UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2487

September Term, 2013

JARRON LAMAR CRIPPEN

v.

STATE OF MARYLAND

Krauser, C.J.,
Zarnoch,
Salmon, James P.
(Retired, Specially Assigned),

JJ.

Opinion by Salmon, J.

Filed: May 1, 2015

Jarron Lamar Crippen (hereinafter "Crippen") was convicted of first-degree burglary, theft, and malicious destruction of property after a bench trial in the Circuit Court for Worcester County. He was sentenced to ten years in the custody of the Maryland Division of Corrections. In this appeal, Crippen contends that the State introduced insufficient proof that he was the criminal agent who committed any of the crimes for which he was convicted.

I.

THE STATE'S EVIDENCE[1]

This case arises out of a burglary of the residence of John Brady on January 8, 2013. The residence that was burglarized was a townhome in Pocomoke City, Maryland. Mr. Brady had rented the townhouse for approximately three years prior to the burglary.

On January 8, 2013, Mr. Brady arrived home after work at about 4:00 p.m. Upon arrival, he found that his back door was ajar and that the door was damaged. Mr. Brady looked closely at the door to determine the extent of the damage. He saw some marks on the outside of the door that "looked like someone had put some footprints on the door, like that's the way they broke into the house." These footprints were not there before Mr. Brady left for work that morning. Mr. Brady then determined that a number of items had been stolen from his home including a laptop computer, a computer gaming laptop and some computer games and accessories.

[1] Crippen presented no evidence.

The Pocomoke City police were immediately notified of the break-in. The investigating officers examined, *inter alia*, a window located to the right of the rear door that had been kicked in. Mr. Brady testified, without objection, that the investigating officer(s) noticed marks on the frame of the window to the right of the rear door. The police officers told Mr. Brady that they believed that the marks were evidence of an attempt to enter through that window. Mr. Brady's exact testimony in this regard was:

> I do recognize what was shown here [State's Exhibit 7 and 8]. This was after officers had arrived on scene and conducted their investigation. They began inspecting the windows, dusting for prints. And then they noticed these marks on the windows and actually showed me that this was the result of what was done when the individual tried to break into the house initially through the windows.

Mr. Brady further testified that the townhouse he had rented for about three years was attached to five or six others. Prior to the burglary of his townhouse, he never gave appellant permission to be on his property nor had he even met appellant.

Officer Zina Means of the Pocomoke City Police Department investigated the burglary at Mr. Brady's home. Officer Means photographed the door and the window to the right of the rear door. She also processed the rear windows and door for latent fingerprints. Four latent print "lift cards" were created based on fingerprints found on one of the panes in the right rear window. Those were submitted to the Maryland State Police fingerprint lab.

Officer Means testified, without objection, that she "listed" on the lift cards two suspects who live in close proximity of Mr. Brady's townhouse and "were known for this type of activity."[2] She added that appellant lived "a hundred to two hundred feet from [Mr. Brady's] residence." In her words: "I could probably hit it with a rock."

Officer Means was shown State's Exhibit nos. 6 & 7 and asked if she recognized them. She answered:

> Exhibit 6 is actually a [picture of] the right rear window of the window of which I lifted the prints off of.
>
> Exhibit 7 is actually the door - - not the door - - the window jamb which appeared to be types of pry marks on the same window jamb [ ] which appeared to be types of pry marks on the same window.

At that point in her answer, defense counsel said: "Objection. Your Honor it calls for speculation." The court sustained the objection.

The window as depicted in State's Exhibit 6 has two parts. The lower part is designed to slide upward behind the upper portion. The window had a total of 12 panes, six on the upper part and six below. The marks on the window jamb, about which Officer Means attempted to testify, are at the bottom of the portion of the window that, if it is not locked or stuck, can be slid upward.

[2] Defense counsel successfully objected when Officer Means attempted to testify that she submitted Crippen's "name because he's – lives in an area that I know for high crime."

When cross-examined about the footprint on the door, Officer Means could only say that the mark was left by a shoe that was "larger than a woman's foot." She explained on further cross-examination why she concluded that appellant was a "suspect":

> [DEFENSE COUNSEL:] Did you – did you formulate the suspects, or when did you formulate an opinion that you believed Mr. Crippen to be a suspect?[3]
>
> A. While processing the scene. On other occasions, they were always known to be in that area.
>
> * * *
>
> Other incidents where vehicles were broken into, and they were normal people that were seen in the area, passing through quite frequently, so –
>
> * * *
>
> – that's where I came to the conclusion.
>
> * * *
>
> Q. Okay. And at the time that you believed Mr. Crippen to be a suspect, you believed Mr. [Rodney] Collier as well –
>
> A. That's correct.

Officer Means emphasized that she would have asked for a fingerprint analysis regardless of whether or not she suspected Crippen and Collier. She further testified that she

[3] When appellant was sentenced, it was revealed that he had several drug-related convictions and a conviction for second-degree assault but no breaking and entering or theft convictions.

did not attempt to obtain a search warrant for the homes of either of the suspects because, while they had been known to stay in the area, neither man "was on the lease."

Lindsey Schultz, an employee of the Forensic Services Division of the Maryland State Police, was accepted by the court as an expert in latent fingerprint and palm print identification. Of the four latent lift cards Ms. Schultz was given, only the first card contained a "fingerprint of value." The print on that card was lifted by Officer Means from the lower part of the window that was to the right [looking at the door from the outside] that had been kicked in. Ms. Schultz compared the results of her analysis of the fingerprint on that card with Mr. Crippen's fingerprint card. Based on that comparison, Ms. Schultz concluded that the latent print found on the window pane was from appellant's left thumb. There was insufficient information to conclude that Mr. Collier's prints were on any of the lift cards.

Following the close of the evidence, the trial court heard argument from counsel and found appellant guilty. The judge explained how he believed appellant's thumbprint got on the right rear window and why he found appellant guilty:

> THE COURT: They're going to see if the window is unlocked and push the window up. There's no explanation as to why . . . [the defendant's] fingerprint would be on the window, other than that. And, apparently, the window was

locked,[4] and, therefore, the door was kicked in, entry was made and items were taken.

So I don't have any problem, based on that evidence, in finding him guilty of Count No. 1, the breaking and entering.

Count No. 2, the theft of the items, the game system, the video games, the laptop. And there's testimony as to the value which falls in the -- as charged, between at least 1,000 but less than $10,000, so I'll enter a finding of guilt as to Count No. 2.

As to Count No. 3, malicious destruction of the door and frame, based on the breaking, I'll also find him guilty of that count.

II.

In *Moye v. State*, 369 Md. 2, 13 (2002) the Court said:

While a valid conviction may be based solely on circumstantial evidence, it cannot be sustained "on proof amounting only to strong suspicion or mere probability." *White* [*v. State*], 363 Md. [150] at 163, 767 A.2d [855] at 862 [(2001)] (explaining that "[c]ircumstantial evidence which merely arouses suspicion or leaves room for conjecture is obviously insufficient") (quoting *Taylor* [*v. State*], 346 Md. [452] at 458, 697 A.2d [462] at 465 [(1997)]) (internal quotations omitted). A conviction based solely on circumstantial evidence should be sustained only where "the circumstances, taken together, are inconsistent with any reasonable hypothesis of innocence." *Wilson v. State*, 319 Md. 530, 537, 573 A.2d 831, 834 (1990); *West v. State*, 312 Md. 197, 211-12, 539 A.2d 231, 238 (1988).

[4] There was no testimony as to whether the window that housed the pane on which appellant's print was found was locked. Although Mr. Brady testified that "usually" his rear door was locked, he did not say whether his rear windows were usually locked.

See also, *United States v. Cruz*, 285 F.3d 692, 699 (8th Cir. 2002) (evidence that showed defendant was "probably guilty" not sufficient to establish guilt beyond a reasonable doubt). In regards to the issue of appellant's criminal agency, the evidence was purely circumstantial.

Because the *corpus delecti* of the offenses was proved in this case, the sole issue before us is whether the State produced sufficient circumstantial evidence of Crippen's criminal agency. Crippen argues that the fact that his thumbprint was on a window pane close to the door that was kicked in was insufficient to show, beyond a reasonable doubt, that he was the person who broke into Mr. Brady's home and stole his property.

The State disagrees, arguing:

> Mr. Brady testified that he did not know Crippen and had not given him permission to enter his townhouse. Although Crippen lived close by, the fingerprint that matched Crippen's was on the outside of a window at the back of the house. They were not on the outside of the front door where members of the public may be expected to touch. Also, there were pry marks on the same window where the fingerprint was found and, from the pry marks, one could infer that someone was trying to force the window open and, when that was not successful, decided to kick in the back door. The evidence was sufficient for the fact finder to infer that Crippen's thumbprint was impressed on the window at the time the crime was committed. The judgment should be affirmed as the evidence was sufficient to sustain his convictions.

(Emphasis added).

The evidence regarding marks on the window was limited and there was no evidence that the window was either locked or stuck. As mentioned, Mr. Brady said that investigating officers showed him marks on the window frame and told him that they appeared to be pry

marks that resulted from "what was done when the individual tried to break into the house initially through the windows." There were also pictures of the marks on the window frame, but from the pictures, alone, one cannot tell how or when the marks were made or for what purpose. And, as noted, when Officer Means referred to "pry marks" on the window jamb, the court sustained defense counsel's objection on the grounds that at least part of that testimony was speculative. Moreover, without engaging in speculation, it is difficult to see how any trier of fact could determine when or how the marks on the window jamb were made.

The Court of Appeals has said, with respect to the sufficiency of fingerprint evidence:

> It is generally recognized that finger print evidence found at the scene of a crime must be coupled with evidence of other circumstances tending to reasonably exclude the hypothesis that the print was impressed at a time other than that of the crime.

McNeil v. State, 227 Md. 298, 300 (1961) (citations omitted). *See also*, *Commonwealth v. LaCorte*, 369 N.E. 2d. 1006, 1009 (1977)("when fingerprints constitute the only identification evidence, most jurisdictions require the prosecution to establish beyond a reasonable doubt that the fingerprints in fact were placed at the scene during the commission of the crime.").

The question in this case boils down to whether the State introduced sufficient evidence to exclude the hypothesis that appellant left his thumbprint on the window pane at some point other than at the time of the burglary.

This Court, in *Lawless v. State*, 3 Md. App. 652, 659 (1968), applied the standard set forth in *McNeil v. State*, *supra*, after surveying authority from sister jurisdictions in order to address a sufficiency challenge to a conviction based, in significant part, on fingerprint evidence. Richard William Lawless was convicted of grand larceny. *Id*. at 654. The larceny at issue had been committed during the course of a break-in of a private residence. The State's evidence against Lawless included a fingerprint that had been lifted from a pane of glass that had been removed from the door so that the intruder[s] could enter. *Id*. at 654-55. Our discussion regarding the sufficiency of fingerprint evidence, in light of the decision by the Court of Appeals in *McNeil*, is instructive. In *Lawless*, we first set forth what has been characterized as a "threefold test" that is used to analyze the sufficiency of fingerprint evidence, *viz*.:

> From the cases considered, we think it clear that the "finger print evidence found at the scene of the crime" as stated in the rule enunciated in *McNeil v. State*, *supra*, refers only to that evidence which proved that the print was that of the accused. Thus the "circumstances tending to reasonably exclude the hypothesis that the print was impressed at a time other than that of the crime" need not be circumstances completely independent of the fingerprint, and may properly include circumstances such as the location of the print, *the character of the place or premises where it was found and the*

> *accessibility of the general public to the object on which the print was impressed*.

Lawless v. State, 3 Md. App. at 658-659 (emphasis added).

Later, in *Lawless* we said:

> The question is whether the evidence was sufficient to show that the appellant was the criminal agent. The premises from which the goods were stolen was a private residence not accessible to the general public. Entry was gained through a basement door, at the bottom of a stairwell. The door was opened by breaking a pane of glass in the door. The appellant's print was found on the pane. The prints of two other people were also found on the pane. One was the owner of the premises and the other a person also charged with the offense. It is clear that the evidence tended to show that the appellant was at the scene of the crime. By the location of the basement door and the print, it was a rational inference that he was there unlawfully, and there was no evidence to the contrary. The owner of the premises said that he had not given the appellant or "anyone that looks like him permission to go into" the house on the date of the crime or "at any time". We think, therefore, that the evidence before the jury was sufficient for them "to reasonably exclude the hypothesis that the print was impressed at a time other than that of the crime" and to find that the appellant entered the premises on the day charged and stole the goods. We feel that there was relevant evidence given to the jury to sustain the conviction and, since, in order to overturn a judgment entered on the verdict of a jury for insufficiency of the evidence, it is necessary that there be no legally sufficient evidence or inferences drawable therefrom from which the jury could find a defendant guilty beyond a reasonable doubt, we hold that the lower court did not err in denying the motion for judgment of acquittal and affirm the judgment.

Lawless v. State, 3 Md. App. at 659-60 (citations omitted)(emphasis added).

The major distinction between this case and *Lawless*, is that in *Lawless* a pane of glass with the defendant's fingerprints on it was removed so that the perpetrator could reach in and unlock the back door. Lawless's print was found on that broken pane. By contrast, appellant's prints were not on the door used to gain entry but on a pane of glass near the door used by the intruders to enter. Therefore, the nexus between the point of entry and Crippen's print was more remote than in *Lawless*. Moreover, in *Lawless* the place of entry (down a flight of basement stairs) was somewhat less accessible to the public than in the subject case.

The case of *Edmonds and Stanley v. State*, 5 Md. App. 132 (1968) is also instructive. Edmonds and Stanley were convicted of storehouse breaking with intent to steal. The intruders gained entry by breaking out a pane of glass in a "ground level overhead-type door." *Id*. at 135. The intruders had also broken into an interior office in the residence by cutting out a pane of glass. An investigating officer testified that the "prints [of one the defendants] were so located 'that who-ever removed the glass deposited these prints on same, because I received prints from both sides of the glass at the edge in a way that it would have to have been placed on there by the subjects who removed the glass from the door.'" *Id*. The officer further testified that the latent fingerprints on the broken glass "were less than a day old." *Id*.

We affirmed the judgments of conviction in *Edmonds and Stanley*, after concluding that the trial court's findings were not clearly erroneous. We explained:

> The evidence was clear that the crime was committed within a seven hour span in the early morning hours of June 10, 1967. That entry had been effected through the outer door from which glass had been removed was likewise clear. It would be beyond reason, in the absence of evidence to the contrary, to assume that anyone other than the burglars had neatly stacked the glass fragments from the broken panel. The fingerprints on the glass fragments found at the outer door appeared on both sides of the glass in such a manner as to compel the conclusion that they were imprinted at the time the glass was removed from the door. And the evidence showed that the prints were less than a day old. Under these circumstances, and bearing in mind that appellant Stanley's prints were also found on the glass cut out from the window of the interior office - the only rational conclusion being that it was the burglars who removed the glass from both the outer door and inner office window - we conclude that the evidence was legally sufficient to support the convictions of each appellant.

Id. at 142-43 (footnote omitted). The major difference between *Edmonds and Stanley* and this case, is that here there was no evidence as to whether the appellant's thumbprint was "fresh"; moreover, appellant's print was not found on both sides of the pane - only on the outside, which is far less incriminating.[5]

In *Colvin v. State*, 299 Md. 88, 111, *cert. denied*, 469 U.S. 873 (1984), the Court affirmed convictions for first-degree premeditated murder and associated offenses. Colvin's fingerprints were lifted from pieces of glass found on the basement floor of the dwelling where the victim lived. The State also proved that Colvin had pawned some items that were

[5] Depending on the surface, heat, and weather conditions, a person's fingerprints can stay on an object for a considerable period of time. For instance, in a well-known Baltimore City murder case, a suspect's print was discovered on the inside of a library book used by the victim; that fingerprint was ten years old. See *Homicide*: A Year on the Killing Streets, by David Simon, page 304 (1991).

taken from the victim's residence. The Court rejected Colvin's challenge to the sufficiency of the evidence, saying:

> We find that the circumstances surrounding the fingerprints found on the glass broken from the basement door tend to exclude the hypothesis that the print was impressed at a time other than that of the crime. The house was a private residence not accessible to the general public. The basement door was located at the back of the house. By the location of the basement door and the fingerprints on the broken glass it was a rational inference that appellant was there unlawfully. There was no evidence that appellant was anything but a stranger to the premises. Appellant offered no evidence to the contrary. Mrs. Sorrell testified that the basement door was locked and the glass was intact on the morning of her mother's murder. Susan Sorrell testified that the basement door was locked and the glass intact that same afternoon. We think, therefore, that there was sufficient evidence from which the jury could "reasonably exclude the hypothesis that the print was impressed at a time other than that of the crime."

Id. (citation omitted). The "take-away" principle from *Colvin* is that fingerprints on glass that was broken to gain entry, which was found inside the burglarized premises, supports a rational inference that tends to exclude the possibility that the prints were made at a time other than when the break-in occurred. In *Colvin*, there was a very close nexus between the window pane with the incriminating fingerprint on it and the break-in, because the window pane with appellant's print on it was also the one broken in order to gain entry. The same cannot be said of fingerprints here, which were on an unbroken window pane.

The problem of assessing the sufficiency of fingerprint evidence was recently summarized by the Colorado Court of Appeals, when it said: "[E]stablishing that a

fingerprint belongs to a particular person does not, by itself, prove that the person committed a particular crime. Courts have therefore established standards to ensure that fingerprint-based proof of identity is not conflated with proof of culpability." *People v. Clark*, 214 P.3d 531, 536 (Colo. App. 2009), *aff'd on other grounds*, 232 P.3d 1287 (Colo. 2010). The Colorado Supreme Court, in *People v. Ray*, 626 P.2d 167, 171 (Colo. 1981), cited with approval to the opinion of this Court in *Edmonds and Stanley*, *supra*, in discussing fingerprint evidence. In *Ray*, the defendant was accused of second-degree burglary. *Id*. at 168. The victims of the burglary discovered that their locked house had been broken into and a number of items taken. *Id*. It was determined that a milk chute in the back of the house had been broken open, and that it provided the point of entry for the burglar. *Id*. The trial court granted the defendant's motion for judgment of acquittal after the jury was unable to reach a verdict. *Id*. The Colorado Supreme Court described the milk chute and its damage as follows:

> The milk chute was approximately 20 inches wide and 14 to 16 inches high. It had two steel doors, one on the outside of the house and the other on the inside, with a space the width of the outside wall between them. Only a latch was maintained on the outer door, but the inner door had been secured by a bar lock, which had been forcibly torn loose from its fastenings.

Id. The police lifted "five latent fingerprints from the outside surface of the inside [portion of the] milk chute door," and one of the prints was from Clark's [the defendant's] hand. *Id*. The prosecution offered no other evidence as to Clark's criminal agency.

The *Ray* court upheld the trial court's entry of a judgment of acquittal, and explained why the evidence was insufficient:

> In this case, the evidence establishes that the defendant touched the outer surface of the inside door of the milk chute at the Winegar residence. No innocent purpose has been suggested which would be consistent with that activity. There was no evidence, however, as to the time that the fingerprint was left on the door. No evidence placed the defendant inside the Winegar residence on the day of the burglary or at any other time. Because the inside of the milk chute was readily accessible to anyone in the Winegars' backyard, the fingerprint could have been impressed at a time other than the time when the crime was committed. The fingerprint was the only evidence tending to tie the defendant to the crime. We conclude that this evidence, when viewed as a whole and in the light most favorable to the prosecution, is not substantial and sufficient to support a conclusion by a reasonable mind that the defendant is guilty of the burglary beyond a reasonable doubt. Thus, the trial court was correct in granting the defendant's motion for a judgment of acquittal.

People v. Ray, 626 P.2d at 171 (emphasis added) (citations and footnote omitted).

In a footnote, the *Ray* Court gave as an example of how the print could have been made at a time other than the burglary in question. *Id*. at 171 n.6. The example was "the fingerprint is consistent with an unsuccessful attempt by the defendant to accomplish an unauthorized entry." *Id*.

This case is similar to *Ray* in that there was no testimony as to when the fingerprints were made and here, as in *Ray*, it was not difficult to gain access to the backyard of the home where the break-in occurred. But, unlike *Ray*, there was some evidence of marks that were made on the window frame of the window pane that had Crippen's thumbprint on it. The

evidence concerning when the marks were made was, however, somewhat ambiguous, i.e., a statement to the victim by the investigating officers who evidently said the mark on the window was "the result of what was done when the individual tried to break into the house initially through the windows." It is unclear as to when – in relation to the break-in at issue – the investigating officer thought a first break-in attempt had been made or how the officer(s) could make such a determination.

Moreover, in order for that hearsay statement to be considered as probative evidence, sufficient to be relied upon, the State would need to prove that there was some basis for the comment inasmuch as the worth of an opinion is no better than its basis. Here, we simply do not know whether the marks on the window were there before the date of the burglary.

We also note that while the State's evidence showed that during the three years (approximately) that Mr. Brady lived in the townhouse, appellant had not been granted permission to be on his property, the record is silent as to whether appellant had such permission prior to Mr. Brady's rental of the townhouse. This is important in light of the fact that there was no evidence as to the age of the fingerprint nor was there any evidence found inside of the residence that pointed to Crippen's involvement in the crimes.

III.

CONCLUSION

This is a case where it would be fair to say that there is a substantial likelihood that Crippen is guilty. This, however, is not enough. *See U.S. v. Cruz*, *supra*, 285 F.3d at 699. We hold that the State failed to produce sufficient evidence to exclude the reasonable hypothesis that appellant's thumbprint was put on the pane at sometime other than when the break-in was committed. A reasonable hypothesis that appellant was not the person who broke into the victim's house and stole his goods is that he left the print during a prior unsuccessful effort to break into the townhome. That was the "reasonable hypothesis of innocence" suggested in *Ray*, 626 P.2d at 171 n.6.

JUDGMENTS REVERSED. COSTS TO BE PAID BY WORCESTER COUNTY.