Circuit Court for Baltimore County
Case No: 03-K-04-002931

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 450

September Term, 2019

DARRYL McNAIR

v.

STATE OF MARYLAND

Arthur,
Beachley,
Woodward, Patrick L.
(Senior Judge, Specially Assigned),

JJ.

PER CURIAM

Filed: September 1, 2020

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

On February 15, 2005, Darryl McNair, appellant, pled guilty in the Circuit Court for Baltimore County to first-degree assault and robbery with a dangerous and deadly weapon. The court sentenced him to 25 years' imprisonment for the assault and to a consecutive term of 20 years for the robbery. He did not seek leave to appeal.

Nearly 13 years later, Mr. McNair filed a motion to correct an illegal sentence in which he asserted that the court erred in failing to merge the offenses for sentencing purposes. The circuit court denied relief. Mr. McNair appeals that ruling.[1] For the reasons to be discussed, we shall affirm the judgment.

BACKGROUND

At the plea hearing, the State informed the circuit court that, pursuant to a plea agreement with the defense, Mr. McNair would plead guilty to first-degree assault (count 2) and robbery with a dangerous and deadly weapon (count 3) and upon the court's acceptance of the plea the State would nol pros the remaining 11 charges, including attempted first-degree murder. The parties were "free to argue for any sentence" they deemed "appropriate," but the prosecutor stated that he had informed defense counsel that the State intended to "argue for 45 years" imprisonment.

After examining Mr. McNair on the record and concluding that he was entering the plea knowingly and voluntarily, the State proffered facts in support of the plea. The State related that, on July 6, 2004, then 18-year-old Phillip Mortenson met Mr. McNair (also 18

[1] In its brief, the State moved to dismiss the appeal as untimely filed. Following a remand to the circuit court for a determination of when Mr. McNair filed his appeal, the circuit court concluded that the appeal was timely filed in that court. Then by order dated July 15, 2020, this Court lifted the stay of this appeal.

years old) at Howard County Community College and spent the day with him and "other persons who were associates of Mr. McNair." The group ultimately ended up at the home of Mr. Mortenson, where they played pool and basketball and partied late into the night. Mr. Mortenson had the home to himself, as his parents were away at the beach.

At about 2:00 a.m., Mr. Mortenson decided it was time "to break up the festivities" and "went down to the basement entertainment area and informed Mr. McNair, David Patrick, and Terry Cox that it was time for them to leave." The prosecutor continued:

> At that time the three of them [McNair, Patrick, and Cox] then turned on Phil Mortenson and, and attacked him. They beat him significantly, including the use of a pool cue. Eventually, during the course of the entire assault also used a golf club, also used a metal chain. The attack initiated in the basement of, of the home. Phillip was eventually able to, in effect, escape from the three of them. He ran up to the first floor of the residence. He locked himself into a bathroom on the first floor. The three, Mr. McNair, Mr. Cox, and Mr. Patrick, then broke through the door of the bathroom, breaking the frame, and then continued to assault Phillip Mortenson. Phil was then, eventually also again able to escape from the three of them. He ran up to the second floor of the residence and he locked himself into his mother's office. They then broke down the door of that office and again continued to attack him. He eventually ended up in the master bedroom in the main area of that bedroom where the attack continued. At one point he heard one of the three call out "Kill him." He was then stabbed. He was also tied up, utilizing some of the . . . household items that were there, a phone cord and a chain, and left, in effect, to die there on, on the bedroom floor . . . of his parents' bedroom.
>
> During the course of this attack, and then after he'd been left there, the three were gathering a lot of property from . . . within the residence. Jewelry and other personal property belonging to the Mortensons. The value of that property was well over $10,000 that was removed from the household. They then stole and took the, a Dodge Intrepid and a Ford Mustang, recent models of each that also belonged to the Mortensons and then left with Phil Mortenson still on the floor of, of his parents' bedroom.

Mr. Mortenson ultimately freed himself and managed to reach a neighbor's house and the police were then called to the scene.

As noted, Mr. McNair pled guilty to first-degree assault and robbery with a dangerous and deadly weapon and was sentenced to consecutively run terms of 25 and 20 years' imprisonment. Years later, he filed a *pro se* motion to correct an illegal sentence claiming that the offenses should have merged. The circuit court summarily denied the motion.[2]

DISCUSSION

Mr. McNair, still representing himself, asserts that the circuit court erred in denying his motion to correct an illegal sentence and in doing so summarily and without holding a hearing. He maintains that first-degree assault and the robbery merged under the required evidence test because the factual proffer "relied on to convict him failed to set forth any facts that prove the assault [was] separate and distinct from the robbery." Alternatively, he maintains that the offenses should merge under the rule of lenity or under a "unit of prosecution" theory.

First, we note that our review of a circuit court's ruling on a motion to correct an illegal sentence is *de novo*. *Bratt v. State*, 468 Md. 481, 494 (2020). Second, Md. Rule 4-345 does not require the circuit court to support its ruling on a motion to correct an illegal

[2] Mr. Patrick also pled guilty to first-degree assault and robbery with a dangerous or deadly weapon and was sentenced, like Mr. McNair, to a total term of 45 years' imprisonment. Ten years later, Mr. Patrick filed a motion to correct an illegal sentence in which he too maintained that his sentences should have merged for sentencing purposes. The circuit court disagreed, and on appeal this Court affirmed the judgment. *Patrick v. State*, No. 118, Sept. Term, 2016 (filed February 28, 2017).

sentence with a memorandum or a statement of reasons, and the Rule does not require a hearing on the motion. Accordingly, the circuit court did not err in summarily denying the motion without a hearing.

Turning to the merits, when different crimes are committed during the same transaction or incident, the "required evidence test" is used to determine whether the offenses are the same for double jeopardy purposes, thereby precluding separate sentences. *Purnell v. State*, 375 Md. 678, 693 (2003). The Court of Appeals has summarized the required evidence test as follows:

> The required evidence is that which is minimally necessary to secure a conviction for each . . . offense. If each offense requires proof of a fact which the other does not, or in other words, if each offense contains an element which the other does not, the offenses are not the same for double jeopardy purposes, even though arising from the same conduct or episode. But, where only one offense requires proof of an additional fact, so that all elements of one offense are present in the other, the offenses are deemed to be the same for double jeopardy purposes.

Monoker v. State, 321 Md. 214, 220 (1990) (quotation marks and citations omitted).

Here, first-degree assault and robbery with a dangerous or deadly weapon do not merge under the required evidence test because each offense contains an element the other does not. First-degree assault, of the type at issue here, is intentionally causing or attempting to cause serious physical injury to another. Md. Code, Criminal Law, § 3-202(a)(1). Robbery with a dangerous or deadly weapon is committing or attempting to commit robbery with a dangerous weapon. Criminal Law, § 3-403. Robbery is "the felonious taking and carrying away of the personal property of another[.]" *State v. Stewart*, 464 Md. 296, 321 (2019) (quotation marks and citation omitted). First-degree assault does

not require the theft of property. Robbery with a dangerous or deadly weapon requires the use of a dangerous weapon, but it does not require the infliction of serious bodily injury. Accordingly, even if they were committed during the same episode, under the circumstances of this case, the two offenses did not merge under the required evidence test.

Mr. McNair also maintains that the two crimes should have merged under the rule of lenity. We disagree. The rule of lenity is a principle of statutory construction whereby any "doubt or ambiguity as to whether the legislature intended that there be multiple punishments for the same act or transaction will be resolved against turning a single transaction into multiple offenses." *Marquardt v. State*, 164 Md. App. 95, 149 (2005) (quotation marks and citation omitted). In determining whether the rule of lenity applies, the focus is on "whether the two offenses are of necessity closely intertwined or whether one offense is necessarily the overt act of the other." *Id.* at 149-50 (quotation marks and citation omitted). Here, there is nothing to suggest that the Legislature intended to punish with a single sentence a defendant who (1) inflicted serious bodily injury on a victim, and (2) committed robbery with a dangerous or deadly weapon. Punishment for robbery with a dangerous or deadly weapon is focused on the use of the weapon in the commission of the robbery, not on whether the victim has suffered a serious bodily injury. Accordingly, the two offenses did not merge under the rule of lenity.

Finally, Mr. McNair asserts that merger was required "based on unit of prosecution" because the State "failed to articulate any facts that would prove first-degree assault distinct from robbery." He points specifically to the State's proffer that "during the course of the attack" on Mr. Mortenson the assailants were "gathering a lot of property from . . . within

the residence." Again, we disagree with Mr. McNair.[3] First, the factual proffer supported an assault in the basement, an assault in the bathroom, an assault in the office, and an assault in the bedroom; and the robbery of various items taken both during the assault and after they left him tied up in the bedroom. As discussed above, there is no indication that the Legislature intended the two distinct offenses at issue here to constitute a single conviction and sentence.

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

[3] Mr. McNair's "unit of prosecution" argument may have applied if he had been convicted and sentenced for multiple counts of first-degree assault, but that was not the case.