UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1679

September Term, 2014

RAMONT KIRBY

v.

STATE OF MARYLAND

Eyler, Deborah S.,
Hotten,
Nazarian,

JJ.

Opinion by Eyler, Deborah S., J.

Filed: July 15, 2105

In 1999, a jury sitting in the Circuit Court for Baltimore City convicted Ramont Kirby, the appellant, of murder in the first degree, use of a handgun in the commission of a crime of violence, and wearing, carrying, or transporting a handgun. The court sentenced Kirby to life imprisonment for murder and to a consecutive term of twenty years' imprisonment for the handgun offense.[1] Upon appeal, this Court affirmed. *Ramon Kurby a/k/a Ramont Kirby v. State of Maryland*, No. 769, September Term, 1999 (filed July 26, 2000). The Court of Appeals denied Kirby's subsequently filed petition for writ of certiorari. *Ramon Kurby v. State of Maryland*, 361 Md. 435 (2000).

In 2014, Kirby, proceeding *pro se*, filed a motion to correct an illegal sentence in which he asserted that his convictions were void, and hence his sentences illegal, because the verdict was not properly returned. Specifically, he claimed that, upon polling, seven of the twelve jurors failed to answer and, therefore, the verdict was not unanimous – or was, at best, ambiguous. The circuit court disagreed and denied the motion.

Kirby appealed and presents two questions for our review, which are reducible to one: Did the circuit court err in denying Kirby's motion to correct an illegal sentence? [2]

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[1] For sentencing purposes, the conviction for wearing, carrying, or transporting a handgun merged into the conviction for use of a handgun.

[2] Kirby phrased the questions presented as:

I. Did the trial judge have the authority to sentence Appellant to life plus twenty years without first, taking corrective steps to attempt to cure seven ambiguous jurors' verdict?

(continued...)

Finding no error, we shall affirm the circuit court's order.

FACTS AND PROCEEDINGS

The record before us does not include the full transcript of Kirby's trial. It does, however, include what is necessary to resolve this appeal, that is, the transcript of April 8, 1999, reflecting the jury's announcement of its verdict, which we set forth in its entirety below.

> THE CLERK: Mr. Kirby, please stand and face the jury. **Members of the jury, have you agreed upon your verdict?**
>
> THE JURY: **Yes, we have.**
>
> THE CLERK: In the case of State of Maryland and Ramont Kirby, Case No. 198103002, as to the verdict sheet **how do you find as to the Defendant, Ramont Kirby, on October 12th, 1996 committed the murder in the first degree of Alcinder Lyons, not guilty or guilty?**
>
> THE FOREWOMAN: **Guilty.**
>
> THE CLERK: How do you find as to the Defendant, Ramont Kirby, on October 12th, 1996 did use a handgun during the commission of a crime of violence, not guilty or guilty?
>
> THE FOREWOMAN: Guilty.
>
> THE DEFENDANT: You all some lying motherfuckers, man.
>
> THE COURT: Please, silence.
>
> [DEFENSE COUNSEL]: Sit.

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[2](...continued)

II. Did the lower court abuse its discretion by refusing to correct Appellant's illegal sentence which resulted from a defective verdict?

THE DEFENDANT: Shit. How the fuck evidence - -

THE CLERK: How do you find as to the Defendant, Ramont Kirby, on October 12th 1996 did wear, carry or transport a handgun, not guilty or guilty?

THE FOREWOMAN: Guilty.

THE CLERK: Madam Forelady you may be seated.

THE DEFENDANT: That's all right, the Lord will punish you all –

THE COURT: Excuse me, sir.

THE DEFENDANT: You too. Man, they took my life for nothing man.

THE CLERK: **Counsel, would you like the jury polled?**

THE DEFENDANT: They took my life for nothing man.

[DEFENSE COUNSEL]: Please.

THE DEFENDANT: There ain't nothing nobody can say man.

THE CLERK: Juror No. 1, you're [sic] heard the verdicts of your Foreperson, are you [sic] verdicts the same?

JUROR NO. 1: **(No audible response.)**

THE CLERK: Juror No. 2, you're [sic] heard the verdicts of your Foreperson, are you [sic] verdicts the same?

JUROR NO. 2: Yes.

THE CLERK: Juror No. 3, you're [sic] heard the verdicts of your Foreperson, are you [sic] verdicts the same?

JUROR NO. 3: Yes.

THE CLERK: Juror No. 4, you're [sic] heard the verdicts of your Foreperson, are you [sic] verdicts the same.

THE DEFENDANT: How?

JUROR NO. 4: **(No audible response.)**

THE CLERK: Juror No. 5, you're [sic] heard the verdicts of your Foreperson, are you [sic] verdicts the same?

JUROR NO. 5: Yes.

THE CLERK: Juror No. 6, you're [sic] heard the verdicts of your Foreperson, are you [sic] verdicts the same?

JUROR NO. 6: **(No audible response.)**

THE CLERK: Juror No. 7, you're [sic] heard the verdicts of your Foreperson, are you [sic] verdicts the same?

JUROR NO. 7: Yes.

THE CLERK: Juror No. 8, you're [sic] heard the verdicts of your Foreperson, are you [sic] verdicts the same?

JUROR NO. 8: **(No audible response.)**

THE CLERK: Juror No. 9, you're [sic] heard the verdicts of your Foreperson, are you [sic] verdicts the same?

JUROR NO. 9: **(No audible response.)**

THE CLERK: Juror No. 10, you're [sic] heard the verdicts of your Foreperson, are you [sic] verdicts the same?

JUROR NO. 10: Yes.

THE CLERK: Juror No. 11, you're [sic] heard the verdicts of your Foreperson, are you [sic] verdicts the same?

JUROR NO. 11: **(No audible response.)**

THE CLERK: Juror No. 12, you're [sic] heard the verdicts of your Foreperson, are you [sic] verdicts the same?

JUROR NO. 12: **(No audible response.)**

THE CLERK: **Harken to the verdict as the Court has recorded it, you say as to the Defendant, Ramont Kirby, on October 12th, 1996 committing** [sic] **the murder in the first degree of Alcinder Lyons, guilty**. That the Defendant, Ramont Kirby, on October 12th, 1996, did use handgun [sic] during the commission of a crime of violence, guilty. That the Defendant, Ramont Kirby, on October 12th, 1996, did wear, carry or transport a handgun, guilty. **And so say you all?**

THE JURY: **Yes.**

THE CLERK: Thank you.

(Emphasis added.)

The court then thanked the jury and dismissed them.

DISCUSSION

– A–

The Poll

Relying on the fact that the transcript reflects a "no audible response" from seven of the twelve jurors when polled, Kirby contends that the "verdict[] was not unanimous." He maintains that those seven jurors – Juror Nos. 1, 4, 6, 8, 9, 11, and 12 – "deliberately chose to remain silent when asked if they agree[d] with the verdict[s] of the Foreperson" and that the trial court judge made no "attempt to properly cure" the "ambiguity" arising from their

silence. Therefore, Kirby asserts, the "trial court accepted and enrolled an erroneous verdict" and the sentences imposed are illegal.

The State first responds that Kirby's claim is not "cognizable in a motion to correct an illegal sentence." We disagree. If a jury's verdict is defective for lack of unanimity, the conviction would be a nullity, *Caldwell v. State*, 164 Md. App. 612, 635 (2005), and hence, the legality of the sentence imposed for the conviction could be challenged in a motion to correct an illegal sentence pursuant to Rule 4-345(a). *Chaney v. State*, 397 Md. 460, 466 (2007) (a sentence is illegal for purposes of Rule 4-345(a) where there was no conviction).

The State also asserts that, even if the polling was defective, because Kirby did not object to the polling process, he waived appellate review of the issue. In the context of this case, we disagree. If the verdict was void because the polling was defective, the failure to object to the polling process would not preclude the defendant from challenging the legality of his sentence in a motion to correct an illegal sentence under Rule 4-345(a). *Bryant v. State*, 436 Md. 653, 662 (2014) (Rule 4-345(a) permits a court to correct an "inherently" illegal sentence "at any time," even if no objection was made at trial).

Finally, the State maintains that the verdict was valid because "the record reflects that the court clerk hearkened the jury's verdict in this case, and the jury responded 'yes' in unison."

We agree with the State that the verdict was valid and, hence, the sentences imposed were legal. We hold, therefore, that the circuit court did not err in denying Kirby's motion to correct an illegal sentence. We explain.

Rule 4-327 states, in pertinent part:

> (a) Return. The verdict of a jury shall be unanimous and shall be returned in open court.
>
> * * *
>
> (e) Poll of jury. On request of a party or on the court's own initiative, the jury shall be polled after it has returned a verdict and before it is discharged. If the sworn jurors do not unanimously concur in the verdict, the court may direct the jury to retire for further deliberation, or may discharge the jury if satisfied that a unanimous verdict cannot be reached.

"The requirement of unanimity is, of course, a constitutional right set forth in Article 21 of the Maryland Declaration of Rights, which states that 'every man hath a right . . . to a speedy trial by an impartial jury, without whose unanimous consent he ought not to be found guilty,' and implemented through Rule 4-327(a)." *Jones v. State*, 384 Md. 669, 683 (2005). "A jury verdict that is not unanimous is defective and will not stand." *Caldwell,* 164 Md. App. at 635. "A verdict is defective for lack of unanimity when it is unclear whether all of the jurors have agreed to it." *Id.* at 636. "Whether a verdict satisfies the unanimous consent requirement," we said in *Caldwell*, is "a mixed question of law and fact, which we review *de novo*, considering the totality of the circumstances." *Id.* at 643.

In *Jones, supra,* the Court of Appeals observed that Rule 4-327(a) and (e) (requiring that the jury return a unanimous verdict in open court and permitting the polling of the jury as to its verdict) "embod[ies] the essence of [the] historical procedure for 'returning' a verdict." 384 Md. at 681. The Court then explained that "the 'return' of a verdict by a jury has been comprised of three distinct procedures" -- the foreperson's announcement, polling,

and hearkening -- with "each fulfilling a specific purpose." *Id.* at 682-84.

When a verdict has been reached, the jury returns to the jury box and the foreperson, speaking for the jury, announces the jury's verdict in open court. The purpose of requiring the foreperson to give "an oral announcement of the verdict" in open court is "to enable the defendant to exercise the right to poll the jury as to the verdicts." *Id.* at 684.

Although a defendant "has the absolute right to poll the jury," in order to exercise that right the defendant must request to do so. *Id.* at 683; *see also* Md. Rule 4-327(e). "The object of a poll of the jury," the Court of Appeals said long ago, "is to call on *each* juror to answer for himself, and in his own language." *Ford v. State*, 12 Md. 514, 546 (1859) (emphasis in the original). This process "ensure[s] the unanimity of the verdict prior to its entry on the record." *Jones,* 384 Md. at 682. "When a poll is demanded, the verdict becomes final only upon its acceptance after the poll." *Id.* at 683-684.

In the absence of a polling, the verdict is not final unless and until the jury hearkens to its verdict. *State v. Santiago*, 412 Md. 28, 38 (2009). Hearkening requires the jury "to listen carefully and indicate its assent to the verdict as announced to insure unanimity and the agreement of each and every juror to the verdict as announced." *Id.* Hearkening serves the same function as polling, that is, to "secure certainty and accuracy, and to enable the jury to correct a verdict, which they have mistaken, or which their foreman has improperly delivered." *Jones,* 384 Md. at 684 (internal quotation marks and citation omitted). Because they serve the same purpose, a jury's verdict need only be polled or hearkened – not both. *Jones v. State,* 173 Md. App. 430, 458 (2007). It is only where neither polling nor

hearkening have occurred that a verdict is improperly rendered and recorded and, consequently, "a nullity." *Id.* at 457.

Here, after the foreperson announced the jury's verdicts, a poll was conducted. As Kirby points out, the transcript of the polling reflects a "no audible response" by seven of the twelve jurors when asked, individually, whether his or her verdict was the same as that announced by the foreperson. Kirby then asserts that those seven jurors "deliberately chose to remain silent," thus rendering the jury's verdict "not unanimous," or at best ambiguous.

We are not persuaded that the seven jurors (Juror Nos. 1, 4, 6, 8, 9, 11, and 12) in fact remained silent when polled. Rather, it appears that their responses simply were not loud enough to be picked up by the recording equipment and, thus, when the proceeding later was transcribed, the transcriber could not discern any "audible response."[3] This presumption is supported by the fact that no one challenged the poll and, immediately upon its completion, the jury clearly assented to the verdicts when hearkened. Based on the totality of the circumstances, we are confident that the jury's verdicts in this case were unanimous.

–B–

The Murder Verdict

Kirby next contends that, when announcing its verdict on the murder charge, the

[3] The transcript of the jury's announcement of its verdict on April 8, 1999, includes a "Transcriber's Certificate," dated June 29, 1999, in which the transcriber certifies that "the proceedings in the matter of State of Maryland v. Ramont Kirby, Criminal Case No. 198103001 and 002, heard on April 8, 1999, were recorded by means of videotape" and that the "videotaped proceedings" were transcribed "to the best of [the transcriber's] ability in a complete and accurate manner."

jurors "failed to state in their own language, the degree of murder," and therefore the verdict "was in noncompliance with the Acts of 1809, chapter 138, sec. 3." In other words, Kirby appears to be saying that, because each juror did not individually state that he or she found him "guilty of murder *in the first degree*," the verdict was defective.

Kirby did not make this argument in his motion to correct illegal sentence and, therefore, it is not properly before us. *Chertkof v. Dept. of Natural Res.*, 43 Md. App. 10, 16 (1979) ("the appellant [is] precluded from raising a theory in this appeal upon which [he] now relies for the first time"). Even if it were, we would reject it. Chapter 138 of the Acts of 1809 divided murder into degrees. When Kirby was tried in 1999, Maryland Code (1957, 1996 Repl. Vol., 1998 Supp.) section 407 of Article 27 provided that "[a]ll murder which shall be perpetrated by means of poison, or lying in wait, or by any kind of wilful, deliberate and premeditated killing shall be murder in the first degree." [4] Section 412(a) of Article 27 stated that, "[i]f a person is found guilty of murder, the court or jury that determined the person's guilt shall state in the verdict whether the person is guilty of murder in the first degree or murder in the second degree."[5]

Decades after the legislature divided murder into degrees, the Court of Appeals held in *Williams v. State*, 60 Md. 402, 403 (1883), that a "general verdict of 'guilty' on an

[4] Murder in the first degree is currently codified at Md. Code (2002, 2012 Repl. Vol., 2014 Supp.) section 2-201 of the Criminal Law Article ("CL").

[5] This provision is currently codified as CL section 2-302. It states: "When a court or jury finds a person guilty of murder, the court or jury shall state in the verdict whether the person is guilty of murder in the first degree or murder in the second degree."

indictment for murder, is a bad verdict, and on such a verdict no judgment can be pronounced." In that case, although the foreman had announced the verdict as guilty of murder in the first degree, upon polling, each individual juror stated that his verdict was "guilty" without mentioning the degree of murder. *Id.* In reversing the conviction, the Court of Appeals noted that "murder in the first degree is punishable by death, and murder in the second degree, by confinement in the penitentiary." *Id.* "The Code, therefore, provides that on an indictment for murder, the jury shall, if they find the person 'guilty,' ascertain in their verdict whether it be murder in the *first or second* degree." *Id.* (emphasis in the original). The Court held that the failure of each individual juror, when polled, to "say for himself, whether he found the prisoner guilty of murder in the first or second degree" rendered the murder verdict in *Williams* "a nullity." *Id.*

Some eighty-eight years later, the Court of Appeals addressed a similar issue, but held that the verdict was valid. *Strong v. State*, 261 Md. 371 (1971) (death sentence later vacated in *Strong v. Maryland*, 408 U.S. 939 (1972)). In *Strong*, the forelady announced the verdict as: "Guilty. Guilty of first degree murder, the first degree." *Id.* at 373. The clerk then polled the jury, asking each juror the identical question: "Juror No. [___], you have heard the verdict as given by your Forelady. Is your verdict the same?" *Id.* Each juror, in turn, answered: "Yes" or "Yes, it is." *Id.* Thereafter, the clerk intoned: "Hearken to the verdict as the Court has recorded it. You say Cornelius Thomas Strong is guilty of murder in the first degree as to Indictment 3029 of the Docket of 1969, and so say you all?" *Id.* at 373-374. The jurors responded "yes." *Id.* at 374.

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

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

Id. at 374.

In the case at bar, the courtroom clerk asked the jury whether it had found "Defendant, Ramont Kirby, on October 12th, 1996 committed the murder *in the first degree* of Alcinder Lyons, not guilty or guilty?" (Emphasis added.) The foreperson responded: "Guilty." And, as in *Strong*, when polled each juror was asked if his or her verdict was the same as that announced by the foreperson. Finally, when the verdict was hearkened, the clerk stated: "Harken to the verdict as the Court has recorded it, you say as to the Defendant, Ramont Kirby, on October 12th, 1996 committing [sic] the *murder in the first degree* of Alcinder Lyons, guilty. . . . And so say you all?" (Emphasis added.) The jury responded: "Yes." Accordingly, there was no confusion about the murder verdict – the jury convicted Kirby of murder in the first degree.

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