UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2341

September Term, 2015

SETH ZACHARY SCHAFFERMAN

V.

STATE OF MARYLAND

Kehoe,
Nazarian,
Kenney, James A., III
(Senior Judge, Specially Assigned),

JJ.

Opinion by Kenney, J.

Filed: May 5, 2017

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

Appellant, Seth Zachary Shafferman, appeals his conviction of felony theft of property worth between $1,000 and $10,000 following a bench trial in the Circuit Court for Carroll County. He presents two questions for our review:

1. Was the evidence sufficient to sustain the conviction of felony theft?
2. Did the trial court err in calculating the amount of restitution?

For the reasons that follow, we shall affirm the judgment of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

On October 18, 2014, the State of Maryland filed a Statement of Charges formally charging appellant with "THEFT-SCHEME: 1K TO UNDER 10K" as a result of a "scheme and continuing course of conduct," pursuant to which he stole "U.S. CURRENCY of MARYLAND SIGN DESIGN having a value of at least $1,000 but less than $10,000, in violation of CR 7-104 of the Annotated Code of Maryland."

Appellant entered a plea of not guilty prior to his July 20, 2015 trial.[1] After appellant waived his rights to a jury trial on the record, the trial proceeded on the following agreed statement of facts:

> That on multiple dates between February 21, 2014 and June 20, 2014, Seth Zachary Schafferman, the [appellant] seated before Your Honor today, purchased multiple items from various Home Depot stores with a company check as requested by his employer, Maryland Sign Design, Incorporated.

[1] After entering the plea, defense counsel stated that it was his "client's intent to begin performing some volunteer community service" in the hope that, if he "is successful in doing some things, perhaps we can ask for a disposition beneficial to [him]." This was based on a suggestion at a pre-trial conference with the judge who presided over the trial. At the pre-trial conference, defense counsel also understood that the State would be "requesting a total amount of restitution of $1,391.33."

The [appellant] was in charge of supplying the company vehicles with their required tools when given the permission to purchase them. Maryland Sign Design, Incorporated bookkeeper would provide the [appellant] with a company check.

On the multiple dates and times the [appellant] would go to the various Home Depot stores and purchase items in that manner, then a short time later return the item to a Home Depot with the purchase receipt for cash. Once the cash was obtained, the [appellant] would keep the cash for himself.

The [appellant] would then take one of his personally owned -- personally previously owned tools matching the description of what he was sent to purchase by his employer and give the used tool to the company.

Maryland Sign Design represented and advised that the [appellant] did not have permission to do this and that any cash that was obtained from a returned item is to be given back to Maryland Sign Design, their bookkeeper. Maryland Sign Design provided Deputy Hugel of the Carroll County Sheriff's Department with a loss amount of $1,234.12.

Also, between the dates of February 21, 2014 and June 20, 2014, the [appellant] purchased multiple unauthorized items with the issued company checks at various Home Depot locations according to Maryland Sign Design, Incorporated, according to their representative with a total loss of amount of $157.21. The total being $1,391.33.

On October 8, 2014, Deputy Hugel of the Carroll County Sheriff's Department made contact with the [appellant] and set up an interview. At 1:00 p.m. he responded to the [appellant]'s residence . . . in Westminster, Carroll County, Maryland.

He sat down inside the residence and discussed the case with the [appellant]. Through the interview he learned from the [appellant] that the [appellant] previously worked for a different company doing the same work where he was required to buy and have all his own tools for the job.

The [appellant] then left the former company and started working for Maryland Sign Design, Incorporated. His tools were still new he advised but he could not return them because it was past the return date. Once with Maryland Sign Design, the [appellant] was put in charge of stocking the vehicles and would purchase tools when approved by the company's supervisor.

At that time the [appellant] was low on money and saw an opportunity to make money. The [appellant] advised that when he was approved to purchase the tool for the company vehicles, he went and purchased the item from Home Depot, that the item would be the same item he had already owned from working at the previous company, that the [appellant] would then give Maryland Sign Design his slightly used tool,

> then return the newly purchased item to Home Depot for cash and keep the money. All items were originally paid for with the Maryland Sign Design, Incorporated company issued check.
>
> Deputy Hugel had the [appellant] complete a list from memory of all the tools that he purchased and returned for cash and gave Maryland Sign Design the old tool for. The [appellant] completed a list from memory and advised he may be forgetting some of those items. The list is handwritten by the [appellant] and had been attached to the case folder in the case.
>
> The list is as follows:
> 134-piece Husky tool kit;
> 185-piece Husky tool kit;
> Rigid impact drill;
> 268-piece Husky tool kit;
> Sawzall Milwaukee;
> 12-piece Milwaukee kit;
> Sawzall blades; and
> 11-piece impact socket set of the Husky brand.
>
> All events occurred in Carroll County. All witnesses would identify the [appellant] as Seth Zachary Schafferman.

Following the reading of the agreed facts, defense counsel moved for judgment of acquittal "on the basis of insufficient evidence." The court denied the motion, stating "I do find the [appellant] guilty of the single count," and set a sentencing hearing for October 29, 2015. In doing so, the court commented that it would "see what [appellant] can do by then both by way of volunteer hours and also in terms of paying back the restitution."

During an oral victim impact statement at the sentencing hearing on October 29, 2015, the manager of Maryland Sign Design, Inc., stated that he felt "like [appellant] was grooming [him] for this theft to happen." He further stated that appellant's actions had "caused [him] sleepless time" and "drained money out of [the] business." The State requested a sentence of "two years, suspended all but 30 days to be imposed . . . as well

as the remainder of restitution to be paid pursuant to a payment plan as Your Honor sees fit. And based on [the State's] calculations with his payment of $200 today, that would leave [$1,191.33]."

Defense counsel pointed out that appellant had provided Maryland Sign Design, Inc. "a check for $200 going towards restitution" and he had "successfully completed" the 100 hours of community service discussed at trial. Defense counsel also indicated that "this case ha[d] been an impediment" to appellant's ability to find another job, but he "is slowly doing what he needs to do to take care of this to make [Maryland Sign Design, Inc.] whole in regard to all of those matters," and based on his "performance at the Volunteer Community Service and his ability to come up with some money here today, Your Honor, it warrants probation . . . and I would ask the Court to consider that."

In issuing its sentence, the court stated:

> Mr. Shafferman, would you stand up? Sir, you did do the volunteer community service and that is to your credit. I am factoring that into the sentence that the Court is going to enter. I do not know why you have not been able to get some sort of even unskilled employment during this period of time to pay more than the $200 which would put you in a better stead today.
>
> While I am going to give that consideration what you have done, I must tell you that the victim impact statement in this case is very significant to the Court.[2] It really does put a face on this crime and it is not so much about the money. It is about the deception that has been visited upon [the victim]."
>
> I am very concerned about this so this is what I am going to do. I am going to sentence you to six months to the Carroll County Detention Center. I am going to suspend all but 30 days of that sentence. I am going to order you on work release so that you can start paying restitution.

[2] Larry James, the manager of Maryland Sign Design, Inc., gave the impact statement at the sentencing hearing, discussing how appellant's actions had affected him and Maryland Sign Design, Inc.

> You are going to be on probation for two years through Parole and Probation subject to standard conditions and the following special conditions: you will pay restitution to [the victim] through Parole and Probation in the amount of $1,191.31 and you are to have no contact with [him].

Appellant filed this timely appeal on November 30, 2015.

DISCUSSION

Sufficiency of the Evidence

Standard of Review

On appellate review of a circuit court's decision in a criminal trial, it is not the function of the court to undertake an independent review of the record in the nature of a retrial. *Winder v. State*, 362 Md. 275, 325 (2001). Rather, we determine "whether 'any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt' when the evidence is presented in the light most favorable to the State." *Bible v. State*, 411 Md. 138, 156 (2009) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). In other words, the appropriate inquiry for the reviewing court is not whether the evidence established guilt beyond a reasonable doubt in its mind, but whether, using the same standard, any rational trier of fact could have found the essential elements of the crime charged, *State v. Smith*, 374 Md. 527, 535 (2003) (citing *In re Timothy F.,* 343 Md. 371, 379-80 (1996). We "will reverse the judgment only if we find that no rational trier of fact could have found the essential elements of the crime." *Winder*, 362 Md. at 325.

Contentions

Appellant contends that "the evidence was insufficient to sustain his conviction for a theft scheme involving goods worth a total of between $1,000 and $10,000." As an initial matter, he asserts, citing Maryland Rule 8-131(c), that the issue was sufficiently preserved for appeal because appellate courts "will review" bench trials "on both the law and the evidence." More particularly, he argues that the State's evidence failed to meet the statute's $1,000 threshold because "the statement of facts fails to explain why the 'loss' to the company was calculated without any deduction, whatsoever, for the value of the 'slightly used tools,' 'matching the description of what he was sent to purchase by his employer,' which were submitted for the new tools that he returned for cash." (Emphasis in original). He posits that when the "intrinsic value" of the used tools is taken into account the offense becomes a misdemeanor, and not a felony. He asserts, citing *Mercer v. State*, 237 Md. 479, 484–85 (1965), and *Champagne v. State*, 199 Md. App. 671, 674–75 (2011), that "[a]ny uncertainty in the amount involved to determine whether a felony or misdemeanor was committed must be resolved in favor of the accused."

Regarding the $157.21 for any unauthorized items that he purchased, appellant contends that "the statement of facts omits any claim, whatsoever, that those items were either kept by appellant, for personal use, sold or not delivered to the employer." As such, the facts proffered were "not sufficient to charge 'theft' of those additional items" under Maryland Code (2002, 2012 Repl. Vol.), § 7-104(a)–(b) of the Criminal Law Article ("CR § 7-104(a)–(b)").

According to the State, "the proper focus is on what [appellant] obtained – cash in the amount of $1,234.12," and not "what the employer obtained as a result of his actions." In other words, the "statement of facts shows that [appellant] intended to and did obtain cash," in an amount "sufficient to establish theft over $1,000." It points out that appellant cited "no authority for the proposition that, in calculating the amount of the theft, the trial court is required to *sua sponte* deduct any value received by the victim as a result of a defendant's action," and contends that such an argument is "inconsistent with the statute's focus on what the defendant obtained."

In response to appellant's argument that the $157.21 in "unauthorized" purchases should be deducted from the aggregate amount in the theft charge, the State asserts that "there was sufficient evidence [in the statement of facts] to support the charge." But, if not, "the evidence would be sufficient to support the conviction of theft over $1,000."

In the event that the evidence was insufficient to support a conviction for theft over $1,000, the State contends, citing *Hobby v. State*, 436 Md. 526, 558–59 (2014) and *Champagne*, 199 Md. App. at 678, that "the proper remedy would be . . . to enter a judgment of guilty of theft under $1,000." According to the State, this Court could then either "remand for the sole purpose of resentencing" or affirm the sentence, which was less than the eighteen month maximum for theft under $1,000.

Analysis

CR § 7-104 provides, in relevant part:

Unauthorized control over property

(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.

Unauthorized control over property--By deception

(b) A person may not obtain control over property by willfully or knowingly using deception, 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.

As to penalty, CR § 7-104(g) provides, in relevant part:

Penalty

(g)(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;

* * * *

(2) Except as provided in paragraphs (3) and (4) of this subsection, a person convicted of theft of property or services with a value of less than $1,000, is guilty of a misdemeanor and:
(i) is subject to imprisonment not exceeding 18 months or a fine not exceeding $500 or both; and
(ii) shall restore the property taken to the owner or pay the owner the value of the property or services.
(3) A person convicted of theft of property or services with a value of less than $100 is guilty of a misdemeanor and:
(i) is subject to imprisonment not exceeding 90 days or a fine not exceeding $500 or both; and

> (ii) shall restore the property taken to the owner or pay the owner the value of the property or services.

The current theft statute has its roots in English common law. *See Lee v. State*, 59 Md. App. 28, 32–36 (1984). "Distinctions among larceny, embezzlement, obtaining by false pretenses, extortion, and the other closely related theft offenses, including shoplifting, can be explained by a brief exposition of the historical role criminal law played in protecting property." *Id.* at 32. Over time, "the courts began to realize that the actor's wrong typically had little to do with the act of acquiring physical control over the object, but, rather revolved around the intent behind the acquisition," and as a result, they directed their focus more on the "intent of the actor as evidenced by his unauthorized exercise of control over the property" than the fact that the actor "had obtained possession lawfully." *Id.* at 34. This shift in philosophy engendered changes to our larceny jurisprudence, as now reflected in CR § 7-104.

Relevant to the underlying criminality of appellant's actions is CR § 7-104(a), which proscribes a person from "willfully or knowingly obtain[ing] or exert[ing] unauthorized control over property," and CR § 7-104(b), which proscribes a person from "willfully or knowingly" obtaining control over property "using deception." Both subsections contain the identical requirement that an individual "intend[] to deprive the owner of the property." CR § 7-104(a)–(b).

Because CR § 7-104 does not provide definitions for the terms "willfully," "knowingly," or "intend," we look elsewhere for their meanings. "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). Nevertheless, 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).

Under CR § 7-102(b)

> (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.

Because a definition of "intend" does not appear in the statute or relevant case law, we look to the dictionary to determine its meaning. *Schreyer v. Chaplain*, 416 Md. 94, 101 (2010) (quoting *Md.–Nat'l Capital Park & Planning Comm'n v. Anderson*, 164 Md. App. 540, 579 (2005) (stating that we may "consult the dictionary to elucidate terms that are not defined in the statute"). "Intend," as defined in Merriam-Webster's Collegiate Dictionary, Tenth Edition (2010), means "to direct the mind on."

As defined in CR § 7-101(c) "deprive" means "to withhold property of another . . . permanently;" and under CR § 7-101(i) property includes "money."

Here, the agreed statement of facts, more specifically appellant's purported statement to Deputy Hugel that he "was low on money and saw an opportunity to make money," amply demonstrates that Maryland Sign Design, Inc.'s money was the "property" over which appellant exerted "unauthorized control" and that he did so with the intent to withhold it permanently from that business. The factual statement demonstrates that appellant's decision to return the tools in exchange for a cash refund was "unauthorized." Appellant "was in charge of supplying the company vehicles with their required tools" and, when given the permission to purchase them, he was provided with a company check. He was not, however, authorized to return the tools for money and to keep the money. Rather, "any cash that was obtained from a returned item [was] to be given back to Maryland Sign Design, their bookkeeper."

Regarding the $157.21 in "unauthorized" purchases made by appellant, the facts state that "between the dates of February 21, 2014 and June 20, 2014, [appellant also] purchased multiple unauthorized items with the issued company checks at various Home Depot locations according to Maryland Sign Design, Incorporated, according to their representative with a total loss of amount of $157.21." Not only were the purchases unauthorized, the stated facts, especially the fact that appellant was "low on money," support an inference that he did not acquire them for the company and exercised control over them for his own purposes.

In short, appellant's actions with regard to the money that he received when he returned the unauthorized tools purchased using company checks and his purchases of the unauthorized items (whether he kept them for himself of returned them for cash) were proscribed by CR § 7-104(a).

Appellant's actions were also proscribed by CR § 7-104(b) because he obtained the money from Maryland Sign Design, Inc. by deception, which is defined in § CR 7-101(b) as "knowingly to . . . create or confirm in another a false impression that the offender does not believe to be true." Appellant's theft scheme involved using company checks to purchase tools from Home Depot stores, returning those tools, and "then tak[ing] one of his personally owned – personally previously owned tools matching the description of what he was sent to purchase by his employer and giv[ing] the used tool to the company." These actions were intended to create the false impression that Maryland Sign Design, Inc. was paying for and receiving new tools. To be sure, appellant's actions were not the most conventional form of theft, but they constituted theft all the same.

As an alternative argument, appellant urges us to consider what Maryland Sign Design, Inc. obtained as a result of his actions. But, "neither the current theft statute nor analogous prior case law requires proof of loss as an essential element of the crime." *Lane v. State*, 60 Md. App. 412, 422 (1984) (internal quotation marks omitted). Rather, the actions taken with the intent "to deprive the owner of the property" (in this case money), are sufficient to sustain a conviction under the statute. *See* CR § 7-104.

Certainly, the employer in this case should not, as a matter of law, be required to accept or credit used tools for the new tools that it thought it was purchasing.

In short, we are not persuaded, based on these facts, that "no rational trier of fact could have found the essential elements of the crime."

Calculation of Restitution

Standard of Review

Assuming the restitution does not exceed the authority of the court, "[w]e review [a sentencing] court's restitution order for abuse of discretion." *Silver v. State*, 420 Md. 415, 427 (2011); *see Stachowski v. State*, 213 Md. App. 1, 13 (2013).

Contentions

Appellant contends that the circuit court "erred in calculating the amount of restitution that [he] was ordered to pay his employer, Maryland Sign Design, Inc. in at least, two respects." First, it "failed to deduct from the cost of the 'new' tools the value of the 'slightly used' tools," that appellant provided to the company. Second, it included the $157.21 in "unauthorized" purchases, notwithstanding, appellant contends, the State's failure to prove all the elements of theft under CR § 7-104(a)–(b).

The State responds that appellant's claims that "the trial court did not deduct the value of the 'slightly used' tools that [appellant] gave the employer . . . , and that there were insufficient facts alleged regarding $157.21 of the amount," were not raised below, and therefore, not preserved for appellate review. According to the State, appellant "made a strategic decision not to contest the amount of restitution in the hope that the trial court

would be lenient." But, had the issues been preserved, "the amount of restitution was proper" because "the record does not establish that the 'slightly used' tools had any monetary value" and does not indicate how the circuit court "could have calculated" any possible value for the used tools.

Analysis

We address first the State's claim that appellant did not preserve for appellate review the issues of the circuit court's failure to offset against the amount of restitution the value of the used tools and the insufficiency of evidence supporting the unauthorized purchase of tools in the amount of $157.21. An order to pay restitution is a component of a criminal sentence, and 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). But, a challenge to the actual amount of restitution awarded by the circuit court is not a challenge to the legality of the order. "Thus, unlike a contention that a court's restitution order is illegal, an argument that an order is simply incorrect cannot be made in the first instance on appeal." *Id.* 205 at 566. In other words, "[i]f there is an opportunity to object to a ruling or order when it is made, the failure to do so (and to inform the court of the relief requested) may constitute waiver." *Reiger v. State*, 170 Md. App. 693, 698 (2006) (quoting *Hill v. State*, 355 Md. 206, 219 (1999)).

In arguing for a sentence without jail time at the sentencing hearing, appellant's counsel pointed out that appellant had completed over 100 hours of community service, as requested by the circuit court, and had produced a check for $200.00 to be applied

towards his restitution payments. He did not question, or otherwise challenge, the amount of restitution—a total of $1,391.33 (before deducting the $200 paid at trial)—proffered by the State. Following the court's sentence of six months in the Carroll County Detention Center with all but thirty days suspended, appellant did not object in any manner. Under these circumstances, we conclude that appellant's argument is waived.

Had the argument been properly preserved, appellant would fare no better. Under Maryland Code (2001, 2008 Repl. Vol.), § 11-603 of the Criminal Procedure Article ("CP § 11-603"):

> (a) 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 . . . if: (1) as a direct result of the crime . . . property of the victim was stolen, damaged, destroyed, converted, or unlawfully obtained, or its value substantially decreased;

This Court has stated that "as 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). In this case, the statement of facts showed that the combined total of the money obtained through the tool replacement scheme and the unauthorized purchases was $1,391.33. In addition, no challenge was made to the amount of restitution ordered at sentencing, and no evidence was produced to call into question the loss sustained by Maryland Sign Design, Inc. Therefore, we perceive neither error nor abuse of discretion in the court's award of restitution.

JUDGMENTS OF THE CIRCUIT COURT FOR CARROLL COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANT.