ordered to run concurrently. Parker filed a motion to set aside the verdict and/or for a new trial, and the trial court denied the motion.

Parker does not challenge the weight or sufficiency of the evidence, so only a brief summary of facts is necessary. On the morning of September 1, 2014, Green, Rogers, and Melissa Driskell were riding their bicycles on a two-lane county road. Driskell was riding on or near the fog line in front of the men and Rogers was riding behind her, also on or near the fog line. Green was riding to Rogers's left and was further away from the fog line. Parker was driving to work that morning; he said he was blinded by sunlight when he came out of a curve behind the bicyclists and he did not see the riders until immediately before he struck the men. Green was pronounced dead at the hospital, and Rogers sustained serious injuries. Driskell was not injured.

Analysis

Parker's sole argument on appeal is that the jury's verdicts are mutually exclusive and cannot stand. Specifically, he argues that he struck the men by one course of conduct and that, by convicting him of both criminally negligent homicide -- which requires proof of negligence, and second-degree assault -- which requires proof of recklessness, the jury's finding of both mental states under the circumstances presented in this case resulted in impermissible mutually exclusive verdicts. Our review of this issue is de novo. See Ex parte Walker, 928 So. 2d 259, 262 (Ala. 2005) ("Walker's case involves only issues of law and the application of the law to the undisputed facts. Thus, our review is de novo.").

Green's death and Rogers's injuries resulted from both men being struck by Parker's car during one course of conduct. Thus, we must determine whether the verdicts finding that Parker acted negligently as to Green and recklessly as to

Rogers are mutually exclusive or merely inconsistent.

Section 13A-6-4(a), Ala. Code 1975, provides, "A person commits the crime of criminally negligent homicide if he or she causes the death of another person by criminal negligence." Section 13A-2-2(4), Ala. Code 1975, defines criminal negligence as follows:

"A person acts with criminal negligence with respect to a result or to a circumstance which is defined by statute as an offense when he fails to perceive a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation."

Section 13A-6-21(a) (3), Ala. Code 1975, provides that a person commits second-degree assault if he or she recklessly causes serious physical injury to another person by means of a deadly weapon or a dangerous instrument. Section 13A-2-2(3), Ala. Code 1975, states, in relevant part:

"A person acts recklessly with respect to a result or to a circumstance described by a statute defining an offense when he is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation."

Parker relies on Martinez v. State, 989 So. 2d 1143 (Ala. Crim. App. 2006), as support for his argument. Martinez struck a vehicle carrying a driver and four passengers. Four people were killed, and a fifth suffered serious physical injuries. Martinez was indicted on four counts of vehicular homicide and one count of first-degree assault. The jury found Martinez guilty of four counts of criminally negligent homicide and one count of second-degree assault. Martinez appealed, arguing that the jury found that he had acted with

criminal negligence as to the four deaths but that, as to the survivor who suffered serious injuries, he acted recklessly. This Court stated that the "jury found two distinct degrees of culpability for one course of conduct that arose from one set of circumstances, id. at 1150, and reversed the second-degree assault conviction because it was inconsistent with the remaining convictions. Martinez does not govern this case, however, because the Alabama Supreme Court subsequently set forth controlling precedent that demands a different result.

The Alabama Supreme Court in Heard v. State, 999 So. 2d 992, 1000 (Ala. 2007), addressed the difference between inconsistent verdicts and mutually exclusive verdicts. The Court stated:

"Confusion exists throughout Alabama courts over the difference between inconsistent verdicts and mutually exclusive verdicts. 'The general rule is that there need be no rational compatibility between the verdicts on the several counts of an indictment. The exception to this rule is where the jury returns multiple convictions as to crimes which are mutually exclusive of each other. Conway v. State, 489 So. 2d 641, 642 (Ala. Crim. App. 1986)' Grikis v. State, 552 So. 2d 187, 187 (Ala. Crim. App. 1989). This seemingly straightforward rule has been somewhat difficult to apply because of confusion over the meaning of the terms 'inconsistent verdicts' and 'mutually exclusive verdicts.'"

The Court also stated:

"Mutually exclusive verdicts exist when a guilty verdict on one count logically excludes a guilty verdict on another count. In contrast, inconsistent verdicts can exist where there is a verdict of guilty and another of not guilty, as when there are two guilty verdicts that are not mutually exclusive. Inconsistent criminal verdicts are permissible; mutually exclusive verdicts are not."

Id. at 1005 (emphasis added).

Addressing the analysis used to determine whether guilty

verdicts are mutually exclusive, the Court explained that

"mutually exclusive verdicts are the result of two positive findings of fact that cannot logically coexist. In other words, it is legally impossible for the State to prove the elements of both crimes. In order to determine whether the guilty verdicts are mutually exclusive as a matter of law, the alleged underlying offenses or acts must be carefully scrutinized. The two guilty verdicts are not mutually exclusive if no element of one crime necessarily negates an element of the other."

Id. at 1004-05. The Court then analyzed the facts of that case in light of the applicable legal principles, as follows:

"Heard was convicted of both capital murder and felony murder. According to Alabama law, a defendant must have the intent to kill in order to be found guilty of a capital offense. § 13A-5-40(b), Ala. Code 1975 Felony murder, on the other hand, does not require the specific intent to kill; it requires only the intent to commit the underlying felony. § 13A-6-2(a)(3), Ala. Code 1975; Mitchell v. State, 706 So. 2d 787 (Ala. Crim. App. 1997). The absence of an intent to kill, however, is not necessarily an element of felony murder, as contrasted with the intent to kill, which is an element of capital murder.

"In other words, a felony-murder conviction does not require proof that the defendant unintentionally killed the victim, only that the defendant intended to commit the underlying felony. Therefore, it is possible that a defendant intended to kill the victim (the element necessary for the capital conviction) while at the same time intending to commit an underlying felony (the element necessary for the felony-murder conviction). Therefore, the most that can be said of the verdicts finding Heard guilty both of capital murder and of felony murder is that they may be merely inconsistent. These two verdicts are not mutually exclusive; they do not contain mutually exclusive essential elements."

Id. at 1005.¹

In Hammonds v. State, 7 So. 3d 1055 (Ala. 2008), the Alabama Supreme Court was presented with circumstances virtually identical to those in Martinez, on which Parker relies. The Hammonds Court further discussed and then applied the principles it had set out in Ex parte Heard. While he was driving under the influence of alcohol, Hammonds struck a vehicle occupied by five people; one person was killed and two people were injured, and Hammonds was charged with reckless murder and first-degree assault. The jury found Hammonds guilty of reckless murder and second-degree assault. He argued that the verdicts were mutually exclusive. The Alabama Supreme Court held that the verdicts had, at most, some factual inconsistency because the jury found that he acted under circumstances manifesting an extreme indifference to human life by creating a grave risk of death to his murder victim, but not to his two assault victims, even though the death and injuries resulted from one course of conduct – driving his vehicle while he was intoxicated. The Court upheld the verdicts and stated that it would not disturb guilty verdicts on the basis of apparent inconsistencies as long as there existed sufficient evidence to support the verdicts. The Court quoted Dunn v. United States, 284 U.S. 390, 393-94 (1932), as follows:

"Consistency in the verdict is not necessary. Each count in the indictment is regarded as if it was a separate indictment.... That the verdict may have been the result of compromise, or of a mistake on the part of the jury, is possible. But verdicts cannot be upset by speculation or inquiry into such matters."

¹The Alabama Supreme Court issued Ex parte Heard while Martinez was on remand to the trial court. On return to remand, this Court stated, "[B]ased on Heard, we conclude that we ultimately reached the correct result because this case involved two positive findings of fact that cannot logically co-exist," and further stated, "One single act cannot be both negligent and reckless." Martinez, 989 So. 2d at 1152.

Hammonds, 7 So. 3d at 1063. The Hammonds Court further stated:

"The rationale for allowing inconsistent verdicts is

"'(1) there is no way to know why the jury rendered an inconsistent verdict, and therefore such verdicts must be upheld in the interest of protecting lenity; (2) since the government cannot appeal inconsistent acquittals, it would be unfair to allow a defendant to appeal inconsistent convictions; and (3) the requirement of a sufficiency of the evidence review on appeal prevents any harm that could result from an inconsistent verdict.'

"State v. Purdie, 174 P.3d [881, 884 (Idaho Ct. App. 2007) (citing United States v. Powell, 469 U.S. 57, 65-69 (1984) (footnote omitted))."

Id. at 1061.

Hammonds and Ex parte Heard control the outcome in this case. Parker's argument in support of reversal mistakenly focuses solely on the states of mind necessary to establish criminally negligent homicide and second-degree assault, and he contends that the jury could not legally have found him guilty of acting both recklessly and negligently during the course of one act. We disagree. First, the proper focus, as explained in Hammonds and Ex parte Heard, is on all of the elements of the crimes. Second, analysis of the elements of the crimes in light of facts of the case and the relevant principles leads us to conclude that the verdicts are not mutually exclusive.

As to Green, the jury determined that Parker acted with criminal negligence, that is, he failed to perceive a substantial and unjustifiable risk, and that Green died as a result. As to Rogers, the jury determined that Parker acted recklessly, that is, he was aware of but consciously disregarded a substantial and unjustifiable risk and caused serious physical injury to Rogers by means of a deadly weapon or a dangerous instrument -- his vehicle. No element of one

crime necessarily negates an element of the other. Contrary to Parker's argument, it was not legally impossible for the State to prove the elements of second-degree assault without also proving the elements of criminally-negligent homicide. For example, the jury could have determined that Parker acted recklessly as to Rogers because he was aware of but consciously disregarded a substantial and unjustifiable risk that a bicycle rider would be riding on or near the fog line, but that, as to Green, he acted with negligence because he failed to perceive a substantial and unjustifiable risk of striking a rider who was well inside the fog line, closer to the middle of the road. The verdicts are, at most, inconsistent. They may have been the result of a conscious decision by the jury, or they may have been the result of compromise or mistake on the part of the jury, but we will not inquire into or speculate about such matters. Furthermore, we will not disturb the verdicts because they are supported by the evidence.

For the foregoing reasons, we affirm the circuit court's judgment.

AFFIRMED.

Windom, P.J., and Kellum, Burke, and Joiner, JJ., concur.