UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1147

September Term, 2013

CINDY L. SMITH

v.

STATE OF MARYLAND

Graeff,
Kehoe,
Thieme, Raymond G., Jr.
(Retired, Specially Assigned),

JJ.

Opinion by Thieme, J.

Filed: July 9, 2015

Appellant, Cindy L. Smith, was convicted by a jury in the Circuit Court for Harford County of: six counts of first-degree burglary, one count of second-degree burglary; five counts of theft having a value of at least $1,000; six counts of theft; six counts of malicious destruction of property; one count of theft having a value of at least $10,000; theft scheme having a value of at least $1,000; theft scheme having a value of at least $10,000, theft scheme, and contributing to the condition of a minor. She was sentenced to an aggregate sentence of forty years' imprisonment, all but twenty-five of which was suspended.

Appellant presents two questions for our review, which we quote:

1. Was there sufficient evidence to support [appellant's] conviction for first-degree burglary of 2215 Whiteford Road (Count 23)?

2. Did the court err in granting the State leave to amend [C]ount 16 of the indictment (second-degree burglary)?

For the reasons discussed below, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On August 29, 2012, Deputy First Class (DFC) Brian Brandow responded to a call that a burglary was in progress at 2215 Whiteford Road in Whiteford, MD. When he arrived, DFC Brandow observed a gray truck in the home's driveway. The truck was running and its passenger door was open. DFC Brandow also observed two individuals, one of whom was appellant, walking down the path from the residence. He made contact with the two people, and appellant explained that she cleans foreclosed homes, and was there because she had cleaned out the house. DFC Brandow spoke with the home's resident inside the house, and noticed a small pry bar on the floor near the door, and pry marks on

the door near the doorknob consistent with that pry bar. The truck was also searched, and DFC Brandow recovered a screwdriver in the truck that had a handle matching the pry bar he observed in the residence.

Subsequent to her arrest, appellant was questioned and reiterated that she went around to houses which were for sale or in foreclosure and cleaned them out for banks and would sell items left in the homes, or take them to the dump. When asked, appellant could not identify for which bank or foreclosure company she worked. Following the interview, police served three separate search warrants on appellant's mother's home, where appellant resided with her son, Logan Wagner. These searches recovered items missing from recently burglarized homes. Appellant was charged with a thirty-two count indictment in connection with seven burglaries in Harford County, including at 2215 Whiteford Road and 3626 Aldino Road.

Taylor All, Wagner's girlfriend, testified that she, Wagner, and appellant burglarized homes. Generally, the group pried open doors using a screwdriver. The stolen items were usually taken to appellant's mother's house and then sold to pawn shops, jewelry stores, or at yard sales.

Additional facts will be presented as they become relevant to our discussion.

DISCUSSION

I.

Appellant's first contention is that there was insufficient evidence to support her conviction for first-degree burglary of 2215 Whiteford Road. She specifically asserts that the State only elicited testimony that DFC Brandow responded to a burglary call at that address, and his testimony did not provide evidence of breaking, entering, or that the edifice was a dwelling. The State counters that sufficient evidence was produced at trial to support the conviction, and that appellant's argument about the building not being a dwelling is not preserved.

We begin with the threshold issue of preservation. Appellant contends that the State never produced evidence that 2215 Whiteford Road was a dwelling. First-degree burglary is defined as "break[ing] and enter[ing] the dwelling of another with the intent to commit theft." Maryland Code (2012 Repl. Vol., 2014 Supp.), Criminal Law (C.L.) Article, § 6-202(a). Following the State's case, appellant moved for a judgment of acquittal on the charge of first-degree burglary of 2215 Whiteford Road:

> There again, there was no evidence produced with regard to the break-in at that address. I think the victim was never called to testify. There is no evidence the house was ever secured, . . . which my client was not authorized to enter there, the value of the property, the ownership of the property. None of that was testified to in this case[.]

The court ruled on the motion for judgment of acquittal:

> Moving on to 23, which is the home of Claudia Theis, in that case there was information, which according to the Court's recollection, came into evidence without objection that there was a burglary at a home of Claudia Mae Theis, the defendant was found there immediately upon arrival of the officers working away from the home, which obviously had pry marks at the doors, indicating an attempt at forced entry or forced entry. And as I previously stated, there was the pry bar inside the living room, which was found by the officers, which appeared to be of the type that could have made the markings on the door, according to them or at least according to the first officer on the scene. And I believe that the other officer made a comment in that regard. And once again, a similar tool, the screwdriver found in the vehicle which had been used to transport the defendant there. So I believe there is sufficient corroboration with regard to that.

At the close of evidence, appellant again moved for judgment of acquittal on this count:

> And in that case, it's alleged that the house of Ms. Claudia Theis at 2215 Whiteford Road was broken into. First of all, I don't know if it's Claudia Theis' house or not. I have no idea. No one's come into court and testified this is my house, my name is Claudia Theis and I own this property. No one testified to that. We don't know who own this property. For all I know, Cindy Smith owns this property.
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> No one testified that the house was secured and that the door was entered into without the permission of the homeowner or without someone else in the household giving permission. We don't know if anybody gave permission to anybody. We don't know who owns this household. So there has to be testimony by the homeowner or victim that they owned the property, that they did not authorize entry, that the premises was closed, that the entry was without authorization in the legal sense and none of that was proven. None of this was even testified to because Ms. Theis never showed up for Court.

The court again denied the motion after taking time to consider it.

We have described the nature of our review of unpreserved issues:

> The failure to object before the trial court generally precludes appellate review, because "[o]rdinarily appellate courts will not address claims of error which have not been raised and decided in the trial court." *State v. Hutchinson*, 287 Md. 198, 202 (1980); *see also* Md. Rule 8-131(a). "[I]t is the extraordinary error and not the routine error that will cause us to exercise the extraordinary prerogative [of reviewing plain error]." *Williams v. State*, 34 Md. App. 206, 212 (1976) (Moylan, J., concurring). "Plain error is 'error which vitally affects a defendant's right to a fair and impartial trial[,]'" and an appellate court should "'intervene in those circumstances only when the error complained of was so material to the rights of the accused as to amount to the kind of prejudice which precluded an impartial trial.'" *Richmond v. State*, 330 Md. 223, 236 (1993) (quoting *State v. Daughton*, 321 Md. 206, 211 (1990), and *Trimble v. State*, 300 Md. 387, 397 (1984), *cert. denied*, 469 U.S. 1230 (1985)). "[P]lain error review tends to afford relief to appellants only for 'blockbuster[ ]' errors." *United States v. Moran*, 393 F.3d 1, 13 (1st Cir., 2004) (quoting *United States v. Griffin*, 818 F.2d 97, 100 (1st Cir.1987)).
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> In assessing whether to note, and perhaps to correct, an unpreserved issue, "[t]he touchstone remains our discretion." *Williams*, *supra*, 34 Md. App. at 212; *see also*, *e.g.*, *Claggett v. State*, 108 Md. App. 32, 40 (1996); *Stockton v. State*, 107 Md. App. 395, 396-98 (1995); *Austin v. State*, 90 Md. App. 254, 268 (1992).

Martin v. State, 165 Md. App. 189, 195-96 (2005)(footnote omitted), *cert. denied*, 391 Md. 115 (2006). Moreover, Maryland Rule 8-131(a) provides:

> **Generally.** The issues of jurisdiction of the trial court over the subject matter and, unless waived under Rule 2-322, over a person may be raised in and decided by the appellate court whether or not raised in and decided by the trial court. Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court, but the Court may decide such an issue if necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal.

Nowhere in the above motions for judgment of acquittal does appellant assert that the State failed to prove that 2215 Whiteford Road was a dwelling. Further, the Court did not rule on such an issue, as it was never raised. Accordingly, this aspect of appellant's present argument is unpreserved for our review and we exercise our discretion not to conduct a plain error review of this issue.

We move now to appellant's substantive assertion, that the evidence was insufficient to prove she committed first-degree burglary of 2215 Whiteford Road.

We have recently reiterated the applicable standard of review in determining the sufficiency of evidence to support a conviction:

> The test of appellate review of evidentiary sufficiency 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. 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, *cert. denied*, 438 Md. 143 (2014) (internal quotations and citations omitted)). As noted above, first-degree burglary is defined as "break[ing] and enter[ing] the dwelling

of another with the intent to commit theft." C.L. § 6-202(a). Appellant here contends that the State did not provide sufficient evidence to support that a breaking or an entering occurred. The Court of Appeals has defined breaking as: "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, pushing open a door kept closed merely by its own weight." *Jones v. State*, 395 Md. 97, 119 (2006).

We hold that the evidence was sufficient to support a conviction for first-degree burglary of 2215 Whiteford Road. A burglary was reported at that address, and DFC Brandow observed appellant walking away from the residence toward the waiting truck. This establishes her presence at the scene. Pry marks were present on the door of the residence, indicating force was applied in order to gain entry. A pry bar was found inside the home, and it matched the pry marks on the door, and that pry bar's handle matched the handle of a screwdriver found in the truck in which appellant was traveling.

We are mindful 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." *Handy v. State*, 175 Md. App. 538, 562, *cert. denied*, 402 Md. 353 (2007) (citation and quotation marks omitted). The presence of pry marks on the door, and a pry bar found inside the house matching tools found in the truck shows both a breaking and an entering occurred at 2215 Whiteford Road. We are persuaded that, viewing the evidence in a light most

favorable to the State, a rational trier of fact could have found that appellant committed first-degree burglary of 2215 Whiteford Road.

II.

We move to appellant's second contention, that the court erred in permitting the State leave to amend Count 16 of the indictment, which was second-degree burglary of 3626 Aldino road. She asserts that the trial court should not have permitted the State to amend the indictment to change the name of the company whose storehouse she burglarized from "Mr. Dixie Construction" to "Dixie Construction Company, Inc." Appellant argues that this change deprived her of the defense that the building she burglarized was not a storehouse because it was owned by a person, and not a corporation.

The State counters that appellant is mistaken, and that it did not allege a burglary from the storehouse of "Mr. Dixie Construction," rather the amendment changed the name of the victim from "Dixie Construction" to "Dixie Construction Company, Inc." The State further asserts that this change comported with Maryland Rule 4-204, because it did not change the character of the offense charged.

The State moved to amend Count 16: "My motion regarding Count 16 would be to change the wording so that it says, unlawfully did break and enter the storehouse of another located 3626 Aldino Road, etc."

As an initial matter, we agree with the State that Count 16 of the initial indictment read "Dixie Construction." It read:

> **AND**, the jurors aforesaid, upon their oath aforesaid, do further present that **CINDY LYNN SMITH**, on the 21st day of August, 2012, in the County aforesaid, unlawfully did break and enter the storehouse of *Dixie Construction*, located at 3626 Aldino Road, Aberdeen, with the intent to commit theft in violation of Section 6-203 of the Criminal Law Article, against the peace, government and dignity of the State.

(Italics added for emphasis).

Maryland Rule 4-204 provides:

> On motion of a party or on its own initiative, the court at any time before verdict may permit a charging document to be amended **except that if the amendment changes the character of the offense charged, the consent of the parties is required.** If amendment of a charging document reasonably so requires, the court shall grant the defendant an extension of time or continuance.

(Emphasis added).

We have recently reiterated what constitutes merely a change of form:

> "Generally speaking, amendments that have been deemed to be merely changes of form have been such things as a clerical correction with respect to the name of a defendant, the substitution of one name for another as a robbery victim, a change in the description of money, changing the name of the owner of property in a theft case, and changing the date of the offense. An amendment as to substance, by contrast, would change the very character of the offense charged."

Webster v. State, 221 Md. App. 100, 121-22 (2015) (quoting *Albrecht v. State*, 105 Md. App. 45, 68 (1995)). When considering the character of the offense charged, we quoted the Court of Appeals:

> "We thus think it clear that there is a change in the character of the offense charged where the amendment 'change[s] the basic description of the offense,' *Gray v. State*, [216 Md. 410,] 416 (1958); it is equally clear that the

> basic description of the offense is indeed changed when an entirely different act is alleged to constitute the crime."

Id. (quoting *Thanos v. State*, 282 Md. 709, 716 (1978)).

We are persuaded that the amendment to Count 16 constituted a mere change of form. The amendment changed "Dixie Construction" to "the storehouse of another." This amendment in no way changed the character of the offense charged. Appellant was on notice that Count 16 charged her with second-degree burglary of 3626 Aldino Road. The amendment in no way altered this fundamental charge, nor did it alter the location of where the crime was alleged to have occurred. Accordingly, the court did not require the consent of the parties. We affirm.

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