Circuit Court for Cecil County
Case No. K-09-1632

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1644

September Term, 2016

EMILIO BALDWIN

v.

STATE OF MARYLAND

Woodward, C.J.,
Leahy,
Moylan, Charles E., Jr.
(Senior Judge, Specially Assigned),

JJ.

PER CURIAM

Filed: November 6, 2017

*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.

Following a jury trial in the Circuit Court for Cecil County in 2010, Emilio Baldwin was convicted of two counts of second-degree assault, attempted third-degree burglary, and motor vehicle theft and was sentenced to eight years' imprisonment for second-degree assault (count 2), a concurrent five years' imprisonment for second-degree assault (count 6), a concurrent five years' imprisonment for motor vehicle theft, and to ten years' imprisonment for attempted burglary, to run consecutive to the sentence for count 2. In 2016, Baldwin filed a motion to correct an illegal sentence pursuant to Rule 4-345(a) in which he maintained that his sentences should have merged because he claimed they were all part of the same continuous event. The circuit court denied the motion and Baldwin noted this appeal. For the reasons to be discussed, we affirm.

The charges in this case stemmed from an incident that occurred in the early morning of October 26, 2009, when Baldwin and two other men attacked a man, Jose Ruiz, who was parked in front of the home of Jose Juan Rodriquez and Gwendolyn Slevin. Ruiz had arrived at the house and was waiting in his car for Rodriquez, so that they could drive to work together. Slevin heard noise outside and opened her front door and "saw three men beating on Jose," who was still in the car. Baldwin was one of the three attackers. Slevin stood at her door screaming at the men. Baldwin then approached Slevin with a "black handgun in his hand." Slevin slammed the door shut and called 911. The men left and Rodriquez went outside and brought Ruiz inside the house. The men then reappeared about three or four minutes later. Baldwin approached the front door and "tried to push the door down" or "in." Rodriquez tried to keep the door closed, but Baldwin managed to get his "left foot into the house." Rodriquez then "forced him with the door to push off the house"

and Baldwin then "took off." About the same time, one of Baldwin's companions "jumped into" Ruiz's car and "took off."

Upon sentencing, Baldwin's criminal history was reviewed, which included prior convictions for burglary. It was also noted that, when Baldwin committed the offenses in this case, he was on probation in another case. When imposing the ten-year sentence for the attempted third-degree burglary in this case, and ordering it to run consecutive to the sentence imposed for second-degree assault, the court stated that "the reason for our heavier sentence on the property-related matter is because it seems to be a pattern on the part of the defendant to engage in burglary and breaking and entering offenses." Baldwin appealed, but raised no issue regarding sentencing. This Court affirmed the judgments. *Baldwin v. State,* No. 667, September Term, 2010 (filed March 8, 2010).

In this appeal, Baldwin asserts that the circuit court erred in denying his motion to correct his sentence. He maintains that the crimes were "the same continuous act with no break in time or intent" and, therefore, the sentences should have merged under the required evidence test, the doctrine of fundamental fairness, and/or the rule of lenity. The State responds that merger was not required because the offenses were "four discrete acts." The State also points out that the assaults (on Ruiz and on Slevin) took place before the attempted burglary, which happened after the men left and then returned. And the attempted third-degree burglary was "distinct from the motor vehicle theft" as Baldwin committed the attempted burglary while his co-defendant stole the motor vehicle. Moreover, the State notes that merger under the required evidence test fails because attempted third-degree burglary is not a lesser included offense of second-degree assault

or motor vehicle taking. Finally, the State asserts that the rule of lenity is not applicable because "there is no ambiguity about whether the legislature intended separate punishments for the four offenses at issue."

We agree with the State. Although a court's failure to merge a sentence where merger is *required* constitutes an illegal sentence for Rule 4-345(a) purposes, *see Pair v. State*, 202 Md. App. 617, 624 (2011), merger of Baldwin's sentences was not required for the reasons articulated by the State. In short, the crimes do not merge under the required evidence test and the rule of lenity is not implicated. As for Lewis's argument that his sentences should have merged for fundamental fairness reasons, as we did in *Pair*, we decline "to review the issue of merger pursuant to the so-called 'fundamental fairness' test because we do not believe that it enjoys the procedural dispensation of Rule 4-345(a)." *Id.* at 649.

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