UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2514

September Term, 2013

FREDDIE EDWARDS

v.

STATE OF MARYLAND

Berger,
Nazarian,
Raker, Irma S.
(Retired, Specially Assigned),

JJ.

Opinion by Raker, J.

Filed: May 4, 2015

Freddie Edwards, appellant, was convicted in January 2000, in the Circuit Court for Baltimore City of first degree felony murder, second degree murder and robbery. In proper person, he appeals from the circuit court's denial of his motion to correct an alleged illegal sentence. Appellant presents the following questions for our review:

> Was appellant subjected to double jeopardy when he was indicted for first degree premeditated murder but subsequently convicted of second degree murder and first degree felony murder?
>
> Was the indictment constructively amended or subject to a 'variance' without appellant's knowledge and consent?
>
> Was appellant subjected to double jeopardy when he was acquitted of the charged offense of first degree premeditated murder and then convicted of the uncharged offense of first degree felony murder from a single count indictment in a single proceeding?

We shall answer each question in the negative and affirm.

I.

Appellant was indicted by the Grand Jury for Baltimore City with the offenses of murder, robbery, the use of a handgun in the commission of a crime of violence and the unlawful possession of a handgun. On January 13, 2000, he was convicted of first degree felony murder, second degree murder and robbery.[1] The court merged the convictions and

[1]The State *nolle prossed* the use of a handgun in the commission of a crime of violence and the unlawful possession of a handgun charges.

sentenced him to life imprisonment. On direct appeal, this Court affirmed. *Edwards v. State*, No. 134, Sept. Term 2000 (filed July 5, 2002), *cert. denied*, *Edwards v. State*, 371 Md. 614 (2002). In 2008-09, appellant filed a petition and supplemental petition for post-conviction relief, which the circuit court denied. On October 25, 2013, appellant filed a motion to correct an illegal sentence, which the circuit court denied. Appellant appeals from the October 2013 denial of his motion to correct an illegal sentence.

The facts underlying appellant's contentions are as follows. In August 1998, appellant completed a drug treatment program and moved into the home of Deborah Compton and her two sons, Brian and Terrance. Appellant relapsed. Between Friday, January 8, 1999 and the morning of Saturday, January 9, appellant spent his paycheck on crack cocaine. When he came home high on drugs at 10:00 a.m. on Saturday, Ms. Compton became upset and asked him to leave the home. He pleaded with her to allow him to stay, but she insisted that he leave. She reached for the telephone to make a call, and appellant grabbed her by the nose and the mouth "to try to get her to calm down and listen to what he wanted to say to her, but she wouldn't." During the struggle, Ms. Compton lost consciousness and stopped moving. Appellant wrapped tape around her mouth, tied her hands and feet and placed her in the laundry room. He then took all the money from Ms. Compton's wallet, searched her dresser drawers for money and left.

After spending all of the money, appellant returned to the house for the television and VCR. After exchanging both items for crack cocaine, he returned to the house a third time. At that point, Ms. Compton was not breathing. He took her car and began "hacking," *i.e.* running an unlicensed taxi. He testified that "I would get a fare and buy my drugs." Appellant was arrested on January 11, 1999.

Appellant was indicted by the Grand Jury for Baltimore City for murder and related crimes. The first count of the indictment read as follows:

> "The Jurors of the State of Maryland, for the body of the City of Baltimore, do on their oath present that the aforesaid DEFENDANT(S), late of said City, heretofore on or about the date(s) of the offense set forth above, at the location set forth above, in the City of Baltimore, State of Maryland, feloniously, willfully and of deliberately premeditated malice aforethought did kill and murder one Deborah Compton; contrary to the form of the Act of Assembly, in such case made and provided, and against the peace, government and dignity of the State.
> (Art 27, Sec. 616; 407-413; Common Law)"[2]

[2]Article 27 — Crimes and Punishments was repealed and reenacted as the Criminal Law Article of the Annotated Code of Maryland by 2002 Md. Laws Ch. 26 (H.B. 11). Section 2-208 of the Criminal Law Article of the Annotated Code of Maryland was derived without substantive change from Article 27, § 616, the provision cited in the indictment. The current provision, § 2-208 of the Criminal Law Article, provides as follows:

> "(a) An indictment for murder or manslaughter is sufficient if it substantially states:
>
> > '(name of defendant) on (date) in (county) feloniously (willfully and with deliberately premeditated malice) killed (and murdered) (name of victim) against the peace, government, and dignity of the State.'"

The jury convicted appellant of first degree felony murder, second degree murder and robbery. We affirmed appellant's convictions on direct appeal and the circuit court denied his petition for post-conviction relief.

On October 25, 2013, in proper person, in the Circuit Court for Baltimore City, appellant filed a motion (pursuant to Rule 4-345) to correct an illegal sentence. He argued that the indictment was insufficient to put him on notice that he was charged with either felony murder or second degree murder. He contended that first degree felony murder is distinct from first degree premeditated murder in that the latter requires a specific *mens rea*, while the former does not. He averred that, because the crimes are different and only one crime may be charged in a single count, he was indicted only for first degree premeditated murder. He alleged that he was never indicted for second degree murder or first degree felony murder. Second, appellant argued that the trial court erred in permitting the jury to consider felony murder and second degree murder in that the indictment charged only first degree premeditated murder. He maintained that in doing so, the court constructively amended the indictment, an amendment which did not conform to the Maryland Rules. Finally, appellant argued that he was subjected to double jeopardy when he was acquitted of first degree premeditated murder, but convicted of first degree felony murder and second degree murder.

The court denied appellant's motion to correct an illegal sentence. This timely appeal followed.

II.

Appellant's arguments before this Court mirror his arguments below. First, he argues that the indictment was insufficient because it charged him with first degree premeditated murder only, while he was convicted of first degree felony murder and second degree murder. Second, he contends that his convictions for first degree felony murder and second degree murder amounted to an impermissible constructive amendment of the indictment. Finally, appellant claims that he was subjected to double jeopardy when he was acquitted of first degree murder but convicted of first degree felony murder and second degree murder.

The State argues that appellant mischaracterizes his indictment. Appellant was not indicted with first degree murder only. Rather, appellant was indicted in accordance with the statutory short form indictment, which, according to the State, may be used to charge first degree premeditated murder, first degree felony murder, second degree murder and manslaughter and may charge multiple forms of homicide simultaneously in a single count. Appellant's indictment therefore referred to several modalities of murder and was never

amended. The statutory short form includes first degree felony murder and second degree murder.[3]

III.

The court may correct an illegal sentence at any time. Rule 4-345(a). A motion to correct an illegal sentence may be raised at any time, even if no objection was made at the time the sentence was imposed, the issue was not raised on a timely-filed direct appeal or the defendant purported to consent. *Matthews v. State*, 424 Md. 503, 513 (2012). Illegal sentences include sentences that violate the double-jeopardy clause of the Fifth Amendment of the United States Constitution. *State v. Griffiths*, 338 Md. 485, 496-97 (1995). Whether the double jeopardy clause has been violated is a question of law, which we review *de novo*. *Pair v. State*, 202 Md. App. 617, 625 (2011).

We turn first to appellant's argument that the indictment was insufficient to charge felony murder or second degree murder. At the time appellant was indicted, § 616 of Article 27 of the Annotated Code of Maryland[4] provided as follows:

[3]Currently, the statutory short form indictment for murder is codified in § 2-208 of the Criminal Law Article of the Annotated Code of Maryland. At the time that appellant was indicted, however, § 616 of former Article 27 governed the statutory short form indictment.

[4]Unless otherwise indicated, all subsequent references herein to the Maryland Code (1957, 1996 Repl. Vol.) shall be to Article 27.

> "In any indictment for murder or manslaughter, or for being an accessory thereto, it shall not be necessary to set forth the manner or means of death. It shall be sufficient to use a formula substantially to the following effect: 'That A.B., on the . . . day of . . . nineteen hundred and . . ., at the county aforesaid, feloniously (wilfully and of deliberately premeditated malice aforethought) did kill (and murder) C.D. against the peace, government and dignity of the State'."

This statute has existed in substantially the same form for nearly a century. *See Dishman v. State*, 352 Md. 279, 286 (1998). The Court of Appeals has described the impact of the statutory short form indictment as follows:

> "It is well settled that under an indictment pursuant to the statutory formula, *even though it spells out murder in the first degree*, the accused may be convicted of murder in the first degree, of murder in the second degree, or of manslaughter."

Id. at 289 (emphasis in original). Likewise, although the statutory short form uses words like "wilfully" and "of deliberately premeditated malice," it has long been established that it charges felony murder as well. *See e.g.*, *Ross v. State*, 308 Md. 337, 346-47 (1987) (stating that where accused was aware he was charged with murder in the first degree, accused was not misled or deprived of constitutional right to fair notice). The Court of Appeals has rejected constitutional challenges to the use of the statutory short form indictment to charge felony murder. *Id.* at 344-45. Because appellant's indictment conformed to the form in § 616, it was sufficient to charge appellant with first degree felony murder as well as the lesser included offense of second degree murder.

Appellant argues that the indictment was constructively amended[5] when the court instructed the jury on the offenses of felony murder and second degree murder. We hold that the indictment was not amended, either directly or constructively.

Appellant relies on Rule 4-204, which provides as follows:

> "**Rule 4-204. Charging document — Amendment.**
> On motion of a party or on its own initiative, the court at any time before verdict may permit a charging document to be amended except that if the amendment changes the character of the offense charged, the consent of the parties is required. If amendment of a charging document reasonably so requires, the court shall grant the defendant an extension of time or continuance."

The Rule is clear that an indictment may not be amended if it adds an offense or changes the character of the offense. Indictments may not be amended, constructively or otherwise, outside of the confines of the Rule. *Johnson v. State*, 427 Md. 356, 373-75 (2012).

In the case *sub judice*, the court did not amend the indictment. The statutory short form indictment included felony murder and second degree murder and hence, appellant was

[5] "A constructive amendment occurs when the charging terms of the indictment are altered, either literally or in effect, by prosecution or court after the grand jury has last passed upon them." *United States v. Pierre,* 484 F.3d 75, 81 (1st Cir. 2007) (quoting *United States v. Fisher*, 3 F.3d 456, 462 (1st Cir. 1993)) (internal quotation marks omitted). An indictment is constructively amended when the trial court's jury instructions amend an indictment by broadening the possible bases for conviction from that which appeared in the indictment. *See United States v. Lee*, 359 F.3d 194, 208 (3d Cir. 2004). A constructive amendment of an indictment deprives a defendant of the right to be tried only on the charges presented in an indictment returned by the grand jury. *United States v. Syme*, 276 F.3d 131, 148 (3d Cir. 2002).

not convicted of a crime different from that charged in the indictment. *Dishman* makes clear that the statutory short form indictment for murder includes first degree murder, second degree murder and manslaughter.

> "While some of these cases refer to second degree murder and manslaughter as lesser offenses of first degree murder, the language makes clear that an indictment under § 616 alleging first degree murder also *charges* second degree murder and manslaughter. . . .
>
> . . . Therefore, we conclude that Petitioner was charged not just with first degree, but also with second degree murder, manslaughter, and with being an accessory to murder."

Dishman, 352 Md. at 289-90 (emphasis in original).

Felony murder is not a separate and distinct crime from first degree premeditated murder—it is simply a different modality of a single crime.[6] First-degree murder may be committed in two ways: premeditated murder and felony murder. Premeditated murder and felony murder are simply alternate means of committing the same crime and are not separate and distinct crimes. *Wooten-Bey v. State*, 308 Md. 534, 539 (1987); *Huffington v. State*, 302

[6]Most jurisdictions that have considered this issue have held that premeditated murder and felony murder are not two separate crimes. *See, e.g., State v. Arnett*, 760 P.2d 1064, 1068 (Ariz. 1988) (premeditated murder and felony murder are merely two forms of the same crime: first degree murder); *State v. Powell*, 664 P.2d 1, 2-3 (Wash. 1983) (state legislature intended to specify alternative means of committing single offense); *State v. McCowan,* 602 P.2d 1363, 1370 (Kan.1979), cert. denied 449 U.S. 844 (1980) (first degree murder statute does not create two different offenses, merely two theories for proving same offense); *Gray v. State*, 463 P.2d 897, 911 (Alaska 1970) ("although there are several ways of committing first degree murder, it is still only one crime; and only one sentence can be imposed").

Md. 184, 188-89 (1985); *Newton v. State*, 280 Md. 260, 268 (1977); *Selby v. State*, 76 Md. App. 201, 209-10 (1988). The statutory short form indictment was sufficient to charge appellant of first degree premeditated murder, first degree felony murder and second degree murder. *See Dishman*, 352 Md. at 289; *Dykes v. State*, 319 Md. 206, 209 (1990); *Ross*, 308 Md. at 344.

Appellant's final contention is that his convictions for second degree murder and first degree felony murder, which occurred simultaneously with his acquittal of first degree premeditated murder, violated the double jeopardy clause.

The Fifth Amendment to the United States Constitution states that no person shall be "subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V.[7] The Supreme Court of the United States has described double jeopardy protections as follows:

> "The Double Jeopardy Clause protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense."

Brown v. Ohio, 432 U.S. 161, 165 (1977). Although the constitution may mandate that some crimes be merged for sentencing purposes, the double-jeopardy clause does not bar multiple

[7]The double jeopardy clause applies to the states through the Fourteenth Amendment of the United States Constitution. *State v. Long*, 405 Md. 527, 535-36 (2008). Maryland common law offers similar protections. *Id.*

convictions arising from the same indictment and at the same trial. *Missouri v. Hunter*, 459 U.S. 359, 365-66 (1983); *Brown*, 432 U.S. at 165.

Appellant's argument suffers from a similar flaw to that of the defendant in *Ohio v. Johnson*, 467 U.S. 493 (1984). In that case, Johnson was indicted with one count each of murder, involuntary manslaughter, aggravated robbery and grand theft. *Id.* at 495. In a single proceeding, he pled guilty to involuntary manslaughter and grand theft, but pled not guilty to the more serious offenses, robbery and murder. *Id.* The Supreme Court held that he could be tried for the aggravated robbery and murder charges without violating the Fifth Amendment to the United States Constitution. The Court stated as follows:

> "The grand jury returned a single indictment, and all four charges were embraced within a single prosecution. Respondent's argument is apparently based on the assumption that trial proceedings, like amoebae, are capable of being infinitely subdivided, so that a determination of guilt and punishment on one count of a multi-count indictment immediately raises a double jeopardy bar to continued prosecution on any remaining counts that are greater or lesser included offenses of the charge just concluded. We have never held that, and decline to hold it now."

Id. at 501.

Appellant was charged with multiple forms of murder in a single indictment and tried in a single trial. The jury rendered its verdicts contemporaneously, finding him not guilty of first degree premeditated murder and guilty of second degree murder and first degree felony

murder simultaneously. Appellant suggests that in the instant between when he was "acquitted" of first degree premeditated murder and he was convicted of first degree felony murder, double jeopardy attached. He is wrong.

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