Circuit Court for Somerset County
Case No. C-19-CR-19-098

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0719
September Term, 2020

LANCE CARL FRIDLEY

v.

STATE OF MARYLAND

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

JJ.

Opinion by Wells, J.

Filed: October 21, 2021

On April 13, 2019, appellant Lance Carl Fridley and Kevin Bivens got into a physical altercation. As a result, Bivens was injured and Fridley was charged with attempted robbery and attempted armed robbery, among other charges. At trial, the court instructed the jury on the uncharged crimes of robbery and armed robbery. The jury convicted Fridley of several offenses, including robbery and armed robbery. The trial court sentenced Fridley on the armed robbery conviction, after merging robbery and several additional convictions into armed robbery.

Fridley now appeals, raising two issues for our review, which we have rephrased for clarity:[1]

1. Whether the trial court erred in instructing the jury on the charges of completed robbery and completed armed robbery, rendering the convictions and sentences on those charges illegal.

2. Whether there was sufficient evidence to convict Fridley of completed robbery and completed armed robbery.

For the following reasons, we hold that the trial court erred by instructing the jury on the completed crimes of robbery and armed robbery. We therefore reverse the

[1] Fridley's verbatim questions in his appeal read:

1. Where Appellant was charged with attempted robbery and attempted armed robbery but convicted of completed robbery and completed armed robbery, did the trial court err by instructing the jury on the completed offenses, and must the convictions and sentences be vacated because Appellant was convicted of crimes that were not charged?

2. Is the evidence insufficient to sustain the convictions for completed robbery and completed armed robbery?

convictions for both crimes. Further, we decline the State's request to automatically enter convictions on the lesser included charges of attempted robbery and attempted armed robbery, holding that the trial court's error in instructing the jury on the completed form of both crimes was not harmless. Because we reverse Fridley's convictions for the completed robbery and armed robbery charges, we need not reach Fridley's sufficiency claims for either offense. We affirm Fridley's other convictions. We remand for re-sentencing on the convictions of first-degree assault, second-degree assault, reckless endangerment, and fourth-degree burglary, all of which the court previously merged into armed robbery at sentencing.

FACTUAL BACKGROUND

A. The Events of April 13, 2019

In the early morning of April 13, 2019, Fridley and his girlfriend Nicole Confer visited Bivens' residence, hoping to buy drugs. Fridley testified that he and Confer had visited Bivens earlier in the night when they purchased $100 worth of crack cocaine from him. They returned around midnight to purchase more. Bivens disputed this account, claiming that the pair visited him only once, at midnight, to purchase drugs, and he told them that he did not have any drugs to sell.

What followed is also in dispute. According to Bivens, upon Fridley's arrival, he told him that he did not have any drugs and shut the door. As he was walking away from the door, Bivens "heard it fly open and then slam shut, so he went back to the door and opened it again." After Bivens opened it, Fridley struck him on the top of his head and asked for "drugs money, or 'something,'" and upon Bivens' refusal, Fridley continued to

hit Bivens. As Bivens was on the ground, Fridley "touched Biven's back and side pockets like he was trying to find something." As he was trying to get up, Bivens "felt a sharp pain in his back" and he saw Fridley running away towards his car. Bivens testified that Fridley shot him in the back.

Fridley gave a different account of what happened. According to Fridley, he and Confer went back to Bivens' house around 12:30 a.m. to purchase another $100 worth of crack cocaine, even though Fridley admitted he only had $20. When Fridley and Confer did not receive as much crack as they hoped for, Confer became angry because she believed Bivens owed them "extra" for having "regularly bought hundreds of dollars' worth of drugs from Bivens" in the past. Confer told Bivens that she and Fridley would not leave until he gave them more drugs. Bivens then "grabbed ahold of Confer" causing Fridley to "lose control and hit Bivens repeatedly." Fridley and Bivens were fighting and "rolling around on the ground" before Bivens hit his head "on a metal gate by the front door." Fridley claims that at the time he and Confer left Bivens' house, Bivens was "fine" and Fridley had helped Bivens "wipe some blood off his face."

Another issue in dispute is whether Fridley shot Bivens. Bivens claimed that Fridley shot him in the back. Fridley denied shooting anyone. It is undisputed that Bivens went to the hospital and had "several lacerations on his head and arms" and a "large wound on the back of his shoulder." The treating physician testified that the wound "could have been caused by a shotgun discharge."

B. The Trial

Fridley was charged with sixteen offenses.[2] The indictment read in part:

SIXTH COUNT

> The Grand Jurors for the County of Somerset and the State of Maryland inform and charge that Lance Carl Fridley . . . did unlawfully and feloniously, with a dangerous weapon, *attempt* to rob Kevin Lamont Bivens and violently did *attempt* to steal from said person drugs and money.

SEVENTH COUNT

> The Grand Jurors for the County of Somerset and the State of Maryland inform and charge that Lance Carl Fridley . . . did unlawfully and feloniously *attempt* to rob Kevin Lamont Bivens of drugs and money.

(Emphasis added).

After the State rested its case-in-chief, defense counsel moved for judgment of acquittal on Counts 6 and 7, which defense counsel characterized as "armed robbery" and "robbery" respectively. Defense counsel stated that "there was no evidence that there was any taking of personal property of Bivens . . . as a consequence . . . there is no basis for" the completed robbery and armed robbery counts "to go forward." The trial court denied Fridley's motion, stating that, regarding attempted robbery and attempted armed robbery, the two need not be "charged in the specific (sic) as to the attempt."

[2] Attempted first-degree murder; attempted second-degree murder; first-degree assault; second-degree assault; reckless endangerment; attempted armed robbery; attempted robbery; first-degree burglary; third-degree burglary; fourth-degree burglary; use of a firearm in a crime of violence; unlawful possession of a rifle or shotgun; openly carrying a dangerous weapon with intent to injure; prohibited possession of ammunition; and attempted commission of crimes because of race [counts 15 and 16]. Prior to trial, the State entered a *nolle prosequi* on the charge of unlawful possession of a rifle or shotgun.

So, when instructing the jury on the charged crime of attempted robbery, the trial court gave the following instruction:

> The Defendant is charged with the crime of robbery or attempt to commit robbery. Robbery is the taking and carrying away of property from someone else or someone's presence and control by force or threat of force with the intent to deprive the victim of property. In order to convict the Defendant of robbery, the State must prove that the Defendant took or attempted to take the property of Kevin Bivens, that the Defendant took or attempted to take the property by force or threat of force, and that the Defendant intended to deprive Kevin Bivens of the property.

Similarly, when the trial court instructed the jury on the charged crime of attempted armed robbery, the trial court said the following:

> The Defendant is also charged with the crime of robbery with a dangerous weapon. In order to convict the Defendant of robbery with a dangerous weapon**,** the State must prove all of the elements of robbery and must also prove the Defendant committed the robbery by using a dangerous weapon. A dangerous weapon is an object that is capable of causing death or serious bodily harm.

Following instructions, counsel for Fridley objected to the completed robbery and armed robbery instructions, telling the trial court that the instructions "w[ere] inconsistent with the way the charges read in the indictment that Mr. Fridley robbed Mr. Bivens." The trial court denied Fridley's request, believing that the instruction would not confuse the jury because the instruction was "plain as to what the statute states, as well as the pattern jury instruction itself."

The jury returned a guilty verdict on the following offenses: first-degree assault, second-degree assault, reckless endangerment, armed robbery, robbery, fourth-degree

burglary, use of a firearm in a crime of violence, openly carrying a dangerous weapon with intent to injure, and illegal possession of ammunition. Fridley was found not guilty of the following: attempted first-degree murder, attempted second-degree murder, first-degree burglary, third-degree burglary, and attempted commission of crimes because of race. The trial court sentenced Fridley to 15 years for using a firearm in a crime of violence, merging carrying/wearing a dangerous weapon with intent to injure and illegal possession of ammunition into that sentence. For armed robbery, the trial court sentenced Fridley to 15 years consecutive, merging the first-degree assault, second-degree assault, reckless endangerment, robbery, and fourth-degree burglary into that sentence. The convictions of robbery and armed robbery and the resulting sentences are at issue in this appeal.

DISCUSSION

I. FRIDLEY WAS ILLEGALLY CONVICTED AND SENTENCED FOR ROBBERY AND ARMED ROBBERY, TWO CRIMES FOR WHICH HE WAS NOT CHARGED

A. Parties' Contentions

Fridley asserts that his convictions for robbery and armed robbery are illegal because they were not included in the indictment. Fridley argues that his convictions are illegal under *Johnson v. State*, 427 Md. 356 (2012), where the Court of Appeals held that a person "may not be convicted of a crime that the State has not included in the indictment." Fridley asserts that the lone exception to that rule—where an individual may be convicted of a lesser included offense of a charged crime even if the lesser included offense was not specifically charged—does not apply here because completed robbery and completed armed robbery are "not lesser-included offenses of the attempted versions of those crimes."

Because the State did not seek an amendment to the indictment, Fridley argues, he was convicted of an uncharged crime and was therefore denied due process, resulting in an illegal conviction and sentence. Under Rule 4-345(a), Fridley argues, this Court must reverse the convictions and vacate the sentences because where an illegal sentence results from an illegal conviction, the Rule requires the sentence be vacated.

Notably, the State does not contest Fridley's assertion that his convictions and sentences for robbery and armed robbery should be vacated.[3] Instead, the State argues that Fridley was "not convicted of uncharged crimes" as the jury's verdict "represented a unanimous guilty verdict on attempted robbery and attempted armed robbery." The State notes that even though the attempt and completed versions of robbery and armed robbery are distinct crimes, the statutes for each "combine the completed offenses and their related attempts in a single subsection." Moreover, the attempts are "lesser included offense[s] of the consummated crime." Thus, the State argues, under the trial court's jury instruction, the jury's guilty verdicts on robbery and armed robbery were, "in substance[,]" guilty verdicts on attempted robbery and attempted armed robbery, and this Court should thus affirm his convictions. The State further maintains that Fridley's sentences should be affirmed because, in sentencing Fridley, the trial court referred to the counts in the indictment that "contained the attempted robbery and attempted armed robbery charges."

[3] In a section rebutting Fridley's claim that there was insufficient evidence to convict him of robbery and armed robbery, the State essentially concedes that Fridley should not have been convicted of the completed offenses of robbery and armed robbery. The State notes that we need not reach Fridley's sufficiency claim as our resolution of the first issue, "no matter who prevails," will render evaluating the sufficiency claim unnecessary.

Even though the trial court referred to these counts as robbery and armed robbery, according to the State, it was still consistent with its "comments at trial that attempts fell within the robbery statutes."

A. Analysis

Generally, an individual may not be convicted of a charge unless it was included in the indictment. *Johnson*, 427 Md. at 375; *Turner v. State*, 242 Md. 408, 414 (1966) ("[I]t is elementary that a defendant may not be found guilty of a crime of which he was not charged in the indictment."). An indictment's purpose is to "place an accused on adequate notice," so that a defendant may properly prepare a defense. *Ayre v. State*, 291 Md. 155, 163 (1981). If a defendant is convicted of a charge that was not included in the indictment, it violates due process and the resulting sentence is illegal. *Johnson*, 427 Md. at 375–76.

In *Johnson*, the defendant was convicted and sentenced for assault with intent to murder even though that charge was not contained in the indictment. *Id.* at 372. The State in *Johnson* argued that the conviction and sentence were proper because, during trial, the "instructions, verdict sheet, arguments of counsel and sentence all addressed" the charge that was not contained in the indictment, thus constructively amending the indictment. *Id.* The Court disagreed, reasoning that first, Maryland law does not provide for constructive amendments, and second, the State did not properly amend the indictment under Rule 4-204. *Id.* at 373–75. The Court thus vacated the sentence and the conviction. *Id.* at 378.

Similarly, in this case, Fridley was convicted and sentenced on the charges of robbery and armed robbery, charges that were not contained in the indictment. Indeed, the issue in *Johnson* was a closer call than the present case. In *Johnson*, the State argued that

the conviction on the uncharged crime was proper because the "arguments of counsel" addressed the charge that was not contained in the indictment. *Johnson*, 427 Md. at 372. Yet here, nothing in the record suggests that counsel for either side addressed the crime of completed robbery or armed robbery. And furthermore, the Court in *Johnson* disagreed with the State's argument, suggesting instead that even if the appellant or his attorney had discussed the uncharged crime at some point during the trial, "without a formal charge on that offense, Petitioner would not have had the proper motivation to defend against it, and in any event should not have devoted time and resources to defending a charge not contained in the indictment." *Id.* at 377. Therefore, in this case, where neither party addressed completed robbery or armed robbery, Fridley clearly did not have the proper motivation, or even awareness, to defend against it.

Moreover, unlike the State's argument in *Johnson*, the State here does not argue that the indictment was constructively amended, or even that the indictment was amended at all. Instead, the State merely argues that Fridley was "not convicted of uncharged crimes," because the jury's verdict was "in substance a finding of guilt on the charged attempts rather [than on] the completed crimes." A simple reading of the record does not support the State's contention. First, as previously mentioned, the trial court instructed the jury on

both the completed and attempted versions of robbery and *only* the completed version of armed robbery.[4] Following deliberation, the trial court asked the jury for its verdict:

> [THE CLERK]: What say you, is the Defendant guilty or not guilty as to armed robbery.
>
> [FOREPERSON]: Guilty.
>
> [THE COURT]: Guilty or not guilty as to robbery?
>
> [FOREPERSON]: Guilty.

The trial court asked for the jury's verdict on completed robbery and armed robbery, not the charged attempt versions, and the jury subsequently convicted Fridley on those charges.[5] Importantly, attempted robbery and robbery are distinct crimes. *See Cooper v. State*, 14 Md. App. 106, 117 (1972) ("Violence to a person with an intent to steal and the larceny not consummated is not robbery but attempted robbery.")

Moreover, during sentencing, the trial court sentenced Fridley on the counts of robbery and armed robbery, not on the attempted version of either offense:

> [THE COURT]: As to Count 6, armed robbery, the sentence of this Court is 15 years . . . I will merge . . . Count 7, robbery . . . into Count 6.

[4] The State posits that when instructing the jury on armed robbery, the trial court "incorporate[ed] its 'robbery' instruction, including its discussion of attempt." However, the trial court merely stated that in order to convict the defendant of armed robbery, the State must prove "all of the elements of robbery," in addition to the added element of using a dangerous weapon. However, "attempt" is not an "element of robbery," and the trial court made no reference at all to attempt in its instruction on armed robbery.

[5] Because the verdict sheet referred to the charges of "robbery" and "armed robbery" and not the attempt versions, the jury never even had an opportunity to convict Fridley of the charged crimes.

In other places in the record, the trial court routinely refers to the charges of robbery and armed robbery, charges not included in the indictment. The verdict sheet used by the jury listed the charges of "robbery" and "armed robbery," not attempted robbery or attempted armed robbery. The pre-sentence investigation order listed the disposition of "guilty" next to the charges of "robbery" and "armed robbery." And the enumerated convictions on the sentencing guidelines form included "[r]obbery and "[r]obbery with a dangerous weapon." Taken together, the record clearly shows that Fridley was convicted and sentenced on crimes that were not charged and not included in the indictment, violating Fridley's due process rights. *See Turner v. New York*, 386 U.S. 773, 775 (1967) ("[A] conviction upon a charge not made is not consistent with due process."); *Landaker v. State*, 327 Md. 138, 140 (1992) (same).

The resulting convictions and sentences are also violations of Article 21 of the Maryland Declaration of Rights that guarantees every defendant the right "to be informed of the accusation against him[.]" *Johnson*, 427 Md. at 374–75. Accordingly, Fridley's sentences for robbery and armed robbery must be vacated. *See* Md. Rule 4-345(a). Furthermore, we vacate Fridley's convictions for robbery and armed robbery. Where an illegal sentence stems from an illegal conviction, Rule 4-345(a) "dictates that both the conviction and the sentence be vacated." *Johnson*, 427 Md. at 378; *see also Alston v. State*, 425 Md. 326, 342 (2012) (directing the trial court upon remand to correct the "imposition of the illegal convictions and sentences" pursuant to Rule 4-345(a)).

B. SIMPLY SUBSTITUTING CONVICTIONS FOR ATTEMPTED ROBBERY AND ATTEMPTED ARMED ROBBERY WOULD ALSO BE ILLEGAL

Because we hold that Fridley's convictions for robbery and armed robbery are illegal and must be vacated, we next address whether we should enter convictions for the lesser included charges of attempted robbery and attempted armed robbery, as the State requests. We decline to do so, finding that the trial court erred in its jury instruction, and that such error was not harmless.

A. Parties' Contentions

In the event that we hold that Fridley was improperly convicted of robbery and armed robbery and vacate the convictions, the State urges us to "enter convictions on the charged, lesser included" offenses of attempted robbery and attempted armed robbery and remand for sentencing. According to the State, Maryland courts have routinely held that "an appellate court reversing a conviction may enter a conviction for a lesser included offense." Furthermore, the State asserts that the jury instruction and the State's theory at trial provided Fridley "every incentive to defend against attempted robbery." Consequently, the State argues that the guilty verdicts of robbery and armed robbery "necessarily included guilty findings on the lesser included attempts." Thus, upon finding error on the convictions of completed robbery and armed robbery, the State asks us to enter guilty verdicts on the charged attempts and remand for resentencing. As a final point, the State argues that we should also remand for resentencing on the counts of first-degree assault, second-degree assault, reckless endangerment, and fourth-degree burglary, which were previously merged into the armed robbery convictions.

In his reply brief, Fridley argues that the proper remedy for the court's error would be vacating the convictions for completed robbery and armed robbery and remanding for a new trial on the attempt versions. Contrary to the State's argument, Fridley contends it would be improper to enter convictions on the lesser included attempt versions of robbery and armed robbery. Relying on the Court of Appeals' decision in *Smith v. State*, 412 Md. 150 (2009), Fridley asserts that a new trial is appropriate because, after instructing the jury on only the completed versions of robbery and armed robbery, in closing, "defense counsel's incentive to devote time to arguing against a conviction on the attempted offenses was removed." If the trial court has properly instructed the jury, Fridley argues, defense counsel's strategy in closing arguments would have differed by focusing on the gaps in the State's case as to the attempt elements. Therefore, Fridley concludes, just as it was improper in *Smith* to "impose convictions on crimes that counsel had not had an opportunity to address," so too is it improper here.

B. Analysis

Ordinarily, a trial court's instruction to the jury is reviewed for abuse of discretion. *State v. Elzey*, 472 Md. 84, 107 (2021). In determining whether the trial court abused its discretion, a reviewing court looks at three factors: "(1) whether the requested instruction was a correct statement of the law; (2) whether it was applicable under the facts of the case; and (3) whether it was fairly covered in the instructions actually given." *Id.* (quoting *Seley-Radtke v. Hosmane*, 450 Md. 468, 482 (2016)). An abuse of discretion is found when jury instructions are "ambiguous, misleading, or confusing to jurors." *Id.* (quoting *Thomas v. State*, 413 Md. 247, 257 (2010)). Furthermore, a trial court's jury instruction should be

read in context and must be considered "as a whole," and should not be condemned merely because "of the way in which it is expressed or because an isolated part of it does not seem to do justice to one side or the other." *Morris v. Christopher*, 225 Md. 372, 378 (1969).

If a trial court commits error in its jury instructions, reversal will only be required if the error was not harmless. In a criminal case, error is harmless "only if it did not play **any role** in the jury's verdict." *Porter v. State*, 455 Md. 220, 234 (2017) (emphasis in original). "To say that an error did not contribute to the verdict is . . . to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed by the record." *Bellamy v. State*, 403 Md. 308, 332 (2008). However, jury instructions that are "ambiguous, misleading, or confusing to jurors can never be classed as noninjurious." *Midgett v. State*, 216 Md. 26, 41 (1958) (quoting *Wintrobe v. Hart*, 178 Md. 289, 296 (1940)).

It is clear that the trial court erred in its jury instruction on attempted robbery and attempted armed robbery by including the completed offenses. Even if the trial court's instructions were partially correct statements of the law, under the second factor outlined by the Court of Appeals, the trial court erred because the instructions were inapplicable under the facts of the case. *See id.* at 40 ("[a]n instruction ought not to be given, although it is a correct statement of the law in the abstract, which is not applicable to the facts that are in evidence.") (citation omitted). The indictment, the evidence, and the prosecutor's case all address the crimes of attempted robbery and attempted armed robbery. Nothing

raised by the parties indicates that Fridley ever took anything,[6] and thus instructing the jury as to the completed versions of those crimes was erroneous.

The question before us then is whether that error precludes us from entering convictions on the lesser included attempt charges, as the State asks. We do not believe that to be legally possible. There are three general purposes for jury instructions: "aiding the jury in understanding clearly the case, providing guidance for the jury's deliberations, and helping the jury to arrive at a correct verdict." *Preston v. State*, 444 Md. 67, 82 (2015). Reversal is warranted if the trial court's instructions mislead or confuse the jurors. *Smith v. State*, 403 Md. 659, 663 (2008). Instructing a jury as to a crime that the defendant was not charged with is unfairly prejudicial. *Midgett*, 216 Md. at 39–40.

In *Midgett*, the Court of Appeals vacated a kidnapping conviction due to misleading jury instructions. The Court in *Midgett* addressed a jury instruction like the one here, that instructed the jury as to two varying forms of a crime. *Id.* At common law, kidnapping included an intent to carry a person to some other place, or in the alternative, an intent to conceal a person. *Id.* at 38–39. The indictment in *Midgett* charged the defendant only with "carrying" the seized person with the "intent to have [the victim] carried" but did not charge the defendant with the intent to have the victim concealed. *Id.* at 40. Thus, the Court reasoned, "any reference in the charge or instruction to the word 'concealed' could have the effect of misleading and confusing the jury and was highly prejudicial to the

[6] The State notes in its brief that "the prosecutor's closing argument never alleged an actual taking of property and the prosecutor told the jury that Fridley was 'charged with attempting to take money or drugs or something from Kevin Bivens.'"

defendant." *Id*. The Court further explained that the instruction was "clearly prejudicial" by "diverting the mind of the jury from the single charge of carrying with an intent to 'carry' and directing its attention *to the more aggravated element of the offense* of kidnapping with which the defendant was not charged." *Id.* (emphasis added).

The issue with the jury instructions in this case is analogous. Like common law kidnapping, the Maryland robbery and armed robbery statutes contemplate multiple ways to commit the offenses. Section 3-402(a) of the Maryland Criminal Law Article reads: "A person may not commit *or attempt to commit* robbery." Likewise, Section 3-403(a) reads: "A person may not commit *or attempt to commit* robbery . . . with a dangerous weapon." The attempt and completed offenses are included in the same sections of the statutes. Yet, the two are distinct crimes, a fact that the State acknowledges in its brief. Despite their distinction, the trial court instructed the jury on both attempted robbery and completed robbery, and only on completed armed robbery, even though Fridley was not charged with either of the completed offenses.

Under the Court's reasoning in *Midgett*, the trial court's instruction was not harmless because it "divert[ed] the mind of the jury" from the attempt charges, instead "directing [the jury's] attention to the more aggravated" crime of completed robbery and armed robbery. *Midgett*, 216 Md. at 41. The completed versions of robbery and armed robbery are inherently more aggravated crimes than the attempted versions of those crimes. Thus, including the completed versions in the jury instructions was prejudicial, evidenced by the fact that the jury convicted him of those more aggravated crimes even though no evidence was presented indicating completed robbery or armed robbery.

In *Midgett*, the Court stated that it is "reversible error to give an instruction on a particular issue unless such issue is presented by the pleading and proof." 216 Md. at 41 (citing *Ritterpusch v. Lithographic Plate*, 208 Md. 592 (1956)). The issue of an actual taking, a required element in completed robbery and armed robbery,[7] was not presented either by the pleading (the indictment), or the proof (the evidence at trial). As previously mentioned, the Court of Appeals in *Wintrobe* stated that "instructions which are ambiguous, misleading or confusing to jurors can never be classed as noninjurious." *Wintrobe*, 178 Md. at 296. Therefore, the misleading and confusing jury instruction that directed the jury's attention to the more aggravated crime of completed robbery and armed robbery constitutes reversible error.

In support of its argument that we should enter convictions on the lesser included offenses, the State cites multiple cases that stand for the proposition that a conviction of a greater offense constitutes a conviction of all lesser included offenses. However, the cases cited by the State are distinguishable. In *Brooks v. State*, cited by the State, the Court of Appeals directed the trial court to enter a conviction of robbery after vacating the defendant's conviction of armed robbery. 314 Md. 585, 586–87 (1989). However, in *Brooks*, the defendant was originally charged with the greater offense of armed robbery, and the Court of Appeals vacated the conviction based on an insufficiency of evidence. *Id.*

[7] Under Md. Code Ann., Crim. Law § 3-401, robbery retains its common law definition: "the felonious taking and carrying away of the personal property of another, from his person or in his presence, by violence, or by putting him in fear." *Darby v. State*, 3 Md. App. 407, 413 (1968) (quoting Clark and Marshall, Crimes, (6th Ed.) § 12.09, p. 781) *cert. denied*, 393 U.S. 1105 (1969).

at 587, 601. Similarly, in *Hobby v. State*, also cited by the State, the Court of Appeals directed the trial court to enter a conviction on the lesser included offense of theft of property having a value over $10,000 after vacating a sentence for theft of property having a value over $100,000, which the defendant was originally charged with, due to an insufficiency of evidence. 436 Md. 526, 530, 551–54 (2014).

In each of the cases cited by the State the defendant was originally charged with the greater offense. This case differs because the State is asking us to enter convictions of lesser included offenses to greater offenses that were not charged. Indeed, we are unable to find a case in which a Maryland court enters a conviction of a lesser included offense when the greater offense was not included in the indictment. Consequently, we decline to do so here and remand for a new trial on the charges of attempted robbery and attempted armed robbery.

C. WE REMAND FOR RESENTENCING ON THE PREVIOUSLY MERGED CHARGES

Fridley's convictions of first-degree assault, second-degree assault, reckless endangerment, and fourth-degree burglary were merged into the sentence for armed robbery. Fridley was also convicted of the use of firearm in a crime of violence, openly carrying a dangerous weapon with intent to injure, and illegal possession of ammunition. The sentences for the latter two convictions were merged into the sentence of use of a firearm in a crime of violence. The State asks, in the event that we vacate Fridley's convictions on completed robbery and armed robbery, we should remand for re-sentencing on the merged convictions. The State also asserts that Fridley's claim "does not affect his

conviction for using a firearm in a crime of violence," that his convictions for first-degree and second-degree assault serve as predicate crimes of violence to sustain the firearm conviction, and that he does not contest these convictions on appeal. Accordingly, we must address whether to remand for sentencing on the offenses that merged into the now vacated armed robbery conviction.

Generally, where there is a conviction on only one offense, and an erroneous jury instruction requires vacating the conviction, the case is remanded for a new trial. *State v. Hawkins*, 326 Md. 270, 290–91 (1992). However, when multiple convictions are involved, "the remedy for an error in the instructions on one of the offenses depends upon the degree to which the erroneous instruction taints each individual conviction." *Id.* at 91. In *Nottingham v. State*, we held that an erroneous jury instruction resulting in a conviction of affray did not taint the convictions of second-degree assault or reckless endangerment because the element that the trial court erred in instructing on—fighting in public "to the terror of the people"—was not an element of the other convictions. 227 Md. App. 592, 612 (2016). We find the same here. The taint of the erroneous instruction as to completed robbery and armed robbery cannot reasonably be said to extend to the convictions on the charges of assault in the first and second degree, reckless endangerment or fourth-degree burglary as none of these convictions involve the taking or attempted taking of property, the element at issue in the erroneous jury instruction. Thus, the trial court's instruction error regarding armed robbery and robbery did not taint these convictions. Similarly, the conviction of the use of a firearm in a crime of violence, and the convictions that merged into it, remains intact as the convictions of first-degree and second-degree assault serve as

predicate "crimes of violence" under Md. Code Ann., Crim. Law § 4-204(b) and defined in Md. Code Ann., Pub. Safety § 5-101(c). Because the convictions for first-degree assault, second-degree assault, reckless endangerment, and fourth degree burglary no longer merge into armed robbery, the court should resentence Fridley for these convictions.

THE ARMED ROBBERY AND ROBBERY JUDGMENTS OF THE CIRCUIT COURT FOR SOMERSET COUNTY ARE REVERSED.

JUDGMENT FOR USE OF A FIREARM IN THE COMMISSION OF A CRIME OF VIOLENCE IS AFFIRMED. ALL OTHER CONVICTIONS ALSO AFFIRMED.

ON REMAND, APPELLANT MAY BE TRIED FOR THE CRIMES OF ATTEMPTED ROBBERY AND ATTEMPTED ARMED ROBBERY.

CASE REMANDED FOR RE-SENTENCING ON THE CONVICTIONS FOR FIRST-DEGREE ASSAULT, SECOND-DEGREE ASSAULT, RECKLESS ENDANGERMENT, AND FOURTH-DEGREE BURGLARY.

COSTS ALLOCATED AS FOLLOWS: 2/3 FOR SOMERSET COUNTY, 1/3 FOR APPELLANT.

The correction notice(s) for this opinion(s) can be found here:

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