Circuit Court for Prince George's County
Case No. CJ170717

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2330

September Term, 2017

JAVON MARQUIES THOMAS

v.

STATE OF MARYLAND

Fader, C.J.,
Leahy,
Moylan, Charles E., Jr.
(Senior Judge, Specially Assigned),

JJ.

PER CURIAM

Filed: December 28, 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 Prince George's County, Javon Thomas, appellant, was convicted of attempted fourth-degree burglary. He raises two issues on appeal: (1) whether there was sufficient evidence to support his conviction, and (2) whether the trial court abused its discretion by not giving the American Bar Association-approved *Allen* charge to the jury. For the reasons that follow, we affirm.

Thomas first contends that there was insufficient evidence to support his conviction for attempted fourth-degree burglary because, he claims, the State failed to prove that he intended to commit that offense or that he took a substantial step toward the commission of that offense. *See Spencer v. State*, 450 Md. 530, 567 (2016) ("[T]he crime of attempt consists of a specific intent to commit a particular offense coupled with some overt act in furtherance of the intent that goes beyond mere preparation." (citation omitted)). "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 s*hould 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) (citation omitted) (emphasis in original). 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*, 191 Md. App. at 314 (citation omitted).

Viewing "the evidence in the light most favorable to the State," as we are required to do, we conclude that the State presented sufficient evidence to support Thomas's

conviction. The testimony at trial established that Thomas twice rang the doorbell to the victim's home and, when she did not answer, he went into her backyard and scaled an eleven-foot high deck that was attached to the second-story of her home.[1] When the victim observed Thomas on her deck near the sliding glass door leading into her home, she yelled at him to "get out of here." At that point, Thomas jumped over the railing and fled the premises. Based on this evidence, the jury could reasonably find that Thomas rang the doorbell to determine if anyone was home and then climbed her back deck to enter the home undetected. His intent to enter the home could further be inferred from his immediate flight upon seeing the victim and his lack of explanation for being at the residence. Moreover, the jury could also find that Thomas's actions in reconnoitering the premises and then scaling the deck to get to the rear entrance were both substantial steps towards committing the crime. Consequently, we are persuaded that there was sufficient evidence to sustain Thomas's conviction.

Thomas also asserts that, after receiving a jury note indicating "what each respective juror's vote" was at that point during the deliberations, the trial court abused its discretion by not giving the jury the ABA-approved *Allen* charge. However, Thomas did not request that the court give the ABA-approved *Allen* charge, did not object to the court's failure to provide it, and did not object to the written response that the court ultimately sent back to the jury. Consequently, Thomas's claim is not preserved for appellate review. *See*

[1] The victim testified that there were no stairs leading to the deck from the outside; rather, the deck was only accessible from her kitchen, which was located on the second-floor of the home.

Maryland Rule 4-325(e) ("No party may assign as error [on appeal] the giving or the failure to give an instruction unless the party objects on the record promptly after the court instructs the jury, stating distinctly the matter to which the party objects and the grounds of the objection.").[2]

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.

[2] We note that Rule 4-325(e) allows this Court, "on its own initiative or on the suggestion of a party . . . [to] take cognizance of any plain error in the instructions [to the jury], material to the rights of the defendant, despite a failure to object." Thomas does not ask us to recognize plain error in this case and we decline to exercise our discretion to engage in plain error review.