Circuit Court for Prince George's County
Case No: CT021208X

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2443

September Term, 2019

ANTHONY MILLS

v.

STATE OF MARYLAND

Friedman,
Gould,
Woodward, Patrick L.
(Senior Judge, Specially Assigned),

JJ.

PER CURIAM

Filed: March 9, 2021

*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.

In 2007, a jury sitting in the Circuit Court for Prince George's County found Anthony Mills, appellant, guilty of robbery, second-degree assault, first-degree burglary, third-degree burglary, fourth-degree burglary, and theft under $500. The court sentenced Mr. Mills to 15 years' imprisonment for robbery, a consecutive term of 10 years for second-degree assault, and a consecutive term of 20 years for first-degree burglary; the court merged the remaining convictions for sentencing purposes. On direct appeal, this Court affirmed the judgments. *Mills v. State*, No. 2585, Sept. Term, 2007 (filed December 15, 2008).

In a subsequent post-conviction proceeding, the circuit court merged the sentence for second-degree assault into robbery, leaving a total term of 35 years' imprisonment. In 2018, Mr. Mills, representing himself, filed a Rule 4-345(a) motion to correct an illegal sentence in which he argued that the robbery conviction should have merged with the first-degree burglary conviction for sentencing purposes because they were essentially "one crime." The State opposed the motion and by an opinion and order dated December 18, 2019, the circuit court denied relief. Mr. Mills appeals that ruling. For the reasons to be discussed, we shall affirm the judgment.

BACKGROUND

Trial

At trial, Maria Matamoros testified that on March 18, 2002 she was living in an apartment in Silver Spring. In the early afternoon, she arrived home from her job and after parking and exiting her vehicle, "all of a sudden, somebody spoke to me and asked me about an address." She identified Mr. Mills as that person. She related that he had asked

her about University Boulevard and she told him to take Piney Branch to get to University. Ms. Matamoros then proceeded into her apartment. Very "quickly" thereafter, she heard a knock on her door. When she opened the door, Mr. Mills was standing there and asked to use her phone. Ms. Matamoros closed the door, retrieved the telephone, opened the door, and gave Mr. Mills the phone. He then asked her for a piece of paper and a pencil. Ms. Matamoros then closed the door, not "completely closed" she related, "just closed" – with Mr. Mills standing outside with her phone. As she approached the door again with paper and pencil, Ms. Matamoros testified that Mr. Mills, whom she had not invited into her home, "opened the door like this, and I fell back." She related that Mr. Mills "threw a blow" at her, hitting her in the face with his hand and knocking her to the floor. Mr. Mills entered the apartment, closed the door, and grabbed Ms. Matamoros by the neck. With his hands still on her neck, Mr. Mills lifted Ms. Matamoros off the floor and screamed at her to give him money. He dragged her to the bedroom and continued to ask for money. She could not breath and soon felt like she "couldn't even hear." She related that "I had blood from here from my ear and from my nose" and "just had no more strength[.]" Ultimately, Mr. Mills "threw" her on the bedroom floor and left. Once she recovered enough to get up, she noticed that her purse, that she had left on her bed, was missing. The purse contained $500 in cash that she had intended to use to pay her rent.

As noted, among other offenses, the jury convicted Mr. Mills of first-degree burglary and robbery and the court imposed consecutive sentences for those convictions.

Motion to Correct Illegal Sentence

In his motion to correct an illegal sentence Mr. Mills asserted that the robbery conviction should have merged with the first-degree burglary for sentencing purposes because they were essentially "one crime." He also claimed that the Indictment was "ambiguous as to whether the robbery [was] charged as a lesser included offense of the first-degree burglary, or whether it [was] charged as a separate crime."[1]

The circuit court denied relief. The court summarized Mr. Mills's arguments and its rejection of the same as follows:

> The basis for Defendant's argument is that 'the single act of punching Ms. Matamoros served as both the element of the breaking for the first-degree burglary and the use of force in the robbery. Similarly the theft of the purse was used to fulfill an element of both the robbery and of the first-degree burglary. However this is factually incorrect and legally unfounded.
>
> First, the breaking was more than just the single act of punching Ms. Matamoros. According to her trial testimony, Defendant knocked on her door and asked to borrow her phone. When she handed it to him, he asked for a paper and pencil. She went to get the piece of paper and the pencil and closed the door 'it wasn't completely closed. It was just closed … when I brought the paper and the pencil he punched like this my face. He opened the door like this, and I fell back.
>
> In Maryland, a 'breaking' can consist of pushing further open a half-open door. Jones v. State, 2 Md. App. 356, 359-60 (1967); Dorsey v. State, 231 Md. 278, 279-80 (1963). So the punch was not the 'breaking,' the opening of the door was. The punch was immediately thereafter, but it was not the actual 'breaking.'

[1] Count 1 of the Indictment charged that Mr. Mills, on or about the 18th of March 2002, "feloniously did rob Maria Matamoros of United States currency, a purse and other property, (having a value of $500.00 or less) in violation of Article 27 § 486[.]" Count 3 charged that Mr. Mills on or about the 18th of March 2002 "did unlawfully break and enter the dwelling of Maria Matamoros with intent to commit a crime of violence, in violation of Article 27, Section 29[.]" Clearly, the Indictment was unambiguous; Mr. Mills was charged with robbery (Count 1) and first-degree burglary (Count 3).

Opinion and Order, p. 1-2 (citations to motion and transcript omitted).

The circuit court further concluded that the "single act of punching Ms. Matamoros was not the only force used in connection with the robbery." *Id.* p. 2. The court noted that the trial evidence established that, after Mr. Mills had punched Ms. Matamoros in the face, he "picked her up by her neck, dragged her by the neck from the front door to a bedroom and choked her to the point that she couldn't breathe, had no strength to fight back, and urinated on herself. All while screaming at her to give him money." *Id.* p. 2-3. The court determined that, "This ongoing assaultive action was the force in the robbery – not just the initial punch." *Id.* p. 3.

Moreover, the court found that, "even if the facts were as Defendant claims, the two charges would not merge." *Id.* The court first addressed the "required evidence test" set forth in *Blockburger v. U.S.*, 284 U.S. 299, 304 (1932) and concluded that "the robbery and first-degree burglary clearly do not merge," but pointed out that Mr. Mills had "not even address[ed] this usual test." *Id.*

Rather, the court noted that Mr. Mills had relied on the rule of lenity to support his position, but that he had made "no attempt to analyze the legislative intent in enacting the robbery statute, and the first-degree burglary statute." *Id.* at p. 3-4. Nonetheless, the court concluded that neither statute "'indicate any doubt or ambiguity as to whether the legislature intended that the offenses be punished distinctly.'" *Id.* at p. 4 (quoting *Williams v. State*, 187 Md. App. 470, 480 (2009) (further quotation omitted). Accordingly, the court found that robbery and first-degree burglary do not merge under the rule of lenity. *Id.*

The court then turned to Mr. Mills's contention that the offenses should merge for "fundamental fairness" reasons. *Id.* Noting that merger under this concept is both rare and "fact driven," the court concluded that robbery and first-degree burglary do not merge in this instance. The court noted that the "burglary was complete when Defendant entered the Matamoros apartment" and the "robbery began when Defendant grabbed her by the neck and choked her in order to take money from her." *Id.* at p. 5. Although acknowledging that "both crimes were committed in the same transaction," the court concluded that "neither was an integral component of the other, and neither was incidental to the other." *Id.* In short, the court found that they were "distinct crimes." *Id.* The court, therefore, found that separate sentences were appropriate because "the first-degree burglary sentence punished the breaking and entry into the Matamoros apartment (even possibly the force of punching her to gain entry)" and the "robbery sentence punished the second, separate wrongdoing of choking, grabbing and throwing Ms. Matamoros in order to take money from her." *Id.* As such, the court concluded that "[i]t would be fundamentally unfair to allow the subsequent robbery to go unpunished as merely 'incidental to' the burglary." *Id.*

DISCUSSION

In 2002, when the offenses against Ms. Matamoros occurred, Article 27, § 29 (now codified as § 6-202 of the Criminal Law Article) provided that: "A person may not break and enter the dwelling of another with the intent to commit theft or a crime of violence." Article 27, § 486 (now codified as Crim. Law § 3-402) provided that: "A person may not commit or attempt to commit robbery." Robbery consists of "the felonious taking and carrying away of the personal property of another, from his [or her] person or in his [or

her] presence, by violence or putting into fear." *Snowden v. State*, 321 Md. 612, 617-18 (1991).

On appeal, Mr. Mills presents one issue: "Whether Fundamental Fairness and the Rule of Lenity requires that [his] conviction for Robbery Merges into his First-Degree Burglary conviction." He does not argue that the required evidence test applies, specifically noting that that test "is not the exclusive standard of determining whether criminal convictions should merge at sentencing."

As he did in the circuit court, Mr. Mills asserts that "the single act of punching Ms. Matamoros served as both the element of breaking for the first-degree burglary and the use of force in the robbery." And he maintains that "the theft of the purse was used to fulfill an element of both the robbery and of the first-degree burglary." In other words, he asserts that the "robbery appears as incidental to the first-degree burglary, with the actions of the robbery fully encompassed by the first-degree burglary with the additional element in the first-degree burglary of entering Ms. Matamoros' apartment." To be clear, he maintains that "the assault constituted both the means of 'breaking' into the home of Ms. Matamoros and the 'use of force' in the robbery." He concludes by stating that distinct and consecutive sentences for the robbery and first-degree burglary "resulted in a period of incarceration beyond the term legally permitted pursuant to fundamental fairness and the rule of lenity."

The State responds that Mr. Mills's argument that the convictions should have merged under the principle of fundamental fairness is not preserved for appellate review because at sentencing he "failed to raise any merger argument," much less "any argument based on fundamental fairness." The State cites *Clark v. State*, 246 Md. App. 123, 139

(2020) ("[a]lthough 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." (citation omitted)).[2] But even if preserved, the State maintains that merging robbery and first-degree burglary in this instance is not appropriate because, despite Mr. Mills's claim to the contrary, the circuit court properly concluded that "the robbery was not 'clearly incidental' to the burglary."

As for merger under the rule of lenity, the State first points out that Mr. Mills "does not formulate any argument to support the proposition that ambiguity exists regarding whether the legislature intended robbery and first-degree burglary to be punished separately" and, therefore, this Court should not address this claim. But in any event, the State maintains that nothing in the first-degree burglary statute indicates "whatsoever that a theft or other violent crime successfully completed in the wake of a burglary would not be separately punishable."

In reply, Mr. Mills appears to attempt to refute the State's position that he did not preserve the merger issue on fundamental fairness grounds by including excerpts from his sentencing hearing. Those excerpts, however, merely reflect a discussion between the sentencing court and counsel regarding the calculation of the sentencing guidelines and his "offender score." Merger was not mentioned.

[2] We note that the Court of Appeals granted certiorari in *Clark*, but not for the proposition cited above.

We are not persuaded that the circuit court erred in denying Mr. Mills's motion to correct an illegal sentence. First, we agree with the State that his "fundamental fairness" claim is an issue that is not properly before us. Although a sentence that should have merged based on the required evidence test or the rule of lenity is considered an inherently illegal sentence for Rule 4-345(a) purposes, *see Pair v. State*, 202 Md. App. 617, 624 (2011), a sentence that could, perhaps, have merged based on fundamental fairness is not. *Id*. at 649 (declining "to review the issue of merger pursuant to the so-called 'fundamental fairness' test because" it does not "enjoy[ ] the procedural dispensation of Rule 4-345(a).").

As for merger under the rule of lenity, Mr. Mills does not point to any statutory language, nor cite any appellate decision, which supports a proposition that the legislature intended to prohibit separate sentences for first-degree burglary and robbery when those offenses were committed in close proximity or pursuant to a continuous course of criminal conduct – or that the legislature's intent regarding the same is ambiguous. In short, we agree with the circuit court and the State that the rule of lenity is inapplicable. Mr. Mills committed the first-degree burglary when he opened the door to Ms. Matamoros's apartment with the intent to commit a theft or a crime of violence. The intent to commit a theft or crime of violence was proved by the State at trial by Ms. Matamoros's testimony that Mr. Mills opened her door, assaulted her, and demanded money. To be sure, the robbery followed closely on the heels of the first-degree burglary when Mr. Mills dragged Ms. Matamoros by the neck to the bedroom, threw her on the floor, and stole her purse. Nonetheless, the first-degree burglary and the robbery were separate and distinct crimes and, therefore, separate and distinct sentences are legal.

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.