UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1613

September Term, 2014

TERRENCE E. LYNCH

v.

STATE OF MARYLAND

Eyler, Deborah, S.,
Hotten,
Nazarian,

JJ.

Opinion by Eyler, Deborah S., J.

Filed: July 10, 2015

After a bench trial in 1999 in the Circuit Court for Baltimore County, Terrence E. Lynch, the appellant, was found guilty of attempted second-degree murder, first-degree assault, and malicious destruction of property. He was sentenced to incarceration for a term of thirty years for attempted second-degree murder; a consecutive term of fifteen years for first-degree assault; and a concurrent term of three years for malicious destruction of property.

On April 5, 2000, in an unreported opinion, we affirmed Lynch's convictions. *Lynch v. State*, No. 590, Sept. Term 1999. Thereafter, Lynch filed a petition for post-conviction relief. In January 2001, the post-conviction court granted Lynch a new sentencing hearing. At that hearing, which took place on April 17, 2001, the court imposed the same sentences it originally had imposed. It subsequently granted a motion for modification of sentence, reducing the sentence for first-degree assault to thirteen years.

On November 18, 2013, Lynch filed a motion to correct illegal sentence, which, in a written opinion and order, the circuit court denied. In this timely appeal, Lynch, who is proceeding in proper person, asks whether the court erred in denying his motion.

For the reasons that follow, we conclude that the court indeed erred. We shall vacate the sentence for first-degree assault.

FACTS AND PROCEEDINGS

The relevant facts are set forth in our unreported opinion on direct appeal:

> [Lynch] and Deborah Sorillo, the victim, lived together

for approximately six months prior to October 11, 1998. On that night, they got into an argument. Although it is disputed whether [Lynch] told her to leave or whether she left of her own volition, it is agreed that Deborah Sorillo left the apartment that night and went to her mother's house. Ms. Sorillo's sister, Stephanie Sorillo, was visiting their mother at the time.

The next morning, Stephanie drove Deborah to her workplace on Timanus Lane in Woodlawn. When Stephanie and Deborah Sorillo arrived at the parking lot of Deborah's workplace, [Lynch] was in his car, waiting. He was holding the "key pass" that Deborah needed to get into work. Deborah told Stephanie that she did not want to get out of the car because she did not want to "make a scene" at her workplace. She asked Stephanie to drive away. Stephanie agreed to do so and drove toward the exit. Before she could reach the exit, [Lynch's] car hit the rear driver's side of her car. [Lynch] pulled his car in front of her car to block it in. [Lynch] exited his car with a hammer in his hand. With the hammer, he broke the windshield of Stephanie's car.

Stephanie was initially unable to get out of her car because the door jammed. She was eventually able to do so. Stephanie described what happened next:

> When I got out of the car, I reached my hand behind me to grab my sister Debbie, and she wasn't there. So I headed up towards the building to get security, but I turned around before I got up there and noticed that she and [Lynch] were struggling and he had a hammer in his hand raised and he hit her with the hammer. And they were struggling. He kept hitting her over and over about her head. I screamed out to him, asked him why was he doing this? I begged him to stop. And he wouldn't stop. He just looked over at me and kept on beating her.

Barry Beach was at his workplace at Lockheed Martin on Timanus Lane at 8:00 on the morning of October 12, 1998. He heard what sounded like a car accident and looked outside to see if anyone needed assistance. He observed [Lynch] holding something he thought was a tire iron or baseball bat and "beating on the vehicle." He saw [Lynch] pull Deborah out of the vehicle and beat her with the object. . . . According to Mr. Beach, [Lynch] hit Deborah in excess of 20 times. Mr. Beach called 911.

Steven Fritz was in his Jeep at a construction site on Timanus Lane at approximately 8:00 that morning. He also witnessed the assault and called 911[.]

* * *

According to Mr. Fritz, Deborah Sorillo's "head was split open, the skull was like split, the skin. Also, she had cuts on her arms. There was an enormous amount of blood."

* * *

After the assault, [Lynch] drove to his sister's house, where he hid the hammer in some bushes. Later that morning, he turned himself in to the Baltimore City police. Baltimore County Police Officer Douglas Jess drove to Baltimore City and took [Lynch] into custody. [Lynch] directed the officer to his sister's house, where the officer retrieved the hammer. Officer Jess then took [Lynch] to the Baltimore County police station in Woodlawn. At the station, [Lynch] gave first a verbal, then a written, statement to Officer Jess. [Lynch] admitted to Officer Jess that he had broken the glass on Stephanie's vehicle and hit Deborah with the hammer. [Lynch] told the officer that he had gone to Deborah's workplace because he had items belonging to her and she had money she owed to him. [Lynch] told Officer Jess that he "got very upset and it escalated from there."

(Footnote omitted.)

Lynch was charged by way of a criminal information setting forth three counts: first-degree assault (count one); attempted common law murder (count two); and malicious destruction of property (count three).[1] The charging document did not specify the factual basis for the first-degree assault charge; it merely alleged that Lynch "did unlawfully assault Deborah Sorillo in the first degree; contrary to the form of the Act of Assembly in such case made and provided and against the peace, government and dignity of the State. (1st Degree Assault - Art. 27, Section 12A-1)."

After the court convicted Lynch of all three counts, it held a sentencing hearing, on March 18, 1999. Lynch, through counsel, argued that the sentences imposed for attempted second-degree murder and first-degree assault should run concurrently because they occurred "as a continuum" and "within moments of each other . . . [and] for the same reason[,]" that is, to harm Deborah Sorillo, not her sister, Stephanie. The court rejected that argument and sentenced Lynch as we have described above.

In Lynch's post-conviction case, the court concluded that it could not determine from

[1]The record before us does not include the criminal information. However, attached to Lynch's brief is one page of the criminal information setting forth the three counts charging first-degree assault, attempted common law murder, and malicious destruction of property. The docket entries show, and the parties do not dispute, that these were the only charges filed against Lynch.

the transcript of the March 18, 1999 sentencing hearing whether the sentencing court had considered the issue of merger. Specifically, it could not determine whether the sentencing court had considered the rule of lenity and decided that it did not apply, or whether it had determined that two independent acts had taken place that gave rise to the consecutive sentences for attempted second-degree murder and first-degree assault. As a result, Lynch was granted a new sentencing hearing.

At the re-sentencing hearing, the judge stated that "there were two separate incidences of assault." The first incident was "the assault by frightening with the hammer against the windshield, and the second assault consummated and merging into the attempted second degree murder occurred after the victim was pulled from the car." The court explained its reasoning as follows:

> It was never raised explicitly, but it is implicit in the question of whether there was one continuum of events or two separate crimes. That was Mr. Stein argued [sic] very vociferously to the Court that Judge, this is one event.
>
> It starts when he accosts the victim and the driver of the car in the parking lot, and it continues until he is apprehended, and therefore, it's one event. There can only be one sentence, and the State argued – and I think rightfully so – that there were, in effect, two crimes.
>
> The first crime was the first degree assault by frightening when Mr. Lynch approached the victim in the car and hit the windshield with the hammer. There was no physical contact between the hammer and the victim in the case, but I'm certain

> the victim was frightened.
>
> That was her testimony. I was extremely frightened. And secondly, he committed the assault by frightening with a deadly weapon – that is a hammer – a weapon that could cause a serious bodily harm to a victim if, in fact, an assault were consummated.
>
> Then after that assault took place, and I note that from a practical and a geographical perspective, it could have been over at that point. Mr. Lynch could have turned around and run away, and he certainly could have been prosecuted and, I believe, convicted on those facts for committing a first degree assault by frightening the victim.
>
> But he didn't turn around and run away. He pulled the victim from the car and began to bludgeon her with the hammer, and in doing so, I believe he committed a second first degree assault and the attempted murder. Now, obviously there's a question of whether or not the second first degree assault merges into the attempted murder.

After clarifying that "it was my intent on the date of sentencing in this case to sentence the Defendant to an additional 15 years of incarceration for his first degree assault by threatening the victim in the car when he struck the windshield of the car[,]" the court concluded that the rule of lenity did not apply and merger of the first-degree assault conviction was not required.

DISCUSSION

Lynch contends the circuit court erred in denying his motion to correct illegal

sentence pursuant to Rule 4-345(a).[2] He argues that, at the April 17, 2001 re-sentencing hearing, the court effectively added, and convicted him of, a second count of first-degree assault when only one such count was charged. He points out that the State never amended the charging document to add a second count of first-degree assault; that at his 1999 trial he was found guilty of one count of first-degree assault; and that the charging document did not clearly express that the first-degree assault charge was based on a different act than the first-degree assault encompassed in the attempted second-degree murder charge.

Rule 4-345(a) "creates a limited exception to the general rule of finality." *State v. Griffiths*, 338 Md. 485, 496 (1995). The exception applies only to sentences that are inherently illegal; that is, 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 and, for either reason, is intrinsically and substantively unlawful." *Chaney v. State*, 397 Md. 460, 466 (2007).

As it did in *Thompson v. State*, 119 Md. App. 606, 608 (1998), in the instant case, the State seeks "double duty" from a single first-degree assault conviction. Writing for this Court in *Thompson*, Judge Moylan observed that this is "a small [problem], but a chronic and nagging one" that "recurs with annoying frequency." *Id*. at 607-08. He noted that

[2] Rule 4-345(a) states that "[t]he court may correct an illegal sentence at any time."

"[t]he State frequently seeks to endow that single charge of assault with the chameleon-like capacity to allege first one crime and then, should the desire arise, a separate and distinct crime and potentially, therefore, two crimes at once." *Id*. at 608.

The State maintains, as did the court at the April 17, 2001 re-sentencing hearing, that the fifteen-year sentence imposed for the first-degree assault conviction was premised upon Lynch's conduct of intentionally frightening Deborah Sorillo by smashing the windshield of her sister's vehicle with the hammer. If, as the State and sentencing court suggest, there were <u>two</u> first-degree assaults, the first being the smashing of the windshield and the second being the beating of Sorillo, we are constrained to ask why two assault counts were not included in the charging document. To shed some light on that question, we look to *Thompson*.

At about 11:00 p.m. on the night in question, Eugene Thompson and his brother entered a trailer home and, at gunpoint, attempted to rob three men. Thompson took seven dollars and a leather jacket from Lyray Simpson; the other men had nothing worth stealing. Thompson and his brother then left. At 11:30 p.m., Thompson returned to the trailer without his brother and once again confronted the three men. This time he robbed Simpson of narcotic drugs, but again took nothing from the other two men.

The State charged Thompson in a fifteen-count indictment. There was one count for conspiracy and another count for unlawful possession of a firearm as a convicted felon. The

remaining counts "grouped themselves into three sets of major and lesser included crimes committed against each of the three victims respectively." *Id.* at 611. The flagship counts were for the armed robbery or attempted armed robbery of each victim. Under each flagship count, the State charged "three descending ladders of lesser included (and in one instance lesser unincluded) charges." *Id.* at 612. Three of the lesser included offenses were for first-degree assault of each victim.

At trial, the court granted a judgment of acquittal on one of the three assault charges. Thompson was convicted of the remaining fourteen counts. During the sentencing hearing, the issue arose whether the two assault convictions would merge, for sentencing, into the conviction of armed robbery of Simpson and the conviction of attempted armed robbery of one of the other victims. The court did not merge the assault convictions, instead imposing separate sentences for both of them. Those sentences were made consecutive to the sentence for the armed robbery conviction, but concurrent with each other.

On appeal, Thompson argued that the assault convictions were lesser included offenses of the armed robbery and attempted armed robbery convictions and, therefore, should have been merged for sentencing. The State countered that the assault convictions were not premised on Thompson's 11:00 p.m. armed robbery and attempted armed robbery; rather, they were based on his conduct at 11:30 p.m. Therefore, merger was not required.

In addressing that issue, we stated that "the question of whether certain counts charge

crimes that are lesser included offenses within other counts or, on the other hand, charge unrelated criminal conduct, can frequently be resolved within the four corners of the indictment." *Id.* at 617. From the indictment, we concluded that the assaults charged were lesser included offenses within the greater inclusive offenses of the 11:00 p.m. armed robbery and attempted armed robbery. Therefore, merger was required. In explaining our holding, we stated:

> More broadly, we hold that in a multi-count indictment where a count qualifies in all regards as a lesser included offense within a greater inclusive offense which is also charged, that count will be presumptively deemed to be a lesser included offense unless the charging document clearly indicates that such is not the case and that the other unrelated criminal conduct is intended to be the subject of the count. The addition of a second assault count at the end of the indictment (and, therefore, out of the logical sequence for charging lesser included offenses) might well suffice.

Id. at 621-22.

Judge Moylan admonished that the State's attempt to use vaguely charged assault counts to support assault convictions separate from the assaults that were lesser included offenses of the armed robbery and attempted armed robbery was two-faced:

> If through a series of trial mishaps, the highest count left standing against [Thompson] for the "eleven o'clock" attack on Lyray Simpson were that of first-degree assault (Count 7), would the State concede that [Thompson] could not be convicted of that offense for the reason that the count referred to some other assault that occurred thirty minutes later? The State cannot have it both ways.

Id. at 619. Judge Moylan went on to ask, rhetorically:

> What would the State's position be if the judge sentenced [Thompson] to twenty years imprisonment for the "eleven o'clock" assault on Lyray Simpson under Count 7 and then sentenced [him] to a consecutive term of twenty years for the "eleven thirty" assault on Lyray Simpson under precisely the same Count 7?

Id. He answered with the obvious: that one assault and a completely unrelated assault cannot be charged in a single count. Because the 11:30 p.m. assaults were not charged, Thompson could not be convicted of them, and therefore could not be sentenced for them.

We return to the instant case, which is even more straight-forward than *Thompson*. In the charging document, count one is for the first-degree assault of Deborah Sorillo; count two is for the attempted murder of Deborah Sorillo; and count three is for malicious destruction of property. Although the charging document was not a symmetrical and descending ladder of interrelated charges of the sort at issue in *Thompson*, it included multiple counts and, as in *Thompson*, did not set forth any details about the specific act upon which the first-degree assault charge was based. As *Thompson* holds, unless clearly stated otherwise, that first-degree assault charge is presumed to be the lesser included offense to the attempted murder charge. And indeed there was never a dispute below that Lynch's beating of Deborah Sorillo with the hammer was the act that formed the basis of the attempted murder charge, and that the first-degree assault was a lesser included offense. As the judge stated at the April 17, 2001 re-sentencing hearing, the first-degree assault that was

based on beating Deborah Sorillo with the hammer "consummated and merg[ed] into the attempted second degree murder."

We echo the questions posed by Judge Moylan in *Thompson*: If through a series of trial mishaps, the attempted second-degree murder charge was eliminated and the highest count left standing against Lynch was first-degree assault, would Lynch only be susceptible of conviction for the intent-to-frighten variety of assault based on the smashing of the windshield and not for the consummated battery type of assault based on the vicious beating of Sorillo with the hammer? If, as the court stated at the April 17, 2001 re-sentencing hearing, the evidence supported a finding of two assaults, could they both be supported by the single count?

It is clear under *Thompson* that the answer to both questions is "no." There was but a single count of first-degree assault in the multi-count charging document. The sentencing court recognized that the first-degree assault conviction was based on the beating of Deborah Sorillo, the same act that formed the basis of the attempted second-degree murder conviction. Indeed, it would strain logic to conclude otherwise. That assault conviction was merged into the attempted second-degree murder conviction. There was no other first-degree assault charge. The State could have added a second first-degree assault count to the charging document alleging an intent-to-frighten variety of assault arising out of the smashing of the windshield. It did not. Lynch was not convicted, and could not have been

convicted, of a first-degree assault that was not charged. And he could not be sentenced for an uncharged crime that did not carry a conviction.

Accordingly, the fifteen year (later reduced to thirteen year) sentence for the uncharged first-degree assault must be vacated. The first-degree assault that Lynch was charged with and convicted of was a lesser included offense of the second-degree murder conviction, and therefore properly was merged into that conviction for sentencing.

ORDER OF CIRCUIT COURT FOR BALTIMORE COUNTY REVERSED. SENTENCE FOR FIRST-DEGREE ASSAULT VACATED. COSTS TO BE PAID BY BALTIMORE COUNTY.