

UNREPORTED  
IN THE COURT OF SPECIAL APPEALS  
OF MARYLAND

No. 1445

September Term, 2014

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DON HANNA, JR.

v.

STATE OF MARYLAND

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Wright,  
Arthur,  
Raker, Irma S.  
(Retired, Specially Assigned),

JJ.

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Opinion by Raker, J.

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Filed: December 29, 2015

\*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.

Don Hanna, Jr., appellant, asks this Court to vacate his conviction and sentence for first degree felony murder and second degree felony murder because the Circuit Court for Somerset County granted his motions for judgment of acquittal to every underlying felony charged in the indictment. His argument is based upon the Fifth Amendment to the United States Constitution and Maryland common law protections against double jeopardy.

We shall hold that appellant's protection against twice being put in jeopardy was not violated, and shall affirm.

#### I.

Appellant was indicted by the Grand Jury for Somerset County in an eleven count indictment, charging murder of Adrian Marshall and attempted second degree murder and first degree assault of Rashana Taylor. Count 1, first degree murder; count 2, conspiracy to commit first degree murder; count 3, second degree murder; count 4, conspiracy to commit murder; count 5, robbery; count 6, robbery with a dangerous and deadly weapon; count 7, conspiracy to commit robbery with a dangerous weapon; count 8, conspiracy to commit robbery; count 9, use of a firearm in a felony or crime of violence; count 10, first degree assault; count 11, attempted second degree murder; and count 12, assault in the first degree. Appellant proceeded to trial before a jury in May 2014. The trial court granted appellant's motion for judgment of acquittal as to counts 2, 4, 5, 6, 9, 10, 11 and 12. The jury returned guilty verdicts on counts 1, 3, 7 and 8. The court imposed a sentence of life imprisonment on count 1, first degree murder, merged second degree murder, a term of imprisonment of

fifteen years for conspiracy to commit robbery with a dangerous weapon, count 7, to be served concurrently, and merged count 8, conspiracy to commit robbery.

The charges arose out of an event that occurred on November 28, 2013, about 12:55 a.m., at the home of Adrian Marshall, located at 11297 Greenwood School Road, Princess Anne. Adrian Marshall was fatally shot in the neck when he went into his backyard to feed his dog. His fiancée Rashana Taylor and her young daughter were at the home at the time.

Several people appear to have been involved in this murder: Brandon Early, the shooter, Raekwon Lee, the individual who went to victim’s front door, Cory Hamilton, driver of one of the cars to victim’s house, and appellant Don Hanna, who allegedly told the group the victim had a lot of money and who rode to victim’s house with Cory Hamilton. The four men were to share the proceeds of the robbery.

At the end of the State’s case, the court granted appellant’s motion as to count 5, robbery. The following colloquy took place:

“DEFENSE COUNSEL: Count five, Your Honor, he is charged with did unlawfully and feloniously rob Adrian Marshall of drugs and money. There has been no testimony that anything was taken?”

THE COURT: I don’t think so either.

DEFENSE COUNSEL: In fact the testimony is that there wasn’t anything taken.

THE COURT: Is there testimony?

PROSECUTOR: Your Honor, by the Statute it says rob or attempt to rob.

THE COURT: Well do you have a separate count for attempted robbery?

PROSECUTOR: Yes, Your Honor. I think there is a separate count. The statute covers both, Your Honor.

THE COURT: Well, we're not going to go to the jury with both. We're going with one or the other.

PROSECUTOR: Yes, Your Honor.

THE COURT: So the conspiracy—okay.

DEFENSE COUNSEL: Your Honor, the fifth count says did unlawfully and feloniously rob Adrian Marshall of drugs and money. Now, the sixth count did feloniously rob or attempt to rob.

THE COURT: Okay. All right. So I'm going to grant it as to count five and deny it as to count six.

DEFENSE COUNSEL: Yes, Your Honor.

THE COURT: If you're making it as to count six.

DEFENSE COUNSEL: Yes, Your Honor. . . .”

The following morning, defense counsel revisited his motion for judgment of acquittal as to count six. Following a chambers conference, defense counsel argued in open court: “We would submit nothing was taken and you cannot charge him in the disjunctive. You cannot charge did this or that.” The court granted the motion for judgment of acquittal as to count six, stating as follows:

“Okay. Well, I’ll grant the motion. And that count will be directed for your Defendant. So we’re left with first degree murder, second degree murder, conspiracy to commit armed robbery and conspiracy to commit robbery.”

The defense presented no evidence, and moved for judgment of acquittal on counts 1 and 3, first degree felony murder and second degree common law felony murder. He argued as follows:

“Your Honor, just to be brief my Client has been found not guilty of both robbery and armed robbery. The only two charges aside from felony murder left in the indictment before the Court are conspiracy to commit armed robbery and conspiracy to commit robbery. Both of those are misdemeanors. As my client has been acquitted of the underling felonies of both robbery and armed robbery I would submit that he is entitled to judgment of acquittal on the charge of felony murder both first and second degree because there is no felony he was participating in.”

The court denied the motion and submitted the case to the jury.

On the murder count, the court instructed the jury only as to first degree and second degree felony murder, not premeditated first degree murder. The court instructed the jury as follows:

“The Defendant is charged with the crime of first degree felony murder. In order to convict the Defendant of first degree felony murder the State must prove, one, that another participating in the crime with the Defendant committed or attempted to commit a felony; two, that another participating in the crime killed Adrian Marshall; three, that the act resulting in the death of Adrian Marshall occurred during the commission or attempted commission of an armed robbery or robbery. Felony murder

does not require the State to prove that the Defendant intended to kill Adrian Marshall.”

The jury returned guilty verdicts, the court imposed sentence, and this appeal followed.

## II.

Before this Court, appellant argues that both the convictions for first degree felony murder and second degree murder must be vacated. As to the first degree felony murder, appellant argues that the conviction must be vacated because the trial court granted defense counsel’s motion for judgment of acquittal as to every underlying felony, and thus, the conviction is barred on federal double jeopardy grounds and Maryland common law double jeopardy grounds.<sup>1</sup> As to the second degree murder conviction, appellant presents several arguments. He argues that the conviction must be vacated because, like the first degree conviction, the court granted defense counsel’s motions for judgment of acquittal as to every underlying felony, and second degree felony murder with robbery as an underlying felony is not a cognizable crime in Maryland. Additionally, the jury basis for the conviction is unclear as to whether it was for second degree murder, depraved heart or intentional variety on the one hand, and second degree felony murder on the other hand. Therefore, because the

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<sup>1</sup>The Double Jeopardy Clause of the Fifth Amendment to the U.S. Constitution is applicable to the states through the Fourteenth Amendment. *Benton v. Maryland*, 395 U.S. 784 (1969). The Maryland Constitution does not contain a comparable prohibition. Rather, a prohibition against double jeopardy is part of Maryland common law. *Pugh v. State*, 271 Md. 701, 704 (1974).

felony murder violates double jeopardy principles, and it is unclear upon which modality of murder the jury returned the jury verdict, the judgment of conviction should be vacated. Responding to the State’s lack of preservation argument, appellant maintains that as to the first degree conviction, the double jeopardy argument was presented to the trial court, although not using the exact words *double jeopardy*. Appellant makes the same argument as to the second degree conviction, and in the alternative, urges us to exercise our discretion and to consider the issue as plain error.

The State presents first a preservation argument, stating that this Court should not consider appellant’s double jeopardy argument because he did not present that argument below and therefore, it is waived. The State argues that had appellant articulated before the trial court his double jeopardy argument, the trial court likely would have submitted a particularized jury verdict sheet as to second degree murder. On the merits, the State argues that double jeopardy principles do not apply here because the circuit court granted appellant’s motion for judgment of acquittal on count six, robbery, on a ground unrelated to the sufficiency of the evidence. The State maintains that the court granted the motion based on a procedural defect in the indictment, *i.e.*, that the indictment erroneously<sup>2</sup> charged appellant with robbing or attempting to rob the victim, and hence, double jeopardy is not implicated.

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<sup>2</sup>We take no position as to whether the trial court’s ruling on the motion to dismiss was correct legally or not. It matters not to the issues presented in this appeal.

### III.

We address first the State’s argument that the issues appellant presents in this appeal were not preserved for our review. We make short shrift of that argument—we hold the issues were preserved. Appellant made clear to the trial court he was arguing jeopardy, *albeit* he did not use the magic words “double jeopardy.”

The Fifth Amendment to the United States Constitution, and Maryland common law, protect a person from being placed in jeopardy twice for the same offense. The underlying purpose of the protection is to prevent the state from repeatedly attempting to convict a person for the same crime. Considering appellant’s argument, we must examine whether the trial court’s grant of judgment of acquittal constituted an acquittal for the purposes of double jeopardy.

Appellant relies upon *Wright v. State*, 307 Md. 552 (1984), to support his argument that a judgment of acquittal on the underlying felonies precludes submission to the jury of the charge of first degree felony murder. There, the trial court granted the defendant’s motion for judgment of acquittal on the charge of attempted armed robbery. The Court of Appeals held that the Fifth Amendment to the United States Constitution and Maryland common law principles precluded the felony murder conviction.

In *United States v. Martin Linen Supply Co.*, 430 U.S. 564 (1977), the United States Supreme Court addressed the standard for determining what constitutes an acquittal for the purposes of double jeopardy. The trial court had entered a verdict of acquittal pursuant to



Rule 29(c)) of the Federal Rules of Criminal Procedure. The jury was unable to reach a unanimous verdict and the court discharged the jury. The Court held that “what constitutes an ‘acquittal’ is not to be controlled by the form of the judge’s action.” *Id.* at 571. Rather, an acquittal for the purposes of double jeopardy is defined as a “ruling of the judge, whatever its label, [that] actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged.” *Id.* Because the trial court had evaluated all of the Government’s evidence and determined that it was insufficient to sustain a conviction, the court’s ruling constituted an acquittal for the purposes of double jeopardy. *Id.* at 572. The Court made clear that an acquittal, which was a resolution of the elements of the charged offense, was a bar to a retrial, even if the ruling was based upon “an egregiously erroneous foundation.” *Id.* at 571. In sum, to determine whether an acquittal occurred for double-jeopardy analysis, we must “determine whether the ruling of the judge, whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged.” *Id.* The salient point is whether the judge evaluated the evidence and decided that it was legally insufficient to sustain a conviction. *Smith v. Massachusetts*, 543 U.S. 462, 469 (2005).

The State relies upon *Kendall v. State*, 429 Md. 476 (2012), and *Jackson v. State*, 92 Md. App. 304 (1992), as support for its argument that the circuit court’s ruling granting appellant’s motion for judgment of acquittal on count six was not an “acquittal” because,

notwithstanding the characterization of the motion, the court did not grant the motion “on the ground that the evidence was insufficient in law to sustain a conviction.”<sup>3</sup>

In *Kendall*, the Court of Appeals considered a similar double jeopardy argument.<sup>4</sup> The District Court judge first denied the defense motion for judgment of acquittal on three charges. The court then terminated the prosecution of those charges for a purely procedural reason — noncompliance with the rule on service of process — that the court made clear was unrelated to guilt or innocence but recorded its action on the docket sheet as “NG”—*i.e.*, “not guilty”—a label that seemingly denoted a judgment of acquittal. If the District Court actually found the defendant not guilty, the Fifth Amendment to the United States Constitution and Maryland common law double jeopardy principles preclude further prosecution of the defendant on those charges. Writing for the Court, Judge Robert N. McDonald wrote: “That protection is triggered not only by a properly-labeled ‘acquittal’ but also by a ‘ruling of the judge, whatever its label, [that] actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged.’” *Id.* at 479. The Court said, quoting *United States v. Martin, supra*, at 571, that [t]he critical question is “whether the ruling of the judge,

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<sup>3</sup>Criminal Procedure Article, § 6-104. Motion for judgment of acquittal on ground of insufficient evidence, provides, in pertinent part, as follows:  
“(a) *Motion after State’s evidence.* — (1) At the close of the evidence for the State, a defendant may move for judgment of acquittal on one or more counts or on one or more degrees of a crime, on the ground that the evidence is insufficient in law to sustain a conviction as to the count or degree.”

<sup>4</sup>The parties in *Kendall* agreed that if double jeopardy principles applied, the State could not appeal the judge’s ruling dismissing the charges.

whatever its label, actually represents a resolution, correct or not, of some of all of the factual elements of the offense charged.” *Kendall* at 486. Finding that it could not be clearer that the termination of the prosecution of the three charges was based on a purely procedural ground having nothing to do with defendant’s guilt or innocence, and no resolution of any factual element of the crime charged, the protection against double jeopardy was not triggered by the court’s ruling.

In *Jackson v. State*, 92 Md. App. 304 (1992), this Court addressed motions for judgment of acquittal based on the statute of limitations. The trial court had granted the motion on a particular count, and then changed its mind, concluding that it had granted the motion based on a mistaken understanding of the applicable statute of limitations. On appeal, appellant argued that the trial court violated the prohibition against double jeopardy by changing its ruling on the “motion for judgment of acquittal” made at the close of the State’s case. The court held that double jeopardy principles were not triggered by the trial judge granting the motion for judgment of acquittal, which was, in reality, the grant of a motion to dismiss. The court noted that “the trial judge explicitly stated that there was no doubt, in his mind, that the evidence was sufficient to convict under count ten,” and that the inclusion of count ten within the misdemeanor category and thus subject to the one year statute of limitations was in the nature of a “slip of the tongue.” *Id.* at 314.

Appellant maintains that *Wright* is legally indistinguishable from the instant case. He is wrong. He omits the key distinction between the two cases—that in *Wright*, the trial court,

in granting the motion for judgment of acquittal, actually ruled on the sufficiency of the evidence. The trial judge stated as follows:

“I agree with defense counsel *that there is not sufficient evidence to require the Defendants to put on a defense with respect to the charges of attempted armed robbery and subordinate counts, nor the charge of conspiracy to commit armed robbery except for the Defendant Coley. I just cannot accept the State’s position that there is that sufficient evidence, that reasonable inferences could be drawn.* I think it will allow the jury to speculate far too much. These are criminal charges and there must be a much more exacting demand upon the State in criminal charges . . . .”

*Wright*, 307 Md. at 556.

Appellant responds to *Kendall* and *Jackson* by arguing that in both of those cases, the trial judge’s acquittal was unambiguous and explicitly based upon a reason other than the sufficiency of the evidence. Here, appellant argues, the trial court gave two reasons for granting the motion—that nothing was taken and that the charge improperly contained two alternative crimes, robbery and attempted robbery. Therefore, when the ruling is not clear and unambiguous, any doubt must be resolved in appellant’s favor, and the bar of double jeopardy or *autrefois acquit* applies.

We hold that when a trial court grants a defendant’s motion for a judgment of acquittal on any basis that did not resolve any factual element of the charged offense, including a basis that was an erroneous interpretation of the law, the trial court’s ruling does not constitute an acquittal for the purposes of double jeopardy. The trial judge’s ruling must

be examined in context and considered in the totality of the circumstances. After viewing the entire record, and the judge’s ruling on day one and then on day two, it is clear that the trial judge did not grant the judgment of acquittal on count six on the sufficiency of the evidence or on failure of proof of any element of the offense. The count included a charge of robbery and attempted robbery. Nothing was taken in the criminal event and hence the court granted the motion as to count five, robbery. The next day, upon defense counsel’s renewal of his motion as to count six, and the duplicitous argument (one which according to the Maryland rules should have been made pre-trial), the court granted the motion. Accordingly, because the trial court’s ruling did not resolve any factual element of the armed robbery charge or attempted robbery, that ruling did not constitute an acquittal for the purposes of double jeopardy.

**JUDGMENTS OF CONVICTIONS OF  
THE CIRCUIT COURT FOR  
SOMERSET COUNTY, AFFIRMED.  
COSTS TO BE PAID BY  
APPELLANT.**