UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2633

September Term, 2013

MARTIN MICHAEL MORGAN

v.

STATE OF MARYLAND

Meredith,
Woodward,
Friedman,

JJ.

Opinion by Woodward, J.

Filed: July 23, 2015

*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.

A jury in the Circuit Court for Anne Arundel County convicted Martin Morgan, appellant, of multiple crimes stemming from his knife attack on a corrections officer: attempted first degree murder, attempted second degree murder, first and second degree assault of a Division of Corrections Officer, first and second degree assault, reckless endangerment, and carrying a concealed weapon.[1] Appellant, who was granted the right to file a belated appeal, raises the following questions for our review:

> 1. Did the, trial court err in failing to grant a postponement in order to obtain a psychiatric examination/evaluation of [appellant] for competency?
>
> 2. Did the trial court err in refusing to propound an instruction on self-defense?
>
> 3. Did the trial court err in sentencing [appellant] on the conviction for first degree assault of a Division of Corrections Officer?

We conclude that the trial court did not err in denying appellant's requests for a postponement and for a self-defense instruction. We agree with appellant that his conviction and sentence for "first degree assault of a DOC employee" must be vacated, and that under the rule of lenity, his remaining assault convictions must be merged for sentencing purposes into his conviction for attempted first degree murder.

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[1] Appellant was sentenced to life imprisonment on the attempted first degree murder conviction (count 1), consecutive to any sentences he was then serving; twenty-five years for the first degree assault on a Division of Corrections Officer (count 3), consecutive to sentences he was serving, but concurrent to count 1; and three years for the weapon conviction (count 8), consecutive to any sentences he was then serving, but concurrent to counts 1 and 3. The remaining counts were merged for sentencing purposes.

FACTS AND LEGAL PROCEEDINGS

Appellant's convictions stem from his in-custody assault of a corrections officer at Jessup Correctional Institution.

Sergeant Rodney Johnson testified that at about 3:30 p.m. on September 13, 2007, he and other corrections officers conducted a scheduled "movement" of inmates who had previously signed up to attend Ramadan services. Appellant did not leave with that movement. Instead, he told Sgt. Johnson that he was going to eat before going to the Ramadan services. About twenty-five minutes later, appellant returned with a carton of milk**.** Sgt. Johnson told him that it was too late to go to the services because the service movement was over with; appellant responded "fuck that." Sgt. Johnson directed him to return to his cell for "lock in," and appellant said, "I'm not locking in no fucking where." Sgt. Johnson finished locking down all the dinner movement, and then he called for assistance from other officers. Appellant was handcuffed and taken to a medical room for a strip search.

After the handcuffs were removed and as he was in the process of removing his clothing, appellant reached toward his waistband and pulled out a homemade knife. Appellant swung the knife, slashing Sgt. Johnson across his face causing Sgt. Johnson to fall backward.

Appellant then "lunged" at Sgt. Johnson and stabbed the knife into the left part of his chest.

Captain Kenneth Eason and Officer Willard Smith were present during appellant's knife attack. Captain Eason testified that during the altercation, appellant asked whether the captain wanted to "fight him[.]" According to Officer Smith, appellant said, "I'm going to kill one of you bitches."

We shall add facts to our discussion of the issues raised by appellant.

DISCUSSION

I. Postponement for Competency Evaluation

Appellant contends that "the trial court erred in failing to grant a postponement in order to obtain a psychiatric examination/evaluation [] for competency." We disagree.

Maryland Rule 4-271(a)(1) provides that, "[o]n motion of a party, or on the court's initiative, and for good cause shown, the county administrative judge or that judge's designee may grant a change of a circuit court trial date." *See also* Md. Code (2001, 2008 Repl. Vol.), § 6-103(b)(1) of the Criminal Procedure Article ("Crim. Proc.") ("For good cause shown, the county administrative judge or a designee of the judge may grant a change of the trial date in a circuit court[.]"). "We review the decision to deny a motion for a continuance for an abuse of discretion[.]" *Prince v. State*, 216 Md. App. 178, 203, *cert. denied*, 438 Md. 741 (2014).

A criminal defendant has a Fourteenth Amendment due process right not to be tried while "[i]ncompetent to stand trial," which is statutorily defined to mean "not able: (1) to understand the nature or object of the proceeding; or (2) to assist in one's defense." Crim.

Proc. § 3-101(f)(1)(2); *see* Crim. Proc. § 3-107(a); *Gregg v. State*, 377 Md. 515, 526 (2003). This constitutional right is codified in section 3-104 of the Crim. Proc., which provides in pertinent part:

> (a) *Incompetency apparent before or during trial*. — If, before or during a trial, the defendant in a criminal case . . . appears to the court to be incompetent to stand trial or the defendant alleges incompetence to stand trial, the court shall determine, on evidence presented on the record, whether the defendant is incompetent to stand trial.
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> (b) *Finding of competence*. — If, after receiving evidence, the court finds that the defendant is competent to stand trial, the trial shall begin as soon as practicable or, if already begun, shall continue.
>
> (c) *Reconsideration of competency finding*. — At any time before final judgment, the court may reconsider the question of whether the defendant is incompetent to stand trial.

"[A] person accused of committing a crime is presumed competent to stand trial." *Wood v. State*, 436 Md. 276, 285 (2013). When competency is challenged upon motion of counsel for the accused, as in this case, the trial court must find beyond a reasonable doubt that the defendant is competent to stand trial. *Id.* at 286; *Roberts v. State*, 361 Md. 346, 366 (2000).

Appellant appeared for trial six months after his assault on Sgt. Johnson, accompanied by a public defender. After meeting with appellant that morning, defense counsel filed a motion seeking a postponement to investigate appellant's competency to

stand trial and the possibility of filing a "not criminally responsible" ("NCR") plea. The following colloquy occurred before the administrative judge:

> [DEFENSE COUNSEL]: Your Honor, we are here because of information I received about ten minutes ago from [appellant]. We were about to pick a jury upstairs. [Appellant] indicated some things to me that caused me to ask for a postponement for a time to file Motion for Competency and NCR in this case.
>
> THE COURT: All right. Why don't you tell me in greater detail why there is any reason to think that after all these months [appellant] is now suddenly incompetent?
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> [DEFENSE COUNSEL]: He's indicated to me that he's hearing voices; he's telling me he's been diagnosed with lead paint poisoning; he's on several medications, including Prozac and Thorazine. The DOC, this information I just received. I don't feel comfortable going forward with at least asking for time to investigate these issues, Your Honor. This is an attempted murder trial case with a very serious penalty.
>
> THE COURT: How many times have you met with your client before today?

[DEFENSE COUNSEL]:	Twice. I mean – before today? One time. He's in Cumberland.
THE COURT:	And when you visited with him at Cumberland, did you have a lengthy conversation?
[DEFENSE COUNSEL]:	I never went to Cumberland.
THE COURT:	So–
[DEFENSE COUNSEL]:	I met with him here, and I've met with him here now three times.
THE COURT:	Yes. Has he ever give[n] you any indication that he appeared to be [in]competent prior to today?
[DEFENSE COUNSEL]:	From my personal observations, no.
THE COURT:	What voices are you hearing, [appellant]?
[APPELLANT]:	You can get that from the psychiatrist.
THE COURT:	Sir?
[APPELLANT]:	The psychiatrist's got all that. That ain't – something new, ain't nothing new.
THE COURT:	What voices are you hearing?
[APPELLANT]:	I said, leave that to the psychiatrist.

THE COURT:	You were before me before, right?
[APPELLANT]:	Huh?
THE COURT:	Were you in front of me before, another day?
[APPELLANT]:	No. I –
THE COURT:	You've never seen me?
[APPELLANT]:	This is my second time to see him. I don't even know his name.
THE COURT:	Okay.
[APPELLANT]:	Last time he came here, the only thing he asked me was my name. That's all he asked me, my name, told me he'd postpone it.
THE COURT:	Now, isn't that interesting –
[APPELLANT]:	Never got a chance to talk to him.
THE COURT:	– that now you're talking very, very clearly and very articulately but when I ask you a simple question, you start mumbling like you're trying to act crazy.
[APPELLANT]:	I ain't got that crazy.
THE COURT:	Okay. What's the State's position?
[PROSECUTOR]:	Your Honor, we're going to oppose the postponement. This

	matter's set for a three-day trial. I did speak with Correctional Officer Moore who's the officer who transported the defendant from MCTC. I asked him if there was any indication the defendant was either hearing voices, complaining, agitated, any other indication, and it wasn't until the defendant got into the courtroom, sat at trial table and we were about to call for the jury to come in, that he started raising his voice; he was making comments to his attorney. I will point out that his attorney went downstairs this morning to talk to him about whether they wanted defense witnesses present that had been ready for tomorrow. Clearly, the conversation was had because the attorney came up and said, no, he doesn't want them. There was no complaint of hearing voices at that point so I think it's just a matter of convenience, and, so, therefore, we would oppose the postponement.
THE COURT:	Anything else, [defense counsel]?
[DEFENSE COUNSEL]:	If I could add one thing.
THE COURT:	Yes, sir.
[DEFENSE COUNSEL]:	Apparently, he's out of medication right now, he's indicating. **The issue for me that's the most important here**

	is not whether he's competent today but whether there's an NCR issue going back to October. And I would need some time to investigate that. He tells me he's being treated by a psychiatrist. I have no idea what his medication situation was back in October.
THE COURT:	Uh-huh.
[DEFENSE COUNSEL]:	My concern is we'd have to do this all over again at some point in the future.
[PROSECUTOR]:	Your Honor, just for the point of NCR, I mean, clearly, the State has to prove its case before you can get into whether NCR applies so if he's uncomfortable in regards to NCR, if there's ever a conviction, certainly a postponement of the sentencing can address that issue, but we're here; we're ready to try the case, and there's no indication whatsoever as counsel pointed out to Judge Mulford that this was ever an issue before.
	(Pause).
[DEFENSE COUNSEL]:	**He's correct, Your Honor**.
THE COURT:	**The postponement is denied.** If NCR comes into effect it would be only in the event that the defendant is convicted, and I

> would certainly utilize my good offices to make sure that there will not be sentencing until the NCR aspect of it can be wholly pursued. But **I believe that the defendant is malingering and, therefore, the case will not be postponed.**

(Emphasis added).

The following day, at the close of the State's case, the trial court asked defense counsel to address the concerns raised in his pre-trial motion for a continuance relating to the issues of competency and a NCR plea. Defense counsel responded:

> Your Honor, I filed that pursuant to what happened yesterday, the information that I received from the defendant yesterday morning. We went before Judge Hackner briefly requesting a postponement on this issue, which was denied. I just feel it's incumbent upon me based upon what I have been told by the defendant, to file such a motion. And I guess we could deal with that in the event he is convicted.

(Emphasis added). After ruling that it would not accept a late-filed NCR plea,[2] the trial court concluded that appellant's behavior throughout the trial confirmed his competency to stand trial:

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[2] Section 3-110(a)(2) of the Criminal Procedure Article mandates that "[a] written plea of not criminally responsible by reason of insanity shall be filed at the time provided for initial pleading, unless, for good cause shown, the court allows the plea to be filed later." Maryland Rule 4-242(b)(3) specifies that "[a] plea of not criminally responsible by reason of insanity shall be entered at the time the defendant initially pleads, unless good cause is shown." That plea generally must be entered "within 15 days after the earlier of the appearance of counsel or the first appearance of the defendant before the circuit court pursuant to Rule 4-213(c)." Md. Rule 4-242(b)(3). That deadline clearly had passed for appellant.

> The Court has had an occasion to specifically observe the defendant. I've observed him, even though on a limited basis, communicate with counsel. I observed him yesterday vehemently shake his head and offer rebuttals, such that the Court had to admonish him at one point in time, not to interrupt a witness or [the prosecutor]. And the Court has nothing at this point in time presently before the Court which would cause the Court to have any concern regarding the defendant's competency. Competency is a separate issue that can be raised at any point in time, but the Court has nothing to indicate at this point in time pursuant to Criminal Procedure Article 3-104 that there is a competency issue.

Appellant contends that the administrative judge failed to conduct an adequate competency inquiry. According to appellant, "[a]part from asking [him], 'What voices are you hearing?' – to which [appellant] did not appropriately respond – Judge Hackner did little else, if anything, by way of inquiring into [appellant's] then existing mental state before making the unfounded conclusion that [appellant] was 'trying to act crazy' and was therefore 'malingering.'"

The excerpted record refutes appellant's contention that the administrative judge failed to adduce or consider evidence bearing on defense counsel's request to postpone the trial for a competency evaluation. After counsel explained that he felt compelled to seek postponement because appellant said that he was hearing voices and was "off his medication," the administrative judge elicited information from the prosecutor, defense counsel, and appellant himself, regarding appellant's ability to understand the proceedings and participate in his defense.

The prosecutor proffered that she observed appellant conversing and consulting with defense counsel that morning and that courthouse personnel reported that appellant communicated and behaved appropriately with them while being brought to the courthouse and into the courtroom. According to the prosecutor, appellant began "talking to himself" only after he entered the courtroom.

Defense counsel conceded that he moved for a postponement out of an abundance of caution and that he had no cause to question appellant's competency based on his three prior meetings with appellant. Defense counsel's chief concern was not appellant's competency to stand trial, but the NCR-related possibility that appellant might have been off his medications at the time that he assaulted Sgt. Johnson.

In sum, the only fact proffered in support of a competency postponement was appellant's bald, self-serving, eleventh-hour report to defense counsel that he was "hearing voices." When the judge asked appellant to provide details, he answered that this was "nothing new" and that the court could "get that [information] from the psychiatrist." There is nothing in the record to indicate that appellant's mental health provider at Jessup Correctional Institute, where he was serving life sentences for first degree murder and related offenses,[3] had questioned appellant's competency to stand trial. Nor is there any

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[3] At the time of the assault on Sgt. Johnson, appellant was serving two concurrent life imprisonment sentences for first degree murder and conspiracy to commit first degree murder, a consecutive twenty years for using a handgun to commit a crime of violence, a consecutive nine years for first degree assault, and another concurrent five years for using (continued...)

evidence that appellant, in his dealings with either defense counsel or the court, lacked understanding of the charges and proceedings relating to his assault of Sgt. Johnson. Finally, appellant did nothing to suggest, either to defense counsel or to the court, that he was unable to assist in his defense.

The administrative judge properly considered this information, as well as his own observations of appellant, in denying the postponement. Given appellant's previous experience in assisting with his criminal defense, the lack of any competency concerns during the six months between the attack on Sgt. Johnson and the trial date, appellant's appropriate behavior and consultation with defense counsel before trial, the last-minute timing of appellant's self-serving report that he was "hearing voices" and "off his medication," and appellant's responses to the court's inquiries, we cannot say that the administrative judge erred in finding that appellant was "malingering" in an effort to delay the trial. In turn, based on that factual finding, the administrative judge did not abuse his discretion in denying appellant's motion to postpone trial for a competency evaluation.

Similarly, we are not persuaded by appellant's contention that his disruptive behavior during trial, which resulted in appellant being admonished, shackled, and at times removed

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[3](...continued)
a handgun to commit a crime of violence. *See Morgan v. State*, No. 448, Sept. Term, 2006, slip op. at 5 (unreported) (filed Oct. 31, 2007).

from the courtroom, necessitated a postponement to conduct a competency evaluation.[4] When the State concluded its case-in-chief, the trial judge revisited appellant's request for a postponement. As set forth above, defense counsel advised the trial court that the administrative judge had denied the motion but did not renew his prior concern about appellant's ability to assist in his defense. Instead, defense counsel reiterated his desire to investigate an NCR defense. The court ruled that it was too late to enter a NCR plea.[5]

At that point, appellant told the trial court that he felt "railroaded" because he did not know he was going to trial until the day before and had been unable to contact his family. In the course of discussing this complaint, the trial judge pointed out that he had seen

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[4] The trial court explained its decision to maintain shackles as follows:

> Okay. [Defense counsel], before you walked in I told [appellant] that I was going to order the officers to have him unshackled, but he refuses to acknowledge me and he refused to acknowledge that if he does not obey proper court order and decorum, that – you know, he refuses to acknowledge that he must obey proper court order and decorum before I'll unshackle him.
>
> So since he refuses to acknowledge that, he's going to stay shackled. I don't have any problem with unshackling him, but unless he is to acknowledge verbally to the Court that he will obey proper order and decorum in the courtroom, not cause an outburst and not cause any security issues, I . . . really have no option but to leave him shackled, and I would simply tell the jury . . . he is an inmate, allegedly assaulted a guard and they are not to take any inference from the fact that he's shackled.

[5] Appellant does not challenge in this appeal the lower court's ruling that it was too late to enter a NCR plea.

appellant "vehemently shake his head and offer rebuttals" during trial and stated: "I appreciate your concerns and it once again corroborates in my mind that you are competent." On this record, the trial court's finding of competency was based on appropriate legal standards and supported by substantial evidence. In turn, the court did not abuse its decision in denying appellant's request to postpone trial for a competency evaluation.

II. Self-Defense Instruction

Appellant next asserts that "the trial court erred in refusing to propound an instruction on self-defense" because there was evidence that "the weapon emerged instantaneously on the strip search while [appellant] was surrounded and up against the wall," so that "it is not unreasonable that . . . [he] may have begun swinging the knife upon its discovery simply in an attempt to defend himself." We are not persuaded that such evidence generated a self-defense issue.

Under Md. Rule 4-325(c), a trial "court may, and at the request of any party shall, instruct the jury as to the applicable law[.]" We review the trial court's decision not to give a requested self-defense instruction for abuse of discretion, considering "(1) whether the requested instruction was a correct statement of the law; (2) whether it was applicable under the facts of the case; and (3) whether it was fairly covered in the instructions actually given." *Stabb v. State*, 423 Md. 454, 465 (2011). "The burden is on the complaining party to show both prejudice and error." *Tharp v. State*, 129 Md. App. 319, 329 (1999), *aff'd*, 362 Md. 77 (2000).

To establish complete self-defense, the accused must establish the following elements:

> (1) The accused must have had reasonable grounds to believe himself in apparent imminent or immediate danger of death or serious bodily harm from his assailant or potential assailant;
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> (2) The accused must have in fact believed himself in this danger;
>
> (3) The accused claiming the right of self-defense must not have been the aggressor or provoked the conflict; and
>
> (4) The force used must have not been unreasonable and excessive, that is, the force must not have been more force than the exigency demanded.

State v. Faulkner, 301 Md. 482, 485-86 (1984). If the accused had an "honest but unreasonable belief" that force was required to defend himself, the self-defense may be "imperfect" in that it does not constitute a complete defense, but instead mitigates attempted murder to attempted voluntary manslaughter. *Id.*

In *Wilson v. State*, 422 Md. 533 (2011), the Court of Appeals summarized the standards for determining when a trial court must give both perfect and imperfect self-defense instructions:

> [W]hen evidence is presented showing the defendant's subjective belief that the use of force was necessary to prevent imminent death or serious bodily harm, the defendant is entitled to a proper instruction on imperfect self-defense. For entitlement to the instruction with respect to both perfect self-defense and imperfect self-defense,

> the defendant has the burden of initially producing some evidence on the issue of mitigation or self-defense . . . sufficient to give rise to a jury issue. . . . Once the issue has been generated by the evidence, however, the State must carry the ultimate burden of persuasion beyond a reasonable doubt on that issue.
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> * * *
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> It is only when some evidence has been adduced which is looked to by the defendant on the issue of self-defense or other mitigation, that the State must carry the ultimate burden of persuasion beyond a reasonable doubt on that issue.
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> * * *
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> *Some evidence* is not strictured by the test of a specific standard. It calls for no more than what it says – some, as that word is understood in common, everyday usage. It need not rise to the level of beyond reasonable doubt or clear and convincing or preponderance. The source of the evidence is immaterial; it may emanate solely from the defendant. It is of no matter that the self-defense claim is overwhelmed by evidence to the contrary. If there is any evidence relied on by the defendant which, if believed, would support his claim that he acted in self-defense, the defendant has met his burden. Then the baton is passed to the State. It must shoulder the burden of proving beyond a reasonable doubt to the satisfaction of the jury that the defendant did not kill in self-defense.

Id. at 541-42 (citations and internal quotation marks omitted).

Typically, a defendant's account of the altercation provides the evidence of his actual belief regarding his use of force in self-defense. *Compare id.* at 543 (self-defense instruction was required where defendant told police that when he saw the victim's handgun, he believed it was, "Kill or be killed"), *with Thomas v. State*, 143 Md. App. 97, 117 (2002)

(self-defense instruction was not required where defendant "never expressed fear for his own safety, nor did he claim . . . that his conduct . . . resulted from provocation"). *See generally State v. Martin*, 329 Md. 351, 361 (1993) ("Ordinarily, the source of the evidence of the defendant's state of mind [with respect to self-defense] will be testimony by the defendant."). Moreover,"[a]n aggressor is not entitled to a self-defense instruction if he initiated a deadly confrontation or escalated an existing confrontation to that level." *Thornton v. State*, 162 Md. App. 719, 734 (2005), *rev'd on other grounds*, 397 Md. 704 (2007); *see also Sutton v. State*, 139 Md. App. 412, 454-55 (2001) ("the accused claiming the right of self-defense must not have been the aggressor or provoked the conflict").

At the close of the evidence in the instant case, and again after the court instructed the jury, defense counsel asked for a self-defense instruction. The trial court declined to give one, explaining that it

> heard no evidence that the defendant [used] no more force [] than was reasonably necessary to defend himself in light of the threatened or actual harm, since the officers were not armed prior to the alleged assault. And there was no testimony that the defendant actually believed that he or she was in immediate imminent danger of bodily harm. The Court therefore feels that a self defense instruction . . . would be improper and the Court will deny a request for a self defense instruction.

We agree that appellant did not generate either perfect or imperfect self-defense because there was no dispute that appellant initiated the knife attack and no evidence that he actually believed that he was in imminent danger of death or serious bodily harm.

According to Sgt. Johnson, appellant attacked the unarmed corrections officers while removing his clothing.

[PROSECUTOR]:	How would you describe the [appellant]'s demeanor or how he was behaving when he was throwing the shirts down?
[SGT. JOHNSON]:	He was – he was violent. He appeared to be violent. He – hostile.
[PROSECUTOR]:	Now did there come a time that he reached toward his waistband of his pants?
[SGT. JOHNSON]:	Yes.
[PROSECUTOR]:	Okay. Where were you exactly when [appellant] was taking off the clothing?
[SGT. JOHNSON]:	Right behind him.
[PROSECUTOR]:	Okay. And-
[SGT. JOHNSON]:	Right – and –
[PROSECUTOR]:	– the other officers were still in the room?
[SGT. JOHNSON]:	The other officers were still behind me and Captain Eason was on my right-hand side, but behind me.
[PROSECUTOR]:	Okay.

[SGT. JOHNSON]:	But on my right-hand side.
[PROSECUTOR]:	So out of all the officers, who was the closest to the defendant?
[SGT. JOHNSON]:	Myself.
[PROSECUTOR]:	Okay. What happened after [appellant] reached toward his waistband?
[SGT. JOHNSON]:	[Appellant] reached for his waistband and when – and when he went up with his – with his right hand, his arm, Captain Eason said, he got a knife, and [appellant] reached across and swung down, cut me across my face, my forehead and my chin, and that's when I fell back in the room, and once I fell backwards [appellant] lunged over top of me, take [sic] the knife and – and sticking it right in the left part of my chest.
[PROSECUTOR]:	When you were on the ground, were you on your back?
[SGT. JOHNSON]:	Yes.
[PROSECUTOR]:	Did you know you were cut on your forehead when you were on the ground?
[SGT. JOHNSON]:	Yes, because when I – when I was backing up – when he cut me across the face I was backing up and 1 couldn't see anything

> because the blood, and when I fell backwards I fell on the floor. I fell on the floor and that's when he stood over top of me and stuck me in my chest.

The other officers present during the attack agreed that appellant was the aggressor throughout the altercation. According to Captain Eason, who assisted in transporting appellant, appellant asked Captain Eason if he wanted to fight, and the captain refused, saying "that's not what I'm here for." Officer Smith testified that, as appellant was attacking Sgt. Johnson, he stated: "I'm going to kill one of you bitches."

Appellant presented no evidence that he actually believed that he was in imminent danger of serious bodily injury during the strip search; he did not testify or otherwise make a statement regarding the altercation. Therefore, because appellant did not challenge the evidence that he was the aggressor in the knife attack and did not present any evidence regarding his state of mind, the trial court did not err in refusing to give a self-defense instruction.

III. Sentencing Merger

In his final assignment of error, appellant contends that the trial court erred by (1) sentencing appellant on the charge of "first degree assault of a Division of Correction Officer," and (2) failing to merge his conviction for first degree assault into his sentence attempted first degree murder for sentencing purposes. For reasons explained below, we agree that merger is appropriate.

The State charged appellant with eight offenses stemming from his assault of Sgt. Johnson, as follows:

> Count 1: Attempted first degree murder (Crim. Law § 2-205)
> Count 2: Attempted second degree murder (Crim. Law § 2-206)
> **Count 3: First degree assault of a DOC employee (Crim. Law § 3-210)**
> **Count 4: First degree assault (Crim. Law § 3-202)**
> Count 5: Second degree assault of a DOC employee (Crim. Law § 3-210)
> Count 6: Second degree assault (Crim. Law § 3-203)
> Count 7: Reckless endangerment (Crim. Law § 3-204)
> Count 8: Carrying a concealed deadly weapon (Crim. Law § 4-101(c)(1)

(Emphasis added).

The State's theory was that there was a single criminal incident during which appellant attacked Sgt. Johnson with a homemade knife. None of the charges against appellant related to the other officers present during that altercation. Appellant was convicted on all counts. Before addressing his sentencing challenge, we shall review the pertinent assault law and merger principles.

Assault Statutes

Assault is a statutory offense, bifurcated between first and second degree. Under Md. Code (2002, 2012 Repl. Vol.), Criminal Law Article ("Crim. Law") § 3-203(a),[6] second

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[6] Crim. Law § 3-203 provides:

> (a) *Prohibited*. – A person may not commit an assault.

(continued...)

degree assault retains its judicially established meaning, so that it encompasses the common law offenses of battery (an offensive touching) and assault (either intent to frighten or attempted battery). *Jones v. State*, 440 Md. 450, 455 (2014). In addition, the General Assembly has established, as a separate modality of second degree assault, assault on a law enforcement officer, which is defined to include "a correctional officer at a correctional facility." *See* Crim. Law § 3-201(c) (2) (i); Crim. Law § 3-203(c). In contrast to other second degree assaults, which are classified as misdemeanors and subject to a maximum

[6](...continued)

> (b) *Penalty*. – Except as provided in subsection (c) of this section, a person who violates subsection (a) of this section is guilty of the misdemeanor of assault in the second degree and on conviction is subject to imprisonment not exceeding 10 years or a fine not exceeding $2,500 or both.
>
> (c) *Law enforcement officers*. – (1) In this subsection, "physical injury" means any impairment of physical condition, excluding minor injuries.
>
> (2) A person may not intentionally cause physical injury to another if the person knows or has reason to know that the other is:
>
> (i) a law enforcement officer engaged in the performance of the officer's official duties; or
>
> (ii) a parole or probation agent engaged in the performance of the agent's official duties.
>
> (3) A person who violates paragraph (2) of this subsection is guilty of the felony of assault in the second degree and on conviction is subject to imprisonment not exceeding 10 years or a fine not exceeding $5,000 or both.

sentence of ten years plus a $2,500 fine, second degree assault of a law enforcement officer is a felony that carries a maximum sentence of ten years and a $5,000 fine. *See* Crim. Law § 3-203(b)-(c)(3).

The first degree assault statute sets forth two distinct modalities.[7] Crim. Law § 3-202(a)(1) criminalizes "an attempt to cause serious physical injury to another," while subsection 3-202 (a)(2) prohibits "an assault with a firearm[.]" Both are felonies that carry a sentence of up to 25 years. Crim. Law § 3-202(b). Unlike the second degree assault statute, the first degree assault statute does not establish assault on a law enforcement officer as a separate modality of the offense.

Nevertheless, the General Assembly has enacted enhanced sentencing provisions that apply whenever an "inmate [is] convicted of assault . . . on an employee of a State correctional facility[.]" *See* Crim. Law § 3-210(a). An inmate convicted of either a first or

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[7] Crim. Law § 3-202 provides in pertinent part:

> (a) *Prohibited*. – (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) *Penalty*. – 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.

a second degree assault on a DOC employee must be sentenced in accordance with this statute, which requires consecutive sentences and prohibits suspended sentences.[8]

Merger Principles

The Double Jeopardy Clause protects against multiple punishments for the same offense. *Jones v. State*, 357 Md. 141, 156 n.7 (1999). The test for determining whether two offenses are the same for double jeopardy purposes is the "required evidence" test established under *Blockburger v. United States*, 284 U.S. 299 (1932). The Court of Appeals has explained:

> [I]f all 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.'" Stated another way, 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,'" there is no merger under the required evidence test even though both offenses are based

[8] Crim. Law § 3-210 provides in pertinent part:

> (a) *In general.* — An inmate convicted of assault under this subtitle . . . on an employee of a State correctional facility . . . shall be sentenced under this section.
>
> (b) *Consecutive sentence.* — A sentence imposed under this section shall be consecutive to any sentence that the inmate was serving at the time of the crime or that had been imposed but was not yet being served at the time of sentencing.
>
> (c) *Suspension of sentence prohibited.* — A sentence imposed under this section may not be suspended.

> upon the same act or acts. "'But, where only one offense requires proof of an additional fact, so that all elements of one offense are present in the other,'" and where both "offenses are based on the same act or acts, . . . merger follows . . . .

State v. Lancaster, 332 Md. 385, 391-92 (1993) (citations omitted).

Merger may also be compelled under the rule of lenity, "which applies only where at least one of the two offenses subject to the merger analysis is a statutory offense." *Latray v. State*, 221 Md. App. 544, 555 (2015). This canon of statutory construction assumes that "'it is reasonable to believe that the legislature that enacted a particular statute or statutes would express some intent as to multiple punishment.'" *Id.* at 556 (citation omitted). "'If the Legislature intended two crimes arising out of a single act to be punished separately, we defer to that legislated choice,'" but when there is uncertainty "'as to what the Legislature intended, we . . . give the defendant the benefit of the doubt.'" *Id.* at 555 (citation omitted). *See Miles v. State*, 349 Md. 215, 227 (1998).

The Court of Appeals has held that under the required evidence test a first degree assault conviction based on the "intent to injure" modality must be merged into a conviction for attempted voluntary manslaughter when "[t]he intent to kill envelops the intent to do serious physical injury," because "the evidence required to show an attempt to kill would demonstrate causing, or attempting to cause, a serious physical injury." *Dixon v. State*, 364 Md. 209, 240-41 (2001). This result is consistent with the principle that convictions stemming from a single criminal assault on a single victim generally merge. *Compare, e.g.,*

Marlin v. State, 192 Md. App. 134, 171 (2010) (under rule of lenity, reckless endangerment merged into first degree assault for sentencing purposes because both convictions were based on a "singular act of shooting" involving a single victim), *with Carpenter v. State*, 196 Md. App. 212, 232 (2010) (conviction for first degree assault based on punching victim did not merge for sentencing purposes with conviction for attempted first degree murder based on subsequent shooting of same victim during a later encounter because "these two convictions 'spawned from separate acts'").

"The failure to merge a sentence when it is required is considered an inherently illegal sentence as a matter of law." *Latray*, 221 Md. App. at 555.

Appellant's Sentences

At sentencing, the court addressed merger issues as follows:

THE COURT: So, Madam Clerk, Count 2 [attempted second degree murder] merges into Count 1 [attempted first degree murder] for sentencing, and then Counts 4, 5 and 6, which would be first-degree assault, second-degree assault DOC employee. Second-degree assault should merge into **Count 3**, **first-degree assault on a DOC employee**. So merge Counts 4, 5 and 6 into Count 3, **first-degree assault on a DOC employee**, Count 7, reckless endangerment, . . . merges into Count 1, the attempted first-degree murder.

And then Count 8 [carrying a concealed deadly weapon] remains, stands on its own.

Counsel, any – I mean, the first-degree assault on a DOC employee, I don't know if that merges or not. I don't think that merges into Count 1, attempted first-degree murder.

[DEFENSE COUNSEL]: **I don't think so. It has an additional element.**

(Emphasis added).

Ultimately, the court imposed separate sentences for "first degree assault on a Division of Correction Officer" and attempted first degree murder, explaining:

> Count 1, attempted first-degree murder, the sentence is life. That sentence will be consecutive to any and all sentences you are now serving. **Count 3, first-degree assault on a Division of Corrections officer, 25 years in the Division of Correction. That sentence is consecutive to any and all sentences you are now serving but concurrent to the sentence in Count 1.** Count 3 [sic], the deadly weapon charge,[[9]] is three years in the Division of Corrections consecutive to any and all sentences you are now serving. That sentence is concurrent to the sentence in Count 1 and Count 3. The overall net sentence is life, consecutive to any and all sentences that you are now serving. The Court will not suspend any portion of that sentence.

(Emphasis added).

[9] The court was apparently referring to Count 8 (carrying a concealed weapon).

Appellant's Challenge

Citing *Dixon*, appellant contends that "the trial court should have merged the first degree assault conviction into the conviction for attempted first degree murder." He reasons that, because "there is no statutory crime of 'first degree assault of a Division of Corrections Officer,' this charge and/or sentence was duplicative," so that "[t]he trial court should not have imposed any sentence on this conviction, and/or it should have merged (ultimately) into the attempted first degree murder conviction."

We agree that there is no offense for "first degree assault of a DOC employee," that is separate and distinct from "first degree assault" of the same individual. Thus there should not have been a separate conviction on Count 3, and we shall vacate that conviction and the corresponding 25-year sentence.

Nevertheless, appellant was properly convicted of first degree assault under the "intent to injure" modality, as charged in Count 4 with the victim being "Sgt. Rodney Johnson," who was then an employee of the Division of Correction. We know the employment status of Sgt. Johnson, because the jury convicted appellant under Count 5 of second degree assault on "Sgt. Rodney Johnson an employee of the Division of Correction," which is a separate crime under Crim. Law §§ 3-203(c) and 3-201(c)(2)(i). *See Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000); *Parker v. State*, 185 Md. App. 399, 415-21 (2009). We must now determine whether separate sentences may be imposed on the Count 1 (attempted first degree murder) and Count 4 (first degree assault) convictions.

Although the *Dixon* Court explained why a first degree assault/intent to injure conviction merges into an attempted voluntary manslaughter conviction, we recognize that the first degree assault conviction in that case was not subject to Crim. Law § 3-210, which requires consecutive sentences and prohibits suspended sentences. The General Assembly has not specified how these sentencing considerations operate when there are separate convictions for attempted first-degree murder and first degree assault/intent to injure, with the victim being a correctional officer – both arising from one assault by an inmate against one corrections officer where "the evidence required to show an attempt to kill [also] demonstrate[d] causing, or attempting to cause, a serious physical injury." *See Dixon*, 364 Md. at 240. Given this ambiguity, we apply the rule of lenity to resolve this uncertainty in appellant's favor. Accordingly, we shall merge, for sentencing purposes, appellant's first degree assault conviction (Count 4) into his attempted murder conviction (Count 1). In light of that merger, we need not remand for re-sentencing.

CONVICTION AND SENTENCE ON COUNT 3 ("FIRST DEGREE ASSAULT OF A DOC EMPLOYEE") VACATED; REMAINING CONVICTIONS AND SENTENCES AFFIRMED. COSTS TO BE PAID 2/3 BY APPELLANT, 1/3 BY ANNE ARUNDEL COUNTY.