

Circuit Court for Cecil County
Case No. 07-K-14-001735

UNREPORTED*
IN THE APPELLATE COURT
OF MARYLAND**

No. 1653

September Term, 2022

HENRY ERIC HAMILTON

v.

STATE OF MARYLAND

Nazarian,
Tang,
Getty, Joseph M.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Nazarian, J.

Filed: August 16, 2023

* This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for persuasive value only if the citation conforms to Maryland Rule 1-104(a)(2)(B).

**At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Special Appeals of Maryland to the Appellate Court of Maryland. The name change took effect on December 14, 2022.

Henry Eric Hamilton was indicted in the Circuit Court for Cecil County for conspiracy to commit murder, armed robbery, first-degree assault, and other related offenses. After a trial, the jury convicted Mr. Hamilton of conspiracy to commit first-degree assault; the court granted motions for judgment of acquittal on some offenses and the jury acquitted him of the rest. The circuit court then sentenced Mr. Hamilton to twenty-five years of incarceration.

Mr. Hamilton now contends that his sentence was illegal. He argues that because conspiracy to commit first-degree assault (the one charge for which he was convicted) is a lesser included offense of conspiracy to commit armed robbery (a greater offense for which he was acquitted) and the maximum sentence for conspiracy to commit armed robbery is twenty years, the maximum sentence in his case was twenty years (not the twenty-five years authorized for conspiracy to commit first-degree assault). The circuit court denied Mr. Hamilton's motion to correct an illegal sentence and he appeals. And in light of the unique circumstances of this trial, we reverse and remand for resentencing.

I. BACKGROUND

The underlying facts and procedural history are detailed in our opinion on Mr. Hamilton's direct appeal, *see Hamilton v. State*, No. 736, Sept. Term 2015, 2018 WL 904348 (Md. App. Feb. 14, 2018), so we'll focus here on the parts bearing on the sentencing issues before us.

Mr. Hamilton was indicted for first-degree murder, second-degree murder, armed robbery, robbery, first-degree assault, conspiracy to commit each of those offenses, and

other related offenses. His trial began on March 24, 2015. After the State completed its case-in-chief, the court granted Mr. Hamilton’s motion for judgment of acquittal on, among other related offenses, the counts of first- and second-degree murder, armed robbery, robbery, and conspiracy to commit robbery.

The court then instructed the jury on the remaining counts. With regard to conspiracy, the court explained that the State must prove that Mr. Hamilton agreed with at least one other person to commit the crimes charged. The statute (and the relevant Criminal Pattern Jury Instruction) required the State to prove *one or the other* of the two modalities of first-degree assault—the firearm modality or serious physical injury modality—and the court and parties seemed to express the intention to instruct the jury accordingly. But when the court actually instructed the jury, it instructed the jurors that in order to prove first-degree assault, the State must prove that Mr. Hamilton used a firearm in committing an assault *and* that he “intended to cause serious physical injury” when committing an assault:

Conspiracy is an agreement between two or more persons to commit a crime. In order to convict the defendant of conspiracy the state must prove that the defendant agreed with at least one other person to commit the crime charged, and that the defendant entered into an agreement with the intent that the crimes charged would be committed.

* * *

In first degree assault the state must prove the elements of second degree assault, and the state must also prove that the defendant used a firearm to commit the assault, *and* that the defendant intended to cause serious physical injury in the commission of the assault. A firearm is a weapon that propels a bullet by gunpowder or similar explosive. Serious physical injury that creates a substantial risk of death or causes serious and permanent or serious and protracted loss or impairment of

the function of any body member or organ.

(Emphasis added)

During their deliberations, the jury sent the court a series of notes. One of the notes asked the court to provide “a paper with clear rules for conspiracy and degrees.” The court advised the parties that it had “prepared a two-page summary of the instructions [it] read relating to conspiracy, first degree murder, second degree murder, first degree assault and assault” and provided the document to counsel. In the course of discussing the response, the court reiterated that the summary reflected the instructions it believed it had read to the jury. Everyone agreed that the court should provide the summary to the jury, and the court did so, without objection. But it turns out that the summary didn’t track the instructions the court had given orally—it tracked the *pattern* instruction, which separates the two modalities of first-degree assault with the disjunctive “or,” not the conjunctive “and.” This means that the court misspoke when it said that it instructed the jury using the pattern instruction, and when it provided the two-pager to the jury, the court gave the jurors a different (written) version of the elements than it had read to them originally.

The court gave the jury answers to its other questions and the jurors continued deliberating. The jury convicted Mr. Hamilton of one count of conspiracy to commit first-degree assault and acquitted him on the remaining charges. The court imposed a sentence of twenty-five years.

On October 13, 2022, Mr. Hamilton filed a motion to correct an illegal sentence. He argued that his twenty-five-year sentence for conspiracy to commit first-degree assault exceeded the maximum sentence for conspiracy to commit armed robbery, a greater

offense that was among the charges, but for which he was acquitted. The State responded that Mr. Hamilton had “failed to identify any illegality of the sentence imposed by the [circuit court].” On November 2, 2022, the circuit court entered an order denying Mr. Hamilton’s motion, and Mr. Hamilton noted this timely appeal.

II. DISCUSSION

There is one issue before us on appeal:¹ whether the court imposed an illegal sentence on Mr. Hamilton for conspiracy to commit first-degree assault. In Maryland, “[t]he court may correct an illegal sentence at any time.” Md. Rule 4-345(a). And “[a] failure to merge a sentence is considered to be an ‘illegal sentence’ within the contemplation of [Maryland Rule 4-345].” *Pair v. State*, 202 Md. App. 617, 624 (2011). The legality of the sentence raises an issue of law that we review *de novo*. *Bratt v. State*, 468 Md. 481, 493–94 (2020).

A. Mr. Hamilton’s Sentence Was, Under These Circumstances, Illegal.

Mr. Hamilton contends that his sentence of twenty-five years in prison for conspiracy to commit first-degree assault is illegal because conspiracy to commit first-

¹ Mr. Hamilton filed an informal brief and framed the issue as follows:

The Circuit Court erred in denying of the motion to correct illegal sentence based upon the structure of the indictment as filed in this case, where the indictment alleged Con[sp]ire Armed Robbery and Conspire First Degree Assault, and the state failed to meet its[] burden of production, resulting in acquittal of the appellant.

The State phrased its Question Presented as follows: “Is [Mr.] Hamilton’s sentence legal?”

degree assault is a lesser included offense of conspiracy to commit armed robbery, a charge for which he was acquitted and that carries a maximum sentence of only twenty years. He argues that the conspiracy to commit first-degree assault conviction merges into the conspiracy to commit armed robbery offense since the State charged him with both offenses based on the same operative facts. And as a result, Mr. Hamilton says, the circuit court could impose only twenty years of incarceration, the maximum sentence for the greater offense.

The State responds that the circuit court denied Mr. Hamilton's motion to correct an illegal sentence correctly. While acknowledging that Mr. Hamilton's theory would be correct if the conspiracy to commit first-degree assault charge had in fact been a lesser included of conspiracy to commit armed robbery, the State claims that that wasn't true in this particular case. Instead, the State says, the circuit court instructed the jury that it must find that Mr. Hamilton intended to cause serious physical injury in order to find Mr. Hamilton guilty of conspiracy to commit first-degree assault. And because that "intent" element isn't an element of conspiracy to commit armed robbery, the State argues, conspiracy to commit first-degree assault doesn't merge into conspiracy to commit armed robbery, and the court wasn't bound by the statutory maximum for armed robbery. In light, though, of the presence of a firearm and of the way this jury was instructed (incorrectly) and advised in response to the juror's notes, we cannot say with certainty that the jury found that Mr. Hamilton intended to cause serious physical injury. And if the jury found only a conspiracy to commit first-degree assault via the firearm modality, a definite

possibility if the jury followed the summary sheet distributed during deliberations, the assault charge would have to merge into conspiracy to commit armed robbery, and that charge caps his sentence exposure.

The common law doctrine of merger stems from “[t]he Double Jeopardy Clause of the Fifth Amendment of the United States Constitution [which], applied to the states through the Fourteenth Amendment, prohibits multiple punishments for the same offense.” *Butler v. State*, 255 Md. App. 477, 497–98 (2022). Most commonly, we apply the “required evidence” test to determine whether two convictions merge for sentencing purposes. *McGrath v. State*, 356 Md. 20, 23 (1999). Under the required evidence test, we determine *first* whether the convictions are based on the same act or acts. *Morgan v. State*, 252 Md. App. 439, 460 (2021). If the offenses are based unambiguously on separate acts by the defendant, there is no merger; if the offenses are based on the same conduct, *then* we examine the elements of both offenses. “[I]f all of the elements of one offense are included in the other offense, so that only the latter offense contains a distinct element or distinct elements, the former merges into the latter.” *Snowden v. State*, 321 Md. 612, 617 (1991) (*quoting State v. Jenkins*, 307 Md. 501, 517 (1986)). In cases where merger applies, a court generally is precluded from imposing separate sentences, and a sentence may only be imposed for the offense containing the additional element. *Paige v. State*, 222 Md. App. 190, 206–07 (2015). And normally when a defendant is charged with a greater offense and a lesser included offense based on the same conduct, *and* is convicted only of the lesser included offense but acquitted of the greater offense, he may not receive a sentence

exceeding the maximum sentence of the greater charge.² *Dixon v. State*, 364 Md. 209, 236–37 (2001) (citing *Simms v. State*, 288 Md. 712, 724 (1980), *superseded by statute on other grounds*).

Mr. Hamilton argues here that the State failed to clarify which acts constituted each offense, and he suggests that the two offenses were “based generally on the same operative factual assertions.” He’s right, and the State doesn’t dispute that the conspiracy to commit armed robbery charge and the conspiracy to commit first-degree assault charge were predicated upon the same events.

Since Mr. Hamilton’s conspiracy to commit first-degree assault and conspiracy to commit armed robbery charges were grounded in the same conduct, we examine the elements of both offenses to determine whether conspiracy to commit first-degree assault is a lesser included offense of conspiracy to commit armed robbery and would merge into

² Where a defendant is charged both with a greater offense and lesser included offense but acquitted of the greater, it would be fundamentally unfair to impose a sentence greater than the maximum for the greater charge. Otherwise, a defendant would be better off being convicted of the greater offense as well:

[I]t is unfair to permit the State to exact a more severe and unanticipated penalty than that which could have been imposed if the prosecution had been wholly successful.

Accordingly, we hold that when a defendant is charged with a greater offense and a lesser included offense based on the same conduct, with jeopardy attaching to both charges at trial, and when the defendant is convicted only of the lesser included charge, he may not receive a sentence for that conviction which exceeds the maximum sentence which could have been imposed had he been convicted of the greater charge.

Simms, 288 Md. at 724.

the greater offense. To prove a criminal conspiracy, the elements common to both offenses, “the State must prove that two or more persons combined or agreed to accomplish some unlawful purpose, or to accomplish a lawful purpose by unlawful means.” *Savage v. State*, 226 Md. App. 166, 174 (2015). To prove that a defendant committed armed robbery, the State must establish that the defendant took “property of any value, by force, with a dangerous or deadly weapon.” *Bellamy v. State*, 119 Md. App. 296, 306 (1998). First-degree assault can be proven through either of two modalities: *either* by proving that the defendant committed an assault with a firearm, *i.e.*, the “firearm” modality, Md. Code (2002, 2021 Repl. Vol.), § 3-202(b)(2) of the Criminal Law Article (“CR”); *or* by proving that the defendant intentionally caused or attempted to cause serious physical injury to another, *i.e.*, the “intent” modality. CR § 3-202(b)(1).

Under certain circumstances, conspiracy to commit first-degree assault merges into conspiracy to commit armed robbery. If the State relied on the “firearm” modality to prove first-degree assault, the elements of first-degree assault are encompassed in the armed robbery offense and the offenses would merge. *Morris v. State*, 192 Md. App. 1, 39–40 (2010). In such a case, the court would be bound by the statutory maximum sentence for armed robbery and would not be permitted to charge the maximum for first-degree assault.³

Under the “intent” modality, however, first-degree assault is not a lesser-included offense of armed robbery. *Middleton v. State*, 238 Md. App. 295, 310 n.15 (2018)

³ A person convicted of conspiracy may not receive a sentence greater than “the maximum punishment for the crime that the person conspired to commit.” CR § 1-202.

(“Although first-degree assault committed with a firearm . . . is a lesser-included offense of armed robbery, first-degree assault, based upon the specific intent ‘to cause serious physical injury to another’ . . . is not a lesser-included offense of armed robbery.” (citations omitted)). To establish first-degree assault through the “intent” modality, the State must prove that a defendant “intentionally cause[d] or attempt[ed] to cause serious physical injury to another,” an element not required to establish armed robbery. CR § 3-202(b)(1). Similarly, to establish armed robbery, the State must prove the taking of property, which is not a requisite element to establish first-degree assault under the “intent” modality. CR § 3-202(b)(1). Both offenses require proof of an element that the other offense doesn’t, so if the State establishes first-degree assault through the “intent” modality, first-degree assault is not a lesser included offense of armed robbery, and the court isn’t bound by the statutory maximum sentence for armed robbery.

We can’t tell with precision which scenario best fits this case because this jury was given different instructions at different times. Before deliberations began, the circuit court instructed the jury that they could convict Mr. Hamilton of first-degree assault only if the State proved: (1) the elements of second-degree assault, (2) that he used a firearm to commit the assault, *and* (3) that he intended to cause serious physical injury in committing the assault. In other words, the court instructed the jury that the State must prove the “firearm” modality *and* the “intent” modality of first-degree assault before they could convict Mr. Hamilton of conspiracy to commit first-degree assault. Again, this instruction was incorrect—the State can establish first-degree assault through either modality and need

not prove both—although again, nobody objected to the (mis)instruction. And had the court reiterated in its response to the jury note the instruction it gave before deliberations began, the State would have the better argument, even though the original instruction misstated the law. But when the court responded to the jury’s request for “a paper with clear rules,” the court gave a *different* instruction, this time instructing the jurors (correctly) that the State could prevail by proving *either* of the two modalities. And since the jury wasn’t asked to detail its findings, we don’t know, and can’t know, whether they found a conspiracy to commit first-degree assault via the firearm modality, the serious physical harm modality, or both.

We must presume that a jury understands and follows the instructions of the court, *Whittington v. State*, 147 Md. App. 496, 534 (2002), but the conflicting instructions this jury received leave us unable to conclude that it *must* have found that Mr. Hamilton intended to cause serious physical injury to the victim, the finding that would be necessary to render the conspiracy to commit first-degree assault charge independent of the conspiracy to commit armed robbery. And without that independence, we must find that his conviction for conspiracy to commit first-degree assault merged into the conspiracy to commit armed robbery charge, and that the latter caps his sentencing exposure at twenty years. *See Snowden v. State*, 321 Md. 612, 619 (1991) (“we are constrained to give the Petitioner the benefit of the doubt” when the rationale behind the verdict is not “readily

apparent”). As a result, Mr. Hamilton’s twenty-five year sentence was illegal when issued, and we reverse his sentence and remand for resentencing consistent with this opinion.

**JUDGMENT OF THE CIRCUIT COURT
FOR CECIL COUNTY REVERSED AND
CASE REMANDED FOR RESENTENCING
CONSISTENT WITH THIS OPINION.
CECIL COUNTY TO PAY COSTS.**