UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1916

September Term, 2014

JOHN WESLEY LEE

v.

STATE OF MARYLAND

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*Zarnoch,
Leahy,
Rodowsky, Lawrence F.
(Retired, Specially Assigned),

JJ.

Opinion by Leahy, J.

Filed: October 9, 2015

*Zarnoch, Robert A., J., participated in the 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.

**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.

While an inmate at a Maryland correctional facility, appellant John Wesley Lee was charged with willful and pre-meditated murder and other offenses after a fellow inmate was stabbed to death. On January 16, 1998, at the conclusion of his trial in the Circuit Court for Baltimore City, a jury found him guilty of murder (count 1), wearing and carrying a deadly weapon (count 2), and wearing and carrying a deadly weapon with the intent to injure (count 3). Lee was acquitted of conspiracy to commit murder. The circuit court later sentenced Lee to life imprisonment for murder, to run consecutive to the sentences he was then serving.[1] (The remaining offenses merged with murder for sentencing purposes.) Lee appealed and this Court, in an unreported decision, affirmed. *John W. Lee v. State of Maryland*, No. 774, September Term, 1998 (filed April 27, 1999). The Court of Appeals denied Lee's petition for writ of certiorari, *John Wesley Lee, Jr. v. State,* 355 Md. 613 (1999), and Lee's subsequent petitions for post-conviction relief were unsuccessful.

In 2012, Lee 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 the murder conviction was a nullity and consequently, that his sentence was illegal because, when announcing their verdict, the jury stated that it found him guilty of "murder" without specifying whether it was murder in the first or second degree. The circuit court denied the motion and from that ruling, Lee appealed. For the reasons set forth below, we affirm.

[1] An investigative report in the record before us indicates that, at the time of this incident, Lee was "serving 50 years for armed robbery, handgun violation, and attempted murder."

BACKGROUND

A three-count Indictment (197125005) filed in 1997 charged that Lee and a co-defendant, Alexander Bryd, on August 14, 1993, in the weight room of the Maryland State Penitentiary on Forest Street in Baltimore City, "feloniously, wilfully and of deliberately premeditated malice aforethought did kill and murder one Johnny White" (count 1); "unlawfully did wear and carry concealed upon and about their person(s), a certain dangerous and deadly weapon to wit: a knife" (count 2); and "unlawfully did wear and carry openly with the intent and purpose of injuring [Johnny White], a certain dangerous and deadly weapon to wit: a knife" (count 3). In a separate Indictment (197125007), Lee was charged with conspiring with Bryd to "feloniously, wilfully and of deliberately premeditated malice aforethought" kill Johnny White.

Lee and Bryd were tried jointly before a jury. The record before us does not include the trial transcripts, other than the jury's announcement of their verdict, but it does include a "Verdict Sheet" with respect to Lee, which was completed as follows:

<u>VERDICT SHEET</u>

197125005 **Count I** **Did commit murder, in the first degree (willful, deliberate, premeditated, no mitigation, no justification, no excuse) as to Johnny White on or about August 14, 1993.**

Not Guilty ________ Guilty ___√___

Count II Unlawfully did wear and carry concealed upon and about his person, a certain dangerous and

deadly weapon to wit a knife on or about his person on or about August 14, 1993.

Not Guilty ________ Guilty ___√___

Count III Unlawfully did wear and carry openly with the intent and purpose of injuring Johnny White, a certain dangerous and deadly weapon to wit a knife on or about August 14, 1993.

Not Guilty ________ Guilty ___√___

197125007 Count I Unlawfully did conspire with Alexander Bryd and others unknown to feloniously, wilfully and of deliberately premeditated malice aforethought to kill and murder Johnny White on or about August 14, 1993.

Not Guilty ___√_____ Guilty ______

(Emphasis added.)

When the jury returned to the courtroom, their verdict was announced as follows:

CLERK: Members of the Jury, have you agreed upon a verdict?

JURY: We have.

CLERK: And will the foreperson say for you?

JURY: Yes.

CLERK: Mr. Foreman, would you stand up please. As to the State of Maryland v. Alexander Bryd, case Number 197125004 - count 1, charging the defendant with murder, your verdict please?

FOREMAN: Not guilty.

CLERK: And as to 197125006 – count 1, charging the defendant with conspiracy to commit murder, your verdict?

FOREMAN: Not guilty.

CLERK: **As to the case of John Wesley Lee, 197125005 – count 1, Charging the defendant with murder, your verdict?**

FOREMAN: **Guilty.**

CLERK: As to count 2, wear and carry a deadly weapon?

FOREMAN: Guilty.

CLERK: As to count 3, wear and carry a deadly weapon with intent to injure?

FOREMAN: Guilty.

CLERK: And as to 197125007, count 1, charging the defendant to commit conspiracy to commit murder, your verdict?

FOREMAN: Not guilty.

(Emphasis added.)

The transcript reflects that the defense then requested that the jury be polled, but the polling was not transcribed. Rather, the transcript simply states: "CLERK poles [sic] the Jury and they affirm."

Following the polling, the clerk hearkened the verdict:

CLERK: Harken to the verdict, as the court has recorded it, as in the case of Alexander Bryd, Case Number 197125004 count 1, your verdict is, "Not guilty." And as to case number 197125006 count 1, your verdict is, "Not guilty." **As to John Wesley Lee, indictment number 197125005 count 1, your verdict is, "Guilty."** Count 2, your verdict is, "Guilty." Count 3, your verdict is, "Guilty." And as to 197125007 count 1, your verdict is, "Not guilty." And so say you all?

JURY: Yes.

(Emphasis added.)

Five days later, Lee filed a motion for a new trial stating that, "[t]he Defendant was convicted of the first degree murder of Johnny White," and charging, *inter alia,* that the verdict was contrary to the evidence. That motion was denied, and in the appeal that followed, Lee challenged various rulings made by the trial court, but not the announcement of the jury's verdict. As noted, this Court affirmed the judgment and Lee's subsequent petitions for post-conviction relief were denied.

It appears that Lee challenged the announcement of the murder verdict, for the first time in 2012 in the underlying motion to correct an illegal sentence. In the motion, Lee pointed out that, when pronouncing a guilty verdict for murder, the jury must specify whether the defendant is guilty of murder in the first or second degree, *see* Md. Code, Criminal Law, §2-302 (2012 Repl. Vol.), and the jury failed to do so in his case. He, therefore, asserted that the murder verdict was "void" and hence his sentence was "illegal because the sentence should not have been imposed."

In ruling on Lee's motion, the circuit court made the following factual findings:

> During the announcement of the verdict, the degree of murder for which the Defendant was convicted is not stated, but the Defendant was not charged with second-degree murder. Several other areas of the [trial] transcript demonstrate that everyone in the courtroom understood the Defendant was charged with first-degree murder. During opening statements, the prosecutor told the jury to find the Defendant "[g]uilty of murder in the first degree of Johnny White." *Transcript*, 1/8/1998, p. 168. The Court, prior to closing arguments, only instructed the jury on first degree murder. *Transcript*, 1/15/1998, pp. 42-44. The State argued during closing that "Mr. Lee is guilty of murder in the first degree . . ." *Transcript*, 1/15/1998, p. 67. Counsel for

> the Defendant mentioned during his closing that "[J]udge Prevas instructed you as to the elements of what constitutes a 1st degree murder . . ." *Transcript,* 1/15/1998, p. 70. The verdict sheet also specified that the Defendant was charged with murder in the first degree. The Defendant did not raise the issue of the reading of the verdict on direct appeal. Lee v. State, No. 774 (Md.App., May 28, 1999).[2]

The circuit court then found that, because the jury failed to indicate the degree of murder when announcing their verdict, "the reading of the verdict was defective." Nonetheless, the circuit court concluded that "any challenge to the propriety of trial proceedings" should have been raised in Lee's direct appeal and, because life imprisonment for first-degree murder was a permitted sentence, Lee was not entitled to relief.

DISCUSSION

Lee contends, as he did below, that the murder verdict was not properly announced and therefore it was a nullity and no sentence should have been imposed.

The State responds, first, that because Lee acknowledged in his direct appeal and in post-conviction proceedings that he was convicted of first-degree murder, he "should not now be heard to assert the contrary." Rule 4-345(a), however, allows the trial court to correct an illegal sentence "at any time" and the Court of Appeals has stated that "a motion to correct an illegal sentence under Rule 4-345(a) is not waived even if 'no objection was made when the sentence was imposed' or 'the defendant purported to consent to it.'"

[2] The trial transcripts are not in the record before us, but Lee does not dispute the factual findings made by the circuit court.

Johnson v. State, 427 Md. 356, 371 (2012) (quoting *Chaney v. State*, 397 Md. 460, 466 (2007)).

Second, the State maintains that, even if Lee's verdict is "ambiguous," his sentence is not illegal for purposes of Rule 4-345(a) because life imprisonment is a permitted sentence for first-degree murder. We disagree. If Lee's murder verdict was void, as he maintains, the legality of the sentence he received could be challenged in a motion to correct an illegal sentence pursuant to Rule 4-345(a). *Alston v. State,* 425 Md. 326, 339 (2012) ("Where the trial court imposes a sentence or other sanction upon a criminal defendant, and where no sentence or sanction should have been imposed, the criminal defendant is entitled to relief under Rule 4-345(a).").

Finally, the State asserts that the circuit court's factual findings provide "ample evidence that Lee was actually convicted of first degree murder." We agree with the State's last contention, which forms the basis of our holding that the murder conviction was not a nullity and therefore, is not illegal. First we examine the statute at issue.

In 1809, the General Assembly recognized that "the several offences which are included under the general denomination of murder, differ so greatly from each other in the degree of their atrociousness, that it is unjust to involve them in the same punishment[.]" *See* Laws of Maryland, 1809, Chapter 138, Section 3. Accordingly, the legislature enacted a statute dividing murder into first and second degree. *Id.* First-degree murder was defined as murder "perpetrated by means of poison, or by lying in wait, or by any kind of wilful,

deliberate and premeditated killing," or murder "committed in the perpetration of, or attempt to perpetrate, any arson, or to burn any barn [or certain other buildings], rape, sodomy, mayhem, robbery or burglary [.]" *Id.* "[A]ll other kind of murder" was "deemed murder of the second degree[.]" *Id.*[3] The Act also provided that the punishment for first-degree murder was "death, by hanging by the neck," while a conviction for second-degree murder was "confinement in the penitentiary . . . for a period not less than five years nor more than eighteen years[.]" *Id.* at Sec. 4. Notably, when Lee was tried in 1998, death was no longer the *mandatory* penalty for a first-degree murder conviction.[4]

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[3] The statute for first-degree murder is presently found in Crim. Law, § 2-201(a) of the Maryland Code, which provides:

> (a) *In general.* – A murder is in the first degree if it is: (1) a deliberate, premeditated, and willful killing; (2) committed by lying in wait; (3) committed by poison; or (4) committed in the perpetration of or an attempt to perpetrate : (i) arson in the first degree; (ii) burning a barn [or certain other buildings]; (iii) burglary in the first, second, or third degree; (iv) carjacking or armed carjacking; (v) escape in the first degree from a State correctional facility or a local correctional facility; (vi) kidnapping under § 3-502 or § 3-503(a)(2) [of the Criminal Law Article]; (vii) mayhem; (viii) rape; (ix) robbery under § 3-402 or § 3-403 [of the Criminal Law Article]; (x) sexual offense in the first or second degree; (xi) sodomy; or (xii) a violation of §4-503 [of the Criminal Law Article] concerning destructive devices.

Second-degree murder is presently codified as Crim. Law, § 2-204(a), which provides that "[a] murder that is not in the first degree under § 2-201 of this subtitle is murder in the second degree."

[4] Presently, upon conviction of first-degree murder, a person shall be sentenced to imprisonment for life without the possibility of parole or imprisonment for life. Crim. Law, § 2-201(b). When Lee was convicted in 1998, the penalty for first-degree murder could also be death, *see former Art. 27, § 412(b) of the Maryland Code,* but in 2013 the legislature (continued...)

Central to the issue presently before us, the 1809 law also provided that, "the jury before whom any person indicted for murder shall be tried, shall, if they find such person guilty thereof, ascertain in their verdict, whether it be murder in the first or second degree[.]" *Id.* at Sec. 3. By the time Lee was tried in 1998 , this provision had been slightly modified to read: "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." *See* Article 27, § 412(a) (1992 Repl. Vol.; 1997 Supp.).[5]

It appears that the Court of Appeals first construed this statutory provision in 1859 when it decided *Ford v. State*, 12 Md. 514. In that case, the defendant, William Ford, was indicted for murder and specifically charged with "the wilful murder" of another man "by shooting him with a pistol." *Id.* at 515. Following a jury trial, the foreman announced a verdict of guilty of murder in the first-degree, but upon polling each juror announced a verdict of "guilty of murder" without specifying the degree. *Id.* at 545-546. 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 was guilty of murder in the first or second degree and "the finding of the jury of only 'guilty' [was] insufficient."

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[4](...continued)
repealed the death penalty. A person who is convicted of second-degree murder is subject to imprisonment not exceeding thirty years. Crim. Law, § 2-204(b) (formerly Art. 27, § 412(c)).

[5] Presently codified as Crim. Law, § 2-302, the statute now reads: "When a court or jury finds a person guilty of murder, 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."

Id. at 543-544. Thus, the Court of Appeals reversed the judgment and ordered a new trial. *Id.* at 549.

Similarly, in *Williams v. State*, 60 Md. 402 (1883), the foreman announced the jury's verdict as guilty of murder in the first degree. *Id.* at 403-404. But upon polling, when the individual jurors were asked to state their verdict, each, in turn, responded "guilty" without specifying the degree of murder. *Id.* In reversing the judgment, the Court of Appeals noted that, "murder in the first degree is punishable by death, and murder in the second degree, by confinement in the penitentiary." *Id.* "The Code, therefore, provides that on an indictment for murder, the jury shall, if they find the person 'guilty,' ascertain in their verdict whether it be murder in the *first or second* degree." *Id.* (Emphasis in the original). The Court then held that the failure of each individual juror, when polled, to "say for himself, whether he found the prisoner guilty of murder in the first or second degree" rendered the murder verdict a "nullity." *Id.*

In *Strong v. State*, 261 Md. 371 (1971) (death sentence later vacated in *Strong v. Maryland*, 408 U.S. 939 (1972)), the forelady announced the verdict as: "Guilty. Guilty of first degree murder, the first degree." *Id.* at 373. The clerk then polled the jury, asking each juror the identical question: "Juror No. ___, you have heard the verdict as given by your Forelady. Is your verdict the same?" *Id.* Each juror, in turn, answered: "Yes" or "Yes it is." *Id.* Thereafter, the clerk intoned: "Hearken to the verdict as the Court has recorded it. You say Cornelius Thomas Strong is guilty of murder in the first degree as to Indictment 3029 of

the Docket of 1969, and so say you all?" *Id.* at 373-374. The jury responded: "yes." *Id.* at 374.

On appeal, Strong, relying on *Ford* and *Williams* argued that the murder verdict was defective. *Id.* The Court of Appeals disagreed, stating:

> In the present case [as distinguished from *Ford* and *Williams*] it is clear to us that the requirements of the law were met. The forelady said explicitly, with repetition, that the accused had committed first degree murder and, when each juror was asked individually whether his verdict was the same as that of the forelady, he replied in the affirmative. This was the equivalent of each juror saying: "I find the accused guilty of murder in the first degree" and we are entirely persuaded that each juror knowingly and intentionally so stated when he answered "yes" or "yes, it is" to the clerk's standard question.

Id. at 374.

We turn now to the verdict announced in Lee's case. Upon the clerk's inquiry, the foreman announced the verdict as follows:

> CLERK: As to the case of John Wesley Lee, **197125005 – count 1, Charging the defendant with murder, your verdict?**
>
> FOREMAN: Guilty.

(Emphasis added.)

The clerk and the foreman referred to "Count 1" but failed to mentioned the degree of murder. "Count 1" of indictment 197125005 charged Lee "feloniously, wilfully and of deliberately premeditated malice aforethought did kill and murder one Johnny White." Although this language clearly describes murder in the first degree, under this count as charged, the jury could have convicted Lee of the lesser offenses of second degree murder

and manslaughter instead. But, at trial the State only advocated for a first-degree murder conviction. Moreover, the jury was instructed on first-degree murder, but not instructed on second-degree murder or on manslaughter. And the verdict sheet, which has been described as a "tool used to aid the jury in reaching its verdict," *Ogundipe v. State*, 424 Md. 58, 72-73 (2011), asked the jury to determine whether Lee was "not guilty" or "guilty" of "count 1" under indictment "197125005," specifically, "Did commit murder, in the first degree (willful, deliberate, premeditated, no mitigation, no justification, no excuse) as to Johnny White on or about August 14, 1993." As the verdict sheet clearly demonstrates, the jury was not asked to render a verdict for second-degree murder or for manslaughter. Thus, when the clerk asked for the jury's verdict on indictment "197125005 - count 1, charging the defendant with murder," it was understood by all that the charge and the verdict was in regard to murder *in the first degree*.

After the foreman announced the verdict, the jury was polled. But Lee has not provided us with a transcript of the polling and, therefore, we do not know if the phrase "murder in the first degree" was used in the polling process. *See* Md. Rule 8-411 (it is the appellant's responsibility to ensure that a transcript of proceedings "relevant to the appeal" is prepared and filed with this Court).

After the polling, the clerk hearkened the verdict:

> CLERK: Harken to the verdict, as the court has recorded it, as in the case of Alexander Bryd, Case Number 197125004 count 1, your verdict is, "Not guilty." And as to case number 197125006 count 1, your verdict is, "Not guilty." **As to John Wesley Lee, indictment number 197125005 count 1, your verdict is "Guilty."** Count 2, your verdict

> is, "Guilty." Count 3, your verdict is, "Guilty." And as to 197125007 count 1, your verdict is, "Not guilty." And so say you all?

JURY: Yes.

(Emphasis added.)

In hearkening the verdict, the clerk again referred to "count 1" in "indictment number 197125005," the first-degree murder charge and the *only* murder charge on the verdict sheet. Notably, the defense did not object to the verdict or request any clarification – a clear indication that all involved understood that the jury had convicted Lee of first-degree murder, the only homicide charge the State had pursued. Moreover, in Lee's motion for a new trial filed five days later, he stated that the "Defendant was convicted of the first degree murder of Johnny White[.]" Under these circumstances, we hold that the jury's murder verdict was valid. Lee's sentence to life imprisonment, therefore, was legal and the circuit court did not err in denying his motion to correct it.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS TO BE PAID BY APPELLANT.