Circuit Court for Montgomery County
Case No. CR57195

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1557

September Term, 2017

MICHAEL JACKSON

v.

STATE OF MARYLAND

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

JJ.

PER CURIAM

Filed: October 3, 2018

*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.

Michael Jackson, appellant, appeals the denial, by the Circuit Court for Montgomery County, of his motion to correct illegal sentence. For the reasons that follow, we affirm.

In 1990, following a jury trial, Jackson was convicted of first-degree rape, first-degree rape as an aider and abettor, first-degree sexual offense, assault with intent to rob, battery, and daytime housebreaking.[1] At trial, the State's evidence showed that the victim was sleeping in her apartment on the morning of September 23, 1989. Around 8:30 a.m., Jackson and his co-defendant, whom the victim recognized in the course of the events that unfolded, broke into her townhouse. They seized her seven-year-old son and held him at knife point. They then robbed her of around $200.00, each of them raped her, and Jackson forcibly had oral sex with her.

During closing, the State argued that Jackson could be convicted of first-degree rape, as opposed to second-degree rape, based on his use of a deadly weapon; his committing the offense while being aided and abetted by another person; or his committing the offense in connection with a breaking and entering. The verdict sheet did not ask the jury to specify what basis it used to convict appellant of first-degree rape. Relevant to this appeal, Jackson received a sentence of life imprisonment for first-degree rape and a consecutive sentence of ten years' imprisonment for daytime housebreaking. In 2017, Jackson filed a motion to correct illegal sentence claiming that his consecutive sentence

[1] This Court vacated Jackson's assault with intent to rob conviction on direct appeal. *See Miles v. State*, 88 Md. App. 248 (1991).

for daytime housebreaking was illegal because it should have merged with his sentence for first-degree rape. The circuit court denied his motion without a hearing. This appeal followed.

Jackson first contends that, because it is possible that the jury convicted him of first-degree rape based on a finding that he committed a rape during a breaking and entering, his convictions for first-degree rape and daytime housebreaking merge under the required evidence test.[2] The required evidence test "focuses upon the elements of each offense; if all of 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." *State v. Lancaster*, 332 Md. 385, 391 (1993) (internal quotation marks and citation omitted). When evaluating a multi-purpose statute using the required evidence test this Court must:

> [C]onstruct from the alternative elements within the statute the particular formulation that applies to the case at hand. It should rid the statute of alternative elements that do not apply. It must, in other words, treat a multi-purpose statute in the alternative as it would treat separate statutes. The theory behind the analysis is that a criminal statute written in the alternative creates a separate offense for each alternative and should therefore be treated for double jeopardy purposes as separate statues would.

Dixon v. State, 364 Md. 209, 244 (2001).

[2] Jackson concedes that the jury could have also convicted him of first-degree rape based on the evidence that he used a deadly weapon or that he was aided and abetted by another person. He nevertheless contends that, because the jury did not specify which factor it relied on in convicting him of first-degree rape, we must resolve any ambiguity in his favor. We do not need to resolve this issue, however, because even if Jackson is correct, the crimes of first-degree rape committed in connection with a breaking and entering and daytime housebreaking do not merge.

To convict Jackson of first-degree rape at the time of his trial, the State was required to prove that he engaged in vaginal intercourse with another person by force or threat of force against the will and without the consent of the other person and that one of five factors was present, including, relevant to this appeal, that he "commit[ed] the offense in connection with the breaking and entering of a dwelling." Md. Code (1957, 1987 Repl. Vol & 1990 Supp.), Art. 27, § 462. To convict Jackson of daytime housebreaking, the State was required to prove that he broke into a dwelling house with the intent to commit a felony therein or with the intent to steal, take, or carry away the personal goods of another. Md. Code (1957, 1987 Repl. Vol.), Art. 27, § 30(b).

Applying the required evidence test to those crimes, we hold that daytime housebreaking is not a lesser included offense of first-degree rape committed in connection with a breaking and entering because each of these offenses requires proof of a fact which the other does not. Specifically, daytime housebreaking requires proof of a breaking into a dwelling house with the specific intent to commit a felony or theft therein. There is no requirement that a defendant possess such a specific intent to convict him or her of first-degree rape in connection with a breaking and entering. Only proof of a breaking and entering, followed by a rape, is required. Moreover, a first-degree rape committed in connection with a breaking and entering requires proof of an "entering" into the dwelling. Daytime housebreaking does not. *See Hawkins v. State*, 291 Md. 688, 692 (1981) (holding that misdemeanor breaking and entering is not a lesser included offense of daytime housebreaking because the latter requires specific intent and the former requires an entry); *cf. Hebron v. State*, 331 Md. 219, 627 A.2d 1029 (1993) (holding that conviction for a

crime that required "breaking and entering" also required the State to prove that defendant had actually entered the premises); *Brown v. State*, 311 Md. 426, 535 A.2d 485 (1988) (noting that the distinction between daytime housebreaking, which required breaking, and another type of burglary that did not require breaking was significant in the application of mandatory minimum sentencing under § 643B of Article 27). Consequently, merger is not required under the required evidence test.

Jackson alternatively contends that merger is required under the rule of lenity. Again, we disagree. The rule of lenity applies only when the sentencing statute is ambiguous as to whether the Legislature intended to impose multiple punishments for violations of two or more statutes, arising out of a single act or transaction. *Alexis v. State*, 437 Md. 457, 485 (2014). Here, we discern nothing in either statute that indicates the General Assembly intended merger under these circumstances, especially considering the presence of additional aggravating factors relevant to the first-degree rape charge. The statutes proscribing first-degree rape and daytime housebreaking that were in effect at the time of Jackson's trial were enacted more than ten years apart. Moreover, when we examine the conduct proscribed by the first-degree rape statute and the conduct proscribed by the daytime housebreaking statute, the offenses:

> (1) do not constitute conduct proscribed by a "single statute"
>
> (2) are not "of necessity closely intertwined," and
>
> (3) do not relate to each other in such a manner that one offense is "necessarily the overt act" of the other. Nor is this a situation in which one of the statutes "by its very nature affects other offenses."

Dillsworth v. State, 308 Md. 354, 367 (1987) (*quoting Johnson v. State,* 56 Md. App. 205, 215 (1983). Because these relationships are not present, we will not assume an ambiguity in the legislative intent which would call the rule of lenity into play. *See Jones v. State*, 336 Md. 255, 261 (1994) (noting that the rule of lenity is an aid for resolving an ambiguity and may not be used to create an ambiguity where none exists).

Because Jackson's sentences for first-degree rape and daytime housebreaking do not merge under the required evidence test or the rule of lenity, his consecutive sentence for daytime housebreaking is not illegal. Consequently, the circuit court did not err in denying his motion to correct illegal sentence.

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