UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2113

September Term, 2015

MICHAEL McCARTHY

v.

STATE OF MARYLAND

Krauser, C. J.,
Nazarian,
Moylan, Charles E., Jr.
(Retired, Specially Assigned),

JJ.

PER CURIAM

Filed: July 22, 2016

Convicted of first-degree murder and wearing or carrying a dangerous weapon openly with intent to injure, in the Circuit Court for Baltimore City, Michael McCarthy, appellant, contends on appeal (1) that the evidence was not sufficient to support his first-degree murder conviction because the State failed to prove that he acted with premeditation and (2) that his trial counsel was ineffective by not moving for a judgment of acquittal on the charge of wearing or carrying a dangerous weapon openly with intent to injure, thereby failing to preserve for appellate review a sufficiency of the evidence claim with respect to that charge. For the foregoing reasons, we affirm appellant's convictions.

"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, *cert. denied*, 415 Md. 42 (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). We "consider circumstantial evidence as well as direct evidence" and note that "circumstantial evidence alone is 'sufficient to support a conviction, provided the circumstances support rational inferences from which the trier of fact could be convinced beyond a reasonable doubt of the guilt of the accused.'" *Painter, supra*, 157 Md. App. at 11 (citation omitted).

Viewing the evidence "in the light most favorable to the prosecution," as we are required to do, we conclude the State presented sufficient evidence to support appellant's first-degree murder conviction. The jury reasonably found that McCarthy acted with premeditation based on the evidence that (1) shortly before the murder, the victim argued with McCarthy, told him to leave her apartment, and called 911; (2) McCarthy, according to his own testimony, then engaged in a protracted altercation with the victim during which he was angry and kept "going at" the victim with a knife even after she no longer had a weapon; and (3) the victim suffered at least eight separate knife wounds including a deep cut to the front of her neck, two stab wounds to her chest, and defensive wounds to her arm and hand. *See Pinkney v. State*, 151 Md. App. 311, 339-40 (2003) (finding sufficient evidence of premeditation where the victim, an infant child, suffered four fatal blows to his head); *Hunt v. State,* 345 Md. 122, 161 (1997) (finding that the time taken by a defendant between the first and second shots of a single-action gun was sufficient to demonstrate premeditation); *Hounshell v. State*, 61 Md. App. 364, 375 (1986) (noting that "the brutality of the murder act may, in and of itself, provide sufficient evidence to convict for first degree murder" (citation omitted)). Moreover, to the extent McCarthy contends that other evidence adduced at his trial supports a conclusion that he did not act with premeditation, "our task is not to determine whether there were other permissible inferences that the jury could have made" but instead to "ensure that the evidence supports a finding that the elements of the crime existed beyond a reasonable doubt." *Pinkney*, 151 Md.App. at 338-39.

Although McCarthy also contends that the evidence was not sufficient to support his conviction for wearing or carrying a dangerous weapon openly with intent to injure, he concedes that this issue is not preserved for appellate review as his trial counsel failed to make a motion for judgment of acquittal with respect to that charge. *See Starr v. State*, 405 Md. 293, 303 (2008) ("In a jury trial, the only way to raise and to preserve for appellate review the issue of the legal sufficiency of the evidence is to move for a judgment of acquittal on that ground." (citation omitted)). He therefore, relying on *Testerman v. State*, 170 Md. App. 324 (2006), asks us to find that he received ineffective assistance of trial counsel. The instant case is distinguishable from *Testerman*, however, because the record regarding trial counsel's strategy and legal theories is not sufficiently developed to permit a fair evaluation of appellant's claim that defense counsel was ineffective. Accordingly, *Testerman* does not require us to consider McCarthy's claim of ineffective assistance of trial counsel on direct appeal and we decline to do so. It may, however, be presented at "a post-conviction proceeding pursuant to the Maryland Uniform Post Conviction Procedure Act, Maryland Code, § 7–102 of the Criminal Procedure Article (2001)[.]" *Mosley v. State*, 378 Md. 548, 558 (2003) (noting that a post-conviction proceeding "is the most appropriate way to raise [a] claim of ineffective assistance of counsel").

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