

Decided: November 25, 2013

S13A0949. ALLABEN v. THE STATE.

HUNSTEIN, Justice.

Appellant Dennis Allaben was found guilty of malice murder, felony murder, aggravated assault with intent to murder, battery, simple battery, and reckless conduct in connection with the strangulation death of his wife, Maureen Allaben.¹ The felony murder verdict was vacated by operation of law, and the trial court entered a judgment of conviction only for malice murder, merging the remaining verdicts into that conviction. On appeal, Allaben contends, among

¹ The crimes occurred on January 3, 2010, and Allaben was indicted in DeKalb County on March 31, 2010, for malice murder, felony murder based on aggravated assault, and aggravated assault with intent to murder, all based on Allaben strangling the victim. In addition to these charges, the trial court charged the jury on involuntary manslaughter as a lesser included offense on the malice murder and felony murder counts. It also charged the jury on battery, simple battery, and reckless conduct as lesser included offenses on the aggravated assault count. On August 11, 2011, the jury found Allaben not guilty of involuntary manslaughter but guilty of the remaining offenses. That same day, the trial court sentenced him to life imprisonment on the malice murder count, and the remaining verdicts were merged or vacated by operation of law. Allaben filed a motion for new trial on September 12, 2011, and an amended motion for new trial on November 2, 2012, which was denied on December 17, 2012. Allaben filed a notice of appeal on January 15, 2013. The case was docketed in this Court for the April 2013 term and orally argued on June 4, 2013.

other things, that the jury returned mutually exclusive verdicts. Because we conclude that the guilty verdict on reckless conduct was mutually exclusive of the remaining verdicts, we reverse Allaben's conviction for malice murder, set aside all the guilty verdicts, and remand the case for further proceedings.

1. Viewed in the light most favorable to the verdicts, the evidence shows that on January 3, 2010, Allaben strangled the victim to death. He rolled her body up in blankets that he secured with duct tape and placed her in the back of his pickup truck. He drove his two children, who were seven and eight years old, to his brother's house in Virginia, telling them on the way that he had killed their mother. In Virginia, he also told his sister-in-law that he had killed his wife. He said that she was engaging in some unusual practices, including the poisoning of his food, and that he took a cloth soaked with ether and held it to her face so that she would go to sleep. He then planned to tie her up, so that he could talk to her about what she was doing. However, he told his sister-in-law that the cloth went too far down the victim's throat, and she choked to death.

Leaving the children at their relatives' house in Virginia, Allaben returned with his wife's body to Atlanta and drove to a friend's house. He told the friend that his wife was in his truck, that she was dead, and that he needed an attorney.

Allaben also told the friend the same story he told his sister-in-law about the victim's allegedly unusual behavior, and he said, "I didn't mean for this to happen. I love her so much. This isn't what I wanted." The friend subsequently called a police officer that he knew, and Allaben surrendered to the officer.

The medical examiner testified that the victim was placed in a police choke hold and strangled to death and that there was no evidence of a rag on or in her body. According to the medical examiner, someone placed in a police choke hold would probably lose consciousness in one to two minutes and would suffer irreversible brain damage and die after four to six minutes. Finally, he testified that the victim's death was a homicide, "[t]he intentional taking of a life by another person."

This evidence was sufficient to authorize a rational jury to find beyond a reasonable doubt that Allaben was guilty of the crimes of which he was convicted. See Jackson v. Virginia, 443 U. S. 307, 319 (99 SCt 2781, 61 LE2d 560) (1979).

2. Allaben contends that the verdicts on malice murder, felony murder, aggravated assault, battery, and simple battery were mutually exclusive of the

verdict on reckless conduct, because the former required the jury to find criminal intent and the latter required only a finding of criminal negligence.

We agree.

“Verdicts are mutually exclusive ‘where a guilty verdict on one count logically excludes a finding of guilt on the other.’” Jackson v. State, 276 Ga. 408, 410 (2) (577 SE2d 570) (2003) (citation omitted). We have held that verdicts are mutually exclusive where a jury returns “‘verdicts of guilt as to both [criminal intent and criminal negligence] offenses in those factual situations involving the same act by the accused as to the same victim at the same instance of time.’” Walker v. State, ___ Ga. ___ (2) (a) (___ SE2d ___), 2013 Ga. LEXIS 785, *10 (Case No. S13A0861, decided Oct. 7, 2013) (citation omitted) (bracketed material in original). “[S]uch verdicts reflect[] an illogical finding by the jury” that the defendant “acted with both criminal intent and criminal negligence” toward the victim. *Id.* at *9 (citation and quotation marks omitted). And, if a jury returns a guilty verdict on a crime that can be committed in two ways, one of which is, and one of which is not, mutually exclusive of a guilty verdict for a second crime, the guilty verdicts are considered mutually exclusive unless we can “‘conclusively state that the verdict [on the first crime] rested

exclusively on the [non-mutually exclusive] ground so as to eliminate the reasonable probability that the jury might have returned a mutually exclusive verdict.” Id. at *11-12 (citation omitted and bracketed material added).

Here, all the verdicts involve the “same act by the accused as to the same victim at the same instance of time.” Walker, __ Ga. at __, 2013 Ga. LEXIS 785, *10. And the jury found that Allaben acted with criminal negligence in strangling the victim when it returned its guilty verdict on reckless conduct. See Jackson, 276 Ga. at 411-412; OCGA § 16-5-60 (b). That verdict thus would be mutually exclusive of the verdicts for malice murder, felony murder based on aggravated assault, aggravated assault with intent to murder, battery, and simple battery if the jury had to find that Allaben acted with criminal intent to return guilty verdicts on those offenses.² Because a judgment of conviction was not

²We acknowledge that it is possible that someone might begin to strangle another person with only criminal negligence and then continue to strangle her to death with criminal intent. However, the State did not pursue that theory at trial. In fact, the prosecutor argued in closing that Allaben was acting with the intent to kill at the time he began strangling the victim and that the case involved an “[i]ntentional killing. . . . Not reckless conduct.” Moreover, based on the indictment, the evidence, the verdict form, and the jury instructions, we cannot know if the jury relied on such an “evolving intent” in rendering its verdicts. Thus, “we cannot conclusively state” that the jury relied on that theory “so as to eliminate the reasonable probability that the jury might have returned a mutually exclusive verdict by finding [Allaben] acted with both criminal intent and criminal negligence at the same time as to the same

entered on the guilty verdicts for felony murder, aggravated assault, battery, and simple battery, we first examine whether the verdicts for malice murder and reckless conduct were mutually exclusive.

(a) Malice murder requires a jury to find that the defendant acted with criminal intent. See Walker, ___ Ga. at ___, 2013 Ga. LEXIS 785, *8; Ledford v. State, 289 Ga. 70 (1) (709 SE2d 239) (2011); OCGA § 16-5-1 (a),

(b). In Dumas v. State, 266 Ga. 797 (471 SE2d 508) (1996), we held that a guilty verdict of malice murder was mutually exclusive of a verdict for vehicular homicide, because the malice murder verdict required a finding that the defendant acted with an intent to kill and the vehicular homicide verdict required a finding that he acted without an intent to kill. See *id.* at 800. In Jackson, we also said that a guilty verdict for involuntary manslaughter based on reckless conduct required a finding that the defendant acted “with criminal negligence, that is, . . . without any intention to do so,” and was thus inconsistent with the guilty verdict on felony murder based on aggravated assault, which required a finding that the defendant acted with criminal intent. 276 Ga. at 412.

victim.” Walker, ___ Ga. at ___, 2013 Ga. LEXIS 785, *11-12 (citation and quotation marks omitted).

Thus, under our established precedent, it appears that verdicts finding Allaben guilty of malice murder and reckless conduct are mutually exclusive. The State, however, advances several arguments as to why that is not so under the circumstances of this case. These arguments have no merit.

(1) Relying on Parker v. State, 270 Ga. 256 (507 SE2d 744) (1998), overruled on other grounds by Linson v. State, 287 Ga. 881, 886 (700 SE2d 394) (2010), the State contends that the verdict for reckless conduct does not logically exclude a finding of guilt for malice murder. In Parker, this court explained the concept of implied malice.³ We said that it is a concept that “has been defined to mean conduct exhibiting a “reckless disregard for human life,””³ id. at 260 (citation omitted), which is consistent with the

general rule that extremely negligent conduct, which creates what

³ In defining malice murder, OCGA § 16-5-1 (a) says:

(a) A person commits the offense of murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being.

(b) Express malice is that deliberate intention unlawfully to take the life of another human being which is manifested by external circumstances capable of proof. Malice shall be implied where no considerable provocation appears and where all the circumstances of the killing show an abandoned and malignant heart.

a reasonable man would realize to be not only an unjustifiable but also a very high degree of risk of death or serious bodily injury to another or to others – though unaccompanied by any intent to kill or do serious bodily injury – and which actually causes the death of another, may constitute murder. If a reckless disregard for human life constitutes implied malice and implied malice is, in turn, the equivalent of a specific intent to kill, then it necessarily follows that reckless disregard for human life may be the equivalent of a specific intent to kill. Evidence that the defendant acted in reckless disregard for human life is, for purposes of demonstrating his guilt of the crime of malice murder, as equally probative as evidence that he acted with a specific intent to kill.

Id. (citations, bracketing, and indentation omitted). The State contends that, because reckless disregard for life is the equivalent of a specific intent to kill, the malice murder verdict is not logically excluded by the reckless conduct verdict, a crime which is committed when

[a] person . . . causes bodily harm to or endangers the bodily safety of another person by consciously disregarding a substantial and unjustifiable risk that his act or omission will cause harm or endanger the safety of the other person and the disregard constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation.

OCGA § 16-5-60 (b).

Even assuming that a finding of implied malice to support a malice murder verdict and a finding of recklessness to support a reckless conduct verdict are not mutually exclusive, when instructing the jury on the malice murder count,

the trial court did not charge that a reckless disregard for human life is the equivalent of an intent to kill. It simply told the jury that malice may be implied when no considerable provocation appears and “when all of the circumstances of the killing show an abandoned and malignant heart.” It then instructed the jurors that “to constitute murder, the homicide must have been committed with malice. . . . [L]egal malice is the unlawful intention to kill without justification, without excuse, without mitigation.” Thus, the record shows that there is no basis for the State’s assertion that jury may have based its malice murder verdict on a finding that Allaben acted with reckless disregard for human life, without any intent to kill.

Moreover, even if the trial court had charged the jury that a reckless disregard for human life may be the equivalent of a specific intent to kill, the State’s argument would still be unavailing. The jury was charged that it could base a malice murder verdict on express malice, which requires a specific intent to kill, or implied malice, and the verdict form did not offer the jury an opportunity to specify whether the malice murder verdict was based on express or implied malice. Thus, even if the trial court had charged on reckless disregard for human life, we could not “conclusively state” that the malice

murder verdict “rested exclusively” on that ground “so as to eliminate the reasonable probability that the jury might have returned a mutually exclusive verdict by finding [that Allaben] acted with both criminal intent and criminal negligence at the same time as to the same victim.” Jackson, 276 Ga. at 412-413, n.5.

(2) The State argues that, because the aggravated assault verdict merged into the malice murder conviction and the reckless conduct offense was charged as a lesser included offense to aggravated assault, any error regarding the reckless conduct verdict is moot. See Roberts v. State, 282 Ga. 548, 550, n.2 (651 SE2d 689) (2007) (holding that an argument regarding a guilty verdict on aggravated assault was moot because that verdict was merged into the conviction for felony murder). We disagree. In cases where mutually exclusive verdicts have been returned, the error is not just in the verdicts themselves: A judgment of conviction entered on such verdicts is deemed void. See Walker, ___ Ga. at ___, 2013 Ga. LEXIS 785, *18, n.3; Jackson, 276 Ga. at 410, n.2. Thus, Allaben’s attack on the judgment and conviction for malice murder is proper. See Walker, ___ Ga. at ___, 2013 Ga. LEXIS 785, *1, *19-20 (holding that a guilty verdict for felony murder was mutually exclusive of a

guilty verdict that was vacated by operation of law); Jackson, 276 Ga. at 409, 412 (same).

(3) The State argues that the jury’s verdict of not guilty on the lesser included crime of involuntary manslaughter on the malice murder count shows that the jury found that Allaben did not act with recklessness when he killed the victim, as the trial court charged the jury that it could find Allaben guilty of involuntary manslaughter if it found that he caused the victim's death “without any intention to do so by the commission of the offense of simple battery or battery or reckless conduct.” However, the State’s reliance on the not guilty verdict for involuntary manslaughter is misplaced, as “this Court will not ‘speculate why a jury acquitted on . . . (one) offense and convicted on . . . (another) offense. The reason could be an error by the jury in its consideration or it could be mistake, compromise, or lenity.’” Dryden v. State, 285 Ga. 281, 284, n.3 (676 SE2d 175) (2009) (citation omitted) (bracketed material in original).

(4) The State also contends that, because reckless conduct was charged as an included offense only on the aggravated assault count of the indictment, a verdict on reckless conduct should only affect that count and not

the malice murder count. This Court, however, has never held that a verdict on an offense included in one count may only be considered mutually exclusive to another offense charged as part of that count. Rather, verdicts are mutually exclusive where a guilty verdict is entered on one offense, no matter in which count, that logically excludes a verdict of guilt on another offense, such as where, as in this case, a jury returns ““verdicts of guilt as to both [criminal intent and criminal negligence] offenses in those factual situations involving the same act by the accused as to the same victim at the same instance of time.”” Walker, __ Ga. at __, 2013 Ga. LEXIS 785, *10 (citation omitted) (bracketed material in original).

(5) For these reasons, there is at least a reasonable probability that the jury returned mutually exclusive verdicts for malice murder and reckless conduct. Accordingly, we must reverse Allaben’s malice murder conviction, set aside the guilty verdict for that offense and reckless conduct, and remand for a new trial on those counts. See Walker, __ Ga. at __, 2013 Ga. LEXIS 785, *19-20; Jackson, 276 Ga. at 413.

(b) As mentioned previously, Allaben also contends that the guilty verdicts for felony murder, aggravated assault, battery, and simple battery

were mutually exclusive of the guilty verdict for reckless conduct. Although the guilty verdict for felony murder was vacated by operation of law because he was convicted of malice murder for killing the victim, see Malcolm v. State, 263 Ga. 369 (4) (434 SE2d 479) (1993), our reversal of Allaben’s malice murder conviction means that his felony murder conviction “no longer stands vacated as a matter of law,” and on remand, the State could elect not to retry Allaben for malice murder and instead elect to have a conviction and sentence imposed on the felony murder verdict. See Walker, __ Ga. at __, 2013 Ga. LEXIS 785, *20. Similarly, the guilty verdicts for aggravated assault, battery, and simple battery, which were merged into the malice murder conviction, are now “unmerged” based on our reversal of the latter conviction, and a conviction and sentence could be entered on those verdicts on remand. See *id.* at *27; Harris v. State, 286 Ga. 245 (8) (686 SE2d 777) (2009). In such situations, however, we have held that if a defendant raises an issue on appeal that, on remand, would bar entry of a conviction on a verdict that was merged or vacated, it is appropriate to address that issue. See Walker, __ Ga. at __, 2013 Ga. LEXIS 785, *21. Here, Allaben contends that the verdicts for felony murder, aggravated assault, battery, and simple battery were mutually exclusive of the reckless conduct

verdict and thus void from the beginning. Because no valid judgment may be entered on a void verdict, see Anthony v. Gator Cochran Constr., 288 Ga. 79, 80 (702 SE2d 139) (2010), it is appropriate to address Allaben’s attack on those guilty verdicts at this time.

(1) An aggravated assault charge may be predicated on OCGA § 16-5-20 (a) (1) (assault by attempting “to commit a violent injury to the person of another”), which requires specific criminal intent and would be mutually exclusive of a verdict for a crime of criminal negligence. Alternatively, such a charge may be predicated on OCGA § 16-5-20 (a) (2) (assault by placing the victim “in reasonable apprehension of immediately receiving a violent injury”), which does not require a specific intent toward the victim and would not be mutually exclusive of a verdict based on negligence. See Walker, ___ Ga. at ___ 2013 Ga. LEXIS 785, *11-12; Jackson, 276 Ga. at 412, n.5. We have held that if “the indictment, the evidence, the jury instructions, and the verdict form all allowed the jury to find [a defendant] guilty of aggravated assault and thus felony murder based on either OCGA § 16-5-20 (a) (1) or (a) (2),” then we must conclude that the jury based the verdict on (a) (1) in determining if the verdict was mutually exclusive of another verdict

returned by the jury. Walker, __ Ga. at __, 2013 Ga. LEXIS 785, *12. Accord Jackson, 276 Ga. at 412-413, n.5.

Here, the indictment charged Allaben with felony murder based on aggravated assault and with aggravated assault with intent to murder. The trial court instructed the jury that the felony murder charge was predicated on aggravated assault with intent to murder and separately charged on aggravated assault with intent to murder. The court also charged the jury that it could find Allaben guilty of felony murder based on aggravated assault and of aggravated assault only if it found “beyond a reasonable doubt that [Allaben] attempted to cause a violent injury to the alleged victim.” See OCGA § 16-5-20 (a) (1). The trial court did not include a charge on OCGA § 16-5-20 (a) (2). Consequently, the jury’s verdicts on felony murder and aggravated assault, on the one hand, and reckless conduct, on the other, were mutually exclusive. We thus must set aside the guilty verdicts for felony murder and aggravated assault. See Walker, __ Ga. at __, 2013 Ga. LEXIS 785, *19-20; Jackson, 276 Ga. at 413.

(2) As for the guilty verdicts for simple battery and battery, the trial court charged the jury that to find Allaben guilty of simple battery, it had to find that he intentionally caused physical harm to the victim, see OCGA

§ 16-5-23 (a) (2), and to find him guilty of battery, it had to find that he intentionally caused substantial physical harm or visible bodily harm to the victim. See OCGA § 16-5-23.1 (a). Thus, the guilty verdicts for those crimes and reckless conduct were mutually exclusive, and we must set aside the guilty verdicts for the two battery offenses. See Walker, __ Ga. at __, 2013 Ga. LEXIS 785, *19-20; Jackson, 276 Ga. at 413.

3. We do not address Allaben's remaining enumerations of error, because they relate to issues that are not likely to recur in the event of a retrial.

Judgment reversed and case remanded. All the Justices concur.