UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 996

September Term, 2016

MATTHEW EVERETT COTTMEYER

v.

STATE OF MARYLAND

Kehoe,
Leahy,
Alpert, Paul E.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Alpert, J.

Filed: July 17, 2017

Circuit Court for Somerset County
Case No.: 19K16010641

*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.

Appellant, Matthew Everett Cottmeyer, was charged in the Circuit Court for Somerset County, Maryland, with first degree burglary, conspiracy to commit first degree burglary, theft between $1,000 and $10,000, and related offenses. Appellant was acquitted by a jury of the burglary and conspiracy related charges, but convicted on the theft charge. Appellant was sentenced to ten years, with all but five years suspended, with credit for time served. He was also ordered to pay $1,583.95 restitution, as a condition of probation, to the victim in this case. Appellant timely appealed and presents the following questions for our review:

> 1. Was the evidence legally sufficient to sustain Mr. Cottmeyer's conviction?
>
> 2. Did the trial judge err in refusing to admit text messages corroborating Mr. Cottmeyer's claim that another person asked him to pawn the stolen property?
>
> 3. Did the trial judge err in ordering Mr. Cottmeyer to pay $1,583.95 in restitution, where the evidence did not show that the loss suffered was a "direct result" of his conduct?

For the following reasons, we shall affirm.

BACKGROUND

Sometime in October 2015, Sharon Hoffman returned to her home in Eden, Maryland, from an extended stay in Georgia, and noticed that one of her windows was open and that several items of jewelry were missing from her bedroom. Hoffman described the missing jewelry as follows: (1) her grandmother's cameo ring, worth approximately $100 to $150 dollars; (2) her wedding band (3) engagement ring and, (4) her ex-husband's wedding ring, with all three of these appraised as a set at over $2,000.00; (5) a 1972 James

M. Bennett High School class ring, with her initials inside, originally purchased between $100 and $150 dollars; (6) a gold chain; and, (7) a tennis bracelet with small diamonds.

Hoffman testified that a family named the Bonnevilles lived next door, and that the daughter's name was Jacqueline Bonneville Hughes. Hoffman also testified that, while she was away in Georgia, her ex-husband, Harry Hoffman stayed at the house. Mr. Hoffman denied that he took any of his ex-wife's jewelry.

On October 20, 2015, Maryland State Trooper James Cannon took a report from the Hoffmans about the theft. Sharon Hoffman informed him that the seven items of jewelry were valued at $1,583.95. This information was then turned over to the Criminal Investigations section for the Maryland State Police.

Gerry Cullen, an employee of Crazy Louie's Pawn Shop in Salisbury, Maryland, confirmed that he was the custodian of records for the store and the records were kept in the ordinary course of business. Those records established that appellant sold five (5) rings on September 6, 2015 at approximately 4:35 p.m. These included: (1) a ten karat yellow gold men's ring with a broken shank; (2) a ten-karat yellow gold 1972 James M. Bennett High School class ring; (3) a fourteen-karat yellow gold cameo ring with antique setting; (4) a fourteen-karat women's yellow gold ring; and, (5) a fourteen-karat women's yellow gold wrap with two diamonds. Appellant was paid $150.00 for the five rings. This record was filed with law enforcement as required by pertinent licensing authority for the State of Maryland.

Maryland State Police Corporal Jonathan Pruitt, a criminal investigator, became involved in the burglary and theft from Sharon Hoffman's home on or around October 20,

2015. On November 12, 2015, he learned that appellant sold five rings, matching the description of the ones stolen, to Crazy Louie's. The rings, including the class ring with Hoffman's initials inside, were never recovered because they were either sold or melted down.

Corporal Pruitt eventually spoke to appellant on the phone on November 20, 2015, and appellant came to the Maryland State Police barrack in Princess Anne for an interview three days later on November 23, 2015. Appellant waived his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966), and a recording of his interview was played for the jury, without objection. In that interview, a transcript of which was admitted into evidence, appellant stated the following:

> Jackie is the one that called me 'cause Kyle never really talks to me. Jackie called me saying she had four or five rings that she needed me to pawn because Kyle didn't have his license anymore for some reason or another. Something was going on with Kyle or something or whatever story they gave me. So, I was like all right. I just figured I was doing a favor for a friend. So, I went down there, five rings, like she said, pawned them, and that was it. [1]

Appellant told Corporal Pruitt that "Jackie" was the victim's neighbor, and that they broke into the neighbor's house by climbing through a window. Appellant took Jackie and Kyle to the pawnshop, and that, after he sold the rings, including the victim's high school class ring, he gave the money to Kyle, who then gave the money to Jackie. Appellant did not receive any money in return.

[1] Although some of the evidence indicates the rings were "pawned," our review of the pawnshop records persuades us that appellant actually sold the rings in exchange for $150 cash.

Appellant maintained that he was just "doing a favor for a friend." Appellant informed Corporal Pruitt as follows:

> After – after I came out the pawnshop and we were headed back home – I was going to drop them off, I kinda was pressing them a little bit. And I was saying things kinda didn't make sense or whatever. Why, you know, (inaudible) five rings right now and Bennett – one of them was a Bennett ring. And I was like, "Y'all didn't go to Bennett." So, I was like, "What's the deal?" And he ended up – she ended up saying they went to the neighbor's house. They were gone for a while or whatever. And –

Appellant continued, as follows:

> [APPELLANT]: -- she was like, "All right. Well, our next door neighbors are gone for a while –" I forget where she said they went to. And, she said Kyle went in the window and let me in, then I came in through the door. And, then, we were rummaging around or whatever and found these rings."
>
> CORPORAL PRUITT: And, then, were you pissed? 'Cause I'd be pissed if someone just had me pawn –
>
> [APPELLANT]: Yeah.
>
> CORPORAL PRUITT: -- some stolen – stolen rings.
>
> [APPELLANT]: Yeah, I said – she was like "They're elderly. They're elderly. They're not gonna notice. You're not gonna get in any trouble," or whatever. I was like, all right.

Corporal Pruitt confirmed that "Jackie" was Hoffman's neighbor, Jacqueline Hughes. He also went to the Hoffman residence and saw a "smudge of a palm print on the window," but it was not suitable for evidence collection due to age and weathering.

Appellant testified on his own behalf. Appellant confirmed that "Jackie" had five gold rings that she wanted him to sell. She claimed that she obtained the rings from her grandmother. After he drove Jackie and Kyle to the pawnshop and sold the rings for her

while she remained outside in the car, he gave her the money, less $20 gas money for himself. It was after the transaction was complete, according to appellant, that Jackie informed him that she and Kyle stole the rings from the neighbor's house.

Appellant also explained that he did not look at the rings until he was inside the pawn shop. On cross-examination, appellant agreed that he saw the high school class ring as it was laid out on the counter, and agreed that he became suspicious at that point in time. Based on his suspicions, appellant testified that he then questioned Jackie and Kyle about where the rings came from.

Appellant further testified that he had never been on the victim's, Hoffman's, property or in that house. He confirmed that, sometime in 2015, he was convicted for theft for stealing speakers from a Target. And, appellant concluded by testifying that, had he known the rings were stolen, he would not have sold them.

We shall include additional detail in the following discussion.

DISCUSSION

I.

Appellant first contends that the evidence was insufficient to sustain his conviction under either the theory that he obtained or exerted unauthorized control over, or that he was in possession of, Hoffman's jewelry. The State responds that appellant did not challenge the evidence on the grounds that he did not obtain or exert unauthorized control and that that claim is unpreserved. The State also argues on the merits that the evidence was sufficient to sustain appellant's conviction under either theory.

At the end of the State's case-in-chief, appellant's counsel made a motion for judgment of acquittal, and argued as follows with respect to the theft count:

> As to count seven theft between one thousand and ten thousand, again, the evidence that's been submitted by the State at this point or produced by the State at this point is that for my Client there is evidence that he pawned these items. His statement will indicate that he did not know at the time he pawned them that they were stolen. That he received information later from Jackie that her and Kyle had been in fact the ones that stole the items.

The court denied the motion. After appellant testified in his own defense, counsel renewed the motion, arguing as follows as to the theft count:

> [DEFENSE COUNSEL]: … Under count seven, again, the testimony as presented by the State is that there was a pawning of these items by [appellant]. [Appellant's] statement is what the State is relying on for that information as well as that he came into possession of those items not knowing that they were stolen. Learned later that –
>
> THE COURT: But he became suspicious did he not almost right away when he was in the pawn shop?
>
> [DEFENSE COUNSEL]: He did indicate that he became suspicious inside of the pawn shop based on one of the items and then followed up with questions –
>
> THE COURT: By his own testimony, so, yes.
>
> [DEFENSE COUNSEL]: Yes. And I would indicate probably pawn shops are suspicious as well which is why they have so much paperwork for a person to fill out. And yet we don't charge them because suspicion is not enough. It is knowing possession or should have known. I don't think a suspicion is enough to show that you should have known and certainly he didn't acknowledge that he did in fact know. And his testimony was that he did not know. Had he known he would not have signed the paperwork or pawned the items at all.

In response, the State contended, in pertinent part, that "[t]he only evidence that we have that Jackie or Kyle – the evidence before the court that Jackie and Kyle were involved

in any of this is the word of [appellant] the person who pawned them." The court denied the motion for judgment of acquittal on the theft count.

A criminal defendant who moves for judgment of acquittal is required by Maryland Rule 4-324(a) to "'state with particularity all reasons why the motion should be granted[,]' and is not entitled to appellate review of reasons stated for the first time on appeal." *Starr v. State*, 405 Md. 293, 302 (2008) (quoting *State v. Lyles*, 308 Md. 129, 135 (1986)). "This means that a defendant must 'argue precisely the ways in which the evidence should be found wanting and the particular elements of the crime as to which the evidence is deficient.'" *Poole v. State*, 207 Md. App. 614, 632 (2012) (quoting *Arthur v. State*, 420 Md. 512, 522 (2011))(quotation marks and further citation omitted).

We concur with the State's contention that appellant never argued the evidence was insufficient to show that he exerted or obtained unauthorized control over Hoffman's jewelry, therefore, those grounds are not preserved for appellate review. In any event, even if preserved, we also agree that the evidence was sufficient to sustain appellant's conviction under either theory.

In considering a challenge to the sufficiency of the evidence, we ask "'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.'" *Grimm v. State*, 447 Md. 482, 494-95 (2016) (quoting *Cox v. State*, 421 Md. 630, 656-57 (2011)). *Accord Jackson v. Virginia*, 443 U.S. 307, 319 (1979). "[W]e defer to the fact finder's 'resolution of conflicting evidence, and, significantly, its opportunity to observe and assess the credibility of witnesses.'" *Riley v. State*, 227 Md. App. 249, 256 (quoting

State v. Suddith, 379 Md. 425, 430 (2004)), *cert. denied*, 448 Md. 726 (2016). Indeed, it has consistently been held that "'there is no difference between direct and circumstantial evidence.'" *Mangum v. State*, 342 Md. 392, 398 (1996) (quoting *Hebron v. State*, 331 Md. 219, 226 (1993)).

"Maryland's consolidated theft statute creates the single statutory crime of theft, demarcating the seriousness of the offense based on the value of the goods stolen." *Counts v. State*, 444 Md. 52, 55 (2015). While a single offense, we note that the jury was instructed concerning both theories by knowingly obtaining or exerting unauthorized control, and by possession of stolen property. Section 7-104(a) of the Criminal Law Article prohibits unauthorized control over property as follows:

> (a) A person may not willfully or knowingly obtain or exert unauthorized control over property, if the person:
>
> (1) intends to deprive the owner of the property;
>
> (2) willfully or knowingly uses, conceals, or abandons the property in a manner that deprives the owner of the property; or
>
> (3) uses, conceals, or abandons the property knowing the use, concealment, or abandonment probably will deprive the owner of the property.

Md. Code (2002, 2012 Repl. Vol., 2016 Supp.), § 7-104 of the Criminal Law ("Crim. Law") Article.

Several of the key terms in Crim. Law § 7-104(a) are defined in § 7-101. For instance, "deprive" means:

> [T]o withhold property of another:

(1) permanently;

(2) for a period that results in the appropriation of a part of the property's value;

(3) with the purpose to restore it only on payment of a reward or other compensation; or

(4) to dispose of the property or use or deal with the property in a manner that makes it unlikely that the owner will recover it.

Crim. Law § 7-101(c).

"Exert control" is defined, in pertinent part, by statute and "includes to take, carry away, appropriate to a person's own use or sell, convey, or transfer title to an interest in or possession of property." Crim. Law § 7-101(d). "Obtain" means, also in pertinent part, "in relation to property, to bring about a transfer of interest in or possession of the property." Crim. Law § 7-101(g). Further, an "owner" is "a person, other than the offender: (1) who has an interest in or possession of property regardless of whether the person's interest or possession is unlawful; and (2) without whose consent the offender has no authority to exert control over the property." Crim. Law § 7-101(h). And, "property" means "anything of value." Crim. Law § 7-101(i).

"Willful," as generally employed in criminal statutes, "has been construed to mean 'only intentionally or purposely as distinguished from accidentally or negligently and does not require any actual impropriety,' but ... it has also been held to require 'a bad purpose or evil intent.'" *Deibler v. State*, 365 Md. 185, 192 (2001) (quoting R. Perkins and R. Boyce, *Criminal Law* 875-76 (3d ed.1982). Most applications of the term "'willful,' if not all, [fall] within the ... definition: a willful act is committed voluntarily and intentionally,

not necessarily with the intent to deceive." *Kim v. Md. State Bd. of Physicians*, 423 Md. 523, 545 (2011) (citation and quotation marks omitted). "Intend," as defined in Merriam–Webster's Collegiate Dictionary, Tenth Edition (1999), means "to direct the mind on." *See Schreyer v. Chaplain*, 416 Md. 94, 101 (2010) (stating that we may "consult the dictionary to elucidate terms that are not defined in the statute") (citation and quotation marks omitted).

Further, "knowing conduct," under Crim. Law § 7-102(b), is defined as follows:

> (1) A person acts "knowingly":
>
> (i) with respect to conduct or a circumstance as described by a statute that defines a crime, when the person is aware of the conduct or that the circumstance exists;
>
> (ii) with respect to the result of conduct as described by a statute that defines a crime, when the person is practically certain that the result will be caused by the person's conduct; and
>
> (iii) with respect to a person's knowledge of the existence of a particular fact, if that knowledge is an element of a crime, when the person is practically certain of the existence of that fact.
>
> (2) The terms "knowing" and "with knowledge" are construed in the same manner.

In addition to unauthorized use, the second theory of theft applicable to our discussion is Crim. Law § 7-104(c), possessing stolen personal property, which prohibits in pertinent part:

> (1) A person may not possess stolen personal property knowing that it has been stolen, or believing that it probably has been stolen, if the person:

> (i) intends to deprive the owner of the property;
>
> (ii) willfully or knowingly uses, conceals, or abandons the property in a manner that deprives the owner of the property; or
>
> (iii) uses, conceals, or abandons the property knowing that the use, concealment, or abandonment probably will deprive the owner of the property.

This Court has explained that this crime has four elements:

> (1) the property must be stolen; (2) the defendant must be in possession of the stolen property; (3) the defendant must know that the property has been stolen or believe that it probably has been stolen; and (4) the defendant must intend or act to deprive the owner of the property in the manner described in § 7-104(c)(i), (ii), or (iii).

In re Landon G., 214 Md. App. 483, 493 (2013).

Applicable to appellant's argument, the Court of Appeals has stated that "guilty knowledge" that an object is stolen may be "inferred from facts and circumstances such as would cause a reasonable man of ordinary intelligence, observation and caution to believe that the property had been unlawfully taken." *Anello v. State*, 201 Md. 164, 168 (1952). As this Court has more recently explained:

> The permitted inference, of course, is that the unexplained possessor of the recently stolen goods was the actual original thief, who picked up the stolen goods and carried them away in the first instance. If the evidence, moreover, establishes that the theft was inextricably part and parcel of a burglary or a robbery (or, for that matter, a murder or a rape or an arson), the indivisibility of the total criminal package establishes the criminal agency of the possessor for whatever role he played in the criminal episode.

Molter v. State, 201 Md. App. 155, 168 (2011).

Here, under either theory, there is no dispute that appellant sold five of Hoffman's rings to Crazy Louie's. The nature of that transaction was further explained by appellant

himself, during cross-examination by the prosecutor, when he testified that Jackie handed him a plastic Ziploc baggy containing the five rings, and waited in the car as he walked into the pawn shop. Appellant agreed that he then spoke to the pawnbroker and informed him that he had jewelry he wanted to sell. At that point, appellant described when he first became suspicious, testifying as follows:

> Q. Okay. And you saw them in the pawn shop laid out. And you got to look at them enough to notice that one of them was a Bennett ring?
>
> A. Correct.
>
> Q. And it didn't cross your mind at that point there is something a little suspicious about this?
>
> A. Which is why I questioned them.
>
> Q. So you knew that something was suspicious while you were in the pawn shop?
>
> A. Not necessarily that's why I questioned them.
>
> Q. Did you or did you not get suspicious where the rings came from while you were in the pawn shop?
>
> A. Suspicious.
>
> Q. Okay. Enough so that when you got back in the car you asked her about it?
>
> A. Correct.

The jury could infer that appellant knew that the jewelry was stolen, at least at the moment the rings, including the high school class ring, lay before him on the pawnbroker's counter. They could also infer that his actions in selling these rings was intentional and willful. Moreover, even assuming that appellant was in joint possession of the jewelry, and recognizing that the specific theft charge against appellant was stealing "personal

property of Sharon Hoffman having a value of at least $1,000 but less than $10,000" under Crim. Law § 7-104, the jury was free to disbelieve appellant's version of events and could conclude that he was involved in the theft of all of her property. *See Pryor v. State*, 195 Md. App. 311, 329 (2010)("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") (citation omitted); s*ee also Burns v. State*, 149 Md. App. 526, 553 (2003)(recognizing that "[t]here may, of course, be factual scenarios in which joint possessors of stolen property may both, or all, be in such firm and continuing control of the property as to support an inference of mutual guilt even with respect to crimes against property"). Thus, we conclude that the evidence was sufficient to sustain appellant's conviction.

II.

Appellant next asserts the court erred in not admitting text messages, purportedly between appellant and Jacqueline Hughes, on the grounds that these were statements against Hughes' penal interest. The State responds on the merits that the messages were not admissible under that exception to the rule against hearsay. We agree with the State.

On cross-examination, Corporal Pruitt testified that he suggested that appellant try to text "Jackie", a.k.a., Jacqueline Hughes, in order to see if "she would acknowledge something via text that could verify what he had to say[.]" The following then ensued:

BY [DEFENSE COUNSEL]:

> Q. I'm showing you what has been marked as State's exhibits 1 and 2. Can you identify what State's – I mean Defense exhibit 1 is?

A. Yes. These are screen shots of [appellant's] phone when he text[ed] between Jackie and himself.

Q. And were you able to personally observe those on the phone as well as the screen shots?

A. Yes. I believe he either text[ed] me or e-mailed me a copy of the screen shots.

Q. Okay. And were you able to look at the entire conversation between himself and Jackie?

A. Yes.

Q. Okay. Is that an accurate reflection of what you recall seeing as to the conversation between him and Jackie of this incident?

A. Correct.

[DEFENSE COUNSEL]: Move to admit State's exhibit – Defendant's exhibit 1 and 2.

THE COURT: Any objection.

[PROSECUTOR]: Objection. Hearsay, Your Honor.

THE COURT: It is hearsay. Tell me how you get it in?

[DEFENSE COUNSEL]: Your Honor, it would, a, she doesn't acknowledge anything. She just says – it's his words that he's sending to her. And she acknowledges by saying she recalls what he's talking about.

[PROSECUTOR]: Objection, Your Honor.

THE COURT: Sustained. Come up, come up.

(Counsel and the Defendant approached the bench and the following ensued:)

THE COURT: I didn't ask you what she said. I just asked you how you were going to get it in.

[DEFENSE COUNSEL]: Sorry. I would have argued that it is a statement against her penal interest. She's acknowledging that he pawned the rings for her and her boyfriend. He asked her remember the rings I

pawned for you (inaudible). She says, yeah, what about them. So it's a statement against her interest that she is the person that gave him those rings.

[PROSECUTOR]: (Inaudible). She just says what about it.

THE COURT: Say again?

[PROSECUTOR]: She doesn't even acknowledge if it is true or not. She says what about it, what about that circumstance. It's not a statement against penal interest. It's just saying what about that time that you pawned those rings. It's not an admission. It's not anything.

THE COURT: Objection is sustained.

[PROSECUTOR]: Your Honor, I'd ask that the jury be instructed to disregard that –

(Counsel and the Defendant returned to the trial table and proceedings resumed in open Court.)

THE COURT: The jury will disregard the statements that were just made by the Defense Counsel. Objection sustained.

The exhibits, included with the record, purport to be print outs of one long text message exchange from appellant's cell phone, reproduced over two printed pages. The name "Jackieee" is printed at the top of each page, along with two different times: 9:42 a.m. and 10:08 a.m. Read as a whole, the message is as follows[2]:

Wyd [sent]

J: Just sitting here bored you

Bored. Hey u remember them rings I pawned for u n kyle?.. [sent]

J: Arent you workin lol and what bout it

Not yet [sent]

[2] The parties, in their briefs, added the names of the participants in the text message. We have reproduced the contents of the exhibits, as is.

But how much did they give I forget [sent]

J: Idk

U don't remember [sent]

J: I have no idea what time u go in today usually you already there lol

Under the Maryland Rules, hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Md. Rule 5-801(c). Further, "[e]xcept as otherwise provided by these rules or permitted by applicable constitutional provisions or statutes, hearsay is not admissible." Md. Rule 5-802. "[I]n deciding whether a hearsay exception is applicable, we review the trial judge's ruling for legal error rather than for abuse of discretion; that is because hearsay is never admissible on the basis of the trial judge's exercise of discretion." *Thomas v. State*, 429 Md. 85, 98 (2012).

Maryland Rule 5-804(b)(3) provides an exception to hearsay for:

> A statement which was at the time of its making so contrary to the declarant's pecuniary or proprietary interest, so tended to subject the declarant to civil or criminal liability, or so tended to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless the person believed it to be true. A statement tending to expose the declarant to criminal liability and offered in a criminal case is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

In *Jackson v. State*, 207 Md. App. 336, 348-49, *cert. denied*, 429 Md. 530 (2012), we explained:

> For a statement to be admissible under Rule 5-804(b)(3), the proponent of the statement must convince the trial court that "'1) the

> declarant's statement was against his or her penal interest; 2) the declarant is an unavailable witness; and 3) corroborating circumstances exist to establish the trustworthiness of the statement.'" *Stewart v. State*, 151 Md. App. 425, 447, 827 A.2d 850 (2003) (quoting *Roebuck v. State*, 148 Md. App. 563, 578, 813 A.2d 342 (2002)). "The proponent of the declaration has the burden 'to establish that it is cloaked with 'indicia of reliability[,]' … mean[ing] that there must be a showing of particularized guarantees of trustworthiness.'" *Id*. (quoting *West* [*v. State*], 124 Md. App. [147], 167, 720 A.2d 1253 [(1998)]) (other citations omitted).
>
> "The trial court's evaluation of the trustworthiness of a statement is 'a fact-intensive determination' that, on appellate review, is subject to the clearly erroneous standard." *Id*. (quoting *State v. Matusky*, 343 Md. 467, 486, 682 A.2d 694 (1996)) (citing *Powell v. State*, 324 Md. 441, 453, 597 A.2d 479 (1991); *Wilkerson v. State*, 139 Md. App. 557, 576-77, 776 A.2d 685 (2001)). Then, like other exceptions to the hearsay bar, "'admissibility is a question addressed exclusively to the discretion of the trial judge.'" *Wilkerson*, 139 Md. App. at 577, 776 A.2d 685 (quoting *Jacobs v. State*, 45 Md. App. 634, 653, 415 A.2d 590 (1980)).

Moreover, the trial judge must "'be satisfied that the statement was in fact against the declarant's interest and that the declarant actually understood that his statement could indeed cause him [or her] a loss of property, money, or liberty.'" *Jackson*, 207 Md. App. at 350 (quoting Joseph F. Murphy, Jr., *Maryland Evidence Handbook* § 802[E] (4th ed. 2010)).

Looking to the text messages, we first consider whether Hughes made a statement that is against her penal interest. The Court of Appeals has stated, "[t]he statement must in fact be against the penal interest of the declarant. It need not be a full confession but must involve substantial exposure to criminal liability." *State v. Standifur*, 310 Md. 3, 13 (1987). Appellant suggests that Hughes' response "what bout it" was an acknowledgement that appellant sold the stolen rings on her behalf. The State disputes this, stating that "the texts do not specify what rings he is referring to or when he pawned them." Even accepting

Hughes' acknowledgment, the messages do not contain any agreement that the rings were stolen. There is no exposure to criminal liability in the text of the message.

This conclusion appears to be the primary basis for the trial court's ruling, and is sufficient to support affirmance. Nevertheless, we continue with our analysis. The penal interest exception also requires proof that the witness was unavailable. The Maryland Rules of Evidence define "unavailability" as follows:

> "Unavailability as a witness" includes situations in which the declarant:
>
> (1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement;
>
> (2) refuses to testify concerning the subject matter of the declarant's statement despite an order of the court to do so;
>
> (3) testifies to a lack of memory of the subject matter of the declarant's statement;
>
> (4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or
>
> (5) is absent from the hearing and the proponent of the statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subsection (b)(2), (3), or (4) of this Rule, the declarant's attendance or testimony) by process or other reasonable means.
>
> A statement will not qualify under section (b) of this Rule if the unavailability is due to the procurement or wrongdoing of the proponent of the statement for the purpose of preventing the witness from attending or testifying.

Maryland Rule 5-804(a).

Appellant suggests that subsection (1) applies because "[a]lthough the record does not show that Jackie invoked her Fifth Amendment right against self-incrimination, one can infer that she was unavailable given defense counsel's description of her as a

"Codefendant," and given that Corporal Pruitt indicated to [appellant] that Jackie's connection to the stolen rings was being investigated."

Our research reveals that Hughes, along with Kyle Insley, were listed as codefendants in the circuit court docket entries in appellant's case. The Maryland Judiciary Case Search website also shows that she was charged contemporaneously with appellant. According to the judiciary website, all charges against Hughes were nolle prossed on or around June 13, 2016.[3]

However, even given that Hughes was a codefendant, the problem in this case is that we do not even have as much as a proffer as to her unavailability. *See Commercial Union v. Porter Hayden*, 116 Md. App. 605, 642-43(concluding that the trial judge may resolve an "unavailability" issue on the basis of a proffer from counsel), *cert. denied*, 348 Md. 205 (1997); *see also Gray v. State*, 368 Md. 529, 547 (2002)(recognizing that a witness who invokes his right to remain silent becomes "unavailable"). No discussion of whether Hughes was available to testify, or whether she would invoke her right against self-incrimination, appears in the record. Although this issue arises more frequently with prosecution witnesses, "[t]he ultimate question is whether the witness is unavailable despite good-faith efforts undertaken prior to trial to locate and present that witness." *Cordovi v. State*, 63 Md. App. 455, 462-63 (citation omitted), *cert. denied*, 304 Md. 297

[3] "We take judicial notice that records of the Maryland Judiciary are made available by the Administrative Office of the Courts on the Judiciary website." *Marks v. Criminal Injuries Comp. Bd.*, 196 Md. App. 37, 79 n.17 (2010) (citing http://www.mdcourts.gov); *see also* http://casesearch.courts.state.md.us/casesearch/

(1985). Under the circumstances, although there was a possibility that Hughes might invoke her privilege against self-incrimination, absent any showing on the issue, we conclude that Hughes' unavailability as a witness was unsupported.

In any event, the final requirement for admission of a statement against penal interest is a showing of "corroborating circumstances [that] clearly indicate the trustworthiness of the statement." As this Court has explained:

> "The corroboration requirement serves to deter 'criminal accomplices from fabricating evidence at trial.'" *Roebuck*, 148 Md. App. at 580 (quoting *United States v. Camacho*, 163 F.Supp.2d 287, 299 (S.D.N.Y.2001)). But, "there is no litmus test that courts must follow to establish adequate corroboration or trustworthiness." *Roebuck*, 148 Md. App. at 580. Ultimately, it is "within the trial court's discretion to determine whether the evidence was sufficiently reliable for admissibility." *Wilkerson*, 139 Md. App. at 577; *see West*, 124 Md. App. at 166.

Stewart v. State, 151 Md. App. 425, 447 (2003); *see also Matusky v. State*, 105 Md. App. 389, 398 (1995) (observing that "a declaration against penal interest is 'presumptively unreliable'") (citing *Wilson v. State*, 334 Md. 313, 335 (1994)), *aff'd*, 343 Md. 467 (1996).

In this case, there is an apparent foundational problem concerning the lack of authentication of the text messages. "Maryland Rule 5-901 addresses the requirements to authenticate evidence, including electronically stored evidence." *Donati v. State*, 215 Md. App. 686, 709 (2014). It provides as follows: "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Md. Rule 5-901(a).

In *Dickens v State*, 175 Md. App. 231 (2007), this Court addressed the authentication requirements for text messages. In that case, Mr. Dickens fatally shot his

wife; the only dispute between the State and the defense was whether the killing was premeditated murder or a lesser degree of culpable homicide. *Dickens*, 175 Md. App. at 234-35. The State's theory was that Mr. Dickens had been planning for several weeks to murder his wife because she was seeing another man. *Id.* at 236. Mr. Dickens, however, told the police that he went to his wife's mother's house with a gun planning to commit suicide in front of his wife, but after he told his wife of his plan, and she told him to "go ahead," Mr. Dickens "lost it" and shot his wife. *Id.* at 235.

The State introduced several text messages, the content of which showed "veiled threats to kill" the victim. *Dickens*, 175 Md. App. at 238-39, 241. Dickens argued the text messages were not properly authenticated. This Court disagreed. One of the texts was sent from a telephone number associated with a cell phone that was possessed by the defendant until he discarded it shortly after the murder. *Id.* at 238-39. Another text message referred to the daughter of Dickens and the victim, and this Court agreed that the circumstantial evidence established that that message was sent by Dickens. *Id.* at 239. Three messages were sent by the same sender, and one of these referred to wedding vows. *Id.* at 240. Under these circumstances, and after recognizing that the burden of proof for authentication is slight, this Court held that the text messages were properly admitted at trial. *Id.* at 240.

Unlike *Dickens*, here, there is little actual evidence showing when the text messages were made and under what circumstances. As the State observes, there is no date provided for the message. And, left unexplained are the two different times provided for the message, with the first page listing a time of 10:08 a.m., and the second page listing the non-sequential time of 9:42 a.m. There are also no phone numbers, and, other than the

nickname "Jackieee" and the reference to "kyle," no indication who exactly the participants were to the messages.

We acknowledge that Corporal Pruitt testified the appellant told him that the text message came from appellant's cellphone. However, this amounts to, at best, double hearsay which, although admissible under certain circumstances, *see* Md. Rule 5-805, undermines the overall trustworthiness of the out-of-court statement. Considering all of the evidentiary factors, we conclude that the trial court properly declined to admit the text messages under the penal interest exception to the rule against hearsay.

Furthermore, even had the court erred, we conclude that any error would be harmless beyond a reasonable doubt. *See Dionas v. State*, 436 Md. 97, 108 (2013)(An error is harmless when a reviewing court is "'satisfied that there is no reasonable possibility that the evidence complained of—whether erroneously admitted or excluded—may have contributed to the rendition of the guilty verdict'") (quoting *Dorsey v. State*, 276 Md. 638, 659 (1976)). Here, the text messages are not entirely exculpatory because, by their content, appellant admits that he sold the rings for Hughes and "kyle," apparently referring to Kyle Insley. Moreover, whereas appellant's theory of the case was that he did not know the rings were stolen, nothing in the messages adds anything to that defense. There simply is no admission that the rings were stolen. Accordingly, we conclude that any error in excluding the text messages was harmless beyond a reasonable doubt.

III.

Finally, appellant asserts that the court erred in ordering, as a condition of probation, restitution in the amount of $1,583.95, on the grounds that that amount was for the theft of

all of Hoffman's jewelry, not just the five (5) rings that he sold to Crazy Louie's. The State responds that appellant raised no claim as to restitution at sentencing and this issue is unpreserved. The State further suggests that the failure to preserve the issue was somehow strategic, and that, in any event, the amount of restitution was proper.

As previously set forth, appellant was charged generally, in Count 7 of the information, with stealing "personal property of Sharon Hoffman having a value of at least $1,000 but less than $10,000" under Crim. Law § 7-104. At trial, there was evidence that Hoffman reported that seven (7) items were stolen, valued at $1,583.95. There was also evidence that appellant sold five (5) gold rings to Crazy Louie's and received $150.00. Appellant was acquitted on the burglary and conspiracy counts, and only convicted of the aforementioned theft of Hoffman's property, valued between $1,000 and $10,000.

At sentencing, Hoffman spoke of her loss, specifically commenting on: (1) her grandmother's cameo ring; (2) her high school class ring; (3) her wedding ring; (4) her engagement ring; (5) her husband's wedding band; and, (6) a gold chain. After Hoffman described these items, including their sentimental value, and noting that some of the items were melted down or sold, the prosecutor asked for restitution as follows[4]:

> [PROSECUTOR]: Your Honor, there is also the matter of first restitution. The report indicates fifteen hundred eighty-three dollars and ninety-five cents (inaudible) purchase price. Some things were appraised

[4] Although Ms. Hoffman and the State appeared to indicate that there was a report or other proof of loss related to the amount of restitution, we have been unable to find any written documentation in support of Hoffman's loss, other than the pawnshop record, admitted at trial, showing that appellant sold five (5) rings on September 6, 2015.

higher. Some of them are more valuable now, but we can't necessarily as Ms. Hoffman and I had –

THE COURT: That's not like to be – you are not likely to get –

MS. HOFFMAN: I'm just saying I do have all the –

THE COURT: And I believe you do, yes.

Fifteen-eighty-three, what is it?

[PROSECUTOR]: Fifteen-eighty-three and ninety-five cents.

THE COURT: Okay.

Defense counsel then offered no objection to this amount of restitution. Instead, counsel reminded the court that appellant was only convicted of theft, contending that he was "only convicted of being in possession of the items." After hearing allocution from appellant, in which he maintained that he did not know the rings were stolen, the court ordered, as a condition of probation, restitution in the amount of $1,583.95, directing that appellant pay $50 per month beginning sixty days from his release on probation.

Regarding the State's preservation argument, an order to pay restitution is a component of a criminal sentence. *Walczak v. State*, 302 Md. 422, 426 n.1 (1985). Therefore, if the order exceeds the authority of the court, it is an illegal sentence that can be challenged at any time, even on appeal. *McDaniel v. State*, 205 Md. App. 551, 556 n.2 (2012). Of course, "an argument that an order is simply incorrect cannot be made in the first instance on appeal." *McDaniel*, 205 Md. App. at 566. We are persuaded this issue is properly before us. *See also Chaney v. State*, 397 Md. 460, 463 (2007) (exercising discretion under Maryland Rule 8-131(a) to address the restitution condition).

As for the merits, an order of restitution entered in a criminal case, even when attached as a condition of probation, "is a criminal sanction – part of the punishment for the crime." *Chaney*, 397 Md. at 470 (citing *Goff v. State*, 387 Md. 327, 338-40 (2005)); *see also Pete v. State*, 384 Md. 47, 54 (2004)("[R]estitution is generally available as part of a sentence for a criminal conviction under [Criminal Procedure Article] § 11-603 or as a condition of probation under [Criminal Procedure Article] § 6-221"). Although an order of restitution has a "therapeutic and rehabilitative function with respect to the defendant, its predominant and traditional purpose is to reimburse the victim for certain kinds of expenses that he or she incurred as a direct result of the defendant's criminal activity." *Chaney*, 397 Md. at 470. "It is not a judicially imposed gift to the victim, but reimbursement that the defendant, personally, must pay." *Id.*; *see also Pete*, 384 Md. at 55(indicating that restitution serves three purposes: (1) punishment of defendant; (2) rehabilitation of defendant; and, (3) recompense to the aggrieved victim).

To effectuate restitution, the General Assembly has enacted the provisions in Subtitle 6, of Title 11 of the Criminal Procedure Article. Md. Code (2001, 2008 Repl. Vol.) §§ 11-601 - 11-619 of the Criminal Procedure Article ("Crim. Proc."). Pertinent to our discussion, Crim. Proc § 11-603 provides:

> (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[.]

We review for abuse of discretion, a trial court's determination that damage was a "direct result" of the actions underlying the offense for which the defendant was convicted. *State v. Stachowski*, 440 Md. 504, 512-13 (2014). Appellant's argument is that he should not be accountable for all the jewelry stolen from Hoffman, as he only pawned five of her rings. The short answer to his claim is provided by the theft statute. Section 7-104(g) provides:

> (1) A person convicted of theft of property or services with a value of:
>
> (i) at least $1,000 but less than $10,000 is guilty of a felony and:
>
> 1. is subject to imprisonment not exceeding 10 years or a fine not exceeding $10,000 or both; and
>
> 2. shall restore the property taken to the owner or pay the owner the value of the property or services[.]

Crim. Law § 7-104(g).

And, Section 7-103(a) defines "value" as follows:

> (a) In this section, "value" means:
>
> (1) the market value of the property or service at the time and place of the crime; or
>
> (2) if the market value cannot satisfactorily be ascertained, the cost of the replacement of the property or service within a reasonable time after the crime.

The Court of Appeals has explained that we "do not read statutory language in a vacuum, nor do we confine strictly our interpretation of a statute's plain language to the isolated section alone." *Williams v. Peninsula Reg'l Med. Ctr.*, 440 Md. 573, 580 (2014) (citation omitted). "Rather, the plain language must be viewed within the context of the

statutory scheme to which it belongs, considering the purpose, aim, or policy of the Legislature in enacting the statute." *Id*. at 580-81.

Here, as opposed to the restitution statute, the cited provisions of the theft statute specifically set forth the responsibilities of a thief to his or her victim. And, "[i]t is well settled that when two statutes, one general and one specific, are found to conflict, the specific statute will be regarded as an exception to the general statute." *Magnetti v. Univ. of Md., College Park*, 402 Md. 548, 567 (2007). As this Court has stated:

> [A]s long as the loss is attributable to the adjudicated offense, the State has proffered evidence to sustain that finding, and the [defendant] has sufficient notice of the claim, the amount of restitution is limited only by the State's proof of loss attributed to the offense or conduct in which the [defendant] was adjudged to be involved.

In re Earl F., 208 Md. App. 269, 279 (2012); *see also Carlini v. State*, 215 Md. App. 415, 455 (2013)(construing Crim. Law § 7-104(g)(1)(ii) and holding that, under that provision, "restitution was required as a matter of law"). We are persuaded that appellant is accountable for Ms. Hoffman's entire loss, and the court properly ordered restitution in the amount of $1,583.95.

JUDGMENT AFFIRMED.

COSTS TO BE PAID BY APPELLANT.