

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 684

September Term, 2016

MICHAEL WAYNE DUNCAN

v.

STATE OF MARYLAND

Woodward, C.J.,
Nazarian,
Moylan, Charles E., Jr.
(Senior Judge, Specially Assigned),

JJ.

PER CURIAM

Filed: June 2, 2017

*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.

Convicted of theft of property with a value of less than \$1000, rogue and vagabond, and malicious destruction of property with a value of less than \$1000, appellant, Michael Duncan, presents one question for our review:

Is the evidence sufficient to establish Mr. Duncan’s criminal agency?

As Duncan concedes, the issue was not preserved for appellate review because he did not raise sufficiency of the evidence in his motion for judgment of acquittal. Nevertheless, he claims that the failure to preserve the issue was the result of ineffective assistance of counsel, which he suggests is “so clear that it permits recognition on appeal.” Alternatively, Duncan requests plain error review.

Even if the record before us was adequate to permit this Court to review Duncan’s claim of ineffective assistance of counsel,¹ which it is not, Duncan would not be entitled to relief. “The failure to preserve or raise an issue that is without merit does not constitute ineffective assistance of counsel.” *Gross v. State*, 371 Md. 334, 350 (2002). Assuming it had been preserved for our review, Duncan’s claim that the evidence was insufficient is without merit.

“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.’” *Donati v. State*, 215 Md. App. 686, 718, *cert. denied*, 438 Md. 143 (2014) (citations omitted). “[T]he

¹ Although “a claim of ineffective assistance of counsel is raised most appropriately in a post-conviction proceeding[,]” review on direct appeal may be appropriate “where the critical facts are not in dispute and the record is sufficiently developed to permit a fair evaluation of the claim[.]” See *In re Parris W.*, 363 Md. 717, 726 (2001).

test is ‘not whether the evidence *should have or probably would have* persuaded the majority of fact finders but only whether it *possibly could have* persuaded *any* rational fact finder.’” *Anderson v. State*, 227 Md. App. 329, 346 (2016) (citation omitted) (emphasis in original). We “consider circumstantial evidence as well as direct evidence” and note 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.’” *Painter v. State*, 157 Md. App. 1, 11 (2004) (citation omitted).

The State presented evidence at trial that an unidentified man shattered the window of Heather Testerman’s car, which was parked in her driveway, and ran away with a purse that she had left inside the vehicle. A short time later, a paper copy of Ms. Testerman’s gym membership, which was in her purse at the time of the theft, was found on the ground near Ms. Testerman’s home. The paper was stained with blood, which, according to Ms. Testerman, was not present prior to the theft of the purse. Forensic testing revealed that the DNA profile of the blood matched a DNA sample taken from Duncan. There was also blood on the seat of the vehicle, in the area of the shattered window glass. Although the blood that was found inside the vehicle was not tested, the facts, taken as a whole, were sufficient to have persuaded the jury, beyond a reasonable doubt, that it was Duncan who broke the window of Ms. Testerman’s car and stole her

purse, cutting himself in the process, and leaving his blood in her car and on the paper that he dropped on the ground as he fled.

**JUDGMENTS OF THE CIRCUIT COURT
FOR QUEEN ANNE'S COUNTY
AFFIRMED. COSTS TO BE PAID BY
APPELLANT.**