

Notice: This opinion is subject to formal revision before publication in the advance sheets of Southern Reporter. Readers are requested to notify the **Reporter of Decisions**, Alabama Appellate Courts, 300 Dexter Avenue, Montgomery, Alabama 36104-3741 ((334) 242-4621), of any typographical or other errors, in order that corrections may be made before the opinion is printed in Southern Reporter.

ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 2006-2007

CR-05-1669

Rufo Ruiz Martinez

v.

State of Alabama

Appeal from Madison Circuit Court
(CC-05-4898, CC-05-4899, CC-05-4900, CC-05-4901, and CC-05-4902)

On Return to Remand

BASCHAB, PRESIDING JUDGE

In an opinion that was released on December 20, 2006, we concluded that the jury's verdicts finding the appellant, Rufo

CR-05-1669

Ruiz Martinez, guilty of criminally negligent homicide in case numbers CC-05-4898, CC-05-4899, CC-05-4900, and CC-05-4901 were inconsistent with the verdict finding him guilty of second-degree assault in case number CC-05-4902 and that the conviction for second-degree assault in case number CC-05-4902 could not stand. Therefore, we affirmed the appellant's convictions and sentences in case numbers CC-05-4898, CC-05-4899, CC-05-4900, and CC-05-4901. However, we reversed his conviction in case number CC-05-4902 and remanded the case to the trial court with instructions that it enter a judgment of guilty of the lesser included offense of third-degree assault and impose a sentence for that offense.

While this case was on remand to the trial court, the Alabama Supreme Court released its decision in Heard v. State, [Ms. 1041265, January 12, 2007] ___ So. 2d ___ (Ala. 2007). In Heard, the Alabama Supreme Court attempted to clarify the difference between inconsistent verdicts and mutually exclusive verdicts. Specifically, the supreme court stated:

"[M]utually 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.

"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."

Heard, ___ So. 2d at ___.

In this case, we held that, because the jury found two distinct degrees of culpability for one course of conduct that arose from one set of circumstances, the verdicts in case numbers CC-05-4898, CC-05-4899, CC-05-4900, and CC-05-4901 were inconsistent with the verdict in case number CC-05-4902. The language we used in our original opinion regarding inconsistent verdicts and mutually exclusive verdicts may not be entirely consistent with Heard. However, based 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. Specifically, the jury found that the appellant acted negligently in case numbers CC-05-4898, CC-05-4899, CC-05-4900, and CC-05-4901, but recklessly in case

CR-05-1669

number CC-05-4902. One single act cannot be both negligent and reckless. Therefore, the jury's verdicts in case numbers CC-05-4898, CC-05-4899, CC-05-4900, and CC-05-4901 and in case number CC-05-4902 were mutually exclusive. See Heard. Accordingly, we correctly concluded that the appellant's conviction for second-degree assault in case number CC-05-4902 could not stand.

On remand, the trial court entered a judgment of guilty on the lesser included offense of third-degree assault in case number CC-05-4902 and sentenced the appellant to serve a term of twelve months in the Madison County Jail. Because the trial court has complied with our instructions, we affirm that court's judgment.

AFFIRMED.

McMillan, Wise, and Welch, JJ., concur; Shaw, J., concurs specially, with opinion.

SHAW, JUDGE, concurring specially.

I concur to affirm the trial court's judgment on return to remand. I write only to make one observation.

In its recent decision in Heard v. State, [Ms. 1041265, January 12, 2007] ____ So. 2d ____ (Ala. 2007), after noting that it found certain Georgia cases persuasive with respect to the law governing mutually exclusive verdicts, the Alabama Supreme Court, quoting Jackson v. State, 276 Ga. 408, 577 S.E.2d 570 (2003), stated:

"'If the judge did not send the jury back to resolve its mutually exclusive verdicts before the jurors were dismissed, the Georgia Supreme Court, citing Thomas [v. State], 199 Ga. App. 586, 405 S.E.2d 512 (1991), rev'd on other grounds, 261 Ga. 854, 413 S.E.2d 196 (1992)], and Dumas [v. State], 266 Ga. 797, 471 S.E.2d 508 (1996)], held:

""[W]here there are mutually exclusive convictions, it is insufficient for an appellate court merely to set aside the lesser verdict, because to do so is to speculate about what the jury might have done if properly instructed, and to usurp the functions of both the jury and the trial court." (Footnote omitted) [Dumas, 266 Ga. at 799, 471 S.E.2d at 511]. Thus, where, as here, it was both legally and logically impossible to convict Jackson of both felony murder and involuntary manslaughter, we must reverse both mutually exclusive convictions and order a new trial.'

"Jackson, 276 Ga. at 413, 577 S.E.2d at 575 (citations omitted)."

____ So. 2d at _____. This language strongly suggests, without specifically holding, that a new trial is the proper remedy

where the verdicts rendered are mutually exclusive. However, in Ex parte Dorsey, 881 So. 2d 533 (Ala. 2003), the Supreme Court did not order a new trial after finding mutually exclusive verdicts, and the Supreme Court in Heard overruled Dorsey only "to the extent Dorsey conflicts with the rationale in the present case that verdicts finding the defendant guilty of felony murder and capital murder are not mutually exclusive. ..." ____ So. 2d at ____.

I urge the Supreme Court to clarify at its earliest opportunity whether its holding in Heard prohibits the kind of remedy this Court fashioned in the present case -- reversal of the second-degree-assault conviction with instructions for the trial court on remand to enter a judgment of guilty of the lesser-included offense of third-degree assault and to impose a sentence for that offense. Based on the particular circumstances of this case, and without a clear directive from the Supreme Court to the contrary, I see no need for this Court to grant broader relief than that requested by the appellant.