IN THE COURT OF APPEALS OF IOWA

No. 3-510 / 12-1336
Filed July 24, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

MARSHAUN JORDAN MERRETT,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Richard G. Blane II, Judge.

Marshaun Merrett appeals from his judgments, convictions, and sentence for assault with intent to inflict serious injury, two counts of assault, and intimidation with a dangerous weapon with intent.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Mark C. Smith, State Appellate Defender, and Bradley M. Bender, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Kyle Hanson, Assistant Attorney General, John Sarcone, County Attorney, and Daniel Voogt, Assistant County Attorney, for appellee.

Considered by Eisenhauer, C.J., and Potterfield and Tabor, JJ.

POTTERFIELD, J.

Marshaun Merrett appeals from his judgments, convictions, and sentence after a jury trial for assault with intent to inflict serious injury, two counts of assault, as lesser included offenses of attempted murder; and intimidation with a dangerous weapon with intent. He argues the jury's negative finding on a special interrogatory regarding the dangerous weapon sentencing enhancement is in conflict with the jury's finding of guilt on the charge of intimidation with a dangerous weapon. He also argues that the lesser-included assault verdicts cannot stand in the face of this inconsistency and his counsel was ineffective in failing to address this issue after the jury reported its verdicts. We find the intimidation-with-a-dangerous-weapon-with-intent guilty verdict is inconsistent with the negative special interrogatory and remand for further proceedings on that count. We affirm the remaining charges, finding the challenge to the assault verdicts was not preserved for our review.

I. Facts and proceedings.

Marshaun Merrett was arrested after several shots were fired from a vehicle he was driving into another vehicle containing three people: Jones, Johnson, and Klueppel. Merrett's vehicle contained one passenger, a man known as "Thirsty." Merrett was charged by trial information with three counts of attempt to commit murder (one for each person in Jones's car) and with intimidation with a dangerous weapon with intent.[1] Each of the four charges required proof Merrett possessed or aided and abetted in the possession of a

[1] Merrett was also charged with, and acquitted of, gang participation and charged with and convicted of driving while barred. Neither of those charges is involved in this appeal.

firearm and required proof of specific intent. Each of the four charges is a forcible felony, requiring submission to the jury of a special interrogatory under Iowa Rule of Criminal Procedure 2.22 together with Iowa Code section 902.7 (2011). Section 902.7 provides for a minimum five-year sentence where a jury finds the defendant: 1. guilty of a forcible felony and 2. "represented that the person was in the immediate possession and control of a dangerous weapon, displayed a dangerous weapon in a threatening manner, or was armed with a dangerous weapon while participating in the forcible felony."

A jury trial was held June 4, 2012. The court instructed the jury that each of the three attempted-murder counts include the lesser offenses of assault with intent to inflict serious injury and assault, with elements as follows:

> As to Count [I, II and III], the State must prove all of the following elements of Assault with Intent to Inflict Serious Injury:
> 1. . . . the Defendant intentionally pointed a firearm at [Jones, Johnson, or Klueppel].
> 2. This was done with the specific intent to cause a serious injury.
> 3. If the State has proved both elements, the Defendant is guilty of Assault with Intent to Inflict Serious Injury. If the State has proved only element number 1, the Defendant is guilty only of Assault. If the State has failed to prove both elements, the Defendant is not guilty in Count [I, II and III].

On the charge of intimidation with a dangerous weapon with intent, the marshaling instruction read that the State must prove:

> 1. On or about the time period between November 25, 2011 and November 26, 2011 the Defendant shot or discharged a dangerous weapon into a vehicle which was occupied by [Jones, Johnson, and/or Klueppel].
> 2. A firearm is a dangerous weapon, as explained in Instruction No. 34.
> 3. [Jones, Johnson, and/or Klueppel] actually experienced fear of serious injury and the fear was reasonable under the existing circumstances.

> 4. The Defendant shot or discharged the dangerous weapon with the specific intent to injure or cause fear or anger in [Jones, Johnson, and/or Klueppel].
>
> If the State has proved all of these elements, the Defendant is guilty of Intimidation with a Dangerous Weapon with Intent. If the State has proved elements 1, 2 and 3 but not 4, the Defendant is guilty of the included offense of Intimidation with a Dangerous Weapon. If the State has failed to prove any one or more of the elements 1, 2 or 3, the Defendant is not guilty of Count V.

The court also instructed the jury on the theory of aiding and abetting. The verdict forms for attempted murder each specified the name of the alleged victim and stated:

> Verdict No. 1
>
> We find the Defendant guilty of Attempt to Commit murder.
>
> If this is your verdict, you must answer the following interrogatory:
>
> During the commission of the offense the Defendant represented he was in the immediate possession and control of a dangerous weapon, displayed a dangerous weapon in a threatening manner or was armed with a dangerous weapon
>
> ____ Yes ____ No
>
> _____
> Presiding Juror
>
> Verdict No. 2
>
> We find the Defendant guilty of the crime of Assault with Intent to Inflict Serious Injury.
>
> _____
> Presiding Juror
>
> Verdict No. 3
>
> We find the Defendant guilty of the crime of assault.
>
> _____
> Presiding Juror
>
> Verdict No. 4
>
> We find the Defendant not guilty of Count [I, II, III]
>
> _____
> Presiding Juror

As to Jones, the jury found Merrett guilty of Assault with Intent to Inflict Serious Injury and as to Johnson and Klueppel, the jury found Merrett guilty of Assault, apparently finding no specific intent to inflict serious injury on those

occupants of Jones's car. The special interrogatory was not asked or answered on any of these three lesser included counts, since none was a forcible felony.

The verdict form for Intimidation with a Dangerous Weapon with intent stated:

> We find the Defendant guilty of the crime of Intimidation with a Dangerous Weapon with Intent.
>
> If this is your verdict, you must answer the following interrogatory.
>
> During the commission of the offense the Defendant represented he was in the immediate possession and control of a dangerous weapon, displayed a dangerous weapon in a threatening manner, or was armed with a dangerous weapon.
>
> ____ Yes ____ No
>
> _____
> Presiding Juror

The jury returned the verdict form with a checkmark in the "no" space after the special interrogatory but with the signature of the presiding juror.[2]

After the jury reported their verdict to the court, the court called both counsels together to discuss the inconsistency in the verdict form for intimidation with a dangerous weapon.

> Court: The jury has forwarded to me a verdict, and I'm going to review Count V, Verdict No. 15. It reads: We find the defendant guilty of the crime of intimidation with a dangerous weapon with intent.
>
> Then the question is: If this is your verdict, you must answer the following interrogatory: During the commission of the offense the defendant represented he was in immediate possession and control of a dangerous weapon, displayed a dangerous weapon in a threatening manner, or was armed with a dangerous weapon. They have checked that no.
>
> I find that inconsistent. I don't think that they can answer all of the elements of committing the crime and then answer no.

[2] The verdict form for intimidation with a weapon with intent contained a lesser included offense for intimidation with a dangerous weapon (without intent) and provided an alternative for a not guilty verdict on Count V.

I'm willing to hear from counsel on how they could answer affirmatively to the crime as to all of the elements being met and then answer that no. I'll give you a few minutes to think about it. But my concern is I could not accept what appears to be an inconsistent verdict. Can you?

. . . .

[Merrett's Counsel]: Your Honor, obviously, we don't know what the jury's thought process is with regard to this. Perhaps if they were finding this verdict under a theory of aiding and abetting, that perhaps Mr. Merrett was not the shooter but just the driver, and that he did not know until the shooting began that the shooter was in possession of a dangerous weapon.

The Court: Do you want me to submit an additional interrogatory?

[Merrett's Counsel]: I believe that this is the jury's verdict and that we should accept it.

The Court: I've already advised you that I cannot find under these facts that they could answer both of those inconsistently without further information from the jury.

. . . .

The Court: Well, the only way I think that we could resolve this would be to submit an additional interrogatory, and that is: Are you making a finding that the defendant is guilty under Count V based upon an aiding and abetting theory?

[Merrett's Counsel]: I would object to that. I think that it invades the decision of the jury. It's like we're questioning them about the basis for their verdict, and I don't think we get to do that.

The Court: Do you have any legal authority?

. . . .

[Merrett's Counsel]: Well, I, obviously, haven't had an opportunity to do any sort of research with regard to this issue.

The Court: That's why I'm giving you an opportunity. We can spend all afternoon if we want to get it right.

. . . .

The Court: The record will show that we are back in open court outside the presence of the jury. The defendant is present with his counsel. . . . The Court gave counsel an opportunity to conduct research and look at the issue raised by the Court concerning what appears to be an inconsistent verdict regarding Count V, Verdict No. 15, that I have already read into the record. I briefly discussed this with counsel. . . . [W]e've recessed over an hour, I think, since our last meeting. At this point maybe the State and the defense have reached an agreement on how to resolve this issue. Counsel, do you care to make a record?

[State's Counsel]: May it please the Court. Your Honor, it is my understanding we have reached such an agreement. It's the State's suggestion that the Court receive the verdicts as they are

currently rendered and take no further action. It's my understanding that—and I would like the record to specifically reflect that—[Merrett's Counsel] has had this discussion with her client and me, and it is their decision, similar trial strategy, that this is the manner in which we should proceed. That is all I have. Thank you.

The Court: [Merrett's Counsel].

[Merrett's Counsel]: Thank you, Your Honor. After having the opportunity to do some research, I do believe that if the Court were to find the verdicts inconsistent that the Court would have the power, the ability, to send this verdict back to the jury for further deliberations. I've explained to my client, Mr. Merrett, and have spoken to him about the possible outcomes that could result from that, the possible outcomes being that the jury could leave the verdict as it is; the jury could change its answer to the interrogatory from no to yes, thus imposing a five-year mandatory minimum on Mr. Merrett; or the jury could change its answer to the original question of guilty to not guilty. I have discussed with Mr. Merrett what I believe are the relative likelihoods of those things happening. And my concern is that by sending the verdict back to the jury it sends them an implicit message that it's wrong in some way and would encourage them to change the answer to the interrogatory which, as it is right now, definitely benefits the defendant. So, Mr. Merrett, have we discussed all those things? [Merrett]: Yes.

[Merrett's Counsel]: And do you understand that the Court does have the power to send this question back, this verdict back, to the jury for further deliberations? [Merrett]: Yes.

[Merrett's Counsel]: And do you understand that if the verdict were sent back, the jury could change the verdict on the main charge to not guilty? [Merrett]: Yes.

[Merrett's Counsel]: The jury could also change the answer to the special interrogatory from no to yes. Do you understand that? [Merrett]: Yes.

[Merrett's Counsel]: Or the jury could leave its verdict undisturbed and leave it as it is, which right now is guilty to intimidation with a dangerous weapon with intent and no on the firearm question. You understand that? [Merrett]: Yes.

[Merrett's Counsel]: And at this time are you choosing to ask the Court to leave the verdict as it is? [Merrett]: Yes.

. . . .

[Merrett's Counsel]: Your Honor, I would concur with my client's decision. I believe that we would request that the Court accept the verdict as is.

The Court: And, [Merrett's Counsel], based on your discussion with Mr. Merrett, I take it this would be kind of a trial strategy because of the potential adverse effect that you could get by the Court submitting it back to the jury for further consideration.

> [Merrett's Counsel]: Yes, Your Honor. I believe that—we believe that the risk of sending it back that the jury changing its answer to the interrogatory is more likely than the jury changing its answer on the original question. So that would be a trial strategy decision that I believe is in my client's best interest at this time.

The district court accepted the jury's verdicts and later sentenced Merrett on the three lesser included assault conviction and on the intimidation conviction. Merrett appeals.

II. Analysis

Merrett argues both the merits of his claim—that the special interrogatory was inconsistent with his convictions for intimidation with a dangerous weapon and the three counts of assault—or, in the alternative that he was provided with ineffective assistance of counsel.

A. Error Preservation.

"It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal." *Meier v*. *Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002). "The claim or issue raised does not actually need to be used as the basis for the decision to be preserved, but the record must at least reveal the court was aware of the claim or issue and litigated it." *Id.* at 540. Here, the district court clearly was aware of the claim of inconsistency as to the intimidation count but was persuaded not to act by counsel's agreement. The State argues it would be unfair to allow Merrett now to claim error was preserved but argue a position on appeal precisely opposite of that which he took in trial court. The State contends Merrett "cannot have it both ways." *State v*. *Duncan*, 710 N.W.2d 34, 43 (Iowa 2006).

Our doctrine of judicial estoppel is "designed to protect the courts rather than the litigants." *Id.* In *Duncan*, the defendant sought to challenge the admission of evidence he used to bolster his case at trial. *Id.* The court found he was estopped from adopting a contrary position on appeal and that allowing him to engage in such a challenge would undermine the judicial process. *Id.* Here, we are faced with potentially legally inconsistent verdicts. Our supreme court recently articulated how fundamental to the judicial process untangling an incongruous jury verdict is:

> In constitutional terms, a jury verdict involving compound inconsistency insults the basic due process requirement that guilt must be proved beyond a reasonable doubt. . . . [W]e are concerned about the perceptions of the criminal justice system when inconsistent verdicts are allowed to stand. We are concerned that allowing a potentially long prison term arising from a compound felony to stand when a defendant has been found not guilty of predicate offenses will have a corrosive effect on confidence in the criminal justice system. When liberty is at stake, we do not think a shrug of the judicial shoulders is a sufficient response to an irrational conclusion. We are not playing legal horseshoes where close enough is sufficient. It is difficult to understand why we have a detailed trial procedure, where the forum is elaborate and carefully regulated, and then simply give up when the jury confounds us.

State v. Halstead, 791 N.W.2d 805, 815 (Iowa 2010) (citation omitted). We decline to find Merrett's appeal is estopped by his earlier position. We also conclude error was preserved as to the intimidation count—the court was fully aware of the issue, counsel presented arguments regarding the error, and the court ultimately ruled by not submitting the issue to the jury. *See Meier*, 641 N.W.2d at 537.

However, regarding Merrett's other arguments on appeal—that the assault charges were also legally inconsistent with the special interrogatory negative

answer—the district court was not made aware of the claimed inconsistency, and we decline to consider it for the first time on appeal. *See id.*; *see also State v. Pearson*, 547 N.W.2d 236, 241 (Iowa Ct. App. 1996) ("Pearson has failed to preserve error on the issue because it was not raised in district court. We will accordingly only consider the issue of inconsistent verdicts if the failure to raise the issue resulted from ineffective assistance of counsel." (citations omitted)).

B. Inconsistent verdict: intimidation count

In *Halstead*, our supreme court outlined Iowa's approaches to different kinds of inconsistent verdicts:

> At the outset, it is important to note that the term "inconsistent verdicts" is often used in an imprecise manner and may include a wide variety of related, but nonetheless distinct, problems. A jury verdict may be deemed inconsistent based upon inconsistent application of facts or inconsistent application of law. For example, in a vehicular manslaughter case, the conviction of a defendant for the death of one passenger in the car but acquittal on a charge related to another passenger is "factually inconsistent." There is no legal flaw in the jury's verdict, but the verdicts seem inconsistent with the facts. On the other hand, the conviction of a defendant of a compound crime when he or she is acquitted on all predicate offenses is said to be "legally inconsistent." In these cases, the jury verdict is inconsistent as a matter of law because it is impossible to convict a defendant of the compound crime without also convicting the defendant of the predicate offense. . . .
>
> Some allegedly inconsistent verdicts involve a defendant in a single proceeding having multiple counts, such as a case involving compound and predicate felonies or multiple deaths due to a single act or occurrence. In other cases, jury verdicts may be said to be inconsistent if multiple defendants are tried either together or separately. For instance, it may be claimed that the conviction of one defendant of conspiracy while all of the possible confederates are acquitted produces an inconsistent verdict because it takes more than one person to conspire.
>
> This case involves a single defendant who is convicted of a compound crime and acquitted of the predicate crime in a single proceeding. Sometimes labeled in the cases as "true inconsistency" or "repugnancy," a jury verdict in a compound-conflict case, as will be seen below, has serious flaws. For

> purposes of clarity, in this opinion we will refer to the inconsistency in this case as a compound inconsistency.
>
> Before addressing the narrow issue presented in this case, it is important to note that the question of inconsistent verdicts has sometimes been characterized as not involving constitutional issues. As will be seen below, the question of the validity of an inconsistent verdict, however, can be approached only with due regard to important constitutional concepts including double jeopardy, guilt beyond a reasonable doubt, and the right to a unanimous jury verdict. At a minimum, the outcome in this case is affected by strong constitutional currents.

791 N.W.2d at 807–808 (citations omitted).[3]

In evaluating whether a jury verdict should be set aside due to inconsistency, "any potential remedy should be available only when the jury verdicts are truly inconsistent or irreconcilable. A reviewing court must carefully examine the pleadings and the instructions to ensure that the jury verdicts are so inconsistent that they must be set aside." *Id.* at 815. Our rule of criminal procedure 2.22 states the following regarding inconsistent verdicts:

> If the jury renders a verdict which is in none of the forms specified in this rule, or a verdict of guilty in which it appears to the court that the jury was mistaken as to the law, the court may direct the jury to reconsider it, and it shall not be recorded until it is rendered in some form from which the intent of the jury can be clearly understood. If the jury persists in finding an informal verdict, from which, however, it can be understood that the intention is to find for the defendant upon the issue, it shall be entered in the terms in which it is found, and the court must give judgment of acquittal.

The State argues reconsideration by the jury was permissive; however, the rule clearly states the verdict "shall not be recorded until it is rendered in some form from which the intent of the jury can be clearly understood." Iowa R. Crim P. 2.22.

[3] Halstead preserved error on the inconsistency by filing a motion for new trial based on the inconsistent verdicts. *Halstead*, 791 N.W.2d at 807.

This same rule governs the submission of special interrogatories:

> 2.22(2) Answers to interrogatories. It must also return with the general verdict answers to special interrogatories submitted by the court upon its own motion, or at the request of the defendant in prosecutions where the defense is an affirmative one, or it is claimed any witness is an accomplice, or there has been a failure to corroborate where corroboration is required. Where a defendant is alleged to be subject to the minimum sentence provisions of Iowa Code section 902.7, (use of a dangerous weapon), and the allegation is supported by the evidence, the court shall submit a special interrogatory concerning that matter to the jury.

Here, the jury apparently found Merrett guilty of intimidation with a dangerous weapon with intent. Below that statement and before any signature line, the form instructed the jury to answer a special interrogatory as to whether Merrett represented, displayed, or was armed with a dangerous weapon. The elements of Intimidation with a Dangerous Weapon include the shooting or discharge of a dangerous weapon. When the jury answered no to the special interrogatory, while the presiding juror signed the verdict form for guilty for intimidation with a dangerous weapon with intent, a true inconsistency appeared.

In *State v*. *Teeters*, our supreme court considered a situation in which a jury failed to answer the dangerous weapon special interrogatory but still found the defendant guilty of the forcible felony. 487 N.W.2d 346, 349 (Iowa 1992).

> Although the court was aware of the jury's failure to answer the interrogatory, it ignored the failure and simply dismissed the jury. At sentencing the trial court concluded that the mandatory minimum sentence required by section 902.7 was applicable, without even referring to the jury's failure to answer the interrogatory.
>
> The court of appeals felt obliged to reverse Teeters' enhanced sentence by reason of the following language in *State v*. *Mumford*, 338 N.W.2d 366, 370–71 (Iowa 1983):
>
> > In application of rule 21(6) to situations where special findings of the jury conflict with the general verdict, we are persuaded that trial courts should

> have some of the alternatives in criminal cases which Iowa Rule of Civil Procedure 206 provides in civil cases. That rule gives the trial court in civil cases the alternative of (a) accepting the verdict and entering judgment consistent with the special findings, (b) sending the matter back to the jury for further deliberation, or (c) ordering a new trial. While we have substantial doubt that the first alternative should ever be availed of in a criminal trial, we approve use of the latter two in criminal cases.
>
> (Emphasis added.) We think reversal is not appropriate here. To be sure, the verdict was not in proper form; the interrogatory should have been answered. The trial court should have been alert to the deficiency and should have directed the jury to return to its deliberations in order to supply an answer.
>
> The deficient jury form was, however, not in conflict with the general verdict. *Indeed there was no way the jury could have found Teeters guilty of the forcible felony without finding he used a firearm*. *For each of the three felonies charged*, *the jury was instructed*, *among other things*, *that Teeters could not be found guilty unless the jury found he "shot" the victim*.

Id. (emphasis added). In this case, we are presented with an answer to the special interrogatory in direct conflict with the general verdict, and reversal is required. *See State v. Mumford*, 338 N.W.2d 366, 371 (Iowa1983) (sffirming district court decision to allow further jury deliberations after it returned a verdict with "No" to the special interrogatory and an inconsistent guilty verdict on robbery in the first degree requiring the use of a firearm).

1. Aiding and abetting.

The State argues the jury could have determined Merrett was aiding and abetting the crimes, and therefore, the answer to the special interrogatory is not in conflict with the general verdict; instead, the jury found he was not personally in possession of a dangerous weapon but he helped someone who was.

The instruction on aiding and abetting read as follows:

> All persons involved in the commission of a crime, whether they directly commit the crime or knowingly "aid and abet" its commission, shall be treated the same way.
>
> "Aid and abet" means to knowingly approve and agree to the commission of a crime, either by active participation in it or by knowingly advising or encouraging the act in some way before or when it is committed. . . .
>
> If you find the State has proved the Defendant directly committed the crime, or knowingly "aided and abetted" other person(s) in the commission of the crime, then the defendant is guilty of the crime charged.
>
> The crime charged in Counts I, II, III, IV, and V, requires a specific intent. Therefore, before you can find the Defendant "aided and abetted" the commission of the crime, the State must prove the Defendant either has such specific intent or "aided and abetted" with the knowledge the others who directly committed the crime had such specific intent. If the Defendant did not have the specific intent, or knowledge the others had such specific intent, the Defendant is not guilty.

The aiding and abetting instruction described specific intent and explicitly stated the aiding and abetting could include Count V—the Intimidation with a Dangerous Weapon count—which contained the special interrogatory answered by the jury in the negative.

Even if the jury concluded the passenger in Merrett's car shot the weapon, not Merrett, the aiding and abetting instruction encompassed the entire Count V charge. It instructed the jury that if Merrett knowingly aided or abetted another person in the commission of the offense—which included shooting or discharging a dangerous weapon, that Merrett was also guilty of the offense charged. The special interrogatory also encompassed the possibility of aiding and abetting the possession of a dangerous weapon.

The State concedes that the district court "did not adequately communicate to the jury that Merrett could be held responsible for the gun enhancement under the aiding-and-abetting theory," referring to the interrogatory

"Did the State of Iowa establish beyond a reasonable doubt that at the time of the commission of the offense the defendant, himself, or a person he was aiding and abetting was armed with a firearm?" While the interrogatory may have been confusing to the jury regarding the possession of a dangerous weapon, it was the court's duty not to record this verdict until the jury's intent was understandable. *See* Iowa R. Crim. P. 2.22.

2. Double Jeopardy.

Merrett argues that on remand his case must be dismissed, as double jeopardy prevents its retrial. "It is clear under double-jeopardy principles that the defendant may not be tried on the offenses for which he was acquitted." *Halstead*, 791 N.W.2d at 816. The *Halstead* court concluded "collateral estoppel bars any subsequent retrial on the compound felony charge because the factual issues of guilt on the predicate felonies have been authoritatively determined." Here, in contrast, Merrett was not acquitted of a predicate offense and convicted of a felony; the jury answered a special interrogatory in the negative which was required by statute for a separate sentencing enhancement. Though the instructions were listed together and the court was required to submit the special interrogatory, the jury's answer to the special interrogatory did not constitute an acquittal on the underlying felony. "Normally, when error occurs at trial resulting in a reversal of a criminal conviction on appeal, double jeopardy principles do not prohibit a retrial." *State v*. *Heemstra*, 759 N.W.2d 151, 513 (Iowa Ct. App. 2008). An acquittal was not authoritatively determined in this case; instead, error occurred at trial when the court accepted the legally inconsistent verdicts. We therefore remand for retrial on the intimidation with a dangerous weapon count.

C. Ineffective assistance—assault charges.

We review Merrett's arguments regarding the inconsistency between the special interrogatory and the assault counts in the context of an ineffective-assistance-of-counsel claim. Our review is de novo. *State v. Brubaker*, 805 N.W.2d 164, 171 (Iowa 2011). "To establish an ineffective-assistance-of-counsel claim, a defendant must prove by a preponderance of the evidence: (1) trial counsel failed to perform an essential duty, and (2) prejudice resulted." *Id.* "Generally, ineffective assistance of counsel claims are preserved for postconviction to allow trial counsel an opportunity to defend the charge. We depart from this preference if the record on direct appeal is sufficient to evaluate the merits of a defendant's ineffective assistance of counsel claim." *Pearson*, 547 N.W.2d at 241.

The remaining counts present us with potentially inconsistent findings amongst multiple counts. *See Halstead*, 791 N.W.2d at 807 n.2 ("[Mmutually exclusive verdicts [occur] when a jury makes positive findings of fact that are mutually inconsistent."). The jury found Merrett guilty of assault with intent to inflict serious injury and two counts of simple assault. Under the jury instructions, these charges required him to have "intentionally pointed a firearm" at one of the occupants of the car either personally or by aiding and abetting someone else. The special interrogatory appeared only below the count's verdict form for attempted murder, and so the special interrogatories were not answered at all with respect to the assault charges. Since none of the lesser included assault charges was a forcible felony, the sentencing enhancement of Iowa Code section 702.9 did not apply to them. However, Merrett argues the negative answer to the

interrogatory on the *intimidation* count raises an inconsistency with the guilty verdicts on the lesser offenses. Each marshaling instruction for each offense for which Merrett was found guilty required Merrett to have possessed—or aided and abetted in the possession of—a firearm. We find these charges are much like the ones in *Teeters*, where in order to find Merrett guilty of the offense the jury must have also found him guilty of possessing a dangerous weapon in some way. 487 N.W.2d at 349. In light of the "no" answer to the interrogatory on the intimidation verdict form, the verdicts present an indication of confusion or compromise on the part of the jury.

At trial, Merrett's counsel presented an extensive record regarding why she decided not to request clarification from the jury regarding any potential discrepancy between the intimidation with a dangerous weapon verdict and the special interrogatory. No record was made, however, regarding the decision not to request clarification from the jury regarding any potential discrepancy between the assault counts and the special interrogatory answer. We find the record insufficient to consider whether her actions constituted ineffective assistance on direct appeal. *See Pearson*, 547 N.W.2d at 241.

Therefore, we reverse and remand for a new trial on the intimidation with a dangerous weapon count, affirm the assault convictions, and preserve the assault verdict arguments for possible postconviction proceedings.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Eisenhauer, C.J., concurs; Tabor, J., dissents in part.

TABOR, J. (dissenting in part)

I respectfully dissent from the majority's decision to reverse and remand for a new trial on Merrett's conviction for intimidation with a dangerous weapon. My objection is fueled by the fact neither party requested such an outcome.

Merrett highlights the inconsistency between the jury's verdict finding him guilty of intimidation with a dangerous weapon with intent to injure or to provoke fear or anger, a violation of Iowa Code section 708.6, and its answer of "no" to the interrogatory asking if he was armed with a dangerous weapon for purposes of the mandatory minimum sentencing enhancement at section 902.7. But Merrett does not ask for a new trial. Instead Merrett seeks a remand for entry of judgment of acquittal—pointing to that result in *Halstead*, 791 N.W.2d at 816.

The majority is influenced by the analysis in *Halstead*—recognizing the fundamental nature of untangling an incongruous jury verdict. In fact, the majority appears to read *Halstead* as precluding a trial court from accepting an agreement by the parties to waive clarification of an apparent inconsistency between a general verdict and a special interrogatory. But the majority stops short of granting Merrett the acquittal awarded Halstead—instead sending Merrett's case back for retrial where he could achieve a worse outcome than he faced before this appeal.

I favor affirming Merrett's conviction for intimidation with a dangerous weapon—absent the five-year mandatory minimum provided in section 902.7. That is the result sought by both the defense and the prosecution at trial. I believe the trial court followed a prudent path in granting the parties' joint request

not to question the jurors about the apparent inconsistency between their intimidation verdict and their answer to the dangerous-weapon interrogatory.

On appeal, Merrett faults the trial court for doing exactly what his trial counsel and he personally asked the court to do, which was "leave the verdict as it is." The judge verified counsel was pursuing a trial strategy "because of the potential adverse effect that you could get by the Court submitting it back to the jury for further consideration." Trial counsel agreed she and Merrett thought was in Merrett's best interest to have the court refrain from resolving the inconsistency: "[W]e believe that the risk of sending it back that the jury changing its answer to the interrogatory is more likely than the jury changing its answer on the original question."[4]

The majority nevertheless finds Merrett preserved error on his claim because the trial court "was fully aware of the issue, counsel presented arguments regarding the error, and the court ultimately ruled by not submitting the issue to the jury." The majority examines the concept of judicial estoppel, but finds it did not prevent Merrett from taking opposite positions at trial and on appeal because the *Halstead* court expressed "concern about the perceptions of the criminal justice system when inconsistent verdicts are allowed to stand."

I disagree that Merrett preserved error on the inconsistent verdict claim he advances on appeal.[5] The State aptly frames the question as one of invited error. Our supreme court has long held defendants cannot "predicate error upon

[4] The prosecutor also urged the trial court to accept the verdict despite the negative answer to the interrogatory.

[5] Significantly, Merrett's appellate counsel anticipated the error-preservation problem, and alternatively raises his claim as ineffective assistance of trial counsel.

the court's doing the very thing they requested the court to do." *State v. Beckwith*, 53 N.W.2d 867, 869 (Iowa 1952) (declining to consider claim on appeal when defendant urged court not to grant mistrial when one of jurors held in contempt); *see also State v. Rasmus*, 90 N.W.2d 429, 430 (Iowa 1958) (citing general rule that "[a] party to a criminal proceeding cannot assume inconsistent positions in the trial and appellate courts"); *State v. Eckrich*, 670 N.W.2d 647, 649 (Iowa Ct. App. 2003) (finding defendant did not preserve double jeopardy claim where he made a tactical choice to withdraw his motion for adjudication of law points regarding multiple prosecutions to proceed with favorable sentencing).

By quoting *Halstead* in its error-preservation analysis, the majority seems to suggest that parties—try as they might—cannot legally waive the right to clarify potentially inconsistent verdicts. *Halstead* does not address that question and I don't think we can extrapolate from its mention of due process that such a departure from our rules of error preservation is a logical extension of its holding. Initially, it is important to recognize Merrett's case does not present "compound inconsistent verdicts" as were denounced in *Halstead*. At issue here is a general verdict which appears at odds with a special interrogatory. *See Mumford*, 338 N.W.2d at 372 (approving trial court's decision to send matter back to the jury for further deliberation). *Mumford* does not address whether the trial court may accept the parties' agreement to enter judgment on the general verdict and sentence without the enhancement implicated by the special interrogatory.

The majority does not cite any authority or draw any analogies to situations where a trial court is barred from granting a joint request by the parties in a criminal case, despite the fact the defense waiver is plainly a strategic

decision. A few situations do fall into this category. One example where waiver is not permitted—even as a matter of strategy—is a guilty plea lacking a factual basis. *See State v. Hack*, 545 N.W.2d 262, 263 (Iowa 1996) ("Endorsing such strategies . . . would erode the integrity of all pleas and the public's confidence in our criminal justice system."). Another example requiring a court to reject the parties' agreement is where they negotiated for an illegal sentence. *See, e.g.*, *State v. Woody*, 613 N.W.2d 215, 218 (Iowa 2000) ("Neither party may rely on a plea agreement to uphold an illegal sentence."); *State v. Fix*, 830 N.W.2d 744, 751 (Iowa Ct. App. 2013).

The question here is whether accepting a defendant's waiver of the right to resolve an apparent inconsistency between a general verdict and a special interrogatory regarding possession of a dangerous weapon implicates the same type of fundamental concern for the integrity of the judicial process as allowing a defendant to plead guilty to a crime he or she did not commit or to accept a sentence not provided by law. I don't think the answer is preordained by *Halstead*. *Halstead* rightly expressed unease about "allowing a potentially long prison term arising from a compound felony to stand when a defendant has been found not guilty of predicate offenses." *See* 791 N.W.2d at 815. But here we are not shrugging our judicial shoulders in response to an irrational jury conclusion, leaving in place a dubious conviction and lengthy sentence. Instead, we are allowing the defense to make an educated guess regarding how the jury would respond after further deliberations and to reap a sentencing windfall from the

jury's negative answer to the interrogatory.[6] Accepting such a waiver from a defendant is not so different from accepting a defendant's guilty plea refusing to admit commission of a criminal act, but recognizing the record contains strong evidence of actual guilt. *See North Carolina v. Alford*, 400 U.S. 25, 37 (1970). Nothing in our existing case law suggests a defendant should not be allowed to avoid the risk that when more thoroughly instructed, the jury would confirm that it believed he was armed with a dangerous weapon.

Here, the trial judge immediately recognized the discrepancy between the intimidation verdict and the dangerous-weapon interrogatory and brought it to the attention of the parties. Defense counsel attributed the jurors' inconsistency to the evidence that Merrett was acting in concert with others: "Perhaps if they were finding this verdict under a theory of aiding and abetting, that perhaps Mr. Merrett was not the shooter but just the driver, and that he did not know until the shooting began that the shooter was in possession of a dangerous weapon?"[7] Defense counsel balked at the court's offer to submit an additional interrogatory, saying: "I believe that this is the jury's verdict and we should accept it." Even after researching the issue, defense counsel—with Merrett's on-the-record blessing—implored the court to leave the verdict alone.

Because the court honored the defendant's request to let the verdict stand, we can only examine the propriety of that decision by asking whether counsel provided ineffective assistance in not insisting on further deliberations or

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[6] It may be a viable question whether Merrett's sentence without the five-year mandatory minimum is illegally lenient, but the State does not raise that issue.

[7] The wording of the aiding-and-abetting instruction and the special interrogatory in this case mistakenly allowed the jurors to infer that Merrett could not be held responsible for the dangerous-weapon enhancement under an aiding-and-abetting theory.

a new trial. *See Mumford*, 338 N.W.2d at 370–71 (setting out alternatives under what is now rule 2.22). Defense counsel's dialogue with the court reveals a reasonable, tactical decision not subject to second guessing on appeal. *See Eckrich*, 670 N.W.2d at 649 n.1. Accordingly, we should reject Merrett's alternative claim that he received ineffective assistance of counsel.

I would affirm Merrett's conviction for intimidation with a dangerous weapon with intent to injure or provoke fear or anger.