Circuit Court for Montgomery County
Case No: 129615C

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 567

September Term, 2019

BERNARD JEAN

v.

STATE OF MARYLAND

Berger,
Leahy,
Zarnoch, Robert A.
(Senior Judge, Specially Assigned),

JJ.

PER CURIAM

Filed: July 10, 2020

*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 2016, Bernard Jean, appellant, appeared in the Circuit Court for Montgomery County and pled guilty to first-degree assault, armed robbery, use of a handgun in the commission of a crime of violence, and possession of a regulated firearm after having been convicted of a crime of violence. The court sentenced him on each count to various terms of imprisonment, suspending a portion of each, for a total executed term of 18 years, to be followed by a three-year period of supervised probation. He did not seek leave to appeal.

In 2019, Mr. Jean, representing himself, filed a Rule 4-345(a) motion to correct an illegal sentence in which he asserted that the sentence for first-degree assault should have merged with the sentence imposed for armed robbery. He also claimed that the "total sentence imposed" is illegal because the court, after pronouncing sentence for each count, stated "that's a total of 80 years," but because the handgun sentences were run concurrently with each other, the aggregate term was actually 65 years' imprisonment, with all but 18 years suspended. The circuit court denied relief, stating that the "State set out two distinct offenses at [the] time of plea – armed robbery outside of bar, first degree assault inside the bar."[1] The court did not specifically address Mr. Jean's claim regarding the "total" sentence. For the reasons to be discussed, we shall affirm the judgment.

<u>BACKGROUND</u>

A four-count indictment filed in the circuit court included the following two counts:

> COUNT ONE: ASSAULT – FIRST DEGREE. The Grand Jurors of the State of Maryland, for the body of Montgomery County, upon their oaths and affirmations, present that BERNARD JEAN, on or about May 4, 2016, in Montgomery County, Maryland, **did assault Ermias Michael in the first**

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[1] Judge Robert A. Greenberg presided over the plea, sentencing, and Rule 4-345(a) motion.

> **degree, to wit: striking the victim in the head and face**, in violation of Section 3-202 of the Criminal Law Article against the peace, government and dignity of the State.
>
> COUNT TWO: ARMED ROBBERY. The Grand Jurors of the State of Maryland, for the body of Montgomery County, upon their oaths and affirmations, present that BERNARD JEAN, on or about May 4, 2016, in Montgomery County, Maryland, **did feloniously rob with a dangerous weapon, Ermias Michael of his wallet and US Currency, to wit: demanding that the victim give him all of his money and revealing a handgun**, in violation of Section 3-403 of the Criminal Law Article against the peace, government, and dignity of the State.

(Emphasis added.)

These charges, plus the two handgun offenses, arose after an incident at Legends Billiards Café in Wheaton.[2] The victim exited the bar to smoke a cigarette and Mr. Jean followed him outside. At the plea hearing, the prosecutor further related that, Mr. Jean

> approached the victim and demanded that he give him all of his money and pulled up his shirt to reveal a black and silver handgun in his waistband.
>
> According to the victim, the defendant stated, give me all of your money or I'll blast you. Mr. Michael then took out his wallet and opened it to show the suspect that there was no money inside of it. The defendant then took the wallet from the victim and [the victim] fled back inside the bar as the defendant pursued.
>
> The defendant chased the victim around the bar tables and yelling, you owe me money. He then proceeded to strike the victim in the head with the gun and go through his pants pockets, taking the victim's cash. The other bar patrons attempted to break up the assault until they saw that the defendant had a handgun and they backed off. At that time, the defendant fled the bar and traveled across the street.

[2] The record before us does not include the transcript from either the plea or sentencing hearings. Mr. Jean attached excerpts from those proceedings to his motion to correct an illegal sentence. The State asserts that we should decline to address Mr. Jean's contentions on appeal because of the missing transcripts. Although we do not condone the incomplete record, because we are able to address the issues based on the record that is before us, we shall do so.

> Defendant attempted to flee the area. This is when he was observed attempting to jump over an iron security fence that surrounded the laundromat and ended up catching himself on the fence as he was, as he freed himself from the fence, that's the point at which Officer Danello arrived on the scene.

DISCUSSION

Merger of First-Degree Assault & Armed Robbery

Mr. Jean maintains that the sentence imposed for first-degree assault (25 years' imprisonment, with all but 7 years suspended) must be vacated because it should have merged with the sentence for armed robbery (20 years' imprisonment, all but 6 years suspended, to run consecutive to the assault sentence). He asserts that "first degree assault is a lesser included offense of robbery with a dangerous weapon." He also claims that, "even though [he] pled guilty, he is still entitled to relief" because "his conduct was one single and continuous course of conduct which the State outlined to the court during his plea hearing." Specifically, he points to the State's proffer that "[t]he defendant chased the victim around the bar tables yelling you owe me money" and "then proceeded to strike the victim in the head with the gun and go through his pants pockets, taking the victim's cash." He also asserts that the "indictment did not specify separate conduct constituting first degree assault apart from the assault required for armed robbery."

The State responds that the "indictment made clear that the basis for the first-degree assault was different than the assaultive element for robbery," noting that the first-degree assault count was "based on 'striking the victim in the head and face,'" whereas the armed robbery count "was based on 'revealing a handgun.'" Hence, the State maintains that "the

record shows that the first-degree assault and the robbery were based on separate conduct" and, therefore, merger was not required.

In support of his position, Mr. Jean relies primarily on *Morris v. State,* 192 Md. App. 1 (2010) in which this Court concluded that convictions for first-degree assault and attempted armed robbery of victim Tina Bussard should have merged, as should have convictions for first-degree assault and armed robbery of victim Frank Fultz. Accordingly, we vacated the separate sentences that had been imposed for first-degree assault. *Morris,* while certainly instructive here, is factually distinguishable from Mr. Jean's case.

In *Morris,* we noted that first-degree assault may merge with robbery with a dangerous weapon and cited cases where the appellate courts held they should merge and other cases where merger was not mandated. *Id.* at 40-43. In determining whether they should merge in *Morris,* we stated that, "[t]he dispositive inquiry is whether" the defendant's "first-degree assault convictions were distinct acts or whether they arose out of the acts of armed robbery against" the victim. *Id.* at 40. If they arose out of the "same act or transaction," the "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.'" *Id.* at 39 (quoting *Purnell v. State,* 375 Md. 678, 698 (2003)). "[W]hen 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." *Id.*

We concluded in *Morris* that the first-degree assault and attempted-armed-robbery convictions involving victim Bussard should have merged because the record did "not reflect a break in [the defendant's] acts with regard to Bussard, who testified that [the

defendant] threatened her with a gun, demanded her money and keys, and pulled her from Room 507 while she was holding her pocketbook." *Id.* at 42. We further noted that "neither the charging document nor the jury instructions made clear that the charges of assault were based upon separate and distinct acts from those upon which the robbery charges were based." *Id.* at 44. We held, therefore, that because of "ambiguities reflected in the record," the sentence for first-degree assault of victim Bussard merged into the attempted-armed-robbery conviction. *Id.* We also held that the convictions involving victim Fultz merged for sentencing purposes where the defendant was charged with "assault[ing] Frank Fultz in the first degree" and, in a separate count, "with robbing Fultz of money with a dangerous weapon, 'to wit: [a] revolver'" because "the presentment did not allege an assaultive act separate from that done in the furtherance of the robbery." *Id.* at 44. In short, because of the "ambiguities as to the particular acts for which he was charged," we resolved the conflict in the defendant's favor and merged the assault and armed robbery convictions involving victim Fultz. *Id.* at 45.

In contrast, here Count 1 of the indictment charged Mr. Jean with first-degree assault "to wit: striking the victim in the head and face" and Count 2 charged him with armed robbery "to wit: demanding that the victim give him all of his money and revealing a handgun." Unlike in *Morris,* there was no ambiguity as to the conduct supporting the separately charged offenses.

First-degree assault can be viewed as an aggravated form of second-degree assault. Second-degree assault can be committed in distinct ways: (1) by intentionally frightening the victim, (2) by actually battering the victim, and/or (3) by attempting to batter the victim.

Jones v. State, 440 Md. 450, 455 (2014). Second-degree assault may rise to first-degree assault when the defendant (1) causes or attempts to cause serious physical injury and/or (2) by using a firearm. Md. Code, Criminal Law, § 3-202; *see also Dickerson v. State,* 204 Md. App. 378, 383, *cert. denied*, 427 Md. 608 (2012).

"Robbery is the 'felonious taking and carrying away of the personal property of another from his person by the use of violence or by putting in fear.'" *Fetrow v. State,* 156 Md. App. 675, 687, *cert. denied,* 382 Md. 347 (2004) (quotation omitted). "Robbery with a dangerous or deadly weapon is the offense of common law robbery, aggravated by the use of a 'dangerous or deadly weapon.'" *Id.* (quotation omitted).

Here, the circuit court, in denying Mr. Jean's Rule 4-345(a) motion, concluded that the armed robbery occurred outside of the bar, which is consistent with Count 2 of the indictment charging armed robbery, "to wit: demanding that the victim give him all of his money and revealing a handgun." The State's proffer of facts also related that Mr. Jean approached the victim outside the bar "and demanded that he give him all of his money and pulled up his shirt to reveal a black and silver handgun in his waistband." The State further proffered that the victim would have testified that Mr. Jean said, "give me all of your money or I'll blast you" and in response the victim produced his wallet which Mr. Jean then took. Those facts support a conviction for armed robbery outside the bar. Count 1 of the indictment charged Mr. Jean with first-degree assault, "to wit: striking the victim in the head and face." The State's proffer of facts related that, after Mr. Jean took the victim's wallet, the victim fled back into the bar. Mr. Jean pursued him inside and "proceeded to strike the victim in the head with the gun[.]" Those facts support a

conviction for first-degree assault inside the bar based on Mr. Jean causing or attempting to cause serious physical injury to the victim by striking him on the head.

In short, we are persuaded that there was no ambiguity in the behavior constituting the separate crimes of armed robbery and first-degree assault. Moreover, even though the two crimes may have risen out of the same transaction – beginning outside the bar and then moving inside the bar – the offenses do not merge under the required evidence test because, under these particular facts and the presentment, the crimes were not the same offense. First-degree assault, of the modality at issue here, requires the infliction or attempted affliction of serious physical injury, but that is not an element of robbery with a dangerous weapon. And while the commission of a larceny is an element of robbery with a dangerous weapon, it is not an element of first-degree assault. Therefore, assault in the first degree of the "serious physical injury" variety and robbery with a dangerous weapon are not the "same offense" under the required evidence test and thus, under that test, do not merge.

Legality of "Total Sentence"

Mr. Jean contends that his "total sentence" is illegal because the sentencing court, after pronouncing sentence for each count, stated "that's a total of 80 years." Because the handgun sentences (Counts 3 and 4) were run concurrently with each other, the aggregate term was actually 65 years' imprisonment, with all but 18 years suspended. He asserts that the circuit court erred in denying his Rule 4-345(a) motion without holding a hearing on the merits of this claim.

At sentencing, the court pronounced sentence as follows:

> I'm going to sentence you on Count 3 [use of a handgun in the commission of a felony or crime of violence] first to 15 years in the Department of Corrections. I'm going to suspend all but five. That's a mandatory sentence.
>
> Count 4 [possession of a regulated firearm after having been convicted of a crime of violence] 20 years, suspend all but five. Those sentences will be concurrent to one another.
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> Count 1, which is first-degree assault, I'll give you 25 years, suspend all but seven, and that is going to be consecutive to the fourth count.
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> And then on Count 2 [robbery with a dangerous weapon], I'm going to give you 20 years, suspend all but six. And that's going to be consecutive to Count 1. So, **that's a total of 80 years, but you're going to serve 18** of those, well potentially, but 18 years executed. So, you've got a lot of back-up time.

(Emphasis added.)

The court, in fact, imposed sentences totaling 80 years' imprisonment (15+20+25+20 = 80), but given that the handgun sentences were run concurrently, the aggregate sentence *to be served* was 65 years' imprisonment, with all but 18 years suspended. Mr. Jean seems to contend that, because the court indicated the sentences totaled "80 years," and not 65 years, the sentencing package is somehow illegal. We disagree. The court clearly announced the term of each sentence and whether it would run concurrent or consecutive to another. Both the docket entry and the commitment record accurately reflect the sentence imposed. There is no illegality in the sentencing package. Accordingly, the circuit court did not err in failing to hold a hearing on Mr. Jean's Rule 4-345(a) motion to address this issue.

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