UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1605

September Term, 2014

STACEY L. FRYBERGER

v.

STATE OF MARYLAND

Eyler, Deborah S.,
Hotten,
Nazarian,

JJ.

Opinion by Nazarian, J.

Filed: July 13, 2015

*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.

Stacey Fryberger was tried and convicted of two charges by a jury in the Circuit Court for Worcester County: theft of property worth between $1,000 to $10,000 and obtaining property of a vulnerable adult worth at least $1,000. She was sentenced to one year of incarceration, all but 90 days suspended, followed by two years of supervised probation. As a condition of probation, the trial judge ordered Ms. Fryberger to pay the victim, Eva Bunting, $600 in restitution. Ms. Fryberger argues two errors on appeal: *first*, that the restitution order constitutes an illegal sentence, and *second*, that there was insufficient evidence to support her convictions. Unfortunately, Ms. Fryberger failed to preserve either issue, so we affirm.

I. BACKGROUND

On November 19, 2013, Ms. Fryberger and her husband, James, visited the home of Eva Bunting. Mr. Fryberger had borrowed (and not repaid) money from Ms. Bunting earlier that year, and the discussion during this visit included a request for another loan. Soon after their arrival, Mr. Fryberger excused himself to go to the bathroom and Ms. Fryberger continued to chat with Ms. Bunting. But after Mr. Fryberger had been gone for over a half-hour, Ms. Bunting became suspicious and went to check on him, and she found him in her bedroom, going through her jewelry.

After he returned, Mr. Fryberger asked Ms. Bunting to lend him $1,000. Ms. Bunting agreed, and Ms. Fryberger wrote an IOU in exchange for a $1,000 check, detailing the rate at which the Frybergers would repay the loan. After the couple left her house, though, Ms. Bunting checked her jewelry box and noted that several pieces of jewelry were missing.

A month or two passed, and Ms. Bunting did not hear (or receive payment) from the Frybergers. So she sent Mr. Fryberger a letter demanding payment and the return of her jewelry. In February, Ms. Fryberger turned the note and a few pieces of Ms. Bunting's jewelry in to the Delaware police, claiming that she did not know where the jewelry had come from but "[b]eing an honest person, [she] took it to [the police];" Ms. Bunting later testified that the "two pieces of jewelry [were] no good." Ms. Fryberger contended that she was unable to make payments on the loan as her business began to fail. She did manage to repay the loan to Ms. Bunting in August 2014 by taking a title loan against her car, but was unable to return any of the other pieces of jewelry that had been taken from Ms. Bunting's house.

On September 8, 2014, Ms. Fryberger was tried and convicted in a one-day jury trial of theft of property worth between $1,000 to $10,000 and obtaining property of a vulnerable adult of at least $1,000. The trial testimony detailed the amount of the loan, but the only testimony about the value of the stolen jewelry came from Ms. Bunting. The trial judge sentenced Ms. Fryberger to one year, all but 90 days suspended, with two years of supervised probation. The court also ordered Ms. Fryberger to pay $600 restitution to Ms. Bunting to compensate her for the lost jewelry. Ms. Fryberger did not object to the restitution order during sentencing. When asked whether she had disputed the calculation of the restitution award, she did not challenge either the sufficiency of the evidence or present her own evidence to rebut Ms. Bunting's claims:

> [JUDGE]: Does the defense have any quarrel with the $600 figure?

> [MS. FRYBERGER]: I only know the three pieces that were returned.
>
> COUNSEL FOR [MS. FRYBERGER]: I guess we would have to rely on Ms. Bunting's testimony.

Indeed, the court and counsel discussed the possibility that the court would consider revising and shortening Ms. Fryberger's sentence once she made restitution:

> [JUDGE]: If the restitution in the amount of $600 is paid, I'll consider revising the jail sentence in this matter --
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> COUNSEL FOR [MS. FRYBERGER]: Thank you, Your Honor.
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> [JUDGE]: -- to some lesser period.
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> * * *
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> COUNSEL FOR [MS. FRYBERGER]: Your Honor, just to clarify. Is that if the full restitution is paid, then you'll consider a modification?
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> [JUDGE]: Full restitution, $600 which I've determined.

Ms. Fryberger filed a timely notice of appeal.

II. DISCUSSION

Ms. Fryberger raises three questions on appeal,[1] but they combine logically into two, neither of which she preserved. *First*, she contends that the restitution order constitutes an illegal sentence. *Second*, she disputes that the evidence was sufficient for the jury to find that Ms. Fryberger knew or should have known that Ms. Bunting was over the age of 68, thereby qualifying her as a "vulnerable adult," a term we explain below, and that Ms. Fryberger was an accomplice to the theft.

A. Ms. Fryberger Failed To Preserve Her Challenge To The Restitution Order.

Ms. Fryberger contends, citing Md. Rule 4-345(a), that the restitution order constituted an illegal sentence because there was insufficient evidence to support the amount the court ordered her to pay.[2] She does not dispute that she failed to object to the order in the circuit court. Citing our holding in *Juliano v. State*, 166 Md. App. 531 (2006),

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[1] Ms. Fryberger's brief listed the following Questions Presented:

1) Does the restitution order in the amount of $600 constitute an illegal sentence?

2) Is the evidence insufficient to sustain the theft-from-a-vulnerable-adult charge where the State failed to prove that the alleged victim was over age 68 or that Ms. Fryberger knew or should have known the same?

3) Is the evidence insufficient to sustain the theft charge to the extent it related to the jewelry, where the State failed to prove that Ms. Fryberger was an accomplice?

[2] The relevant portion of Rule 4-345(a) provides: "[t]he court may correct an illegal sentence at any time."

she asks us to review the order anyway, notwithstanding the Court of Appeals's subsequent holding in *Chaney v. State*, 397 Md. 460 (2007).

It is true that *Chaney* and *Juliano* point in different directions, but the more recent Court of Appeals decision trumps. In *Chaney*, the Court of Appeals held that appellate courts can review sentences that suffer from an inherent illegality, even if the challenge was not raised or decided in the trial court. But this exception to the preservation rule is a narrow one, and other challenges *must* be raised and preserved:

> The *scope* of this privilege, allowing collateral and belated attacks on the sentence and excluding waiver as a bar to relief, is narrow, however. We have consistently defined this category of "illegal sentence" as limited to those situations in which the illegality inheres in the sentence itself; *i.e.* there either has been no conviction warranting any sentence for the particular offense or the sentence is not a permitted one for the conviction upon which it was imposed and, for either reason, is intrinsically and substantively unlawful. As we made clear in *Randall Book Corp.*, [316 Md. 315 (1989),] any other deficiency in the sentence that may be grounds for an appellate court to vacate it—impermissible considerations in imposing it, for example—must ordinarily be raised in or decided by the trial court and presented for appellate review in a timely-filed direct appeal.

Id. at 466-67 (emphasis in original) (internal citations omitted). From there, the Court rejected the argument that the restitution order was inherently illegal because there was not enough evidence to support the amount of restitution the trial court had ordered:

> Restitution in the amount of $5,000 is permitted as a condition of probation upon a conviction for second degree assault . . . and appellant does not seem to contend otherwise. His complaint is that these conditions were inappropriate in this case, in large part because no evidentiary foundation was laid to support them, but, even if so, that does not make the conditions intrinsically illegal. At best, it would require that

> this Court, in a timely-filed direct appeal, vacate them, if (1) the complaint about them was preserved for appellate review, or (2) we choose to exercise the discretion we have under Maryland Rule 8-131(a) to consider an issue not raised in or decided by the trial court.

Id. at 467.

Chaney compels the same result here. Ms. Fryberger did not challenge the fact or amount of restitution in the trial court, and does not contend that a restitution order was inappropriate for the offenses of which she was convicted. She claims only that there was insufficient evidence to support the amount of the order, the exact shortcoming that the Court rejected in *Chaney*.

Chaney also recognized our discretion to review unpreserved issues for plain error under Md. Rule 8-131(a):

> It is a discretion that appellate courts should rarely exercise, as considerations of both fairness and judicial efficiency ordinarily require that all challenges that a party desires to make to a trial court's ruling, action, or conduct be presented in the first instance to the trial court so that (1) a proper record can be made with respect to the challenge, and (2) the other parties and the trial judge are given an opportunity to consider and respond to the challenge.

397 Md. at 468. We decline to exercise our discretion to review the sufficiency challenge to this restitution order. There is no mystery here about the source of the evidence supporting the restitution amount, nor any other circumstances warranting a departure from the usual, and important, requirement that the parties and the circuit court have the first opportunity to address and correct any potential errors.

B. Ms. Fryberger Also Failed To Preserve Her Sufficiency Argument.

Ms. Fryberger moved for judgment of acquittal at the conclusion of the State's evidence, arguing that the State did not prove that she knowingly obtained or exerted control over the jewelry or that she knew or should have known that Ms. Bunting was over 68 years old. The trial judge denied the motion, finding that a reasonable juror could find that the State had proven these elements:

> The evidence is such that viewed in the light most favorable to the State a reasonable juror could conclude that the defendant is guilty beyond a reasonable doubt as to each of the charges, specifically Ms. Bunting—in terms of Ms. Bunting's age, she's 88 years old. She's not 68 or 69 or 70 or 71 or 72. She's way over 68 years of age. And in terms of youth and age, any reasonable person interacting with Ms. Bunting would conclude that she was over 68 years of age without her having revealed her birthdate or age. So the motion for judgment is denied.

Ms. Fryberger then took the stand in her defense and, after redirect examination, her counsel rested without renewing the motion for judgment, as Md. Rule 4-324 required.

The introduction of evidence by the defense effectively withdraws a motion for judgment, and she needed to renew the motion at the close of evidence to preserve a sufficiency objection:

> A defendant who moves for judgment of acquittal at the close of evidence offered by the State may offer evidence in the event that the motion is not granted, without having reserved the right to do so and to the same extent as if the motion had not been made. In so doing, the defendant withdraws the motion.

Rule 4-324(c). "In other words, a defendant is required to renew a motion for judgment of acquittal at the close of all the evidence or to argue anew why the evidence is insufficient to support a particular conviction." *Hobby v. State*, 436 Md. 526, 540 (2014). So by failing to reassert her objection and point specifically to how the State failed to prove its case, Ms. Fryberger waived her sufficiency of evidence argument.[3]

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

[3] The Court of Appeals has held for over five decades that sufficiency of evidence claims cannot be reviewed if they were not preserved. *See Lotharp v. State*, 231 Md. 239 (1963) (finding that appellate review of sufficiency of the evidence is predicated on the denial of the motion for judgment and therefore there can be no review without a motion for judgment); *Ennis v. State*, 306 Md. 579, 587 (1986) ("[Defendant] failed to renew her motion for judgment of acquittal at the close of all the evidence. Her failure to do so effectively precluded the trial court from considering her sufficiency contention. Consequently, there was nothing for the Court of Special Appeals to consider."); *Tarray v. State*, 410 Md. 594, 613 (2009) ("[Defendant] failed to preserve her argument as to the sufficiency of the evidence of deception by failing to object, with particularity, at the time of trial. Fundamentally, . . . at the close of all the evidence, the defendant must state with particularity all the reasons why the motion should be granted."); *see also Williams v. State*, 131 Md. App. 1, 6 (2000) (finding defendant's motion for judgment of acquittal made after the conclusion of the State's evidence was withdrawn after presenting evidence, and the failure of the defendant to renew the motion precluded the appellate court from reviewing the sufficiency of the evidence.); *Allen v. State*, 91 Md. App. 705, 727 (1992).