

Circuit Court for Anne Arundel County
Case No. C-02-CR-17-002364

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 382

September Term, 2018

ADDISON PAYTON HARVEY

v.

STATE OF MARYLAND

Wright,
Berger,
Moylan, Charles E., Jr.
(Senior Judge, Specially Assigned),

JJ.

PER CURIAM

Filed: February 4, 2019

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104

Addison Payton Harvey, appellant, was convicted by a jury in the Circuit Court for Anne Arundel County of second-degree assault, reckless endangerment, use of a firearm in the commission of a crime of violence, and two related weapons offenses. On appeal, Mr. Harvey asks (1) whether the circuit court erred in accepting legally inconsistent verdicts from the jury, and (2) whether the circuit court’s order of restitution constitutes an illegal sentence. We shall not address the merits of either issue as the first was not preserved for appellate review, and we are without jurisdiction to consider the second.

At trial, Trevon Edwards testified that he and a friend were involved in “scrimmage” with a group of about seven individuals, including Mr. Harvey. During this encounter, Mr. Harvey and two or three others pulled out guns and tried to rob Mr. Edwards and his friend. Mr. Harvey pointed a gun at Mr. Edwards and demanded money from him. Mr. Edwards refused and went to help his friend, who was being beaten by others. Mr. Harvey followed Mr. Edwards, “with [his] gun on [Mr. Edwards].”

Mr. Edwards then ran towards the street to “get out of there.” He heard a “loud bang” from behind him, and his arm went limp. He was later taken to the hospital where he was treated for a gunshot wound to his neck.

In addition to the charges that resulted in his convictions, Mr. Harvey was charged with first-degree assault. The jury acquitted Mr. Harvey of that charge. Mr. Harvey now argues that, “because first degree assault is defined as the use of a firearm in the commission of a second degree assault, and because [he] was acquitted of first degree assault but convicted of using a firearm in the commission of a second degree assault, the verdict in this case is legally inconsistent.”

As Mr. Harvey concedes in his brief, he did not object to the jury’s verdict at trial. Accordingly, his claim was not preserved for our review.

“[T]o preserve for review any issue as to allegedly inconsistent verdicts, a defendant in a criminal trial by jury must object to the allegedly inconsistent verdicts before the verdicts are final and the trial court discharges the jury.” *Givens v. State*, 449 Md. 433, 486 (2016). One of the purposes of the requirement is to give the trial court the opportunity to “correct the error in the proceedings by sending the jury back to deliberate to resolve the inconsistency.” *Id.* at 473. Another reason for this “iron-clad preservation requirement” is that, “[w]hen inconsistent jury verdicts of conviction and acquittal are rendered, it is more frequently the acquittal that is at odds with the true belief of the jurors than it is the conviction.” *Travis v. State*, 218 Md. App. 410, 452 (2014). In other words, “[t]he verdict of acquittal is frequently returned in the interest of lenity and actually is a windfall for the defendant.” *Id.* The preservation requirement prevents the defendant “from accepting the inconsistent verdict and seeking thereafter a windfall reversal on appeal.” *McNeal v. State*, 426 Md. 455, 466 (2012) (citing *Price v. State*, 405 Md. 10, 40 (2008) (Harrell, J., concurring)).¹

¹ Mr. Harvey suggests that the lack of objection “was not a strategic decision on the part of defense counsel” but was due to “confusion about the consistency of the verdict[.]” As the Court of Appeals has explained, “[i]f defense counsel is unsure of whether verdicts are legally inconsistent, defense counsel may request a brief pause in the proceedings or recess, prior to the finality of the verdicts, during which defense counsel may evaluate the verdicts and arrive at a determination as to whether they are legally inconsistent.” *Givens v. State*, 449 Md. 433, 475 (2016).

Mr. Harvey asserts that even though there was no objection to the verdict at trial, he is entitled to relief because it was “plain error” for the court to accept a legally inconsistent verdict. To the contrary, it would have been error for the court, “in the absence of a request from the defendant, [to] advise a jury that its verdicts are inconsistent and send the jury back to resolve the inconsistency.” *Ndunguru v. State*, 233 Md. App. 630, 642 (2017). This is because “the rule against legally inconsistent verdicts is intended to protect the criminal defendant” and, therefore, “[t]he choice of whether to object to inconsistent verdicts belongs to the defendant alone.” *Givens*, 449 Md. at 476 (quoting *Price*, 405 Md. at 41 n. 10 (Harrell, J., concurring)). Accordingly, a trial court “may not, *sua sponte*, send the jury back to resolve [an] inconsistency, because it is the defendant who is entitled, should he [or she] so wish, to accept the benefit of the inconsistent acquittal[.]” *id.* (citation omitted), rather than risk that the jury, upon further deliberation, would resolve the inconsistency in favor of the State.

We are without jurisdiction to review Mr. Harvey’s claim that the court’s order of restitution constitutes an illegal sentence as he did not note an appeal from that order. At Mr. Harvey’s sentencing hearing on April 6, 2018, the court reserved ruling on restitution at the State’s request. The notice of appeal in this matter was filed on May 2, 2018. The State filed a Motion for Restitution Order on May 7, 2018, and the court’s order of restitution was entered on the docket on May 29, 2018. No appeal was filed from the entry of that order.

Pursuant to Maryland Rule 8-202, a notice of appeal “shall be filed within 30 days after entry of the judgment or order from which the appeal is taken.” “The 30-day

requirement for notices of appeal is jurisdictional; if [it] is not met, the appellate court acquires no jurisdiction[.]” *Griffin v. Lindsey*, 444 Md. 278, 285-86 (2015) (citation and internal quotation marks omitted).

**ORDER OF RESTITUTION NEITHER
AFFIRMED NOR REVERSED.
JUDGMENTS OF THE CIRCUIT COURT
FOR ANNE ARUNDEL COUNTY
OTHERWISE AFFIRMED. COSTS TO BE
PAID BY APPELLANT.**