Circuit Court for Wicomico County
Case No.: C-22-CR-19-000545

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 122

September Term, 2020

DEMETRIES FOUNTAIN

v.

STATE OF MARYLAND

Berger,
Arthur,
Woodward, Patrick L.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Berger, J.

Filed: April 2, 2021

Appellant, Demetries Fountain ("Fountain"), was convicted by a jury sitting in the Circuit Court for Wicomico County, of false imprisonment, two counts of conspiracy to commit false imprisonment, second degree assault, two counts of conspiracy to commit second degree assault, reckless endangerment, two counts of conspiracy to commit reckless endangerment, verbal extortion by threat of injury, conspiracy to commit verbal extortion, extortion of less than a $1000 and conspiracy to commit extortion of less than $1000. Fountain was sentenced to four consecutive terms of imprisonment of ten years each for false imprisonment, conspiracy to commit false imprisonment, second degree assault, and conspiracy to commit second degree assault, followed by five years, consecutive, for extortion by threat of injury and to five years, concurrent, for conspiracy to commit extortion by threat of injury. The trial court merged the remaining convictions for sentencing purposes. On this timely appeal, Fountain asks us to address the following questions:

1. Whether the evidence was insufficient to sustain the convictions for false imprisonment and conspiracy thereof.

2. Assuming, arguendo, that the evidence is sufficient to sustain the convictions, whether Fountain's separate sentences for false imprisonment, conspiracy to commit false imprisonment and second-degree assault are improper.

3. Whether the trial court erred in sentencing Fountain on multiple conspiracy counts.

For the following reasons, we answer question 3 in the affirmative and shall remand for resentencing. Otherwise, the judgments are affirmed.

BACKGROUND

On February 5, 2019, at around 11:00 p.m., Oliver Jackson stopped at a Wawa store in Salisbury, Maryland, to buy cigarettes. He ran into Dywan Marshall, a person he knew as "Pete," and asked him about purchasing $40 worth of crack cocaine. Jackson had purchased drugs from Marshall on prior occasions. He told him that he would be receiving his tax refund from the I.R.S. the following morning and that he could pay him then.

Marshall got into Jackson's car and they then drove to 910 East Church Street in Salisbury, where they were met outside by Fountain. They then went inside the apartment, and Jackson saw approximately six other people, both male and female, drinking, smoking marijuana and playing cards. After approximately 45 minutes, and after Marshall and Fountain spoke, Fountain gave Jackson the crack cocaine and Jackson smoked it immediately on the premises. Jackson did not pay for the drugs at that time. Jackson would later admit on cross-examination that, "at the beginning" it was his intention to stay in the apartment with everyone until the money was in his bank account and pay for it then.

Nevertheless, a couple hours later, Marshall and Fountain wanted to know when Jackson would pay for the crack cocaine he had just ingested. Jackson testified "I told them when it comes on my account. I wasn't going anywhere. I'm right here." Jackson also testified that he "felt threatened" and that Fountain "got in my face" and told him, "I want my money" and "I'm not going to play with you."

Shortly thereafter, Fountain left the apartment and returned with two foot-long snakes, both wrapped around his hands. Jackson testified that Fountain then "[p]ut them in my face" and told him they would bite him. As he did this, Fountain yelled and

screamed, "I want my money, I want my money." Jackson again testified that he did not feel free to leave the apartment. Fountain then left the apartment again, taking his snakes with him.

Fountain then returned and ordered Jackson to accompany a woman he did not know, but later identified at trial as Eleanor Callis, to a nearby bank. Jackson went into the building with Callis, gave her his ATM card and his pin, and she tried to retrieve the $40 owed to Fountain.[1] Asked later on cross-examination how Callis obtained his card, Jackson testified "I gave it to her. I felt threatened all night." Because he only had $32 in the bank, Callis did not retrieve any money at that time, and the two of them returned to the apartment in question.

At some point, apparently after this first trip to the bank, and according to Jackson, Callis took Jackson's cell phone and his car keys and Jackson maintained that he did not feel that he was free to leave. He later testified:

> And they kept saying, well – okay, well, she kept checking, wanted to make sure if my money was there.
>
> And I kept saying it's going to be there, I'm not going anywhere. And eventually, she – was it her? Someone hollered, make sure the doors are locked. Don't let him get out the window. So at that point, I realized that I wasn't going anywhere.

[1] A custodian of records for SECU bank testified that several attempts were made to withdraw from Jackson's account, and that one of those, that occurred inside a SECU branch bank lobby, was recorded on surveillance video. According to the testimony received at trial, that video depicted someone using Jackson's ATM card. The video was admitted into evidence without objection. None of the video exhibits are included with the record on appeal.

Jackson had testified:

> At that point, I was really scared. I wanted to get away. I didn't know – because they had my phone. They had my keys, and I just wanted to pay them and that was it and get away from there.

Jackson told Fountain that the money would be there in the morning. Despite that, Fountain ordered him to remove all his clothes and then began beating him with a belt and his fists. The beating went on for several minutes, with the remainder of the group "egging" Fountain on.

At some point after these beatings, Fountain produced a silver handgun and put it up to Jackson's temple. Jackson testified that Fountain "told me he could kill me if he wanted to." Asked what Fountain's demeanor was at this point, Jackson replied, "[e]vil." Jackson identified the gun that was used that evening and it was admitted into evidence.

Later that morning, Callis took Jackson's car, without asking, and went back to the bank with his ATM card and his PIN number to try to retrieve the money. Callis withdrew $32 and returned to the apartment, and Jackson was ordered to strip down and was beaten again. Jackson testified that they "[w]hipped me with a belt and it seemed like everyone was punching and stomping on me" and that included everyone in the apartment, which included Fountain, Marshall, and several others.

Jackson then testified that, after again telling them that his tax refund would be deposited when the bank opened, the group then demanded he pay them $250. At around 5:00 or 6:00 a.m., someone handed Jackson his cellphone and he called his mother, Jacqueline Jackson. When he told her he needed more money, Marshall grabbed the phone

from him and told Jackson's mother that Jackson was a "crack addict" and they "wanted their money." Jackson's mother was told where and when to meet the group to pay the $250.

One of the beatings was recorded on Jackson's own cell phone and that recording was played for the jury.[2] Jackson identified Fountain as the man beating him with a belt on the video.

Shortly thereafter, Jackson testified that the same woman from before, *i.e.*, Callis, and another man took Jackson's car to go meet Jackson's mother.[3] After they returned, Callis put the money, along with Jackson's keys and cellphone on the dining room table. As Fountain and Marshall were "splitting the money up," Jackson grabbed his belongings and fled out the door. Jackson met his parents, and they took him to the hospital. He sustained bruises, cuts and abrasions. He also reported the incident to the police.

On cross-examination, Jackson admitted that his initial intention was to stay in the apartment after smoking the drugs and wait until the money was in his bank account before paying and then leaving. He also agreed that he told police that he believed Fountain hit him in the head with the handgun, but he was not sure that was the case at trial. Jackson further testified: "I did try to leave, but I felt threatened. So that's when they started hollering about the -- make sure all the doors are locked, don't let him go through the windows."

[2] The video exhibit, State's Exhibit 6, is not included with the record on appeal.

[3] Callis denied that she went to the meeting with Jackson's mother, testifying that Jackson's mother was met by Lauren Lecates and Luis Colon.

Jackson was then asked who was the "leader" of this incident, and he replied that Fountain was the "leader" during the beatings with the belt. Jackson agreed that someone took his watch during the evening, but it was not Fountain. He also agreed that Fountain did not take him to the bank.

On redirect examination, Jackson clarified that, although he originally intended to stay at the house until the money was in his bank account, he did not want to stay after Fountain threatened him with the snakes, or after he was beaten and whipped with a belt, or after Fountain held a gun to his head. Asked whether he intended to stay after Fountain became aggressive, Jackson testified: "No. I was – I was scared. I was terrified. Terrified and confused."

Jackson's mother, Jacqueline Jackson, then testified at trial. She was getting ready to go to her work that morning as a school crossing guard when she got the call saying that her son, Jackson, owed the unidentified callers $250. She testified, in part, as follows:

> The phone call, itself, it sound like my son was in hell. That's what it sound like, the background noises. This guy's asking me for money. Say, I got your son. He said, I got your son, and he owes me money, and I want my money, you know. So I said, well, how much does he owe you?
>
> He said $250. I said, well, there's no way I – I don't have $250 on me. So I said, I'll have to go to the bank and get the money, but I need to -- I need to know he's all right. I think -- I said I need to know that's he's all right.
>
> So they put him on the phone, and all he said was, I'm all right.

Ms. Jackson testified she heard "crazy stuff" in the background, including someone telling her son, "why are you doing this to your mother?" Over the course of several more

telephone calls that morning, she made arrangements to meet these unidentified individuals after her crossing guard duties concluded. She spoke to the same person during those calls, who insisted that he wanted his money that same morning. At one point, asked to speak to her son and her request was denied.

Ms. Jackson then went to a bank, took out $260 from an ATM, and then drove to the pre-arranged meeting place, identified as "Goose Creek," and waited in her car.[4] Moments later, she saw a man and a woman driving her son's car. After they parked, the woman and Ms. Jackson got out of their respective vehicles at the same time, and met in the parking lot. Ms. Jackson "was scared because I didn't know what kind of people I'm dealing with here." The unidentified woman approached her, said, "I had nothing to do with this," and then took the prearranged money and fled in Jackson's car. Approximately fifteen minutes later, Jackson returned, alone in his car, and it was clear to his mother that he was injured. Jackson told her he was beaten and "tortured," and his mother and father, who had earlier been notified of events, took him to the nearest hospital.

Officer Kyle Dean, of the Salisbury City Police Department, met Jackson at the hospital at around 9:39 a.m. After describing Jackson's injuries, Officer Dean testified that he made arrangements to have Jackson transported to the Salisbury Police Department the next day, February 6, 2019. Officer Dean met Jackson at the police station at around 11:00 a.m. and presented him with a photo lineup. Jackson identified a photo of Fountain within

[4] Darlene Joseph testified she worked at Goose Creek, a gas and convenience store located in Salisbury, Maryland. Video surveillance of the store parking lot from the day in question was admitted without objection. Although that video is not included with the record on appeal, photographs of the scene were admitted and are included.

less than a minute as being involved in this incident. He also identified Tabari McCready in another photo lineup identification.[5]

Detective David Underwood then met with Jackson, speaking with him for over an hour. Based on information provided, a search warrant was prepared and executed later that same evening at 910 East Church Street. Recovered items included an operable .22 Smith and Wesson handgun, four crack pipes containing cocaine residue, two belts, and four cell phones. Additionally, several individuals were present, including Fountain, Eleanor Callis, and others.

Fountain was interviewed and, after waiving his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966), Fountain told the detective he was not involved. However, Fountain did explain that a person was present who owed him approximately $120 incurred while playing cards. Fountain stated that after this man pushed him, he punched him approximately four to six times, knocked him to the ground, and then kicked him in the chest. Fountain then stated that he fell asleep in a chair, and that, at around 10:00 a.m., an unidentified female gave him $120 in cash. He denied handling a gun during the incident. He also denied knowing that the victim was beaten with a belt. Detective Underwood testified:

> Q: Did he say that he remembered hitting, if he remembered hitting him with a belt?
>
> A: He stated that he did not remember it.

[5] Officer Jesse Kissinger also testified and identified Fountain and McCready as two known individuals who were present on the cell phone video footage of Jackson's beating.

> Q: Did he say anything else about that?
>
> A: He did, if I can refer to my notes to get this quote correct.
>
> Q: Sure.
>
> A: I'm not going to tell you I did, I'm not going to tell you I didn't do it, but I can't remember everything because I was really drunk. But if I did do it I'll take that, too, I'll take that part, too. I mean, hey, if I did, he said I hit him with the belt, I must have been really, really pissed off or drunk.
>
> Q: Did you ask him about handling any guns within the last 24 hours?
>
> A: I did.
>
> Q: And what did he say?
>
> A: He advised me that he had handled a nine-millimeter and a .45-caliber handgun in the past 24 hours.
>
> Q: Did you ask him any other questions pertinent to this investigation?
>
> A: No.[6]

Eleanor Callis then testified for the State pursuant to a plea agreement, testifying that she agreed to testify against her fellow co-defendant, Fountain. Callis agreed that the victim, Jackson, arrived at the residence with "Pete" and then went to another room, behind a curtain. At some point, Callis saw Fountain "scaring" and "teasing everybody" in the residence with a pair of snakes. Later, Jackson asked Callis to drive him to a bank because he was "incapacitated and didn't want to drive himself." Callis testified that after Jackson

[6] Detective Underwood testified, without objection, that he viewed the video of the beating on Jackson's cell phone and that he saw Fountain and others depicted on that video.

was unsuccessful in trying to retrieve money from the ATM, she used his card with his permission and saw that he only had a $32 balance.

Callis further testified that she returned a second time to the bank with "Luis" and they withdrew the $32 and gave it to Jackson upon their return. She also testified that, after this second trip, she returned Jackson's card and his keys and then went to a separate room. Callis also was questioned about whether she saw Fountain holding a gun during the evening, and she eventually admitted that both Fountain and Tabari McCready held the gun, although she was not "100 percent with saying that Demetries had it. I can say for a fact that Tabari did."

Callis testified that she saw Jackson getting punched and she heard him getting whipped with a belt. She testified that she was in another room at the time. She further was asked to identify the individuals depicted on the video of that beating and she identified Fountain. Callis agreed that she saw Jackson naked and testified that "Pete" ordered him to strip. She also testified that she believed "Pete" was encouraging Fountain to get angry at Jackson and that Fountain was "inebriated to the point that he didn't really know what he was doing[.]" Callis further testified that she did not go to Goose Creek for the exchange and that it was another woman, Lauren Lecates, and a person identified as Luis Colon.

On cross-examination, Callis also testified that she did not see the victim try to leave and that "it was obvious that he was uncomfortable and whatnot. But he never got up to leave on his own. He never made an attempt to leave." She also testified that he told her, when they went to the bank to try to get money, that he wanted to go back to the residence

"for more drugs." However, on redirect, Callis confirmed that he really was not free to leave, testifying as follows:

> Q: Were there any words or threats against Mr. Jackson?
>
> A: What's that? I'm sorry.
>
> Q: Were there any words or threats to Mr. Jackson?
>
> A: During which time?
>
> Q: At all.
>
> A: Yes.
>
> Q: Was Mr. Jackson free to leave?
>
> A: It was implied that he wasn't. It was a very scary moment. I wouldn't be able to foresee anyone letting him leave.

We may include additional detail in the following discussion.

DISCUSSION

I.

Fountain first contends that the evidence was insufficient to sustain his convictions for false imprisonment and conspiracy to commit false imprisonment because the State failed to establish that Jackson was confined against his will. The State responds that Jackson failed to preserve this argument as to the conspiracy counts, and that, as for the merits, it was clear that, as the evening went on, Jackson was prevented from leaving the residence.

A motion for judgment of acquittal made at the close of all the evidence is a prerequisite to a claim of evidentiary insufficiency on appeal. *Haile v. State*, 431 Md. 448, 464 (2013); *see also* Md. Code (2001, 2018 Repl. Vol., 2020 Supp.) § 6-104 of the Criminal

Procedure Article ("Crim. Proc."); Md. Rule 4-324. Rule 4-324 (a) provides, in pertinent part, that "[a] defendant may move for judgment of acquittal . . . at the close of the evidence offered by the State and, in a jury trial, at the close of all the evidence. The defendant shall state with particularity all reasons why the motion should be granted." Because "[t]he language of [Rule 4-324(a)] is mandatory," *Wallace v. State*, 237 Md. App. 415, 432 (2018) (quoting *State v. Lyles*, 308 Md. 129, 135 (1986)), "a defendant must 'argue precisely the ways in which the evidence should be found wanting and the particular elements of the crime as to which the evidence is deficient,'" *Arthur v. State*, 420 Md. 512, 522 (2011) (quoting *Starr v. State*, 405 Md. 293, 303 (2008)). "Rule 4-324 (a) is not satisfied by merely reciting a conclusory statement and proclaiming that the State failed to prove its case." *Arthur*, 420 Md. at 524. "Accordingly, a defendant 'is not entitled to appellate review of reasons stated for the first time on appeal.'" *Id*. at 523 (quoting *Starr*, 405 Md. at 302).

At the end of the State's case-in-chief, Fountain's counsel made a motion for judgment of acquittal and offered particularized argument with respect to the false imprisonment charge. Although defense counsel argued the evidence was insufficient to sustain his conviction for conspiracy to kidnap, as well as other conspiracy charges including conspiracy to commit robbery, he did not offer any separate and particularized argument as to the conspiracy to commit false imprisonment.

During its argument on Fountain's motion, the State averred:

> Now false imprisonment seems to me as a given, he's actually on video, he's obviously not allowed to leave. There's no legal justification for it. And at one point even Tabari is holding his arm. You have Dywan holding the camera or the video, he's shouting words of encouragement and you can hear those in

> the video, whip him or beat him, like beat that bitch and all the other words that they were saying. That's enough for conspiracy. That's also enough -- and, of course, he's also there as far as the false imprisonment goes, not allowing him to leave.

In its summary of the evidence, the trial court noted that the victim, Jackson, indicated several times that he did not feel free to leave. The court denied the motion with respect to four false imprisonment and conspiracy counts, but granted it as to the charge of conspiring to commit false imprisonment with one Lauren Lecates. The defense declined to put on any evidence, renewed its motion, and the court again adopted its ruling at the close of the case.

Although we tend to agree with the State that Fountain did not squarely argue the conspiracy to commit false imprisonment counts, our review of the record persuades us that he did argue generally as to conspiracy and the trial court considered the conspiracy to commit false imprisonment counts in ruling on Fountain's motion. *See Starr*, 405 Md. at 304 (recognizing that "an appellant/petitioner is entitled to present the appellate court with 'a more detailed version of the [argument] advanced at trial'"). Under these circumstances, we conclude that the argument is adequately preserved. *See generally,* Md Rule 8-131 (a) (observing that the appellate court may consider issues "raised in or decided by" the trial court); *Redkovsky v. State*, 240 Md. App. 252, 261-62 (2019) ("We have recognized, however, that a motion for judgment of acquittal may be sufficient to preserve an issue where the acquittal argument generally includes the issue raised on appeal.") (citations omitted).

In considering a challenge to the sufficiency of the evidence, we ask "'whether 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.'" *Grimm v. State*, 447 Md. 482, 494-95 (2016) (quoting *Cox v. State*, 421 Md. 630, 656-57 (2011)); *accord Jackson v. Virginia*, 443 U.S. 307, 319 (1979). "[W]e defer to the fact finder's 'resolution of conflicting evidence, and, significantly, its opportunity to observe and assess the credibility of witnesses.'" *Riley v. State*, 227 Md. App. 249, 256 (quoting *State v. Suddith*, 379 Md. 425, 430 (2004)), *cert. denied*, 448 Md. 726 (2016). In doing so, the jury is free to "accept all, some, or none" of a witness's testimony. *Correll v. State*, 215 Md. App. 483, 502 (2013), *cert. denied*, 437 Md. 638 (2014).

Further, "[w]e 'must give deference to all reasonable inferences [that] the fact-finder draws, regardless of whether [the appellate court] would have chosen a different reasonable inference.'" *Cox v. State*, 421 Md. 630, 657 (2011) (quoting *Bible v. State*, 411 Md. 138, 156 (2009)). This Court has noted that in this undertaking, "the limited question before us is not 'whether the evidence *should have* or *probably would have* persuaded the majority of fact finders but only whether it *possibly could have* persuaded *any* rational fact finder.'" *Smith v. State*, 232 Md. App. 583, 594 (2017) (quoting *Allen v. State*, 158 Md. App. 194, 249 (2004), *aff'd*, 387 Md. 389 (2005)).

Finally, we will not reverse a conviction on the evidence "'unless clearly erroneous.'" *State v. Manion*, 442 Md. 419, 431 (2015) (quoting *State v. Raines*, 326 Md. 582, 589 (1992)). This applies to cases based upon both direct and/or circumstantial evidence because, as the Court of Appeals has explained, "[a] valid conviction may be

based solely on circumstantial evidence." *State v. Smith*, 374 Md. 527, 534 (2003) (citing *Wilson v. State*, 319 Md. 530, 537 (1990)).

"False imprisonment is a common law tort. We have defined it as the 'deprivation of the liberty of another without his consent and without legal justification.'" S*tate v. Dett*, 391 Md. 81, 92 (2006) (citations omitted). And, the offense "is most frequently the product of either an assault or a battery." *Marquardt v. State*, 164 Md. App. 95, 129-130 (quoting *Lamb v. State*, 93 Md. App. 422, 470-71 (1992) (footnote omitted), *cert. denied*, 329 Md. 110 (1993)), *cert. denied*, 390 Md. 91 (2005). "To obtain a conviction for false imprisonment, the State was required to prove: (1) that appellant confined or detained [the victim]; (2) that [the victim] was confined or detained against her will; and (3) that the confinement or detention was accomplished by force, threat of force, or deception." *Jones-Harris v. State*, 179 Md. App. 72, 99, *cert. denied*, 405 Md. 64 (2008); *accord Garcia-Perlera v. State*, 197 Md. App. 534, 448 (2011).

Conspiracy in Maryland is a common law crime. The Court of Appeals discussed the elements of the crime of conspiracy in *Carroll v. State*, 428 Md. 679 (2012), explaining as follows:

> A criminal conspiracy consists of the combination of two or more persons to accomplish some unlawful purpose, or to accomplish a lawful purpose by unlawful means. The agreement at the heart of a conspiracy need not be formal or spoken, provided there is a meeting of the minds reflecting a unity of purpose and design. The crime is complete when the agreement is formed, and no overt acts are necessary to prove a conspiracy.

Id. at 696-97 (internal citations and quotation marks omitted).

"[A] conspiracy may be shown by circumstantial evidence, from which a common design may be inferred[.]" *Mitchell v. State*, 363 Md. 130, 145 (2001). In *Mitchell*, the Court of Appeals explained:

> Although a conspiracy may be shown by circumstantial evidence, from which a common design may be inferred, the requirement that there must be a meeting of the minds – a unity of purpose and design – means that the parties to a conspiracy, at the very least, must (1) have given sufficient thought to the matter, however briefly or even impulsively, to be able mentally to appreciate or articulate the object of the conspiracy – the objective to be achieved or the act to be committed, and (2) whether informed by words or by gesture, understand that another person also has achieved that conceptualization and agrees to cooperate in the achievement of that objective or the commission of that act. Absent that minimum level of understanding, there cannot be the required unity of purpose and design.

Id. at 145-46 (citations omitted).

Here, Jackson testified that he initially stayed in the residence after purchasing the narcotics because he intended to pay for them from his imminent tax refund he expected later the morning. As the evening continued, however, Fountain and his companions became upset and threatened Jackson. Fountain even threatened to have his pet snakes bite him, all the while screaming that he wanted his money. Jackson began to feel that he was not free to leave the residence, testifying at one point that "I felt threatened all night."

In addition, Jackson was ordered to go to a bank branch to try to retrieve the money owed, apparently only $40. After this attempted withdrawal proved unsuccessful, Jackson's car keys and his cell phone were taken away from him. Further, after he was apparently prevented from leaving through a window, someone said that they should lock

the doors to prevent any other escape. Jackson testified that "at that point, I realized that I wasn't going anywhere."

Soon thereafter, what had been verbal assaults turned brutally physical. At some point during the evening, Jackson testified that Fountain put a handgun to his temple, informing Jackson that he could kill him "if he wanted to." And, Jackson was ordered to disrobe and then beaten with a belt by several individuals. The beating was recorded on Jackson's own cell phone and played for the jury during trial.

As the morning rose, so too did the ante. "Pete" Marshall, the man who brought Jackson to this den in the first place, spoke to Jackson's mother and informed her that she needed to pay $250, a sum more than six times the original amount owed for the crack cocaine. After payment for Jackson's release, arguably a ransom, was secured at the gas station by two of Fountain's companions, the money was handed over to Fountain and Marshall. Only then was Jackson finally allowed to leave. Notably, he immediately fled to meet his parents who then took him to the hospital.

From these facts, we conclude that a rational juror could find that Jackson was confined against his will and that Fountain conspired with others to accomplish this objective. The evidence was sufficient to sustain Fountain's convictions for false imprisonment and conspiracy to commit false imprisonment.

II.

Fountain next suggests that separate sentences for false imprisonment, conspiracy to commit false imprisonment and second-degree assault are improper as a matter of fundamental fairness because his unlawful confinement was "merely incidental" to the

assault. The State responds that we should decline to address Fountain's fundamental fairness claim because it was not properly preserved. *See Pair v. State*, 202 Md. App. 617, 649 (2011) (holding that claims for merger under the doctrine of fundamental fairness did not involve an inherently "illegal sentence" and were not reviewable under Maryland Rule 4-345(a)), *cert. denied*, 425 Md. 397 (2012). The State also addresses the merits and argues that there was ample evidence showing that Jackson's forced detention lasted much longer than was necessary to commit the assaults upon him.

At sentencing, defense counsel stated it was his understanding that the State's position was that there were "13 offenses arising from one criminal event." Defense counsel then asked for clarification of the counts at issue, and the court recited the litany of convictions, and included the ones that it thought merged. Primarily, the court merged sentences where Fountain was convicted of multiple conspiracies involving different people for a charge, *i.e*., two conspiracies to commit second degree assault, merging the two conspiracies into one. The court followed suit on the other offenses, including merging lesser offenses into greater offenses, ultimately leaving three underlying offenses of false imprisonment, second degree assault, and verbal extortion, as well as their three respective conspiracies.

Thereafter, defense counsel argued that the court should apply the sentencing guidelines, which called for a sentence based on the offenses and Fountain's offender score of one to five years. Defense counsel also argued that the State's recommendation of 66 years, plus ten concurrent, was "immoderate, even by the most hawkish prosecutorial

standards." The court was not asked to apply, nor did it apply, the doctrine of fundamental fairness.

Maryland Rule 4-345 (a) provides that "[t]he court may correct an illegal sentence at any time." "A sentence is illegal when the illegality inheres in the sentence itself." *Taylor v. State*, 224 Md. App. 476, 500 (2015) (internal quotations omitted), a*ff'd on other grounds*, 448 Md. 242 (2016), *cert. denied*, 137 S.Ct. 1373 (2017). The "'failure to merge a sentence is considered to be an "illegal sentence" within the contemplation of the rule.'" *McClurkin v. State*, 222 Md. App. 461, 489 n.8 (2015) (quoting *Pair*, 202 Md. App. at 624), *cert. denied*, 443 Md. 736, *cert. denied*, 577 U.S. 1019 (2015).

"Maryland recognizes three grounds for merging a defendant's convictions: (1) the required evidence test; (2) the rule of lenity; and (3) 'the principle of fundamental fairness.'" *Carroll*, 428 Md. at 693-94 (quoting *Monoker v. State*, 321 Md. 214, 222 23 (1990)). Under the required evidence test, "we examine the elements of each offense and determine 'whether each provision requires proof of a fact which the other does not ...'" *Paige v. State*, 222 Md. App. 190, 206-07 (2015) (quoting *Blockburger v. United States*, 284 U.S. 299, 304 (1932)). Under the rule of lenity, "a court confronted with an otherwise unresolvable ambiguity in a criminal statute that allows for two possible interpretations of the statute will opt for the construction that favors the defendant." *Bellard v. State*, 452 Md. 467, 502 (2017) (citation omitted). And, fundamental fairness is "fact-intensive" and is essentially a question of equity and "depends on the circumstances surrounding the convictions, not solely on the elements of the crimes." *Latray v. State*, 221 Md. App. 544, 558 (2015).

Fountain makes no argument with respect to the required evidence test or the rule of lenity and we need not consider them further. *See generally, Carroll*, 428 Md. at 694-700 (recognizing that conspiracy does not merge into the underlying offense under required evidence or rule of lenity, and that merger is not required under fundamental fairness). Instead, Fountain's argument is that merger is required under principles of fundamental fairness. As we noted, however, in *Pair, supra*, a trial court's failure to merge an individual's convictions pursuant to principles of fundamental fairness does not render the resulting sentence illegal. *Pair*, 202 Md. App. at 649. There, we distinguished the "heavily and intensely fact-driven" fundamental fairness test from the required evidence test and the rule of lenity, which could "both be decided as a matter of law, virtually on the basis of examination confined within the 'four corners' of the charges." *Id*. at 645. We opined that because the fundamental fairness test is "such a fluid test dependant upon a subjective evaluation of the particular evidence in a particular case" a non-merged sentence under the fundamental fairness test is not an inherently "illegal sentence" as that term is considered for the purposes of Md. Rule 4-345(a)). *Id*. at 649. Here, because Fountain did not raise an objection to the trial court's failure to merge his convictions based on principles of fundamental fairness, we conclude that the issue is unpreserved for our review.

Moreover, even were we to consider the issue, we note that appellant primarily relies on *Hawkins v. State*, 34 Md. App. 82 (1976), *cert. denied*, 279 Md. 683 (1977). We summarized the holding of that case as follows in *Jones-Harris, supra*:

> In *Hawkins*, the defendant approached the victim, engaged her in a brief conversation, and then seized her by the throat and pointed a gun at her. [*Hawkins*, 34 Md. App.] at 83.

> The victim was ordered to disrobe and lie on the ground. After the victim complied, the defendant then proceeded to rape her. *Id*. Defendant was convicted of both false imprisonment and rape. The trial court refused to merge the two convictions for purposes of sentencing. On appeal, we held that the trial court erred in failing to merge the offenses, reasoning that "[t]o hold otherwise would be to hold that in every case of rape, a conviction for false imprisonment would also be proper." *Id*. at 92. We noted, however, that "confinement after or before the rape is committed would preclude the merger." *Id*.

Jones-Harris, 179 Md. App. at 99.

We distinguished *Hawkins* as follows:

> The facts in this case, unlike those in Hawkins, show that [the victim] was not detained only for the time sufficient to accomplish the sexual assaults. And, the charge of false imprisonment was supported by facts independent of the facts supporting the two charges of second-degree sexual offense. According to the victim, as soon as appellant punched her in the face, she felt that she could not leave. Appellant next picked her up, carried her to the bin, and then threw her into that bin. While the two were in the storage bin, appellant prevented [the victim] from speaking with her father by throwing her phone away. Moreover, while in the bin, appellant threw [the victim] around in the bin five to six separate times. Proof that appellant committed those acts was sufficient to support the charge of false imprisonment . . . . Accordingly, we hold that the court did not err in failing to merge the sentences.

Jones-Harris, 179 Md. App. at 100-01.

We are persuaded that this case is closer to *Jones-Harris* than *Hawkins*. Indeed, as even the Court indicated in *Hawkins*, 34 Md. App. at 92, "confinement after or before the [crime into which it is claimed the false imprisonment should be merged] is committed would preclude the merger." Here, it is clear that Jackson was not detained only for the time necessary to accomplish the assault. Jackson was confined against his will and not

free to leave essentially from dusk to dawn and subject to, at varying times, threats and beatings by the participants that lasted over several incidents. Thus, even if considered, the sentences do not merge under the principle of fundamental fairness.

III.

Finally, Fountain asserts that the trial court erred in sentencing him on three conspiracy convictions as there was only one conspiracy the night/morning of the incident. The State agrees, as do we.

Here, Fountain was convicted of conspiring with Tabari McCready and Dywan "Pete" Marshall of: two counts of conspiracy to commit false imprisonment; two counts of conspiracy to commit second degree assault; and two counts of reckless endangerment. He was also convicted of conspiring with Marshall to commit one count of conspiracy to extort by verbal threat, and one count of conspiracy to extort less than $1,000. Fountain was sentenced on three of these conspiracy counts as follows: a consecutive ten years for conspiracy to commit false imprisonment (Count 7 with McCready); a consecutive ten years for conspiracy to commit second degree assault (Count 32 with McCready); and a concurrent five years for conspiracy to commit verbal extortion by threat of injury (Count 50 with Marshall).

It is well established that "only one sentence can be imposed for a single criminal common law conspiracy no matter how many criminal acts the conspirators have agreed to commit." *McClurkin*, 222 Md. App. at 490. The unit of prosecution for a conspiracy is "the agreement or combination rather than each of its criminal objectives." *Id*. A conspiracy "remains one offense regardless of how many repeated violations of the law may have been

the object of the conspiracy." *Martin v. State*, 165 Md. App. 189, 210 (2005) (citation omitted), *cert. denied*, 391 Md. 115 (2006). The conviction of a defendant for more than one conspiracy turns, therefore, "on whether there exists more than one unlawful agreement." *Savage v. State*, 212 Md. App. 1, 13 (2013). Where the State fails to establish a second conspiracy, "there is merely one continuous conspiratorial relationship . . . that is evidenced by the multiple acts or agreements done in furtherance of it." *Id*. at 17. "If a defendant is convicted of and sentenced for multiple conspiracies when, in fact, only one conspiracy was proven, the Double Jeopardy Clause has been violated." *Id*. at 26.

Here, although the underlying offenses were separate and distinct, it is clear that there was only one agreement to confine Jackson against his wishes until he paid for the narcotics. Whereas there was but one conspiracy, we shall vacate Fountain's convictions and sentences for conspiracy to commit second degree assault (Count 32) and conspiracy to extort (Count 50), vacate his sentence for conspiracy to commit false imprisonment (Count 7). *See McClurkin*, 222 Md. App. at 490-91 (vacating the lesser conspiracy counts in favor of the count with the maximum penalty) (citing *Jordan v. State*, 323 Md. 151, 161-62 (1991)); *see also Cathcart v. State*, 169 Md. App. 379, 386 n.5 (2006) (observing that false imprisonment is a common law crime for which no statute prescribes a maximum sentence), *vacated on other grounds*, 397 Md. 320 (2007).[7]

[7] We recognize that the court agreed with counsel that several other conspiracy convictions in this case merged, however, it is the overall agreement, or combination thereof, that is the focus of a criminal conspiracy.

Further, in accordance with *Twigg v. State*, 447 Md. 1, 20-27 (2016) and Maryland Rule 8-604(d)(2), "[i]n a criminal case, if the appellate court reverses the judgment for error in the sentence or sentencing proceeding, the Court shall remand the case for resentencing." Accordingly, we shall remand this case to the circuit court for resentencing. We note that, upon remand, the court ordinarily may not impose a sentence greater than the sentence that it originally imposed. *Twigg*, 447 Md. at 30 n.14 ("The only caveat, aside from the exception set forth in [Md. Code (1988, 2013 Repl. Vol.), § 12-702(b)(1)-(3) of the Courts and Judicial Proceedings Article], is that any new sentence, in the aggregate, cannot exceed the aggregate sentence imposed originally").

CONVICTIONS AND SENTENCES FOR CONSPIRACY TO COMMIT SECOND-DEGREE ASSAULT (COUNT 32) AND CONSPIRACY TO EXTORT (COUNT 50) VACATED. SENTENCE FOR CONSPIRACY TO COMMIT FALSE IMPRISONMENT (COUNT 7) VACATED AND REMANDED FOR FURTHER PROCEEDINGS. JUDGMENTS OTHERWISE AFFIRMED. COSTS TO BE ASSESSED ONE-HALF TO APPELLANT AND ONE-HALF TO WICOMICO COUNTY.