Circuit Court for Baltimore County
Case No. 03-K-05-000266

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 3520

September Term, 2018

THURMAN SPENCER

v.

STATE OF MARYLAND

Fader, C.J.,
Arthur,
Moylan, Charles E., Jr.
(Senior Judge, Specially Assigned),

JJ.

PER CURIAM

Filed: February 5, 2020

Thurman Spencer, appellant, appeals the denial, by the Circuit Court for Baltimore County, of his motion to correct illegal sentence. For the reasons that follow, we shall affirm.

In 2006, a jury convicted Mr. Spencer of two counts of armed robbery and one count each of first-degree rape, first-degree burglary, and use of a handgun in the commission of a crime of violence. The court imposed a sentence of life imprisonment for the first-degree rape and concurrent twenty-year sentences for each of the remaining offenses. In 2014, Mr. Spencer filed a motion to correct illegal sentence, claiming that: (1) his conviction for armed robbery should have merged into his conviction for use of a handgun during the commission of a crime of violence, and (2) his sentence for first-degree rape should have merged into his sentence for first-degree burglary because it was a lesser-included offense. The circuit court denied his motion without a hearing.

Mr. Spencer now raises the same claims on appeal. First, he asserts that the sentences imposed on the armed robbery counts should merge into his sentence for use of a handgun in the commission of a crime of violence. However, Section 4-204 of the Criminal Law Article (formerly Article 27, § 36B(d)) of the Maryland Code) provides that the penalty for the use of a handgun in the commission of a crime of violence or felony shall be "in addition to any other penalty imposed for the crime of violence or felony." In *Whack v. State*, 288 Md. 137, 149-150 (1980), the Court of Appeals held that the legislature, in enacting this provision, clearly intended that separate and distinct sentences be imposed for the use of a handgun in the commission of a felony and the underlying felony, even where the two offenses were part of the same incident.

In attempting to distinguish *Whack*, Mr. Spencer relies on *State v. Ferrell*, 313 Md. 291 (1988), wherein the Court of Appeals found that "the offense of armed robbery merged into the greater offense of use of a handgun in the commission of a felony or crime of violence." *Ferrell* is distinguishable, however, because it was decided in the context of whether the Double Jeopardy Clause prohibited successive prosecutions, not multiple punishments. *Id*. at 292 ("The issue in this case is whether the defendant's prosecution . . . is barred, under double jeopardy principles, by the defendant's prior conviction [.]"). Consequently, Mr. Spencer's separate sentences for armed robbery and use of a handgun in the commission of a crime of violence do not violate the Double Jeopardy Clause and merger was not required.[1]

Mr. Spencer also contends that his sentence for first-degree rape should merge into his sentence for first-degree burglary. In so arguing, he notes that when the trial court instructed the jury, it stated that first-degree burglary was the breaking and entering of someone's home with the intent to commit a crime of violence, and that armed robbery and first-degree rape were both crimes of violence. He thus claims that "the jury could have found [him] guilty of first-degree burglary based on the rape" in which case the "rape offense would have become a lesser included offense of the 1st-degree burglary." Again, we disagree.

[1] In his reply brief, Mr. Spencer contends that *Whack* was wrongly decided and should be overruled. However, this Court must follow opinions assented to by a majority of the Court of Appeals unless they are subsequently overruled in another case or by statute. *See Marlin v. State*, 192 Md. App. 134, 151 (2012).

"Sentences for two convictions must be merged when: (1) the convictions are based on the same act or acts, and (2) under the required evidence test, the two offenses are deemed to be the same, or one offense is deemed to be the lesser included offense of the other." *Brooks v. State*, 439 Md. 698, 737 (2014). In applying the "required evidence" test, "courts look at the elements of the two offenses in the abstract. All of the elements of the lesser included offense must be included in the greater offense. Therefore, it must be impossible to commit the greater without also having committed the lesser." *Williams v. State*, 200 Md. App. 73, 87 (2011) (citation omitted).[2]

However, even if we assume that the jury convicted Mr. Spencer of first-degree burglary after finding that he had the intent to commit a rape, as opposed to the intent to commit an armed robbery, when he entered the victims' residence, merger would not be required because first-degree rape is not a lesser included offense of first-degree burglary under the required evidence test. The offense of first-degree burglary is committed when a person breaks and enters the home of another with the intent to commit a felony. Even if the intended felony is rape, proof of a completed or even an attempted rape is not required. Thus, it is possible to commit first-degree burglary without also committing first-degree rape.

Because Mr. Spencer's sentences for armed robbery do not merge into his sentence for use of a firearm during the commission of a crime of violence and his sentence for first-

[2] Mr. Spencer does not contend that his sentences should have merged under either the rule of lenity or the principle of fundamental fairness.

degree rape does not merge into his sentence for first-degree burglary, the circuit court did not err in denying his motion to correct illegal sentence.

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