UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2918

September Term, 2015

FREDERICK JO VAUGHN

v.

STATE OF MARYLAND

Krauser, C.J.,
Nazarian,
Moylan, Charles E., Jr.
(Senior Judge, Specially Assigned),

JJ.

PER CURIAM

Filed: April 6, 2017

In 2004, following a jury trial in the Circuit Court for Frederick County, Frederick Jo Vaughn, appellant, was convicted of three counts of first-degree rape, two counts of conspiracy to commit first-degree rape, and related offenses. The court subsequently sentenced Vaughn to life imprisonment for the first-degree rape of A.D. (count 1),[1] life imprisonment for the first-degree rape of A.D. (count 2), life imprisonment for first-degree sex offense (count 5), and life imprisonment for conspiracy to commit first-degree rape (count 15). All of these sentences were ordered to run consecutively to each other. The court further sentenced Vaughn to life imprisonment on a second count of conspiracy to commit first-degree rape (count 9), which was to run concurrently with his life sentence for the first degree rape of A.D. (count 1). Finally, the court imposed various terms of imprisonment for the remaining offenses which Vaughn was found guilty of, all of which were to run concurrently with his life sentence for the first-degree rape of A.D. (count 1). When Vaughn subsequently appealed his convictions, this Court affirmed in *Vaughn v. State,* No. 2638, September Term, 2004 (filed December 21, 2005).

In 2015, Vaughn filed a motion to correct an illegal sentence in which he asserted that his four consecutive life sentences were "subjective, ambiguous, and illegal." He also maintained that the sentencing court erred in running some of his sentences consecutive to, rather than concurrent with, other sentences. And he further asserted that he should only have been convicted of and sentenced for one count of conspiracy to

[1] We shall refer to the rape victims by their initials. Vaughn was convicted of three counts of first-degree rape, all involving the same victim (A.D.), and of conspiring with his nephew to rape A.D. and another woman, H.B.

commit rape, not two counts, because "the State's evidence only established a single understanding between" him and his alleged co-conspirator. The circuit court denied the motion, prompting this appeal. For the reasons that follow, we shall remand the case to the circuit court with instructions to merge the convictions for conspiracy to commit first-degree rape (counts 9 and 15) and to vacate one of the two sentences imposed for that crime. Otherwise, we affirm the circuit court's judgment denying Vaughn's motion to correct his sentences.[2]

I.

The charges against Vaughn arose after a group of people gathered at a rented cottage at the Catoctin Inn on or about April 14, 2002, for an evening spent drinking and using cocaine. The party took an ominous turn when, late in the night, Vaughn and his nephew, James Gorham, joined the group. Gorham was acquainted with one of the partygoers, to whom he regularly supplied cocaine in exchange for rides to and from New York. After all but the two couples who had rented the cottage left the party, Vaughn sexually assaulted one woman, Gorham sexually assaulted the other woman, and Vaughn forced another man present to sexually assault one of the victims.

Vaughn was charged with numerous offenses, including conspiring with Gorham to "commit a rape in the first degree upon" A.D. (count 9) and conspiring with Gorham to

[2] In its brief, the State moved to dismiss the appeal on the ground that the motion was still pending before the circuit court. The record before us, however, indicates that the circuit court denied Vaughn's motion on January 4, 2016 and Vaughn noted a timely appeal on January 28, 2016. Accordingly, we shall deny the State's motion to dismiss this appeal.

"commit a rape in the first degree upon" H.B. (count 15). The conspiracy was alleged to have occurred on or about April 14, 2002, the same date the women were assaulted. In urging the jury to find Vaughn guilty of the conspiracy to rape A.D. and H.B., the State, in its closing argument at trial, pointed to a conversation between Vaughn and Gorham that occurred just before the women were raped. The prosecutor stated: "They discuss over at the front door what's gonna go down and I suggest to you [Vaughn] decides he's taking [A.D.]. [Gorham] decides he's taking [H.B.]. That's what happens."

The Court of Appeals in *Jordan v. State*, 323 Md. 151 (1991) held that "'only one sentence can be imposed for a single conspiracy no matter how many criminal acts the conspirators have agreed to commit.'" *Id.* at 161 (quoting *Tracy v. State*, 319 Md. 452, 459 (1990)). That is because the "'unit of prosecution is the agreement or combination rather than each of its criminal objectives.'" *Id.* In other words, "'conspiracy remains one offense regardless of how many repeated violations of the law may have been the object of the conspiracy.'" *Id.* (quoting *Mason v. State*, 302 Md. 434, 445 (1985)). Thus, if the facts in the case "do not support the determination that two conspiracies existed," imposition of two sentences for conspiring to commit two distinct crimes is error and results in an illegal sentence which can be corrected at any time. *Id.*

Based on the record before us, it appears that the State's evidence in support of the conspiracy to commit first-degree rape was the conversation between Vaughn and

Gorham just prior to Vaughn and Gorham raping A.D. and H.B. Accordingly, only one sentence should have been imposed for the single conspiracy to commit these crimes.[3]

The State does not attempt to persuade us that there were, in fact, two conspiracies to commit first-degree rape, but instead merely asserts that this Court "considered on direct appeal whether legally sufficient evidence undergirded all of Vaughn's convictions" and "concluded that it did." In other words, the State seems to contend that this Court previously held on direct appeal that the evidence was sufficient to support two convictions for conspiracy to commit first-degree rape. The State, therefore, maintains that the claim raised here is barred under the law of the case doctrine. We disagree.

On direct appeal Vaughn did not raise the issue he is raising here and thus we did not specifically address the conspiracy convictions nor the sentences imposed for that crime. The only issue on direct appeal was whether the evidence was sufficient to support the convictions. We noted, however, that Vaughn's "argument [was] not directed specifically toward lack of proof as to the elements of any of the 17 charges." *Vaughn, supra,* No. 2638, September 2004, slip op. at 6. Rather, he "challenge[d] generally the credibility of the witnesses against him and suggest[ed] alternative theories for some of the evidence," including that "the sex was consensual." *Id.* We noted that the "jury saw and heard the witnesses" and that it had determined that "fear, not consent, resulted in

[3] On remand, the circuit court shall merge the two convictions for conspiracy to commit rape in the first-degree (counts 9 and 15) and vacate one of the two sentences imposed for that crime. Which sentence is vacated is left to the court's discretion, as the penalty imposed for both counts was the same.

rape and assault by [Vaughn]." *Id.* at 6-7. Thus, we concluded that the evidence was sufficient for the jury "to determine beyond a reasonable doubt [Vaughn's] guilt." *Id.* The law of the case doctrine, therefore, does not bar the claim Vaughn is raising here. *See 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," but declining to apply the doctrine where the illegal sentence argument was not previously addressed on appeal), *cert. denied*, 399 Md. 594 (2007).

II.

Vaughn's claim that the four consecutively run life sentences were "subjective, ambiguous, and illegal" has no merit. A sentence to life imprisonment for first-degree rape, first-degree sex offense, and conspiracy to commit first-degree rape is a penalty permitted by statute. *See* §§ 3-303(d), 3-305(b), and 1-202 of the Criminal Law Article (MD Code, 2002; 2012 Repl. Vol.). And the sentencing transcript clearly indicates that the court intended to run these sentences consecutively to each other.

Finally, Vaughn's assertion that the sentencing court's running of some of his sentences consecutive to, rather than concurrent with, other sentences rendered certain sentences illegal also has no merit. As the Court of Appeals stated years ago, a court's sentencing power "includes the determination of whether a sentence will be consecutive or concurrent." *Kaylor v. State*, 285 Md. 66, 70 (1979). *See also Malee v. State*, 147 Md. App. 320, 334 (2002) (observing that in *Kaylor*, "the Court of Appeals placed an

unequivocal seal of approval on the discretionary decision of a sentencing judge to impose consecutive sentences for multiple convictions").

APPELLEE'S MOTION TO DISMISS THE APPEAL DENIED.

JUDGMENT OF THE CIRCUIT COURT FOR FREDERICK COUNTY AFFIRMED IN PART AND REVERSED IN PART. CASE REMANDED TO THAT COURT WITH INSTRUCTIONS TO MERGE THE CONVICTIONS FOR CONSPIRACY TO COMMIT FIRST-DEGREE RAPE (COUNTS 9 AND 15) AND TO VACATE ONE OF THE TWO SENTENCES IMPOSED FOR THAT CRIME.

COSTS TO BE SPLIT BETWEEN APPELLANT AND FREDERICK COUNTY.