IN THE COURT OF APPEALS OF THE STATE OF ALASKA

ASHLEY R. JOHNSTON, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-11570 Trial Court No. 1JU-12-863 CR MEMORANDUM OPINION No. 6306 — March 9, 2016

Appeal from the Superior Court, First Judicial District, Juneau, Philip M. Pallenberg, Judge.

Appearances: Glenda Kerry, Law Office of Glenda J. Kerry, Girdwood, for the Appellant. Donald Soderstrom, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and Craig W. Richards, Attorney General, Juneau, for the Appellee.

Before: Mannheimer, Chief Judge, Allard, Judge, and Suddock, Superior Court Judge.[*]

Judge SUDDOCK.

Ashley R. Johnston and some accomplices started a fire on a municipal baseball field in Juneau. The fire damaged a small tractor, a specialized trailer, and a large number of buckets filled with an adhesive for an ongoing turf replacement project.

[*] Sitting by assignment made pursuant to Article IV, Section 16 of the Alaska Constitution and Administrative Rule 24(d).

Johnston was charged with third-degree criminal mischief for intentionally damaging the trailer and the adhesive,[1] and third-degree arson for intentionally damaging the small tractor, a motor vehicle.[2] She was tried separately from her co-defendants.

The jury found her guilty of criminal mischief, but it acquitted her of arson. On appeal, she claims that these verdicts are fatally inconsistent. She argues that the jury's "rejection of the evidence that [she] was guilty of arson, either as a principal or as an accomplice, necessarily conflicts with the evidence that she is guilty of criminal mischief, either as a principal or accomplice." We disagree.

As a preliminary matter, we note that Johnston did not raise the issue of inconsistent verdicts in the superior court. This is fatal to her claim. As we held in *Miller v. State*, a defendant must raise the issue of inconsistent verdicts before the jury is discharged, or the issue is forfeited.[3] A defendant who does not object to allegedly inconsistent verdicts cannot establish plain error because of the powerful and obvious tactical reasons not to object.[4] As we pointed out in *Miller*, by withholding an objection until the jury is discharged and the matter is beyond remedy, a defendant may gain a new trial on any charges of which the defendant was convicted, while at the same time precluding a new trial on any charges of which the defendant was acquitted, due to the

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[1] Former AS 11.46.482(a)(1) (2012).

[2] AS 11.46.420(a).

[3] *Miller v. State*, 312 P.3d 1112, 1115 (Alaska App. 2013).

[4] *Id.*

guarantee against double jeopardy.[5] In contrast a timely objection could result in the jury deliberating further and returning verdicts in the State's favor.

Moreover, we conclude that the verdicts in Johnston's case can be rationally reconciled.[6] To convict Johnston of the criminal mischief charge, the jury was required to find that she acted intentionally to damage any property of another. But to convict her of the arson charge, the jury had to find that she acted with the specific intent to damage the tractor.

The record shows that the fire started at or near the trailer or the buckets of adhesive, but not near the tractor. The trailer was "completely burnt" and multiple buckets of adhesive were destroyed by the fire. In contrast, the tractor suffered only heat damage. The jury could reasonably have concluded that Johnston and her accomplices intentionally started the fire fully aware that the trailer and the buckets of adhesive would be damaged, but without intending to damage the more remote tractor.

Because the jury could rationally find that Johnston was guilty of acting intentionally to damage some property but not the tractor, the verdicts are not logically inconsistent.

The judgment of the superior court is AFFIRMED.

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[5] *Id.*; *see Moreno v. State*, 341 P.3d 1134, 1146 (Alaska 2015) ("Whether the defendant made a tactical decision not to object or intelligently waived an opportunity to object must be plainly obvious from the face of the record, not presumed in the face of a silent or ambiguous record.").

[6] *See Edwards v. State*, 158 P.3d 847, 857 (Alaska App. 2007) (citing *Davenport v. State*, 543 P.2d 1204, 1208 (Alaska 1975)).