UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1235

September Term, 2015

JAMES THOMAS ROSS, II

v.

STATE OF MARYLAND

Krauser, C.J.,
Woodward,
Salmon, James P.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Krauser, C.J.

Filed: October 5, 2016

Convicted by a jury, in the Circuit Court for Anne Arundel County, of one count of attempted robbery, second-degree assault, reckless endangerment, and attempted theft of property with a value of less than $1,000, and three counts of conspiracy to commit robbery, James Thomas Ross, II, appellant, was sentenced, by that court, to a term of ten years' imprisonment for the attempted robbery alleged by Count 1; to a term of ten years' imprisonment for the conspiracy alleged by Count 5 (to run concurrently with the sentence imposed for attempted robbery); to a term of seven years' imprisonment, with all but two years suspended, for the conspiracy alleged by Count 12 (to run consecutively to the sentences imposed on Counts 1 and 5); and to a term of seven years' imprisonment, with all but two years suspended, for the conspiracy alleged by Count 19 (to run consecutively to all other sentences). In sum, Ross received an aggregate term of twenty-four years' imprisonment, with all but fourteen years suspended.[1] *Ross v. State*, No. 2209, September Term, 2013, slip op. at 1, 8-9 (filed Jun. 8, 2015).

On appeal, this Court held that there was insufficient evidence of separate conspiracies and remanded the case to the circuit court, with instructions that that court vacate two of Ross's three conspiracy convictions, leaving it to the discretion of the circuit court to decide which two of his three convictions should be vacated. *Id.*, slip op. at 11-13, 14. The circuit court subsequently vacated two of Ross's three conspiracy convictions (Counts 5 and 19), resulting in an aggregate sentence of seventeen years' imprisonment, with all but twelve years suspended. Appealing that sentence, Ross raises

[1] His remaining convictions were merged for sentencing purposes.

a single issue for our review, and that is: whether the circuit court erred or abused its discretion in not vacating his conspiracy convictions based on Counts 12 and 19, for which consecutive sentences had been imposed. Finding neither error nor abuse of discretion by that court, we affirm.

DISCUSSION

I.

In resolving Ross's earlier appeal, we clearly left it within the circuit court's discretion to determine, on remand, which of the conspiracy convictions to vacate. *Ross v. State*, *supra*, slip op. at 14. Consequently, we review the action subsequently taken by the circuit court for abuse of discretion. An abuse of discretion occurs when the court acts in a manner that was "manifestly unreasonable," or exercises its discretion "on untenable grounds, or for untenable reasons," or when "no reasonable person would take the view adopted by the [trial] court." *Wilson-X v. Dep't of Human Res.*, 403 Md. 667, 675 (2008) (citations and quotations omitted).

II.

Ross contends that the circuit court abused its discretion in vacating his conspiracy conviction based on Count 5, instead of his conspiracy conviction based on Count 12, in conjunction with its vacation of his conspiracy conviction based on Count 19. The effect of the court's action, as Ross notes, was to impose an aggregate sentence of seventeen years' imprisonment, with all but twelve years suspended, instead of the flat ten-year term of imprisonment that Ross had requested. According to Ross, the circuit court, in imposing sentence, improperly focused upon the individual attempted robberies, which were

committed in the course of what this Court had previously found was but a single conspiracy. Moreover, Ross contends that, by previously imposing a greater sentence, albeit a concurrent one, for the conspiracy conviction based on Count 5, the circuit court had, in effect, "implicitly" acknowledged that it had found the conspiracy alleged by Count 5 to be "the actual conspiracy" for which punishment must be imposed as it was, according to Ross, the conspiracy "for which there was the most evidence adduced" and as the court declared that it had found "this conspiracy to be the meeting of the minds for which [Ross] was being convicted."

Ross acknowledges that the recent decision of the Court of Appeals, in *Twigg v. State*, 447 Md. 1 (2016), seemingly permits what the circuit court did, upon remand, in this case. After Twigg was convicted of second-degree rape, third-degree sexual offense, incest, and child sexual abuse, the circuit court sentenced him to consecutive terms of twenty years' imprisonment for second-degree rape, ten years' imprisonment for third-degree sexual offense, and ten years' imprisonment for incest, as well as fifteen years' imprisonment for child sexual abuse, with all of that term suspended, in favor of five years' probation. *Id.* at 5.

On appeal, we held that the circuit court had erred in failing to merge, for purposes of sentencing, the convictions for second-degree rape, third-degree sexual offense, and incest into the conviction for child sexual abuse. *Twigg v. State*, 219 Md. App. 259, 272 (2014), *rev'd in part*, 447 Md. 1 (2016). But, instead of vacating only the sentences for the lesser included offenses, this Court vacated the entire sentence and remanded the case to

the circuit court, under Maryland Rule 8-604(d),[2] to afford it an opportunity to impose a new sentence for child sexual abuse, so long as it did not exceed the maximum penalty prescribed by law, as of the time Twigg had committed the offense (which was fifteen years' imprisonment). 219 Md. App. at 282.

Observing that, "[i]n imposing sentences for multiple convictions in a single case," a trial court "considers not only the sentence for each conviction, but also the total sentence for all of the convictions together," we concluded that, even if, on remand, the circuit court imposed the maximum penalty of fifteen years' imprisonment for child sexual abuse, that sentence would not be an unlawful "increase" of his earlier sentence, totaling forty years of imprisonment. *Id.* at 287. We rejected Twigg's contrary contention that to permit the circuit court to impose a term of incarceration for child sexual abuse, when it had

[2] Maryland Rule 8-604(d) provides in part:

> (1) Generally. If the Court concludes that the substantial merits of a case will not be determined by affirming, reversing or modifying the judgment, or that justice will be served by permitting further proceedings, the Court may remand the case to a lower court. In the order remanding a case, the appellate court shall state the purpose for the remand. The order of remand and the opinion upon which the order is based are conclusive as to the points decided. Upon remand, the lower court shall conduct any further proceedings necessary to determine the action in accordance with the opinion and order of the appellate court.
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> (2) Criminal Case. In 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.
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> * * *

previously declined to do so, would result in an "increase" in his sentence, as "defy[ing] common sense." *Id.* at 287.

The Court of Appeals thereafter granted both Twigg's petition for writ of certiorari and the State's cross-petition, to review this Court's holdings as to both the merger issue and the re-sentencing issue. Ultimately, the Court concluded that we had erred in holding that all three of the lesser included offenses were required to be merged, because, under the facts of that case, all three could have supported a conviction for child sexual abuse. It therefore held that only the sentence for the lesser included offense carrying the greatest maximum penalty must be vacated. 447 Md. at 10, 18-19.[3] But, of particular relevance to the issue before us, the Court of Appeals upheld this Court's authority, under Rule 8-604(d), to vacate the (otherwise lawful) sentence imposed for the greater offense, as well as any unlawful sentences, and to remand for re-sentencing as to all charges. 447 Md. at 19-21.

Ross's attempt to distinguish *Twigg* from the instant case by pointing out that *Twigg* involved a remand for re-sentencing after an appellate court had merged convictions for purposes of sentencing, whereas this case involves a remand so that convictions could be vacated rather than merged, is unpersuasive.

First, the distinction upon which Ross relies is a distinction without a difference. Both in *Twigg* and in the instant case, a sentencing error had resulted in a greater sentence

[3] Although it is not relevant to the question before us, we note that the Court of Appeals held that Twigg was entitled to vacatur of the twenty-year sentence for second-degree rape but not the remaining two sentences for the lesser included offenses of third-degree sexual offense and incest. *Twigg v. State*, 447 Md. 1, 18-19 (2016).

being imposed than that permitted by law. Whether there was an error in failing to merge convictions for sentencing purposes, as in *Twigg*, or an error in failing to enter only a single conviction, where the evidence adduced supported only that single conviction and not multiple ones, as here, the result is substantially the same—in both cases, an illegal sentence was imposed. *Compare Randall Book Corp. v. State*, 316 Md. 315, 321-22 (1989) (holding that claim of failure to merge sentences is cognizable under Rule 4-345(a)), *with Jordan v. State*, 323 Md. 151, 159-62 (1991) (holding that multiple conspiracy convictions where "the facts do not support the determination" that multiple conspiracies existed resulted in the imposition of an illegal sentence).

Second, the reason why, in Ross's previous appeal, we ordered that two of the three conspiracy convictions be vacated was precisely because the evidence adduced, at Ross's trial, did not support the existence of three conspiracies, but only one. *Ross v. State*, *supra*, slip op. at 11-13. Now, in this second appeal, Ross argues as if there had been three separate conspiracies but that only one of them, the one for which the circuit court had previously imposed a concurrent sentence, was "the actual conspiracy" for which punishment must be imposed. But, this argument misses the point entirely. The very premise of our previous judgment was that there was only one conspiracy, not three, and that, in effect, Counts 5, 12, and 19 all charged the same crime. Consequently, evidence adduced in support of Counts 12 and 19 would also support Count 5 and vice versa, and it was entirely appropriate for the circuit court, upon remand, to consider the harm suffered by all three victims in determining which convictions should be vacated, and, concomitantly, what sentence should be imposed.

Ross has pointed to no instance of legal error in the proceedings challenged in this appeal. Moreover, because we conclude that the circuit court did not act in a manner that was "manifestly unreasonable," or that it exercised its discretion "on untenable grounds, or for untenable reasons," and because Ross has failed to demonstrate that "no reasonable person would take the view adopted by the [sentencing] court," *Wilson-X*, *supra*, 403 Md. at 675 (citations and quotations omitted), we hold that the circuit court did not abuse its discretion in vacating Ross's conspiracy conviction based on Count 5, instead of his conspiracy conviction based on Count 12, in conjunction with its vacation of his conspiracy conviction based on Count 19.

JUDGMENTS OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY AFFIRMED. COSTS ASSESSED TO APPELLANT.