

Circuit Court for Somerset County
Case No. C-19-CR-17-000034

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 1491

September Term, 2017

JIMMY LEE CULLEN

v.

STATE OF MARYLAND

Woodward, C.J.,
Graeff,
Moylan, Charles E., Jr.
(Senior Judge, Specially Assigned),

JJ.

PER CURIAM

Filed: November 21, 2018

*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.

Following a jury trial, in the Circuit Court for Somerset County, Jimmy Lee Cullen, appellant, was convicted of third-degree burglary and fourth-degree burglary. Cullen’s sole claim on appeal is that there was insufficient evidence to sustain his convictions. For the reasons that follow, we affirm.

In reviewing the sufficiency of the evidence, we ask “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.” *Ross v. State*, 232 Md. App. 72, 81 (2017) (citation omitted). Furthermore, we “view[] not just the facts, but ‘all rational inferences that arise from the evidence,’ in the light most favorable to the” State. *Smith v. State*, 232 Md. App. 583, 594 (2017) (quoting *Abbott v. State*, 190 Md. App. 595, 616 (2010)). In this analysis, “[w]e give ‘due regard to the [fact-finder’s] findings of facts, its resolution of conflicting evidence, and, significantly, its opportunity to observe and assess the credibility of witnesses.’” *Potts v. State*, 231 Md. App. 398, 415 (2016) (quoting *Harrison v. State*, 382 Md. 477, 487-88 (2004)). Whether a conviction is based on direct evidence, circumstantial evidence, or both does not affect our review. *Id.*

With respect to the charge of third-degree burglary, Cullen contends that there was insufficient evidence to sustain his conviction because the State failed to prove that: (1) he committed a breaking to gain entry into the victim’s residence and (2) he entered the residence with the specific intent to commit a theft therein. However, the jury could reasonably find that Cullen committed an actual breaking based on the evidence that the victim locked her back door prior to leaving her home and that, when she returned, that door was open and “[p]art of the [door] frame” had been “broken.” See *Jones v. State*, 395

Md. 97, 118-19 (2006) (noting that a breaking only requires proof of an “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”). Moreover, the jury could find that Cullen intended to commit a theft when he entered the residence based on the evidence that: (1) he entered the victim’s house by breaking the door frame; (2) when the victim returned to her house and began looking around, he texted her and asked her to pick him up at another location;¹ (3) he was later discovered locked inside one the victim’s bedrooms; (4) that same bedroom had been “ransacked” and the dresser drawers had been pulled out; (5) several items were later discovered missing from that room; (6) he left the house after the victim’s son called the police; and (7) when the police apprehended him the next day, he was hiding under his mother’s bed. *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”).

Finally, Cullen contends that the evidence was insufficient to prove a fourth-degree burglary because the State failed to prove that he had committed a breaking. He concedes that this claim is not preserved because his defense counsel did not make a motion for judgment of acquittal with respect to that charge. *See Peters v. State*, 224 Md. App. 306, 354 (2015) (“[R]eview of a claim of insufficiency is available only for the reasons given by [the defendant] in his motion for judgment of acquittal.” (citation omitted)). Therefore,

¹ The victim knew Cullen because he was the cousin of her ex-husband.

Cullen asks us to conclude that his defense counsel’s failure to preserve the issue constituted ineffective assistance of counsel.

However, “[p]ost-conviction proceedings are preferred with respect to ineffective assistance of counsel claims because the trial record rarely reveals why counsel . . . omitted to act, and such proceedings allow for fact-finding and the introduction of testimony and evidence directly related to the allegations of the counsel’s ineffectiveness.” *Mosley v. State*, 378 Md. 548, 560 (2003). Consequently, we decline to review this claim on direct appeal. But, even if the record before us was adequate to permit this Court to review Cullen’s claim of ineffective assistance of counsel, which it is not, he would not be entitled to relief. “The failure to preserve or raise an issue that is without merit does not constitute ineffective assistance of counsel.” *Gross v. State*, 371 Md. 334, 350 (2002). And for the reasons previously set forth, Cullen’s claim that the State failed to prove that he committed a breaking is without merit.

**JUDGMENTS OF THE CIRCUIT
COURT FOR SOMERSET COUNTY
AFFIRMED. COSTS TO BE PAID
BY APPELLANT.**