UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1606

September Term, 2014

SHANNON LEE HILTON

v.

STATE OF MARYLAND

Krauser, C.J.,
Graeff,
Friedman,

JJ.

Opinion by Friedman, J.

Filed: October 16, 2015

Following a bench trial in the Circuit Court for Worcester County, appellant, Shannon Lee Hilton, was convicted of second-degree burglary, fourth-degree burglary, and theft of property with a value less than $1,000. The trial court sentenced appellant to a prison term of seven years, suspending all but 18 months, on the second-degree burglary charge, merging the remaining convictions therein for sentencing purposes. The court further ordered him to pay $600 in restitution to the victim of the burglary. Appellant thereafter filed a timely notice of appeal.

Appellant presents the following questions for our consideration:

1. Did the trial judge violate Md. Crim. L. Code Ann., §6-205(f) when he found Mr. Hilton guilty of fourth-degree burglary in addition to theft?

2. Does the restitution order in the amount of $600 constitute an illegal sentence?

3. Did the trial judge commit plain error by failing to provide defense counsel with an opportunity to make a closing argument?

For the reasons that follow, because the State concedes, and we agree, that the trial court erred in convicting appellant of both fourth-degree burglary and theft of property with a value less than $1,000, we vacate the court's conviction and sentence on the fourth-degree burglary conviction. We shall affirm the remaining judgments of the trial court.

BACKGROUND

At trial, Paul Dykes testified that he stored his 20-gauge Winchester Model 140 youth shotgun in a shed on his 50-acre property in Worcester County. On the afternoon of March 20, 2014, Mr. Dykes was working on farm equipment in front of that shed when he

realized he required some parts. In preparation of leaving the property to run his errands, he put his tools away in the shed–noticing the shotgun–and shut the shed door.

When Mr. Dykes was about a quarter mile away from his driveway on his way to Fruitland, Maryland, he passed appellant's car, which was headed in the direction of Mr. Dykes's house.[1] Having a "funny feeling" about appellant and thinking about the shotgun in his shed, Mr. Dykes turned his vehicle around and drove back to his house. There, he encountered appellant in the driveway, about 25 feet away from the shed, getting back into his car. Mr. Dykes asked appellant what he was doing on the property, whereupon appellant came up with "a couple of excuses, he had to use the bathroom, and this and that." Mr. Dykes told appellant he was not permitted on the property when Mr. Dykes was absent.

After appellant left the property, Mr. Dykes went to the shed, where he observed that the door, which he had left closed only moments earlier, was open. Further exploration revealed that the shotgun was missing from the shed.

When later questioned by Maryland State Police Corporal Kyle Clark, appellant denied Mr. Dykes's accusation of theft of the shotgun. He said he had only met Mr. Dykes at the end of his driveway, engaged in a very brief conversation, and left the premises immediately thereafter.

[1] Appellant, whom Mr. Dykes had known for approximately six years, had driven to the house the day before in the same car, so he was easily identifiable to Mr. Dykes. During the visit on March 19, 2014, appellant had entered the shed where Mr. Dykes kept the shotgun in plain sight, telling Mr. Dykes he was looking for a pair of pliers.

Appellant presented no evidence. Following the denial of his motions for judgment of acquittal as to all counts, the court, explaining that the "only issue is credibility of Mr. [Dykes]," ruled that "it would defy common sense not to find that Mr. Hilton was the one that was in that area without any perceived business whatsoever, and was there briefly and then leaves, is the one that had taken the [shot]gun."

DISCUSSION

I.

Appellant first contends that the trial court erred when it convicted him both of theft, pursuant to Md. Code (2012 Repl. Vol., 2013 Supp.), §7-104 of the Criminal Law Article ("CL"), and fourth-degree burglary, pursuant to CL §6-205(c), because CL §6-205(f) prohibits a person from being convicted of both crimes if they arise out of the same act. As the burglary and theft arose from appellant's alleged theft of Mr. Dykes's shotgun from the shed, he concludes, he should not have been convicted of both crimes. The State acknowledges that CL §6-205(f) precludes conviction of both crimes and concedes that the conviction of fourth-degree burglary was erroneous and should be vacated.

Appellant was charged with, and convicted of, the misdemeanor of theft of property with a value less than $1,000, pursuant to CL§7-104. He was also charged with, and convicted of, fourth-degree burglary in violation of CL §6-205(c), which prohibits a person from being in or on the dwelling or storefront of another with the intent to commit theft. The trial court acknowledged that both crimes arose from appellant's alleged theft of Mr. Dykes's shotgun from his "storehouse" on March 20, 2014.

CL §6-205(f) unambiguously states: "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." Because the fourth-degree burglary was based on the theft of the shotgun from Mr. Dykes's shed, which established the violation of CL §7-104, the trial court erred in convicting appellant of fourth-degree burglary, and his conviction of and sentence for that crime must be vacated.

II.

Appellant next argues that the trial court's order that he pay restitution in the amount of $600 to Mr. Dykes was arbitrary because the State failed to prove by a preponderance of the evidence that the shotgun was worth $600. Therefore, he avers, the court's imposition of restitution in that amount comprised an illegal sentence.[2]

Maryland Code (2008 Repl. Vol., 2013 Supp.), §11–603 of the Criminal Procedure Article ("CP"), governs the award and payment of restitution by a criminal defendant and provides, in pertinent part:

> (a) *Conditions for judgment of restitution*.—A court may enter a judgment of restitution that orders a defendant or child respondent to make restitution in addition to any other penalty for the commission of a crime or delinquent act, if:
>
> (1) as a direct result of the crime or delinquent act, property of the victim was stolen, damaged, destroyed, converted, or unlawfully obtained, or its value substantially decreased[.]

[2] An order to pay restitution is part of a criminal sentence. If such a condition exceeds the authority of the court, it is an illegal sentence, and a challenge to it can be raised initially at any time, including on appeal. *McDaniel v. State*, 205 Md. App. 551, 556 n 2 (2012).

* * *

(b) *Right of victims to restitution*.---A victim is presumed to have a right to restitution under subsection (a) of this section if:

(1) the victim or the State requests restitution; and

(2) the court is presented with competent evidence of any item listed in subsection (a) of this section.

Restitution under CP §11–603 "'is a *criminal sanction,* not a civil remedy.'" *McDaniel*, 205 Md. App. at 558 (quoting *Grey v. Allstate Ins. Co.*, 363 Md. 445, 451 (2001))(emphasis in original). The predominant goal of the restitution statute is "to compensate the victim for the expenses and losses caused directly by the defendant." *Id*. An order of restitution is proper so long as the court is presented with "[c]ompetent evidence of entitlement to, and the amount of, restitution," and such evidence need only be "reliable, admissible, and established by a preponderance of the evidence." *Id*. at 559. Moreover, it is the defendant challenging the charge who bears the burden of proving that the amount of restitution claimed is not fair or reasonable. *Id*.

Here, there is no question Mr. Dykes's shotgun was stolen from his shed, and the trial court deemed the circumstantial evidence sufficient for a determination that appellant was the person who stole it. Therefore, Mr. Dykes proved his entitlement to restitution for the theft of the shotgun.

With regard to the amount of the restitution, when the prosecutor asked Mr. Dykes the value of his missing shotgun, the victim stated, "Approximately $600, 600 to 700 area. It's hard to really judge it because it was an older gun. They still make the same model, but there's different grades of it. So the low end would be $500." And, he had earlier testified

that the shotgun was "more of a family heirloom, beings [sic] it was my grandfather's gun and was given to me when I was young."

Given the age of the shotgun, and the unlikelihood of the existence of a receipt or bill of sale detailing its purchase price, Mr. Dykes's testimony regarding its value comprised competent evidence of its value. *See Stone v. State*, 178 Md. App. 428, 442 (2008)("Maryland law is well-established that the owner of personal property is presumptively qualified to testify about the value of his goods."). The trial court's imposition of a restitution order in the amount of $600, within the range of possible values provided by the victim, was not arbitrary, as appellant suggests. Appellant's assertion that the shotgun was "just as likely to be worth $500, $700, or any amount in between" does not meet his burden of proving that the amount of restitution imposed by the court was unfair or unreasonable.

III.

Finally, appellant claims that the trial court erred in failing to provide defense counsel an opportunity to make a closing argument before rendering its judgment. Conceding that he did not object to this alleged lack of opportunity to present a closing argument, thereby failing to preserve the issue for appellate review, appellant nonetheless asks that we exercise our discretion to review the matter for plain error and hold that a trial court is *required* to ask defense counsel if he or she wishes to make a closing argument. We decline to do so.

There is no question that appellant made no objection to his alleged lack of opportunity to make a closing argument. As such, the point is not preserved for appellate

review. *See* Maryland Rule 8–131(a) (except for issues of subject matter and personal jurisdiction, "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.").

Recognizing his non-preservation problem, appellant invites us to notice plain error and hold that a trial court must ask a criminal defendant if he wishes to make a closing argument or run the risk of committing reversible error. Under governing Maryland law, however, it is not error, much less plain error, for the trial court not to inquire if a defendant is desirous of presenting a closing argument. *Covington v. State*, 282 Md. 540 (1978). *See also Cherry v. State*, 305 Md. 631, 640 (1986)("*Covington* teaches that the failure to afford defense counsel the opportunity to argue the sufficiency of the evidence and the applicable law before a verdict is rendered … is not reviewable on direct appeal in the absence of timely protest or objection when the record is not sufficient to show that the failure to protest or object was not knowing and purposeful.").

JUDGMENT AND SENTENCE OF FOURTH-DEGREE BURGLARY CHARGE VACATED; REMAINDER OF THE JUDGMENTS OF THE CIRCUIT COURT FOR WORCESTER COUNTY AFFIRMED; COSTS TO BE PAID ONE-THIRD BY WORCESTER COUNTY AND TWO-THIRDS BY APPELLANT.