UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1315

September Term, 2014

ALONZO EUGENE TURNER

v.

STATE OF MARYLAND

Woodward,
Friedman,
Zarnoch, Robert A.
(Retired, Specially Assigned),

JJ.

Opinion by Woodward, J.
Dissenting Opinion by Friedman, J.

Filed: January 4, 2016

On December 21, 1989, Alonzo Eugene Turner, appellant, was convicted by a jury in the Circuit Court for Prince George's County of first-degree murder and other related offenses in connection with the murder of Eric English. Appellant was sentenced to life imprisonment plus to a term of ten years' imprisonment, all but five years suspended, to run consecutive to the life sentence. Appellant appealed, and this Court affirmed his convictions in an unreported decision.

On July, 15, 2013, appellant filed a *pro se* motion to correct an illegal sentence pursuant to Md. Rule 4-345(a). He argued, as he does now on appeal, that his sentence was illegal because when announcing their verdict, the jury failed to personally utter whether they had found him guilty of murder in the first or second degree. The circuit court denied the motion on July 1, 2014. Appellant then noted this appeal and presents two questions for our review which we have consolidated and reworded into one: Did the circuit court err in denying [appellant's] motion to correct an illegal sentence?[1] Finding no error, we shall affirm the judgment of the circuit court.

[1] Appellant phrased the questions presented as:

1. Whether *Strong v. State*, 261 Md. 371 (1971) supersede Maryland Criminal Law Code Ann. § 2-302 mandatory language? If not,
2. Did the lower court err in refusing too [sic] correct an illegal sentence?

BACKGROUND

We adopt a portion of the factual background from this Court's unreported decision in *Turner v. State*, No. 389, Sept. Term 1990 (filed December 17, 1990), slip op. at 1-3.

> During the evening of March 31, 1989, Eric English, Varek Queen, Donald Strong and Richard Padgett were "cruising" the Iverson Mall area of Prince George's County in Strong's car when mechanical problems forced them to proceed on foot. According to Strong and Padgett, while they were seeking the home of a friend of Strong's mother to secure assistance, English was approached by appellant Turner. Turner angrily accused English of having robbed him a day or two earlier. Turner went to a nearby building and returned almost immediately with a sawed-off shotgun. He forced the four men to lie down in two parking spaces adjacent to an apartment complex. During this occurrence, Turner continued to accused English of having robbed him, an accusation English hotly denied. At this point, Strong and Padgett indicated that a man later identified as appellant Rector was standing beside Turner and said, "Bust him." Turner then shot English to death with the shotgun. Turner, demanding "who had the money," took $40 from Strong and told him to "[t]ake off your chains." [1] According to Padgett, Rector then took a gold chain belonging to Strong and everyone fled the scene.
>
> [1] There is conflicting evidence whether the individuals were told to empty their pockets and remove their jewelry before or after English was shot.
>
> ***
>
> Turner and Rector both testified. Turner, 17 years old at the time, averred that Padgett initiated the incident by coming at him with a knife. He obtained a shotgun and, according to him, forced the men to lie on the ground for two reasons: to recover $50 English had allegedly stolen from him, and to disarm English, whom Turner believed was armed. Turner further alleged that he shot English when it appeared that English was reaching for a weapon.

As appellant himself points out, the jury's verdict sheet was completed, in part, as follows:

VERDICT SHEET

COUNT I

* * *

3. Do you find the defendant Alonzo Turner guilty or not guilty of first degree murder of Eric English?

Guilty √ Not Guilty ____

NOTE: If you verdict is guilty, do not answer question 5.

* * *

5. Do you find the defendant Alonzo Turner guilty or not guilty of second degree murder of Eric English?

Guilty ____ Not Guilty ____

When the jury returned to the courtroom to announce their verdict, the following occurred:

THE DEPUTY CLERK:	Ladies and gentlemen of the jury, please stand. Ladies and gentlemen, **are you agreed of your verdict?**
THE FOREMAN:	**We are**.
THE DEPUTY CLERK:	Who shall say for you?
THE FOREMAN:	I shall.

THE DEPUTY CLERK: Madam Foreman, what say you, do you find the defendant Alonzo Turner guilty or not guilty of felony murder of Eric English?

THE DEPUTY CLERK: Not guilty.

* * *

THE DEPUTY CLERK: **Do you find the defendant Alonzo Turner guilty or not guilty of first degree murder** of Eric English?

THE FOREMAN: **Guilty**.

(Emphasis added).

After the remaining verdicts were announced, defense counsel requested a polling of the jury. The polling was not transcribed, but the transcript states: (Whereupon, the jury was duly polled, each juror answering "yes" to the question, "Is the foreman's verdict your verdict?").

Immediately following the polling, the jury's verdict was hearkened, as follows:

THE DEPUTY CLERK: Ladies and gentlemen of the jury, harken to your verdict as the Court has recorded it, your foreman says that Alonzo Turner is guilty as to Counts Two, Three, Seven, Eight, Nine – I'm sorry.

THE COURT: Start over again. This would be guilty of Count one, which charges first degree murder.

THE DEPUTY CLERK:	You found the defendant Alonzo Turner guilty of felony murder of Eric English?
THE COURT:	No. It's not felony murder. It's first degree murder of Eric English.
THE DEPUTY CLERK:	**You found the defendant Alonzo Turner guilty of first degree murder** of Eric English, guilty of use of a handgun in the commission of a felony, guilty of robbery with a deadly weapon, guilty of use of a handgun in the commission of a felony of robbery. You have found the defendant Sean Rector guilty of felony murder, guilty of use of a handgun in the commission of felony murder, guilty of robbery with a deadly weapon, and guilty of use of a handgun in the commission of the felony of robbery in the matters alleged against them **and so say you all?**
THE JURY:	**Yes**

(Emphasis added).

After then inquiring if counsel had "anything else," and receiving a negative response from both the prosecutor and defense counsel, the court thanked and dismissed the jury.

DISCUSSION

Appellant argues that the jury, not the clerk, was required to state the degree of murder that it found he had committed and, because it did not do so, his sentence is illegal. The State counters that the record "unequivocally reflects that the jurors found [appellant] guilty of first-degree murder."

We begin by noting that a sentence is "inherently illegal" and subject to correction under Md. Rule 4-345(a) where there was no conviction warranting any sentence or where the sentence imposed was not a permitted one. *Chaney v. State,* 397 Md. 460, 466 (2007). But "where the matter complained of is a procedural error, the complaint does not concern an illegal sentence for purposes of Rule 4-345(a)." *Tshiwala v. State,* 424 Md. 612, 619 (2012).

In essence, appellant claims that his murder conviction was null and void because the jury did not personally utter the degree of murder on which it was convicting him and therefore, there was no conviction for which a life sentence could have been imposed. He bases his contention on Article 27, § 412(a) of the Maryland Code (1957; 1987 Repl. Vol.), which provided: "If a person is found guilty of murder, the court or jury that determined the person's guilt shall state in the verdict whether the person is guilty of murder in the first degree or murder in the second degree." [2]

[2] This provision is presently codified as Md. Code (2012 Repl. Vol.) § 2-302 of the Criminal Law Article and provides: "When a court or jury finds a person guilty of murder, (continued...)

The above statute was enacted in 1809 when the General Assembly divided murder into degrees and mandated that the penalty for first-degree murder was "death, by hanging" and the penalty for second-degree murder was a minimum term of imprisonment of five years and a maximum term of eighteen years. *See* Laws of Maryland, 1809, Chapter 138, Sections 3 and 4. It appears that the Court of Appeals first construed this provision in 1859 when it decided *Ford v. State*, 12 Md. 514 (1859). In that case, the defendant was charged with the "wilful murder" of another man, "by shooting him with a pistol." *Id.* at 515. Following a jury trial, the jury announced a verdict of "guilty" to the charge of murder, without specifying the degree. *Id.* at 548. Defense counsel asked that the jury be polled, and the trial court directed the clerk:

> to ask the jury, when he polled them, 'Whether they found the prisoner guilty of murder in the first degree, or murder in the second degree?' To which question, when it was put to the jury, the foreman answered for the jury, in the words, 'Guilty of murder in the first degree,' in an audible voice; and each of the remaining eleven jurors, when polled, responded, 'Guilty,' without specifying the degree of murder in words.

Id.

On appeal, the Court of Appeals determined that, based on the "plain and unambiguous words of the statute," the jury had "the duty" to ascertain whether the defendant

[2](...continued)
the court or jury shall state in the verdict whether the person is guilty of murder in the first degree or murder in the second degree."

was guilty of murder in the first or second degree and "the finding of the jury of only 'guilty' [was] insufficient." *Id.* at 543-44. Thus, concluding that, "[i]n the eye of the law, there has been no valid and sufficient verdict," the Court of Appeals reversed the judgment and ordered a new trial. *Id.* at 549.

Similarly, in *Williams v. State*, 60 Md. 402, 403 (1883), the Court of Appeals held that a "general verdict of 'guilty' on an indictment for murder, is a bad verdict, and on such a verdict no judgment can be pronounced." Although the foreman in *Williams* announced the verdict as guilty of murder in the first degree, upon polling, when asked to state the verdict, each individual juror, as in *Ford*, stated "guilty" without mentioning the degree of murder. *Id.* In reversing the judgment, the Court of Appeals stated that "the verdict rendered on the poll [was] a defective verdict" because of the failure of the each juror, when polled, to state whether he had found the defendant guilty of murder in the first or second degree. *Id.* at 403-04.

Some eighty-eight years later, the Court of Appeals again addressed this issue, but held that the verdict was valid in *Strong v. State*, 261 Md. 371 (1971) (death sentence later vacated in *Strong v. Maryland*, 408 U.S. 939 (1972)). In *Strong*, the forelady announced the verdict as: "Guilty. Guilty of first degree murder, the first degree." *Id.* at 373. Upon polling, the individual jurors were asked if their verdict was the same as the forelady's and each juror replied "yes" or "yes, it is." *Id.* at 373. On appeal, Strong, relying on *Ford* and *Williams* argued that the murder verdict was defective because, upon polling, the jurors did not state

the degree of murder. *Id.* at 373-74. The Court of Appeals rejected that argument and held that the verdict was valid. The Court concluded that each juror's affirmative response to question of whether his or her verdict was the same as that announced by the forelady "was the equivalent of each juror saying: 'I find the accused guilty of murder in the first degree."' *Id.* at 374.

Appellant maintains that *Strong* was "wrongly decided" because the statute plainly requires the jury to state whether they found the defendant [g]uilty of first or second-degree murder and to hold as the Court did in *Strong* is simply "inferring or conjecturing what degree of murder the jury intended to find." We disagree and, moreover, we are not in a position to overrule a decision of the Court of Appeals.

Appellant, nevertheless, points out that in *Strong* the foreperson stated that the defendant was "guilty of first degree murder, the first degree," but in his case "not one juror uttered the words guilty of first-degree murder" which, appellant claims, distinguishes his case from *Strong*. He asserts, therefore, that "[w]ithout requiring at the very least the foreperson to state the degree of murder for which [he] was found guilty, one cannot say with any sense of certainty, that the jury was unanimous in its conclusion that [he] was guilty of first-degree murder."

The State first counters that, "to the extent [appellant] complains that the polling, hearkening or announcement procedures employed at his trial were defective, a defect in the trial process is not a claim that is cognizable in a motion to correct an illegal sentence."

Although we agree with the State's general proposition that a procedural error does not "concern an illegal sentence for purposes of Rule 4-345(a)," *Tshiwala,* 424 Md. at 619, if the jury had returned a general verdict of "guilty of murder," appellant's first-degree murder conviction would have been a nullity, and hence the sentence would have been illegal and subject to correction under Rule 4-345(a). *Accord Colvin v. State,* ___ Md. App. ____, No. 2341, Sept. Term, 2014 (filed November 30, 2015), slip op. at 6 (stating that "when a verdict is not finalized [due to a fatal defect in the polling process, for example], any sentence based upon such a verdict is illegal").

The State next asserts that "the record unequivocally reflects that the jurors found [appellant] guilty of first-degree murder" as indicated by "the foreperson's response to the clerk's question, the polling of the individual jurors and the jury's hearkening of its verdict." We agree.

As we recently stated in *McGhie v. State*, ___ Md. App. ___, No. 2540, Sept. Term, 2011 (filed November 24, 2015), the Court of Appeals' decisions in *Ford, Williams,* and *Strong* "make clear that, to support a first-degree murder conviction, the jury verdict must reflect that the jurors unanimously found the defendant guilty, not just of murder, but of murder in the first degree." Slip op. at 11. But we noted that "each juror need not utter those specific words." *Id.* Thus, in *McGhie* we held that, although the jury failed to announce the degree of murder when convicting the defendant of murder, it was clear from the circumstances that the jury unanimously found McGhie guilty of felony murder, which as a

matter of law was first-degree murder, and hence the murder conviction was "not void or a nullity based on the failure of the jury to state the specific words 'first degree' murder." Slip op. at 14.

Here, the verdict sheet reflects that the jury was asked to determine whether appellant was "guilty or not guilty of first degree murder of Eric English." A check mark was placed next to "guilty." A note on the verdict sheet directed that, if the jury's verdict was guilty on the first-degree murder count, they were "not [to] answer question 5," which asked whether they found appellant "guilty or not guilty of second degree murder of Eric English." The verdict sheet reflects that question 5 was not, in fact, answered. Although the Court of Appeals has stated that "the contents of the verdict sheet do not constitute the jury's verdict," *Ogundipe v. State*, 424 Md. 58, 72 (2011), the verdict sheet in this case clearly supports the our conclusion that the jury did indeed unanimously determine that appellant was guilty of the *first-degree* murder of Eric English.

Turning to the announcement of the verdict, which is dispositive, appellant's complaint is that neither the foreperson nor the individual jurors upon polling personally spoke the words "first-degree murder." But as we stated in *McGhie,*"each juror need not utter those specific words." Slip op. at 11. The clerk specifically asked if the jury found appellant "guilty or not guilty *of first degree* murder of Eric English?" (Emphasis added). The foreman answered "guilty" and upon polling, when asked if "the foreman's verdict [was] your verdict," each juror answered "yes." Moreover, when hearkening the verdict, the clerk

intoned: "you found the defendant Alzono Turner guilty of first degree murder of Eric English . . . and so say you all?" The jury responded "yes." Thus, there is no doubt that the jury unanimously returned a verdict of guilty of murder *in the first degree*.

Because appellant's conviction was valid, the life sentence imposed for that conviction was legal. The circuit court, therefore, did not err in denying appellant's motion to correct his sentence.

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.

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Filed: January 4, 2016

For the same reasons that I dissented from *Colvin v. State*, ___ Md. App. ___ (2015), I must dissent here as well. Turner seeks review pursuant to a motion to correct an illegal sentence under Maryland Rule 4-345(a), which is a privilege with a narrow scope. *Chaney v. State*, 397 Md. 460, 509-10 (2007) ("The scope of this privilege, allowing collateral and belated attacks on the sentence and excluding waiver as a bar to relief, is narrow."). The procedural error alleged in the instant case is not of the kind or type cognizable on a motion to correct an illegal sentence. Procedural errors in finalizing verdicts do not always cause the sentences corresponding to those verdicts to be illegal. *Brightwell v. State*, 223 Md. App. 481, 489 (2015) ("Sentences corresponding to verdicts of conviction that were not properly finalized have been, under certain circumstances, held to be illegal."). The alleged error of which Turner complains is not "a substantive error in the sentence itself," which is subject to correction at any time under Rule 4-345(a), but merely "a procedural error," "subject to ordinary review and procedural limitations." *Bryant v. State*, 436 Md. 653, 663 (2014). Accordingly, I would not reach the merits of Turner's case and would instead, dismiss his appeal.

Of course, there is a chicken-and-the-egg quality to my analysis. If I thought for one minute that Turner was convicted by a non-unanimous jury, that defect would, in my judgment, render his conviction illegal and, therefore, his claim would clearly be cognizable under Rule 4-345(a). It is only because of my view as to the merits that I would decline to reach the merits. Nevertheless, I think that it is important to reject Turner's claim on the basis

of the rule, rather than conclusively reaching the merits, lest the scope of the rule be allowed inadvertently to grow larger until every manner and type of claim that can be framed as involving the possibility of illegality is entitled to yet another bite of the appellate review apple. Therefore, I dissent.