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INCONSISTENT VERDICTS IN ILLINOIS CRIMINAL TRIALS

INTRODUCTION

Illinois and federal criminal trial courts frequently preside over trials in which the defendant is tried on a multi-count indictment.¹ The numerous counts reflect various crimes that the defendant is alleged to have committed and often, these counts all arise out of the same transaction or alleged criminal conduct. Occasionally, when the counts arise out of the same transaction or occurrence, the verdicts rendered in a multi-count trial are inconsistent. In a multiple charge trial an inconsistency arises when there is a guilty verdict on one charge and an acquittal on another charge where the same essential element common to both crimes is found both to exist and not exist.

It is the purpose of this comment to examine verdict inconsistencies in multi-count trials. Although the major emphasis of this comment will deal with the decisions of the Illinois courts in *People v. Dawson*,² *People v. Hairston*,³ and *People v. Murray*,⁴ the federal court's treatment of the problem will also be considered, for it is essential to a full understanding of the Illinois decisions.

In addition to describing what appears to be the present Illinois position on inconsistent verdicts, this comment will examine three aspects of verdict inconsistency. In the first part of the comment the meaning of the term verdict inconsistency will be explored and a method will be developed which will aid in determining whether verdicts are inconsistent. In the second part, the relationship between a finding of verdict inconsistency and the United States Constitution will be explored. The third part will consider the proper disposition, by courts of review, of inconsistent verdicts.

DETERMINING WHETHER A LEGAL INCONSISTENCY EXISTS

The Nature of Inconsistent Verdicts

Inconsistent verdicts in Illinois have been placed into two subgroups: legally inconsistent verdicts and logically inconsistent verdicts. Until very recently, the Illinois courts had held

1. FED. R. CRIM. P. 8(a) (1972); ILL. REV. STAT. ch. 38, § 111-4 (1975).
2. 60 Ill. 2d 278, 326 N.E.2d 755, *cert. denied*, 423 U.S. 835 (1975).
3. 46 Ill. 2d 348, 263 N.E.2d 840 (1970), *cert. denied*, 402 U.S. 972 (1971).
4. 34 Ill. App. 3d 521, 340 N.E.2d 186 (1975).

that only legally inconsistent verdicts required reversal.⁵ Today, the Illinois courts hold that *neither* form of inconsistency, legal or logical, requires reversal.⁶

Legally Inconsistent Verdicts

In order to analyze the Illinois courts' treatment of verdict inconsistency it is necessary first to define and understand the distinction which the courts have created between legally and logically inconsistent verdicts. In *People v. Murray*,⁷ the Illinois Appellate Court gave the following definition of legal inconsistency:

Verdicts of guilty of crime A but not guilty of crime B, where both crimes arise out of the same set of facts, are legally inconsistent when they necessarily involve the conclusion that the same essential element or elements of each crime were found both to exist and not to exist.⁸

This definition reveals the two indispensable prerequisites which must be met before verdicts can be held legally inconsistent. The first requirement is that the two crimes contain at least one essential element which is *common* to both crimes. The second requirement is that the common essential element is found to exist in one crime but not to exist in the other crime. The case of *People v. Pearson*⁹ affords an excellent opportunity to examine these requirements in a factual setting.

In *Pearson*, the defendant allegedly fired shots at police officers and was charged with two counts of aggravated assault¹⁰ and two counts of armed violence.¹¹ In a bench trial, the defendant was found not guilty of the armed violence counts but was found guilty of the two counts of aggravated assault. The defendant's sole contention upon appeal was that the findings of guilty on the aggravated assault counts were legally inconsistent with the findings of not guilty on the armed violence counts. The appellate court determined that upon the particular facts of the case, the elements of the armed violence counts and the elements of the aggravated assault counts were identical.¹² The

5. *People v. Hairston*, 46 Ill. 2d 348, 361-62, 263 N.E.2d 840, 849 (1970).

6. *People v. Murray*, 34 Ill. App. 3d 521, 537, 340 N.E.2d 186, 198 (1975).

7. *Id.*

8. *Id.* at 531, 340 N.E.2d at 194.

9. 16 Ill. App. 3d 543, 306 N.E.2d 539 (1973).

10. ILL. REV. STAT. ch. 38, § 12-2(a)(1) (1975) provides in part: "A person commits an aggravated assault, when, in committing an assault, he: (1) Uses a deadly weapon"

11. ILL. REV. STAT. ch. 38, § 33A-2 (1975) provides in part: "A person commits armed violence when, while armed with a dangerous weapon, he performs any act prohibited by [section 12-2]"

12. Compare note 10, *supra*, with note 11, *supra*. Due to the specific-

court then reversed the convictions on the grounds that a guilty verdict on the counts of aggravated assault was a finding that each of their elements existed, while a not guilty verdict on the counts of armed violence was a finding that at least one element did not exist.¹³ Therefore, since an essential element common to both crimes was found both to exist and not to exist, the verdicts were legally inconsistent.

Logically Inconsistent Verdicts

Verdicts are logically inconsistent where the factfinder accepts in one verdict and rejects in another verdict the same theory of the state or the defendant.¹⁴ With logically, as opposed to legally inconsistent verdicts, however, the two crimes involved are composed of *completely different elements*, thereby preventing a finding that the same essential element which is common to both crimes both exists and does not exist.¹⁵

This discussion between legally and logically inconsistent verdicts has been a constant source of confusion for the Illinois courts.¹⁶ Logical inconsistency seems to be the classification which the Illinois courts have applied when, despite the legal inconsistency of the verdict, reversal of the conviction appears undesirable. The courts have been reluctant to reverse such a conviction due to a belief that the defendant was guilty of both counts. The courts in this situation do not consider a verdict to be "legally" inconsistent where the inconsistency was due to jury leniency, *i.e.*, the jury believed that the defendant was guilty of both charges beyond a reasonable doubt but, as an act of mercy, they convicted him on one count and acquitted him on the other count. Therefore, the court, firmly believing that the defendant is guilty, considers the inconsistency logical, as opposed to legal, in order to justify its result. It is apparent, therefore, that the distinction between legally and logically

ity of the indictment, the defendant was charged, in all counts, with committing an aggravated assault by using the same deadly (dangerous) weapon, a gun.

13. 16 Ill. App. 3d at 547-48, 306 N.E.2d at 542.

14. In *Murray*, the court stated:

Verdicts of guilty of crime A but not guilty of crime B, where both crimes arise out of the same set of facts, while not legally inconsistent because the two crimes have different essential elements . . . may nevertheless be logically inconsistent. Verdicts are logically inconsistent when they can be construed to involve both the acceptance and the rejection of the same theory of the case for the State or the same theory of the defense.

34 Ill. App. 3d at 532, 340 N.E.2d at 194 (citation omitted).

15. *Id.* at 521, 340 N.E.2d 186.

16. *E.g.*, *People v. Hairston*, 46 Ill. 2d 348, 362, 263 N.E.2d 840, 849 (1970).

inconsistent verdicts is nothing more than an artificial device which the courts use to avoid the equally complicated formulation of a solution to verdicts which are found to be legally inconsistent. Verdicts are either consistent or inconsistent and classifying them as logically inconsistent has only confused an already complex area of the law.

The Search for a Common Essential Element

The Illinois courts' difficulty in analyzing inconsistent verdicts stems not from the definition of legal inconsistency, since that definition is a sound one,¹⁷ but rather, from the problem of analyzing two crimes in a factual setting to determine if the two crimes contain a common essential element. By way of example, assume that charge A is comprised of elements 1, 2, 3 and X and that charge B is comprised of elements 4, 5, 6 and X. If element X, which is common to both crimes, is the *only contested issue* in charges A and B, verdicts of not guilty on charge A and guilty on charge B would be legally inconsistent. The problem which the Illinois courts appear to have is in *determining* whether element X in charge A is the same as element X in charge B. One of the purposes of this comment, therefore, is to develop a method of analysis which would be of assistance in making this crucial determination as to whether two crimes have a common essential element. This method of analysis is derived from the United States Supreme Court case of *Ashe v. Swenson*.¹⁸

In *Ashe* six men, engaged in a poker game, were robbed by three or four masked gunmen. In the first trial for the robbery of one of the poker players, the defendant was found not guilty. The only contested issue in that trial was whether the defendant was one of the robbers, since the defense admitted that a robbery had taken place. Six weeks later, the defendant was tried again, this time for the robbery of another one of the six poker players, and was found guilty. The Supreme Court reversed the conviction and held that the principle of collateral estoppel was embodied in the fifth amendment guarantee against double

17. It would appear that the term logical inconsistency is unnecessary. The real issue is whether two crimes have a common essential element. If they do not, it merely adds to the confusion to classify the verdicts as other than consistent. In other jurisdictions, the courts simply decide whether or not an inconsistency exists and they do not play this semantical game of logical versus legal inconsistency. The Illinois courts' approach has been so confusing that Annot., 18 A.L.R.3d 259 (1968), which divides the jurisdictions into those requiring consistency and those not requiring consistency, has Illinois listed in both categories.

18. 397 U.S. 436 (1970).

jeopardy, and was to be applied to the states via the fourteenth amendment.¹⁹

The major point of interest in *Ashe* is the determination that the issue of identity in the first trial was the same as the issue of identity in the second trial.²⁰ Furthermore, since the first trial had necessarily resolved the issue of identity in favor of the defendant, the state was barred in the second trial, by the principle of collateral estoppel, from attempting to relitigate that very same issue.²¹ Therefore, the basic principle to be derived from *Ashe* is that the record of a prior trial should be carefully scrutinized and that an ultimate issue of fact or an essential element of a crime which a rational jury must have decided in reaching its verdict may subsequently be used by the defendant as a bar to the relitigation of that same element or issue in a later trial.²²

In this manner, *Ashe* provides a method of analysis which can be used to determine whether the ultimate factual issue or essential element of one crime is the same as that of another crime.²³ The court made it clear how that method was to be applied when it stated:

The federal decisions have made it clear that the rule of collateral estoppel in criminal cases is not to be applied with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality. Where a previous judgment of acquittal was based upon a general verdict, as is usually the case, this approach requires a court to 'examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.' The inquiry 'must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings.'²⁴

However, it is not proposed that *Ashe* would actually operate as a bar in the area of verdict inconsistency.²⁵ The decision is

19. *Id.* at 445.

20. The Court explained that "[t]he situation is constitutionally no different here, even though the second trial related to another victim of the same robbery. For the name of the victim, in the circumstances of this case, had no bearing whatever upon the issue of whether the petitioner was one of the robbers." *Id.* at 446.

21. *Id.* at 447.

22. *Id.* at 446.

23. 'Collateral estoppel' is an awkward phrase, but it stands for an extremely important principle in our adversary system of justice. It means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit.

Id. at 443.

24. *Id.* at 444 (citation and footnote omitted).

25. See text accompanying notes 95-99 *infra*.

being used to show that if the crimes were tried at different times, and a bar would result under *Ashe*, then there is at least one common element between the two crimes. In this manner, the *Ashe* test will be applied to a recent group of Illinois cases in order to determine whether a common essential element does or does not exist within a particular factual setting.

A Factual Application of the Ashe Test

Crimes with Mutually Exclusive Elements—Tobin v. People

Inconsistency can exist between two guilty verdicts where a guilty verdict on one count necessarily precludes the finding of an essential element on the other count. For example, assume that charge A consists of elements 1, 2, 3, and X and that charge B consists of elements 5, 6 and 7. It must be assumed further, that implicit within a finding of elements 5, 6 and 7 is the conclusion that X does not exist. Therefore, a finding of guilty on both charges is a legal inconsistency because the guilty verdicts indicate that element X both does and does not exist.

This type of inconsistency between two guilty verdicts is factually demonstrated in *Tobin v. People*.²⁶ In that case the defendant was found guilty of robbery, larceny, and receiving stolen property, all the charges having arisen out of a single transaction. The *Tobin* court, utilizing a method of analysis similar to that used eighty years later in *Ashe*, examined each verdict in light of the evidence in the record in order to determine what essential elements must have been decided. The court held that in order to find the defendant guilty of receiving stolen property he must have illegally received the property from another person who had previously obtained it illegally.²⁷ This finding of receivership was legally inconsistent, however, with the findings that the defendant had committed the robbery.²⁸

In this manner, the court was able to determine that guilty verdicts in these crimes containing mutually exclusive elements resulted in verdict inconsistency. The *Tobin* court's determination, that the guilty verdicts were legally inconsistent, could also be reached through an application of the *Ashe* method of analysis. In order to apply *Ashe* to the *Tobin* case, it is necessary to hypothesize that the robbery charge and the charge of receiving stolen property were tried at different times. If the

26. 104 Ill. 565 (1882).

27. *Id.* at 567.

28. The court stated: "This imports a distinct and subsequent transaction and involving another person, the [defendant] receiving the property from some other person who had previously obtained it by robbery. . . . [T]he prisoner could not, under the evidence in this case, have been guilty of both these offenses" *Id.*

robbery charge was tried first, a guilty verdict would have indicated that the defendant had not received the goods from the robber, but rather, that the defendant had been the robber. Then, in the second trial, the prosecution would be precluded, by the *Ashe* doctrine of collateral estoppel, from attempting to relitigate the very same issue of receivership. Unlike the clear analytical treatment of this problem in *Tobin*, however, the Illinois decisions since *Tobin* have been confusing and often irreconcilable. Therefore, *Ashe* will be used as a method of analysis to determine whether the recent Illinois cases of *People v. Hairston*,²⁹ *People v. Dawson*³⁰ and *People v. Murray*³¹ contain legally inconsistent verdicts. Through the application of *Ashe* to these cases it will be possible to determine whether, in each case, there is a common essential element.

Solicitation and Accountability—People v. Hairston

In *People v. Hairston* the defendant was charged, under the accountability doctrine,³² with one count of murder and two counts of attempted murder.³³ In other, separate indictments, the defendant was charged with soliciting Dennis Jackson to commit each of the principal crimes.³⁴ All charges were tried together before a jury. During the trial, the prosecution had attempted to prove these charges by establishing that the defendant, as "chief" of a group of boys affiliated with an organization known as the Blackstone Rangers, had "ordered" Jackson and others to kill the victims. The prosecution did not attempt to place the defendant at the scene of the crime, but rather tried to establish that the defendant was accountable for Jackson's conduct.³⁵ The sole defense raised was that the defendant had not been a member of the organization and had not ordered or solicited any person to shoot the victims. The fact that Jackson did the shootings was never at issue. The defendant was found not guilty of the murder and attempted murder charges, but he was found guilty of the solicitation charges. The defendant, on appeal, contended that the verdicts were legally inconsistent, and

29. 46 Ill. 2d 348, 263 N.E.2d 840 (1970).

30. 60 Ill. 2d 278, 326 N.E.2d 755 (1975).

31. 34 Ill. App. 3d 521, 340 N.E.2d 186 (1975).

32. ILL. REV. STAT. ch. 38, § 5-2(c) (1975) [hereinafter cited as § 5-2(c)] provides in part:

A person is legally accountable for the conduct of another when:
 . . . (c) Either before or during the commission of an offense, and with the intent to promote or facilitate such commission, he *solicits*, *aids*, *abets*, *agrees* or *attempts* to aid, such other person in the planning or commission of the offense.
 (emphasis added).

33. 46 Ill. 2d at 351, 263 N.E.2d at 844.

34. *Id.*

35. See note 32 *supra*.

required reversal.³⁶ The Illinois Supreme Court, in response to the defendant's contention, stated that there could be no legal inconsistency where the verdicts of acquittal and conviction resulted from crimes composed of entirely different elements.³⁷ The court held that the verdicts involved were, in fact, legally consistent and affirmed the defendant's conviction.³⁸

The basis of the *Hairston* decision was that all elements of the two crimes were different. However, the court's determination that the two crimes lacked a common essential element is, upon close examination, in error. Through the use of the *Ashe* method of analysis it will be shown that the two crimes do involve a common essential element.

In applying the *Ashe* test to the *Hairston* case it is necessary to hypothesize that the charges of murder and attempted murder were tried first and that the charges of solicitation were tried separately, in a second proceeding. If the first trial resulted in an acquittal of the murder and attempted murder charges, the prosecution would be barred in the second trial, by the *Ashe* doctrine of collateral estoppel, from relitigating those essential elements or ultimate issues of fact which were necessarily determined in the first trial. This point can be further clarified by using the *Ashe* test to compare the *mens rea* of the crimes involved in the two trials. In the first trial, the *mens rea* of the accountability doctrine involves intent to promote or facili-

36. 46 Ill. 2d at 360, 263 N.E.2d at 848.

37. See text accompanying note 8 *supra*.

38. Specifically, the court stated:

Within our own jurisdiction, we have, in those instances where inconsistent verdicts of guilty were returned on separate indictments or separate counts of a single indictment, aligned ourselves with those who hold that a reversal and new trial must follow. But where, as here, the verdicts inconsistently acquit and convict of separate crimes arising from the same act, our courts have followed the view that logical consistency in verdicts in such instances is not necessary, so long as the verdicts are not legally inconsistent. To use the words of the court in *State v. Baird* (Wash.), 93 P.2d 409, 412, we follow the view that: 'In law there is no inconsistency in verdicts of acquittal and conviction upon charges of crimes composed of different elements, but arising out of the same state of facts.' The verdicts here were legally consistent, if not logically so, and defendant's claim of a right to discharge must be denied.

46 Ill. 2d at 361-62, 263 N.E.2d at 849 (citations omitted). In support of this quote, the court cited *People v. Taylor*, 56 Ill. App. 2d 170, 205 N.E.2d 807 (1965); and *People v. Ingersoll*, 58 Ill. App. 2d 216, 208 N.E.2d 79 (1965). In *Taylor*, the situation was not one where there was only one contested issue common to both crimes. The conflict in the jury verdicts could easily have been resolved on the basis of the different mental requirements. The guilty verdict on the aggravated battery count only required a showing of "knowledge," while the attempted murder charge (on which the defendant was found not guilty) was a "specific intent" crime. Hence, there was no inconsistency. Similarly, in *Ingersoll*, there were different factual contentions which could resolve the verdicts. In situations such as *Taylor* and *Ingersoll*, a bar would not result under the collateral estoppel doctrine as enunciated in *Ashe*.

tate the commission of the offense. The *mens rea* of the second trial, (for solicitation), is "intent that [the] offense be committed."³⁹ Since the defendant could only be found guilty of murder or attempted murder through the accountability doctrine, an acquittal of murder and attempted murder in the first trial would have indicated that the defendant had *not* "with the intent to promote or facilitate such commission, . . . solicit[ed], aid[ed], abet[ted], agree[d], or attempt[ed] to aid, such other person in the planning or commission of the offense."⁴⁰ Surely, if the defendant had *not* intended to promote or facilitate the crime when he allegedly told Jackson to kill the victims, he did not intend that the victims be killed.⁴¹ In the same manner, the *Ashe* test can be used to compare the *actus rea* of the two crimes. Under this line of reasoning, an acquittal in the first trial would have indicated that the defendant, pursuant to the accountability doctrine, had not "solicit[ed], aid[ed], abet[ted], agree[d], or attempt[ed] to aid,"⁴² Jackson in killing the victims. If the defendant, therefore, did not "order" Jackson to kill the victims, the prosecution is barred from relitigating the *actus rea* at the second trial, *i.e.*, that the defendant had "command[ed], encourage[d] or request[ed] another to commit that offense."⁴³ Thus, it is seen that under the facts of *Hairston*, if the defendant was not

39. ILL. REV. STAT. ch. 38, § 8-1(a) (1975) [hereinafter cited as § 8-1(a)] provides in part:

A person commits solicitation when, with intent that an offense be committed, he commands, encourages or requests another to commit that offense.

40. See note 32 *supra*. It should be noted that in comparing the acquittal of the murder charge with the charge of solicitation to commit murder, one need look only to the elements of § 5-2(c) to determine if *Ashe* will act as a bar since it was uncontested that Jackson did in fact murder the victim.

41. It could be argued that § 5-2(c) has an additional element not found in § 8-1(a): causation. The express language of § 5-2, however, would not appear to support this contention. First of all, § 5-2(a), which requires causation, uses the express language "he causes another" in order to clearly indicate that causation is required. The lack of such language in § 5-2(c) would imply that causation is not required. Secondly, if one "attempts to aid," that is sufficient to satisfy the *actus rea* requirement of § 5-2(c). If one has failed in fact to aid but has merely attempted to aid, it is difficult to imagine how such a failure to give aid could "cause" the commission of a crime.

In any event, causality, like the murder itself, was not at issue in the first trial. The defendant did not raise a causality defense based on the § 5-2(c) accountability provision (*i.e.*, that although the defendant "ordered" Jackson to commit the murder, the defendant was not causally linked to the crime because Jackson's murderous actions were caused by an intervening superseding event). Rather, the defendant's sole contention was that he had not ordered the murder in the first place. To say that the jury based its acquittal on a lack of causality would be as unrealistic and irrational as saying that the basis of the acquittal was that the jury determined that a murder had not been committed. Neither is supported by the evidence and neither was a contested issue at trial.

42. See note 32 *supra*.

43. See note 39 *supra*.

accountable for Jackson's conduct then the defendant could not have solicited Jackson's conduct.

Felony Murder and Robbery—People v. Dawson

People v. Dawson,⁴⁴ the most recent Illinois Supreme Court decision on point, provides another factual context in which to apply the *Ashe* method of analysis and demonstrates why a method such as that employed in *Ashe* is needed to determine if two charges contain a common essential element. In *Dawson*, the defendant was charged in a three-count indictment with murder,⁴⁵ felony murder,⁴⁶ and armed robbery⁴⁷ of a gas station attendant. All of the charges arose out of a single transaction involving the defendant and his alleged accomplice, Hawkins. The prosecution tried to establish, through the testimony of Hawkins, that the defendant and Hawkins had agreed to rob a service station and that the defendant gave Hawkins a gun with which to perform the robbery.⁴⁸ Hawkins admitted having committed the robbery and also having killed the service station attendant, McKinney. The prosecution attempted to prove the defendant's guilt in the crimes charged solely by showing Dawson's accountability for Hawkins' conduct.⁴⁹ The only defense raised was that the defendant had not been involved in the robbery or the killing and that Hawkins had performed those acts without the defendant's knowledge or approval.⁵⁰ The defendant was acquitted of murder and felony murder, but was found guilty of armed robbery.

On appeal, the defendant contended that the not guilty verdict on the felony murder charge was legally inconsistent with the guilty verdict on the robbery charge. In its consideration of this contention, the Illinois Supreme Court confused the issue of the existence of a legally inconsistent verdict with the issue of a solution to and the basis behind an inconsistency once one has been found to exist. In reversing the appellate court's holding, that the verdicts were inconsistent,⁵¹ the court illustrated its confusion of these issues by stating:

[w]e think that the assumption upon which the appellate court majority considered the case failed to take into account the prob-

44. 60 Ill. 2d 278, 326 N.E.2d 755 (1975).

45. ILL. REV. STAT. ch. 38, § 9-1(a)(1) (1975).

46. ILL. REV. STAT. ch. 38, § 9-1(a)(3) (1975) provides in part "One who kills an individual without lawful justification commits murder if, in performing the acts which cause the death: . . . (3) He is attempting or committing a forcible felony other than voluntary manslaughter."

47. ILL. REV. STAT. ch. 38, § 18-2 (1975).

48. 60 Ill. 2d at 279, 326 N.E.2d at 756.

49. ILL. REV. STAT. ch. 38, § 5-2 (3) (1975).

50. 60 Ill. 2d at 279, 326 N.E.2d at 756.

51. *People v. Dawson*, 19 Ill. App. 3d 150, 310 N.E.2d 800 (1974).

lems that confronted the jury. While the indictment contained three counts, only two forms of verdict were given to the jury—one form covering murder and the other armed robbery. The instruction dealing with murder (IPI Criminal 7.02) could have easily confused the jury because it provided that the jury had to find Dawson guilty beyond a reasonable doubt of *each* of the propositions listed in instruction. . . . It is true that the jury was given an accountability instruction (IPI Criminal 5.03); this instruction, however, was never incorporated into a murder instruction. We cannot assume that the jury took this abstract accountability instruction and used it to rewrite the murder instruction.

The inconsistency upon which the appellate court reversed the defendant's conviction of armed robbery was therefore non-existent, and for that reason the judgment of the appellate court is reversed.⁵²

This case clearly shows that the Supreme Court of Illinois was troubled by the inconsistency, but it deeply felt that the defendant's conviction had to be affirmed. In order to achieve this result the court classified the inconsistency as logical and affirmed the conviction.⁵³ Although the court's language may well explain the reason for the verdict inconsistency, the fact that the jury misunderstood a technically correct but hard to follow instruction does not change the fact that the verdicts were inconsistent. An application of the *Ashe* test to the facts of *Dawson* will show that the verdicts were legally inconsistent because a common essential element was found both to exist and not to exist.

In applying the *Ashe* method of analysis to *Dawson*, in order to determine whether the two verdicts are legally inconsistent, it is necessary to hypothesize that the felony murder charge is tried first under the same set of facts, resulting in an acquittal of the defendant. The issue in the second trial, for robbery, would then be whether the collateral estoppel doctrine of *Ashe* would prevent the relitigation of any essential element in the second trial that was necessarily decided in the defendant's favor in the first trial. The following language, from the appellate court opinion in *Dawson*, gives a clear answer to this issue.

When the jury found defendant not guilty of murder under sections 9-1(a)(1) and 9-1(a)(3) of the Criminal Code, they actually acquitted him of any participation in the only unlawful act giving rise to the murder—the armed robbery. The verdict of guilty of armed robbery was inconsistent for it found that defendant had participated in the crime that resulted in the felony-murder of the gas station attendant. To say that defendant was not guilty of murder under section 9-1(a)(3), the jury

52. 60 Ill. 2d at 281-82, 326 N.E.2d at 757.

53. See text accompanying note 17 *supra*.

had to find that defendant was not guilty of the armed robbery.⁵⁴

As this quoted passage clearly points out, the *only* rational conclusion which can be reached, when one considers the evidence presented in the felony-murder charge, is that the acquittal reflects the determination that the defendant had not participated in nor was he accountable for the robbery. The *Ashe* method of analysis would, therefore, collaterally estop the prosecution in the second trial from relitigating the issue of the defendant's participation in the robbery.

The confusion in determining whether verdicts are inconsistent has, by no means, been confined to the Illinois Supreme Court. The Appellate Court of Illinois has also had great difficulty in making this determination. The recent appellate court decision in *People v. Murray*⁵⁵ sustains the position that the *Ashe* method of analysis is needed to discover whether verdicts are legally inconsistent.

Murder and Aggravated Battery—People v. Murray

In *People v. Murray*, two defendants were each charged with murder and aggravated battery. The prosecution tried to establish, through eye witness testimony, that the defendants had entered a tavern and fired automatic weapons at the patrons.⁵⁶ The shooting resulted in the death of one man and injuries to three other people. The defendants, relying solely upon an alibi defense, produced eye witnesses to the shootings who claimed that the defendants were not the wrongdoers. In addition, each defendant produced other witnesses who testified that the defendants were in their presence at another place when the shootings occurred. The sole question presented to the jury was identity: were the defendants the perpetrators?⁵⁷ The jury convicted the defendants of murder but acquitted them of the aggravated battery charges.

On appeal the defendants contended that the guilty and not guilty verdicts were legally inconsistent. An application of the *Ashe* method of analysis indicates that the verdicts were, in fact, legally inconsistent. By way of example, if the aggravated battery charges were tried first under the same set of circumstances, the acquittal on those charges would necessarily determine that the defendants were not the perpetrators. The prosecution would then be barred, in the subsequent murder trial, from prov-

54. 19 Ill. App. 3d at 158, 310 N.E.2d at 806.

55. 34 Ill. App. 3d 521, 340 N.E.2d 186 (1975).

56. There was testimony that only one gun had been used, but that factor did not affect the issues of the case.

57. 34 Ill. App. 3d at 530-31, 340 N.E.2d at 193-94.

ing that the defendants were the perpetrators. Under the facts of the case, the essential element of identity in each crime was the same.

In *Murray*, the Illinois Appellate Court arrived at the same conclusion as indicated above, that the verdicts were legally inconsistent, but the reasoning of the Illinois Appellate Court was unclear when it stated:

A mechanical application of the test for legal consistency adopted by our Supreme Court in *People v. Hairston, supra* (namely, 'in law there is no inconsistency in verdicts of acquittal and conviction upon charges of crimes composed of different elements, but arising out of the same set of facts.') would lead to the conclusion that the verdicts in the instant case were not legally inconsistent since the crime of murder of John Sterling and the crimes of aggravated battery of Tommie Akins, Robert Chatman, and Barbara King are obviously crimes composed of different essential elements. But the instant case appears to be unique in that, in every other case which has been cited to us or which we have been able to find, the acquittal has been of the greater crime and the conviction has been of the lesser crime; here, however, the acquittal was of the lesser crimes and the conviction was the greater crime. The conviction for the murder of John Sterling, requiring findings as to all the essential elements of murder, would seem necessarily to require, as a matter of legal consistency, the same findings as to the essential elements of aggravated battery of the three other patrons, which, so far as they go, are either the same as, or less exacting than, the essential elements of murder. Hence, *despite the different essential elements of the two crimes, the verdicts would be legally inconsistent.*⁵⁸

The logic of this statement is unclear because "legally inconsistent verdicts" is a term of art and by definition, verdicts can only be legally inconsistent when at least one essential element is common to both crimes. The fact that murdering one person is more serious than committing aggravated battery upon another person is irrelevant. In other words, committing an aggravated battery upon A is not a lesser included offense of murdering B. The conclusion in *Murray*, that the verdicts were legally inconsistent, was correct because the identity of the perpetrators was a common essential element which was common to both crimes and which was found both to exist and not to exist. However, the court's reasoning in *Murray*, that the crimes were composed of different essential elements, is incorrect, as indicated by the *Ashe* test, and adds nothing to the court's resolution of the issues before it.

These are precisely the kinds of situations which have baffled the courts. Failure to properly determine whether crimes have a common essential element prevents the court from correctly

58. *Id.* at 534, 340 N.E.2d at 195-96 (emphasis added).

determining whether the verdicts are legally inconsistent. The result is often an improper disposition of a case on appeal.

THE EFFECT OF FINDING A LEGAL INCONSISTENCY

Up to this point, the discussion has dealt exclusively with the threshold question of determining whether a legal inconsistency exists. It is the further purpose of this paper to discuss the proper disposition of a case on appeal once it is determined that a legal inconsistency does exist.⁵⁹ If there is a legal inconsistency, a court of review must choose between the following methods of disposition of the guilty verdicts involved: reversal without remand; reversal and remand for a new trial, or an affirmation of the guilty verdict.

The Present Law in Illinois

In *People v. Dawson*,⁶⁰ the Illinois Supreme Court was arguably incorrect in holding that there was no legal inconsistency present.⁶¹ The court also stated that even if the appellate court was correct in holding that the verdicts were legally inconsistent, a reversal of the guilty verdict was not required.⁶² Rather, the Illinois Supreme Court concurred in the views expressed in *United States v. Carbone*,⁶³ the thrust of which was that inconsistent verdicts arise solely from jury nullification: an exercise by the jury of its power to be lenient, resulting in the defendant's acquittal despite the jury's subjective belief of his guilt. According to this line of reasoning, with jury nullification as its starting point, the nullification is thus considered as the sole basis or explanation of verdict inconsistency and such inconsistency cannot possibly be a reflection that the jury failed to find the defendant

59. It will be assumed, for the remainder of the discussion, that the terms "legal inconsistency" and "inconsistency" are interchangeable.

60. 60 Ill. 2d 278, 326 N.E.2d 755 (1975).

61. See text accompanying notes 44-54 *supra*.

62. 60 Ill. 2d at 280-81, 326 N.E.2d at 757.

63. 378 F.2d 420 (2d Cir. 1967). The *Dawson* court quoted, with express approval, the following statement from the *Carbone* decision:

The very fact that the jury may have acquitted of one or more counts in a multicount indictment because of a belief that the counts on which it was convicted will provide sufficient punishment, forbids allowing the acquittal to upset or even to affect the simultaneous conviction. We have repeatedly so held Indeed, if the rule were otherwise, the Government would be entitled to have the jury warned that an acquittal on some counts might undermine a guilty verdict on others—almost the opposite of the standard instruction, which is obviously beneficial to criminal defendants, and which the judge gave here without objection. It is true, as both Judge Hand and Mr. Justice Holmes recognized (citations omitted), that allowing inconsistent verdicts in criminal trials runs the risk that an occasional conviction may have been the result of compromise. But the advantage of leaving the jury free to exercise its historic power of lenity has been correctly thought to outweigh that danger.

Id. at 422-23 (citations omitted).

guilty beyond a reasonable doubt.⁶⁴ *Carbone* indicated that leaving the jury free to exercise nullification outweighed the danger that an occasional inconsistent verdict might have been the result of a compromise.⁶⁵ The inescapable implication of *Carbone* and *Dawson* is that legally consistent verdicts are *not* required and that legally inconsistent verdicts are not a ground for reversal. The Appellate Court of Illinois reached precisely the same conclusion in *People v. Murray*.⁶⁶

In *Murray* the court held that a verdict of guilty on the murder charges was legally inconsistent with a verdict of not guilty on the aggravated battery charges. The *Murray* court then proceeded to discuss, in detail, both the federal decision in *Carbone* and the Illinois Supreme Court decision in *Dawson* in an attempt to decide the proper disposition of the case on appeal. In affirming the convictions, the *Murray* court held "[i]n reliance, therefore, on our Supreme Court's decision in *Dawson*, we conclude that the acquittals do not affect the conviction and that neither legal nor logical consistency of verdicts is now required in Illinois."⁶⁷ Therefore, the thrust of the *Dawson* and *Murray*

64. This is, in actuality, a very real possibility, but one which both the federal, and now the Illinois courts have rejected.

65. The *Carbone* court indicated that if inconsistent verdicts were a possible ground for reversal, an instruction would have to be given to the jury informing them that an acquittal on some counts might undermine the guilty verdict. This, the court reasoned, is too great an invasion of the jury's historic power of nullification. *But see* Sparf & Hanson v. United States, 156 U.S. 51 (1895). The *Carbone* court's analysis is quite disturbing. The courts in this country routinely give instructions which tell the jury that they are not to exercise their power of jury nullification. This is accomplished by explaining to the jurors that they are required to apply the law as instructed by the court. There is no instruction given which informs the jury of its power to nullify the law. It is difficult to understand how the jury's freedom in this area could be restricted to any greater extent. *See generally* Schefflin, *Jury Nullification: The Right to Say No*, 45 S. CAL. L. REV. 168 (1972); and Note, *Jury Nullification: The Forgotten Right*, 7 NEW ENGLAND L. REV. 105 (1971).

Alternatively, it is arguable that the instruction proposed in *Carbone* would be such a radical departure from the jury system as it existed at common law that it would violate ILL. CONST. Art. I, § 13 (1970). Article I, § 13 provides that "[t]he right of trial by jury as heretofore enjoyed shall remain inviolate." *People v. Lobb*, 17 Ill. 2d 287, 161 N.E.2d 325 (1959) points out that the essential elements that "heretofore" existed at common law must be retained in a jury trial today. Surely an essential element of a jury trial is that power to acquit and thereby provide "justice" when the "law" provides otherwise. *See* Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12, 18-19 (1910). The rigid, broad prohibitions that legislatures enact cannot be applied to every technical violation and still be "just." The jury's power to add fairness and mercy to the rules prescribed by "law" was considered an essential element at common law (*see* *Bushell's Case*, 6 Howell's State Trials 999 (1670) and should be considered an essential element today. Law, with considerations of fairness and mercy, is "justice." Law without fairness and mercy is "tyranny." *See* C. Andrews, *The Colonial Period of American History (passim)* (1934); Schefflin, *Jury Nullification: The Right to Say No*, 45 S. CAL. L. REV. 168 (1972).

66. 34 Ill. App. 3d 521, 340 N.E.2d 186 (1975).

67. *Id.* at 537, 340 N.E.2d at 198 (footnote omitted).

decisions is that legal consistency between guilty and not guilty verdicts is no longer required. However, legal consistency between guilty verdicts may still be required since legally inconsistent guilty verdicts were not presented to the courts in *Dawson* or *Murray*.⁶⁸

Within the guilty-not guilty framework as demonstrated in *Dawson* and *Murray*, the Illinois courts have decided to follow a very simple and mechanical rule in the area of legally inconsistent verdicts. When a defendant, on appeal, contends that his conviction is legally inconsistent with an acquittal, the courts will simply hold that verdict consistency is not required. Without an analysis of the inconsistency, the court will then affirm the conviction.

This mechanical rule, which the Illinois courts have chosen to follow, is unsatisfactory because it rejects a careful analysis of the basis behind verdict inconsistencies.⁶⁹ Instead, application of the mechanical rule assumes that the inconsistency is due solely to jury nullification.⁷⁰ The decision to treat jury nullification as the only explanation for a jury's return of inconsistent verdicts ignores several other possible reasons:⁷¹ confusion on the law, prejudice, or compromise by the jury.

Compromise by the jury should be clearly distinguished from jury nullification. When jury nullification occurs, the jurors are unanimous in their conclusion that the defendant is guilty as charged beyond a reasonable doubt but, nonetheless, they decide to be lenient by acquitting the defendant on one of the counts. Compromise, on the other hand, exists when the jurors do not believe that the defendant is guilty beyond a reasonable doubt but decide to "cover their bases" and convict him on one count "just in case" he might be guilty. Compromise is a very real danger, especially in criminal trials today where a prosecutor, due to the increased legislative specificity and proliferation of

68. See *United States v. Bethea*, 483 F.2d 1024 (4th Cir. 1973).

69. Prior to *Dawson*, the Illinois courts recognized that there may well be something "wrong" with an inconsistent verdict. The something "wrong," which the courts failed to articulate carefully, is that such a verdict may reflect the fact that the defendant was not convicted beyond a reasonable doubt. The distinction which the courts have employed may have been a "gut reaction" to this problem. In other words, if the court felt that the defendant had not been prejudiced (jury nullification being the basis of the inconsistency) it simply avoided the inconsistency by labeling it logical and affirmed the decision. On the other hand, if the court felt that the defendant had been prejudiced, then it would recognize the legal inconsistency and reverse the decision. Analysis, however, should also be substituted for this earlier "gut reaction" approach.

70. See text accompanying notes 63-65 *supra*.

71. For an excellent discussion of the various policies and reasons which could result in verdict inconsistency, see Note, *Criminal Law: Validity of Inconsistent Verdicts*, 1961 DUKE L.J. 133.

statutory offenses, can "spin out a startlingly numerous series of offenses from a single alleged criminal transaction."⁷²

A careful analysis of the true basis for a jury's submission of inconsistent verdicts must begin with a determination of what the verdict is attempting to reflect. Although the issue posed to the jury is the same in both crimes, the jury's answer (verdict) to this issue goes in two different directions. By way of example, if the *existence* of element X in two crimes is the common essential element which is asked of the jury, its two verdicts answer the question "Yes—No." In order to determine properly whether the conviction should stand or be reversed (with or without a new trial), it must be determined what the jury's "Yes—No" verdicts actually reflected. If the jury actually believed that the common essential element had been proven beyond a reasonable doubt, the verdict reflects jury nullification. But, if the jury was not exercising its power to be lenient, the verdicts could well reflect the jury's confusion on the applicable law and/or the possibility that the jury believed that there was reasonable doubt as to whether the common essential element existed.

The In re Winship Requirement

The Illinois and federal courts have not analyzed each individual verdict inconsistency and instead, have assumed that jury nullification is, in all cases, the sole explanation for the inconsistency.⁷³ But, as the discussion has shown, an analysis of each individual verdict inconsistency is, in essence, a search to determine whether the existence of a common essential element was found beyond a reasonable doubt. It is proposed that this analysis is required by the due process clause of the United States Constitution which guarantees to a defendant the right to have his guilt proven beyond a reasonable doubt.⁷⁴ The United States Supreme Court held in *In re Winship*:⁷⁵

'Due process commands that no man shall lose his liberty unless the Government has born the burden of . . . convincing the fact finder of his guilt.' To this end, the reasonable-doubt standard is indispensable, for it 'impresses on the trier of fact the necessity of reaching a subjective state of certitude of the facts in issue.' . . .

72. *Ashe v. Swenson*, 397 U.S. 436, 445 n.10. The danger that a jury may be improperly influenced by the fact that the defendant is charged with an incredible number of charges in an indictment is a well-recognized possibility. See generally Comment, *Ashe v. Swenson: Collateral Estoppel, Double Jeopardy, and Inconsistent Verdicts*, 71 COLUM. L. REV. 321, 331 n.60 (1971).

73. *United States v. Carbone*, 378 F.2d 420 (2d Cir. 1967); *People v. Murray*, 34 Ill. App. 3d 521, 340 N.E.2d 186 (1975).

74. *In re Winship*, 397 U.S. 358 (1970).

75. *Id.*

Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.⁷⁶

These due process requirements from *Winship*, therefore, indicate that verdict inconsistencies must be analyzed in order to determine whether the jurors reached the requisite "subjective state of certitude" and actually found that the essential element common to both charges existed beyond a reasonable doubt.⁷⁷ The mechanical rule adopted by the Illinois courts is based upon the *assumption* that the existence of this common essential element was found beyond a reasonable doubt but that the defendant was acquitted on one of the charges due to considerations of leniency.⁷⁸ However, this assumption by both the Illinois and federal courts violates the constitutional requirements of *Winship*. When a defendant appeals a conviction on the grounds that the verdicts were legally inconsistent, he is contending that the jury did not, in fact, find him guilty of every essential element of the crime beyond a reasonable doubt. The mechanical rule applied by the Illinois courts does not consider the validity of the defendant's contention, rather, it is assumed that the defendant was proven guilty beyond a reasonable doubt.

After the Illinois courts apply this mechanical rule, and reject legally inconsistent verdicts as a basis for appeal they often consider whether there was sufficient evidence in the record to support a finding of guilt beyond a reasonable doubt.⁷⁹ Generally, however, verdict inconsistency is not mentioned in this part of a court's decision.⁸⁰ But even if it were mentioned, the *Winship* due process requirement would still not be met or considered within the context of inconsistent verdicts. In fact, the courts misdirect their efforts when they examine the record to determine whether there is sufficient evidence of guilt. The mere fact that the record may *hypothetically* support a finding of guilty does not satisfy the *Winship* requirement that the jury must *actually* have found the defendant guilty beyond a reasonable doubt. Instead, the true inquiry must focus on the meaning of the inconsistent response by the jury in order to determine whether the jury actually found that the common essential element existed. Every defendant has a constitutional right to

76. *Id.* at 364.

77. *Id.*

78. This is because the Illinois courts' approach uses jury nullification as its starting point.

79. See *People v. Hairston*, 46 Ill. 2d 348, 362, 263 N.E.2d 840, 849 (1970); *People v. Murray*, 34 Ill. App. 3d 521, 537, 340 N.E.2d 186, 198 (1975).

80. See note 78 *supra*.

the specific determination of guilt beyond a reasonable doubt by the *particular* jury sitting in his case.⁸¹ That a hypothetical jury may have found that a common essential element existed is irrelevant; rather, it is necessary to determine what the particular jury's inconsistent verdicts actually reflected. A hypothetical finding that a common essential element existed does not satisfy the fundamental *Winship* requirement that the jury actually found a common essential element to exist.

Federal Court Considerations

It is interesting to note that in the federal courts, from which Illinois adopted the mechanical rule of assuming that a defendant was proven guilty beyond a reasonable doubt, there is evidence of a limited rejection of that rule. It would appear that the federal courts reject the mechanical rule when it is literally impossible for jury nullification to have occurred. Although this limited rejection does not meet the constitutional requirement of *Winship*,⁸² it does demonstrate that the mechanical rule is inapplicable when jury nullification is not the reason for the inconsistency.

In *United States v. Maybury*,⁸³ tried without a jury, the judge rendered legally inconsistent guilty and not guilty verdicts. The court of appeals, in reviewing the decision, relied on the United States Supreme Court case of *Dunn v. United States*,⁸⁴ (upon which *Carbone* had relied),⁸⁵ which had held that consistent verdicts were not required.⁸⁶ The holding in *Dunn* was based upon two premises. First, if the two counts were tried separately, an acquittal on the first account could not be pleaded as *res judicata* to the second count.⁸⁷ This first premise was

81. Compare *United States v. Jorn*, 400 U.S. 470 (1971) with *In re Winship*, 397 U.S. 358 (1970). In *Jorn*, the defendant's criminal trial was terminated by an improper *sua sponte* judicial mistrial declaration. Upon the case being set for retrial, the defendant's pre-trial motion for dismissal (grounded upon a claim of former jeopardy) was granted. The Court, in affirming the trial court's dismissal, held that the defendant had a right to the verdict of the particular tribunal sitting as fact finder in his case. See *United States v. Jorn*, 400 U.S. 470, 484-86 (1971). The Court then proceeded to hold that the trial court's mistrial motion was an abuse of discretion because there was not a "manifest necessity" to declare a mistrial.

82. The federal courts have rejected the rule *only* where jury nullification cannot possibly explain the inconsistency. There are other situations, however, where the federal courts fail to inquire as to whether the inconsistency may reflect a possibility that the defendant was not convicted beyond a reasonable doubt.

83. 274 F.2d 899 (2d Cir. 1960).

84. 284 U.S. 390 (1932).

85. *Id.* at 393.

86. *United States v. Carbone*, 378 F.2d 420, 422 (2d Cir. 1967).

87. The Court stated:

If separate indictments had been presented against the defendant for possession and for maintenance of a nuisance, and had been sep-

completely overruled by *Ashe*.⁸⁸ The second premise was jury nullification. The *Maybury* court, however, rejected the second premise of *Dunn* and held that it was inapplicable when a judge sits as a fact finder.⁸⁹

*United States v. Bethea*⁹⁰ is another case in which a federal appellate court rejected the second premise of *Dunn*. In *Bethea* the jury returned inconsistent guilty verdicts.⁹¹ The court held that where a jury returns guilty verdicts to all charges, the rationale of *Dunn*, that jury nullification was the cause of the inconsistency, is inapplicable.⁹² Surely, the jury's inconsistency cannot be based upon leniency where the defendant is convicted on all counts.

Maybury and *Bethea* demonstrate that the results in *Dunn*, *Carbone* and *Dawson*, that inconsistent verdicts are permissible, are inapplicable unless jury nullification is the basis for the verdict inconsistency. The due process requirement of *Winship*, therefore, requires analysis of the inconsistency to determine its basis since if the basis is *determined* to be jury nullification then the result of *Dunn*, *Carbone* and *Dawson* would be proper. The

arately tried, the same evidence being offered in support of each, an acquittal on one could not be pleaded as *res judicata* of the other.

Where offenses are separately charged in the counts of a single indictment the same rule must hold.

Id. This premise for the Court's conclusion has been invalidated by *Ashe*. This error by Mr. Justice Holmes, it should be noted, occurred in the last opinion he wrote as a Justice of the United States Supreme Court at the age of ninety-one. See *United States v. Carbone*, 378 F.2d 420, 422 n.6 (2d Cir. 1967).

88. See *United States v. Carbone*, 378 F.2d 420, 422 (2d Cir. 1967); Comment, *Ashe v. Swenson: Collateral Estoppel, Double Jeopardy, and Inconsistent Verdicts*, 71 COLUM. L. REV. 321 (1971); Bickel, *Judge and Jury—Inconsistent Verdicts in the Federal Courts*, 63 HARV. L. REV. 649 (1950). It appears that both *Dunn* and *Carbone*, upon which *Dawson* and *Murray* relied, have been seriously undermined by *Ashe*, *Jorn* and *Winship* to the point where they should no longer be followed. See text accompanying note 80 *supra*.

89. 274 F.2d at 903. In reviewing the guilty verdict and remanding the case for a new trial, the *Maybury* court stated:

While the historic position of the jury affords ample ground for tolerating the jury's assumption of the power to insure lenity, the judge is hardly the 'voice of the country', even when he sits in the jury's place. If he deems an indictment multiplicitous, he has only to say so, and the time for him to exercise any 'lenity' that he deems warranted is on sentence Since we find no experience to justify approval of an inconsistent judgment when a criminal case is tried to a judge, we think that logic should prevail.

Id.

90. 483 F.2d 1024 (4th Cir. 1973).

91. *United States v. Gaddis*, 96 S. Ct. 1023 (1976). In *Gaddis*, the Court held that the defendants, upon being convicted of robbing the bank, could not also be convicted of receiving or possessing the robbery proceeds; that the error could be cured by vacating the convictions for receiving the proceeds rather than by directing a new trial on all counts. There was solid evidence of the defendant's committing the robbery but there was no evidence of the defendant's receiving or possessing the proceeds.

92. 483 F.2d 1024, 1030 (4th Cir. 1973).

basis, however, must be determined first, otherwise the requirement of *Winship*, that the defendant be found guilty beyond a reasonable doubt, is not met.⁹³

The True Bases of Inconsistent Verdicts

Discovering what inconsistent verdicts actually reflect is, admittedly, a very difficult task. This discovery process can be validly criticized as an attempt to "get inside the minds of the jurors." The difficulty of such an investigation, however, should not preclude it. Courts are constantly faced with this same dilemma in analogous situations. Such an investigation is necessary, for example, in determining whether certain inadmissible evidence created prejudice in the minds of the jurors. Since the improper admission of evidence is considered error the court must determine whether it was harmful error by examining the record and circumstances of the case in order to ascertain whether the jury was prejudiced by it. This determination is made on a case by case basis because evidence which might not be prejudicial in one case might be very prejudicial in another. Although certitude cannot reasonably be expected, the possibility of prejudice requires *individual consideration*. The correct approach, in the analytically difficult areas of evidence and inconsistency, is to use a careful and rational analysis, not a mechanical rule that is ill-equipped to deal with the various practical factors which are in operation.⁹⁴

Disposition of Inconsistent Verdicts

When inconsistent verdicts have been investigated in order to determine what they actually reflected, courts of review should arrive at one of three basic conclusions: first, that jury nullification may have been the reason for the inconsistency; second, that the inconsistency resulted from prejudice or compromise; or third, that the jury was confused as to the requirements

93. It should be obvious that an analysis, to determine the basis of the inconsistency, must precede a conclusion that the basis is jury nullification.

94. Under an analogous situation involving improper admission of evidence the courts have not resorted to a mechanical rule that admissible evidence is not required and that inadmissible evidence does not provide a ground for appeal. Rather, the courts look carefully at each case on its own facts and if it is felt that the interests of justice would be best served, the courts hold that the error was not harmful. Where verdict inconsistency is the contention on appeal, the courts should adopt the same procedure. If after a careful analysis of a case on its own particular set of facts the court believes that justice is best served by affirming the conviction, the court can hold that jury nullification was the cause of the inconsistency. The point is that the court should analyze the situation rather than apply a mechanical rule which, by its very nature, would be error in *some* cases.

of the law. Each of these possibilities will be considered separately.

If jury nullification is determined to be the basis of the inconsistency, it necessarily follows that the jury found the defendant guilty of all counts beyond a reasonable doubt. Therefore, the conviction should be affirmed since the due process requirements of *Winship* have been met.

If the basis of the jury's inconsistent verdicts is prejudice or wholesale compromise, this would be an indication that the jury did have reasonable doubt as to the defendant's guilt. Reaching this conclusion indicates that the prosecution failed to meet its burden of proof and therefore, the defendant is entitled to have his conviction reversed.⁹⁵

The inconsistent verdicts may reflect mistake or confusion by the jury as to the requirements of the law. This might well be the category the courts will choose to employ as a catchall if neither of the first two conclusions are deemed appropriate. If this is the reason for the inconsistency, then the jury did not determine the defendant's guilt or innocence according to the law because they were too confused about the law to make such a determination. Obviously, in this situation, the conviction cannot be affirmed because it would be impossible for the jury to be convinced of the defendant's guilt beyond a reasonable doubt. The ideal solution to this situation would be to reverse and remand the conviction for a new trial so that a proper determination of guilt or innocence may be made.⁹⁶ The problem, however, is whether, on remand, the verdict of acquittal, which was not appealed, will act as a bar on the remanded charge due to the collateral estoppel doctrine, thereby preventing relitigation of the common essential element.⁹⁷ By way of example, assume that charge A and charge B contain a common essential element X. If the verdict on charge A was not guilty and the verdict

95. This was the approach used by the common law courts when it was determined that verdicts were inconsistent. See *Rex v. Woodfall*, 5 Burr. 2661, 98 Eng. Rep. 398 (K.B. 1770); *Rex v. Colson*, 3 Mod. 72, 87 Eng. Rep. 47 (K.B. 1685). See generally Comment, *Inconsistent Verdicts in a Federal Criminal Trial*, 60 COLUM. L. REV. 999, 1001 (1960); Annot., 80 A.L.R. 171 (1932).

96. In Illinois civil cases, where there is an inconsistency between special interrogatories due to confusion, the courts have held that reversal and a new trial is the appropriate remedy. See *Freeman v. Chicago Transit Authority*, 50 Ill. App. 2d 125, 200 N.E.2d 128 (1964). If this is the appropriate consideration when the jury's verdict is a result of confusion in a matter involving mere property, *a fortiori*, it is the appropriate consideration when a person's liberty is at stake.

97. For an excellent discussion of double jeopardy, collateral estoppel and their application to verdict inconsistency, see Comment, *Ashe v. Swenson: Collateral Estoppel, Double Jeopardy, and Inconsistent Verdicts*, 71 COLUM. L. REV. 321 (1971); Comment, *Inconsistent Verdicts in a Federal Criminal Trial*, 60 COLUM. L. REV. 999 (1960).

on charge B was guilty, and the reason for this inconsistency was that the jury was confused as to the law, would the prosecution be barred by collateral estoppel, upon the remand of charge B, from attempting to prove that X does exist since the verdict on charge A necessarily implies that X does not exist?

It is proposed that collateral estoppel does *not* bar the prosecution, on remand, from proving that the element does exist. This conclusion is grounded upon an analysis of the collateral estoppel doctrine as enunciated in *Ashe*.⁹⁸ *Ashe* makes it clear that the issue which the defendant seeks to foreclose from relitigation must actually have been determined in the first trial before the doctrine of collateral estoppel can act as a bar. According to *Ashe*,⁹⁹ relevant matter which, in a practical sense, would affect the determination of whether an issue had been actually decided in the first trial is to be considered in determining whether a bar will result in the second trial.¹⁰⁰ This indicates that the inconsistency of the verdicts and the judicial determination that the inconsistency resulted from confusion would be factors to be considered in determining whether collateral estoppel should apply. These factors would lead to an almost inescapable conclusion that the issue which the defendant is seeking to foreclose had not been determined to a degree of judicial satisfaction which would warrant its foreclosure. In a situation involving verdict inconsistency due to misunderstanding or confusion on the law, the actual finding is open to grave doubt. Therefore, *Ashe* would permit the prosecution, upon remand, to prove any disputed issues against the defendant.

CONCLUSION

Legally inconsistent verdicts have caused the Illinois courts great difficulty for a number of years. The difficulty has stemmed from two different problems, the first problem involving a determination of whether verdicts are legally inconsistent. The treatment which this problem has received to date has been fraught with confusion. Although the definition of legally inconsistent verdicts is sound, the courts' application of facts to this definition has often been inconsistent and faulty because of the complex problems involved in determining whether two crimes have a common essential element. To rectify this difficulty, a

98. *Ashe v. Swenson*, 397 U.S. 436, 444 (1969). It could also be argued that by appealing the guilty verdict the defendant has waived any collateral estoppel as to both the guilty and not guilty verdicts. This argument is rejected since the defendant has not appealed the acquittal and it is difficult to imagine how he waived any rights pertaining to the acquittal.

99. See text accompanying note 24 *supra*.

100. *Ashe v. Swenson*, 397 U.S. 436, 444 (1969).

method is needed by which one can undergo a logical step-by-step analysis in order to determine whether two crimes have a common essential element. The *Ashe* method of analysis is proposed as the method by which to undergo such an analysis since it pinpoints the areas in which elements of two separate crimes may overlap and be the same.

The second problem in the area of verdict inconsistency is how to dispose properly of an appeal once verdicts are determined to be legally inconsistent. The courts' tendency to confuse this problem with the first problem has created even more difficulty in an already complex area of the law.

Once verdicts are determined to be legally inconsistent, the defendant will contend on appeal that the jury did not believe that he was guilty of the crime beyond a reasonable doubt. Although *Winship* requires that this contention be reviewed, the Illinois and federal courts do not review this contention. Instead, the courts merely state that consistent verdicts are not required. It is proposed that the constitutional mandate of *Winship* requires each case to be analyzed on an individual basis in order to determine whether the defendant has been convicted beyond a reasonable doubt. The determination of this question will, in turn, resolve the question of the proper disposition of the appeal.

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