Circuit Court for Wicomico County
Case No. C-22-CR-19-342

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 66

September Term, 2020

ERIC ALEXANDER FRAYNE

v.

STATE OF MARYLAND

Berger,
Leahy,
Eyler, James R.
(Senior Judge, Specially Assigned)

JJ.

Opinion by Leahy, J.

Filed: November 17, 2021

*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.

Eric Alexander Frayne ("Mr. Frayne" or "Appellant"), was convicted by a jury in the Circuit Court for Wicomico County on December 17, 2019, of one count of first-degree burglary, two counts of first-degree assault, one count of use of a firearm in committing a felony, and other related offenses. On February 18, 2020, Mr. Frayne was sentenced to a total of fifty years: twenty years for first-degree burglary; twenty-five years, to run consecutive, for first-degree assault; and an additional five years for the mandatory minimum related to the handgun offense. In a timely appeal, filed on March 18, 2020, Mr. Frayne raised the following questions for our review:

I. "Did the trial court abuse its discretion by allowing the admission of home surveillance video footage that was not properly authenticated?"

II. "Is the evidence insufficient to sustain the conviction for first-degree burglary?"

III. "Is the evidence insufficient to sustain the convictions for first-degree assault and use of a firearm in the commission of a felony?"

We hold that the trial court did not abuse its discretion in admitting the challenged surveillance videos. We also conclude that the evidence is sufficient to support Mr. Frayne's convictions for first-degree burglary, first-degree assault, and use of a firearm in the commission of a felony. Accordingly, we affirm the judgments of the circuit court.

BACKGROUND

Rather than a comprehensive review of the evidence presented, our summary of the trial record provides the necessary background—together with additional facts presented later in our discussion—for our analysis of the issues raised by Mr. Frayne.

Trial

At trial, the State's theory of the case was that on April 22, 2019, Mr. Frayne broke into the Spruce Street home of Billy and Eileen Jones, two retired Delmar residents.[1] Mr. Frayne had entered the home through an unlocked storm door, stole valuables including a "Snake Slayer" handgun, threatened Eileen with that firearm while demanding the combination to a safe on the premises, bludgeoned her with a beer stein, and then fled to the nearby Mason Dixon Sports Complex. Minutes later, Mr. Frayne was apprehended by the police and items stolen from the Jones residence were recovered on his person.

Mr. Frayne's defense was that Delmar police "rushed to judgment" by accusing him of these crimes merely because he was in the vicinity of where the crime occurred. Further, he argued that the State failed to prove beyond a reasonable doubt that he was *both* the intruder and the assailant.

Based on the evidence presented at trial, including home surveillance videos, it was undisputed that an intruder entered the Jones's residence while Billy and Eileen were outside in their yard. The intruder, left drawers and closets open, searched through the house, and stole a fake "look-alike" western-style handgun, a smaller "Snake Slayer" "Derringer-type gun that shoots 410 shotgun shells or .45 ammunition," a "survival knife," and various boxes of ammunition. During her testimony, Eileen explained that she left their front door open, with the paned-glass storm door shut, but unlocked.

[1] Three witnesses from the Jones family testified at trial. We will refer to each by his or her first name, for clarity, and mean no disrespect thereby.

About six months prior to the incident, Billy, a retired police officer, had installed three infrared motion-activated "RO Pro" cameras on the premises, setting them to record in 30-second intervals. One was positioned outside to show the side door into the house, one showed the front door, and a third showed inside a "catchall" or "pantry room" where Billy Jones had a locked gun safe. The front door camera was not operating on April 22, 2019, and the side door camera showed only Billy and Eileen using that entrance. But the camera marked "pantry" captured images of the intruder on a series of 30-second video clips. The videos, which were automatically time- and date-stamped in accordance with the settings Billy programmed when he set up the camera, show the intruder in the pantry between 1:12 and 1:29 p.m.

While entering and exiting the pantry, the intruder wore a plain black baseball cap with no markings, at times with his face uncovered and at other times with a dark hood and mask leaving only his eyes uncovered. He carried a backpack and a handgun that was consistent in size, shape, and appearance with the Snake Slayer firearm. A tattoo is visible on his hand.

At about 1:30 p.m., Eileen, unaware of the intruder, came into the house through the side door, fixed her lunch, then sat on the living room couch to eat it. She testified that, after repeatedly hearing noises from the kitchen, she called out, thinking her husband had come inside for his lunch.

The intruder, dressed in black and wearing a mask, approached Eileen from the direction of the pantry, carrying a gun and a heavy glass beer mug from her kitchen. Eileen related that he held the gun to her temple and repeatedly demanded the combination to the

safe. She explained that she did not know it and would have to ask her husband, who was outside. When the intruder demanded her purse and money, Eileen told him that she did not have either.

Eileen explained that the next thing she could recall was when she was regaining consciousness. At that point, the intruder was leaving through the front storm door, being careful not to let it slam shut. Eileen went outside and told her husband that she had been robbed and beaten. After she described what the intruder was wearing, Billy got into their van and began looking for the intruder, while calling 911 for police and medical assistance.

Billy testified that, based on where he had been sitting in the backyard, he "knew they didn't come out the front door and go to the right or straight." Turning left out of his driveway, toward "the park area next to" his house, Billy spotted a "subject" carrying a backpack and wearing clothes matching Eileen's description. As Billy was talking to a 911 dispatcher, the subject "bailed over . . . about a seven-foot fence." When he hit the ground on the other side, "he dropped something" and "turned around to look at [Billy], picked it up, and then ran into the brush." After describing the suspect and advising responding police officers "what happened," Billy returned to his house, then accompanied Eileen to the hospital.

Within sixteen minutes of dispatch, Delmar PFC Justin Smithhart responded to the Jones's home, where he encountered Eileen "covered in blood, the top of her head, her face, her shirt." After ensuring Eileen was no longer bleeding, he headed toward the Mason Dixon Sports Complex adjacent to the Jones residence. Officer Smithhart saw Mr. Frayne "wearing a hooded sweatshirt and light-colored jeans, a dark sweatshirt" standing between

two sheds. Officer Smithhart stopped his vehicle and asked Frayne to come forward, but instead, Mr. Frayne fled into a wooded area. After chasing Mr. Frayne down a fence line, Officer Smithhart apprehended him. Frayne was then arrested.

Along Mr. Frayne's flight path, Sergeant Michael Bond recovered the loaded and operable firearm stolen from the Jones residence and a backpack consistent with the one carried by the intruder shown in the pantry videos. The backpack contained, *inter alia*, a large "bowie knife," the "look-alike" gun and ammunition, all of which were identified as having been stolen from the Jones residence.

The same day, Billy Jones downloaded and reviewed footage from his home security cameras. At trial, he testified that approximately six months prior to the incident, he had equipped the home with a "RO Pro" video surveillance system. The system was motion activated and would record in 30-second clips once motion was detected. After these clips were recorded, Billy was able to view the recorded clips on an application on his cell phone. The "RO Pro" system, Billy explained, had a "night vision" feature which allowed them to "operate after dark if they detect motion." He testified that the date and time stamps on the videos are automatically programed, and that he believed them to be accurate. He also testified that, to the best of his knowledge, the system was operating properly on the date of the incident. Billy indicated that there was a camera in his "pantry" which he described as a "catchall room" where he kept his gun safe, extra food and a freezer. There were also two cameras set up outside, one in the front of the house and the other facing the side door. On the date of the incident, the camera facing the side door,

which was set up on the Jones's boat, was functional but the camera facing the front of the house was not operational.

Connie Jones, Billy and Eileen's daughter-in-law, also viewed the videos showing the intruder that day. According to Delmar Corporal Keith Heacook, after police unsuccessfully attempted to download the home surveillance videos from Billy's phone onto a thumb drive, Connie downloaded the videos and emailed them as a digital attachment, which was saved on the compact disc admitted into evidence as State's Exhibit 5.

As described at trial, the RO Pro surveillance video clips show Billy and Eileen using the side door to exit and enter their home. In addition, the pantry video clips show the intruder attempting to open the safe with keys that had been in the kitchen and were left on the floor. The intruder was carrying a small handgun consistent with the Snake Slayer and a backpack like the one recovered after Mr. Frayne fled. Billy testified that the weapon in the intruder's hand is the Snake Slayer firearm, not the look-alike gun, based on its size and "the over-and-under barrel." In addition, the intruder's hand tattoo was consistent with the tattoo on Mr. Frayne's hand that police photographed upon his arrest.

At trial, Eileen identified the intruder shown in the pantry videos as her assailant. Three Delmar Police officers involved in the case –Heacook, Smithhart, and Bond – immediately identified the intruder in the pantry videos as Mr. Frayne, whom, they explained, they each knew from previous encounters going back ten years. Connie Jones also recognized the intruder in the videos as Mr. Frayne. Billy testified that Mr. Frayne, whom he also knew from previous encounters, was the intruder in the pantry video footage

and the person he tracked in the adjacent park minutes after the intruder fled in that direction.

The day after the home invasion, Officer Smithhart found a black hat with no markings, like the one worn by the intruder in the pantry video, laying in the yard next to the Jones residence. That location is en route to where Billy spotted Mr. Frayne minutes after the intruder fled.

On April 27, Sergeant Bond, who had transported Mr. Frayne to the police station on April 22, discovered, in his new police cruiser, a black ski hood consistent with the one worn by the intruder in the pantry video. According to the sergeant, he recovered that article in the area Mr. Frayne was seated after learning how to raise the rear seat in his new vehicle. He asserted that he had not transported anyone else in that seat since the time he transported Mr. Frayne to the police station.

DISCUSSION

I. Authentication of Home Video

A. The Parties' Contentions

Appellant contends that "[t]he trial court abused its discretion by admitting into evidence surveillance video footage that was not properly authenticated." He further asserts that Maryland Rule 5-901(a) establishes that authentication is a "condition precedent to admissibility" of video evidence and that Maryland courts recognize two methods of authenticating video: (1) "pictorial testimony theory" and (2) "silent witness theory." Appellant claims neither of those methods were satisfied here. In Appellant's view, "all the State established was that [Billy] Jones had a surveillance system with three

cameras and that he had the ability to view the video footage using an application on his phone." Because "the State provided no information regarding the process of how the recordings from the system were reproduced as State's Exhibit 5[,]" Appellant argues that all of the surveillance videos should have been excluded. Lastly, Appellant avers that the error committed by the trial court was not harmless because "[t]he central issue in this case was identity[.]"

The State counters that "there was sufficient foundational evidence to permit a finding that the footage was what the State purported it to be[,]" which was "home surveillance footage depicting [Mr.] Frayne in the pantry room of the Jones's residence on April 22, 2019." The State concedes that the applicable law governing the authentication of evidence is Maryland Rule 5-901(a)[.]" The State argues "[h]ere, the home surveillance footage was adequately authenticated under either approach [to authentication photos or videos], or by a combination of both." Lastly, relying on *Jackson v. State,* 460 Md. 107, 117 (2018), the State contends that "Maryland has not adopted 'any rigid, fixed, foundational requirements' for admission of evidence under the 'silent witness' theory.'" In the alternative, the State argues that "even if the foundational proof had been inadequate at that point, any error would have been harmless because additional circumstantial proof of authenticity was subsequently admitted." For reasons that follow, we agree with the State.

B. Standards Governing Authentication of Video Evidence

Maryland Rule 5-901 provides in pertinent part:

> **(a) General Provision.** The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.
>
> **(b) Illustrations.** By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this Rule:
>
> (1) *Testimony of Witness With Knowledge.* Testimony of a witness with knowledge that the offered evidence is what it is claimed to be.
>
> . . . .
>
> (4) *Circumstantial Evidence.* Circumstantial evidence, such as appearance, contents, substance, internal patterns, location, or other distinctive characteristics, that the offered evidence is what it is claimed to be.
>
> . . . .
>
> (9) *Process or System.* Evidence describing a process or system used to produce the proffered exhibit or testimony and showing that the process or system produces an accurate result.

To authenticate evidence proffered under this rule, a "'[c]ourt need not find that the evidence is necessarily what the proponent claims, but only that there is sufficient evidence that the *jury* ultimately might do so.'" *Jackson v. State,* 460 Md. 107*,* 116 (2018)(quoting *United States v. Safavian*, 435 F. Supp. 2d 36, 38 (D.D.C. 2006) (emphasis in original)). Evidence is sufficient to support a factual finding if there is "sufficient evidence for a reasonable juror to find that the [evidence] is authentic by a preponderance of the evidence." *State v. Sample*, 468 Md. 560, 598 (2020) (citation omitted). We review a trial court's decision that video evidence is properly authenticated for abuse of discretion. *Darling v. State*, 232 Md. App. 430, 456, *cert. denied*, 454 Md. 655 (2017).

C. Analysis

"[F]or purposes of admissibility, a videotape is subject to the same authentication requirements as a photograph." *Jackson*, 460 Md. at 116. Because videos and photographs can be "easily manipulated," authentication is conducted "as a preliminary fact determination, requiring the presentation of evidence sufficient to show that the evidence sought to be admitted is genuine." *Washington v. State*, 406 Md. 642, 651-52 (2008).

In *Washington*, the Court of Appeals approved two methods for authenticating photos and videos. *Id.* at 652-53. Under the "pictorial testimony theory," videos "are admissible to illustrate testimony of a witness when that witness testifies from first-hand knowledge that the [video] fairly and accurately represents the scene or object it purports to depict as it existed at the relevant time." *Id*. at 652 (quotation marks and citation omitted). The "second, alternative method of authenticating [videos] does not require first-hand knowledge." *Id*. (quotation marks and citation omitted). Under "[t]he 'silent witness' theory of admissibility[,]" a video may be authenticated "as a 'mute' or 'silent' independent photographic witness because the photograph speaks with its own probative effect.[]" *Id*. (quotation marks and citation omitted).

Whereas "the pictorial testimony theory of authentication allows photographic evidence to be authenticated through the testimony of a witness with personal knowledge, . . . the silent witness method of authentication allows for authentication by the presentation of evidence describing a process or system that produces an accurate result." *Id.* at 652. Generally speaking, the foundational basis to authenticate a videotape under the silent witness method "may be established through testimony relative to 'the type of equipment

or camera used, its general reliability, the quality of the recorded product, the process by which it was focused, or the general reliability of the entire system.'" *Jackson*, 460 Md. at 117 (quoting *Washington*, 406 Md. at 653) (internal citations omitted).

There are no "rigid, fixed foundational requirements" for authenticating evidence under either the pictorial testimony or the silent witness method. *Jackson*, 460 Md. at 117 (quoting *Dep't of Pub. Safety & Corr. Servs. v. Cole*, 342 Md. 12, 26 (1996)). Instead, "[t]he facts and circumstances surrounding the making of the photographic evidence and its intended use at trial will vary greatly from case to case, and the trial judge must be given some discretion in determining what is an adequate foundation." *Cole*, 342 Md. at 26.

Here, we conclude that the State had established, through the evidence presented, a sufficient foundation to support the trial court's admission of the video footage under both methods of authentication established in *Washington*. 406 Md. at 652-53. With respect to the recording system, Billy Jones testified that he purchased and installed the RO Pro system, which he had been using for six months prior to the time of the incident that occurred on April 22, 2019. According to Billy, the camera is motion-activated, and records videos in thirty-second intervals. He also explained the video had an infrared feature which allowed the camera to capture images in the dark, albeit with color differences.

Recordings made by the system are digitally stored, so that they can be downloaded and viewed through an application installed on Billy's smartphone. Billy testified that the video system was working accurately that day. He viewed the recordings on the same day

of the home invasion, and believed the time and date stamps for the videos, which were automatically "set on there when it's programmed[,]" were accurate.

The videos recorded by the side door camera were consistent with photos of the Jones's residence and show both Billy and Eileen Jones. Appellant does not specifically contend that these videos required further authentication.

Billy testified that he recognized "everything" visible in the videos recorded by the pantry camera video, including the gun safe and "a bunch of keys" on the floor, which had been hanging in the kitchen. Referring to a still photo taken from one of those videos, Eileen testified that her assailant was the same person shown in the video.

Based on this evidence, the trial court did not abuse its discretion in admitting the challenged video evidence under the pictorial testimony method of authentication, the silent witness method, or a combination of both. The evidence elicited from Billy Jones about "the type of equipment . . . used" and the "general reliability of the entire system[,]" including the accurate time and date stamp and the accessibility of the recordings through his cell phone application, provided authenticating facts under the silent witness method. *See Washington*, 406 Md. at 653. And the testimony by Billy and Eileen about what is shown in the recordings supplied facts to authenticate the videos via the pictorial testimony method. Such testimony and exhibits were sufficient for a reasonable juror to find by a preponderance of the evidence that the videos are what the State proffered them to be – recordings showing an intruder in the pantry shortly before the assault on Eileen. We agree with the trial court and the State that the "weight ultimately to give to the footage was properly a matter for the jury to resolve as the finder of fact."

Appellant points out that Billy Jones did not personally download or transfer the video evidence onto the compact disc admitted at trial as State's Exhibit 5, and, quoting from our opinion in *Washington*, asserts that the State failed to present a "'technician' or someone possessing expertise or knowledge of the computerized system and how the data is transferred therefrom to explain whether the videotape was edited and, if so, how it was edited." *Washington v. State*, 179 Md. App. 32, 51-52, *rev'd on other grounds*, 406 Md. 642 (2008). In *Washington*, the Court of Appeals agreed with this Court that the State failed to "lay an adequate foundation to enable the [trial] court to find that the videotape and photographs reliably depicted the events leading up to the shooting and its aftermath." 406 Md. at 655.

We discern significant distinctions between the video evidence challenged by Appellant and the footage that was not properly authenticated in *Washington*. Whereas the challenged pantry videos were recorded in 30-second time- and date-stamped intervals by a single camera that was installed, reviewed, and identified by the authenticating witness, the *Washington* video evidence was footage recorded by eight different cameras in a commercial location, and then compiled and edited by an unknown person in an unknown manner. *Washington*, 406 Md. at 646. In *Washington*, there was no authenticating testimony by the individual who installed the cameras, much less testimony that the footage presented at trial was the same footage he reviewed when he first played it back on the recording device. *Id.* at 655. To the contrary, the *Washington* video was edited and compiled "by some unknown person" using "some unknown process" at an unstated time. *Id.*

Here, the pantry videos were recorded by the digital camera installed by Billy Jones, which makes footage easily and immediately accessible, both to be viewed and transferred, using an application on his phone. According to Billy, he viewed the recordings made by the two cameras from his cell phone on the same day. At trial, Billy testified that he did not "manipulate" or "change" the videos, and that they were the same ones he viewed on his phone on the day of the home invasion. Because the State established an adequate factual foundation for the jury to conclude that the Jones's videos accurately depicted what took place in that residence on April 22, 2019, the trial court did not abuse its discretion in admitting that evidence.

We also agree with the State that to the extent Appellant alleges preliminary error in admitting the videos, any such error was rendered harmless when "additional circumstantial proof of authenticity was subsequently admitted." Adding to the pictorial witness predicate for admitting the pantry videos, four more prosecution witnesses other than Billy and Eileen Jones—a Connie Jones, Corporal Heacook, PFC Smithhart, and Sergeant Bond—later testified, upon viewing the videos, that they recognized Appellant in the Jones's pantry. Furthermore, when the videos were played, Billy also testified that he recognized his "410 Derringer in his hand[,]" which was one of the guns stolen from his residence and recovered a short time later along Appellant's flight path.

Adding to the silent witness predicate for admitting the videos, Billy Jones and Corporal Heacook explained that after viewing the videos on the day of the home invasion, "a day or two later," Connie Jones "was at the office" when she emailed the videos from Billy's phone to the Delmar Police as an attachment. After receiving that email, "the

administrative staff was able to obtain" the footage and "put it into evidence." Delmar Police saved the video to the compact disc that was admitted into evidence.

Such circumstantial evidence provided additional and compelling authentication that the footage is what the State proffered it to be, *i.e.*, video evidence that Appellant was in the Jones residence on April 22, 2019.

II. Sufficiency Challenge – First-Degree Burglary

A. The Parties' Contentions

Appellant contends that the evidence is insufficient to support his conviction for first-degree burglary because the State "failed to prove the breaking element of first-degree burglary." In his view, the prosecution "offered no proof that [he] broke into the home through a specific point of entry[,]" but instead relied on a speculative "theory" that "he would've had to enter through the front door[.]'"

The State responds that "the evidence supported a rational inference that [Mr.] Frayne entered by opening the closed, but unlocked, storm door on the front entrance." We agree, by way of circumstantial evidence, that this is a rational inference that the jury could reached.

B. Standard of Review

The standard of review for sufficiency of the evidence is "whether, after viewing 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." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *accord Derr v. State*, 434 Md. 88, 129 (2013). We do not re-weigh evidence or make credibility determinations, but instead examine the record

for evidence that could convince the trier of fact of the accused's guilt beyond a reasonable doubt. *Smith v. State*, 415 Md. 174, 185 (2010). In doing so, we draw all reasonable inferences in favor of the prevailing party. *Abbott v. State*, 190 Md. App. 595, 616 (2010). The question is not "whether the evidence *should have* or *probably would have* persuaded the majority of fact finders but only whether it *possibly could have* persuaded *any* rational fact finder." *Fraidin v. State*, 85 Md. App. 231, 241 (1991); *accord Stanley v. State*, 248 Md. App. 539, 564-65 (2020). The home invasion provisions in Maryland Code (2002, 2012 Repl. Vol., 2018 Cum. Supp.) Criminal Law Article ("CR") § 6-202(a), provides that "[a] person may not break and enter the dwelling of another with the intent to commit theft." Under that statute, and at common law, breaking is an essential element of the crime.); *Jones v. State*, 2 Md. App. 356, 359 (1967); *Jones v. State,* 395 Md. 97, 118 (2006). A breaking may be either actual, as alleged in this case, or constructive. *Jones,* 2 Md. App. at 359-60.

"Actual breaking means unloosing, removing or displacing any covering or fastening of the premises. It may consist of lifting a latch, drawing a bolt, raising an unfastened window, turning a key or knob, [or] pushing open a door kept closed merely by its own weight." *Id.* (citation omitted). Conversely, "it is not a breaking to enter through an open door or window or if the one entering had authority to do so at that particular time." *Reagan v. State*, 2 Md. App. 262, 268 (1967).

To be sure, burglary convictions have been reversed on insufficiency grounds when the State has failed to present evidence of an actual breaking. *See Jones*, 395 Md. at 119; *Williams v. State*, 342 Md. 724, 735-36 (1996), *disapproved on other grounds*, *Wengert v.*

State, 364 Md. 76, 89 n.4 (2001); *Reagan*, 2 Md. App. at 268. For example, in *Jones* (unrelated to this case), appellant's conviction for second-degree burglary was predicated on an alleged breaking into a school and monetary theft from several nuns. *Jones*, 395 Md. at 101-02. Pointing to evidence that the appellant was found wandering the halls inside the school, the State maintained that he had entered through a kitchen window that was found open after he was apprehended. *Id.* at 119-21. Reversing, the Court of Appeals pointed out that "[t]o enter through an *open* door is not a breaking" and cited the lack of any evidence that the defendant had "opened any window or door in order to enter" the school. *Id.* at 119 (emphasis in original). "Although the State presented some evidence that the point of entry into the building was a kitchen window . . . there was no evidence presented that the window had been secured previously[.]" *Id.* Nor did the State present any "evidence connecting appellant to the window, or that there was even an actual breaking." *Id.*

In *Williams*, the Court of Appeals held that "testimony indicating that [the homeowner] was security conscious and that the home was equipped with a security system" was insufficient, by itself, "to prove a breaking beyond a reasonable doubt" based on an inference "that this type of person would not leave his door open for a stranger to walk in off the street," so that the accused must have entered the home by "opening a door, threatening the victims, or obtaining entry by deceit." 342 Md. at 735 Likewise, in *Reagan v. State*, , a man entered his apartment to find three strangers who claimed be repairmen. 6 Md. App. 477, 478-79 (1969). This Court reversed the burglary convictions despite evidence that some points of entry had been locked, because there was "no testimony that the apartment had been 'secured' or that other doors and windows . . . had been locked or

even closed," and no "evidence of physical tampering with any part of the building." *Id.* at 479. Our predecessors held that "where there is no evidence of tampering or no evidence showing directly or indirectly that the property was secured the evidence is not sufficient to show a breaking." *Id.* at 480.

Over the years since the decision in *Williams,* this Court consistently has held that a simple "turning of a key or knob" may be an actual breaking when it amounts to trespass. *Jones*, 2 Md. App. at 360; *Holland v. State*, 154 Md. App. 351, 367 (2003). Consequently, "a breaking may occur by opening a closed but unlocked door" without consent from the occupant. *Holland*, 154 Md. App. at 367; *cf. Hobby v. State*, 436 Md. 526, 558 (2014) (evidence that defendant used keys and a garage door opener, obtained without the occupant's consent, was sufficient to establish actual breaking for first-degree burglary).

Returning to the case before us, it was undisputed that Appellant did not have permission to enter the Jones residence. Photos admitted into evidence confirmed Eileen's testimony that the house has a front door and a side door. There was no evidence that any windows in the house were open, let alone open wide enough for Appellant to enter. Eileen testified that when she exited out of the side door to talk with Billy as he was working on their boat, she did not lock the front door like she "normally" does. As she regained consciousness after being bludgeoned, Eileen saw that "[t]he wooden door was open, but the storm door was closed" and her assailant was leaving through that door. She noted that her assailant held onto the door to make sure that it closed quietly.

Based on this evidence, jurors could conclude that Appellant did not enter through the side door because the Joneses would have seen him, or through a window because none

were open. Eileen's testimony that the front door was unlocked and that she saw the assailant leave through the closed storm door supported an inference that door was closed when he entered. We agree with the State that "[b]y process of elimination, a reasonable juror could rationally infer that [Mr.] Frayne's point of entry was the unlocked storm door on the front entrance of the home, and because that door was closed, the act of opening it was sufficient to constitute a 'breaking.'"

III. Sufficiency Challenges – First-Degree Assault and Use of Firearm

Appellant challenges his convictions for first-degree assault and use of a firearm in committing a felony. He contends that the State "failed to prove an intent to cause or attempt to cause serious physical injury or that an assault was committed with a firearm" as required under CR §4-202. As a sub-contention, Appellant also challenges his conviction under CR § 4-204(b), prohibiting the use of a firearm in committing "any felony, whether the firearm is operable or inoperable at the time of the crime." Appellant argues that, because Eileen Jones testified that she believed she was assaulted with a "fake' gun, the State failed to prove she was assaulted with a firearm, statutorily defined to include a "handgun," "whether loaded or unloaded." CR § 4-204(a)(2). He argues that "[i]n this case, where both a fake gun and a real gun were taken and Ms. Jones believed she was assaulted with a 'fake' gun, the evidence is insufficient to prove, beyond a reasonable doubt, an assault with a firearm." Alternatively, he continues, "[t]he State failed to prove that [he] attempted to cause or intended to cause serious physical injury."

A. Analysis

i. CR 3-202- Assault in the First Degree

Section 3-202 of the Criminal Law Article[2] establishes two alternative modalities of first-degree assault, providing that a person "may not intentionally cause or attempt to cause serious physical injury to another" and "may not commit an assault with a firearm[.]" The evidence supports a finding that Appellant intentionally inflicted serious physical injury when he struck Eileen Jones "more than one time."[3] "Serious physical injury" is statutorily defined to mean, in relevant part, "physical injury" that "creates a substantial risk of death" or "causes permanent . . . loss . . . of the function of any bodily member or organ[.]"[4] CL § 3-201(d)(1)-(2). Eileen testified that Appellant "shoved a gun up the side of [her] head." Appellant then stuck Eileen in the head after she told him that she did not

[2] At the time of Appellant's trial, CR § 4-202 provided the alternative modalities of first-degree assault under subsection 4-202(a). The statute was amended in 2020, 2020 Md. Laws ch. 120 (S.B.212), to add a definition of "strangling" under subsection (a). The modalities of first-degree assault were recodified under 4-202(b) and amended to include intentional strangling as a form of first-degree assault under CR § 4-202(b)(3). Accordingly, all references to the Criminal Law Statute in this opinion are from 2002, 2012 replacement volume and 2018 cumulative supplement.

[3] Eileen testified that, based on the stitches she received, she was hit in the head more than one time.

[4] In its entirety, CR 3-201(d) states:

> (d) "Serious physical injury' means physical injury that:
> (1) creates a substantial risk of death; or
> (2) causes permanent or protracted serious:
> (i) disfigurement;
> (ii) loss of the function of any bodily member or organ; or
> (iii) impairment of the function of any bodily or organ.

know the combination to the safe and did not have any money. The police testified that they found a "big solid beer stein[,]" with a smudge of blood on it lying on the floor where Eileen was sitting, allowing the jury to conclude that it was the instrument Appellant used to bludgeon Eileen in one of the most vulnerable areas of the body – her head.

Ms. Jones, who had survived two strokes and was on blood thinner, was knocked unconscious and bled profusely. She required emergency medical treatment at the scene and was transported by ambulance to the hospital. Photos of her blunt force injuries were admitted into evidence. Doctors used surgical staples to close multiple scalp wounds extending over a significant area of her head. She also had severe hand injuries consistent with attempts to defend herself. Her left hand had five broken bones and required two surgeries, but, despite these procedures, her injuries resulted in a permanent loss of motion.

Collectively, this evidence supports findings that Appellant intentionally inflicted injuries that created a substantial risk of death and/or caused permanent injury to her hand. Indeed, that is what the State argued to the jury in closing. Consequently, there is sufficient evidence to convict Appellant of the serious physical injury modality of first-degree assault.

The evidence also supports the second conviction under the firearm modality of first-degree assault. For purposes of this offense, a firearm includes a "handgun" as that term is defined in § 4-201, which provides that a handgun "means a pistol . . . or other firearm capable of being concealed on the person." CR § 4-201(c)(1).

Here, the evidence was sufficient to establish that Appellant stole both a look-alike gun that is not a real firearm and a Snake Slayer that is an operable firearm. The State

argued that Appellant used the Snake Slayer to assault Eileen Jones. Her description of the gun was limited to noting that it was "silver-like" and "chrome," because she only saw it briefly as the assailant approached and then peripherally as he held it to her head. Both the look-alike and the Snake Slayer could fit that description. Even though Eileen testified that when she saw the assailant approaching, her first thought was that he had "a fake gun." However, she also testified that she was "petrified" and explained that she saw "[o]nly the barrel, because I kind of cut my eye sideways 'cause I didn't know what to do, I just figured I was gonna be shot."

The evidence demonstrated that two guns were taken from the residence— a silver 410 Derringer "Snake Slayer" handgun and a fake "cowboy-style" handgun. The pantry videos show Appellant wearing a backpack and holding a handgun. Billy Jones testified the videos showed Appellant with "the 410 Derringer in his hand." Later, when both of those weapons were recovered along Appellant's flight path, the Snake Slayer was found on the ground, whereas the fake handgun was inside the backpack with items stolen from the Jones residence.

Based on this evidence, showing Frayne holding the Snake Slayer in his hand shortly before the assault and then discarding it shortly after the assault, it was reasonable for the jury to infer that Appellant placed the look-alike firearm into his backpack along with the other items stolen, and then used the Snake Slayer to assault Eileen Jones. Consequently, we conclude that the evidence presented at trial was sufficient to support Appellant's first degree assault convictions predicated on using a firearm in committing that felony.

ii. CR § 4-204(b)-Use of Handgun in Commission of Crime

Appellant's sufficiency challenge to his conviction under CR §4-204(b) fails for the same reasons as his challenge to his convictions under CR §3-202. As set out above, there was evidence presented at trial that would allow a jury to infer that Appellant used a firearm in the commission of the assault. A "firearm" as defined under CR § 4-204(a)(2) includes, among other things, a "handgun," "starter gun, or any other firearm, whether loaded or unloaded." Billy testified that the 410 Derringer taken from his house on the day of the incident shot "410 shotgun shells or .45 ammunition" and that there were "410 shells with" the firearm. Therefore, we conclude that the 410 Derringer qualified as a "firearm" under § 4-204(a)(2) and the evidence, as set out above, was sufficient for a jury to conclude that Appellant used this firearm in the commission of the assault of Eileen Jones.

JUDGMENTS OF THE CIRCUIT COURT FOR WICOMICO COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANT.