Circuit Court for Worcester County
Case No. 13-K-16-482

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 78

September Term, 2017

BRENDEN BAKER

v.

STATE

Friedman,
Beachley,
Moylan, Charles E., Jr.
(Retired, Specially Assigned),

JJ.

Opinion by Friedman, J.

Filed: February 15, 2018

After a jury trial in the Circuit Court for Worcester County, Appellant, Brenden Baker, was convicted of first-degree burglary and theft of property with a value of at least $1,000 but less than $10,000. The trial court sentenced Baker to 20 years in prison for the burglary conviction, and to 10 years in prison for the theft conviction, with the sentences to run concurrently.

At trial, the key question was whether Bill Scott paid Ashley Rogers for her services as a prostitute in cash or in goods from the scene of their rendezvous. In the first scenario, Rogers and her boyfriend, Baker, later returned to the scene and stole items; in the second scenario, Rogers and Baker had a right to the goods and Scott was the thief. By their verdict, the jury apparently believed that Baker and Rogers had returned and stolen the items, and convicted Baker of first-degree burglary and theft of property with a value between $1,000 and $10,000.[1] At issue in this appeal is the sufficiency of the evidence to sustain Baker's convictions. For the reasons that follow, we reverse the trial court's conviction of first-degree burglary and affirm the conviction of theft.

FACTS AND LEGAL PROCEEDINGS

In the summer of 2016, Dawn and Lee O'Hara and their five children took a vacation to Myrtle Beach, South Carolina. The O'Haras asked their neighbors, Elizabeth and Bill Scott, to watch their house and attend to their dog while they were away. When the O'Haras returned from vacation, they discovered that goods had been stolen from their house,

[1] As we will discuss in footnote 4, however, logically there was a third possible scenario: that Rogers returned alone to the O'Haras' home and took the goods and gave them to Baker to pawn.

including two Xbox game consoles, Xbox controllers and games, a piggy bank, and an old wallet. Mrs. O'Hara later testified that altogether the items were worth in excess of $1,000. The O'Haras reported the thefts to the Worcester County police. As the Xboxes were new, Mrs. O'Hara was able to give their serial numbers to the police. A pair of Xboxes, with serial numbers matching those reported stolen by the O'Haras, were pawned at a pawnshop in Landover Hills. The pawnshop records revealed that the Xboxes were pawned by Baker. Baker was subsequently arrested and tried for burglary and theft.

At trial, the O'Haras' neighbor, Bill Scott, testified about the circumstances that led to the theft. Scott testified that while the O'Haras were on vacation, he and his wife took turns walking the O'Haras' dog. Critically for our purposes, Scott testified that he did not have a key to the O'Haras' house because the O'Haras always left it unlocked, even while they were on vacation.

Scott testified that he had been engaged in an email and text correspondence with a woman named Ashley Rogers, who worked as a prostitute. They negotiated a fee of $100 for her services. He withdrew $100 from an ATM and picked Rogers up at an agreed upon spot. Rogers took the $100, and Scott brought her to the O'Haras' house. Scott testified that he left Rogers alone briefly while he let the dog out and cleaned up a mess it had made in one of the rooms. Scott and Rogers had sexual contact, and he drove her back to the spot where he had picked her up.

Rogers told a slightly different story. She testified that she was vacationing in Ocean City with her boyfriend, Baker, when she arranged to meet Scott. According to Rogers, Scott refused to pay her in cash for her sexual services, but instead offered her the Xboxes

and whatever else she wanted from the O'Haras' house. She took the Xboxes and other goods, and then she and Baker pawned them in Landover Hills.

At the conclusion of the State's case-in-chief, Baker moved for judgment of acquittal, arguing that there was no evidence that he had broken into the O'Haras' home. The trial court denied the motion, stating:

> Well, of course the rule is also that the jury and trier of fact, and looking at this point in the light most favorable to the State, can believe all, part, or none of the testimony of any witness. So, I mean, there is an explanation from Ms. Rogers. On the other hand, that explanation is contradicted by the testimony that Mr. Scott gave. I think cherry-picking as one does at this point in looking at it in the light most favorable to the State, I think could—a reasonable mind could conclude beyond a reasonable doubt that, first, that the entry was through an unlocked door. That doesn't—the fact that it's unlocked doesn't necessarily mean that it's wide open. And I think the law is clear that breaking can consist merely of opening an unlocked door or pushing open a door which is ajar. So the fact that there are contradictory possible explanations doesn't overcome the fact that in the light most favorable to the State I think a reasonable mind could conclude based on the inferences which [the prosecutor] argues that the Defendant is guilty beyond a reasonable doubt as to the burglary charge as well as to the theft charge … so I deny the motion as to both counts.

Baker elected not to testify and rested without putting on a defense. As noted above, the jury convicted Baker of burglary and theft of goods valued between $1,000 and $10,000. In this Court, Baker challenges the sufficiency of the evidence, *first*, regarding the "breaking" element of the burglary conviction, and *second*, regarding the value of the goods for the theft conviction.

DISCUSSION

The standard for appellate review of evidentiary sufficiency 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. That standard applies to all criminal cases, regardless of whether the conviction rests upon direct evidence, a mixture of direct and circumstantial, or circumstantial evidence alone. Where it is reasonable for a trier of fact to make an inference, we must let them do so, as the question is not whether the [trier of fact] could have made other inferences from the evidence or even refused to draw any inference, but whether the inference it did make was supported by the evidence. This is because weighing the credibility of witnesses and resolving conflicts in the evidence are matters entrusted to the sound discretion of the trier of fact. Thus, the limited question before an appellate court 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.

Darling v. State, 232 Md. App. 430, 465, *cert. denied*, 454 Md. 655 (2017) (cleaned up).[2]

I. SUFFICIENCY OF THE EVIDENCE OF "BREAKING"

Under Maryland law, a person commits burglary in the first degree by breaking and entering the dwelling of another to commit theft or a crime of violence. Md. Code Ann., Crim. Law ("CR") § 6-202 (2017). Each of these elements, including most importantly

[2] "Cleaned up" is a new parenthetical intended to simplify quotations from legal sources. *See* Jack Metzler, *Cleaning Up Quotations*, J. App. Prac. & Process (forthcoming 2018), https://perma.cc/JZR7-P85A. Use of (cleaned up) signals that to improve readability but without altering the substance of the quotation, the current author has removed extraneous, non-substantive clutter such as brackets, quotation marks, ellipses, footnote signals, internal citations or made un-bracketed changes to capitalization.

here, "breaking," retain its judicially-determined common law meaning. CR §6-201(b). It doesn't take much under the Maryland common law to constitute a breaking, merely "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." *Jones v. St*ate, 395 Md. 97, 118-19 (2006) (*Jones I*); *Holland v. State*, 154 Md. App. 351, 367 (2003).[3] As we said in *Himmel v. State*, "it is proper to sustain convictions for 'breaking' where there has been testimony indicating that all doors and windows were closed at the time the last lawful occupant left the building." 9 Md. App. 395, 401 (1970). On the other hand, "entry through a door or window [that is] already open is not [a breaking, because] leaving a door or window open shows such negligence as to forfeit all claims to the peculiar protection extended to dwelling houses." *Jones v. State*, 2 Md. App. 356, 360 (1967) (*Jones II*). Moreover, while possession of stolen goods may be sufficient to support a theft conviction, CR §7-104(c), it is insufficient without more to support a conviction for burglary. *Reagan v. State*, 6 Md. App. 477, 479-80 (1969) (*Reagan I*); *Reagan v. State*, 2 Md. App. 262, 268 (1967) (*Reagan II*).

Here, there was no evidence whatsoever to suggest that Baker committed a breaking. There was no evidence of physical tampering or even any testimony that the last lawful occupant had closed the doors. *Himmel*, 9 Md. App. at 401. Rather, the State invites

[3] We are considering here only "actual" breakings. Maryland law also contemplates the existence of "constructive" breakings, which include breakings "involv[ing] entry gained by artifice, fraud, conspiracy[,] or threat." *Jones I*, 395 Md. at 119.

us to speculate, for example, that it was unlikely that the O'Haras would have left their home open to the elements when they went on vacation; that it was unlikely that Scott or his wife would leave the O'Haras' house open after walking the dog; that it was unlikely that the dog would have stayed in a house with the doors open. These suggestions miss the point. It was the State's burden to prove, beyond a reasonable doubt, that Baker broke into the house.[4] And, it is insufficient, as a matter of law, for the State to sustain a burglary conviction merely by virtue of Baker's subsequent possession of the stolen Xboxes. *See Reagan I*, 6 Md. App. at 477; *Reagan II*, 2 Md. App. at 268.

II. SUFFICIENCY OF THE EVIDENCE OF VALUE IN EXCESS OF $1,000

Baker's second challenge is that the State failed to prove that the value of the stolen goods exceeded $1,000. We reject this argument because Baker failed to preserve it for our review. Baker concedes that he did not mention it as part of his motion for judgment of acquittal. A criminal defendant who moves for judgment of acquittal is required by Maryland Rule 4-324(a) to "'state with particularity all reasons why the motion should be granted[,]' and is not entitled to appellate review of reasons stated for the first time on

[4] As we discussed in the introduction, at trial the State's theory involved Scott paying Rogers in cash and then Rogers returning to the O'Haras' house with Baker to steal the Xboxes and other goods. The defense theory, advanced through Rogers' testimony, was that Scott paid Rogers with the Xboxes and Baker was never in the O'Haras' house at all. Once the jury was shown Scott's ATM receipt and other evidence that Rogers was paid in cash, it may have lead the jury to reject Roger's testimony and the defense version of events. But that didn't mean that the jury had to accept the State's version either. Rather, we note a third alternative consistent with the testimony: that Scott paid Rogers in cash and Rogers later returned to the O'Haras' house alone to steal the Xboxes. We aren't saying that's what happened or even that the jury was required to believe that's what happened, just that it is a third alternative that is consistent with the testimony.

appeal." *Starr v. State*, 405 Md. 293, 302 (2008) (quoting *State v. Lyles*, 308 Md. 129, 135-36 (1986)).

Even if Baker had preserved the argument, it would fail. As noted above, Ms. O'Hara testified that the Xboxes and other goods were worth more than $1,000. "An owner of goods is presumptively qualified to provide testimony regarding the value of his goods." *Pitt v. State*, 152 Md. App. 442, 465 (2003). And while we have noted that electronics depreciate rapidly, *Champagne v. State*, 199 Md. App. 671, 676 (2011), there was testimony here that the Xboxes were brand new, and, thus, had not necessarily lost value.

JUDGMENT OF THE CIRCUIT COURT FOR WORCESTER COUNTY ON THE CONVICTION OF FIRST-DEGREE BURGLARY REVERSED; JUDGMENT OTHERWISE AFFIRMED. COSTS TO BE PAID ½ BY APPELLANT AND ½ BY WORCESTER COUNTY.