

**NOTICE**

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2018 IL App (4th) 160442-U

NO. 4-16-0442

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

**FILED**

November 1, 2018  
Carla Bender  
4<sup>th</sup> District Appellate  
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Champaign County
DEADRIC L. GAINES,	)	No. 15CF1600
Defendant-Appellant.	)	
	)	Honorable
	)	John R. Kennedy,
	)	Judge Presiding.

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JUSTICE DeARMOND delivered the judgment of the court.  
Justices Steigmann and Knecht concurred in the judgment.

**ORDER**

¶ 1 *Held:* The appellate court affirmed, finding defendant could not challenge his conviction based on an inconsistency between the guilty verdict and an answer to the special interrogatory. The court found it lacked jurisdiction to review certain clerk-imposed fines but remanded to the trial court to verify fines have been offset by *per diem* credit, where appropriate.

¶ 2 In November 2015, the State charged defendant, Deadric L. Gaines, with one count of armed robbery. In April 2016, the trial court conducted a jury trial. The jury found defendant guilty, and the court sentenced him to 12 years’ imprisonment.

¶ 3 On appeal, defendant argues (1) based on an inconsistency between the special interrogatory and his guilty verdict, this court should enter a conviction for a lesser-included offense and (2) this court should vacate the clerk-imposed fines or, alternatively, reduce the fines to reflect his *per diem* custody monetary credit. We affirm and remand with directions.

¶ 4 I. BACKGROUND

¶ 5 In late October 2015, Yang Lu was walking home from a grocery store around 7:30 p.m. when he saw two men who appeared to be “hiding in the corner” near where he was walking. When he looked at the men, they pulled the hoods of their sweatshirts up and approached him walking very quickly. He described them as black men in their teens or twenties. One of the men, wearing a silver or gray hooded sweatshirt approached Lu from the front, while the other, wearing a black hooded sweatshirt, went behind, essentially “sandwiching” Lu between them. The taller man in front was holding a handgun pointed at Lu’s stomach, while the other was touching his backpack from behind. Lu could see that the top part of the handgun was silver. The pair demanded money and then a cell phone. Learning Lu had neither on him, they took the frozen pizza he was carrying and fled. Lu approached the first house he could find and knocked on the door. Receiving no answer, he went to his nearby apartment where he called the police.

¶ 6 Based on the description given by Lu, Sergeant Shaun Cook of the Urbana Police Department transmitted a description of the suspects as two black males in their teens, one wearing a gray hooded sweatshirt and the other wearing a black hooded sweatshirt, to other police officers in the area. This information was also conveyed to municipal buses and cabs in case the suspects were using those methods of transportation to leave the scene of the robbery. Within 10 to 15 minutes of speaking with Lu, Sergeant Cook took him to a location where police had stopped a Mass Transit District bus whose driver reported two men matching the description had boarded his bus. The bus driver later testified that, when the men saw the police cars stopping the bus, the one in the black sweatshirt asked him to open the back door so they could exit before they were removed by the deputy sheriffs. He also said they were both carrying

backpacks, with the person in the gray sweatshirt holding a blue and white one. He was asked to point out the backpack on a portion of the bus's security video played at trial.

¶ 7 Lu estimated the amount of time between the robbery and when he was taken to view possible suspects in a "show-up" was 15 to 20 minutes. Although unable to identify their faces, he said their clothes, build, height, and skin color were the same as the men who robbed him. Lu said the first person he was asked to look at during the "show-up" was the person who had been standing behind him during the robbery. That person was identified as defendant.

¶ 8 The State charged defendant by information with armed robbery under a theory of accountability alleging he, or someone for whose conduct he was legally responsible, took property from the person or presence of Lu by threatening the imminent use of force, and the defendant, or someone for whose conduct he was legally responsible, carried on or about his person a firearm. 720 ILCS 5/18-2(a)(2) (West 2014). A jury trial was conducted in April 2016. At trial, in addition to the aforementioned facts, Sergeant Cook identified defendant in open court as the first person shown to Lu during the "show-up." He also identified a blue and white backpack found on a seat of the bus after defendant and codefendant, Dominique Smith, were removed. The backpack contained a loaded "Taurus PT 40 model handgun," which was also taken into evidence. The slide (the top portion of the handgun) was silver.

¶ 9 Other officers were called to testify about the stop of the bus, the removal of the only two passengers at the time, defendant and Smith, and the retrieval of the blue and white backpack and its contents.

¶ 10 Officer Mike Cervantes, a police officer with the Urbana Police Department for the past 9 1/2 years, was called to testify regarding the video- and audio-recorded statement taken from the defendant on the night of his arrest. Defendant, who consented to the interview,

initially denied involvement in the robbery. Later he said he was present but not in the immediate presence of Smith when he robbed “a Chinese guy.” According to defendant, he was seated some distance away when codefendant approached the “Chinese guy” and ran back with a pizza in his hand. Defendant said he fled with the Smith. Eventually, they boarded a bus. He acknowledged seeing Smith with a handgun earlier in the evening and saw him take the gun from his backpack and put it in his waistband before the robbery. Defendant denied having a gun that evening and none was found in the black backpack he was carrying when arrested.

¶ 11 Defendant did not testify. After closing arguments, the trial court read its instructions to the jury. The State tendered an issues instruction for the offense of armed robbery, Illinois Pattern Jury Instructions, Criminal, No. 14.06 (4th ed. 2000) (hereinafter IPI Criminal 4th), which read as follows:

“To sustain the charge of armed robbery, the State must prove the following propositions:

*First proposition:* That the defendant, or one for whose conduct he is legally responsible, knowingly took property from the person or presence of Yang Lu; and

*Second Proposition:* That the defendant, or one for whose conduct he is legally responsible, did so by the use of force or by threatening the imminent use of force; and

*Third Proposition:* That the defendant, or one for whose conduct he is legally responsible, carried on or about his person, or was otherwise armed with, a firearm at the time of the taking.”

The State requested and received, without objection, a modified version of IPI Criminal 4th No. 28.03, an issues instruction on sentence enhancement, which read:

“To sustain the allegation made in connection with the offense of armed robbery, the State must prove the following proposition:  
That during the commission of the offense of armed robbery, the defendant, or one for whose conduct he is legally responsible, was armed with a firearm.

If you find from your consideration of all the evidence that the above proposition has been proved beyond a reasonable doubt, then you should sign the verdict form finding that the allegation was proven.

If you find from your consideration of all the evidence that the above proposition has not been proved beyond a reasonable doubt, then you should sign the verdict form finding the allegation was not proven.”

Based upon the enhancement instruction, the State sought and received, without objection, IPI Criminal 4th No. 28.04, which is a special interrogatory on enhancements. It read:

“The State has also alleged that during the commission of the offense of armed robbery, the defendant, or one for whose conduct he is legally responsible, was armed with a firearm.

If you find the defendant is not guilty of the offense of armed robbery, you would not consider that State’s additional allegation regarding the offense of armed robbery.

If you find the defendant is guilty of armed robbery, you should then go on with your deliberation to decide whether the State has proved beyond a reasonable doubt the allegation that during the commission of the offense of armed robbery, the defendant, or one for whose conduct he is legally responsible, was armed with a firearm.

Accordingly, you will be provided with two verdict forms: \*\*\*

From these two verdict forms, you should select the one verdict form that reflects your verdict and sign it as I have stated. \*\*\*

Your agreement on your verdict at [*sic*] to the allegation must also be unanimous.”

¶ 12 During deliberations, the jury sent out a question seeking clarification on the difference between the third proposition and the “second charge.” After substantial discussion between the court and both counsel, by agreement, the following answer was given:

“There is only one charge, Armed Robbery. That charge has the three propositions referred to in the instructions. Each and every one of the propositions must be proved beyond a reasonable doubt if you are to find the defendant guilty of armed robbery. If you initially determine that the defendant is guilty of armed robbery, then and only then may you consider the additional allegation that the defendant, or one for whose conduct he is legally responsible, was armed with a firearm. You have been provided with an instruction for the charge of armed robbery and a separate

instruction for the additional allegation. You must consider all the instructions in your deliberations.”

¶ 13 After further deliberations, the jury convicted defendant on the single count of armed robbery and responded that the enhancement for possession of a firearm had not been proved beyond a reasonable doubt. The trial court polled the jury as to both verdict forms and all jurors responded those forms represented their individual verdicts. After a hearing on posttrial motions and a sentencing hearing, the court sentenced defendant to 12 years’ incarceration in the Illinois Department of Corrections.

¶ 14 This appeal followed.

## ¶ 15 II. ANALYSIS

### ¶ 16 A. Jury Instructions

¶ 17 Defendant argues the jury’s finding on the second verdict form, finding the State failed to prove defendant, or someone for whose conduct he was legally responsible, was armed with a firearm, amounted to an “acquittal” of defendant for armed robbery with a firearm. We disagree.

¶ 18 “[A] guilty verdict cannot be challenged based on an inconsistent answer to a special interrogatory absent a statute providing such.” *People v. Reed*, 396 Ill. App. 3d 636, 648, 919 N.E.2d 1106, 1115 (2009).

¶ 19 Since 2003, Illinois has followed the reasoning of *United States v. Powell*, 469 U.S. 57 (1984), holding “defendants in Illinois can no longer challenge convictions on the sole basis that they are legally inconsistent with acquittals on other charges.” *People v. Jones*, 207 Ill. 2d 122, 133-34, 797 N.E.2d 640, 647 (2003). In *Powell*, the Supreme Court found there was no constitutional impediment to inconsistent verdicts and that such verdicts may occur for various

reasons. In *Jones*, our supreme court listed several reasons set out in *Powell* to explain why the rule made sense: (1) there was no way for a reviewing court to determine which verdict expressed the jury's true intent; (2) though the inconsistency could be just as injurious to the State as the defense, only the defense had recourse through appeal; (3) an inconsistent verdict could simply be the result of jury lenity with no basis in the facts; and (4) a defendant still had the right to challenge a verdict based on sufficiency of the evidence grounds. *Jones*, 207 Ill. 2d at 130-31.

¶ 20 In *Reed*, this court applied the reasoning of *Jones* to a first-degree murder conviction coupled with a finding against a firearm enhancement related to the same murder. There, this court found “no law exists establishing an inconsistent answer to a special interrogatory trumps the verdict in criminal cases.” *Reed*, 396 Ill. App. 3d at 646. “When a guilty verdict and a negative answer to a special interrogatory like the one at issue are irreconcilable, the jury has also found an essential element was proved beyond a reasonable doubt and not proved beyond a reasonable doubt.” *Reed*, 396 Ill. App. 3d at 647.

¶ 21 Here, defendant essentially argues an inconsistency between the verdict and the enhancement special interrogatory requires the appellate court to vacate the guilty verdict and enter a conviction on a lesser offense. There are a number of problems with such a proposal, not the least of which is the fact that no lesser-included offense was sought by defendant or would have been allowed by the trial court. Additionally, there is no constitutional mechanism for the court to do so *sua sponte*. More importantly, there was no question regarding the use of a firearm in the commission of this robbery. The victim's testimony was clear, the gun was found in the bag of codefendant, and defendant himself acknowledged the gun's presence during the robbery. A point that our supreme court found inescapable in *Jones* was that regardless of what the jury



intended by a conviction of the offense, but acquittal on the enhancement, it did not mean it was not convinced of the defendant's guilt. See *Jones*, 207 Ill. 2d at 130.

¶ 22 In the case before us, the instructions and the answer to the jury's subsequent question during deliberations noted how it had to ascertain whether defendant was guilty of the offense of armed robbery before deciding the issue of the enhancement. When polled, each juror acknowledged their guilty verdict as to the armed robbery charge. We are not about to attempt to second-guess the jury in this, or any other case. See *People v. Spears*, 112 Ill. 2d 396, 409, 493 N.E.2d 1030, 1035 (1986) ("Simply put, courts are not in the business of second-guessing a jury's 'clear intent.' "). When the instructions are read in conjunction with the jury's question seeking to know the difference between the "third proposition and the second charge," several things are evident. The only thing labeled as a "proposition" in the instructions are three propositions found in the issue instruction for armed robbery, IPI Criminal 4th No. 14.06. The third proposition reads: "[t]hat the defendant, or one for whose conduct he is legally responsible, carried on or about his person, or was otherwise armed with a firearm at the time of the taking." There was no second charge, as indicated by the first sentence of the court's response, "[t]here is only one charge, Armed Robbery." The "second charge," as both the court and counsel agreed, was the enhancement instruction, upon which they were asked to submit a verdict form as well.

¶ 23 We must assume the jury followed its instructions, and in doing so, it first concluded defendant was guilty of armed robbery. Based on *Jones*, and *Reed*, our analysis need not look further. See *Reed*, 396 Ill. App. 3d at 648 ("Since we have determined a defendant cannot challenge a conviction based on an inconsistent answer to a special interrogatory, we need not determine whether the guilty verdict and negative answer to the special interrogatory are actually inconsistent because, even if they were, it would have no impact on the jury's guilty

verdict.”) In *People v. Peoples*, 2015 IL App (1st) 121717, ¶¶ 100-03, 35 N.E.3d 1156, 1174-75, although remanded for other reasons, the First District noted that even where a first degree murder verdict was clearly legally inconsistent with the enhancement finding, unless it could say, as a matter of law, that the jury intended to acquit the defendant of the charge, an outright reversal was not appropriate. That is equally true for defendant’s suggestion of entering a verdict for a lesser-included offense.

¶ 24 B. Fines and Fees

¶ 25 Defendant argues this court should vacate certain clerk-imposed fines. We will not review that issue for lack of jurisdiction.

¶ 26 Pursuant to the Illinois Supreme Court’s recent pronouncement in *People v. Vara*, 2018 IL 121823, ¶ 23, we lack jurisdiction to review the circuit clerk’s recording of an assessment. Finding that even an unauthorized levy of fines by the circuit clerk does not vest jurisdiction in the appellate court, our supreme court held “the appellate court lacked jurisdiction to review the clerk’s recording of mandatory fines that were not included as part of the circuit court’s final judgment.” *Vara*, 2018 IL 121823, ¶ 23. “The recording of a fine is a clerical, ministerial function and is not a judgment—void or otherwise. Therefore, the improper recording of a fine is not subject to direct review by the appellate court.” *Vara*, 2018 IL 121823, ¶ 23. Thus, we find we have no jurisdiction to review the circuit clerk’s imposition of the alleged fines.

¶ 27 Alternatively, defendant argues this court should reduce the fines by his *per diem* custody credit. “Any person incarcerated on a bailable offense who does not supply bail and against whom a fine is levied on conviction of such offense shall be allowed a credit of \$5 for each day so incarcerated upon application of the defendant.” 725 ILCS 5/110-14(a) (West 2014).

The trial court stated and the record confirms defendant was entitled to \$975. However, the record is unclear about whether the *per diem* credit was applied, so we remand to the trial court to verify the *per diem* credit was applied and, if not, to correct the sentencing order to reflect the credit.

¶ 28

### III. CONCLUSION

¶ 29 For the reasons stated, we affirm the trial court's judgment but remand with directions for the trial court to verify fines have been offset by *per diem* credit, where appropriate. As part of our judgment, we award the State its \$75 statutory assessment against defendant as costs of this appeal. 55 ILCS 5/4-2002(a) (West 2016).

¶ 30 Affirmed; cause remanded with directions.