

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 169

September Term, 2014

(ON MOTION FOR RECONSIDERATION)

DARRYL NICHOLS

v.

STATE OF MARYLAND

*Zarnoch,
Graeff,
Friedman,

JJ.

Opinion by Friedman, J.

*Zarnoch, Robert A., J., participated in the hearing and conference of this case while an active member of this Court; he participated in the adoption of this opinion as a retired, specially assigned member of this Court.

Filed: February 4, 2016

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

The Appellant, Darryl Nichols (“Nichols”), was charged with premeditated murder, first-degree felony murder, kidnapping, false imprisonment, and extortion, as well as conspiracy to commit these crimes. At the close of evidence, the trial court erroneously instructed the jury that extortion was a valid underlying felony for first-degree felony murder. Nichols was convicted of first-degree felony murder (with extortion as the underlying felony), false imprisonment, conspiracy to commit false imprisonment, extortion, and conspiracy to commit extortion.¹ On appeal from the Circuit Court for Baltimore City, Nichols raises three issues:

- 1) Was the evidence sufficient to warrant a conviction for extortion?
- 2) What is the remedy for the circuit court’s incorrect jury instructions regarding the felony murder charge?
- 3) Were Nichols’ sentences for false imprisonment, conspiracy to commit false imprisonment, and extortion illegal?

For the reasons that follow, we shall affirm in part and vacate in part the judgments of the circuit court.

¹ Nichols’ appeal was consolidated with that of his co-defendant Donta Vaughn (Case #3, September Term 2014) for the purpose of briefing and oral arguments but the decisions will be issued in separate opinions.

FACTUAL AND PROCEDURAL HISTORY

Darryl Nichols, Donta Vaughn, Eric Price,² and Sherelle Ferguson decided to try kidnapping and ransom as a way to make money. Together, they planned and executed a kidnapping scheme, and collected two separate ransom payments totaling \$40,000. Nichols was apprehended during the police manhunt for the kidnapping victim. Police found the body of the victim, Eric Pendergrass, beaten and asphyxiated, and arrested Vaughn and Ferguson soon thereafter.

A jury convicted Nichols of first-degree felony murder, extortion, conspiracy to commit extortion, false imprisonment, and conspiracy to commit false imprisonment. He was acquitted of first-degree murder, conspiracy to commit murder, kidnapping, and conspiracy to commit kidnapping. The circuit court sentenced him to life imprisonment with all but fifty years suspended for first-degree felony murder, life imprisonment with all but fifty years suspended for false imprisonment, fifty years' imprisonment for conspiracy to commit false imprisonment, five years' imprisonment for extortion, and five years' imprisonment for conspiracy to commit extortion, all to be served concurrently. The circuit court also imposed five years of supervised probation following Nichols release from prison.

² Price testified that he quit the conspiracy upon learning that the others planned to kill their victim after collecting the ransom money.

DISCUSSION

I. Sufficiency of the evidence to support a finding of extortion by verbal threat

Nichols' first argument is that there was insufficient evidence adduced at trial to support his conviction for extortion by verbal threat. Specifically, Nichols argues that there was no direct evidence that he, or any of his conspirators verbally threatened anyone to extort money.

In Maryland, the crime of extortion by verbal threat occurs when a person “with the intent to unlawfully extort money, property, labor, services, or anything of value from another,” makes verbal threats to cause physical injury, inflict emotional distress, cause economic damage, or cause property damage to a person. Md. Code Ann., Crim. Law (“CL”) § 3-705. Extortion does not require that the verbal threat be made to the person who actually gives the money, rather, the qualifying threat can be made to anyone. CL § 3-705.

Maryland appellate courts are deferential to the fact-finding of a jury, and, when conducting a sufficiency of the evidence review, will not disturb a verdict if “after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Falcon v. State*, 375 Md. 435, 454 (2003) (internal quotation and citation omitted). A jury's finding of guilt does not need to be the conclusion that we consider to be the most likely or even the conclusion that we might have found if we were the jurors. *State v. Albrecht*, 336 Md.

475, 479 (1994). Rather, the jury’s verdict needs only to be supported with sufficient evidence that could “fairly convince a trier of fact of the defendant’s guilt of the offense charged beyond a reasonable doubt.” *Donati v. State*, 215 Md. App. 686, 718 (2014) (internal citation omitted). Further, there need not be any direct evidence of the crime; a jury can reach a reasonable verdict on the basis of circumstantial evidence. *Hebron v. State*, 331 Md. 219, 228 (1993) (“[A] conviction may be sustained on the basis of a single strand of circumstantial evidence or successive links of circumstantial evidence.”). In light of this deferential standard of review and the circumstantial evidence presented at trial, we affirm the jury’s guilty verdict in regards to the extortion count.

At trial, there were several pieces of circumstantial evidence that together could lead a jury to reasonably infer that Nichols had threatened Pendergrass to force him to call his girlfriend, Tiara Felder, to provide ransom money:

- Price, a co-conspirator who quit the conspiracy, testified that Vaughn and Nichols had planned to kidnap somebody (who was eventually identified as Pendergrass) and try to get ransom money in exchange for his safety.
- Felder testified that she received a telephone call from Pendergrass in the middle of the night, after he disappeared, during which he asked her to deliver thousands of dollars in cash to an unusual drop-off place. Felder testified that in that conversation, Pendergrass had talked in a “short,” “fast,” and “business-like manner,” “like he was talking to a worker instead of a girlfriend.” The timing of

the call, the request, and Pendergrass's manner of speaking in this call raised a "very high flag" of suspicion for her. The jury could reasonably have interpreted this description to mean that Pendergrass made the call and asked Felder to deliver the money because he was being threatened with bodily harm.

- The medical examiner testified that Pendergrass had been beaten before he died. From this evidence, the jury could have inferred that Nichols and his friends used threats and beatings to force Pendergrass to call Felder for the ransom money.

Given the evidence discussed above, there was sufficient circumstantial evidence for a jury to infer that Nichols or one of his co-conspirators verbally threatened Pendergrass to force him to call his girlfriend and ask for ransom money. Therefore, we affirm Nichols' conviction for extortion by verbal threat.

II. Felony Murder Jury Instruction

Nichols next complains that he was wrongfully convicted of first-degree felony murder. He argues that under Maryland law it is legally impossible for extortion to serve as the underlying predicate crime for first degree felony murder and that this Court should review his conviction for plain error. The State agrees that extortion is not a predicate felony for first degree murder but argues against providing relief on direct appeal, suggesting that it should await a post-conviction proceeding. We conclude that because the conviction for first-degree felony murder is an illegal conviction, the proper remedy is to vacate the conviction and that result can be accomplished on direct appeal. We explain.

The definition of first-degree felony murder requires that the victim die during the commission of an explicitly enumerated felony, such as arson, burglary, robbery, rape, or kidnapping. CL § 2-201(a)(4). By contrast, second-degree felony murder occurs when a victim dies during the commission of a non-enumerated and but inherently dangerous felony. *Jones v. State*, 222 Md. App. 600, 616-17 (2015); CL §2-204(a) (“A murder that is not in the first degree ... is in the second degree”).

As Nichols was acquitted of the kidnapping charge, the only felonies that could have supported a felony murder conviction are extortion or false imprisonment. *See Wright v. State*, 307 Md. 552, 562 (1986) (noting that a felony for which the defendant was acquitted of could not later serve as the basis for felony murder). As neither extortion nor false imprisonment is enumerated in CL § 2-201(a)(4), those crimes can only serve as the basis for second-degree felony murder (and only then, if the crimes were inherently dangerous). Nichols was illegally convicted because he was convicted of crime that does not exist in Maryland, namely, first-degree felony murder based on extortion. *Mitchell v. State*, 132 Md. App. 312, 330 (2000) (reaffirming that a “court is without power to render a verdict or impose a sentence under a charging document which does not charge an offense within its jurisdiction prescribed by common law or by statute.”) rev’d on other grounds, 363 Md. 130 (2001).

The circuit court, however, erroneously instructed the jury that extortion could serve as a predicate felony to first-degree felony murder. The circuit court instructed the jury

that first-degree murder, conspiracy to commit murder, conspiracy to kidnap, conspiracy to commit extortion, *and extortion* could all serve as the predicate felony for first-degree felony murder. Both the State and Nichols objected to the instruction. The basis for Nichols' protest was the inclusion of first-degree murder, conspiracy to commit murder, conspiracy to kidnap, and conspiracy to commit extortion in this instruction. Nichols did not, however, object to the inclusion of extortion in the instruction. The circuit court then re-instructed the jury that “[first-degree felony murder requires] that the State must prove that the Defendant or another participating in the crime and the Defendant committed a felony or felonies, any or all of them, of kidnapping *or extortion*.” (Emphasis added). Nichols' counsel did not object to the instruction as given the second time. Thus, Nichols never objected below on the grounds that he advances here.

Ordinarily appellate courts will not address claims of error which have not been raised and decided in the trial court. *State v. Hutchinson*, 287 Md. 198, 202 (1980). Nichols did not object to the inclusion of extortion in the instruction for first degree felony murder either time the instruction was given. The failure to object would usually be a bar to appellate review.

Despite Nichols' failure to object to the inclusion of extortion in the jury instruction, this Court has the power to correct an illegal conviction at any time. *Montgomery v. State*, 206 Md. App. 357, 402 (2012) (holding “that an appellate court has the authority to review an allegedly illegal conviction regardless of whether or not an objection is made at trial.”).

The power to correct an illegal conviction stems from the power to correct an illegal sentence.

Under Rule 4-345(a) this Court has the power to correct an illegal sentence at any time. The power to correct an illegal sentence necessarily includes the power to correct an illegal conviction because “[w]hen the illegality of a sentence stems from the illegality of the conviction itself, Rule 4-345(a) dictates that both the conviction and the sentence be vacated.” *Johnson v. State*, 427 Md. 356, 378 (2012) (holding that the defendant’s sentence on assault with intent to murder was illegal because *the conviction itself* was illegal).³

As a result, the proper remedy is to vacate Nichols’ illegal conviction for first-degree felony murder.⁴

³ Because we reach this conclusion via Rule 4-345(a), we need not reach the parties’ contentions regarding harmless error or ineffective assistance of counsel.

⁴ On motion for reconsideration, the State concedes that Nichols’ conviction for first-degree felony murder is improper, but argues that by vacating Nichols’ conviction we have selected an improper remedy.

Rather than vacate the conviction, the State argues that we should either order a resentencing as if Nichols had been convicted of second-degree felony murder, or failing that, order a new trial for second-degree felony murder. The State argues that *State v. Goldsberry* stands for the proposition that in cases of a legally impossible conviction, the proper remedy is not simply to vacate, but rather, to order either resentencing or retrial. *State v. Goldsberry*, 419 Md. 100 (2011).

In *Goldsberry*, the defendant was charged with both first and second-degree felony murder and the jury was instructed on both charges. *Id.* at 111-12. The trial court, however, erroneously instructed the jury that both first and second-degree felony murder could be predicated upon the commission of attempted robbery. *Id.* The jury returned a verdict

III. Illegality of the other sentences

Nichols' final argument is that his sentences for false imprisonment, conspiracy to falsely imprison, and extortion are illegal because they exceed the maximum penalty for the crimes of which they are, respectively, lesser included offenses. Nichols received

convicting Goldsberry of second-degree felony murder based upon attempted armed robbery. *Id.* at 113 The Court of Appeals determined that his conviction of second-degree felony murder predicated on attempted armed robbery was a legal impossibility but that the verdict unequivocally reflected that the jury found Goldsberry guilty of felony murder. *Id.* at 136-37. The only error was instructing the jury on both first *and* second-degree felony murder when only first-degree felony murder was supported. *Id.* Because of the peculiar circumstances of the case, the Court of Appeals remanded for a new trial for first-degree felony murder. *Id.* at 137. Thus, in *Goldsberry*, there was a fallback position.

In Nichols' case, by contrast, there is no fallback. As a result, the more relevant precedent is *Kohler v. State*. 203 Md. App. 110, 129. In that case, Kohler had been charged with felony murder based on the theory that he, as the buyer, aided and abetted the distribution of marijuana. *Id.* This Court, however, concluded that there was insufficient evidence to convict Kohler of aiding and abetting. *Id.* at 126. Because the evidence was insufficient for the underlying felony, the second-degree murder conviction was also reversed. *Id.* at 130. Importantly to this case, this Court then concluded that “[h]aving foregone the opportunity to present to the jury [an alternative felony murder theory], the State is precluded by double jeopardy principles from re-trying appellant for that crime.” *Id.* at 130.

As in *Kohler*, Nichols was only charged with first-degree felony murder based upon the underlying crime of extortion and the State did not pursue any theory of second-degree felony murder. Nichols was never charged with second degree felony murder. His jury was never instructed on the elements of second-degree felony murder. Nichols cannot now be sentenced for a crime for which he was never charged. *See Landaker v. State*, 327 Md. 138, 140 (1992) (“[C]onviction upon a charge not made would be sheer denial of due process.”). Nor are we able to remand for a new trial for a crime for which Nichols was never charged. *See Johnson v. State*, 427 Md. 356, 375-76 (2012) (noting that “it is elementary that a defendant may not be found guilty of a crime of which he was not charged in the indictment.”).

sentences for first-degree felony murder, false imprisonment, conspiracy to commit false imprisonment, extortion, and conspiracy to commit extortion. Under Maryland law, a lesser included offense cannot have a greater penalty than the greater offense when the defendant is charged with both crimes and jeopardy attaches to both at trial:

When the defendant is charged with a greater offense and a lesser included offense based on the same conduct, with jeopardy attaching to both charges at trial and when the defendant is convicted only of the lesser included charge, he may not receive a sentence for that conviction which exceeds the maximum sentence which could have been imposed had he been convicted of the greater charge.

Simms v. State, 288 Md. 712, 724-25 (1980). We will address each of Nichols' sentences in turn.

a. False imprisonment

False imprisonment is a lesser included offense to kidnapping because kidnapping is defined as false imprisonment with the carrying of the victim to some other place. *Paz v. State*, 125 Md. App. 729, 739 (1999) (internal citations omitted) (“False imprisonment is a lesser included offense of kidnapping. If kidnapping is proved, false imprisonment is also proved.”). Therefore, when charged with both kidnapping and false imprisonment, a person convicted of false imprisonment cannot be sentenced to a longer imprisonment than the maximum sentence for kidnapping: namely, thirty years' imprisonment. CL § 3-502(b) (establishing the penalty for the felony of kidnapping to be imprisonment for a term not exceeding 30 years).

In this case, the State elected to prosecute Nichols for both false imprisonment and kidnapping. Nichols was acquitted of kidnapping but convicted of false imprisonment and sentenced to life imprisonment with all but fifty years suspended. His sentence is greater than the thirty year maximum allowed sentence for kidnapping. Therefore, Nichols' sentence for false imprisonment is illegal. We are compelled to vacate and remand for resentencing.

b. Conspiracy to Commit False Imprisonment

Nichols argues that his sentence for conspiracy to commit false imprisonment is illegal because the sentence he received exceeds the statutory maximum sentence for kidnapping. The State does not directly respond to Nichols' argument that the sentence for conspiracy to commit false imprisonment should be vacated. Rather, the State concedes that the five-year concurrent sentence for the conspiracy to commit verbal extortion should be vacated no matter what other relief is granted in this case. This is because the State recognizes that in this case, there was only one conspiracy but that Nichols was convicted and sentenced for two: conspiracy to commit false imprisonment and conspiracy to commit extortion. We disagree with Nichols' assertion that conspiracy to commit false imprisonment is a lesser included offense of kidnapping but agree with the State's conclusion that the sentence for conspiracy to commit extortion must be vacated.

First, we will address Nichols' contention that conspiracy to commit false imprisonment is a lesser included offense of kidnapping. Conspiracy to commit false

imprisonment is not a lesser included offense of kidnapping because each offense requires distinct elements that the other does not. As stated above, kidnapping is false imprisonment with the carrying of the victim to some other place. *Paz*, 125 Md. App. at 739. Conspiracy to commit false imprisonment, however, is an unlawful agreement between two or more person to commit false imprisonment. *Mitchell v. State*, 363 Md. 130, 145 (2001) (citation omitted) (defining conspiracy as an unlawful agreement between two or more person to accomplish either an unlawful purpose or a lawful purpose by unlawful means); *State v. Hall*, 122 Md. App. 664, 669 (1998) (defining false imprisonment as “the deprivation of the liberty of another without his consent and without legal justification.”). Kidnapping and conspiracy to commit false imprisonment, therefore, each require elements that the other does not. This means that neither kidnapping nor conspiracy to commit false imprisonment is a lesser included offense of the other. Nichols’ contention is simply incorrect.⁵

⁵ Through a motion for reconsideration, Nichols has clarified his additional contention that conspiracy to commit false imprisonment is a lesser included offense of *conspiracy to kidnap*, not kidnapping. Nichols argues that “conspiracy to commit false imprisonment is a lesser included [offense] of conspiracy to commit kidnapping when they are based on the same conduct and both are charged.” The State disagrees with Nichols’ contention and argues that, unlike other crimes, prosecution for conspiracy focuses on the agreement rather than the criminal objective. {Response at 4} We agree with the State.

“[O]nly one sentence can be imposed for a single common law conspiracy no matter how many criminal acts the conspirators have agreed to commit.” *McClurkin v. State*, 222 Md. App. 461, 490 (2015) (explaining that the analysis is different when two separate

Second, we turn to the State’s concession that Nichols’ sentence for conspiracy to extort should be vacated. The Court of Appeals made clear in *Jordan v. State* that “[i]t is well settled in Maryland that only one sentence can be imposed for a single common law conspiracy no matter how many criminal acts the conspirators have agreed to commit.” 323 Md. 151, 161 (1991) (quoting *Tracy v. State*, 319 Md. 452 (1990)). “A conspiracy remains one offense regardless of how many repeated violations of the law may have been the object of the conspiracy.” *Id.*

Here, the testimony at trial revealed that there was one agreement between the perpetrators to kidnap, imprison, and extort money from a single victim. The imposition of one sentence for conspiracy to commit false imprisonment and a second sentence for conspiracy to commit extortion was error and Nichols’ sentence for conspiracy to commit

conspiracies exist). When a defendant is convicted of multiple conspiracies arising out one agreement, the conspiracy conviction that carries the most severe penalty is the conspiracy conviction that remains. *Id.* at 490-91 (citing *Jordan v. State*, 323 Md. 151, 162 (1991)). Because only one sentence may be imposed for a single common law conspiracy, the individual conspiracies do not merge. Rather, they are facets of only one conspiracy, and the conspiracy convictions with lesser maximum penalties are vacated. *Id.*

Nichols participated in one conspiracy comprised of several criminal acts. Nichols was not convicted of conspiracy to commit kidnapping. His conviction for conspiracy to commit false imprisonment carries the most severe penalty of the conspiracy crimes for which he was convicted. Because we are vacating Nichols’ sentence and conviction for conspiracy to commit extortion, Nichols’ conviction and sentence for conspiracy to commit false imprisonment can and does remain.

extortion was illegal. Therefore, pursuant to our power under Rule 4-345(a), we vacate the conviction and sentence for conspiracy to commit extortion.

c. Extortion

Maryland law also requires that the underlying felony in a felony murder charge must merge into the felony murder conviction as a lesser included offense. *State v. Johnson*, 442 Md. 211, 221 (2015) (stating that “application of the required evidence test results [] in merger for sentencing purposes of the conviction for the predicate felony with the felony murder conviction.”). Nichols was convicted of both extortion and felony murder with extortion as the underlying felony. Nichols cannot be sentenced for both extortion and felony murder when the felony murder is predicated on extortion. Given that Nichols’ conviction for felony murder is vacated, however, this issue is moot and the extortion charge stands.

In sum, we conclude that Nichols’ sentences for false imprisonment and conspiracy to commit extortion are illegal but his sentence for extortion is not. To correct the illegal sentences for false imprisonment and conspiracy to commit extortion, we vacate and remand to the Circuit Court for Baltimore City for resentencing. Md. Rule 4-345. In that resentencing, the circuit court should keep in mind that the maximum sentences for false imprisonment may not exceed 30 years’ imprisonment, which is the maximum allowable sentence for kidnapping. The conspiracy to commit extortion sentence is vacated entirely.

CONCLUSION

For the reasons stated, we hold the following: (1) Nichols' conviction for first-degree felony murder is vacated; (2) Nichols' sentence for false imprisonment is vacated and remanded for resentencing with the new punishment not to exceed thirty years' imprisonment; and (3) Nichols' sentence for conspiracy to commit extortion is vacated. In all other respects the judgment of the circuit court is affirmed.

**JUDGMENT FOR FIRST-DEGREE
FELONY MURDER VACATED.
JUDGMENT FOR CONSPIRACY TO
COMMIT EXTORTION VACATED.
SENTENCE FOR FALSE
IMPRISONMENT VACATED AND
REMANDED FOR FURTHER
PROCEEDINGS. JUDGMENTS
OTHERWISE AFFIRMED. COSTS TO BE
PAID BY THE MAYOR AND CITY
COUNCIL OF BALTIMORE.**