UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1568

September Term, 2012

SAM IVOR
a/k/a KING SAM IVOR

v.

STATE OF MARYLAND

Krauser, C.J.,
Meredith,
Thieme, Raymond G., Jr.
(Retired, Specially Assigned),

JJ.

Opinion by Krauser, C.J.

Filed: January 14, 2015

In 1982, a jury sitting in the Circuit Court for Baltimore City found Sam Ivor, a/k/a King Sam Ivor,[1] appellant, guilty of kidnapping, extortion, robbery with a deadly weapon, first-degree rape, first-degree sexual offense, unnatural and perverted sex practice, and two counts of false imprisonment. He was thereafter sentenced to life imprisonment for first-degree rape and life imprisonment for first-degree sex offense, as well as a term of thirty years of imprisonment for kidnapping, ten years of imprisonment for extortion, and ten years of imprisonment for robbery. (The false imprisonment convictions merged for sentencing purposes.) The sentences imposed were to run consecutive to each other. Thus, the total sentence imposed was, in the sentencing judge's summarizing remarks, "two consecutive life sentences plus fifty years consecutive to those life sentences, all to date from September 16, 1981" (the date Ivor was arrested). Ivor appealed and this Court affirmed. *Sam Jones a/k/a Sam Ivor a/k/a Sam Iver*, No. 1107, September Term, 1982 (filed May 23, 1983) (unreported).

In 1992, Ivor petitioned the circuit court to correct an illegal sentence, asserting that his sentences should be served concurrently. He acknowledged that the sentencing court had imposed consecutive sentences, but because it then stated that the sentences were "all to date from September 16, 1981," he claimed that the effect was to make them run concurrently. By order dated January 18, 1993, the circuit court denied relief, stating that, based on the

[1] The circuit court's record from appellant's trial in 1982 indicates that he was also known by the names Sam Jones and Sam Iver and, at trial, he was referred to as Sam Jones. We will refer to him throughout this opinion as Sam Ivor – the name he uses in his brief.

sentencing transcript, it was "clear without any ambiguity whatsoever that it was the intention of [the sentencing court] that all of the sentences should run consecutively." Ivor also raised this precise claim in a petition for post-conviction relief, which the circuit court rejected in a memorandum opinion and order dated March 25, 1994. Ivor's application for leave to appeal that decision was then denied by this Court. *Sam Jones a/k/a Sam King Ivor v. State*, No. 66, September Term 1994 (filed September 8, 1994).

In 2002, Ivor filed a motion to correct an illegal sentence, again asserting that, given the manner in which the sentencing judge announced the starting date of his sentences, the effect was to make the sentences run concurrent with (rather than consecutive to) each other. The circuit court rejected that contention and denied the motion. Ivor appealed and this Court affirmed. *Sam Ivor a/k/a Sam King v. State,* No. 2643, September Term, 2002 (filed March 16, 2004) (unreported).

In 2012, Ivor filed yet another motion to correct an illegal sentence and, once again, contended that his sentences should be deemed to run concurrently with each other and not consecutively to each other. In a supplement to that motion, Ivor further claimed that his sentences were illegal because of alleged defects in the polling of the jury and the hearkening of their verdicts. The circuit court denied the motion, prompting this appeal. For the reasons that follow, we affirm.[2]

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[2] In its brief, the State moved to dismiss this appeal because Ivor "failed to provide a complete transcript of the proceedings below" in violation of Maryland Rules 8-411(g) and 8-413(a)(2). We deny the motion because, in response to our order, the clerk of the circuit court transmitted the entire record to this Court, including the transcripts of the 1982 trial.

DISCUSSION

I.

The sentencing court sentenced Ivor as follows:

> [W]ith respect to Indictment 18128813, Count 2, the count upon which the jury in this case convicted you of **kidnapping**, it's the sentence of the Court that you be and you are hereby committed to the Division of Correction for **a term of thirty years** . . . . The sentence will date from September 16, 1981.
>
> With respect to Indictment 18128814, Count 1, the count upon which the jury convicted you of **extortion**, it is the sentence of the Court that you be and you are hereby committed to the jurisdiction of the Division of Correction for **a term of ten years to run consecutive to the sentence I previously imposed of thirty years.**
>
> With respect to Indictment 18128815, as to count 3, the count upon which the jury convicted you of **robbery**, the sentence of the Court, Mr. King, that you be and you are hereby committed to the jurisdiction of the Division of Correction for **a term of ten years**, **consecutive to two sentences previously imposed.**
>
> With respect to Indictment 18128816, Count 1, the count upon which the jury convicted you of **rape in the first degree**, it is the sentence of the Court that you be and you are hereby committed to the jurisdiction of the Division of Correction for **a term of life imprisonment**. **That term is to run consecutive to the sentences accumulating fifty years which was previously imposed**.
>
> And with respect to Indictment 18128817, as to Count 1, the count upon which the jury convicted you of **sexual offense in the first degree**, that arising from the act of fellatio, it is the sentence of the Court that you be and you are hereby committed to the jurisdiction of the Division of Correction for **a term of life imprisonment to run consecutive to all sentences previously imposed**.
>
> With respect to Indictment 18128818, the convictions under Count 1 of false imprisonment and conviction under Count 2, also false imprisonment, it's

> my view that those two convictions merge into the kidnapping conviction, second count of 18128813. Accordingly, I do not impose any sentences.
>
> **The sentences then are two consecutive life sentences plus fifty years consecutive to those life sentences, all to date from September 16, 1981.**

(Emphasis added.)

As noted above, in 1993 the circuit court rejected Ivor's claim that, given the court's closing remark regarding the starting date of the sentences, the sentences should be deemed to run concurrently with, not consecutively to, each other; and in 1994, the post-conviction court also rejected this claim. In 2002, the circuit court again rejected Ivor's claim that his sentences should run concurrently with each other, and on appeal we affirmed. In an unreported opinion, we plainly stated that "there was no ambiguity in [Ivor's] sentence." *Sam Ivor a/k/a Sam King v. State,* No. 2643, September Term, 2002 (filed March 16, 2004), slip op. at 4. We explained:

> [T]he trial court said nothing that expressly or by implication would indicate that the 50-year and two life sentences were to run concurrently. The court's closing comment was nothing more than a reiteration of the total sentences that were to begin as of the date of his arrest. A contrary view is not only a misinterpretation, it would be illegal.

Slip op. at 5.

In the appeal presently before us, Ivor reiterates his claim that "there is an ambiguity in the sentence structure" based on the court's concluding remark that the sentences were "all to date from September 16, 1981." Because this contention was clearly raised in and decided in his previous appeal, we agree with the State that the issue is barred by the law of the case

doctrine. *Scott v. State*, 379 Md. 170, 183-184 (2004) (Stating that the law of the case doctrine, binding litigants and lower courts to an appellate ruling, applies also to a panel of the same appellate court in a subsequent appeal "unless the previous decision is incorrect because it is out of keeping with controlling principles announced by a higher court and following the decision would result in manifest injustice.") (citations omitted); *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). Ivor has not pointed to any "higher court" decision which would render this Court's 2004 decision incorrect and thus warrant a re-review of this claim.

II.

Ivor's next contention is that the jury's verdicts were a nullity, and hence his sentences illegal, because he claims that the courtroom clerk failed to poll the foreperson when polling the jury as to their verdicts. The State first asserts that this issue is not before us because it was not raised below. Ivor, however, did raise this issue below in a supplement to his motion to correct an illegal sentence.

The State next claims that any error in the polling process is a "error in the sentencing proceeding," which did not result in an "inherently illegal" sentence subject to correction under Md. Rule 4-345(a). The alleged error, however, was not an "error in the sentencing proceeding," but rather in the polling of the jurors as to their verdicts. If a conviction is a

nullity because the verdict was improperly rendered, the sentence would be inherently illegal under Rule 4-345(a). *Chaney v. State*, 397 Md. 460, 466 (2007) (a sentence is "illegal" for purposes of Rule 4-345(a) where there was no conviction warranting any sentence); *Jones v. State*, 173 Md. App. 430, 457 (2007) (a verdict that has "not been properly rendered and recorded" is a "nullity"). Accordingly, we shall address Ivor's claim that the polling of the jury was defective.

After deliberating, the jurors returned to the courtroom, whereupon the verdicts were announced as follows:

> THE COURT: All right. Ladies and gentlemen, I'll ask the Clerk if he would take the verdict.
>
> THE CLERK: **Madame Forelady, will you please stand?**
>
> Mr. Jones [a/k/a Ivor], will you please stand?
>
> How say you, under Indictment 18128813, under the first count charging kidnapping, guilty or not guilty?
>
> THE FORELADY: Not guilty.
>
> THE CLERK: How say you under the second count charging kidnapping, guilty or not guilty?
>
> THE FORELADY: Guilty.
>
> THE CLERK: How say you under Indictment 18128814, under the first count charging extortion, guilty or not guilty?
>
> THE FORELADY: Guilty.
>
> THE CLERK: How say you under Indictment 18128815, under the third count charging robbery, guilty or not guilty?

THE FORELADY: Guilty.

THE CLERK: How say you under the sixth count charging theft, value of three hundred dollars or more, guilty or not guilty?

THE FORELADY: Not guilty.

THE CLERK: How say you under Indictment 18128816 under the first count charging rape in the first degree, not guilty or guilty?

THE FORELADY: Guilty.

THE CLERK: How say you under Indictment 18128817, under the first count charging sexual offense in the first degree, guilty or not guilty?

THE FORELADY: Guilty.

THE CLERK: How say you under the third count charging sexual offense in the second degree, guilty or not guilty?

THE FORELADY: Not guilty.

THE CLERK: Under the sixth count charging unnatural and perverted sexual practice, not guilty or guilty?

THE FORELADY: Guilty.

THE CLERK: How say you under Indictment 18128818, under the first count charging false imprisonment, guilty or not guilty?

THE FORELADY: Guilty.

THE CLERK: How say you under the second count charging false imprisonment, not guilty or guilty?

THE FORELADY: Guilty.

THE CLERK: How say you under the third count charging assault, guilty or not guilty?

THE FORELADY: Guilty.[3]

THE CLERK: Thank you.

[DEFENSE COUNSEL]: **Poll the jury, please.**

THE CLERK: **Madame Forelady, I have recorded the jury's verdict as follows:**

> Indictment 18128813, under the first count, kidnapping; not guilty. Under the second count, kidnapping; guilty.
>
> Under Indictment 18128814, under the first count charging extortion; guilty.
>
> Under Indictment 18128815, under the third count charging robbery; guilty. Under the sixth count charging theft with the value of three [sic] dollars or more; not guilty.
>
> Under Indictment 181288126,under the first count charging rape in the first degree; guilty.
>
> Under Indictment 18128817, under the first count charging sexual offense in the first degree; guilty. Under the third count, sexual offense in the second degree; not guilty. Under the sixth count charging unnatural and perverted sexual practices; guilty.
>
> Under Indictment 18128818, under the first count charging false imprisonment; guilty. Under the second count charging false imprisonment; guilty. Under the third count charging assault; not guilty.
>
> **Are these your verdicts?**

THE JURORS: Yes.

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[3] The transcript indicates that the forelady announced the jury's verdict on the charge of assault as "guilty." When the courtroom clerk re-stated the jury's verdicts for polling purposes, the transcript indicates that the clerk stated that their verdict for assault was "not guilty." The jury's verdict sheet and the docket entry also reflect that the jury found Ivor "not guilty" of assault. Ivor was not sentenced for assault and, in fact, the sentencing court said nothing about that offense when imposing sentence. Thus, the discrepancy in the transcript regarding the jury's verdict on the assault charge is of no consequence to this appeal.

THE CLERK: Thank you, **take your seat. Juror number two, will you please stand? You have heard the verdicts as rendered by the Forelady. Are your verdicts the same as hers?**

JUROR: Yes, they are.

THE CLERK: Juror number 3, you have heard the verdicts as rendered by the Forelady. Are your verdicts the same as hers?

JUROR: Yes, it is.

(Emphasis added.)

The clerk continued with the poll, asking each successively numbered juror to stand and then inquiring whether he or she had "heard the verdicts as rendered by the Forelady" and whether his or her verdicts were "the same as hers." Juror Numbers 4 through 12, like the jurors before them, each – in turn – responded "yes."

Ivor claims that the poll was defective because the clerk failed to poll the forelady. As a result, he asserts that "it is impossible to know if the jury was unanimous."

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)." *Jones v. State*, 384 Md. 669, 683 (2005). "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. "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).

Contrary to Ivor's assertion, we are convinced that the forelady was, in fact, polled. The problem is that the transcriber attributed the forelady's answer to the polling question as "The Jurors" answer. It is clear, however, that the clerk began the polling process by addressing "Madame Forelady" and, after stating the jury's verdict for each charge as the clerk had recorded them, asked: "Are these your verdicts?" The response was "yes." The clerk then told the forelady to sit down and immediately asked Juror Number Two to stand and polled that juror. In short, we are not persuaded that the clerk failed to poll the forelady when polling the jury as to their verdicts and thus, we are satisfied that the verdicts were unanimous.

III.

When the foreperson announces the jury's verdict and a poll has been conducted, the verdict is final; if a poll is not conducted, the verdict does not become final unless the jury hearkens to its verdict. *State v. Santiago*, 412 Md. 28, 38-39 (2009). "When the courtroom

clerk calls upon the jury to hearken to its verdict, the jury is addressed collectively." *Id.* at 38. Thus, hearkening requires the jury "to listen carefully and indicate its assent to the verdict as announced to insure unanimity and the agreement of each and every juror to the verdict as announced." *Id.* 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 (citation 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. Thus, if a jury is polled as to their verdict, the failure to hearken the verdict is not fatal. *Id.* It is only where neither polling nor hearkening has occurred that a verdict is improperly rendered and recorded and, consequently, a nullity. *Id.* at 457.

Although the verdicts in this case were final after the polling was completed, the clerk nonetheless asked the jury to hearken to its verdict. That hearkening gives rise to Ivor's third claim.

> THE CLERK: Harken to the verdicts as the Court has recorded it. You say that Sam Jones [a/k/a Ivor] is **not guilty of kidnapping in the first degree, guilty of kidnapping in the second degree, not guilty of extortion,** guilty of robbery, not guilty of theft, guilty of rape in the first degree, guilty of sexual offense in the first degree, not guilty of sexual offense in the second degree, guilty of unnatural and perverted sexual practice, **guilty of false imprisonment. Guilty of false imprisonment, guilty of false imprisonment**, not guilty of assault, an [sic] so say you all?
>
> JURORS: Yes.

(Emphasis added.)

Ivor points out that the crime of kidnapping is not divided into degrees in Maryland and, therefore, "kidnapping in the second degree is not an offense" in this State. He also points out that the hearkening included a guilty verdict on three counts of false imprisonment, when he was only charged with two counts of false imprisonment. Most significantly, in the hearkening, the clerk stated that the jury's verdict was "not guilty of extortion," but when the forelady announced the verdict on that count, and during the polling process, the jury's verdict was "guilty" of extortion.[4] Consequently, Ivor asserts that the jury's verdicts on the kidnapping, false imprisonment, and extortion charges were ambiguous and that his sentences for kidnapping (thirty years of incarceration) and extortion (ten years of incarceration) were thereby illegal. Finally, he claims he is entitled to "a new trial" because "kidnapping, extortion and false imprisonment [were] used to increase the first degree rape and first degree sexual offense to the first degree."

As noted above, hearkening was not required in this case because the jury's verdicts became final after the polling was accepted. *Smith v. State*, 299 Md. 158, 166 (1984) ("It has never been the law in Maryland that hearkening is *the* prerequisite to an acceptable verdict where the jury has been polled. In other words it has not been doubted that polling is a fully commensurable substitute for hearkening.") (quotation omitted). Thus, although the clerk made several misstatements in hearkening the jury to their verdicts, under the particular

[4] Ivor also points out that, in the hearkening, the verdict stated for assault was "not guilty," but the forelady had announced the verdict on that count as "guilty." We discussed this discrepancy in footnote 3, *infra*.

circumstances of this case, we are not persuaded that the properly rendered verdicts were thereby made defective.

The jury clearly found Ivor not guilty of the "first count" charging kidnapping and guilty of the "second count" charging kidnapping, as reflected in the jury's verdict sheet, the forelady's announcement of the jury's verdicts on these two counts, and in the polling of the jury. The courtroom clerk's subsequent mischaracterization of these offenses as "kidnapping in the first degree" and "kidnapping in the second degree" in no way invalidated the jury's verdicts as the jury's decision was clear.

It was also clear that the jury found Ivor guilty of two counts of false imprisonment as reflected in the jury's verdict sheet, the forelady's announcement of the jury's verdicts on these two counts, and in the polling of the jury. The fact that the courtroom clerk, when hearkening the jury, said "guilty of false imprisonment" three times carries no significance given that Ivor was only charged with two counts of false imprisonment. No where in the record before us is there any indication that Ivor was improperly convicted of three counts of false imprisonment. At the sentencing hearing, the court referred to "the conviction under Count 1 of false imprisonment and conviction under Count 2, also false imprisonment." The court then "merged those two convictions," for sentencing purposes, "into the kidnapping conviction."

More troubling is that the transcription of the hearkening suggests that the jury hearkened to a verdict of "not guilty of extortion" when the forelady, and each of the jurors

when polled, had delivered a verdict of "guilty" of extortion. Yet, there was no objection by anyone to the hearkening. The only way to reconcile this transcriptional inconsistency is to conclude, as we do, either that the transcription of the hearkening is in error or that the courtroom clerk inadvertently misstated the jury's verdict on extortion, as there is no doubt that the verdict of the jury was "guilty" as to extortion as reflected on the verdict sheet, in the forelady's announcement of their verdict on this offense, and in the polling of the individual jurors. Moreover, the docket sheet itself indicates that the clerk recorded the verdict as "guilty" of extortion. Finally, because the jury was polled, the verdict was final *before* the hearkening. Given these circumstances, we hold that this inconsistency did not render the verdict of guilty as to extortion a nullity.

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