UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1857

September Term, 2015

ASHLEY NICHOLLE GORDON

v.

STATE OF MARYLAND

Krauser, C.J.,
Graeff,
Friedman,

JJ.

Opinion by Krauser, C.J.

Filed: October 12, 2016

A jury, sitting in the Circuit Court for Prince George's County convicted Ashley Nicholle Gordon, appellant, of theft of property with a value of between $1,000 and $10,000, and of conspiracy to commit that crime. After merging the latter conviction into the former, the court imposed a suspended sentence of three years of imprisonment, as well as five years of probation, and payment of restitution, in the amount of $6,000, to the victim of the theft.

Appellant raises two questions on appeal:

I. Was the evidence sufficient to sustain her convictions?

II. Did the sentencing court err when it ordered restitution without inquiring into her ability to pay?

For the reasons that follow, we shall affirm.

FACTS

The State prosecuted appellant for conspiring with her supervisor and friend, Zina Mitchell, to steal proceeds from a fashion show held on November 16, 2013, at the Temple Hills Community Center in Prince George's County and for committing that theft. The events that gave rise to that prosecution began in November of 2013. At that time, appellant was working part time at the front desk of the Temple Hills Community Center (the "Center") where she greeted visitors, scanned identification, booked events, and accepted money at the register. She was close friends with a co-conspirator, Zina Mitchell, who was the director of the Center and oversaw its operations.

A fashion show was planned at the Center for the evening of November 16, 2013, and was included in the Center's quarterly events planner. As was customary, the planner

was submitted to and approved by Deborah Jeter, the regional manager of the Maryland National Park and Planning Commission (the "MNPPC"). Dante Weems, an employee of the Center, made flyers for the show, which were approved by Zina Mitchell. The flyers stated, among other things, that pre-sale tickets for the event would cost $15, tickets purchased at the door would cost $20, and that a percentage of the money raised would be donated to an HIV/AIDS charity.

Several Center employees worked at the fashion show. Mitchell assigned the task of collecting money for the tickets, bought at the front desk cash register, to appellant, and the job of collecting the pre-paid tickets, at the gym door, to another employee. The Center's surveillance cameras showed appellant working the front desk from 6:30 p.m. until the event ended at approximately 10:00 p.m., taking money from customers and placing it in the cash register. Appellant, however, never entered the transactions into the register, nor did she close the register's drawer completely, as she was required to do.

The Center's employees were trained to keep the cash register closed for safety reasons and to allow the register to connect to the Center's SmartLink system, which recorded information about each transaction as it occurred. When used properly, the system alerts the MNPPC that money has been collected and "leaves a trail" for the MNPPC to identify how much money was paid to the Center. Moreover, after an event, the employee, who had collected money, was required to place those funds in a safe, along with a printout from the system, detailing the amount, type, and number of transactions. The money was then deposited at the bank by the Center's director, Zina Mitchell.

At the end of the night of the fashion show, the tickets were counted and of the 400 tickets sold, appellant sold approximately 100 tickets. Nonetheless, no money was recorded as having been received during the fashion show, even though appellant had collected approximately $2,000 in cash. Moreover, no printout or money was turned over to the MNPPC regarding the fashion show.

Mericha Johnson, an assistant manager of the Center, testified that about three weeks after the event, Zina Mitchell told her to send an email to Jeter stating that the event had been cancelled. Although Johnson knew the event had in fact occurred, she did what Mitchell asked her to do.

Robert Feeley, an auditor for the MNPPC, testified that while conducting an audit of the Center about an unrelated complaint regarding petty cash, one of the employees told him to look into a fashion show that had been supposedly canceled when, in fact, it had occurred and money had been collected. Feeley reviewed the Center's records and found no record of any money coming into the Center in connection with the fashion show. He also reviewed Mitchell's email that stated that the fashion show had been cancelled, though video surveillance footage from the Center's cameras had recorded such a fashion show having taken place, as well as appellant collecting money at the front desk. When Feeley interviewed appellant, she told him that the show had been canceled and that she had left early that day, at about 3:30 p.m., even though the surveillance footage showed and appellant's signed time card stated that appellant had arrived at work at 7:45 a.m. and left at 10:15 p.m. Appellant also told the auditor that she never touched money at any Center

event, which was contradicted by surveillance footage, which showed her taking cash and placing it in the cash register at the fashion show.

DISCUSSION

I.

Appellant offers several arguments as to why the reversal of her theft and conspiracy to commit theft convictions is in order. First, she argues that her theft conviction must be vacated because the jury did not indicate the nature of the theft for which she had been convicted. Second, she contends that the State produced insufficient evidence, showing that she had knowingly possessed stolen property, to sustain her theft conviction under any of the three kinds of theft. Third, and finally, appellant claims that we must vacate her conspiracy conviction because there was no evidence of an agreement to support that conviction.

The standard for 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." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). "That standard applies to all criminal cases, regardless of whether the conviction rests upon direct evidence, a mixture of direct and circumstantial, or circumstantial evidence alone." *Smith v. State*, 415 Md. 174, 185 (2010) (citation omitted). The limited question before an appellate court "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." *Fraidin v.*

State, 85 Md. App. 231, 241, *cert. denied*, 322 Md. 614 (1991). "Weighing the credibility of witnesses and resolving any conflicts in the evidence are tasks proper for the fact finder." *State v. Stanley*, 351 Md. 733, 750 (1998) (citing *Binnie v. State*, 321 Md. 572, 580 (1991)). A fact-finder is free to believe part of a witness's testimony, disbelieve other parts of a witness's testimony, or to completely discount a witness's testimony. *See Longshore v. State*, 399 Md. 486, 499-500 (2007) (citations omitted).

Moreover, circumstantial evidence will sustain a conviction when all the facts taken together do not require the fact-finder to resort to "mere speculation or conjecture." *Smith*, 415 Md. at 185 (citation omitted). "Where it is reasonable for a trier of fact to make an inference, we must let them do so, as the question is not whether the [trier of fact] could have made other inferences from the evidence or even refused to draw any inference, but whether the inference [it] did make was supported by the evidence." *State v. Suddith*, 379 Md. 425, 447 (2004) (quotation marks and citation omitted) (brackets in original).

A. Theft conviction

The Maryland theft statute consolidates theft by different modalities. *See* Md. Code Ann., Criminal Law (Crim. Law), § 7-104(a)-(e). The consolidation was designed to designate into "a single crime" of theft what was formerly known as larceny; larceny by trick; larceny after trust; embezzlement; false pretenses; shoplifting; and receiving stolen property. Crim. Law § 7-102(a).

The State charged appellant with one count of theft by three different modalities: (1) possessing stolen personal property; (2) knowingly obtaining or exerting unauthorized

control over property; or (3) knowingly obtaining or exerting unauthorized control over property by deception. *See* Crim. Law § 7-104(a)-(c). The statute defines the term "obtain" to mean "to bring about a transfer of interest in or possession of the property[,]" Crim. Law § 7-101(g)(1), and the term "exert control" to mean "to take, carry away, [or] appropriate to a person's own use . . . possession of property." Crim. Law § 7-101(d)(1).

It further states: (1) possession of stolen property requires that the person intended to deprive the owner of the property, *see* Crim. Law § 7-104(c)(1)(i-iii); (2) obtaining or exerting unauthorized control over property requires that the person willfully or knowingly used or concealed the property in a manner that deprives the owner of the property, *see* Crim. Law § 7-104(a)(1-3); and (3) obtaining or exerting unauthorized control over property by deception requires that the person used or concealed the property knowing the use or concealment probably would deprive the owner of the property, *see* Crim. Law § 7-104(b)(1-3).

The State proceeded under the theory that appellant committed the crime of theft either as a principal or an accomplice, and, at the conclusion of the trial, the circuit court instructed the jury that the State need not prove that the defendant "personally commit[ted] the acts that constitute" theft, but that the crimes occurred and that appellant, "with the intent to make the crime happen, knowingly aided, counseled[,] commanded or encouraged the commission of the crime or communicated to a primary actor in the crime that she was ready, willing and able to lend support if needed." C*f. State. v. Raines*, 326 Md. 582, 597 (1992) ("To be an accomplice a person must participate in the commission of a crime

knowingly, voluntarily, and with common criminal intent with the principal offender, or must in some way advocate or encourage the commission of the crime.") (quotation marks, citation, and footnote omitted), *cert. denied*, 506 U.S. 945 (1992).

Appellant first argues that, although there was sufficient evidence to sustain her guilt "under some but not all of the modalities, [her] theft conviction must [] be vacated because the jury did not indicate under which modalities it convicted [her]." We disagree.

In *Rice v. State*, 311 Md. 116, 124-26 (1987), the Court of Appeals declared that the consolidated theft statue "clearly posits a single offense" and that to convict, the jurors need only be unanimous in their verdict that the defendant had unlawfully appropriated the personal property of another. Expanding on that point, this Court has said that "the gravamen of the offense of theft is the depriving of the owner of his rightful possession of his property. The particular method employed by the wrongdoer is not material; an accusation of theft may be proved by evidence that it was committed in any manner that would be theft[.]" *Cardin v. State*, 73 Md. App. 200, 211-12 (1987) (quotation marks and citation omitted), *cert. denied*, 488 U.S. 827 (1988). "In short, the law requires unanimity only in the verdict, not in the rationale upon which the verdict is based." *Id*. at 212 (quotation marks and citation omitted). Moreover, when there is sufficient evidence to prove theft under at least one of the enumerated modalities, there is sufficient evidence to support a theft conviction.

Appellant next seeks reversal of her theft conviction by arguing that there was insufficient evidence that she possessed stolen property, an element common to each of the

three theft modalities. Specifically, she argues that there was no evidence that she stole or intended to steal the money when she took it from the customers paying to attend the fashion show. As appellant's brief puts it:

> After all, [appellant] was lawfully working at the front desk, customers voluntarily exchanged money to attend the show, and no evidence showed that [appellant] knew before or during the fashion show that the proceeds would not be submitted to the Park & Planning Commission. Furthermore, the point of possession cannot merely be when [appellant] left open the register. Otherwise, improper cashier work, in and of itself, would constitute possession of stolen property[.]

We can readily dismiss this argument. A jury could infer that, in taking money from the attendees, placing the money in the cash register, never ringing up the sale, and keeping the cash register open, which permitted her to evade the SmartLink system, appellant was acting with an intent to steal the proceeds of the fashion show when she accepted the money. This inference was further buttressed by Mitchell's assignment of appellant to work the cash register and appellant's ensuing false statements to the auditor that the show had been cancelled and that she had never handled money at the Center. Under the circumstances presented, we are persuaded that there was sufficient evidence, for a jury to believe, that appellant possessed stolen property and obtained or exerted control over the property with an intent to steal it. Moreover, by acting in the manner that she did, appellant gave the attendees the impression that the transaction was being legitimately processed and that the funds would be dispersed to a HIV/AIDS charity as stated in the promotional material. *Cf. Cain v. State*, 162 Md. App. 366, 378-80 (2005) (upholding theft conviction where the defendant collected donations for the 9/11 relief

efforts in New York City, purchased materials with the donations, but failed to take any of the items to the affected area), *cert. denied*, 388 Md. 673 (2005). Therefore, there was also sufficient evidence for a juror to believe that appellant obtained or exerted control of property by deception.

Appellant downplays her false statements to the auditor and suggests that she had made those statements to avoid getting into trouble for working a "15-hour day as a temporary worker." Not only was there no evidence presented that MNPPC prohibited employees from working 15-hour days, but the State introduced evidence that appellant had worked a 15-hour day the week preceding the fashion show, suggesting that appellant's 15-hour work day was not a problem for her employer.

B. Conspiracy conviction

Appellant next claims that there was insufficient evidence to sustain her conspiracy to commit theft conviction. While admitting that conspiracy does not require an overt act, she maintains that the "evidence of any purported agreement is simply too diffuse and speculative" to sustain her conviction. We disagree.

In *Mitchell v. State*, 363 Md. 130, 145 (2001), the Court of Appeals summarized the elements of conspiracy:

> A criminal conspiracy consists of the combination of two or more persons to accomplish some unlawful purpose, or to accomplish a lawful purpose by unlawful means. The essence of a criminal conspiracy is an unlawful agreement. The agreement need not be formal or spoken, provided there is a meeting of the minds reflecting a unity of purpose and design.

(Quotation marks and citations omitted.) *See also Alston v. State*, 177 Md. App. 1, 42 (2007) ("Conspiracy may be proven through circumstantial evidence, from which an inference of a common design may be shown.") (citation omitted), *aff'd*, 414 Md. 92 (2010). And, in *Jones v. State*, 132 Md. App. 657, 660, *cert. denied*, 360 Md. 487 (2000), this Court observed:

> In conspiracy trials, there is frequently no direct testimony, from either a co-conspirator or other witness, as to an express oral contract or an express agreement to carry out a crime. It is a commonplace that we may infer the existence of a conspiracy from circumstantial evidence. If two or more persons act in what appears to be a concerted way to perpetrate a crime, we may, but need not, infer a prior agreement by them to act in such a way. From the concerted nature of the action itself, we may reasonably infer that such a concert of action was jointly intended. Coordinated action is seldom a random occurrence.

The concurrent action taken by appellant and Mitchell, her supervisor and close friend, was sufficient to indicate an unlawful agreement, between them, to commit theft. Mitchell's arrangement of appellant to work the cash register and appellant's decision in leaving the cash drawer open, making it appear that the Center had collected no money during the fashion show, coincided with Mitchell's email to Jeter that the event had been cancelled to explain why no proceeds were deposited. Moreover, appellant's false statement to the auditor that the show had been cancelled provided evidence of the existence of a conspiracy between the two. Under the foregoing circumstances, we are persuaded that there was sufficient evidence of an agreement between appellant and Mitchell to sustain her conspiracy conviction. *Cf. Acquah v. State*, 113 Md. App. 29, 50

(1996) (upholding conviction for conspiracy to commit theft based, in part, on the defendant's "direct participation in the concealment of the continuing crime of theft.").

II.

Appellant contends that the sentencing court erred in ordering her to pay restitution without inquiring into her ability to pay. Appellant cites Md. Code Ann., Criminal Procedure (Crim. Proc.), § 11-603(a), which states that "[a] court *may* enter a judgment of restitution that orders a defendant . . . to make restitution in addition to any other penalty for the commission of a crime" and § 11-605(a)(1), which states that "[a] court *need not issue a judgment of restitution . . . if* the court finds [] that the restitution obligor does not have the ability to pay the judgment of restitution[.]" (emphasis added). The State asserts that appellant has not preserved her argument for our review, but, even if she did, the applicable statute is not Crim. Proc. §§ 11-603 or 11-605, but rather § 7-104 of the Crim. Law, which requires restitution in theft cases and contains no "inability to pay" language. We agree with the State.

A. Preservation

In *Brecker v. State*, 304 Md. 36, 37-38 (1985), the defendant was convicted, among other things, of store house breaking and malicious destruction of property and ordered by the sentencing court, upon the State's request, to pay restitution in the amount of $1,036, for court costs and services rendered by the Public Defender. Although the defendant objected to the amount of restitution requested by the State, he waited, until his appeal, to argue that the sentencing court had erred by not making any inquiry into his ability to pay

before ordering restitution. *Brecker*, 304 Md. at 39-41. The Court of Appeals held that the defendant waived his claim by failing to object to the restitution award at sentencing on the grounds that the trial court failed to consider his ability to pay. *Id*. at 42. *See also Bell v. State*, 66 Md. App. 294, 295-96, 303 (1986)(where appellant was fined $10,000 following convictions for possession of cocaine with the intent to distribute and possession of cocaine; where appellant did not object below to sentence imposed; and where for the first time on appeal argued that his sentence was illegal because the trial court failed to inquire into his ability to pay before imposing the fine, we noted in dicta that the reasoning of *Brecker* applied, and were we to address appellant's argument, we would have found it not preserved for our review).

As in *Brecker*, *supra*, appellant objected at sentencing to the amount of restitution sought by the State but never argued that the court failed to inquire into her ability to pay. Accordingly, appellant has waived her argument for our review. Nonetheless, even if *Brecker* is inapplicable and appellant had preserved her argument for our review, we would have found it without merit.

B. Merits

Appellant was convicted under Crim. Law § 7-104(g), which prohibits theft of property with a value between $1,000 and $10,000. The penalty section for that crime provides that following a conviction the defendant "*shall* restore the property taken to the owner or pay the owner the value of the property or services[.]" Crim. Law § 7-104(g)(1)(i)(2) (emphasis added). In *Carlini v. State*, 215 Md. App. 415, 455 (2013),

we held that restitution under the theft statute "was required as a matter of law." *See also Wallace v. State*, 63 Md. App. 399, 411 ("[U]nder the penalty portion of the theft statute the court *must* sentence the offender to 'restore the property taken . . . or pay [the owner] the value of the property.'") (emphasis and some brackets added) (quotation marks and citation omitted), *cert. denied*, 304 Md. 301 (1985). And in so holding, we noted that the restitution language of "[t]he [theft] statute does not require a preliminary financial inquiry." *Id*.

Nonetheless, appellant directs our attention to her written restitution order that refers to several sections of the restitution statute found in the Crim. Proc. Art. Specifically, the order states that she is to make restitution in accordance with § 11-603; that the judgment of restitution is to be recorded and indexed as a civil judgment in accordance with § 11-609; and that the compliance is made a condition of parole or probation in accordance with § 11-607.

We note that Crim. Proc. §§ 11-601, *et seq*. of the restitution subtitle applies generally to all common law and statutory crimes and contains language regarding the administration of a restitution order: including, among other things, how a court may determine a restitution order; against whom a restitution order may be ordered; to whom it may be paid; how it may be enforced; as well as the procedure for the recording and indexing of a restitution judgment. In contrast, the restitution penalty in the theft statute applies specifically, and only, to theft convictions and contains no language regarding the ability to pay. Therefore, regardless of how the payment is to be enforced or collected

under §§ 11-601, *et seq*., Crim. Law § 7-104 requires, without any determination of an ability to pay, that following a theft conviction restitution shall be ordered.

We are persuaded by the statutory language of Crim. Law §7-104, as well as by the holdings of *Carlini* and *Wallace*, that the sentencing court was not required to inquire into appellant's ability to pay.

JUDGMENTS AFFIRMED.
COSTS TO BE PAID BY APPELLANT.