UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1169

September Term, 2014

ROBERT McLEAN

v.

STATE OF MARYLAND

Meredith,
Berger,
Kenney, James A., III
(Senior Judge, Specially Assigned),

JJ.

Opinion by Meredith, J.

Filed: February 8, 2017

After a jury sitting in the Circuit Court for Baltimore City found Robert McLean, appellant, guilty of sixteen counts that charged him with various acts of obstructing justice, he was sentenced to multiple terms of incarceration with a total executed sentence of 45 years. In this direct appeal, he challenges some of the convictions as being inconsistent with the crimes charged in the indictments, and also challenges the imposition of multiple sentences for conspiracy. In his brief, he raises the following questions:

> 1. Was Mr. McLean illegally sentenced for two violations of Criminal Law Article, § 9-305(b) when he was not charged with that crime?
>
> 2. Must Mr. McLean's two convictions and sentences for violating Criminal Law Article, § 9-302 be vacated because the jury may have convicted him under section (b)(1) which was not charged?
>
> 3. If this Court does not vacate Mr. McLain's [sic] convictions and sentences for violating Criminal Law Article, § 9-302, must the sentences for solicitation to induce avoidance of a subpoena merge into the related sentences for conspiracy to induce avoidance of a subpoena pursuant to *Monoker v. State*, [321 Md. 214 (1989)]?
>
> 4. Must three of the conspiracy sentences imposed in Indictment Number 113038006 merge into the fourth so that there is only one sentence for conspiracy?

The State concedes that there should have been only one sentence imposed for the convictions for conspiracy; we agree, and shall vacate all but the first sentence imposed for conspiracy. But we reject the claims asserted by McLean, in issues 1 and 2, that he was convicted of crimes of which he was not charged, as well as his claim that the solicitation convictions should have merged into the conspiracy convictions. Accordingly,

we shall affirm all other judgments of the circuit court.

BACKGROUND

a. The indictments.

McLean was charged with several variants of obstructing justice in four separate four-count indictments. The jury returned verdicts of "guilty" on each of the sixteen counts. To understand the issues McLean raises on appeal, it is necessary to review all four of the indictments. All four indictments alleged that McLean had committed illegal acts that were intended either to discourage, or prevent Shawn Jackson from testifying that he witnessed McLean committing a crime of violence, or to retaliate against Jackson for testifying against McLean.

The first indictment, filed in Case No. 113038005 ("case 8005"), served as a template for the other three companion indictments. Like all four of the indictments, the indictment in case 8005 identified the "Complainant" as "Shawn Jackson." This indictment identified the "Date of Offense[s]" as "September 28, 2012-November 7, 2012." The "Location" was identified as: "Park Heights Area." In case 8005, the first count charged McLean with a violation of Maryland Code (2002, 2012 Repl. Vol.), Criminal Law Article ("CL"), § 9-302.[1]

[1] CL § 9-302 is captioned "**Inducing false testimony or avoidance of subpoena**," and provides, in pertinent part:

> Prohibited–In general
>
> (a) A person may not harm another, threaten to harm another, or damage or destroy property with the intent to:
>
> (1) influence a victim or witness to testify falsely or withhold

This first count of the indictment charges:

> The Jurors of the State of Maryland for the body of the City of Baltimore, do on their oath present that the aforesaid DEFENDANT(S), late of said City, heretofore on or about the date(s) of offense set forth above at the location(s) set forth above, in the City of Baltimore, State of Maryland, did solicit a person to harm and threaten to harm another and damage and destroy property, with the intent to induce a victim and witness to avoid the service of a subpoena and summons to testify, to be absent from an official proceeding to which the victim and witness had been subpoenaed and summonsed, and not to report the existence of facts relating to a crime and delinquent act, in violation of Criminal Law Article, Section 9-302 of the Annotated Code of Maryland; against the peace, government and dignity of the State.

The language in the second count bears similarities, but charges a violation of CL

---

testimony; or

(continued …)

(…continued)

(2) induce a victim or witness:

(i) to avoid the service of a subpoena or summons to testify;

(ii) to be absent from an official proceeding to which the victim or witness has been subpoenaed or summoned; or

(iii) not to report the existence of facts relating to a crime or delinquent act.

Prohibited–Solicitation

(b) A person may not solicit another person to harm another, threaten to harm another, or damage or destroy property with the intent to:

(1) influence a victim or witness to testify falsely or withhold testimony; or

(2) induce a victim or witness:

(i) to avoid the service of a subpoena or summons to testify;

(ii) to be absent from an official proceeding to which the victim or witness has been subpoenaed or summoned; or

(iii) not to report the existence of facts relating to a crime or delinquent act.

§ 9-303, and states:[2]

> The Jurors of the State of Maryland for the body of the City of Baltimore, do on their oath present that the aforesaid DEFENDANT(S), late of said City, heretofore on or about the date(s) of offense set forth above at the location(s) set forth above, in the City of Baltimore, State of Maryland, did solicit a person to intentionally harm and threaten to harm another and damage and destroy property, with the intent of retaliating against a victim and witness for reporting a crime and delinquent act, in violation of Criminal Law Article, Section 9-303 of the Annotated Code of Maryland; against the peace, government and dignity of the State.

The third count of the indictment was similar in most respects, but alleges a violation CL § 9-305, and states:[3]

---

[2] CL § 9-303 is captioned "**Retaliation for testimony**," and, at the time of the (continued…)

(…continued)

alleged offenses in this case (*i.e.*, prior to amendments effective October 1, 2016) provided in pertinent part:

> Prohibited–In general
>
> (a) A person may not intentionally harm another, threaten to harm another, or damage or destroy property with the intent of retaliating against a victim or witness for:
> (1) giving testimony in an official proceeding; or
> (2) reporting a crime or delinquent act.
>
> Prohibited–Solicitation
>
> (b) A person may not solicit another person to intentionally harm another, threaten to harm another, or damage or destroy property with the intent of retaliating against a victim or witness for:
> (1) giving testimony in an official proceeding; or
> (2) reporting a crime or delinquent act.

[3] CL § 9-305 is captioned "**Intimidating or corrupting juror**," and provides in pertinent part:

(continued…)

> The Jurors of the State of Maryland for the body of the City of Baltimore, do on their oath present that the aforesaid DEFENDANT(S), late of said City, heretofore on or about the date(s) of offense set forth above at the location(s) set forth above, in the City of Baltimore, State of Maryland, by threat, force, and corrupt means, did try to influence, intimidate, and impede a juror, a witness, and an officer of a court of the State and of the United States in the performance of the persons official duties, and the act is taken in connection with a proceeding involving [the commission of a crime of violence, as defined in Criminal Law Article, Section 14-101/ a felonious violation of Title 5 of the Criminal Law Article] and a conspiracy and solicitation to commit such a crime, in violation of Criminal Law Article, Section 9-305 of the Annotated Code of Maryland; against the peace, government and dignity of the State.

(Bracketed language in original.)

The fourth count of the indictment in case 8005 was similar in most respects, but charges a violation of CL § 9-306, and states:[4]

> The Jurors of the State of Maryland for the body of the City of Baltimore, do on their oath present that the aforesaid DEFENDANT(S), late

(…continued)

> Prohibited–In general
>
> (a) A person may not, by threat, force, or corrupt means, try to influence, intimidate, or impede a juror, a witness, or an officer of a court of the State or of the United States in the performance of the person's official duties.
>
> Prohibited–Solicitation
>
> (b) A person may not solicit another person to, by threat, force, or corrupt means, try to influence, intimidate, or impede a juror, a witness, or an officer of the court of the State or of the United States in the performance of the person's official duties.

[4] CL § 9-306 is captioned "**Obstruction of justice**," and provides, in pertinent part: "(a) A person may not, by threat, force, or corrupt means, obstruct, impede, or try to obstruct or impede the administration of justice in a court of the State."

> of said City, heretofore on or about the date(s) of offense set forth above at the location(s) set forth above, in the City of Baltimore, State of Maryland, by threat, force, and corrupt means, did obstruct, impede, and try to obstruct and impede the administration of justice in a court of this State, in violation of Criminal Law Article, Section 9-306[of] the Annotated Code of Maryland; against the peace, government and dignity of the State.

In the second indictment, filed in Case No. 113038006 ("case 8006"), the four counts corresponded to the four counts in case 8005 (set forth above), but, instead of alleging that McLean committed the acts, alleged that he "did conspire with persons unknown to . . ." commit the respective acts of obstruction of justice.

In the third indictment, filed in Case No. 113038007 ("case 8007"), the four counts were virtually identical to the four counts alleged in case 8005, but the dates and location identified at the top of the third indictment were different from those identified in the first and second indictment. For the third indictment (and its companion, the fourth indictment), the "Date of offense" was identified as "November 20, 2012-December 5, 2012," and the location was identified as "401 E. Eager Street." But, otherwise, the indictment in case 8007 was similar to the indictment in case 8005: the first count in case 8007 charged McLean with violating CL § 9-302; the second count in case 8007 charged McLean with violating CL § 9-303; the third count charged McLean with violating CL § 9-305; and the fourth count in case 8007 charged McLean with violating CL § 9-306.

Similar to the manner in which the four counts in the indictment in case 8006 tracked the four counts in case 8005, the four counts in the fourth indictment, filed in Case No. 113038008 ("case 8008"), corresponded to the four counts alleged in case 8007, but charged McLean with conspiring with persons unknown to commit the illegal acts

alleged in case 8007. The only apparent differences between the counts alleged in case 8008 and the counts alleged in case 8006 were the alleged dates and locations.

b. The trial.

The four cases were consolidated for trial. At trial, the State called Shawn Jackson, who testified that, on February 1, 2012, he saw McLean commit a crime of violence and ultimately "report[ed] that crime to the police."

In September 2012, Jackson was approached by his cousin "Cutty," who stated that "somebody gave him . . . paperwork" containing "the statements [that Jackson] had made." Cutty further stated that Jackson needed "to get some money together," or "people was [sic] going to kill" him. Jackson said he ultimately gave Cutty $5000.

Later, Jackson told a police officer that the "ultimate recipient" of the money was a gang known as "BGF." Jackson testified that he "had paid the money to" an individual named Rodney Russell. Jackson further testified that he was a member of BGF, that BGF's "rules" assign "[d]ifferent kinds of sanctions" for cooperating with the police, and that the money he paid was a sanction.

On October 29, 2012, Jackson himself was arrested and assigned to the "3 South" cell block of "Central Booking." McLean was also incarcerated at Central Booking, and the two saw each other "every day" for "a week or two." During one of their conversations, McLean told Jackson that McLean had "talked to some dudes and [Jackson] wasn't going to come to court and testify." On another occasion, "[s]ome other members of" BGF "approached [Jackson] about paying money." Jackson stated

that he "had already took care of that." Later, an individual told Jackson that "he had called somebody else and [Jackson was] all right."

The State also offered into evidence recordings of telephone conversations between McLean and various individuals made while McLean was incarcerated. During those conversations, McLean made statements that included the following evidence of his efforts to influence Jackson not to appear at trial and testify against him.

On September 28, 2012, McLean told his wife Miranda McLean (hereinafter "Miranda") that he spoke to an individual named "Clover," who stated: "I was trying to get that paper work you know get some copies, you know post them all up over Park Heights his picture and all that shit." Miranda stated: "Mail them to me; I'll give them to Dion." McLean replied: "I will mail them to you. Definitely mail them all the important ones. Xerox, Xerox em [sic] and . . . put his picture, put his picture with his statement." McLean also stated: "Let them know he coming to court."

On September 29, 2012, McLean stated to an individual: "Mail that, get the necessary paperwork out to you. Get all the copies you can get or get as many. At least you can put it around in the Park Heights. Get somebody to put them around in the Park Heights area. Tape them up to poles and shit. Put them inside bars and all that."

On October 24, 2012, McLean asked Miranda to "check with" Clover about "getting that information out there[.]" On October 26, 2012, McLean asked Miranda: "Did you ever get in contact with Clover's girl?" McLean stated that he "wanted to know" how Clover was "coming along."

On November 7, 2012, McLean spoke with Clover, who stated: "I made some copies and I showed . . . one of the dudes up there . . . and let him go show the other dudes." Clover further stated: "They be like yo aint [sic] going to court he aint [sic] going to court for sure."

On November 7, 2012, McLean stated to Miranda: "If he anywhere on three north then there is peoples watchin [sic] him, waitin [sic] on him, bust him."

On November 20, 2012, McLean told Miranda that he had been asked if he had "heard from" an individual named "Jay." McLean had replied: "I ain't heard from him. He . . . already know what I said he thought I had talked to two other people within their organization high ranking people in his organization just protecting him up under him they already told him."

On November 23, 2012, McLean spoke with Jay. McLean stated that he had spoken with an inmate "across the hall" and told him: "[T]here ain't too much I don't know about you right now. I got people on the street, I got people in here. I get anything I want pulled upon on the computer and I can have your ass[.]"

On November 28, 2012, McLean told an individual named "Lauren" that he had spoken with "Shawn" and told him: "I know you BG[F] you wanted to join them in all that shit but yet the nigga told you you not that no more cause they knew you went down here and told some shit that you ain't have no business telling." Lauren stated: "I'm surprised they ain't pick him off." McLean replied: "[T]hey was using him to get that money."

On December 1, 2012, McLean told Miranda:

> They pushing these witnesses you know threatening them and all that. I know what's going on. I know what's going on but they not, they not, they not going to do it. This nigga can't do it cause these niggas on the streets pressing him.
>
> * * *
>
> Yeah they on his ass. They on his ass. Yeah [(]inaudible[)] already told me about that. They on his ass. So who knows who is going to show up. Somebody is going to show up. We gonna see if he gonna take that stand I know that. I know that for a fact one of them B.G.F. members gonna show up.

It was stipulated that Jackson did end up testifying against McLean at the trial on the charges arising from the crime of violence committed on February 1, 2012.

As noted, at the conclusion of the trial in cases 8005, 8006, 8007, and 8008, the jury found McLean guilty on all charges.

DISCUSSION

I. Violations of CL § 9-305

McLean asserts that he was "illegally sentenced for two violations of Criminal Law Article, § 9-305(b) when he was not charged with that crime." He argues that CL § 9-305(b) prohibits the solicitation of another to intimidate a witness, whereas CL § 9-305(a) prohibits direct misconduct by a defendant intimidating a witness. He argues that the third counts in cases 8005 and 8007 charged McLean with personally intimidating Jackson and "d[id] not charge him with soliciting someone else to commit the acts against the witness." In McLean's view, based upon the jury instructions, he "was not convicted of committing the acts himself, as he was charged. Instead, he was convicted and

sentenced for soliciting someone else to commit the acts." McLean does not contend the evidence was insufficient to support a conviction of violating CL § 9-305(b). Instead, he asserts that "[h]e was not charged with this crime." He contends that the third counts of the indictments in cases 8005 and 8007 charged him only with violating CL § 9-305(a).

The State's response is two-fold. First, the State contends, appellant did not preserve this argument. Second, even if preserved, the argument is without merit. We agree with the State on both points.

With respect to preservation, the State observes that the crux of McLean's argument on appeal is "that there was a fatal variance between the *allegata* in the indictments . . . and the *probata* upon which the jury convicted McLean . . . ." As the State points out, we held in *Green v. State*, 23 Md. App. 567, 685 (1970), that a claim of a material variance between the allegations in the charging document and the evidence produced at trial is appropriately raised by way of a motion for judgment of acquittal. In *Green*, we stated:

> There is no question but that the first count of the indictment was sufficient on its face to charge that Green forged the check designated. So the indictment itself is not subject to attack. But the general rule is that matters essential to the charge must be proved as alleged in the indictment. *Love and Matthews v. State*, 6 Md. App. 639, 642, 252 A.2d 493. We put it thus in *Benjamin v. State*, 9 Md. App. 373, 375, 264 A.2d 490, "It is, of course, well settled that the evidence in a criminal case must not vary from those allegations in the indictment which are essential and material to the offense charged." When there is a material variance between the *allegata* and the *probata*, the judgment must be reversed. *Melia and Shelhorse v. State*, 5 Md. App. 354, 363, 247 A.2d 554. **To preserve the point on appeal, however, it must be seasonably raised below**. *Jackson v. State*, 10 Md. App. 337, 349, 270 A.2d 322. It may be so raised by a timely motion for judgment of acquittal. *Butina v. State*, 4 Md. App. 312, 319, 242

> A.2d 819. The point then becomes a matter of the sufficiency of the evidence.

Id. at 685 (emphasis added).

Because the question of whether there was a material variance between the *allegata* and the *probata* in *Green* was not raised in the trial court by way of a motion for judgment of acquittal or otherwise, we refused to consider the issue on appeal. *Id*. at 686. Similarly, in the present case, the issue was not raised by motion for judgment of acquittal, and is not preserved.

But the State's second point is that, "[e]ven if the issue had been properly raised, there was no variance, much less a material variance, between the charges and the proof upon which McLean was convicted at trial, as reflected by the jury instructions and the verdict sheet." Again, we agree.

As quoted above, the third count of the indictments in cases 8005 and 8007 charged McLean with improperly intimidating or influencing a witness, "and a conspiracy and solicitation to commit such a crime, in violation of Criminal Law Article, Section 9-305 of the Annotated Code of Maryland; against the peace, government and dignity of the State." Plainly, the indictment put McLean on notice that he was being charged with violating "Section 9-305." McLean is incorrect to claim that he was not charged with a violation of CL § 9-305(b). The evidence that supported the jury's conviction of violating that subsection of CL § 9-305 did not constitute a material variance from the *allegata* in the third count of the indictments. *Cf. McCree v. State*, 214 Md. App. 238, 270 (2013) ("With knowledge of the applicable [statutory] provision, McCree was on notice

of the nature of the allegations against him, and had sufficient opportunity to formulate a defense against these allegations."), *aff'd on other grounds*, 441 Md. 4 (2014).[5]

II. Violations of CL § 9-302

McLean's second issue on appeal is similar to the first. He asserts that his "two convictions and sentences for violating Criminal Law Article § 9-302 must be vacated because the jury may have convicted him under Section (b)(1), which was not charged." He argues that the first counts of the indictments in cases 8005 and 8007 "do not charge a violation of [CL § 9-302] (b)(1). They only charge a violation of (b)(2) . . . ." The State responds with the same two points it made in response to the similar argument relative to the convictions pursuant to the third counts of the indictments in those cases, *i*.e., (1) the argument is not preserved, and (2) there was not material variance between the *allegata* in the indictments and the *probata* at trial.

Again, we agree with the State's arguments. McLean's claim of a fatal variance between the indictments and the proof at trial on these counts was not preserved by a challenge at trial. But, even if McLean had moved for a judgment of acquittal on this basis, the argument would have been without merit because the indictments plainly charged McLean with violating CL § 9-302, and the evidence was sufficient to demonstrate that he acted with the intent to improperly influence an adverse witness not

[5] We further observe that, although Maryland Rule 4-202(a) includes a requirement for a charging document to cite the "statute or other authority for each count . . . at the end of the count," the rule also expressly provides that "error in or omission of the citation of authority is not grounds for dismissal of the charging document or reversal of a conviction."

to testify against him.

III. Convictions for solicitation

In McLean's third issue, he contends that the convictions for *solicitation* to induce avoidance of a subpoena must merge into the corresponding convictions for *conspiracy* to induce avoidance of a subpoena. McLean contends that the decision of the Court of Appeals in *Monoker v. State*, 321 Md. 214 (1990), requires merger of the convictions under CL § 9-302 (for solicitation of a person to harm or threaten to harm another with the intent to influence Jackson) into the convictions for conspiracy to harm or threaten to harm another with the intent to influence Jackson. He asserts that "the crime of solicitation is a lesser included offense of conspiracy under the facts of this case. *See Monoker*, *supra*, 321 Md. at 223-24."

The State, again, challenges McLean's preservation of this argument. To the extent that the argument for merger is based on fundamental fairness, the State observes that we declined to review such an argument in *Pair v. State*, Md. App. 617, 649 (2011), *cert. denied*, 425 Md. 397 (2012), because the trial court had not been afforded an opportunity to consider the fairness issue. Moreover, the State argues, even if this merger argument is preserved for review, merger is not required under the circumstances of this case because the Court of Appeals held in *Carroll v. State*, 428 Md. 679, 695 (2012), that fundamental fairness requires merger only if the two offenses are "'part and parcel' of one another such that one crime is 'an integral component' of the other." (Quoting *Monoker*, *supra*,

321 Md. at 223-24.) As the *Carroll* Court observed: "Conspiracy to commit a crime is generally distinct from the crime itself." 428 Md. at 697.

We agree that here, unlike in *Monoker*, the evidence did not demonstrate that the persons McLean solicited were the same persons with whom he conspired. Consequently, the solicitation convictions were not required to be merged into the conspiracy convictions.

IV. Conspiracy sentences

McLean argues that he should have received only one sentence for his eight conspiracy convictions (four in case 0006 and four in case 0008). The trial court did merge the four conspiracy convictions from case 0008 into the four conspiracy convictions in case 0006, but nevertheless imposed four twenty-year sentences to run concurrently. McLean cites *Tracy v. State*, 319 Md. 452, 459 (1990), as stating: "It is well settled in Maryland that only one sentence case be imposed for a single common law conspiracy no matter how many criminal acts the conspirators have agreed to commit." The State agrees that "the trial court should not have imposed separate sentences as to each conspiracy conviction," citing *Savage v. State*, 212 Md. App. 1, 31 (2013), and *Vandegrift v. State*, 82 Md. App. 617, 644 (1990).

We agree that a single sentence should have been imposed for a single one of the conspiracy convictions. Accordingly, in Case No. 113038006, we shall vacate the sentences that were imposed for the conspiracy convictions of counts 2, 3, and 4, leaving in place the sentence that was imposed with respect to count 1.

IN CASE NO. 113038006, THE SENTENCES THAT WERE IMPOSED FOR THE CONSPIRACY CONVICTIONS PURSUANT TO COUNTS 2, 3, AND 4 ARE VACATED; OTHERWISE ALL JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY IN ALL FOUR CASES ARE AFFIRMED. COSTS TO BE PAID THREE-FOURTHS BY APPELLANT, AND ONE-FOURTH BY THE MAYOR AND CITY COUNCIL OF BALTIMORE.