UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1489

September Term, 2015

IN RE: JAKEEM J.

Berger,
Arthur,
Davis, Arrie W.
(Retired, Specially Assigned),

JJ.

Opinion by Davis, J.

Filed: July 8, 2016

A juvenile petition was filed by the State in the Circuit Court for Wicomico County charging appellant, Jakeem J., with first degree burglary, theft of property valued at between $1,000 and $10,000, malicious destruction of property, fourth degree burglary and attempted fourth degree burglary. At the adjudicatory hearing, on May 26, 2015, appellant, pursuant to a plea agreement, entered a plea of "involved" as to Count 2, felony theft, involving property with a value of between $1,000 and $10,000 on the theory of possession of recently stolen goods.[1] The State *nolle prossed* the remaining charges.

At a disposition hearing before a different judge, held on July 7, 2015, the court committed appellant to the Department of Juvenile Services, but authorized his release on the condition that he undergo electronic monitoring. After the court heard arguments regarding appellant's obligation to pay restitution, the court, on August 17, 2015, issued a Memorandum Opinion ordering restitution in the amount of $1,753 and held appellant and his co-respondent jointly and severally liable for this amount. Appellant filed the instant appeal, in which he raises the following issue for our review:

Did the juvenile court err in ordering restitution?

[1] The State disputes appellant's assertion, in his Statement of the Case, that the "acceptance of his admission was premised on the theory of possession of recently stolen goods."

FACTS AND LEGAL PROCEEDINGS

May 26, 2015 - Adjudication Hearing

Prosecution Statement of Facts

At the juvenile court's request, the prosecutor's statement of facts, presented to the court, contained the following information: On April 21, 2015, at approximately 1:14 p.m., Officer Amendolagine of the Salisbury Police Department responded to 821 Roger Street for a reported burglary. A witness, Eugene Whiting, stated that he had seen four teenage black males, first in the side yard of 823 Roger Street, where one of them tried unsuccessfully to open the window. The four teens then went to 821 Roger Street, where one got on his hands and knees and another stood on his back to remove the window screen. The window was then pried open and one teen crawled inside and allowed the remaining teens to enter. Within a few minutes, the homeowner, Betty Jean Fitzsimmons, arrived and the teens ran out of the back door; two ran in one direction and the other two ran in another direction. Fitzsimmons' bedroom and her daughter's bedroom had been ransacked; the dresser and jewelry box drawers were still open.

Fitzsimmons reported that the following property, valued in the police report as worth a total of $2,968, was missing from the residence:

- A gold rope style necklace with approximately fifteen charms on it, valued at approximately $300;

- A gold necklace with a heart-shaped pendant with diamonds on one side, valued at approximately $150;

• Fourteen rolls of nickels worth $24;[2]

• A black Xbox 360, valued at $400;

• A lime green "Thirty-One" brand gym bag, valued at approximately $75;

• A black Verizon tablet, valued at approximately $400;

• A black Toshiba laptop, valued at $300;

• A class ring from Athlon High School in Laurel, Delaware, valued at $200;

• A men's gold Citizen watch, valued at approximately $150;

• Three Bic lighters worth $6;

• A size l0 men's gold wedding ring with diamonds across the front, valued at $500;

• Size-seven gray and black Nike Jordan Flight basketball shoes, valued at $85;

• Two black Xbox 360 controllers, valued at $100;

• Two Xbox 360 video games, valued at $120;

• A red J & B speaker, valued at $68;

• Two Albuterol inhalers, valued at $70; and

• An iPhone charger, valued at $20.

A short time later, Officers Robbins and Burt, who had not been involved in the initial investigation, found three juveniles in the area who matched the general description given

[2] Both appellant's brief and the record list the approximate amount as $24. We note that the standard value for a roll of nickels is $2, with fourteen rolls valuing $28.

by Whiting. Two of them were Kevin S. and appellant, who was riding a bicycle. Officer Burt asked appellant if he owned the bicycle and appellant responded that it was not his, but that he had found it near the railroad tracks. During a consensual search, the police found, in appellant's vest pocket, a gold watch, "gold bracelets," which were later identified as necklaces by Fitzsimmons as having been stolen from her residence within the preceding 15 to 30 minutes,[3] and an iPhone charger. A police search of Kevin S.'s person and backpack yielded a Toshiba laptop, a Verizon tablet and Nike Jordan sneakers, which, according to Fitzsimmons, had also been stolen from her residence within the proceeding 15 to 30 minutes.

After the prosecution's reading of the statement of facts, the juvenile court asked appellant if he had "any additions or corrections," to which appellant, through counsel, replied:

> Your Honor, just noting for the record that the items recovered from my client, we do believe, meet the threshold amount. Also note that *my client made voluntary statements to the police, at the time, that he had purchased the items from an individual he named as Jeremy for $90.* We would concede to the Court that the circumstances and situations under which would lead a reasonable person to indicate that they would possibly be contraband. *So it is our theory of possession of recently stolen goods.*

(Emphasis supplied).

[3] Appellant notes, in his brief, a "disconnect" between the prosecutor's statement of facts, where he said that "other gold bracelets" were recovered from appellant's pocket and statements made by Fitzsimmons, who identified "two charms and a heart necklace" as her property.

Plea Colloquy

In Count 2 of the juvenile petition, the count to which appellant entered a plea of "involved," the State charged

> That [appellant], on or about April 21, 2015, at Wicomico County, Maryland, did steal electgronic (sic) items, jewelry, and other personal property of Betgty (sic) Fitzsimmons, having a value of at least $1,000 but less than $10,000, in violation of Article CR 7.104 of the Annotated Code of Maryland, and against the peace, government and dignity of the State.

At the adjudicatory hearing, prior to the entry of a plea to this count by appellant and his co-respondent, Kevin S., appellant's counsel asserted that appellant was admitting to theft on the theory of possession of recently stolen property. After the prosecutor informed the court that he anticipated a plea of "involved" to "count two, felony theft, $1,000 to $10,000," the court asked appellant's counsel if that was his "understanding of the agreement." The following colloquy transpired:

> [APPELLANT'S COUNSEL]: Your Honor, yes. We would be tendering an admission to count two, that being *the theft charge on the theory of possession of recently stolen goods.*
>
> * * *
>
> [PROSECUTOR]: But the agreement is to that amount[4] and the Court could order restitution in any amount the Court felt appropriate, given the theft value from the victim. That's my understanding of our agreement.

[4] Appellant notes in his brief that this appears to be a reference to an agreement that the value of the property at issue exceeded $1,000, as required for felony theft.

[APPELLANT'S COUNSEL]: Again, it would be *under a theory of possession of recently stolen goods.* And we certainly don't object to the amount *based on the possession*, but as to where they go is beyond our agreement.

[PROSECUTOR]: *[O]ur agreement does not limit restitution to only items that were found*, an obvious statement but that's the statement. Because the items that were found do not amount to what their charged value is.

[APPELLANT'S COUNSEL]: *Our position would be, again under a theory of possession of recently stolen goods. If the State wants to try, the State certainly is more than welcome.*

[PROSECUTOR]: Yes. I'm just making clear that *the State will be seeking restitution for the full amount stolen from the victim.*

[APPELLANT ' S COUNSEL]: *And we would certainly have an argument to make at that point in time.*

* * *

THE COURT: Okay. What is the discrepancy in value that we're talking about?

[PROSECUTOR]: . . . [A]s described in the police report, the total amount of stolen property, and some of it was recovered so it would be reduced by some amount, but about $3,000 would be the total amount reduced by maybe 1,000 of things that were recovered . . . .

THE COURT: Okay. [Appellant's Counsel], are we okay?

[APPELLANT'S COUNSEL]: Your Honor, again. I—it certainly I think is a legal argument to be made. The State is always welcome to seek whatever restitution they wish, we would be making the legal argument at the appropriate time. We are basically *going* forward [with] *theft under the theory of possession of recently stolen goods. That's the reason for the admission, that's the basis of the admission.* It is everything here. We certainly will make whatever changes to the statement of charges. Again, how that related to *restitution* at a later time the position of the defense would be it's—

> [PROSECUTOR]: The State's position as reflected in the statement of facts will be that these two respondents were acting in concert with at least two other individuals—
>
> THE COURT: Right. I guess I just want to—
>
> [PROSECUTOR]: —would be responsible for all items that were stolen.
>
> THE COURT: Right. I just want to make clear, I guess, or I just want to make sure that *we're clear that the issue is a restitution issue and not a plea issue*.
>
> * * *
>
> [APPELLANT'S COUNSEL]: From the defense point of view, it is a restitution issue but it is one that I think is *triggered by the nature of the plea*. So *we are offering the plea to the theft charge based on possession of recently stolen goods. That is our understanding,* and *we certainly will agree to whatever recovery is made from my client at that particular point in time.*
>
> THE COURT: Okay. Mr. [Prosecutor].
>
> [PROSECUTOR]: The State is satisfied to have that argued as a restitution issue.

(Emphasis supplied).

The court then engaged in a plea colloquy with the respondents. After the prosecution read the statement of facts, *supra*, the court found that "the allegations contained in count two of the petition, that the Respondent committed a delinquent act, have been proven beyond a reasonable doubt and to a moral certainty."

July 7, 2015 - Disposition Hearing

At the disposition hearing on July 7, 2015, during which restitution was also considered, appellant's counsel sought to distinguish his client from the other teenagers

involved, specifically noting that appellant was never identified as one of the four individuals involved in the burglary of the Fitzsimmons residence; rather, appellant had only been identified as "in their company." The court responded:

> Okay. I understand that. This is juvenile court, and part of the problem is that people don't understand or don't seem to understand that it's an offender driven statute, not an offense driven statute. And so, if we are going to all of sudden start basing our dispositions on what the offense is, then I think *we need to change our statute so at least the State and the victims are all aware of that, and then they can offer their pleas accordingly. But the disposition is not dependent on the offense.*

(Emphasis supplied).

During a dispute concerning the appropriate restitution, the following colloquy also occurred:

> [APPELLANT'S COUNSEL]: I would object to my client being part of this because**,** from the very outset, at the time of the taking of the admission in this particular matter, *the admission in this case was based on the fact that my client was admitting to theft under a theory of being in possession of recently stolen goods.* We have maintained that, throughout, noting for the record that my client was found in possession of several items which were determined to be from the complaining witness's home, and those items, to our knowledge, *were returned to the complaining witness, so we would be objecting to the consideration of any testimony beyond what was recovered from my client* and any damage that may have occurred to those items.
>
> THE COURT: Okay . . . I'm inclined to hear everything and reserve on this . . . ruling, but did you want to argue this issue?
>
> [PROSECUTOR]: And I can't recall if Your Honor was here for the adjudicatory hearing when the plea was entered, but certainly [appellant's counsel] espoused that theory, *but the State made equally clear that the State was not accepting the plea on that theory*, but the State was accepting the plea under the theory of possession of stolen property being evidence of involvement in the entire event including the

burglary, and the State would be requesting restitution. Prior to the plea being accepted, *the State made clear that the State would be requesting restitution for the burglary event as a whole, and under the theory that he was in possession—recent possession of property from that burglary, and that was the theory that the State was proceeding on and accepted the plea on that basis. I don't think there is any requirement that there be a meeting of the minds*—he's certainly willing to have—certainly able to have his theory about why he wants to accept a plea—or take a plea, *but the State made clear that the State's theory was that it would be accepted as a lesser included offense of the burglary count.*

* * *

[APPELLANT'S COUNSEL]: Your Honor, *I am concerned by [prosecution's] belief that there doesn't have to be a meeting of the minds*. I think that there does, and I was very clear on the record—we could go back and listen to the tape. I have never relented to [what] the State's belief was in this case. I relented to what we believed was the instance, and if the State is not saying we had an agreement, that we don't have an agreement, and then perhaps the entire thing should be revisited.

[PROSECUTOR]: And that was my concern then, and the State made equally clear what the State's theory [was] and it being accepted on *the basis of his being in possession of property stolen from the burglary, and the State would be requesting that restitution on that theory,* and he went ahead and offered his plea in that—under those circumstances.

* * *

THE COURT: Okay. So there's nothing about the count they pled to that would prevent the Court from ordering—

[PROSECUTION]: That's correct.

THE COURT: —the full amount of restitution?

[PROSECUTION]: That's correct.

THE COURT: What you're asking me to do is get behind the theory of the plea.

> [PROSECUTION]: Well, I'm asking you to accept—the plea is a *lesser—the count is a lesser included offense of the burglary count*. It was made clear at the time of the plea hearing that that was the theory that the State was proceeding on, and it was *accepting the plea under that theory*. The Respondent can have in his own mind the theory that he is accepting a plea on, but, after it being made clear to him that the State is accepting on that theory, that I think the State is entitled to—if he goes through with that plea and enters that plea to a count that the Court can—has no bar to entering the amount that the State is requesting, that the Court can consider all evidence and determine the amount of the restitution.
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> * * *
>
> [APPELLANT'S COUNSEL]: Your Honor, again, my concern being this, that *from the very moment that restitution was mentioned at the admission, the defense has always stated and [the prosecution] can say it's a lesser included—lesser include is included. This is not included. It's a separate count. So we pled to a separate count. Not theft is a lesser included of Count 1.* I understand that that could be a theory, but, quite frankly, that would be an amended Count 1, amending Count 1 for the lesser include [sic]. I would also note that we have *always maintained that this was possession of recently stolen goods.*

(Emphasis supplied).

August 17, 2015 - Memorandum Opinion

On August 17, 2015, the court issued a Memorandum Opinion ordering restitution in the amount of $1,753, *i.e.*, the difference between the value of all the stolen items ($2,968) and the value of those items that were recovered undamaged ($1,215); accordingly, the court held appellant and his co-respondent jointly and severally liable for said amount. In rejecting appellant's argument that restitution would be limited to the stolen goods in appellant's possession, *i.e.*, appellant's theory of the plea, the circuit court opined:

> The court disagrees, as noted above, the plea was to *general theft*, and the statement of facts supports a finding that the respondent was involved in general theft of

> $1,000–$10,000. Defense counsel's statements at the plea hearing articulate the basis for the respondent accepting the plea; namely, that he was caught shortly after the crime with some of the stolen items in his possession. *But the respondent's theory, and basis for accepting the plea, do not transform a plea under the general theft statute,* [Md. Code Ann., Crim. Law ("C.L.")] *§ 7-104,*[5] *as clearly articulated in Count 2, into a specific plea only to possession of recently stolen goods, § 7–104(c).*
>
> The evidence establishes that the value of all stolen items was $2,968. Of that amount, items valued at $1,215 were recovered undamaged, leaving a remainder of $1,753, jointly and severally with the correspondent.

Thus, the basis of the court's opinion was that "the [appellant's] theory and basis for accepting the plea, do not transform a plea under the general theft statute, §7–104, as clearly articulated in Count 2, into a specific plea only to possession of recently stolen goods, § 7–104(c)."

STANDARD OF REVIEW

Appellate courts review a restitution order for an abuse of discretion. *Silver v. State*, 420 Md. 415, 427 (2011). Similarly, restitution ordered in a juvenile delinquency case "will not be overturned on appeal 'except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.'" *In re John M.,* 129 Md. App. 165, 175 (1999), *superceded by statute on other grounds*, MD. CODE ANN., CRIM. PROC. ("C.P.") § 11–603(a)(2)(i), *as recognized in McDaniel v. State*, 205 Md. App. 551 (2012).

[5] Version current at time of case. Subsequently amended by 2016 Maryland Laws Ch. 515 (S.B. 1005).

DISCUSSION

Appellant contends that the juvenile court abused its discretion by ordering him to pay restitution for property taken in the burglary, that was never recovered, because his plea was an admission to theft by possession of recently stolen items, thereby limiting his liability to the stolen items in his possession. The State responds that appellant "admitted involvement as to the general offense of theft," not to a limited modality within the offense. Furthermore, the State maintains that it both "vigorously refused" to limit appellant's plea and expressly stated that it would seek full restitution. Finally, the State argues that evidence presented "allowed the juvenile court to conclude that [appellant] had taken items from the victim's residence" and, therefore, restitution ordered for stolen, unrecovered items from the burglary was not an abuse of the court's discretion.

Md. Code Ann., C.P. § 11–603(a) provides, in part:

> (a) 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 . . . .

(Emphasis supplied). *See also* MD. CODE ANN., CTS. & JUD. PROC. § 3–8A–28. ("The court may enter a judgment of restitution against the parent of a child, the child, or both as provided under Title 11, Subtitle 6 of the Criminal Procedure Article.").

> [T]hree findings . . . are required to support a restitution judgment: (1) that the child committed a delinquent act; (2) that the child damaged, destroyed, or decreased the value of another's property; and (3) that such damage, destruction, or diminution in value caused by the child occurred *during or as a result of the delinquent act*.

In re Daniel S., 103 Md. App. 282, 291 (1995) (Emphasis added) (quoting *In re Jason W.,* 94 Md. App. 731, 734–37 (1993)).

A trial court may not order a criminal defendant to pay restitution to a victim of a crime for which he has not been convicted. *Walczak v. State*, 302 Md. 422, 429–32 (1985). However, a defendant may be required to pay restitution for unrelated crimes where he has agreed to do so in a plea agreement. *Lee v. State*, 307 Md. 74, 81 (1986). In the trial of a criminal case, "restitution is punishment for the crime of which the defendant has been convicted. Restitution depends on the existence of that crime, and the statute authorizes the court to order restitution *only where the court is otherwise authorized to impose punishment*." *Carlini v. State*, 215 Md. App. 415, 437 (2013) (Emphasis supplied) (citing *Walczak,* 302 Md. at 429). This precept is similarly applicable to juvenile delinquency proceedings. "The juvenile court only has the ability to award restitution for reasonable sums that have already been incurred that are causally related to the juvenile's delinquent acts." " *John M.*, 129 Md. App. at 185. *See e.g.*, *Pete v. State*, 384 Md. 47, 57 (2004) (holding restitution order regarding damaged police cruiser was inappropriate for conviction of second degree assault because the damage was not a "direct result" of the assault).

Accordingly, the metric in determining the lawfulness of restitution ordered is the juvenile's delinquent action. Appellant contends that the delinquent action is limited to theft by possession of recently stolen property. The State's position is that the delinquent action encompasses the breadth of the general theft statute, without limitation, and is a lesser included offense of burglary.

The court, in its August 17, 2015 Order, found, in pertinent part:

> Pursuant to a plea agreement, the Respondent was adjudicated of committing the delinquent act set forth in Count 2 of the juvenile petition, Theft $1,000 to $10,000, a violation of § 7–104 of the Criminal Law Article. Upon acceptance of the plea, the State entered a *nolle prosequi* as to all the remaining charges, including the top count of first degree burglary.
>
> * * *
>
> In pleading to Count 2, Respondent was admitting involvement to general theft, as he was charged. He was not charged under, and *did not tender a plea to subsection (c) of § 7–104, the specific provision governing possession of recently stolen goods*. Rather, he tendered a plea to general theft in the amount of $1,000 to $10,000. Moreover, the statement of facts supports a finding of guilt under the general theft statute, at the value agreed upon, $1,000 to $10,000. In the statement of facts, four individuals are seen entering the residence of 821 Roger Street by a neighbor. A screen was ripped off a window, allowing some entry. Then, all four entered through a back door. Within a few minutes, the owner of the residence returned home to discover items missing. As she entered the home, the intruders fled out the back door. Within a short time, the Respondent and Co-Respondent were located by law enforcement. The Respondent and Co-Respondent were searched and found to have items on them that were stolen from the victim's residence, which included jewelry and electronics. In light of this statement of facts, the Court could, and did, find the Respondent involved as to Count 2, the theft of property valued between $1,000 and $10,000 from residence at 821 Roger Street.

(Emphasis supplied).

The court and the State define appellant's delinquent acts as encompassing the full breadth of the general theft offense under § 7–104, *as well as "theft of property . . . from the residence at 821 Roger Street."* Therefore, it is incumbent upon this Court, tasked with the review of the lawfulness of the restitution order, to first determine what constituted appellant's delinquent acts.

Plea Agreement

"[T]he law is well settled that, in the absence of any jurisdictional defect, [agreements between the State and an accused] are based on contract principles and must be enforced." *Hillard v. State*, 141 Md. App. 199, 207 (2001). *See also Ogonowski v. State*, 87 Md. App. 173, 182–83 (1991) (noting that a plea agreement constitutes "a contract between a defendant and the State").

The Court of Appeals has "held that, in considering whether a plea agreement has been violated . . . the terms of the plea agreement are to be construed according to what a defendant reasonably understood when the plea was entered." *Lafontant v. State*, 197 Md. App. 217, 228–29 (2011) (quotations and citations omitted). "[W]e consider terms *implied* by the plea agreement as well as those *expressly provided*." *Id.* at 229 (Emphasis supplied). The test is an objective one, "dependent not on what the defendant actually understood the agreement to mean, but rather, on what a reasonable lay person in the defendant's position . . . would have understood the agreement to mean, *based on the record developed at the plea*

proceeding." *Matthews v. State*, 424 Md. 503, 521 (2012) (Emphasis supplied) (quotation omitted).

Md. Rule 4–243 governs plea agreements and subsection (a)(1) permits a defendant to enter into an agreement with the State's Attorney for a plea of guilty or *nolo contendere* on "any proper condition," including "that the State will not charge the defendant with the commission of certain other offenses." Although the Maryland Code and Maryland Rules do not have provisions concerning plea agreements in juvenile proceedings, this Court, in *In re James B.,* 54 Md. App. 270, 275 (1983), instructs that rules governing adult proceedings may not be binding, but "could be helpful."

In the instant case, as the court noted in its August 17, 2015 Order, *supra*, there is no specific reference in Count 2 to subsection (c) of the Criminal Law Article, § 7–104, which governs possession of recently stolen goods. However, during both the adjudication and disposition hearings, appellant's counsel explicitly stated that the admission was based on a plea of theft by possession of recently stolen goods. Although the State notes, in a footnote in its brief, that it "vigorously refused" to accept the plea on appellant's limiting theory, no such refusal is reflected in the record. At the adjudication hearing, the State did not contest appellant's limitation; rather, it reiterated that it would seek *restitution* for all of the unrecovered items. Subsequent to the several exchanges between counsel, the court sought to clarify that "the issue [was] a *restitution* issue and not a *plea* issue." Counsel for appellant agreed that it was a restitution issue, "one that is *triggered* by the nature of the plea," and

again stated that the plea is offered on the "theft charge based on possession of recently stolen goods." The State responded that it was "satisfied to have that argued as a *restitution* issue."

At the disposition hearing, however, when the restitution amount was considered, the Assistant States Attorney asserted, for the first time, that it never accepted appellant's limited plea; rather, the plea was accepted, by the State, as a "lesser included charge" of burglary. In support of this argument, the State relies upon *Rice v. State*, 311 Md. 166, 124–25 (1987), which states that "Maryland courts have concluded . . . that § 7–104 'posits a single offense,' and that, as a general matter, a conviction under § 7–104 may be based on any of the modalities set forth in the statute." However, the Court of Appeals, in *Rice*, expressly states, "[n]othing in the language of the theft statute or its legislative history suggests that [the former version of the theft statute][6] encompasses multiple crimes for *jury instruction purposes*." *Id.* at 124 (Emphasis supplied). The issue, in *Rice*, is clearly different from the issue in the case *sub judice.*

In the instant case, appellant's counsel left no doubt as to the basis upon which appellant tendered his plea. The record is replete with the pronouncements of appellant's counsel that appellant believed that he was entering the plea of involved as to Count 2 based on the "theory" of possession of recently stolen goods. Significantly, it is clear that, under

[6] Md. Code, Art. 27, § 342, repealed by Acts 2002, c. 26, § 1, eff. October 1, 2002.

the objective standard, a reasonable lay person, in the appellant's position, would have understood, based on the record developed at the plea proceedings, that he was pleading to theft by possession of recently stolen goods. The court, in restricting its observation only to the charge itself, failed to examine the record developed by the plea proceedings, as required under *Matthews, supra*.

Moreover, concomitant to this premise, the State never expressly repudiated or addressed, at the adjudication hearing, appellant's specific and repeated assertions that the theft charge in Count 2 was limited by the modality of possession of recently stolen goods. Although the State, at the adjudication hearing, stated it would seek *restitution* for the full amount of the stolen property, that does not impact the nature of the *plea*. Although they are related, they are distinct issues, just as the court itself articulated, *supra*, when seeking to clarify the parties' positions. An assertion that restitution for the full amount of the stolen property would be sought cannot be construed as the State's acceptance to appellant's plea agreement on a theory that the charge was a lesser included offense of burglary.

The precondition for appellant's tender of his plea to Count 2 was his assumption that the actual charge was theft by possession of recently stolen good. Therefore, patent from the context of the proceedings, is that the juvenile court abused its discretion by ordering appellant to pay restitution that exceeded the action for which he was found delinquent.

Count 2, General Theft as a Lesser Included Offense of Burglary

Assuming, *arguendo*, that the plea agreement did not limit the theft charge to the possession-of-recently-stolen-goods modality, we are unpersuaded by the State's assertion that the general theft charge of Count 2 was a lesser included charge of burglary and, as a consequence of the court's decision, appellant was "involved as to Count 2, [in] the theft of property . . . from the residence at 821 Roger Street."

Md. Code Ann., C.L. § 7–102(a)(1–7) provides that "[c]onduct described as theft in this part constitutes a single crime and includes the separate crimes formerly known as: larceny, larceny by trick, larceny after trust, embezzlement, false pretenses, shoplifting and receiving stolen property." Construing § 7–104, "[t]he 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 *under this subheading . . . .*'" *Cardin v. State*, 73 Md. App. 200, 211 (1987) (citing *Crassock v. State*, 64 Md. App. 269, 277–78 (1985)).

Md. Code Ann., C.L. §§ 6–202 and 6–205 govern burglary in the first degree and fourth degree, respectively. Sections 6-202(a) and 6–205(a) both provide that "a person may not break and enter the dwelling of another with the intent to commit theft." Accordingly, the crime of burglary has four additional elements than the crime of theft: "breaking," "entering," "dwelling," "of another."

Maryland adheres to the "lesser included offense" doctrine, which requires a court to examine the elements of the two offenses, determining that "it must be impossible to commit

the greater [offense] without also having committed the lesser [offense]." *Hagans v. State*, 316 Md. 429, 449 (1989). As a result of the court's determination, "a defendant may only be convicted of an *uncharged* lesser included offense if it meets the elements test."[7] *Id.* at 450.

Additionally, the Court of Appeals has "long and consistently held that exclusive possession of recently stolen goods, absent a satisfactory explanation, permits the drawing of an inference of fact strong enough to sustain a conviction that the possessor was the thief." *Molter v. State*, 201 Md. App. 155, 163 (2011) (citing *Brewer v. Mele*, 267 Md. 437, 449 (1972)). "And when it is shown that the property was stolen as a consequence of a breaking, the trier of fact may further infer that the thief was involved in the breaking." *Grant v. State*, 318 Md. 672, 680-81 (1990) (citing *Brewer*, 267 Md. at 449).

Citing *Molter*, *supra*, the State contends that the evidence presented "allowed the juvenile court to conclude that [appellant] had taken items from the victim's residence." In *Molter*, we held that it was permissible to infer that the appellant, who was found in possession of items reported stolen from a home seven to nine days earlier, was the thief of those stolen items. *Id.* at 165–66. "Molter was seen by an eyewitness at the burglarized home on the day of the burglary and the homeowner testified that the appellant was one of only two

[7] The "elements test" also known, *inter alia*, as the "required evidence test" "focuses upon the elements of each offense; if all of the elements of one offense are included in the other offense, so that only the latter offense contains a distinct element or distinct elements, the former merges into the latter.'" *State v. Lancaster*, 332 Md. 385, 391 (1993).

people who knew that he was going to be out of town on the day the burglary took place." *Hall v. State*, 225 Md. App. 72, 82 (2015). However,

> *Molter* does not stand for the proposition that a minimum amount of evidence is necessary in addition to the possession of recently stolen property in order to support an inference that the possessor was the thief or the burglar. Rather, it stands for the proposition that the *unexplained* possession of recently stolen property permits the jury to infer guilt by itself.

Id. (Emphasis supplied). Significantly, the defendants, in *Molter* and *Hall,* were both charged with and convicted of first-degree burglary *and* theft offenses. Additionally, these cases did not proceed pursuant to plea agreements; rather, these were criminal trial proceedings.

In the case, *sub judice*, assuming that the plea agreement did not limit Count 2 to possession of recently stolen goods and encompassed the full breadth of § 7–104, appellant would not be liable for the "entire event including the burglary," as the State argues. Subsequent to the dismissal, *inter alia,* of Count 1, *i.e.*, first degree burglary, appellant agreed to admit to theft, pursuant to Count 2. Although fourth degree burglary is a lesser included offense of first degree burglary, *Bass v. State*, 206 Md. App. 1, 7–8 (2012), theft under § 7–104 is a not a lesser included offense of burglary. Theft under § 7–104, as set forth in Count 2, outlines none of the essential elements of burglary, *i.e.*, breaking, entering, dwelling or another person. Furthermore, the crime of theft of property valued between $1,000 and $10,000 necessarily requires proof of the value of the stolen goods as an element of the crime, *Counts v. State*, 444 Md. 52, 63 (2015), an element not necessary to prove the crime of burglary.

Therefore, appellant was justified in positing that the offense of burglary was not incorporated into Count 2. Concomitant with this understanding, appellant, through counsel, argued, at the disposition hearing, that burglary was a "separate count" from the count to which he entered a plea and that, at no point in the proceedings, did he plead guilty to Count 2, theft, as "a lesser included [offense] of Count 1," *i.e.,* burglary.

Moreover, despite the prosecutor's assertion, at the disposition hearing, that he accepted appellant's plea "under the theory of possession of stolen property being evidence of involvement in the entire event including the burglary," significantly, appellant was not *charged* with burglary. Although juvenile proceedings are distinct from criminal proceedings, many of the constitutional safeguards afforded to criminal defendants are applicable to juveniles. *In re Roneika S.*, 173 Md. App. 577, 587 (2007) (citations omitted). The Maryland Constitution, Declaration of Rights, Article 21 requires that an accused be informed of the charges against him, including the "*specific conduct with which he is charged*." *Dzikowski v. State*, 436 Md. 430, 445 (2013) (Emphasis supplied) (quotations and citations omitted). This includes juveniles in delinquency proceedings as well. *In re Roneika S.,* 173 Md. App. at 590.

In a short form charging document that was used in the instant case, the essential elements of the offense need not be expressly enumerated; **"**elements may be implied from language used in the indictment or information." *Dzikowski,* 436 Md. at 445-46. (citations omitted). Although "unspecified elements of the crime of theft" may be implied from a

charging document, *Jones v. State*, 303 Md. 323, 338 (1985), a separate delinquent act cannot. Significantly, "a conviction upon a charge not made is not consistent with due process." *Turner v. New York*, 386 U.S. 773, 775 (1967). *See also Landaker v. State*, 327 Md. 138, 140 (1992) (holding that a "conviction upon a charge not made would be sheer denial of due process").

In the instant case, although the word, "steal," which is present in Count 2, denotes theft "broader in scope than simple larceny," it, nevertheless, refers to theft and does not incorporate the elements necessary to sustain a burglary conviction. *Jones,* 303 Md. at 340. Accordingly, any "permissible inferences of guilt,"deducible from the exclusive possession of recently stolen goods, that appellant was also the thief and burglar and, therefore, liable for the unrecovered stolen items, cannot stand. The juvenile court's reasoning, in its Order, that appellant was "caught shortly after the crime with some of the stolen items in his possession," and that the statement of facts, describing the burglary, "supports a finding of guilt under the general theft statute," is therefore incorrect. According to the juvenile court's own logic, if the appellant's "basis for accepting the plea, [does] not transform a plea under the general theft statute, § 7–104, . . . into a specific plea only to possession of recently stolen goods, § 7–104(c)[,]" then certainly a plea to commission of a delinquent act under the general theft statute, § 7–104, does not transform a plea to commission of a delinquent act to theft from a residence, *i.e.*, burglary. Therefore, even assuming that appellant's plea agreement encompassed the full breadth of the general theft statute,

restitution ordered for stolen unrecovered property from the burglary constitutes an abuse of discretion.

CONCLUSION

For the foregoing reasons, we hold that the circuit court, sitting as a juvenile court, abused its discretion by ordering appellant to pay restitution for the full amount of stolen property, minus the recovered items.

JUDGMENT ORDERING RESTITUTION OF THE CIRCUIT COURT FOR WICOMICO COUNTY, SITTING AS A JUVENILE COURT, REVERSED; ALL OTHER JUDGMENTS OF THE CIRCUIT COURT FOR WICOMICO COUNTY, SITTING AS A JUVENILE COURT, AFFIRMED; COSTS TO BE PAID BY APPELLEE.