UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1365

September Term, 2014

RUDOLPH McNEIL

v.

STATE OF MARYLAND

Woodward,
Kehoe,
Arthur,

JJ.

Opinion by Kehoe, J.

Filed: March 3, 2016

In 1994, a jury sitting in the Circuit Court for Baltimore City convicted Rudolph McNeil, appellant, of two counts of first-degree murder and two counts of use of a handgun in the commission of a crime of violence. The court sentenced McNeil to life imprisonment for the murder of victim Gibson Charles and to a consecutive ten year term for the use of a handgun in that offense. The court imposed an additional life sentence for the murder of victim Devon Williams, to run consecutive to the sentences imposed for the offenses involving Charles.[1] McNeil appealed and this Court, in an unreported opinion, affirmed. *McNeil v. State*, No. 303, September Term, 1994 (filed November 28, 1994). The Court of Appeals denied his subsequently filed petition for writ of certiorari. *McNeil v. State*, 338 Md. 116 (1995).

In 1998, McNeil filed a motion to correct an illegal sentence claiming that the sentences were illegal because the "sentence structure" was ambiguous and the sentences as imposed exceeded the maximum permitted by law. The circuit court denied the motion and upon appeal this Court, in an unreported opinion, affirmed. *McNeil v. State*, No. 2498, September Term, 1999 (filed September 21, 2001).

In 2008, McNeil filed a second motion to correct an illegal sentence in which he raised essentially the same issues he had raised in his first motion. The circuit court denied the motion and upon appeal this Court, in an unreported opinion, affirmed.

[1] The court also imposed a ten year term of imprisonment for the second handgun conviction (involving Williams), to run concurrently with the sentence imposed for the first handgun offense.

McNeil v. State, No. 260, September Term, 2009 (filed October 13, 2010). The Court of Appeals denied his subsequently filed petition for writ of certiorari. *McNeil v. State*, 417 Md. 502 (2011).

In 2013, McNeil filed a third motion to correct an illegal sentence in which he asserted that the verdicts were invalid because they were not announced in a manner which reflected that they were unanimous and, therefore, his sentences were illegal. Specifically, he claimed that the forelady was skipped when the jury was polled and that the jury did not respond when the clerk requested that they hearken to their verdicts. The circuit court found that the verdicts were properly announced and denied the motion.

McNeil appealed and presents several questions for our review, which we consolidate and rephrase as follows:

1. Were the verdicts invalid, and hence the sentences illegal, because the clerk did not poll the forelady when polling the jury and because the transcript does not reflect the jury's response to the hearkening of their verdicts?

2. Was the life sentence imposed for first-degree murder illegal? [2]

[2] McNeil phrased the questions presented as follows:

A. Does Maryland Rule 4-327(a) and (e) requires for the jury Forelady's to announce her individual verdict in open court during polling separately from the returning of the verdict for it to be considered a unanimous concurrence?

B. During the hearkening of the jury on to it's verdict, does it

(continued...)

For the reasons to be discussed, we affirm.

Background

McNeil, as noted, was tried before a jury. Because the only issue properly before us relates to the announcement of the jury's verdicts, we shall only recite the facts necessary to address that issue. *Washington v. State*, 180 Md. App. 458, 461 n.2 (2008).

After the jury completed their deliberations, they returned to the courtroom to deliver their verdicts and the transcript reflects that the following occurred:[3]

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[2](...continued)

requires for the jury to express an acceptance of it's verdict in open court before the jury is discharged for the verdict to be considered valid?

C. (1) Did the legislature intended for a life sentence to be imposed on a conviction for first degree murder, where the jury ability to determine guilty on all elements of the offense charged was usurp by trial court's jury instruction? (2) Did the trial court illegally imposed a life sentence on a conviction for first degree murder where there is no way of knowing the basis of the jury's decision as they were instructed on both "intent to kill" and "intent to do serious bodily harm"? (3) Did the trial court illegally impose a life sentence on a conviction for first degree murder where the instruction given to the jury equated both first and second degree murder as being the same?

[3] The record before us does not include the official transcript. What follows is taken from transcript excerpts contained in the appendix to appellant's brief. The State did not object to the excerpts and we have no reason to believe that the excerpts are not accurate.

THE CLERK:	Ladies and gentlemen of the jury, have you agreed upon verdicts?
	You have. Who shall say for you?
	Madame Forelady, stand up please. Mr. McNeil, will you stand up please.
	Madam Forelady, in indictment number 193203029 what is your verdict in the murder of Charles - - Gibson Charles?
FORELADY:	Guilty of murder in the first degree.
THE CLERK:	Okay. And use of a handgun in the commission of a crime of violence?
FORELADY:	Guilty.
THE CLERK:	And as to indictment number 193203031 the murder of Devon Williams?
FORELADY:	Guilty of murder in the first degree.
THE CLERK:	And use of a handgun in the commission of a crime of violence?
FORELADY:	Guilty.
THE COURT:	Do you want the jury polled?
[COUNSEL]:	Poll the jury.
THE CLERK:	You may be seated.
	Juror Number 2, you have heard the verdicts of your Forelady, are your verdicts the same as hers?
JUROR NO. 2:	Yes.

The clerk continued the poll, successively asking Juror Numbers 3 through 12, the same question posed to Juror Number 2; each juror, in turn, responded "yes." Immediately following the response of Juror Number 12, the clerk asked the jury to hearken to their verdicts:

THE CLERK: Hearken to the verdicts as the Court has recorded it you say that Rudolph McNeil in case number 193203029, murder of Gibson Charles, guilty murder in the first degree. Also, count two, use of a handgun in the commission of a crime of violence, guilty.

As in indictment number 193203031, the murder of Devon Williams, guilty of murder in the first degree. Also, use of a handgun in the commission of a crime of violence, guilty, and so say you all.

Thank you very much, ma'am.

THE COURT: Ladies and gentlemen, on behalf of all of us I want to thank each and every one of you for having served as jurors in this trial, particularly because your jury service required extraordinary – performed under unfortunate circumstances regarding the climate outside.

Your duties as jurors are now at an end.

The court continued with a few additional concluding remarks for the jury and then dismissed them.

Discussion

I.

McNeil asserts that the verdicts were a nullity because the forelady was not polled and because the transcript does not reflect any response by the jury to the clerk's hearkening. Consequently, he concludes that his sentences are illegal.

The State moves to dismiss the appeal, asserting that this Court has previously found McNeil's sentences to be legal and, hence "the limited right of appeal afforded by Maryland Rule 4-345(a) is no longer available" to him. Moreover, the State asserts that

McNeil's present "legal sentence contention is also barred under the law of the case doctrine." As to the merits, the State simply maintains that "the jurors were properly both hearkened and polled." Rule 4-345(a) provides that "[t]he court may correct an illegal sentence at any time." If the contentions McNeil is raising here were raised in and decided in any of his previous appeals, we would agree with the State that the issue would be barred by the law of the case doctrine. *State v. Garnett,* 172 Md. App. 558, 562 (observing that "the law of the case doctrine would prevent relitigation of an 'illegal sentence' argument that has been presented to and rejected by an appellate court."), *cert. denied,* 399 Md. 594 (2007). McNeil's argument that the verdicts were defective, however, was not addressed by this Court in any of his previous appeals and, therefore, the law of the case doctrine is inapplicable.

The State also maintains that McNeil's sentences are not "inherently illegal" for Rule 4-345(a) purposes. The State is not correct. If the verdict was defective as a matter of law, then necessarily the resulting sentence was illegal. *See (Kerwin) Jones v. State*, 384 Md. 669, 686 n.17 (2005) ("Thus, the verdict sheet in the present case did not ensure a unanimous verdict and the verdict at issue could not properly be accepted, thereby rendering any sentence imposed for Count nine illegal."); *(Tyshawn) Jones v. State*, 173 Md. App. 430, 457 (2007) ("[A] verdict that has not been followed by either polling or hearkening, has not been properly rendered and recorded and is a nullity." (citations

omitted)). Consequently, if McNeil's verdicts were a nullity because the polling and hearkening were fatally flawed, then the sentences imposed would be illegal and subject to correction under Rule 4-345(a). *Chaney v. State*, 397 Md. 460, 466 (2007) (a sentence is illegal under Rule 4-345(a) where there was "no conviction warranting any sentence"). *See also Alston v.* State, 425 Md. 326, 339 (2012) ("where no sentence or sanction should have been imposed, the criminal defendant is entitled to relief under Rule 4-345(a)."). We deny the State's motion to dismiss the appeal and will address the merits of McNeil's claim.

II.

Maryland 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)." *(Kerwin) Jones v. State*, 384 Md. at 683. "A jury verdict that is not unanimous is defective and will not stand."

Caldwell v. State, 164 Md. App. 612, 635 (2005). "A verdict is defective for lack of unanimity when it is unclear whether all of the jurors have agreed to it." *Id.* at 636 (citations omitted). In other words, "to satisfy the unanimous consent requirement, a verdict must be unambiguous and unconditional and must be final – in the sense of not being provisional or tentative and, to the contrary, being intended as the last resolution of the issue and not subject to change in further deliberation." *Id.* at 642-643. "Whether a verdict satisfies the unanimous consent requirement is a . . . mixed question of law and fact, which we review *de novo*, considering the totality of the circumstances." *Id.* at 643 (citations omitted).

Neither party to this appeal has cited a decision holding that the failure to poll the jury's foreperson, who has just announced the jury's verdict, renders the poll defective. Nor have we found any case discussing the precise issue. However, the Court's analysis in *Strong v. State,* 261 Md. 371, 373-374 (1971)*, vacated on other grounds*, 408 U.S. 939 (1973), is instructive.

Strong was convicted of first-degree murder. When the jury returned to the courtroom to render its verdict, the clerk asked whether Strong was "guilty of the matters wherein he stands indicted or not guilty?" The foreperson responded "Guilty. Guilty of first degree murder, the first degree." *Id.* at 373. Defense counsel asked that the jury be polled. The Court of Appeals described what then occurred:

> [T]he clerk said: 'Juror No. 2, you have heard the verdict as given by your Forelady. Is your verdict the same?' Juror No. 2 replied: 'Yes, it is.' Each of the other ten jurors was asked the identical question by the clerk and each replied 'Yes' or 'Yes, it is.' After juror No. 12 had answered yes, 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?
>
> to which, as the transcript indicates, there was a general jury response of 'yes.'

Id. at 373–74.

On appeal, Strong contended that each member of the jury had not made it expressly clear that he or she found the defendant guilty of first degree murder.[4] In response to Strong's contention that only the foreperson had expressly stated that he was guilty of first degree murder, the Court stated:

> In the present case 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

[4] *See Williams v. State*, 60 Md. 402 (1883) and *Ford v. State*, 12 Md. 514 (1859) (In order for a verdict of guilty for first-degree murder to be valid, the words "guilty of first-degree murder," or something equivalent, must be expressly articulated by each member of the jury if the jury is polled.).

> 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.

261 Md. at 374 (emphasis added).

Strong is not squarely on point but the Court of Appeals' reasoning leads us to conclude that, even though the foreperson did not participate in the poll of the jury, her explicit statements that McNeil was guilty of two counts of first degree murder and two counts of the use of a handgun in the commission of a crime of violence was sufficient to show that she agreed with the verdicts. *See also Coby v. State*, 225 Md. 293, 299 (1961) ("The record shows that after the foreman had announced the verdict of guilty, each of the *other* members of the jury was asked individually if his verdict was the same as that of the foreman and each juror answered that it was. Thus, the polling of the jury clearly indicated the assent of *each* juror to the verdict[.]") (emphasis added)).

In our view, all the jurors, including the foreperson, should be polled when a poll is requested.[5] But bearing in mind that the purpose of a poll is to "ensure the unanimity of the verdict prior to its entry on the record," *Jones, supra*, 384 Md. at 682, we hold that the failure to poll the foreperson in this case did not render the verdicts invalid because there was no indication whatsoever that the foreperson disagreed with the verdicts that she, herself, had just unambiguously announced.

[5]*See Biscoe v. State*, 68 Md. 294, 298 (1888) (foreperson included in poll of jury).

III.

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, supra,* 384 Md. at 684 (quotation omitted). Because they serve the same purpose, a jury's verdict need only be polled or hearkened – not both. *Jones, supra,* 173 Md. App. at 458. Therefore, if a jury is polled as to their verdict, the failure to hearken is not fatal. *Id.* 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, immediately following the polling, the clerk asked the jury to hearken to its verdicts, which was transcribed as follows:

> THE CLERK: Hearken to the verdicts as the Court has recorded it you say that Rudolph McNeil in case number 193203029, murder of Gibson Charles, guilty murder in the first degree. Also, count two, use of a handgun in the commission of a crime of violence, guilty.
>
> As in indictment number 193203031, the murder of Devon Williams, guilty of murder in the first degree. Also, use of a handgun in the commission of a crime of violence, guilty, and so say you all.
>
> Thank you very much, ma'am.

McNeil points out that the transcript does not reflect the jury's response to the hearkening and he therefore asserts that the jury gave no response. But the jury's silence, if it was silent, went unnoted and unremarked upon by the prosecutor, defense counsel or

the trial court itself. The clear implication is that the jury in fact assented because immediately after the hearkening the court thanked the jury for its service and informed them that their "duties" were "now at an end." The lack of any objection to the hearkening by the State or the defense also supports the conclusion that the jury did expressly assent to the hearkening. In short, it appears that the transcriber simply failed to transcribe the jury's response to the hearkening.

In sum, based on the totality of the circumstances, we are satisfied that the verdicts in this case were unanimous and hence valid.

IV.

McNeil's final contention centers on how the jury was instructed on first-degree murder. He did not, however, raise this issue in his motion to correct an illegal sentence and consequently it was not addressed by the circuit court when ruling on the motion. We, therefore, shall not consider it. Rule 8-131(a) ("Ordinarily, the appellate court will not decide" any issue, other than jurisdiction, "unless it plainly appears by the record to have been raised in or decided by the trial court[.]")

Moreover, any issue regarding jury instructions should have been raised in McNeil's direct appeal, not in a motion to correct an illegal sentence under Rule 4-345(a). The Court of Appeals has held that relief is not available under Rule 4-345(a) where "the sentences imposed were not inherently illegal, despite some form of error or alleged

injustice." *Matthews v. State,* 424 Md. 503, 513 (2012). Rather, a sentence is "illegal" for purposes of Rule 4-345(a) where there was no conviction warranting any sentence, *Chaney, supra,* 397 Md. at 466; where the sentence imposed was not a permitted one, *id.*; or where the sentence imposed exceeded the sentence agreed upon as part of a binding plea agreement. *Matthews,* 424 Md. at 514. In other words, to be subject to correction by motion filed under Rule 4-345(a), the "illegality must inhere in the sentence, not in the judge's actions." *State v. Wilkins*, 393 Md. 269, 284 (2006). In short, McNeil's jury instruction argument is not the proper subject of a motion to correct an illegal sentence.

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