UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 118

September Term, 2016

DAVID GERARD PATRICK

v.

STATE OF MARLAND

Leahy,
Shaw Geter,
Kenney, James A., III
(Senior Judge, Specially Assigned),

JJ.

Opinion by Leahy, J.

Filed: February 28, 2017

David Gerard Patrick,[1] appellant, pleaded guilty to first-degree assault and robbery with a dangerous weapon.[2] The Circuit Court for Baltimore County sentenced Patrick to consecutive sentences of 25 years of incarceration for the first-degree assault conviction and 20 years of incarceration for the robbery with a dangerous weapon conviction on February 24, 2005. Patrick did not file a direct appeal. Exactly ten years later, on February 24, 2015, he filed a petition for post-conviction relief and a motion to correct an illegal sentence which the circuit court heard and ultimately denied.[3]

Appellant presents two issues for our review:

> 1. "Whether the Circuit Court for Baltimore County erred in holding that sentences for First Degree Assault and Robbery with a Dangerous and Deadly Weapon do not merge under the rule of lenity."
>
> 2. "Whether the Circuit Court for Baltimore County erred in refusing to consider whether the failure to merge sentences under the doctrine of fundamental fairness resulted in an illegal sentence, subject to review at any time under Maryland Rule [4-345(a)]."

We hold that the circuit court correctly denied Patrick's motion to correct illegal sentence because the first-degree assault and robbery with a dangerous weapon convictions in this case arose out of separate acts and, therefore, do not merge. We do not reach

[1] Patrick was 21 years old when he entered into the plea agreement.

[2] The parties refer to robbery with a dangerous weapon and armed robbery interchangeably throughout their briefing.

[3] Pursuant to the Maryland Code (2001, Repl. Vol. 2008, Supp. Vol. 2016), Criminal Procedure Article ("CP"), §§ 7-101 to -109 and Maryland Rules 4-401 to -408, a petition for post-conviction relief must be filed within ten years from the date of sentencing. A motion to correct an illegal sentence pursuant to Maryland Rule 4-345(a) may be filed any time.

Patrick's second issue because it is not before us. For the reasons that follow, we affirm.

BACKGROUND

A. The Assault and Robbery

In conjunction with the plea agreement presented to the court at a motions hearing on December 9, 2004, the parties submitted an agreed-upon statement of facts of the assault and robbery. The following account is based on that statement, which was read into the record by the State's attorney.

On July 6, 2004, Philip Mortenson, who was then 18 years old, met up with Darrel McNair at Howard County Community College. Mortenson related that his parents were out of town and no one else was home, so they left the campus at approximately 6:00 p.m. to smoke marijuana and hang out at Mortenson's home in Baltimore County. McNair invited four other people to Mortenson's house—Patrick, Jacqueline Helms, Terry Cox, and Gary Graham. Mortenson and his six guests "spent a number of hours there, in effect, relaxing[,] playing basketball, [and] playing pool." The assault began when:

> Darrell McNair broke into the liquor cabinet of Mr. Mortenson's father[.] . . . At approximately 2:00 in the morning, Philip decided that things were getting a little bit out of hand and indicated that he wanted everyone to leave. After he had indicated to everyone that he wanted them to leave, he was then attacked. He was in the basement[.] . . . He could specifically identify that Terry Cox, Darrell McNair and David Patrick were the three that he knew for sure had attacked him. The other two he was uncertain as to their participation, [he] knew that they were somewhere within the same room at the time the attack initiated. . . . [Mortenson] was struck with a pool cue which was broken during the course of this. During the course of the entire incident, he also was struck with a golf club [and with] metal chains. Eventually, at one point he was actually stabbed to [sic] the left flank. While being attacked in the basement level, [Mortenson] managed at one point to

> free himself from them. He ran up the stairs and ran to the bathroom on the first floor of the home. He locked himself in the bathroom. The three individuals, in particular, then broke down the door of the bathroom, and continued to attack him and beat him. [Mortenson] again managed to free himself from them, he ran up the next flight of stairs to the second and the top level of the home, and locked himself in his mother's office. Those three individuals then again broke down the door breaking the doorframe of the office and again continued to attack [Mortenson]. He managed to free himself again from them and got to the master bedroom of the home where he was attacked again, and that is actually when he was stabbed. He was also struck over the head with several bottles, they're actually memorabilia Coca Cola bottles from Cal Ripken . . . that were in the master bedroom. There was a fight that went on within the master bedroom. [The three individuals] then had pulled [phone] cords . . . from the walls, they also used some chains to then tie up [Mortenson] and leave him . . . there[,] in fact[,] had been comments we believe also made by Darrell McNair directing to kill [Mortenson]. [Mortenson] was left bleeding significantly on the floor of the master bedroom of his parents' home.[4]

Patrick and the other four individuals also stole numerous items—including jewelry, personal property, and two cars —from Philip's house.[5]

> At that point and also it had initiated before, a number of the people that were involved in this started collecting up property to steal from the home. There was a significant amount of jewelry and personal property that the list goes on in effect forever, the extreme amount of personal property was stolen from

[4] Mortenson's father provided additional detail at Patrick's sentencing. He told the court

> . . . I don't think it sunk in then but we followed the steps we thought that Phil had followed through the evening and started in the basement in what is our theater area where the three people simultaneously attacked him with a pool stick and beat him. There was blood everywhere. There was blood on every wall, there was blood on the ceilings, pools of blood on the floor, blood on our furniture, doors ripped from their hinges, and this is just in the basement.

[5] At Patrick's sentencing, Philip Mortenson's father told the court that Patrick and his accomplices stole 199 items.

> the home. In addition, the 2000 Dodge Intrepid belonged to Philip's parents . . . was stolen. . . . [A] 2002 Ford Mustang which technically belonged to Philip's parents but was for his use, was also stolen. All five of the individuals then departed from the residence stealing . . . a lot of property.

After laying on the floor chained, tied up, and bleeding for an unknown amount of time, Mortenson was able to untie himself. He then climbed onto the roof through the master bathroom window and escaped from the house. Mortenson, bleeding profusely at this point, sought assistance from a neighbor, who called the police. The police were dispatched at 2:40 a.m. Mortenson was transported to the hospital to receive treatment of his injuries which included a fracture to the occipital orbit (eye-socket), a ruptured eardrum, a stab wound to his abdomen, and other significant injuries to his body.[6]

After identifying the individuals involved in this gruesome incident, on July 12, 2004, the detectives obtained and executed a search warrant for Patrick's residence. Patrick had the car key to the 2000 Dodge Intrepid in his possession. The detectives found the Dodge Intrepid parked in a commercial parking lot near Patrick's house. The Dodge Intrepid contained stolen personal property from Mortenson's house including a safe. The detectives then advised Patrick of his *Miranda* rights, which he waived. Patrick admitted that he was present at Mortenson's house at the time of the assault and robbery and that he stole the property. Patrick was then placed under arrest.[7]

[6] At Patrick's sentencing, Philip Mortenson's father related that Philip was "swollen, black and blue" and "had chain link scars or bruises that had the indentation of every chain link across his back and his forearms, including straight line bruises from pool sticks, on his body."

[7] McNair was arrested several hours after the assault and robbery driving the stolen

A grand jury indicted Patrick on thirteen charges: attempted first-degree murder Maryland Code (2002, 2012 Repl. Vol., 2016 Supp.), Criminal Law Article ("CL"), § 2-205); first-degree assault (CL § 3-202); robbery with a dangerous weapon (CL § 3-403); robbery (CL § 3-402); false imprisonment (common law); four counts of carrying a weapon openly with the intent to injure (CL § 4-101(d)(2)); three counts of theft (CL § 7-104); and malicious destruction of property (CL § 6-301).

B. The Plea Hearing, Plea Agreement, and Sentencing

At a motions hearing[8]—which became a plea hearing—on December 9, 2004, Patrick entered into a plea agreement in which he pleaded guilty to first-degree assault (CL § 3-202) and robbery with a dangerous weapon (CL § 3-403).[9] At the hearing, his counsel walked Patrick through all of his rights and the consequences of pleading guilty including his right to a jury or bench trial, his right to call witnesses and cross-examine the State's witnesses, his right to testify in his defense, his automatic right to appeal from trial, and the maximum penalties for each conviction. In exchange for Patrick's guilty plea, the State entered a *nolle prosequi* to the remaining eleven charges.

2002 Ford Mustang in a high-speed chase in Prince George's County.

[8] Patrick's trial counsel withdrew his omnibus motion at the beginning of the scheduled motions hearing.

[9] A trial was set for January 10, 2005. Patrick was set to be tried with Cox and McNair. McNair was sentenced to 45 years. Cox was sentenced in April 2005, but details of his sentence are not in the record.

After the pre-sentence report was prepared,[10] the circuit court held a sentencing hearing on February 24, 2005. The court sentenced Patrick to consecutive sentences of twenty-five years for the first-degree assault conviction and twenty years for the robbery with a dangerous weapon conviction on February 24, 2005.[11] Patrick filed a motion to reconsider the sentence on March 11, 2005, which the trial court denied on March 17, 2005. On the same day, Patrick filed an application for review of his sentence by a three-judge panel, which the trial court granted. The three judge panel unanimously found the sentence "was appropriate and w[ould] make no change in the sentence" on June 16, 2005. Patrick did not apply for leave to appeal the conviction.

C. Petition for Post-Conviction Relief and Motion to Correct an Illegal Sentence

Patrick, through his counsel, filed a petition for post-conviction relief and a motion to correct an illegal sentence on February 24, 2015. Patrick asserted three arguments in his petition and motion; only one is relevant to this appeal.[12] Patrick contended that he

[10] According to the pre-sentencing report, Patrick was previously convicted of burglary in March 2003 for which he was sentenced to two years of incarceration with all but six months suspended, and second-degree assault for which he received a two-year suspended sentence. Patrick was currently on probation for the second-degree assault conviction when this incident occurred and, therefore, had a pending violation of probation proceeding at sentencing for this case.

[11] At oral argument, Patrick's counsel attempted to argue that Patrick was unaware that the maximum sentence was forty-five years of incarceration. The transcript of the sentencing hearing demonstrates unequivocally, however, that Patrick's attorney informed him before the court of the maximum sentences for each crime and that he faced a potential aggregate sentence of forty-five years of incarceration.

[12] Patrick also asserted that he did not enter into the plea agreement knowingly and intelligently because he was not informed of the nature and elements of the first-degree

received an illegal sentence because first-degree assault and armed robbery merged either under the required evidence test or under the rule of lenity. In response, the State argued that Patrick waived his arguments because, pursuant to CP § 7-106(b)(1)(i)(4), Patrick could have raised the arguments by filing an application for leave to appeal a conviction based on a guilty plea and he failed to do so.[13] Assuming Patrick's illegal sentence argument was raised under the motion to correct an illegal sentence and, therefore, not waived, the State, citing *Pair v. State*,[14] asserted that first-degree assault and armed robbery do not merge either under the required evidence test or under the rule of lenity.

The circuit court held a hearing on Patrick's petition and motion on September 25, 2015. The circuit court denied Patrick's petition for post-conviction relief and motion to correct an illegal sentence in a written statement of reasons and order entered on February 8, 2016.[15] Relying on this Court's decision in *Pair*, the circuit court that found that

assault and armed robbery charges. Patrick also argued that he had ineffective assistance of counsel because his trial attorney failed to investigate his case, provide a "fair assessment of the strengths and weaknesses of the State's case before advising [Patrick] to plead guilty[,]" or advise Patrick correctly. Patrick withdrew the ineffective assistance of counsel argument at the hearing on February 24, 2015.

[13] On the merits, the State maintained that Patrick's plea was knowing and intelligent because the charges were "not complex," and the transcript of the plea hearing demonstrates that the nature of the charges were provided to Patrick in detail. The State also argued that Patrick failed to set forth any particular facts regarding counsel's deficient acts other than general statements.

[14] 202 Md. App. 617, 624 (2011), *cert. denied*, 425 Md. 397 (2012).

[15] The court found that Patrick waived the argument that his guilty plea was not made knowingly and intelligently because Patrick failed to seek leave to file a direct appeal and there were no special circumstances to excuse the waiver.

Patrick's sentences were proper, and that merger was inapplicable under the required evidence test, the rule of lenity, and the principle of fundamental fairness. First, the court concluded that the first-degree assault conviction possessed the same "vitality" as it did in *Pair*, where this Court found that "an assaultive marathon" "was the dog wagging the tail of the robbery and not vice versa." (Citing to *Pair*, 202 Md. App. at 625–26, 628). The court provided its analysis of the first-degree assault of Mortenson and subsequent armed robbery:

> Here, the victim was assaulted, escaped to lock himself in another room, and the door to that room was subsequently broken down to begin another assault. This happened not once, but three times, which constituted an "assaultive marathon" throughout four rooms in the home. Further, the [r]obbery in this case seemed to be an "afterthought," largely due to the time spent assaulting the victim relative to the robbing of the victim. Here, the [r]obbery occurred during a brief spell following the [a]ssault throughout the home. There is not evidence of the [a]ssault as part of a scheme to rob the victim nor any previous attempts to rob the victim, rather, this [c]ourt finds from the statement of facts that [Patrick] and the other perpetrators of the crime simply saw an opportune moment to rob the victim and seized upon that opportunity following the assault.

The court then concluded that the convictions would not merge under the required evidence test, reasoning that each crime contained an element not present in the other—first-degree assault requires infliction of serious bodily injury and armed robbery requires theft of property. Just as this Court determined in *Pair*, the circuit court found that the rule of lenity was inapplicable because both robbery and assault remain common law crimes. Lastly, the circuit court found, also relying on *Pair*, that Patrick waived the question of merger based on the principle of fundamental fairness because the issue is appropriately raised in a post-

conviction petition, not a motion to correct an illegal sentence.[16]

Patrick filed an application for leave to appeal and a notice of appeal on March 9, 2016.[17]

DISCUSSION

I.

Maryland Merger Law

A court's failure to merge a sentence constitutes an illegal sentence within the meaning of Maryland Rule 4-345(a). *See Pair*, *supra*, 202 Md. at 624. Patrick's petition filed on the ten-year anniversary of his sentencing was presented alternatively as a motion to correct an illegal sentence and, therefore, we may consider the merger issue. *See* Maryland Rule 4-345(a). "[A] motion to correct an illegal sentence under Rule 4-345(a) is not waived even if no objection was made when the sentence was imposed or the defendant purported to consent to it." *Johnson v. State*, 427 Md. 356, 371 (2012) (citations and internal quotations omitted). We review the denial of a motion to correct an illegal sentence under a *de novo* standard of review. *Blickenstaff v. State*, 393 Md. 680, 683 (2006).

[16] Because Patrick failed to file leave to appeal his conviction from a guilty plea (a direct appeal), he waived his right to seek relief through a petition for post-conviction relief. CP § 7-106(b)(1)(i)(4).

[17] Patrick also filed an application for leave to appeal the circuit court's decision on his post-conviction petition that he did not knowingly and intelligently enter into the plea agreement, which this Court denied in a per curiam decision. *Patrick v. State*, Case No. 137, Sept. Term 2016 (denied Sept. 27, 2016).

"The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution and the common law of Maryland guard against 'multiple punishments for the same conduct, unless the legislature clearly intended to impose multiple punishments.'" *Morris v. State*, 192 Md. App. 1, 39 (2010) (footnote omitted) (quoting *Jones v. State*, 357 Md. 141, 156 (1999)). We apply a two-part analysis to evaluate the legality of the imposed sentences. First, we must determine whether the charges "'arose out of the same act or transaction.'" *Morris*, 192 Md. App. at 39 (quoting *Jones*, 357 Md. at 157)). As this Court explained in *Morris*:

> The "same act or transaction" inquiry often turns on whether the defendant's conduct was "one single and continuous course of conduct," without a "break in conduct" or "time between the acts." *Purnell v. State*, 375 Md. 678, 698, 827 A.2d 68 (2003). The burden of proving distinct acts or transactions for purposes of separate units of prosecution falls on the State. *Snowden v. State*, 321 Md. 612, 618, 583 A.2d 1056 (1991). Accordingly, when the indictment or jury's verdict reflects ambiguity as to whether the jury based its convictions on distinct acts, the ambiguity must be resolved in favor of the defendant. *Williams v. State*, 187 Md. App. 470, 477, 979 A.2d 184, *cert. denied*, 411 Md. 602, 984 A.2d 245 (2009); *Jones v. State*, 175 Md. App. 58, 88, 924 A.2d 336 (2007), *aff'd*, 403 Md. 267, 941 A.2d 1082 (2008); *Gerald v. State*, 137 Md. App. 295, 312, 768 A.2d 140, *cert. denied*, 364 Md. 462, 773 A.2d 514 (2001).

Id. Second, if we determine the charges arose out of the same transaction, then we apply the *Blockburger* required evidence test to determine whether the different offenses are the same for double jeopardy purposes. *Purnell v. State*, 375 Md. 678, 693 (2003) (citing *Blockburger v. United States*, 284 U.S. 299, 304 (1932)); *see also Brooks v. State*, 284 Md. 416, 424 (1979). The Court of Appeals summarized the *Blockburger* required evidence test as:

> 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. And of course if both [offenses] have exactly the same elements, the offenses are also the same within the meaning of the prohibition against double jeopardy.

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

Patrick concedes that armed robbery and first-degree assault do not merge under the *Blockberger* required evidence test because each crime contains an element the other does not.[18] The merger analysis does not end with the *Blockburger* required evidence test, however. There are two additional relevant "tests" in Maryland merger law—the rule of lenity and the principle of fundamental fairness. *Pair*, 202 Md. App. at 624–25. These two tests form the focus of our review.

II.

The Rule of Lenity

The second merger "test"—referred to as the rule of lenity—is a rule of statutory construction. Convictions merge under the rule of lenity if "the Legislature did not intend, under the circumstances involved, that a person could be convicted of two particular offenses growing out of the same act or transaction." *Pair*, 202 Md. App. at 638 (quoting

[18] As the circuit court concluded, robbery with a dangerous weapon "does not necessarily require the infliction or attempted infliction of serious bodily injury, and further, the [f]irst-[d]egree assault does not require the theft of property."

Brooks, *supra*, 284 Md. at 423–24). Two crimes may not be punished separately if the legislature intended the offenses to be punished by one sentence. *Monoker*, 321 Md. at 222. The rule of lenity, therefore, provides that where the statute and legislative history are ambiguous as to whether the legislature intended two crimes to be punished by one or separate sentences, the convictions merge for the purpose of sentencing. *Id.* at 222. As a rule of statutory construction, this merger "test" has limited applicability. *See Khalifa v. State*, 382 Md. 400, 434 (2004) ("at least one of the two crimes subject to merger analysis [must be] a statutory offense").

The predicate determination in considering whether any convictions should merge under the rule of lenity, however, is that the offenses arose out of the same act or transaction. "The question of whether a particular crime, such as first-degree assault in the present case, is the centerpiece of the prosecution or a mere incident of some other crime is intensely fact-specific." *Pair*, 202 Md. App. at 626. The answer "depends upon the particular facts and circumstances of each individual case and can readily go in either direction." *Id.*

Patrick contends that even though his convictions do not merge under the *Blockburger* required evidence test, his convictions arose out of the same act or transaction and, as a result, they should merge under the rule of lenity. Patrick maintains at least two theories as to why his convictions arose out of the same act. First, he asserts that the indictment and the basis for his convictions articulated by the trial court were ambiguous as to whether his charges were based on distinct acts. He contends, therefore, we must

resolve the ambiguity in his favor—meaning we must assume the charges arose out of the same act or transaction. Second, Patrick contends that his convictions should merge because the first-degree assault, though violent and protracted, was the force necessary to accomplish the armed robbery. Applying the rule of lenity, Patrick maintains that his convictions should merge because the legislative history for the assault and robbery statutes fails to indicate "clear legislative intent" that assault and robbery convictions arising out of the same act should be punished separately.

In response, the State counters that the factual ambiguities in the indictment or record are only resolved in a defendant's favor when applying the required evidence test, not the rule of lenity or fundamental fairness. The State first asserts that any ambiguity about whether Patrick's two convictions arose from the same act or distinct acts is resolved by the fact that Patrick entered into a guilty plea setting out the two separate offenses that carried separate penalties.[19] The State also contends that merger is not required in this case

[19] This is not a particularly convincing argument in this case for at least two reasons. Finding no Maryland decisional law on point, the State cites to a case from the Supreme Court of Georgia for the proposition that Patrick's guilty plea to two offenses demonstrates that the convictions were based on separate acts. *See Nazario v. State*, 746 S.E.2d 109 (Ga. 2013). In *Nazario*, the petitioner pled guilty to 17 counts of a 26-count indictment. *Id.* at 111. On appeal, the petitioner challenged his convictions and resulting sentences as void on merger grounds. *Id.* The court rejected the State's broad argument that a defendant's "entry of a guilty plea waives any and all merger claims" on appeal. *Id.* at 111. The Supreme Court of Georgia noted that merger issues are reviewable on appeal for the first time, but the merger issue must be "established by the record." *Id.* And "as a practical matter, because the factual record in a guilty plea case is usually very limited, defendants who raise merger claims after pleading guilty, particularly claims that a conviction merged as a matter of fact, will rarely prevail." *Id.* The court pointed out that an appellant often cannot demonstrate that his merger claims have merit with "the limited factual record resulting from a guilty plea." *Id.* The appellant in *Nazario*, however, was able to

where the proffered facts permit a finding of a separate basis for each conviction. Regardless, the State points out that Patrick failed to identify any relevant legislative history suggesting that the legislature intended to prohibit separate sentences for first-degree assault and armed robbery, and his attempt to convince us that the rule of lenity applies incorrectly interprets the legislature's silence as ambiguous intent. The State maintains that because the first-degree assault and armed robbery offenses were enacted decades apart, involve different criminal behavior, contain different elements, and neither is the overt act of the other, the legislature's silence on the multiple punishments is not only expected but also does not create ambiguity.

Our review of the record demonstrates unequivocally that the first-degree assault and the robbery with a dangerous weapon convictions arose from separate acts. We are not convinced by Patrick's argument that the assault was merely the force used to carry out the robbery. If Patrick and his accomplices solely intended to rob Mortenson and the contents of his parents' home, they had ample opportunity beginning in the early evening on July 6, 2004 to do so. But there is no evidence in the record that Patrick and his accomplices went to Mortenson's house with the intent to commit theft or armed robbery.

demonstrate the merit of one of his merger contentions. *Id.* at 118. The court held that the appellant's five convictions related to concealing the death of another merged because the record supported his contention that the convictions were "part of a course of conduct." *Id.* at 118.

Second, Patrick filed a petition for post-conviction relief on the grounds that his plea was not knowingly or intelligently entered into. Although his petition was denied on procedural grounds, he may consistently argue that his guilty plea does not demonstrate that he conceded that the convictions were based on separate acts.

Instead, Mortenson and his guests hung out, played basketball, and shot pool from sometime after 6:00 p.m. to 2:00 a.m.

The assault began many hours after Patrick and his accomplices arrived at the home—not until 2:00 a.m. when Mortenson asked his guests to leave. The protracted assault (rather, series of assaults) began in the basement and persisted throughout the three stories of the house as Mortenson attempted to escape his attackers' repeated bludgeoning with a pool stick, a golf club, glass bottles, and metal chains. In the basement, Mortenson was attacked by Patrick, McNair, and Cox and beaten with a pool stick and a golf club. Mortenson freed himself of his attackers and ran up the stairs and locked himself in the bathroom for protection. The assault continued when Patrick and the others broke down the bathroom door and continued to gruesomely assault Mortenson. Mortenson, for a second time, freed himself, ran up the stairs to his mother's office where he again attempted to lock himself in. And yet again, his attackers broke down the door to continue the violent assault. Mortenson escaped the clutches of his attackers for a third time. But the assault continued in the master bedroom where his attackers broke glass bottles on his head, stabbed him in the abdomen, and bound him with chains and a phone cord ripped out of the wall for that purpose. His attackers left him chained, tied up, and bleeding profusely on the floor of the master bedroom.

If Patrick and his accomplices primarily intended to rob Mortenson upon his request that they leave, Patrick and his accomplices could have completed the robbery when Mortenson locked himself in the bathroom or his mother's office. Instead, the record

reveals that the violence continued. Indeed, the record before the circuit court told a story of the visitors' intent on torturing Mortenson, if not killing him.

The circuit court's analysis in its opinion denying Patrick's petition for post-conviction relief and motion to correct an illegal sentence clearly articulates why the first-degree assault of Mortenson and the armed robbery were separate acts.

> Here, the victim was assaulted, escaped to lock himself in another room, and the door to that room was subsequently broken down to begin another assault. This happened not once, but three times, which constituted an "assaultive marathon" throughout four rooms in the home. Further, the [r]obbery in this case seemed to be an "afterthought," largely due to the time spent assaulting the victim relative to the robbing of the victim. Here, the [r]obbery occurred during a brief spell following the [a]ssault throughout the home. There is not evidence of the [a]ssault as part of a scheme to rob the victim nor any previous attempts to rob the victim, rather, this [c]ourt finds from the statement of facts that [Patrick] and the other perpetrators of the crime simply saw an opportune moment to rob the victim and seized upon that opportunity following the assault.

We agree with the circuit court that the robbery seemed to be an "afterthought." The record is equivocal as to whether the theft began during the assault. Because we conclude that Patrick's two convictions arose from separate acts, the rule of lenity is inapplicable.

Even if, *arguendo*, Patrick's convictions arose out of the same act, the rule of lenity would still not apply here. Judge Moylan presented the contours of the rule of lenity in *Pair*:

> If the Legislature intended two crimes arising out of a single act to be punished separately, we defer to that legislated choice. . . . If the Legislature intended but a single punishment, we defer to that legislated choice. If we are uncertain as to what the Legislature intended, we turn to the so-called "Rule of Lenity" by which we give the defendant the benefit of the doubt.

202 Md. App. at 638 (quotations omitted) (quoting *Walker v. State*, 53 Md. App. 171, 201

(1982)); *see also Monoker*, 321 Md. at 222 ("Two crimes created by legislative enactment may not be punished separately if the legislature intended the offenses to be punished by one sentence."). However, "'[i]t is one thing for a single transaction to include several units relating to prescribed conduct under a single provision of a statute. It is a wholly different thing to evolve a rule of lenity for three different offenses created by Congress at three different times.'" *Johnson*, 56 Md. App. 205, 216 (1983), *superseded by statute as recognized in Garner v. State*, 442 Md. 226, 246 (2015) (quoting *Gore v. United States*, 357 U.S. 386, 391 (1958)).

As a rule of statutory construction, the rule of lenity only applies when the offenses arise out of the same act and "at least one of the two crimes subject to merger analysis is a statutory offense." *Pair*, 202 Md. App. at 638 (citing *Khalifa*, 382 Md. at 434). Patrick argues, in light of the Court of Appeals holding in *Robinson v. State*, 353 Md. 683 (1999), subsequently recognized in *Christian v. State*, 405 Md. 306 (2008) and *Marlin v. State*, 192 Md. App. 134 (2010), that the 1996 assault statute abrogated the common law assault offense and, therefore, the rule of lenity applies. [20] In any case, both parties agree that assault is a statutory crime and robbery is a common law crime.

Maryland courts have declined to apply the rule of lenity as broadly as Patrick

[20] We note that *Pair*, 202 Md. App. 617 (2011), published by this Court after *Robinson* offers a different view. This Court specifically held that assault remains a common law crime, though its punishment is "statutorily prescribed." *Id.* at 642. As a result, this Court concluded that the rule of lenity was "not remotely pertinent" to the common law crimes of assault, robbery, and false imprisonment. *Id.* at 641. We note that *Robinson* was not a merger case, and the Court of Appeals did not contemplate merger or the rule of lenity in its opinion.

suggests. In *Whack v. State*, the Court of Appeals was presented with the issue of whether the convictions of armed robbery and use of a handgun in the commission of a felony merge under the rule of lenity. 288 Md. 137, 139, 143 (1980). After reviewing the language of the statutes—the use of a handgun in the commission of a felony statute identifies this crime as a separate offense from the felony with a mandatory minimum sentence—and the respective legislative histories, the Court determined that "[n]othing could more plainly show an intent to impose whatever punishment is provided for the felony [in this case, armed robbery] plus the punishment set forth in [the use of a handgun in the commission of a felony statute]." *Id.* at 148. The Court declined to merge the convictions for armed robbery and use of a handgun in the commission of a felony under the rule of lenity, holding that the General Assembly expressly demonstrated its intent to punish a defendant under two separate statutory provisions. *Id.* at 150; s*ee also Pryor v. State*, 195 Md. App. 311, 338–39 (2010) (declining to merge convictions for first-degree assault and first-degree arson, concluding that there was no ambiguity in the legislature's intent where the "legislature plainly set out separate punishments for first-degree arson and first-degree assault"); *Johnson v. State*, 56 Md. App. at 216 (declining to merge convictions for assault with intent to murder and attempted armed robbery, reasoning that the rule of lenity does not apply where "[t]he statutes prescribing those offenses were enacted at different times[;] [t]he statutes themselves were unambiguous in their penalty provisions; [and] we are aware of no legislative history suggesting otherwise").

Patrick pleaded guilty to first-degree assault and robbery with a dangerous

weapon.[21] CL §§ 3-202, 3-403. As this Court addressed thoroughly in *Pair*, we cannot draw any intent from the assault statute that relates to the robbery statute because the General Assembly did not codify the statutes in conjunction with one another. 202 Md. App. at 639.

> "*Not only were these two statutory offenses* [assault with the intent to murder (the precursor to first-degree assault) and robbery with a dangerous weapon] *created 118 years apart but there is no evidence that the legislature ever considered one when amending the other, nor was there reason for it to do so*. . . . One offense is not necessarily the overt act of the other. And the punishment provided for each offense implicates no necessary likelihood of multiple punishment[s] with respect to the other offense, since . . . the commission of one of these two offenses is not an essential predicate to the commission of the other."

Pair, 202 Md. App. at 639 (emphasis supplied in *Pair*) (quoting *Johnson*, 56 Md. App. at 215–16). Judge Moylan emphasized this point further:

> Self evidently, even when dealing with Maryland statutes, it is absurd to look

[21] CL 3-202, the statute for first-degree assault, provides

> (a) (1) A person may not intentionally cause or attempt to cause serious physical injury to another.
> (2) A person may not commit an assault with a firearm[.]
> (b) A person who violates this section is guilty of the felony of assault in the first degree and on conviction is subject to imprisonment not exceeding 25 years.

CL § 3-403, the statute for robbery with a dangerous weapon, provides

> (a) A person may not commit or attempt to commit robbery under § 3-402 of this subtitle:
> (1) with a dangerous weapon; or
> (2) by displaying a written instrument claiming that the person has possession of a dangerous weapon.
> (b) A person who violates this section is guilty of a felony and on conviction is subject to imprisonment not exceeding 20 years.

> for legislative intent or for the lack thereof in circumstances wherein there would be no occasion for the Legislature to have an intent, one way or the other.

Id. at 641.

As was the case in *Whack*, *Pair*, *Pryor*, and *Johnson* and the statutes there examined, here the General Assembly plainly set out separate punishments for first-degree assault and armed robbery. *See supra* note 19. We discern no ambiguity as to the legislature's intent on this matter. Although the assault statute and the robbery statute were amended at the same time in 1996, the legislative history indicates the purposes of the revisions were to classify robbery and robbery with a dangerous weapon as felonies, and to combine "the current law on crimes related to physical injury . . . in one place in the Code, rather than in several different places and in the common law." 1996 Senate Judicial Proceedings Committee, Bill Analysis, House Bill 749, at 2, 3.

We hold, therefore, that even if the rule of lenity were applicable, Patrick's convictions for first-degree assault and robbery with a dangerous weapon would not merge for the purposes of sentencing where the General Assembly "expressly show[ed] an intent to punish, under two separate statutory provisions[.]" *Whack*, 288 Md. at 150.

III.

Fundamental Fairness

Patrick next contends that he is entitled to have his convictions merged under the principle of fundamental fairness. Citing *White v. State*, 318 Md. 740, 747 (1990), Patrick asserts that fundamental fairness is the "tertiary check"—a standalone test—intended to

prevent the imposition of illegal sentences, and not a "reincarnation of the actual evidence test" as it was described in *Pair*. Patrick maintains that the circuit court's failure to merge his convictions for first-degree assault and robbery with a dangerous weapon merge under the doctrine of fundamental fairness resulted in an illegal sentence, which is reviewable at any time, even on a collateral attack. Patrick contends that the first-degree assault was "part and parcel" of the armed robbery and that the offenses punish the "same harm," warranting merger under fundamental fairness. In support, Patrick maintains that the State relied on the same conduct to establish the elements of assault and the elements of robbery.

The State counters that Patrick's fundamental fairness claim is not properly before this Court citing to *Pair*. The State contends that Patrick has misconstrued this Court's reason for declining to review Pair's fundamental fairness claim—"a reincarnation of the actual evidence test." Instead, the State asserts that this Court's rationale was that a failure to merge a sentence under the fundamental fairness doctrine is not an inherently illegal sentence that may be raised in a Rule 4-345(a) motion because it requires a "heavily and intensely fact-driven" analysis. (Quoting *Pair*, 202 Md. App. at 645). The State asserts that the record only contains a "short preview of the evidence that the State expected to adduce at trial" and the factual record is insufficient for an appellate court to rule on such a claim for the first time.

In the event we reach the merits of this argument, the State presses that merger pursuant to the principle of fundamental fairness is not available because the offenses were

"wholly distinct crimes intended to punish separate harms." [22] The State maintains that merger pursuant to fundamental fairness is only proper where the same conduct gave rise to the two offenses. In this case, the State characterizes the robbery as an "opportunistic afterthought" occurring after the violent assault.

We agree with the State that Patrick's argument—that the convictions should merge pursuant to the principle of fundamental fairness—is not properly before us. Judge Moylan, writing for this Court in *Pair*, described the principle of fundamental fairness as

> the newest and thus far little explored addition to the ranks of merger issues, to wit merger pursuant to fundamental fairness, may be a phenomenon with a critical difference. Such a merger decision would appear to be something that might frequently be heavily fact-driven and dependent on the particular circumstances of the particular case. This would seem to be the type of thing requiring a judgment call by the trial judge, the umpire on the field, with an immediate sense of the pulse of a trial. By its very nature, this could be a discretionary call and not something that can be reduced to legal algebra and decided as a matter of law.

202 Md. App. at 625.

There are "only two cases [*Monoker* and *Marquardt v. State*, 164 Md. App. 95 (2005)] wherein a merger was actually dictated by 'fundamental fairness' as an autonomous criterion." *Id.* at 643–44. Those cases are procedurally distinct from this case. The appellants in *Monoker* and *Marquardt* raised the merger and fundamental fairness issue on direct appeal. *Monoker*, 321 Md. at 223; *Marquardt*, 164 Md. App. at 117; *cf. Howard v. State*, ___ Md. App. ___, ___, No. 747, Sept. Term 2015, slip op. at 46–48 (filed

[22] Lastly, the State contends that, if we merge the convictions, the resulting sentence should be 25 years for the first-degree assault. Because we hold the convictions do not merge, we do not reach this argument.

Feb. 1, 2017) (citation omitted) (declining to merge sentences for false imprisonment and first-degree assault under the principle of fundamental fairness on direct appeal because the appellant's acts contributing to the false imprisonment conviction "were separate from those supporting the first-degree assault charge"). We held previously that merger based on fundamental fairness does not qualify for Rule 4-345(a)'s "procedural dispensations." *Pair*, 202 Md. App. at 649. In reaching this holding we clearly stated that "a non-merged sentence pursuant to such a fluid test dependant [sic] upon a subjective evaluation of the particular evidence in a particular case" is not "an inherently 'illegal sentence' within the tightly limited contemplation of [Rule 4-345(a)]." *Id.* Recently, this Court again declined to review an appellant's fundamental fairness argument raised in a Rule 4-345(a) motion to correct an illegal sentence. *Potts v. State*, ___ Md. App. ___, ___, No. 63, Sept. Term 2016, slip op. at 12 (filed Dec. 28, 2016) (quoting *Pair*, 202 Md. App. at 649) ("Although a defendant may attack an illegal sentence by way of direct appeal, the fundamental fairness test does not enjoy the same 'procedural dispensation of [Md.] Rule 4-345(a)' that permits correction of an illegal sentence without a contemporaneous objection.").

We hold, therefore, that Patrick's fundamental fairness argument is not properly before us on this appeal of a denial of a Rule 4-345(a) motion to correct an illegal sentence.

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE COUNTY AFFIRMED.

COSTS TO BE PAID BY APPELLANT.