

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 1734

September Term, 2016

DARRIN ANDREWS

v.

STATE OF MARYLAND

Berger,
Nazarian,
Moylan, Charles E., Jr.
(Senior Judge, Specially Assigned),

JJ.

PER CURIAM

Filed: July 6, 2017

*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.

Darrin Andrews, appellant, was convicted of first-degree burglary, second-degree burglary, fourth-degree burglary and malicious destruction of property after a jury trial in the Circuit Court for Prince George’s County. At the sentencing hearing, the circuit court merged Andrews’s third and fourth degree burglary convictions into his first degree burglary conviction. It then imposed a sentence of twenty years’ imprisonment for the first-degree burglary conviction and a consecutive sentence of two months’ imprisonment for the malicious destruction of property conviction. On appeal, Andrews contends (1) that there was insufficient evidence to support his convictions for first-degree burglary and third-degree burglary because the State failed to prove that he intended to commit a theft, or any other crime, at the time he entered the victim’s home and (2) that his sentence for malicious destruction of property should merge into his sentence for first degree burglary. For the reasons that follow, we vacate Andrews’s sentence for malicious destruction of property, but otherwise affirm the judgments of the circuit court.

“The standard for our review of the sufficiency of the evidence is ‘whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.’” *Neal v. State*, 191 Md. App. 297, 314 (2010) (citation omitted). “The test is ‘not whether the evidence should have or probably would have persuaded the majority of the fact finders but only whether it possibly could have persuaded any rational fact finder.’” *Painter v. State*, 157 Md. App. 1, 11 (2004) (citations omitted). In applying the test, “[w]e defer to the fact finder’s ‘opportunity to assess the credibility of witnesses, weigh

the evidence, and resolve conflicts in the evidence.” *Neal, supra*, 191 Md. App. at 314 (citation omitted).

Viewed in a light most favorable to the State, the evidence at trial demonstrated that Andrews forcibly entered the victim’s residence by throwing a cinder block through the glass patio door, rummaged through several drawers and the master bedroom closet while inside, and then immediately ran out the residence when the victim returned home and confronted him. Based on this evidence, the jury reasonably could find that Andrews had the intent to commit a theft at the time he entered the premises. *See Winder v. State*, 362 Md. 275, 329 (2001) (noting that “the intention at the time of the break may be inferred from the circumstances”). Consequently, the State presented sufficient evidence to support Andrews’s conviction for first-degree burglary.

Although we affirm Andrews’ convictions, we agree that his sentence for malicious destruction of property should merge into his sentence for first-degree burglary. In *Marquardt v. State*, 164 Md. App. 95 (2005), we held that fourth-degree burglary and malicious destruction of property do not merge under the required evidence test or the rule of lenity. *Id.* at 152-53. But we merged the appellant’s convictions for those offenses under principles of fundamental fairness because the destruction of property in that case, the breaking of the interior and exterior doors of the apartments where the burglaries were committed, was “clearly incidental to the breaking and entering.” *Id.*

The State concedes that merger under the required evidence test and the rule of lenity need not be preserved at the trial court, but relies on *Pair v. State*, 202 Md. App.

617 (2011) – where we held that the failure to merge a sentence under the fundamental fairness doctrine does not result in an “illegal sentence” under Md. Rule 4–345(a) – to argue that Andrews’s failure to raise the issue of merger on the grounds of fundamental fairness in the trial court results in a waiver of this issue on appeal. However, after *Pair* was decided, this Court has reached the merits of a claim for merger under the fundamental fairness doctrine where the issue was not raised in the trial court, and we will follow that precedent in this case. *See Latray v. State*, 221 Md. App. 544, 555 (2015) (“[W]e shall review appellant’s arguments based on the rule of lenity and fundamental fairness despite his failure to raise them at sentencing.”).

Returning to the merits, the evidence in this case, as in *Marquardt*, established that the malicious destruction of the glass patio door of the victim’s house was “incidental to the breaking and entering” of that house. Accordingly, we vacate Andrews’s sentence for malicious destruction of property.

**SENTENCE FOR MALICIOUS
DESTRUCTION OF PROPERTY
VACATED. JUDGMENTS OF THE
CIRCUIT COURT FOR PRINCE
GEORGE’S COUNTY OTHERWISE
AFFIRMED. COSTS TO BE
DIVIDED EQUALLY BETWEEN
THE APPELLANT AND PRINCE
GEORGE’S COUNTY.**