UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1383

September Term, 2015

PATRICK J. QUESENBERRY

v.

STATE OF MARYLAND

Berger,
Arthur,
Reed,

JJ.

Opinion by Berger, J.

Filed: July 14, 2016

Following a bench trial in the Circuit Court for Wicomico County in 2009, Appellant, Patrick Quesenberry ("Quesenberry"), was convicted of two counts of first-degree burglary, one count of attempted first-degree rape, one count of attempted first-degree sex offense, one count of third-degree sex offense, and one count of second-degree assault. For his offenses, the court sentenced Quesenberry to a term of ten years' imprisonment for each burglary offense, a term of life imprisonment for attempted rape, a term of life imprisonment for attempted sex offense, a term of five years' imprisonment for third-degree sex offense, and a term of five years' imprisonment for second-degree assault.

Quesenberry then filed a direct appeal challenging his convictions, which this Court affirmed. *See Quesenberry v. State,* No. 359, Sept. Term 2009 (Md. Ct. Spec. App. February 10, 2011). Thereafter, in January of 2012, Quesenberry filed a petition for post-conviction relief. The circuit court denied Quesenberry's petition for post-conviction relief. Quesenberry then filed an application for leave to appeal, which was denied by this Court on February 21, 2014. In 2015, Quesenberry filed a *pro se* motion to correct an illegal sentence, which was denied. Quesenberry then appealed from the denial of his motion to correct an illegal sentence. In this appeal, Quesenberry presents one question for our review,[1] which we rephrase as follows:

[1] The issue, as presented by Quesenberry, is:

> Did the circuit court fail to correct Appellant's sentences where he alleges the sentencing court erred in imposing separate sentences of his convictions?

> Whether the circuit court erred in denying Quesenberry's motion to correct an illegal sentence.

Additionally, Quesenberry filed a motion to dismiss the State's brief for failing to conform to Md. Rule 8-503(b) and (d). For the reasons set forth herein, we deny Quesenberry's motion to dismiss the State's brief, and we shall affirm the judgment of the Circuit Court for Wicomico County.

BACKGROUND

In Quesenberry's direct appeal, the facts were established as follows:

> At trial, the State presented 12 witnesses, including the victim, [M.S.] Their testimony established that, during the evening of August 10, 2008, [Quesenberry], on several occasions, entered the second floor bedroom of then fourteen-year-old [M.S.] through a bedroom window. The first time he did, [Quesenberry] sat on her bed, placed $20 on her window sill, and then left. On the second occasion, he was discovered by [M.S.] after she had returned from taking a shower. [M.S.] knew [Quesenberry] by name, having met him on a previous occasion. [Quesenberry] then took "off his clothes" and tried to force [M.S.] to engage in vaginal and anal intercourse. His efforts proved futile as he apparently failed to penetrate her body. At some point during the attack, [Quesenberry] said that he "might kill" [M.S.] or "hurt" her father if she "said something." When the attack was over, [Quesenberry] purportedly told [M.S.], "I'll be back to rape you again," and left through the same window he had entered.
>
> Later that same night, [Quesenberry] again entered [M.S.]'s bedroom and "crawled in bed with her." After licking [M.S.] all over her body, he left. Minutes later, [M.S.] told her mother about the attacks, who then called the police. When the police arrived, [M.S.] identified [Quesenberry] as her attacker, and the police thereafter arrested [Quesenberry].
>
> During their investigation, the police recovered a black t-shirt from [M.S.]'s bedroom floor and a pair of underwear from an area just below the outside of [M.S.]'s bedroom

> window. Eventually, [Quesenberry] admitted to the police that the t-shirt and underwear were his, but he claimed that he did not leave the shirt in [M.S.]'s room. Forensic testing confirmed that swabs of saliva taken from [M.S.]'s chest contained [Quesenberry]'s DNA.

Quesenberry, *supra*, No. 359, Sept. Term 2009, slip op. at 1-2.

At the conclusion of Quesenberry's bench trial, the circuit court found Quesenberry guilty of several counts, including first-degree burglary, attempted first-degree rape, and attempted first-degree sexual offense. In doing so, the trial court stated:

> Accordingly, we . . . find that as to count five, attempted first degree rape, [Quesenberry] entered the premises of this child and attempted to have vaginal intercourse with her and that he employed his force as well as the threat of eminent [sic] harm to her and members of her family to complete his crime.

Quesenberry was subsequently sentenced to a term of ten years' imprisonment for each burglary offense, a term of life imprisonment for attempted rape, a term of life imprisonment for attempted sex offense, a term of five years' imprisonment for third-degree sex offense, and a term of five years' imprisonment for second-degree assault.

DISCUSSION

I. Quesenberry's Motion to Dismiss the State's Brief is Denied.

On April 29, 2016, Quesenberry filed a motion to dismiss the State's brief because it did not contain page numbers, and that the State's brief does not contain references to the appendix affixed to it. We deny Quesenberry's motion to dismiss the State's brief.

Maryland Rule 8-503 requires that "[r]eferences . . . to an appendix to appellee's brief shall be indicated as (APX …….)." Md. Rule 8-503(b). Moreover, that rule also provides that "[t]he pages of a brief shall be consecutively numbered." Md. Rule 8-503(a).

In order to enforce Md. Rule 8-503, this Court has discretion to dismiss the appeal if the appellant's brief fails to conform to the rule, dismiss a filing that fails to conform to the rule, not consider "extraneous materials," or merely deny the opposing party's motion if the violation is not substantial. *Parker v. Kowalsky & Hirschhorn, P.A.*, 124 Md. App. 447, 456-57 (1999). When previously confronted with an immaterial violation of the Maryland Rules with regard to the form of briefs, we have "exercise[d] our discretion and den[ied] the motion because we [did] not view the violations as substantial." *Ebert v. Ritchey*, 54 Md. App. 388, 393 (1983).

In this case, there is an argument as to whether the State violated Md. Rule 8-503(b). The State, however, has violated Md. Rule 8-503(a) by not including page numbers in its brief. Nevertheless, the State's brief contains less than seven pages of substantive content, and we reject Quesenberry's contention that the State's omission has caused him hardship. We, therefore, hold that the State's inadvertent violation of Md. Rule 8-503 is not substantial and we exercise our discretion to deny Quesenberry's motion to dismiss the State's brief.[2]

II. Quesenberry Did Not Receive An Illegal Sentence.

Quesenberry contends that the trial court erred in imposing separate sentences for the burglary conviction and the attempted rape and attempted sex offense convictions.

[2] Of note, had we have exercised our discretion differently and granted Quesenberry the relief he sought, Quesenberry would still not succeed on the merits of his appeal. While an appellant's appeal may be dismissed if he or she fails to file a conforming brief within the time allotted in Md. Rule 8-502, an appellee merely forfeits his or her right to present argument if they have not filed a conforming brief. Md. Rule 8-502(d).

Further, Quesenberry avers that the statutes governing rape in the first degree and sex offense in the first degree both include first-degree burglary as an element of the crime. Quesenberry maintains, therefore, that his conviction of first-degree burglary should have merged for sentencing purposes with his convictions of attempted first-degree rape and attempted first-degree sexual offense. The State, for its part, asserts that the propriety of Quesenberry's sentence was already adjudicated in his post-conviction petition, and is therefore the law of the case. Moreover, the State contends that Quesenberry's sentence was not illegal. We agree with the State.

In January of 2012, Quesenberry filed a petition for post-conviction relief. Quesenberry's petition alleged that he received ineffective assistance of counsel during his trial. Quesenberry's ineffective assistance of counsel claim was premised on the assertion that his counsel should have argued in favor of a merger of his sentences.

> A defendant claiming ineffective assistance of counsel must show (1) that counsel's performance was deficient, *i.e.*, that the representation fell below an objective standard of reasonableness, and (2) that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different, *i.e.*, a probability sufficient to undermine confidence in the outcome.

State v. Borchardt, 396 Md. 586, 602 (2007).

Accordingly, to succeed in his petition for post-conviction relief, Quesenberry would necessarily have had to establish that merger was required. Moreover, it is difficult to conceive a scenario where the failure to argue in favor of merger when merger is required is not deficient performance that would have probably changed the outcome of the proceedings. Accordingly, in denying Quesenberry's petition for post-conviction relief,

the question of the propriety of Quesenberry's cumulative sentences has—at least impliedly—been passed upon and is therefore the law of the case. Nevertheless, in order to remove any ambiguity we shall continue and assume, *arguendo*, that the legality of Quesenberry's sentence is not the law of the case. In so doing, we hold that merger was not required in this case, and that Quesenberry's sentence was legal.

Maryland Rule 4-345(a) allows a trial court to "correct an illegal sentence at any time." *Id.* A sentence is considered "illegal" if the sentence itself is not permitted by law, such as when "there either has been no conviction warranting any sentence for the particular offense or the sentence is not a permitted one for the conviction upon which it was imposed[.]" *Chaney v. State*, 397 Md. 460, 466 (2007). "A failure to merge a sentence is considered to be an 'illegal sentence' within the contemplation of the rule." *Pair v. State*, 202 Md. App. 617, 624 (2011). Moreover, "a defendant may attack the sentence by way of direct appeal, or collaterally and belatedly through the trial court, and then on appeal from that denial." *Bishop v. State*, 218 Md. App. 472, 504 (2014) (internal quotations omitted).

"The merger of convictions for purposes of sentencing derives from the protection against double jeopardy afforded by the Fifth Amendment of the federal Constitution and by Maryland common law." *Brooks v. State*, 439 Md. 698, 737 (2014). Within the Fifth Amendment, "[o]ur cases have recognized three separate guarantees embodied in the Double Jeopardy Clause: It protects against a second prosecution for the same offense after acquittal, against a second prosecution for the same offense after conviction, and against

multiple punishments for the same offense." *Justices of Boston Mun. Court v. Lydon*, 466 U.S. 294, 306-07 (1984).

With regard to whether a defendant has received multiple punishments for the same offense, "the decisional law in the area is a veritable Sargasso Sea which could not fail to challenge the most intrepid judicial navigator." *Albernaz v. United States*, 450 U.S. 333, 343 (1981). Part of the reason why this area of law can be so troublesome is because the question as to whether a state-law punishment passes constitutional muster depends on how the state-law offense is intended to be interpreted. Indeed, issues involving multiple punishments for criminal conduct require us to discern whether it was the intent of the legislature for the offender to receive multiple punishments for the prohibited conduct. *Spitzinger v. State*, 340 Md. 114, 121-27 (1995); *Missouri v. Hunter*, 459 U.S. 359, 368 (1983) (holding that the intent of "[l]egislatures, not courts, prescribe the scope of punishments"); *Newton v. State*, 280 Md. 260, 274 n.4 (1977); *see also Anne Bowen Poulin*, *Double Jeopardy and Multiple Punishment: Cutting the Gordian Knot*, 77 U. Colo. L.Rev. 595, 596-97 (2006) (arguing that it is improper to rely on principles of double jeopardy in the multiple punishment context because the analysis renders the Constitution subservient to legislative intent).

"Under Maryland law, the doctrine of merger is examined under three distinct tests: (1) the required evidence test; (2) the rule of lenity; and (3) the principle of fundamental fairness." *Alexis v. State,* 437 Md. 457, 484 (2014). In the instant appeal, Quesenberry contends that his cumulative convictions violate the required evidence test. "Under federal double jeopardy principles and Maryland merger law, 'the principal test for determining

the identity of offenses is the required evidence test.'" *Christian v. State*, 405 Md. 306, 321 (2008) (*quoting Dixon v. State*, 364 Md. 209, 236-37 (2001)). The standard for determining whether two offenses are the same under the required evidence test is the same standard employed by the Supreme Court of the United States to determine whether two offenses are the same under *Blockburger v. United States*, 284 U.S. 299, 304 (1932). *Newton v. State*, 280 Md. 260, 266 (1977). Accordingly, "[t]he applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." *Blockburger, supra*, 284 U.S. at 304. In essence, under the required evidence test we ask whether it is possible in the abstract to commit each offense without also committing the other.

Sections 3-303 and 3-305 of the Criminal Law Article proscribe rape in the first degree and sexual offense in the first degree, respectively:[3]

> (a) A person may not:
>
> (1) engage in [vaginal intercourse or a sexual act] with another by force, or threat of force, without the consent of the other; and
>
> * * *
>
> (iii) threaten, or place the victim in fear, that the victim, or an individual known to the victim, imminently will be subject to death, suffocation, strangulation, disfigurement, serious physical injury, or kidnapping; [or]

[3] Rape in the first degree requires "vaginal intercourse," whereas sexual offense in the first degree requires a "sexual act." *See* Md. Code (2002, 2012 Repl. Vol.) §§ 3-303(a)(1), 3-305(a)(1) of the Criminal Law Article ("CL"). Under the statute, "vaginal intercourse" is expressly excluded from the definition of "sexual act," which includes other acts of a sexual nature, including fellatio and anal intercourse. *See* CL § 3-301.

* * *

> (v) commit the crime in connection with a burglary in the first, second, or third degree.

CL §§ 3-303(a)(1), 3-305(a)(1).

Critically, a person can be found guilty of one or both of the above offenses without also being found guilty of burglary in the first degree. In other words, although Quesenberry is correct that both sexual crimes may include first-degree burglary as an element, it is not a *required* element. *See Brooks v. State,* 284 Md. 416, 422 (1979) ("[T]he true test of whether one criminal offense has merged into another is . . . whether one crime **necessarily** involves the other." (emphasis added) (internal citations omitted)).

In Quesenberry's case, the trial court made clear that his conviction for attempted rape was not predicated upon the burglary, but instead upon the "threat of eminent [sic] harm to [M.S.] and members of her family." Although the court did not make the same expressed finding as to the attempted sexual offense, Quesenberry conceded in his direct appeal that this aggravating factor was the same for both offenses:

> [Quesenberry] also contends that the evidence presented below was insufficient to sustain his convictions for attempted first-degree rape and attempted first-degree sexual offense. While he does not challenge that the evidence was sufficient to prove that he attempted to rape and sexually assault [M.S.], he claims that the State failed to prove "that a statutory, aggravating factor was present," which could "elevate the offense to 'first' degree." Specifically, he maintains that the State failed to prove that he threatened [M.S.] with "violence," which purportedly was the aggravating factor relied on by the circuit court.

Quesenberry, supra, No. 359, Sept. Term 2009, slip op. at 15-16.

In the present case, the elements supporting the two sex offenses were distinct from the burglary offense. Accordingly, Quesenberry's sentences satisfy the *Blockberger* test and were, therefore, legal. As such, we hold that the circuit court did not err in denying Quesenberry's motion to correct an illegal sentence.

APPELLANT'S MOTION TO DISMISS THE STATE'S BRIEF DENIED. JUDGMENT OF THE CIRCUIT COURT FOR WICOMICO COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.