UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2592

September Term, 2015

IN RE: RALPH B.

Eyler, Deborah, S.
Nazarian,
Battaglia, Lynne A.,
(Senior Judge, Specially Assigned),

JJ.

Opinion by Battaglia, J.

Filed: January 17, 2017

We are called upon in this case to determine whether the evidence was legally sufficient to support a delinquency finding that Ralph B., Appellant, was involved in fourth degree burglary in violation of Section 6-205(a) of the Criminal Law Article of the Maryland Code (2002, 2012 Repl. Vol.)[1] and conspiracy to commit fourth degree burglary. Ralph B. presents one question for our review:

> I. Is the evidence insufficient to support a finding that the [sic] Ralph committed the delinquent acts of fourth degree burglary and conspiracy to commit fourth degree burglary?

Ralph B. was charged with fourth degree burglary in violation of Section 6-205(a) of the Criminal Law Article and conspiracy to commit fourth degree burglary in a delinquency petition filed in the Circuit Court for Charles County:

Count 1

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[1] Section 6-205 of the Criminal Law Article of the Maryland Code (2002, 2012 Repl. Vol.) provides:

> (a) *Prohibited — Breaking and entering dwelling.* — A person may not break and enter the dwelling of another.
> (b) *Prohibited — Breaking and entering storehouse.* — A person may not break and enter the storehouse of another.
> (c) *Prohibited — Being in or on dwelling, storehouse, or environs.* — A person, with the intent to commit theft, may not be in or on:
> (1) the dwelling or storehouse of another; or
> (2) a yard, garden, or other area belonging to the dwelling or storehouse of another.
> (d) *Prohibited — Possession of burglar's tool.* — A person may not possess a burglar's tool with the intent to use or allow the use of the burglar's tool in the commission of a violation of this subtitle.
> (e) *Penalty.* — A person who violates this section is guilty of the misdemeanor of burglary in the fourth degree and on conviction is subject to imprisonment not exceeding 3 years.
> (f) *Conviction of theft.* — 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.

> Ralph [B.], on or about September 17, 2015, at Charles County, Maryland, did unlawfully break and enter the dwelling of another, to wit: the owner of 12226 Wendy Lane, Charles County, Maryland, in violation of Criminal Law Article 6-205(a) of the Annotated Code of Maryland, and against the peace, government and dignity of the State. (Burglary-Fourth Degree Theft, Criminal Law Article, Section 6-205(a))[.]
>
> **Count 2**
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> Ralph [B.], on or about September 17, 2015, at Charles County, Maryland, unlawfully did conspire with B[.] W[.] and C[.] R[.] to break and enter the dwelling of another, to wit: the owner of 12226 Wendy Lane, Charles County, Maryland, in violation of Common Law, and against the peace, government and dignity of the State. (Conspiracy/Burglary-Fourth Degree Theft; Common Law)[.]

An adjudication hearing was held in December of 2015. Officer Richard Logsdon of the Charles County Sherriff's Office testified that he and another officer responded to a call that three juveniles were on the property located at 12226 Wendy Lane in Waldorf, Maryland. According to the testimony, when the officers arrived, they noted that the home on the property appeared vacant, and "[t]here were sign[s] on the front, notices, where it looked like it was a foreclosure," and was "abandoned." Officer Logsdon further testified that they first checked to see if the door to the front of the house was secure, which it was, but when they went around to the back of the house, they noticed an open door at the top of the stairs leading up to a second floor deck:

> We looked up top and Officer Squriewell saw that the -- one of the doors was open at the top. It was a -- wooden steps that went up to a deck that attached to the back of the house. We -- Officer Squriewell went up to the top of the deck, I followed up. When he was at the top we could hear a buzzing sound like a -- like an alarm with the door open.

Officer Logsdon also testified that he then saw three juveniles push open a door on the first floor and run out of the house: "[a]t that time I was still on the deck steps and at that

time on the first floor in the back the sliding glass door was pushed open and three juveniles ran out the back."

Laura Lucas, an employee in the Legal Support Department of Wells Fargo Bank, testified on behalf of the Bank that Wells Fargo had bought the home during a foreclosure sale in October of 2013, which was ratified in February of the next year. Lucas testified that no one, except a Wells Fargo employee, had permission to be in the yard or the home on the day of the incident.

Counsel for Ralph B. moved for judgment of acquittal at the end of the State's case, arguing that there was insufficient evidence of a breaking and entering of a dwelling because the second floor deck door was already open when the officers arrived, and "there's no testimony that that door had been closed earlier in the day." He also argued that the home was not a dwelling because it was abandoned and "[n]obody knew of anybody living there. No one actually knew if it was suitable for living."

The State countered by arguing that the open door to the house and the juveniles running out of the house through another door were sufficient to show that there was a breaking and entering. The State also denied that the home was abandoned.

In denying Ralph B.'s motion for judgment of acquittal, the Circuit Court Judge determined, "I don't think there's any question there's a breaking in the light most favorable to the State" by reasoning:

> So the evidence is that the door at the top of the deck is open. There's no video tape for instance or eyewitness that sees three people come in but I don't think there has to be. I mean, you can almost break by bumping the door as you walk in. Certainly if you walk or pass through an interior door that's breaking. Certainly if

> you go from a doorway, down a set of stairs to another flight or to another floor in the house, that's a breaking.

The Judge, in making his final ruling at the close of trial, determined that the house was a dwelling and that there was a breaking, to support a delinquency finding of burglary in the fourth degree:

> [It's] Wells Fargo's house. Now, of course Wells Fargo can't come and live in the house. Wells Fargo is a sort of an ownership fiction. And to read it or to read into the law any other way, I mean, most houses are owned by banks. I hate to say it, that mine is owned by a bank. If I move out to go live in another house, doesn't mean that my house cannot be burglarized. So really it comes down to is there a breaking and I think there is. There's evidence a door is open on the second floor. Is it possible that the door has always been open and three people just walked in the door and - - of course it's possible. But the law is reasonable doubt, not all doubt. And even if, once in the house - - I mean literally stepping into the house I believe - - you'll find a lot of Judges are going to say that's not a breaking because you're breaking the threshold. But, in any event, going into the interior rooms, down the steps, passing through doorways, touching or moving anything - - I think even opening the door to escape is a breaking. And I think the courts would back me up on that.

The Circuit Court also determined that the evidence presented supported a delinquency finding of conspiracy to commit fourth degree burglary:

> There's no evidence for example of a conspiracy other than we see three people run out of the house. There's no testimony I heard Mr. B. say to this one or that one hey, let's go enter a wide open door of a house on the second floor. Right? So there's no testimony of that for sure. But you can look at the circumstances and infer an agreement, a conspiracy. And a conspiracy in this case would be to break and enter the dwelling of another.

At the disposition hearing in January of 2016, Ralph B. was placed on supervised probation for an indefinite period of time.

In reviewing a trial court's finding of a delinquent act, "an appellate court will 'review the case on both the law and the evidence.' We review any conclusions of law *de*

novo, but apply the clearly erroneous standard to findings of fact." *In re Elrich S.*, 416 Md. 15, 30 (2010) (internal citation omitted). In our review we apply the same sufficiency of the evidence standard of review as we do in criminal cases, which the Court of Appeals in *In re Anthony W.*, 388 Md. 251, 261 (2005) (*quoting and citing In re Timothy F.*, 343 Md. 371, 380 (1996)), defined as:

> "Appellate review of the [trial] court's judgment on the evidence is limited to determining whether there is a sufficient evidentiary basis for the court's underlying factual findings. In a criminal case, the appropriate inquiry is not whether the reviewing court believes that the evidence establishes guilt beyond a reasonable doubt, but rather, 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." . . . Consistently, we have held that the judgment of the trial court will not be disturbed unless the trial judge's findings of fact are clearly erroneous.

Burglary in the fourth degree is delineated in Section 6-205 of the Criminal Law Article of the Maryland Code (2002, 2012 Repl. Vol.).[2] With respect to the definition of "breaking" and "entering,"[3] Section 6-201 of the Criminal Law Article of the Maryland Code (2002, 2012 Repl. Vol.) refers us to the common law:

> (a) *In general.* — In this subtitle the following words have the meanings indicated.
> (b) *Break.* — "Break" retains its judicially determined meaning except to the extent that its meaning is expressly or impliedly changed in this subtitle.

* * *

[2] Section 6-205(a) of the Criminal Law Article of the Maryland Code (2002, 2012 Repl. Vol.) provides:

> (a) *Prohibited — Breaking and entering dwelling.* — A person may not break and enter the dwelling of another.

[3] Because we shall find the evidence insufficient to prove breaking and entering, we need not and will not address the issue of whether the house was a dwelling.

> (f) *Enter*. — "Enter" retains its judicially determined meaning except to the extent that its meaning is expressly or impliedly changed in this subtitle.

A breaking may occur "where there has been either an actual breaking or a constructive breaking." *Jones v. State*, 395 Md. 97, 118–19 (2006). Constructive breaking has been defined as breaking that "involves entry gained by artifice, fraud, conspiracy or threat," *id.* at 119; whether there was a constructive breaking in this case is not before us.

Rather, actual breaking has been defined by the Court of Appeals in *Jones*, 395 Md. at 119, 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." In *Jones*, the Court of Appeals reversed a conviction of second-degree burglary based on insufficient evidence of breaking because there was no proof that Jones had opened any door or any window to enter:

> The State offered no proof that appellant opened any window or door in order to enter Holy Cross. Although the State presented some evidence that the point of entry into the building was a kitchen window, and that there were fingerprints on the refrigerator, there was no evidence presented that the window had been secured previously, or that the fingerprints found on the refrigerator belonged to appellant. The State presented no evidence connecting appellant to the window, or that there was even an actual breaking.

Id. at 119.

In *Jones v. State*, 2 Md. App. 356 (1967), this Court reversed a conviction for burglary because of insufficient evidence of a breaking where there was no evidence to show how Jones had gotten into a third floor apartment. In *Jones*, Ms. Selph was alerted to Jones standing in her bedroom in the early morning and testified that when Jones ran

out of her apartment, he "grabbed the door" that led into her apartment and "caught the knob of the door and he closed the door between me and him." *Id.* at 359. Based upon the fact that there was no testimony regarding Jones's entry, we determined that "there was no evidence of a breaking and no facts on which a breaking could be rationally inferred":

> She said that the appellant closed the door to her apartment when he ran upon being observed by her, but there is no evidence as to how the appellant gained entrance to the apartment, and whether or not the door was closed before his entry. The word "breaking" in the definition of burglary is used in a technical rather than popular sense, and there is a breaking if the intruder, by force, removes an obstacle which if left untouched would prevent entrance. So, while the further pushing open of a door or window left partly open, is a breaking, entry through a door or window already open is not, for leaving a door or window open shows such negligence as to forfeit all claim to the peculiar protection extended to dwelling houses.

Id. at 360–61.

In the present case, the only evidence upon which the State relied to support a breaking was the testimony of Officer Logsdon, who only reported that while the front and rear doors to the house on the property were secure, the rear second-floor deck door was open and there was a "buzzing sound . . . like an alarm" coming from inside the home. Officer Logsdon also only testified that he observed the three juveniles push open a door on the bottom level and run out of the house. Even taken in the light most favorable to the State, there is no proof of "unloosing, removing or displacing any covering or fastening of the premises" as *Jones*, 395 Md. at 119, requires. As a result, there was no proof that Ralph B. broke into the house when he entered it.

Although the trial judge suggested that proof of exiting the home through a secure door was sufficient proof of breaking and entering, our reversal of the conviction for

burglary in *Jones*, 2 Md. App. 356, does not support that theory. In *Jones*, 2 Md. App. 356, there was proof that Jones pulled the door shut behind him as he exited the premises, but we reversed the conviction for breaking and entering. Our recognition in *Jones* that exiting a home is not proof of a breaking and entering had already been acknowledged by this Court in *Reagan v. State*, 2 Md. App. 262, 268 n.3 (1967), in which we stated: "[b]reaking out of a house is not a burglarious breaking."

The trial judge also intimated that Ralph B. was guilty of breaking and entering because he had to have gone into "interior rooms, down the steps, passing through doorways, touching or moving anything." There was no proof, however, to support the inferences drawn by the trial judge that Ralph B. had opened interior doors or doors on fixtures appended to the house.[4]

[4] In *Arnold v. State*, 7 Md. App. 1, 4 (1969), we recognized that an interior breaking can constitute a breaking and entering when there is proof that an inner door or a door on a fixture appended to the building had been opened:

> The breaking is not limited to an outside door or window. If the outside door is open but the felonious design requires entrance into a part of the building which is closed, the making of an opening into that part of the house is a breaking. The opening of a gate in a wall which surrounds the house, however high the wall may be, is not enough, although an occasional reference has confused breaking into the curtilage of a house with the ancient crime of breaking into a walled city. Nor will the opening of a trunk, box or piece of furniture within the building meet the requirement. Some part of the building itself must be opened. The opening of a cupboard door or drawer has been a useful testing point for the law in this regard. If the cupboard is an article of furniture within the building the opening of the door or drawer is not a breaking within the burglary meaning, but it is otherwise if the cupboard is a built-in part of the very building itself. The fact that an article of furniture is fastened to the wall, or the floor, will not necessarily make it a 'part of the building.' This will depend upon the facts of the particular case.

The State argues, nevertheless, reasonable inferences could be drawn that Ralph B. opened the deck door when he entered the house, because that door would have been secured, as the others were. The State also points to the "buzzing sound . . . like an alarm" from Officer Logsdon's testimony, but the State did not prove beyond a reasonable doubt that there was an alarm for the house that could have been triggered by the opening of the deck door or, if there was, how long the alarm had been buzzing or when it had started buzzing. No proof that Ralph B. opened the door nor that the door had been secured was adduced overall.

Because we conclude that the evidence was insufficient to prove a breaking and entering in this case, we also determine that the evidence was insufficient to prove conspiracy to commit fourth degree burglary. Accordingly, the findings of Ralph B. involved in fourth degree burglary and conspiracy to commit fourth degree burglary are reversed.

JUDGMENT OF THE CIRCUIT COURT FOR CHARLES COUNTY REVERSED. COSTS TO BE PAID BY CHARLES COUNTY.