Circuit Court for Washington County
Case No. C-21-CR-19-99

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 463

September Term, 2019

JAMES MATTHEW LEIDIG

v.

STATE OF MARYLAND

Berger,
Reed,
Raker, Irma S.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Raker, J.

Filed: May 5, 2020

Appellant James Matthew Leidig was convicted in the Circuit Court for Washington County of third and fourth degree burglary and malicious destruction of property having a value of less than $1,000. He presents the following questions for our review:

> "1. Did the trial court violate Appellant's constitutional right to confrontation when the court admitted DNA evidence through a witness who did not perform the serological or DNA analysis of the crime scene evidence?
>
> 2. Where Appellant was acquitted of theft and first degree burglary, did the court err in ordering him to make restitution for the allegedly stolen property?"

We shall affirm on the first issue, vacate the restitution Order, and remand to the circuit court to determine a restitution amount consistent with this opinion.

I.

Appellant was indicted by the Grand Jury for Washington County on charges of first, third, and fourth degree burglary,[1] malicious destruction of property having a value of less than $1,000, and theft of property having a value of less than $1,000. The jury convicted him of third and fourth degree burglary and malicious destruction of property. The court sentenced appellant to a term of incarceration of eight years for third degree burglary, merged the fourth degree burglary conviction into the third degree burglary

[1] First degree burglary is "break[ing] and enter[ing] the dwelling of another with the intent to commit theft," third degree burglary is doing so "with the intent to commit a crime," and fourth degree burglary is doing so without any specific intent to commit any crime inside the dwelling. Md. Code, Criminal Law, §§ 6-202, 6-204, and 6-205; *Dabney v. State*, 159 Md. App. 225 (2004).

conviction for sentencing purposes, and reduced to judgment restitution in the amount of $886.95.[2]

Appellant's charges arose from his alleged burglary of Ralph and Rebecca Brown's residence, during which he allegedly damaged their living room window and basement door and took Mr. Brown's gun. When Sergeant David Haugh responded to the Browns' residence, he took swabs of reddish brown markings consistent with blood on the window frame and curtain. The blood matched appellant's DNA in a police database. Sergeant Haugh collected DNA samples from appellant, which confirmed the match. At trial, Mr. and Mrs. Brown testified that they did not know appellant and had not invited him into their house.

Tiffany Keener, a forensic scientist with the State Police, testified that one of her former co-workers, Molly Rollo,[3] had analyzed the evidence collected by Sergeant Haugh from the crime scene and deduced from it a male DNA profile before there was any suspect. Ms. Kenner had served as an "administrative" reviewer[4] for Ms. Rollo's report and testified that "[o]n the bottom of each page [of Ms. Rollo's report] I initialed indicating that I agree

[2] The court credited appellant with seventy-nine days for time served prior to sentencing. Because the court ordered restitution directly and not as a condition of probation, the award was reduced to judgment. The court did not impose a sentence for malicious destruction of property, stating that it was "not going to bother to impose a sentence on that."

[3] Ms. Rollo had since left the State Police to work for Prince George's County Police Department.

[4] There was no testimony regarding what an "administrative" reviewer is.

with her results and conclusions." The court admitted Ms. Rollo's report into evidence over appellant's objection on "confrontation" grounds.

Ms. Rollo's report included the following statements: "This report contains the conclusions, opinions and interpretations of the examiner whose signature appears on the report[]" and "The deoxyribonucleic acid (DNA) results reported below were determined by procedures which have been validated according to the Federal Bureau of Investigation's Quality Assurance Standards for Forensic DNA Testing Laboratories." Ms. Rollo signed the report.

Ms. Keener's report, also admitted into evidence, identified appellant expressly as a suspect and compared the DNA profile deduced by Ms. Rollo to a DNA profile developed from a reference sample taken from appellant. Ms. Kenner's report indicated that the two profiles matched at all shared testing locations and stated, "Because the rarity of this profile exceeds 1 in 333 billion, it is unreasonable to conclude that an unrelated individual would be the source of this DNA profile."

In his testimony, Mr. Brown estimated the cost of his gun at $800, holster at $60, and repair to his house at $75. At sentencing, when the State requested $886.95 in restitution and when the court ordered him to pay this amount,[5] appellant did not object.

The jury convicted appellant, the court imposed sentence and restitution, and this appeal followed.

[5] Neither the State nor the court explained how it arrived at this amount.

II.

Before this Court, appellant argues that the trial court violated his constitutional right to confrontation under the Confrontation Clause of the Sixth Amendment to the United States Constitution and Article 21 of the Maryland Declaration of Rights[6] when the court admitted DNA evidence through only Ms. Keener, who had not performed the serological or DNA analysis of the crime scene swabs. Appellant argues that under the test adopted in Maryland, Ms. Rollo's report contains sufficient "indicia of formality" to qualify as testimonial for the purposes of the Confrontation Clause. In appellant's view, the court violated his right to cross-examine Ms. Rollo about the validity of her conclusions that the swabs from the crime scene contained blood and produced a male DNA profile. Appellant contends that the violation of his constitutional right was not harmless because DNA was the only evidence linking him to the crime.

Appellant further argues that the Court should vacate the restitution Order and remand to limit the amount of restitution to only the losses resulting directly from the crimes for which he was convicted. Appellant recognizes that he did not object below but argues that the restitution Order, as part of the sentence, is an illegal sentence and that this issue can be raised at any time. Appellant argues that the restitution of $886.95 includes the cost of not only the damage to the house ($75) but also of the gun and its holster and that this is illegal because the jury found appellant not guilty of theft and first degree

[6] Appellant states that this case can be resolved in his favor solely by the application of the Sixth Amendment but asks the court, should it hold otherwise, to consider whether the Maryland Constitution affords him additional protection.

burglary. Although appellant was convicted of third and fourth degree burglary, appellant argues that any losses related to the alleged theft of a gun were not a "direct result" of these crimes.

The State contends that Ms. Rollo's (non-accusatory) report is not sufficiently formal to qualify as testimonial for the purposes of the Confrontation Clause because it does not *attest* that its statements *accurately reflect* the DNA testing processes used or the results obtained; Ms. Rollo's report does not contain anything that "in substance . . . functions as a certification." *State v. Norton*, 443 Md. 517, 548 (2015). In addition, the State argues that Ms. Rollo's report was admitted properly through Ms. Kenner because she was its "administrative" reviewer. As to appellant's argument under Article 21, the State contends that this issue was not made below and hence not preserved; the State further points out that appellant did not present an argument for Article 21's alleged additional protection besides citing a dissenting opinion.

As to the restitution Order, the State argues that the Order is not an illegal sentence, that it is lawful on its face, and that because appellant did not preserve his objection to the appropriateness of the *amount*, we should decline to consider the issue.[7]

[7] At oral argument, the State conceded that the restitution amount apparently included the cost of the gun and its holster and that, had the State at sentencing been asked for the evidentiary basis for the amount, it would not have met its burden. The State maintained nevertheless that the amount was not illegal on its face and asked us, if we were to remand on this issue, that we do so under our discretionary review.

III.

We review *de novo* a trial court's legal conclusion that the admission of evidence did not violate an individual's right to confrontation. *See Taylor v. State*, 226 Md. App. 317, 332 (2016). The Sixth Amendment to the United States Constitution provides, in pertinent part, that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." Article 21 of the Maryland Declaration of Rights provides similarly that "in all criminal prosecutions, every man hath a right . . . to be confronted with the witnesses against him."[8]

The United States Supreme Court held in *Crawford v. Washington*, 541 U.S. 36, 59 (2004) that the Confrontation Clause bars admission of testimonial hearsay at trial unless the witness is unavailable and the defendant has had prior opportunity to cross-examine the witness.[9] The Court explained that the "text of the Confrontation Clause . . . applies to

[8] Appellant argues that he prevails under the federal constitution, but asks us, if we disagree, to consider his claim under the possibly more expansive Maryland Article 21. This claim is preserved because appellant objected at trial on "confrontation" grounds and the court did not ask him to specify the source of the right. Because, however, the confrontation rights set forth in the Sixth Amendment and Article 21 have been read in *pari materia* "as generally providing the same protection to defendants," *Derr v. State*, 434 Md. 88, 103 (2013) ("*Derr II*"), and appellant provides no argument as to why Article 21 provides additional protection other than that it preceded its federal counterpart, we decline to consider appellant's claim separately under Article 21.

[9] *Crawford* abrogated *Ohio v. Roberts*, 448 U.S. 56, 66 (1980), under which testimonial hearsay was admissible if it had "indicia of reliability" by falling within a "firmly rooted hearsay exception" or by bearing "particularized guarantees of trustworthiness." *Crawford* held that "[w]here testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." 541 U.S. at 68–69.

'witnesses' against the accused—in other words, those who 'bear testimony'" and that testimony, in turn, is a "solemn declaration or affirmation made for the purpose of establishing or proving some fact." *Id.* at 51. The Court declined to provide a "comprehensive" definition of "testimonial," *id.* at 68, but offered "[v]arious formulations" of a "core class of 'testimonial' statements'" as follows:

> "*[E]x parte* in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially; extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions; [and] statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial."

Id. at 51–52 (internal citations and quotations omitted).

In *Williams v. Illinois*, 567 U.S. 50 (2012), the United States Supreme Court examined whether, as in the case at bar, a DNA report deducing a male DNA profile from crime scene swabs before there were suspects was testimonial under the Confrontation Clause and held that it was not.[10] Justice Alito's plurality opinion reasoned that the testifying expert, who had matched the DNA profile from the report with the defendant's DNA profile, relied on the report merely as an assumption or a basis of his expert opinion

[10] Justices Thomas and Breyer filed concurring opinions, and Justice Kagan filed a dissenting opinion joined by three other Justices.

about the match[11] and that "[o]ut-of-court statements that are related by the expert solely for the purpose of explaining the assumptions on which that opinion rests are not offered for their truth and thus fall outside the scope of the Confrontation Clause."[12] *Id.* at 57–58.

The plurality reasoned further that even if the report had been introduced for its truth, it was not testimonial under the Confrontation Clause because it was not accusatory, *i.e.*, not produced for "the primary purpose of accusing a targeted individual," explaining as follows:

> "The . . . report is very different from the sort of extrajudicial statements, such as affidavits, depositions, prior testimony, and confessions, that the Confrontation Clause was originally understood to reach. The report was produced before any suspect was identified. The report was sought not for the purpose of obtaining evidence to be used against petitioner, who was not even under suspicion at the time, but for the purpose of finding a rapist who was on the loose."[13]

Id. at 58; *cf. Bullcoming v. New Mexico*, 564 U.S. 647 (2011) (a lab report with the purpose of showing that defendant's blood-alcohol level exceeded legal limit); *Melendez-Diaz v.*

[11] Unlike in the case at bar, the report at issue in *Williams* "was neither admitted into evidence nor shown to the factfinder." 567 U.S. at 62.

[12] *Crawford* reaffirmed that the Confrontation Clause "does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." 541 U.S. at 59–60.

[13] The Court added, "This conclusion will not prejudice any defendant who really wishes to probe the reliability of the DNA testing done in a particular case because those who participated in the testing may always be subpoenaed by the defense and questioned at trial." *Williams*, 546 U.S. at 58–59.

Massachusetts, 557 U.S. 305 (2009) (a lab report with the purpose of showing that substance connected to defendant contained cocaine).

In a concurring opinion, Justice Thomas disagreed with the plurality's rationales but stated that he agreed with its conclusion solely because the report lacked the requisite "formality and solemnity" to be considered "testimonial." He explained as follows:

> "[The] report is not a statement by a 'witnes[s]' within the meaning of the Confrontation Clause. The . . . report lacks the solemnity of an affidavit or deposition, for it is *neither a sworn nor a certified declaration of fact*. *Nowhere does the report attest that its statements accurately reflect* the DNA testing processes used or the results obtained. The report is signed by two 'reviewers,' but they neither purport to have performed the DNA testing *nor certify the accuracy* of those who did. And, although the report was produced at the request of law enforcement, it was *not the product of any sort of formalized dialogue resembling custodial interrogation*."

Id. at 111 (Thomas, J., concurring in judgment) (emphasis added) (citation to record omitted); *cf. Melendez*, 557 U.S. at 308 (where the reports in question were "sworn to before a notary public by [the] analysts"); *Bullcoming*, 564 U.S. at 653 (where the report, albeit unsworn, included a "Certificate of Analyst" signed by the forensic analyst who tested defendant's blood sample, affirming that the "seal of th[e] sample was received intact and broken in the laboratory," that the "statements in [the analyst's portion of the report] are correct," and that he had "followed the procedures set out on the reverse of th[e] report").

In *State v. Norton*, 443 Md. 517 (2015), the Court of Appeals adopted "a test that, if satisfied, would result in adherence to the opinions of a majority of the Justices" in

Williams including Justice Thomas. The Court of Appeals articulated the new, two-part test as follows:

> "[W]e guide our trial courts, when reviewing the admissibility of forensic documents under the Confrontation Clause, to *consider first, whether the report in issue is formal*, as analyzed by Justice Thomas; *or if not, whether it is accusatory*, in that it targets an individual as having engaged in criminal conduct, under Justice Alito's rationale."

Id. at 547 (emphasis added) (internal citations omitted). Regarding the test of formality, the Court of Appeals explained that "formality does not require that the document contain specific words of attestation, but that the report, in substance, functions as a certification." *Id.* at 548.

The report at issue in *Norton* was indisputably accusatory, admitted into evidence, and contained the phrase "within a reasonable degree of scientific certainty" in its conclusion. 443. Md. at 521. The report also contained the seemingly standard statement, "The DNA profiles reported in this case were determined by procedures that have been validated according to standards established by the Scientific Working Group on DNA Analysis Methods (SWGDAM) and adopted as Federal Standards." *Id.* The Court of Appeals held that the phrase "within a reasonable degree of scientific certainty" in the report's conclusion certified the report and made it formal and testimonial for the purposes of the Confrontation Clause. *Id.* at 524.

Ms. Rollo's report in the case at bar is not testimonial because it is not formal or accusatory. As in *Williams*, "[n]owhere does the report *attest* that its statements *accurately* reflect the DNA testing processes used or the results obtained." 567 U.S. at 111 (Thomas,

J., concurring) (emphasis added); *see also Cooper v. State*, 434 Md. 209, 236 (2013) (holding that the non-accusatory report at issue was not formal because there was no "indication that the results are sworn to or certified or that any person attests to the accuracy of the results"); *Derr II* at 119–120 (holding that the DNA reports were not sufficiently formal because they lacked statements attesting to or certifying the accuracy of the procedures used or results obtained).

Appellant notes the following language on Ms. Rollo's report as evidence of sufficient formality: (1) "[t]his report contains conclusions, opinions and interpretations of the examiner whose signature appears on the report" and (2) "determined by procedures which have been validated according to the Federal Bureau of Investigation's Quality Assurance Standards for Forensic DNA Testing Laboratories." But neither is a "sworn" or "certified declaration of facts." *See Williams*, 567 U.S. at 111 (Thomas, J., concurring). Also unlike in *Norton*, Ms. Rollo's report does not express its conclusion with any degree of certainty.[14] Ms. Rollo's report is not testimonial for the purposes of the Confrontation Clause, and the trial court did not violate appellant's constitutional right by admitting it without Ms. Rollo.

[14] In addition, Ms. Rollo's report was not mandated by statutes, in contrast to the autopsy report in *Malaska v. State*, 216 Md. App. 492 (2014). In *Malaska*, various statutes required medical examiners to investigate deaths by violence, perform autopsies, document findings, and file documentations, which are then deemed competent evidence in state courts. *See* Md. Code, Health-General, §§ 5-309(a)(1), 5-309(b), 5-310(b)(1), and 5-310(d)(1)–(2). We held that "the *formalities required by the statutes, together with the signatures of [the doctors]* . . . render[ed] the autopsy report in the instant case sufficiently formalized to be 'testimonial' for purposes of the confrontation clause." *Malaska*, 216 at 511 (emphasis added).

We turn next to appellant's argument as to the restitution issue. We ordinarily review a restitution order for abuse of discretion. *McCrimmon v. State*, 225 Md. App. 301, 306 (2015). When a court imposes an illegal sentence, we may correct it at any time, even if no objection was made in the trial court. *Chaney v. State*, 397 Md. 460, 465–66 (2007); Md. Rule 4-345(a). To constitute an "illegal sentence," the illegality must "inhere[] 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." *Chaney*, 397 Md. at 510. There is no simple formula to determine which sentences are "inherently illegal" within the meaning of Md. Rule 4-345(a). *Johnson v. State*, 427 Md. 356, 368 (2012).

Restitution is "a *criminal sanction*, not a civil remedy" in Maryland. *Grey v. Allstate Ins. Co.*, 363 Md. 445, 451 (2001). For this reason, a trial court may order restitution "if . . . 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." Md. Code, Crim. Proc. Art., § 11-603(a)(1) (emphasis added). Courts have strictly construed the "direct result" requirement. *See Walczak v. State*, 302 Md. 422, 429 (1985) ("[R]estitution is punishment for the crime of which the defendant has been convicted."). A court may not order restitution for a crime that the defendant was not

convicted of, subject to exceptions not applicable to the case at bar.[15] *Silver v. State*, 420 Md. 415, 428–29 (2011).

The State recognizes that the "amount requested [by the State] does seem to include the value of Brown's handgun, which he estimated as $800, but the record is not definitive because the prosecutor was never asked to explain how he arrived at the total of $886.95." The trial court's restitution Order was not illegal *on its face*—a necessary predicate for a sentence to be illegal. *Chaney*, 397 Md. at 466; *Hoile v. State*, 404 Md. 591, 622 (2008). Appellant was convicted of third and fourth degree burglary, crimes which would allow for restitution of items taken during the commission of those crimes. The restitution Order was therefore not *illegal on its face* because the Order did not itemize which crimes the restitution was for, *i.e.*, it did not specify that the restitution covered damages related to the alleged theft of the gun, and no one at the hearing raised the issue to the court.

As in *Chaney*, 397 Md. at 467, we note that this Court has discretion under Maryland Rule 8-131(a) to address an issue that was not raised in or decided by the trial court. We recognize that this discretion should be exercised rarely. We determine that this is one of those rare cases because the error is plain error and it is judicially efficient to correct. The trial court erred by *apparently* ordering appellant's restitution to include the value of the

[15] "[A] restitution order regarding alleged crimes for which the defendant was not convicted is valid only if the defendant freely and voluntarily agrees to make restitution to victims of the other, alleged crimes as part of a plea agreement." *Silver v. State*, 420 Md. 415, 430 (2011).

handgun and the holster. We shall vacate the trial court's restitution Order and remand to that court to reconsider the matter of restitution.

ORDER OF RESTITUTION IN THE AMOUNT OF $886.95 VACATED. CASE REMANDED TO THE CIRCUIT COURT FOR WASHINGTON COUNTY FOR FURTHER PROCEEDING CONSISTENT WITH THIS OPINION. JUDGMENTS OF CONVICTIONS OTHERWISE AFFIRMED. COSTS TO BE SPLIT EQUALLY BETWEEN THE PARTIES.