UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2429

September Term, 2014

FRANK MILTON JENKINS, JR.

v.

STATE OF MARYLAND

Meredith,
Hotten,
Nazarian,

JJ.

Opinion by Meredith, J.

Filed: October 23, 2015

At the conclusion of a trial in the Circuit Court for Wicomico County, a jury found Frank Jenkins, appellant, guilty of one count of second degree burglary, one count of fourth degree burglary, two counts of malicious destruction of property, one count of theft of property worth between $1,000 and $10,000, and one count of theft of property worth less than $1,000. For sentencing purposes, the convictions for theft and malicious destruction of property merged with the burglary convictions. The trial court sentenced appellant to a term of imprisonment of fifteen years, with all but four years suspended, for the second degree burglary conviction; and the court sentenced appellant to a consecutive term of three years' imprisonment for the fourth degree burglary conviction, all followed by three years of probation. The court also ordered appellant to pay $3,241.00 in restitution to one of the victims. This timely appeal followed.

QUESTIONS PRESENTED

Appellant presents two questions for our review:

> 1. Did the State fail to present sufficient evidence to sustain the convictions?
>
> 2. Did the lower court commit plain error when it ordered Mr. Jenkins to pay $3,241 in restitution?

For the reasons stated below, we answer both questions in the negative and affirm the judgments of the circuit court.

FACTS AND PROCEDURAL HISTORY

On the morning of January 7, 2014, Catherine Locke, an employee of Water Tower Self Storage in Salisbury, Maryland, contacted police to report a robbery.[1] She observed that

[1] We note that Ms. Locke's name is alternatively spelled "Lock" in the record. We will observe the former spelling of her name in this opinion.

several storage units were damaged and that someone had cut padlocks and overlocks on the individual units.[2] She testified that the unit doors were "all mangled," and the door for the unit rented to Terry Brandenburg was off its hinges. Ms. Locke stated that she had not noticed this damage on January 6 when she left work around 4:30 or 5:00 p.m.

Officer John Stuart of the Salisbury Police Department responded to the scene shortly after Ms. Locke's call. Officer Stuart and Ms. Locke observed that there was damage to ten of the storage units. At the time of the break-in, Ms. Locke stated that she did not know what, if any, property had been stolen because she did not know the contents of the individual units. Nevertheless, Ms. Locke provided two names to Officer Stuart as possible perpetrators, one of whom was appellant.[3]

At trial, Ms. Locke testified that she suspected appellant may have committed the acts because she had previously encountered him in a part of the storage area where he was not supposed to be. Ms. Locke explained that, approximately two or three weeks before the robbery, during an inspection of the property, she had attempted to open the door of a storage unit she believed to be vacant, but the door would not open. She stated that it felt like

[2] Ms. Locke explained that the individual renters of storage units would place a padlock on their own individual unit doors. Ms. Locke stated that Water Tower Self Storage would place an overlock on those units when the tenants were delinquent in paying the rental fee. The overlock is designed to prevent delinquent tenants from accessing their unit until they pay Water Tower Self Storage and would be in place in addition to an individual tenant's padlock.

[3] Ms. Locke testified that she soon reevaluated her reasons for having suspicions regarding the second suspect. At trial, she stated that she had been experiencing difficulties with a particular tenant who continuously cut overlocks placed on his unit, but after Ms. Locke threatened to call the police, that individual paid his bill, and Ms. Locke did not experience any other difficulties with him.

someone was holding the door on the other side. Ms. Locke told this individual that she would call the police if he or she did not open the door. Appellant opened the door. Ms. Locke testified that appellant had previously rented a storage unit on the other side of the property from the unit in which she discovered him, but she believed he had vacated his unit because he had paid just one month's rent the month prior, and she had found his unit empty prior to this encounter. Ms. Locke observed a microwave and a radio in the unit where she discovered appellant. When she asked appellant what he was doing in the unit, appellant responded that he was charging his phone, but there was no phone charger in the unit.

Ms. Locke testified that she told appellant he was no longer welcome on the property and that she did not want to see him again. Appellant asked to retrieve his property from his unit, but Ms. Locke denied this request. This encounter occurred in the same building where Ms. Locke found the damaged units that are the subject of the charges in this case. Ms. Locke placed an overlock on this unit. Ms. Locke testified that the next day, she found this overlock cut, and someone had taken the microwave and the radio.

Around this time, Ms. Locke also observed that there was a padlock on the unit that had previously been rented to appellant, but this unit had not been re-rented to a new tenant. Ms. Locke gained access to this unit using a key that had been left in the padlock and saw a heater. Ms. Locke left the padlock on the unit, but she kept the key.

Ms. Locke testified that, following the robbery, she locked the main door leading to the damaged units and attempted to contact the affected tenants. Some tenants did not respond, and some who responded stated that they did not want to visit their units. Terry Brandenburg responded and examined her damaged unit sometime in late February.

Meanwhile, Officer Stuart continued his investigation based on Ms. Locke's information and searched for appellant's name in a database known as RAPIDS that compiles pawn shop transactions in the State of Maryland. This search indicated that appellant had pawned several items at Crazy Louie's Pawn Shop ("Crazy Louie's") in Salisbury, Maryland, at various times on January 6, 2014, and on January 8, 2014. These items included a Murray antique pedal car, an antique toy airport jet service pedal car, and various U.S. coins and paper money. Officer Stuart provided the search results to Ms. Locke.

On February 8, 2014, Officer Stuart also met with appellant, who admitted, in response to a question about the burglary, that he had stayed in a unit on the property in January 2014. Appellant consented to a search of the hotel room he was renting, and that search did not reveal anything that appeared to be out of place or taken from a self storage unit.

Ms. Brandenburg testified that the last time she visited her unit was in November 2013, at which point there were two padlocks on her door. Ms. Brandenburg stated that there were several items missing from her unit following the incident in January 2014. In late February 2014, she met with Corporal Michael Loring of the Salisbury Police Department to discuss her missing property. At trial, Corporal Loring testified as follows concerning the list of items Ms. Brandenburg reported as stolen:

> There was [sic] 11 pedal cars that were stolen from her unit, one of which was a white color NASCAR replica fiberglass pedal car valued at $200. One was a red color 1930 Chrysler cast iron pedal car with State Farm Insurance brass plate attached to the back, it was $550 value. The next thing was a green and teal color late 1950 airport service cast iron pedal car, chain driven, it was $750 value. There was one Peg brand battery operated plastic Thomas train valued at [$]200. One red colored 1960 Murray cast iron pedal fire truck

> valued at $150. One white colored Ace Hardware plastic pedal truck with Ace Hardware on the side valued at $100. One 1960 [B]atmobile replica plastic pedal car valued at $100. One red Power Wheel BMW replica valued at $100. One gray colored Power Wheels, it was a Volkswagen replica, $50 value. One green color 1960 John Deere iron pedal tractor, it was valued at $150. One red colored 1960s cast iron pedal tractor valued at $150. There was one extra large plush Toys-R-Us exclusive battery operated ET from the movie, that was valued at $250. Two boxes of currency, coins, one box contained an unknown amount and unknown denominations of foreign currency and coins and one box contained an unknown amount and denominations of U.S. currency and coins.

At trial, Ms. Brandenburg testified to different values for some of these items, and she stated that the airport service pedal car was irreplaceable. When asked about the discrepancies between the values of the items listed in the police report and her testimony at trial, Ms. Brandenburg testified that she had collected antique toys for twenty years, and she had also spoken with several auctioneers about the value of her stolen property since the time she met with Corporal Loring.

When Ms. Brandenburg visited her unit in February 2014, Ms. Locke provided the list of items that appellant had pawned at Crazy Louie's previously provided by Officer Stuart. From the list, Ms. Brandenburg recognized the airport service pedal car and the Murray pedal car. She visited Crazy Louie's in an attempt to retrieve these items, but they had been sold. Ms. Brandenburg testified that the items that were sold at Crazy Louie's were her property that appellant had pawned.

Ms. Brandenburg stated that, after visiting Crazy Louie's, she returned home and searched eBay, because she believed "that would have been the premiere place to sell [the pedal cars]." Ms. Brandenburg discovered that an antique red Chrysler pedal car had been sold recently by an eBay seller located in Salisbury, Maryland, and she testified that the

picture of the item on eBay was taken in her storage unit. Ms. Brandenburg identified the specialized brass State Farm plate from the picture on the website, and she testified that the Chrysler pedal car that had been sold on eBay was her property. This item had been sold by eBay user "frank239." eBay's records indicated that the item had been listed for sale on December 29, 2013, and sold on January 1, 2014.

With this information, Corporal Loring subpoenaed eBay's records for user "frank239." The information from eBay indicated that user "frank239" was a Frank Jenkins with a listed address of 733 South Division Street, Salisbury, Maryland, and a date of birth of October 16, 1976. Corporal Loring testified that he did a records search of appellant, which revealed appellant had at one time provided an address of 733 South Division Street, Salisbury, Maryland, and had a date of birth of October 16, 1976.

Appellant was subsequently indicted for one count of second degree burglary as to Water Tower Self Storage, one count of fourth degree burglary as to Ms. Brandenburg, one count of malicious destruction of property as to Water Tower Self Storage, one count of malicious destruction of property as to Ms. Brandenburg, one count of theft of property valued between $1,000 and $10,000, and one count of theft of property valued under $1,000. At the conclusion of a trial on December 16, 2014, a jury found appellant guilty of all charges. Appellant's counsel and the State agreed that the theft convictions and convictions for destruction of property merged with the burglary convictions. The court sentenced appellant to a term of imprisonment of fifteen years, with all but four suspended for the second degree burglary conviction, and a consecutive prison term of three years for the fourth

degree burglary conviction, followed by a three year period of probation. The trial court also ordered appellant to pay restitution to Ms. Brandenburg in the amount of $3,241.00.

DISCUSSION

I. Sufficiency of the Evidence

Appellant contends that the State failed to produce sufficient evidence to sustain convictions as to all six counts at trial. The crux of appellant's argument on appeal appears to be that the jury should not have credited Ms. Brandenburg's testimony due to perceived discrepancies between her statements and the documentary evidence. Furthermore, appellant contends, there was no direct evidence placing him at the scene of the crime during the period of January 6-7, 2014.

This Court recently discussed the standard of review for challenges to the sufficiency of the evidence as follows:

> The standard we apply, in reviewing the 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." In applying that standard, we 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."

McClurkin v. State, 222 Md. App. 461, 486 (2015) (internal citations omitted), *cert. denied*, 443 Md. 735 (2015). Furthermore, we have stated:

> "The Court's concern is not whether the verdict is in accord with what appears to be the weight of the evidence, but rather is only with whether the verdicts were supported with sufficient evidence – that is, evidence that either showed directly, or circumstantially, or supported a rational inference of facts which could fairly convince a trier of fact of the defendant's guilt of the offense charged beyond a reasonable doubt. We must give deference to all reasonable inferences [that] the fact-finder draws, regardless of whether [the

> appellate court] would have chosen a different reasonable inference. Further we do not distinguish between circumstantial and direct evidence because [a] conviction may be sustained on the basis of a single strand of direct evidence or successive links of circumstantial evidence."

DeGrange v. State, 221 Md. App. 415, 420-21 (2015) (quoting *Donati v. State*, 215 Md. App. 686, 718 (2014), *cert. denied*, 438 Md. 143 (2014)).

As a preliminary matter, we note that Rule 4-324(a) mandates that, in making a motion for judgment of acquittal, "[t]he defendant shall state with particularity all reasons why the motion should be granted." Additionally, the Court of Appeals has held: "'The issue of sufficiency of the evidence is not preserved when [the defendant]'s motion for judgment of acquittal is on a ground different than that set forth on appeal.'" *Hobby v. State*, 436 Md. 526, 540 (2014) (quoting *Anthony v. State*, 117 Md. App. 119, 126 (1997)). Stated another way, "'[a] defendant may not argue in the trial court that the evidence was insufficient for one reason, then urge a different reason for the insufficiency on appeal in challenging the denial of a motion for judgment of acquittal.'" *Id.* (quoting *Tetso v. State*, 205 Md. App. 334, 384 (2012)).

At the conclusion of the State's presentation of evidence in this case, appellant moved for a judgment of acquittal as follows:

> [APPELLANT'S COUNSEL]: Make a motion for judgment of acquittal as to count one. The charge relates to the storehouse of Water Tower Storage. I would indicate that there's no evidence indicating that Mr. Jenkins broke and entered the storehouse of Water Tower Storage with the intent to commit a theft. The only testimony I heard regarding his presence in a unit of Water Tower Storage indicated he was sitting in an empty storage unit, he did not take anything that did not belong to him as it was an empty unit. I do not believe the State has met its burden as to intent to commit theft on count one.

Count two relates to – it's a fourth degree burglary charge related to the storehouse of Terry Brandenburg. The evidence from the witnesses is that she checked the unit before she left on the 6th which was about 4:30, maybe 5:00. That she arrived back at the location on February [sic] 7th at 8:30 in the morning, that's when she noticed that the unit, there was something amiss, there were locks missing or something of that nature. She went and checked the unit physically and noticed extensive damage to several units, upwards of ten including Ms. Brandenburg's unit. She then contacted police. The items that have been submitted by the state that were allegedly from that unit to try and connect Mr. Jenkins to that unit are dated sales prior to the date that she indicates noticing any damage or finding anything missing. Specifically the eBay transaction being listed at the end of December and sold at the very first of January. The pawn shop records indicating a sale date of the 6th during the workday before Ms. Locke left the facility and checked it and had seen that everything was fine.

THE COURT: I'll do each one.

[APPELLANT'S COUNSEL]: Okay.

THE COURT: Count one, the motion for judgment of acquittal is denied.

Count two the motion for judgment of acquittal is denied.

[APPELLANT'S COUNSEL]: As to count three, did willfully and maliciously destroy a storage unit, the property of the Water Tower Storage. We have absolutely no evidence that he was seen at the unit, that he was seen damaging any unit. It's pure speculation at this point that he was in there.

THE COURT: Denied. The motion for judgment of acquittal is denied as to count three.

Of course the test right now, [appellant's counsel], could a rational trier of fact deduce from the evidence and the inference [sic] drawn therefrom that all elements have been met. You're just making a jury argument right now.

[APPELLANT'S COUNSEL]: Count four, did willfully and maliciously destroy miscellaneous items of value, the property of Terry Brandenburg. Again we have no evidence that Mr. Jenkins was seen at the facility on the date in question.

THE COURT: Motion for judgment of acquittal is denied as to count four.

> [APPELLANT'S COUNSEL]: Did steal miscellaneous items of value of Terry Brandenburg. He's not been found in the possession of anything after the time these items were allegedly stolen. We have the description of the items that she's indicating now are hers, which she identified after finding them as sold by Mr. Jenkins. And that would apply to counts 5 and 6 because they are essentially the same other than value.
>
> THE COURT: Motion for judgment of acquittal as to counts 5 and 6 is denied. It's denied as to all counts.

On appeal, appellant presents some of these same arguments, but appellant also raises some novel arguments that are not preserved for our review because they are raised for the first time on appeal. As to the convictions for theft, appellant argues on appeal that the State failed to present evidence demonstrating that the items taken from the storage unit belonged to Ms. Brandenburg. This argument was not presented to the trial court and is, therefore, not preserved for our review. But even if this argument had been preserved, the State presented ample evidence via the testimony of Ms. Brandenburg and Corporal Loring that the stolen items belonged to Ms. Brandenburg.

With respect to the conviction for malicious destruction of property as to Ms. Brandenburg, appellant argues on appeal that the State failed to produce evidence showing that appellant had destroyed any property of Ms. Brandenburg's. Appellant contends that the locks and damaged door were the property of Water Tower Self Storage, not Ms. Brandenburg. This argument was not presented to the trial court, and is, similarly, not preserved for our review.

Appellant also contends that he could not be convicted of both fourth degree burglary and theft based on the same conduct, and he bases this argument on Maryland Code (2002, 2012 Repl. Vol.), Criminal Law Article ("CLA"), § 6-205(f), which provides: "A person who

is convicted of violating § 7-104 of this article may not also be convicted of violating subsection (c) of this section based on the act establishing the violation of § 7-104 of this article." This contention was not presented to the trial court, and is, accordingly, not preserved for our review.

Appellant's contentions on appeal that were preserved, therefore, are: 1) his argument that the State failed to produce evidence showing that appellant had the intent to commit a theft, which would negate the burglary convictions; 2) that there was no evidence placing appellant at the scene of the crime on the night of January 6-7, 2014; and 3) that defendant was never found in possession of the stolen items.

In order to establish guilt for second degree burglary, the State needed to show that appellant broke and entered "the storehouse of another with the intent to commit theft, a crime of violence, or arson in the second degree." CLA § 6-203(a). Similarly, in order to establish that appellant committed fourth degree burglary, the State needed to show that appellant had the intent to commit theft and was in a storehouse of another person. CLA § 6-205(c).

The Court of Appeals has recognized that there are "practical difficulties in proving directly an accused's intention when he or she breaks into a dwelling, [and] we have held that the intention at the time of the break may be inferred from the circumstances." *Winder v. State*, 362 Md. 275, 329 (2001) (citing *Reed v. State*, 316 Md. 521, 527 (1989)). The consummated commission of theft would be evidence that appellant had the intent to commit theft when he entered the storage units, and, specifically, Ms. Brandenburg's unit. *See Hobby v. State*, 436 Md. 526, 556 (2014) ("It would be nonsensical to conclude that the

evidence was sufficient to support the theft conviction, but not sufficient to support a burglary conviction, where an element of [burglary] is the intent to commit a theft."). Accordingly, if the State presented evidence that appellant committed the theft of property from the units, then that would be sufficient to show that appellant had the intent to commit theft when he broke into the storage units.

This Court has long held that, "absent a satisfactory non-culpable explanation, exclusive possession of recently stolen goods permits an inference of fact that the possession is a guilty possession." *Brown v. State*, 8 Md. App. 224, 225 (1969) (citing *Anglin v. State*, 244 Md. 652, 656 (1966)). Furthermore, if the theft occurs as part of what Judge Moylan has characterized as a "compound theft," then the inference arising from possession of recently stolen goods extends to the compound offense. *See Molter v. State*, 201 Md. App. 155, 169 (2011). "'[T]he unexplained exclusive possession of recently stolen goods permits an inference that the possessor is the thief . . . . [A]nd when it is shown that the property was stolen as a consequence of a breaking, the trier of fact may further infer that the thief was involved in the breaking.'" *Id.* at 170 (emphasis omitted) (quoting *Grant v. State*, 318 Md. 672, 680-81 (1990)).

Appellant recognizes this permitted inference, but he contends that the State failed to adequately demonstrate that he had possession of the stolen items. Appellant argues that the State merely established that appellant sold and/or pawned items that belonged to Ms. Brandenburg, which were taken from her storage unit. Appellant contends that his convictions rest on inferences upon inferences and a chain of circumstantial evidence. *Id.*

We disagree. As the Court of Appeals has recognized, "[a] conviction may be sustained on the basis of a single strand of circumstantial evidence or successive links of circumstantial evidence." *Hebron v. State*, 331 Md. 219, 228 (1993) (citing *Wilson v. State*, 319 Md. 530, 536 (1990)).

In this case, construing the evidence in the light most favorable to the State, we conclude that a rational trier of fact, could have found that appellant committed theft and the other compound offenses associated with his theft. The State produced sufficient evidence from the pawn shop and eBay from which a rational fact-finder could conclude that appellant was in possession of recently stolen goods when appellant pawned and sold some of these items. Accordingly, a rational jury could have concluded that appellant committed theft. A rational jury could have, therefore, inferred that appellant also committed the offenses associated with this theft – in this case, malicious destruction of property and burglary.

Although appellant contends that there were discrepancies in Ms. Brandenburg's and Ms. Locke's testimony, we defer to the fact-finder's assessments of credibility of the witnesses and resolution of conflicting evidence. As the State points out in its brief, there were no irreconcilable conflicts in the evidence, and the jury could have viewed the entirety of the evidence in a manner that rationally resolved any conflicts to the jury's satisfaction. Accordingly, we conclude that there was sufficient evidence to support appellant's convictions.

II. Restitution

Appellant contends that the court committed plain error in ordering him to pay $3,241.00 in restitution to Ms. Brandenburg. Appellant argues that there was not sufficient

admissible evidence of the value of the stolen items to support this request for restitution. Appellant admits that he failed to object on this basis at trial, which ordinarily would mean that this issue would not be preserved for our review. *See* Rule 8-131(a) ("Ordinarily, the appellate court will not decide any other issue [except for jurisdiction] unless it plainly appears by the record to have been raised in or decided by the trial court . . . ."). Appellant, therefore, asks this Court to exercise its discretion and find that the trial court committed plain error.

The Court of Appeals has stated: "Plain error is error which vitally affects a defendant's right to a fair and impartial trial." *Diggs v. State*, 409 Md. 260, 286 (2009). As this Court has noted, "'appellate review under the plain error doctrine 1) always has been, 2) still is, and 3) will continue to be a rare, rare phenomenon.'" *Kelly v. State*, 195 Md. App. 403, 432 (2010) (quoting *Hammersla v. State*, 184 Md. App. 295, 306 (2009)). Plain error review should be "rarely exercise[d], as considerations of both fairness and judicial efficiency ordinarily require that all challenges that a party desires to make to a trial court's ruling, action, or conduct be presented in the first instance to the trial court . . . ." *Chaney v. State*, 397 Md. 460, 468 (2007).

In this case, we decline to exercise our discretion to review for plain error the court's order that appellant pay restitution to the party whose property was stolen. The only case cited by appellant in which an appellate court engaged in plain error review of an order for restitution is *Chaney*. In that case, the trial court imposed restitution as a condition of the defendant's probation, but the Court of Appeals determined that the order of restitution was plain error as it was never discussed during the trial, nor did the State ask for it as part of a

judgment. *Chaney*, *supra*, 397 Md. at 471-73. But the fact that the Court of Appeals exercised its discretion to recognize plain error in any given case does not require appellate courts to thereafter recognize similar unpreserved claims of error. In this case, the State presented evidence of the value of the stolen items and expressly sought restitution at the time of appellant's sentencing. Appellant, therefore, was made aware of the possibility of restitution and had the opportunity to challenge the evidence supporting the value of the stolen items. Appellant failed to do so. We decline to review the court's order of restitution for plain error.

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