UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 00980

September Term, 2016

NICHOLAS RYAN THOMAS

v.

STATE OF MARYLAND

Meredith
Reed,
Davis, Arrie W.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Reed, J.

Filed: July 19, 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.

On June 9, 2016, Nicholas Ryan Thomas, Appellant, was convicted by a jury of burglary, theft with a value between $1,000 to $10,000, and conspiracy to commit burglary. The appellant's charges were in connection with the burglary of Wayne Baker's home in Ocean Pines, Maryland, on October 26, 2015. He was sentenced to ten years' incarceration for each of the three counts, to be served concurrently. On appeal, he presents the following two questions for our review:

1. Did the trial court err in not admitting into evidence DeMascolo's two written, signed statements to police which were inconsistent with her in-court testimony?

2. Was the evidence sufficient to support Appellant's convictions?

For the following reasons, we answer the first question in the negative and the second in the affirmative. Therefore, we affirm the judgment of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

On October 26, 2016, between 4 p.m. and 5 p.m., Wayne Baker received a call from his next-door neighbor, Amy DeMascolo, telling him that someone broke into his house. When Mr. Baker returned home, he found several police officers in his house and driveway. He also saw his front screen was damaged.

After Detective Richardson explained to Baker what happened, Baker entered the house and found it "completely destroyed." Baker described how "everything had been turned upside down [and] all the valuables were missing." The items he identified as missing were a 42" T.V. in the living room, two other T.V.s, an Xbox system, collections of lighters and comic books, and some other personal items.

At about 2:30 p.m. on the same day, Ms. DeMascolo was walking her two poodles when she saw a silver Buick parked in Baker's driveway with its engine running and a young woman sitting in the front passenger seat. Ms. DeMascolo did not pay close attention to the car until she went back into her house and her poodles started barking. When Ms. DeMascolo looked out of the window, she saw "two gentlemen pulling a TV out the bottom of the door." She identified two men in their 20s: one with a brown camo sweatshirt with pink lettering; the other with darker clothing. The two men were later identified as Dakota Fletcher and the appellant, respectively. During trial, Ms. DeMascolo testified that Fletcher and the appellant "both [came] out of the house." One was carrying a TV, the other one, the appellant, was "assisting him with getting the TV in the car and pushing the trunk shut." While watching the two men as they got back into the silver Buick and drove away, Ms. DeMascolo took down the last four numbers of the Buick's Maryland license plate and called 911. However, the license plate numbers she wrote down were not in the correct order.

The day after the burglary, Detective Richardson came to focus on the appellant and two other individuals, Dakota Fletcher and Aurora Schepas, as suspects based on DeMascolo's description of the individuals, the car, and the partial license plate. The appellant owned a 2002 silver Buick with a license plate including the numbers 9654. All three suspects resided at 400 Pacific Avenue in Salisbury. After identifying the suspects, Richardson met with Ms. DeMascolo that afternoon and showed her a six-person array.

Ms. DeMascolo identified two individuals, the appellant and Fletcher, as the two young men she saw coming out of Baker's house.

On October 28, 2015, two days after the burglary, the appellant and Fletcher were both arrested. During the interview, Fletcher confessed to participating in the burglary and stealing the T.V.s from Baker's house with the appellant. In addition, Fletcher led police to a location in Wicomico County to retrieve stolen T.V.s which were later identified by Baker as having come from his house. No additional items have been recovered in connection with the theft from Baker's house.

Before the appellant's trial, Fletcher entered a guilty plea to the burglary of Baker's house. During the appellant's trial, Fletcher testified as to how the burglary of Baker's house occurred. There were areas of dispute at trial concerning the appellant's initial intent and whether the appellant personally entered the residence.

Both the appellant and Fletcher agreed that they met each other from AA and NA meetings in the spring of 2015 and that Fletcher lived with the appellant and the appellant's fiancée, Aurora Schepas, at the appellant's house for about three months prior to the burglary. Fletcher testified that the three of them took the appellant's Buick and drove to Baker's house because they "just needed some money" and Fletcher thought "there would be money in [Baker's] house." Fletcher testified that the appellant was driving while Fletcher was seated in the back seat and Schepas was seated in the front passenger seat.

Fletcher testified that he had the appellant drive past Baker's house to make sure Baker was not home. Then the appellant drove back to Baker's house, backed the Buick

into the driveway, and he and the appellant got out of the car. Fletcher testified that he went inside Baker's house through the unlocked sliding door in the back of the house and let the appellant in through the front door. Once in the house, Fletcher went into Baker's room to get the money and to see if there were any drugs in the house. Fletcher stated that he and the appellant "decided to grab TVs and Xbox and Play Station III" so they could be sold. According to Fletcher, he and the appellant brought the electronics out of the house through the front door as Schepas opened the trunk. They put what Fletcher described as five or six T.V.s into the Buick's trunk, and the appellant drove back to their residence at 400 Pacific Avenue in Salisbury.

The appellant testified to a different set of facts. The appellant stated that three of them - the appellant, Fletcher, and Schepas - went to Ocean Pines to buy marijuana. He explained that he needed to purchase marijuana in order to mitigate the pain caused by Crohn's disease. He continued that he had a significant amount of both his intestine and colon removed at the University of Maryland Hospital a few weeks before the burglary of Baker's house because of Crohn's disease. In addition, he testified that he was still in pain and unable to do many tasks without someone else's help, including lifting and carrying things, at the time when the burglary took place. The appellant denied that he went to Ocean Pines to get money, as Fletcher had testified.

The appellant continued to testify that, when they arrived at Baker's house, Fletcher went inside while he, the appellant, waited in the car. The appellant waited in the car for about five minutes before he got out to smoke a cigarette, at which time he noticed a woman

out walking two little dogs. Throughout all this, the appellant testified that he thought that Fletcher was in the house trying the marijuana they were going to purchase. After a while, the front door popped open, and the appellant heard Fletcher say, "Help me out." The appellant was planning to hand money to Fletcher for the marijuana, but he saw Fletcher leaving the house with a T.V. Then, the appellant got into the car and "shut [his] mouth" until Fletcher got back into the car with the marijuana. According to the appellant, it was Fletcher who put the T.V. and other items in the trunk. In addition, the appellant denied that he broke into Baker's house, stating that he only "got one foot on the stairs," but walked away when he saw Fletcher popping out of the bottom of the front door with a T.V. The appellant added that he did not know what ever happened to the T.V.s, explaining that it was "none of [his] business." However, he was clear that none of the items came into his house.

Pertinent to this appeal, defense counsel moved to admit two written statements made by Ms. DeMascolo prior to her testimony in court for purposes of impeachment. The trial court denied the motion. Ultimately, the jury convicted the appellant on the three counts of burglary, theft with a value between $1,000 and $10,000, and conspiracy to commit burglary of Wayne Baker's house.

The circumstances surrounding the ruling on the evidentiary issue are described in greater detail in conjunction with the analysis of those issues later in this opinion.

DISCUSSION

I. MOTION FOR ADMISSION OF EVIDENCE

A. The Contentions of the Parties

The appellant argues that the trial court applied the wrong standard when deciding whether to admit Ms. DeMascolo's two written, signed statements into evidence. He asserts the trial court abused its discretion when it denied the motion to admit the statements into evidence. The appellant contends that "unless a reviewing court, upon its own independent review of the record, is able to declare a belief, beyond a reasonable doubt, that the error in no way influenced the verdict, such error cannot be deemed 'harmless,'" and the trial court's judgment should be reversed. (Quoting *Dorsey v. State*, 276 Md. 638, 659 (1976)).

The appellant contends that two statements written and signed by Ms. DeMascolo were inconsistent with her in-court testimony. Therefore, they should be admitted into evidence under Md. Rule 5.802.1 as substantive evidence, instead of Md. Rule 5-613 as impeachment, which was the ground for his motion for admission of evidence during trial. In supporting his contention, the appellant argues that defense counsel was offering the statements into evidence pursuant to Md. Rule 5-802.1, but the prosecution opposed based on "impeachment" under Md. Rule 5-613. The trial court also allegedly wrongly applied Rule 5-613 to the alleged inconsistent statements of Ms. DeMascolo in sustaining the prosecution's objection.

The appellant also argues that the foundational requirements of Rule 5-802.1 had been satisfied to justify the admission of Ms. DeMascolo's two inconsistent statements. According to the appellant, the first requirement was satisfied because Ms. DeMascolo wrote and signed the two statements. In the first of these two statements, Ms. DeMascolo wrote that she "saw a white male wearing a brown camo sweatshirt with pink lettering carrying a TV through the bottom part of the front door. There was also another male getting in[to the] front of car." In the second statement, she wrote that she saw one of the two men "taking [a] TV through bottom of screen door" while the other "was driving [the] car." The appellant argues that her in-court testimony was inconsistent with these statements because she testified that she saw both men coming out and removing items from Baker's house, with the appellant "assisting" the other man in carrying the T.V.s. The appellant claims this inconsistency satisfies the second requirement of Rule 5-802.1.

The State responds that this issue is unpreserved because defense counsel did not proffer the statements as substantive evidence, but rather for the purpose of impeachment. During trial, defense counsel consistently offered the two statements of Ms. DeMascolo for the purpose of impeachment under Md. Rule 5-613:

> [Prosecutor]: Your Honor, I believe if he's – well, first of all, the testimony should come from the live witness on the stand. If he is intending to impeach the witness by saying there's something different between her statement and what she's testified today to – or testified to today, that I believe that she needs to be able to be . . . questioned, allowed to refresh her recollection, and then counsel's pretty much stuck with the answer. But to admit her written statement at a different time, I don't believe it's admissible, Your Honor.
>
> [THE COURT]: Well, *on what basis are these admissible*?

> [Defense counsel]: *To impeach her testimony*. She just testified that she saw two men pulling a TV out of the front door and there's no statement at all with respect to that.

(Emphasis added).

Therefore, the State concludes that the trial court properly ruled as a matter of law not to admit Ms. DeMascolo's two prior statements into evidence based on Rule 5-613, the purpose offered by defense counsel.

In addition, the State argues that defense counsel never indicated during the trial that he was offering the statements based on substantive evidence. Instead, according to the State, defense counsel referenced *Hardison v. State*, 118 Md. App. 225 (1997), which concerns Rule 5-613's guidelines for admission of extrinsic evidence of a prior inconsistent statement to impeach a witness, when asking the trial court to reconsider its initial ruling denying admission of DeMascolo's statements. The State argues that Md. Rules 5-613 and 5-802.1 require inapposite foundational requirements, and the foundation defense counsel claimed to have satisfied was for impeachment purposes under Rule 5-613(a) and (b) rather than Rule 5-802.1 for substantive evidence.

Even if this issue is preserved for appeal, the State argues "DeMascolo's trial testimony and her written statements were not shown to be in direct contradiction." The State contends that DeMascolo's in-court testimony did not produce inconsistent statements, but, rather, added additional details to the prior statements. In addition, the purpose of Md. Rule 5-802.1 applies as an exception to hearsay where a witness's prior statement is offered to prove the truth of what it is offered to assert. But, because "[Ms.]

DeMascolo's written statements would tend to prove largely the same fact as her in-court testimony, albeit in less detail," Ms. DeMascolo's written statements cannot be offered to prove the truth of the matter asserted under Md. Rule 5-802.1. Therefore, the State concludes that "it would not have been an abuse of discretion to exclude the statements as cumulative," and continues that, "even if . . . the exclusion of the statement was erroneous, any error would be harmless beyond a reasonable doubt."

B. Standard of Review

The Court of Appeals has explained that the standard of appellate review of an evidentiary ruling depends on whether the issue relates to a pure question of law, finding of fact, or an ultimate decision on the admissibility of relevant evidence. *Brooks v. State*, 439 Md. 698, 708 (2014). According to *Brooks*,

> [q]uestions of law are reviewed without according the trial judge any special deference; findings of fact are assessed under a "clearly erroneous" standard; and an assessment of the admissibility of relevant evidence is reviewed under an abuse of discretion standard. See, e.g., *J.L. Matthews, Inc. v. Maryland–National Capital Park and Planning Comm'n*, 368 Md. 71, 92, 792 A.2d 288 (2002); *Ruffin Hotel Corp. of Maryland, Inc. v. Gasper*, 418 Md. 594, 620, 17 A.3d 676 (2011). For example, a ruling on whether relevant evidence should be admitted or excluded under Maryland Rule 5–403 would be subject to review under an abuse of discretion standard while a determination of whether a statement is hearsay is a legal question subject to *de novo* review. Compare *State v. Simms*, 420 Md. 705, 724–25, 25 A.3d 144 (2011) with *Parker v. State*, 408 Md. 428, 437, 970 A.2d 320 (2009).

Brooks, 439 Md. at 708-09.

Abuse of discretion occurs when "no reasonable person would take the view adopted by the [trial] court or [if] the court acts 'without reference to any guiding rules or principles.'" *Thomas v. State*, 213 Md. App. 388, 405 (2013) (quoting *King v. State*, 407 Md. 682, 697, 967 A.2d 790 (2009)). Thus, if a trial court's ruling is reasonable, we will not disturb the "trial court's evidentiary ruling absent error or a clear abuse of discretion[,] … even if we believe it might have gone the other way." *Fontaine v. State*, 134 Md. App. 275, 288 (2000).

C. Analysis

As indicated *supra*, the appellant argues the trial court committed reversible error by denying admission of two allegedly inconsistent statements made by Ms. DeMascolo because the trial court applied Md. Rule 5-613 rather than Md. Rule 5-802.1. In response to this argument, the State argues that the appellant's argument should be rejected because it is not preserved for review.

Maryland Rule 8-131(a), which governs whether an issue is preserved for appeal, provides:

> (a) **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.

(Emphasis added).

We focus on the second part of Rule 8-131(a) to determine if the issue is preserved for appeal when an appellant fails to provide during trial the basis of the argument he wants the appellate court to review.

As the word "ordinarily" indicates, an appellate court will generally "not . . . consider an issue that has not previously been raised." *State v. Bell*, 334 Md. 178, 187 (1994). *See, e.g.*, *Walker v. State*, 338 Md. 253, 262 (1995); *State v. Hutchinson*, 287 Md. 198, 202 (1980); *Gaylord v. State*, 2 Md. App. 571, 575 (1967). However, there are some situations in which an appellate court will consider an issue that was not previously raised. Such review, as the Court of Appeals explained in *Bell*, is "discretionary, not mandatory." 334 Md. at 178-88.

In *Williams v. State*, this Court decided that a defendant's argument was not preserved for review because the defendant failed to preserve a hearsay challenge, *to state grounds for objections when the State offered the statement*, and to make an objection when the trial court admitted evidence. 131 Md. App. 1, 9 (2000). In another case, this Court declined to review an issue raised by an appellant when his attorney failed to "bring the lower court's attention to [the applicable] hearsay exception." *Goldman, Skeen & Walder, P.A. v. Cooper, Beckman & Tuerk, LLP*, 122 Md. App. 29, 50 (1998).

Here, defense counsel had ample opportunities during trial to bring his argument based on substantive evidence under Md. Rule 5-802.1 as a hearsay exception. Not only did he fail to bring the trial court's attention to Md. Rule 5-802.1, so the trial court could efficiently rule on the grounds of substantive evidence value, but he also continued to offer

impeachment under Md. Rule 5-613 as the ground for his argument. Defense counsel confirmed three times during trial that his offering of the statements into evidence was for the purpose of impeachment.

When defense counsel first attempted to admit both of Ms. DeMascolo's statements into evidence, he clearly manifested that the basis for this was impeachment:

> [Prosecutor]: Your Honor, I believe if he's – well, first of all, the testimony should come from the live witness on the stand. If he is intending to impeach the witness by saying there's something different between her statement and what she's testified today to – or testified to today, that I believe that she needs to be able to be. . . questioned, allowed to refresh her recollection, and then counsel's pretty much stuck with the answer. But to admit her written statement at a different time, I don't believe it's admissible, Your Honor.
>
> [THE COURT]: Well, *on what basis are these admissible*?
>
> [Defense counsel]: *To impeach her testimony*. She just testified that she saw two men pulling a TV out of the front door and there's no statement at all with respect to that.

(Emphasis added). As in *Williams*, where the Court declined to review the defendant's argument because he failed to state grounds for objections to the state's motion to the admission of the statement during trial, defense counsel in this case also failed to state that Md. Rule 5-802.1 was his grounds for admission.

After a lunch break, defense counsel asked the trial court to reconsider its ruling referencing *Hardison*, *supra*, for support:

> [DEFENSE COUNSEL]: Before we call the jury in, Your Honor, I would just ask the Court if we could possibly revisit the Court's ruling sustaining the State's objection to the admission of the written statements by Ms. DeMascolo. And for the reason during the break I had an opportunity to do a

> little bit of research, and there's a case, *Hardison v. State*, and I'm not just reading for the head note here. "An omission from trial testimony of facts recited by a witness in a prior statement is an inconsistency, and extrinsic evidence of such a prior inconsistent" – this is an oral statement – "may be introduced under this rule provided the foundation was laid."

Defense counsel then continued,

> She was given an opportunity to explain. And she agreed that she left out some facts even though she said that's what she testified to today. And the extrinsic evidence, the statements themselves, are not admissible *until I've satisfied the other two which is disclosing and giving the witness an opportunity to explain, and the statement is not one that concerns a noncollateral matter*. I'd just ask the Court to take another look at that.

(Emphasis added). The foundational requirements defense counsel claimed to lay out for admission of extrinsic evidence of prior inconsistent statements were for impeachment purposes under Rule 5-613(a) and (b).

Finally, defense counsel did not object during trial that the court applied the wrong standard by using Rule 5-613, even though the court confirmed that its ruling on the admissibility of the prior statement was based on the impeachment. During the entire trial, defense counsel failed to bring the trial court's attention to the admission of the statements as substantive evidence, despite having ample opportunities to do so. Rather, he continued to base his argument in favor of admission on impeachment. Therefore, appellant's argument that the trial court committed reversible error by applying the wrong standard to decide the admission was not preserved.

Next, we look at whether the trial court erred in not admitting Ms. DeMascolo's two prior statements into evidence as extrinsic impeachment evidence pursuant to Md. Rule 5-

613(b). Although the appellant did not base his argument on Md. Rule 5-613(b), the State added in its brief that the trial court properly excluded extrinsic evidence of Ms. DeMascolo's prior written statements pursuant to this rule. We agree.

The Maryland Rules 5-613 and 5-802.1 provide different ways in which prior inconsistent statements can be used at trial. Under Md. Rule 5-613, the statements may be used for impeachment, whereas under Md. Rule 5-802.1, the statements may be admitted as substantive evidence. Both rules cannot be applied at the same time because "Rule 5-802.1 does not contain the same foundational requirements as Rule 5-613." *Thomas v. State*, 213 Md. App. 388, 406-07 (2012). Maryland Rule 5-802.1 controls "when extrinsic evidence of a prior inconsistent statement is offered as substantive evidence," *Thomas v. State*, 213 Md. App. 406, whereas Md. Rule 5-613 permits a party to use a witness's prior statements, which are inconsistent to his in-court testimony, to impeach the witness's credibility, but "only if a sufficient foundation first has been established." *Id.* at 405.

The Maryland Rule 5-613(b) contains the following foundational requirements:

> (b) **Extrinsic evidence of prior inconsistent statement of witness**. Unless the interests of justice otherwise require, extrinsic evidence of a prior inconsistent statement by a witness is not admissible under this Rule (1) until the requirements of section (a) have been met and the witness has failed to admit having made the statement and (2) unless the statement concerns a non-collateral matter.

In *Hardison v. State*, 118 Md. App. 225 (1997), this Court explained:

> Maryland Rule 5-616 permits extrinsic evidence of prior inconsistent statements to be used for the purpose of impeachment, in accordance with Maryland Rule 5-613(b). Under Rule 5-613(b), for extrinsic evidence of a witness's prior inconsistent oral statement to be admissible for impeachment, the following foundation must be laid: 1) the

> contents of the statement and the circumstances under which it was made, including the person to whom it was made, must have been disclosed to the witness during his trial testimony; 2) the witness must have been given the opportunity to explain or deny the statement; 3) the witness must have failed to admit having made the statement; and 4) the statement must concern a noncollateral matter. Before the requirements of Rule 5-613(b) come into play, however, the prior statement of the witness must be established as inconsistent with his trial testimony.

Id. at 237-38.

To admit Ms. DeMascolo's prior inconsistent statements into evidence for impeachment purpose pursuant to Rule 5-613, these four foundational requirements must be met. However, the appellant failed to prove that they were, in fact, all satisfied. During trial, Ms. DeMascolo did not fail to admit having made the prior statements, which is the third requirement of Rule 5-613(b). The pertinent part of the cross-examination is the following:

> [Defense counsel]. That suspect number five is the one who drove, but it was suspect number three who was putting the TVs in the trunk?
>
> [Ms. DeMascolo]. That's what I have written.
>
> [Defense counsel]. And you didn't say in your second written statement that suspect number five was assisting suspect number three, did you?
>
> [Ms. DeMascolo]. Not in the statement.
>
> [Defense counsel]. And in your first statement you didn't say that suspect number five was assisting suspect number three in that statement either, did you?
>
> [Ms. DeMascolo]. I said there was also another male getting in the front of the car.
>
> [Defense counsel]. Right. So you only saw my client driving the car and standing at the property – or present at the property,

> but from your written statement you didn't tell the police that my client was in the house; is that correct?
>
> [Ms. DeMascolo]. No, that's not correct. I know I told the police when they came to the house, and I know I also spoke with 911, and I know I saw him assist the other defendant.
>
> [Defense counsel]. But wouldn't you agree that a written statement is really important to get the details right?
>
> [Ms. DeMascolo]. I guess so.
>
> [Defense counsel]. And wouldn't you agree that your details aren't correct when it comes to what your testimony is today and what you wrote with respect to what the different suspects were doing?
>
> [Ms. DeMascolo]. No.

And, later, in re-cross-examination, the following colloquy took place:

> [Defense counsel]. But in that five minutes you took to write both of those statements, it would have been important to relay specific facts about what individuals were doing, correct?
>
> [Ms. DeMascolo]. Correct.
>
> [Defense counsel]. And *you would agree that what you've testified here today is inconsistent with what you stated in Defense Exhibit 2 and 3*?
>
> [Ms. DeMascolo]. *I believe not. I believe what I wrote here is correct. Some of the things are missing, but they're not wrong*.

(Emphasis added).

Regarding the third element of Rule 5-613(b), Ms. DeMascolo admitted that she made the prior statements, but she explained that they were merely statements with missing details. This is similar to *Williams*, a case in which this Court held that the witness's trial testimony was not inconsistent with what he had said in his signed statement to the police

because his trial testimony was an extended version of his written statement. *Williams*, 131 Md. App. 1, 10 (2000).

For the aforementioned reasons, the third requirement of Rule 5-613(b) was not satisfied. Thus, the foundational requirements for the introduction of extrinsic evidence of the prior allegedly inconsistent statements of Ms. DeMascolo were not met. We are satisfied that the trial court appropriately evaluated each requirement and did not abuse its discretion in not admitting Ms. DeMascolo's two prior statements.

For the reasons above, we hold that trial court did not abuse its discretion in not admitting Ms. DeMascolo's prior statements as extrinsic evidence of impeachment under Md. Rule 5-613(b).

II. Sufficiency of the Evidence

A. The Contentions of the Parties

The appellant argues that there was insufficient evidence to sustain his convictions because the testimony produced during his trial was "riddled with inconsistencies and impossibilities." The appellant provides five examples supporting his claim. First, the appellant argues that there was no evidence of any forced entry into the house except the damage to the front screen door. Second, the items Baker claimed were taken from his house on October 26th were not admitted by Fletcher's counsel. Third, the number of T.V.s that each party testified was taken was inconsistent, with Baker testifying that only three T.V.s were taken and Fletcher testifying that he took six T.V.s from Baker's house. Fourth, the credibility of Ms. DeMascolo's testimony is in question, as she claimed that she could see, through the tinted window of the silver Buick, who was sitting in the front passenger seat. Finally, the appellant argues that Ms. DeMascolo's two prior statements to the police were inconsistent with her in-court testimony that the appellant came out from Baker's house. Her written statements, which did not mention the appellant coming from the house, were more consistent with the appellant's testimony.

The State responds that the appellant's contention that the evidence was insufficient to support his convictions is not preserved because the appellant "failed to make a timely motion for judgment of acquittal." In addition, the State argues that, even if the issue was preserved, it is without merit because the evidence was sufficient to sustain the convictions.

We agree with the State that the appellant's contention of insufficiency regarding the sufficiency of the evidence is not preserved for review under the particularity requirement of Maryland Rule 4-324.

B. Standard of Review

This Court has explained that the standard of review for 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." *Goines v. State*, 89 Md. App. 104, 108 (1991) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1917) (emphasis in original)). Thus,

> [o]ur concern is not whether the verdict below was in accord with the weight of the evidence, but rather, whether there was sufficient evidence at trial "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 offenses charged beyond a reasonable doubt."

State v. Stanley, 315 Md. 733, 750 (1998) (quoting *State v. Albrecht*, 336 Md. 475, 479 (1994)).

C. Analysis

A defendant must move for judgment of acquittal to preserve an appellate challenge to the legal sufficiency of the evidence. *Hobby v. State*, 436 Md. 526, 539 (2014). Maryland Rule 4-324, which governs a motion for judgment of acquittal, provides:

> (a) **Generally**. A defendant may move for judgment of acquittal on one more counts, or on one more degrees of an offense which by law is divided into degrees, at the close of the evidence offered by the State and, in a jury trial, at the close of all the evidence. *The defendant shall state with particularity*

> *all reasons why the motion should be granted.* No objection to the motion for judgment of acquittal shall be necessary. A defendant does not waive the right to make the motion by introducing evidence during the presentation of the State's case.

(Emphasis added).

Moreover, a defendant must argue precisely the particular elements of the crime for which the evidence is deficient in order to preserve for appellate review a claim related to sufficiency of evidence. *Poole v. State*, 207 Md. App. 614, 632 (2012). If a defendant's motion for judgment of acquittal is on a ground different than that set forth on appeal, the issue of sufficiency of evidence is not preserved for review on appeal. *Id.* "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." *Bates v. State*, 127 Md. App. 678, 691 (1999). These requirements are mandatory. *Whiting v. State*, 160 Md. App. 285, 308 (2004).

Here, after the jury had been already instructed and in order "to preserve the issue for appellate review," defense counsel made a single motion for judgment of acquittal. The trial court heard and summarily denied the motion. In defense counsel's motion for judgment of acquittal, he argued that there was no evidence to show that the appellant broke into Baker's house or his intention regarding the charge of burglary in the first degree. Regarding the second charge of theft, defense counsel argued that there was not enough evidence to show an intent to deprive the owner of the property. Finally, regarding the

conspiracy count, defense counsel argued that there was not enough evidence to show a conspiracy.

However, in challenging the sufficiency of the evidence on appeal, the appellant does not rely on the same grounds as he did during trial. Instead, his argument is that the testimony produced during trial was inconsistent. The appellant argues that there were inconsistencies between the testimonies of Fletcher and Baker regarding forced entry into the house and the number of items such as T.V.s Baker claimed were stolen. Lastly, the appellant is now challenging the credibility of Ms. DeMascolo's testimony, an argument which defense counsel never made in support of his motion during trial. This is analogous to *Graham*, when a petitioner who was convicted of theft of property worth $300 or more argued on appeal that his conviction should be reversed because the State failed to prove the stolen items were worth $300 or more. The conviction in *Graham* was upheld by the Court of Appeals because the record showed that "the petitioner's trial counsel moved for a judgment of acquittal solely on the ground that the State had failed to prove that the owner of the stolen items was 'a corporation, licensed to practice in the State of Maryland.'" *Graham v. State*, 325 Md. 398, 416-17 (1992). Appellant's motion for judgment of acquittal during trial was based on grounds that are different from those set forth in this appeal. Therefore, the issue of sufficiency of evidence is not preserved for our review.

Assuming, *arguendo*, that the issue was properly preserved, we hold that the evidence was sufficient to sustain all of the appellant's convictions. The statutory definition of burglary in the first degree provides that "a person may not break and enter

the dwelling of another with the intent to commit theft or crime of violence." Md. Code. Ann., Crim. Law § 6-202. The breaking element of burglary may be satisfied if the breaking has occurred constructively. *Winder v. State*, 362 Md. 275, 326 (2001). The Court of Appeals has defined "constructive breaking … [to] include '[e]very unlawful entry.'" *Id.* (quoting *Brooks v. State*, 277 Md. at 160 (1976)).

The appellant argues that there was insufficient evidence to prove that he "broke" into Baker's home. He asserts that his conviction was based upon inconsistent testimony because Baker and Fletcher testified differently on whether the rear sliding door was unlocked. We find the appellant's argument to be unpersuasive. From the record before the circuit court, a rational trier of fact could find the breaking element beyond a reasonable doubt. Fletcher himself testified that he opened the front door to let the appellant into Baker's house, which was unlawful entry. In support of this finding, Ms. DeMascolo also testified in court that she saw the appellant coming out of Baker's house. In addition, Ms. DeMascolo watched the appellant and Fletcher attempt to shut the trunk of the car before the appellant got into the driver's seat and drove away. Accordingly, the testimony of Fletcher and DeMascolo permitted a jury to find beyond a reasonable doubt that the appellant committed the first degree burglary.

Next, we consider whether there was sufficient evidence from which a rational fact finder could have concluded that the appellant had committed theft of a value between $1,000 and $10,000. The statutory definition of theft provides that "a person may not willfully or knowingly obtain or exert unauthorized control over property, if the person

willfully or knowingly uses, conceals, or abandons the property knowing the use, concealment, or abandonment probably will deprive the owner of the property." Md. Code Ann., Crim. Law § 7-104. The appellant and Fletcher stole two flat screen televisions and one Xbox video console belonging to Baker. These items have a collective value of at least $1,000 but less than $10,000. We find the appellant's argument, that the number of items Baker claimed were stolen is inconsistent with Fletcher's testimony, unpersuasive. The appellant was charged only with stolen items that were recovered, and Fletcher testified that the appellant participated in taking those items. Therefore, a rational fact finder could conclude that the appellant knowingly concealed or abandoned the property of Baker, knowing that such action would deprive Baker of his property.

Last, we consider whether the evidence was sufficient to sustain the conspiracy charge. Conspiracy is a common-law crime. *Rudder v. State*, 181 Md. App. 426, 432 (2006). A criminal conspiracy is a "combination by two or more persons to accomplish a criminal or unlawful act, or to do a lawful act by criminal or unlawful means." *Id.* at 434 (quoting *Jones v. State*, 8 Md. App. 370, 375 (1969)). During trial, Fletcher testified that Fletcher, the appellant, and Schepas drove to Baker's house because they "needed some money." When they arrived and confirmed nobody was home, Fletcher went in through the rear sliding door of the house and let the appellant in through the front door. The two men searched for money and grabbed electronics, which they placed by the front door. Fletcher also testified that, at one point, either he or the appellant received a phone call from Schepas, who had remained in the car, and was alerting them to the presence of a

suspicious neighbor, Ms. DeMascolo. The jury could have rationally inferred that Fletcher, the appellant, and Schepas acted concertedly and in coordination with one another to commit a burglary of Baker's house.

For the aforementioned reasons, we hold that the evidence presented during trial supported a rational trier of fact finding the essential elements of burglary in the first degree, theft, and conspiracy to commit burglary beyond a reasonable doubt. Thus, we hereby affirm all three guilty verdicts entered against the appellant by the circuit court.

JUDGMENT OF THE CIRCUIT COURT FOR WORCESTER COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.