Circuit Court for Prince George's County
Case No. CT141361X

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1042

September Term, 2021

QIANA JOHNSON

v.

STATE OF MARYLAND

Nazarian,
Reed,
Zic,

JJ.

Opinion by Nazarian, J.

Filed: April 25, 2022

On April 23, 2015, Qiana Johnson was convicted in the Circuit Court for Prince George's County of theft over $100,000 from Metro DC 2, LLC ("Metro") and conspiracy to commit theft over $100,000, also from Metro. Importantly, she also was acquitted of theft from the Estate of Angela McCallister and a series of related charges. Ms. Johnson filed a timely notice of appeal and we affirmed her convictions in an unreported opinion filed May 13, 2016. On September 15, 2015, while Ms. Johnson's case was pending on appeal, the court held a restitution hearing. The court ordered restitution in the amount of $238,000 to Wilmington Trust, the successor to Bank of America.

On June 7, 2019, Ms. Johnson filed a petition seeking post-conviction relief. In addition to asserting ineffective assistance of counsel claims, Ms. Johnson asked the court for permission to note a belated appeal from the restitution order. After a hearing, the court denied Ms. Johnson's petition for post-conviction relief as to the ineffective assistance of counsel claims but granted her the right to file this belated direct appeal to challenge the restitution order.[1] She argues now that the circuit court erred in ordering her to pay $238,000 in restitution to Wilmington Trust because Wilmington Trust was not a victim of a crime of which Ms. Johnson was convicted. We agree and reverse.

[1] Ms. Johnson filed an application for leave to appeal the circuit court's denial of post-conviction relief. On December 16, 2021, we denied Ms. Johnson's application for leave to appeal, *Johnson v. State*, Case No. 1096, Sept. Term 2021, CSA-ALA-1096-2021, and her post-conviction claims are not before us. *See* Md. Code (2001, 2018 Repl. Vol.), § 7-109(b)(4) of the Criminal Procedure Article ("If the application for leave to appeal is denied, the order sought to be reviewed becomes final.").

I. BACKGROUND

A. The Convictions.

Ms. Johnson's convictions stem from her participation in a real estate scheme involving property located at 10505 Keepsake Court in Upper Marlboro (the "Property"). Before she died in 2010, Ms. McCallister lived in and owned the Property. At the time of her death, there was an outstanding mortgage on the Property with Bank of America.

In 2012, David Clark, Ms. McCallister's father, was named the personal representative of Ms. McCallister's estate. Because Ms. McCallister "didn't have any type of insurance to cover the outstanding mortgage," Mr. Clark "turned the keys and the copy of the Death Certificate to the Bank of America." But the Property remained an asset in Ms. McCallister's estate, if an encumbered one. Bank of America never initiated foreclosure proceedings and the Property sat vacant.

In the summer of 2013, Lieutenant Charles Duelley of the Prince George's County Police Department began investigating an individual named Shannon Lee in connection with her alleged participation in a real estate fraud scheme involving vacant houses. When Lt. Duelley executed a search warrant on Ms. Lee's home, car, and post office box, he found documents on numerous houses involved in the scheme, including the Property. After reviewing these documents, Lt. Duelley suspected that Ms. Johnson was involved in the scheme.

It was not until February 2014, however, that Lt. Duelley obtained bank records directly implicating Ms. Johnson. Those documents went back to December 2012, when a

woman named Shamika Staggs emailed Ms. Johnson looking for a rental property because she "knew that [Ms. Johnson] was into the real estate business." Ms. Johnson told Ms. Staggs that she could help her find a rental property, but suggested that Ms. Staggs look for a place to own:

> I can help you Shamika . . . . I told you before that I think you guys should try to own vs renting!! Girl I pay $1100 for my home and Shannon [Lee] only pays $1300 for that big ass home!!!! Girl we will NEVER rent again!!!!
>
> Shannon [Lee] and I can help you guys get started but its going to cost. Remember my Aunt that passed away a few years ago ? you may not because we wasn't on speaking terms but I'm thinking of renting that home out soon. I just have to get everything in order. or I may just sell it because it just reminds me so much of her and my granny. . . . I may need you help by putting it in your name because we have so many homes in our name that if we do decide to sell them Uncle Sam will eat me alive at the end of the year. I will look out for you and give you a few dollars but out of whatever I give you, you will have to pay taxes on it at the end of the year when you file your taxes… but ill keep you posted. We aren't sure yet. Just in the beginning process.

On May 10, 2013, a deed for the Property was filed in the land records in the Circuit Court for Prince George's County. The deed, dated April 17, 2013, showed that the Property had been conveyed to Ms. Staggs by Ms. McCallister. An attached affidavit sworn by Ms. Staggs indicated that Ms. Staggs and Ms. McCallister were related. The deed was signed and dated by Mr. Clark as personal representative, Jane Owens as a notary public, and Laura Miles as an attorney. All three signatures were later discovered to be forgeries.

On September 12, 2013, Ms. Staggs sold the Property to Metro for $238,000.[2] The next day, Ms. Johnson and Ms. Staggs opened a joint bank account at PNC bank in Upper Marlboro. Four days later, proceeds from the sale in the amount of $197,318.34 were deposited into the joint bank account.[3] Two wire transfers were made from the joint account on September 17, 2013—one to Ms. Johnson's personal account for $126,000 and one to an individual named Randie Bondoc for $55,000.[4]

The bank records detailing the activity on the joint account established probable cause for Lt. Duelley to arrest Ms. Johnson in connection with the real estate scheme. On October 7, 2014, the grand jury indicted her on ten counts relating to these transactions:

1. Theft over $100,000 from the estate of Ms. McCallister;
2. Conspiracy to commit theft over $100,000 from the estate of Ms. McCallister;
3. Forgery of a deed;
4. Conspiracy to commit forgery of a deed;
5. Uttering a counterfeit deed;
6. Conspiracy to utter a counterfeit deed;
7. False entry in a public record on May 10, 2013;
8. Theft over $100,000 from Metro;
9. Conspiracy to commit theft over $100,000 from Metro; and
10. False entry in a public record on November 1, 2013.

On April 23, 2015, a jury convicted Ms. Johnson of counts eight and nine—theft over

[2] At the time of the sale, Bank of America still had a lien the Property. The outstanding mortgage was serviced by Ocwen Loan Services.

[3] The sales price of the Property minus costs left net proceeds of $197,318.34.

[4] Randie Bondoc and Ms. Lee share a child together and were living together at the time of this fraudulent transaction.

$100,000 from Metro and conspiracy to commit theft over $100,000 from Metro—and acquitted her of the remaining charges, including theft of property from the estate of Ms. McCallister.

Ms. Johnson's sentencing hearing took place on June 15, 2015. The State asked for a restitution hearing on behalf of Bank of America, "separate from the sentence itself," because it was "not sure how to deal with the restitution in this case. . . ." Defense counsel responded that the State "can't legally ask for restitution" for Bank of America because Ms. Johnson "was not charged with any crime with regards to them in particular." Instead, Ms. Johnson "actually was charged with theft of the estate of Angela McCallister" and was acquitted of those charges. Defense counsel asserted that it would be improper for the State to seek restitution on behalf of Bank of America because they "are not a party or related in any way to Metro," and Metro was the only victim Ms. Johnson was convicted of stealing from. The court told the parties it would schedule a restitution hearing "on another day and time . . . ."

The court sentenced Ms. Johnson to ten years incarceration with all but five years suspended, followed by a period of five years of supervised probation. On June 25, 2015, Ms. Johnson filed a timely notice of appeal challenging the trial court's decisions. We affirmed her convictions in an unreported opinion. *Johnson v. State*, No. 1144, Sept. Term 2015, slip op., 2016 WL 2825801 (Md. App. May 13, 2016).

B. The Restitution Hearing.

The court held a restitution hearing on September 15, 2015. Because Bank of

America's mortgage note for the Property had been assigned to Wilmington Trust in the time between the sentencing hearing and the restitution hearing, the State asked the court to impose restitution in favor of Wilmington Trust:[5]

> [Ms. Johnson] sold the property. The issue that we have [is that] the property was sold to an investment company, the property then was sold to another individual. So that's two bona fide purchasers since it was in the estate of Ms. McAlister [sic]. At the time it was in the estate of Ms. McAlister [sic], there was a note on the property which is currently held by the Wilmington Trust so they are the ones who we are asking to have the Court declare restitution, or grant restitution to. And one of the documents that was filed was a release of the lien so that the property could be sold. So [Wilmington Trust] really ha[s] no route to recover the property, they can't foreclose, it's been sold to a bona fide purchaser since that point. So the issue really is the amount that they are owed.

The State informed the court that Wilmington Trust requested over $500,000 in restitution.

The court asked the State for the fair market value of the Property, but the State didn't have an answer:

> [THE STATE]: The property was sold, Ms. Johnson sold it for, I believe, $238,000.
>
> [THE COURT]: Well, if you have no investment in capital that's probably not a good number. What would be a fair market?
>
> [THE STATE]: Well, that I can't tell you. I can tell you what the value of the note was without the fines and interest, which is 353 I believe, and then the current liability on the note which is 500—

[5] At the restitution hearing, an employee of Ocwen, loan servicer for Wilmington Trust, testified that Wilmington Trust became the holder of the note in April 2015. In its brief, the State asserts that the note was assigned to Wilmington Trust in June 2015. The parties have been unable to locate the exhibits from the restitution hearing, so we are unable to determine the exact date that the note was assigned to Wilmington Trust.

> [THE COURT]: Isn't this in the nature of the typical case where you have an automobile accident and there is more damage than what it's worth?
>
> [THE STATE]: As to the property itself, yes, I see what you're saying and I don't believe at the time there would have been equity in the property. The question is how much they could recover on their note.

Ultimately, when asked for a fair market value of the Property for purposes of restitution, the State recommended "that [it] would probably be in the $238,000 range that Ms. Johnson sold it for."

Defense counsel asked the court to "dismiss this claim for restitution in the interest of justice[,]" and argued that Ms. Johnson was found guilty of theft of property from Metro, not from Wilmington Trust:

> [Metro has] no connection to this entity [Wilmington Trust] that the [S]tate is raising this claim for. [Wilmington Trust was] never listed as a victim in this case. I don't believe that restitution can be ordered to these individuals when my client has not been found guilty of doing anything whereby they were evicted, because had they been listed in this case, the jury could have very well found that my client had not stolen property from them and we didn't get an opportunity to have [Ms. Johnson] defend herself on that and to just come in now and list them as a victim, I guess she's not getting due process here with that. And so I'm asking that this claim be dismissed as they're not the victim that she was found guilty of committing a crime against.

The State disagreed, and characterized Wilmington Trust as a victim based on the language of "Criminal Procedure Article 11-601(j) which defines victim as a person who suffers death, personal injury, or property damage or loss as a direct result of a crime or delinquent act." Defense counsel acknowledged that if the State were seeking restitution on behalf of

Metro, "they would have a good claim there." The defense reminded the court that the $197,318.34 deposited into the joint bank account on September 16, 2013 "was connected to Metro . . . which is the only victim that she was found guilty of committing a crime against and the State even alleged other victims whereby she was not guilty."

The court asked defense counsel twice what happened to the $197,318.34. Defense counsel informed the court that the money was divided three ways—Ms. Johnson received $60,000, Ms. Lee received $60,000, and Ms. Staggs received $80,000. The court questioned where Ms. Johnson's share of the money was, and defense responded that Ms. Johnson "indicat[ed] that she doesn't have it anymore, so I would submit it had been spent on other things."

Defense counsel also contended that "restitution is supposed to be rehabilitative" and "should not rise to the level or exceed [Ms. Johnson's] resources." Ordering Ms. Johnson to pay more than $500,000 in restitution, as Wilmington Trust requested, would frustrate the purpose of Ms. Johnson's sentence. Defense counsel likewise asserted that imposing restitution after Ms. Johnson had been sentenced would amount to an illegal sentence. The court noted that it properly reserved ruling on restitution at Ms. Johnson's sentencing hearing and informed defense counsel that it was "going to go forward with the restitution and . . . pick an amount today."

The court observed that it was "clear" that the jury found Ms. Johnson guilty of fraudulently receiving $197,318.34. But defense counsel noted again that Ms. Johnson didn't receive "anything" from Wilmington Trust (or its predecessor) and "was not found

guilty of doing anything to these folks that are now raising this claim." According to the defense, Wilmington Trust was not a victim that the State chose to name in its charging document and the jury didn't consider whether the mortgage holder was a victim, "[s]o now to come with this different individual that [Ms. Johnson] didn't have an opportunity to defense herself against, it's improper."

The court disagreed, stating "[i]t's like if you steal the car and there is a lien on the car, the lienholder of the car is entitled to the money, not so much the owner of the car at that point." Defense counsel replied that in such a case, the owners would at least have to be listed, but the court disagreed. The State contended that despite not being named in the indictment, Wilmington Trust was still a victim:

> I mean it's an unusual situation just because the type of case it is. The only ones who are essentially left with empty hands here is the lien holder on the property, absent them going in some sort of fashion against the current property holder who is a bona fide purchaser at this point. So there really is no means of putting the toothpaste back in the tube.

An employee from the loan servicer, Nichelle Jones, testified that it was Ocwen's job to "service mortgage loans on behalf of investors[,]" one of which was Wilmington Trust. Ms. Jones testified that she was familiar with the Property, noting it was "one of the properties that is secured by one of the loans that we were servicing." She explained the numbers on the Property's affidavits of debt and payoff, documents that "break[] down the amounts that are owed as a of a certain date . . . ." She testified that as of September 10, 2015, the total amount owed on the Property was $527,695.91, which included unpaid principal, interest, late charges, various fees, and escrow advances. She also looked at the

deed of the trust and told the court that on January 14, 2009, when the deed of trust was first filed, the total amount owed on the Property was $375,500.

On cross-examination, Ms. Jones testified that Wilmington Trust became the lienholder of the Property on April 20, 2015. Because Ms. Johnson was convicted on April 15, 2015, before Wilmington Trust became lienholder, defense counsel moved to dismiss. They argued that Wilmington Trust wasn't "a victim at the time of the trial." The court asked defense counsel whether they "dispute[d] the fact that [Wilmington Trust] can't stand in the shoes" of Bank of America, the original lienholder of the Property. Defense counsel didn't dispute that fact, but did "dispute the fact that they were not a victim at the time that this case was being tried."

The defense asserted that Wilmington Trust could not "become a victim after the fact" and insisted that it was the lienholder's duty to conduct a title search "before they take on an assignment of a deed." The court acknowledged this duty, but noted that a failure to conduct a title search "doesn't make [Ms. Johnson] any less guilty of stealing the money . . . ." Defense counsel responded that their argument against restitution didn't center on Ms. Johnson's guilt, but on the fact that it "would be unjust enrichment for [Ms. Johnson] to have to pay these people money for something that they did not own at the time that the property was allegedly stolen." Again, the court disagreed:

> The rightful owner assigned whatever interest they had to the next person in this chain of title and they have all the rights that come from that, which in this case is to get their money back and obviously it was a very bad deal for them and I understand it. But certainly my Superior Court will let me know if we get this wrong and we've reserved on the issue of restitution.

Defense counsel then asked Ms. Jones whether Ocwen or Wilmington Trust was connected to Metro "in any way[.]" Ms. Jones answered no. The defense asked Ms. Jones whether any money paid for the Property "came out of the pocket of Wilmington Trust[.]" Ms. Jones responded that "Wilmington Trust didn't disburse any money on behalf, to the taxing agencies and the insurance agencies. Ocwen did." Nevertheless, Ms. Jones testified that it was not Ocwen who lost money from the real estate scheme, it was Wilmington Trust.

Ms. Johnson then took the stand. She testified that she never "had any kind of contact with Wilmington Trust[.]" Ms. Johnson acknowledged that $197,318.34 was transferred from the joint account to her personal account but maintained that she kept only $60,000. She testified that $80,000 went to Ms. Staggs and $66,000 went to Ms. Lee and Mr. Bondoc.

After testimony was presented, defense counsel asked the court to decline to order restitution payable to Wilmington Trust. The defense asserted that the State's witness, Ms. Jones, "could not even make a connection as to show that any money was actually lost by Wilmington Trust." Defense counsel noted that the State failed to call a representative from Wilmington Trust itself "to show that they actually lost any money." The defense therefore thought it "improper for the Court to find that [Wilmington Trust is] a victim here without an actual showing that they lost anything. . . ."

The court ordered Ms. Johnson to pay $238,000 in restitution to Wilmington Trust. In its ruling, the court stated that "[t]o follow the [defense's] logic, you would have to

overlook the fact that [Ms. Johnson] was part of a conspiracy to steal houses." The court reasoned that Ms. Johnson was convicted "of stealing a house from a dead woman" and summarized the evidence adduced at trial. The court then explained how it came up with $238,000:

> The house itself sells for $238,000, the difference between what's owed and what the owner of the house or the mortgage company for the house is $527,695.91. I suspect the house was probably under water at the time, and it's difficult to pick a number. I think I'm going to order restitution in the amount of $238,000 to the Wilmington Trust as restitution.

The court ordered that the restitution be joint and several with Ms. Johnson's co-defendants.

C. Petition For Post-Conviction Relief.

On June 7, 2019, Ms. Johnson filed a petition for post-conviction relief alleging ineffective assistance of trial counsel and appellate counsel. The petition asserted that after the restitution hearing, Ms. Johnson asked appellate counsel to note an appeal on Ms. Johnson's behalf. Not only did appellate counsel fail to note an appeal, they also "mistakenly advised [Ms. Johnson] that she could challenge the restitution order as part of the appeal noted from her conviction and sentencing." By failing to note an appeal, appellate counsel provided ineffective assistance of counsel, which prejudiced Ms. Johnson because it "result[ed] in a loss of any opportunity to have an appeal." Counsel asked the post-conviction court to "grant Ms. Johnson the opportunity to file a belated notice of appeal from the restitution order." In its response, the State "consent[ed] to the post conviction court granting relief . . . in the form of the right to file a belated notice of appeal

from the restitution order in this case . . . ."

The court held a post-conviction hearing for Ms. Johnson on April 6, 2021. In its August 12, 2021 opinion and order, the court found that appellate counsel's failure "to adhere to Ms. Johnson[']s appeal requests was 'professionally unreasonable' and a reflection of [appellate counsel's] inattention to Ms. Johnson's wishes." The court also found that Ms. Johnson "[l]ikely . . . would have prevailed on a notice of appeal from the restitution order because she was acquitted of the charges that the restitution was imposed for and Ms. Johnson could not reasonably afford the amount of restitution imposed." For these reasons, the court ruled that Ms. Johnson was "entitled to file a belated notice of appeal from the restitution order." This timely appeal followed.

II. DISCUSSION

On appeal,[6] Ms. Johnson challenges the circuit court's order of restitution and asks us to vacate it.[7] She argues that Wilmington Trust was not a victim of theft over $100,000 from Metro and conspiracy to commit theft over $100,000 from Metro, the two crimes of

[6] Because we denied Ms. Johnson's application for leave to appeal the circuit court's denial of post-conviction relief, we address only her appeal of the restitution order.

[7] Ms. Johnson phrased the Question Presented as follows:

> I. The Court abused its discretion when it ordered restitution in the amount of $238,000, despite the disparity between the home's value, the amount received, and the amount kept by Appellant.

The State phrased its Question Presented as follows:

> Did the circuit court properly order Johnson to pay $238,000 in restitution to Wilmington Trust?

which Ms. Johnson was convicted. Therefore, the argument goes, Wilmington Trust is not entitled to restitution from Ms. Johnson. The State, conversely, argues that "[Ms.] Johnson's unauthorized sale caused Bank of America [and thus Wilmington Trust] to lose its secured interest in the Property." Therefore, the State argues, Wilmington Trust is a proper victim entitled to restitution.[8] We agree with Ms. Johnson.

"[A] victim's entitlement to a restitution award and the amount of the award are facts that the State must establish by a preponderance of the evidence." *Juliano v. State*, 166 Md. App. 531, 540 (2006). On appeal, we "review[] a circuit court's order of restitution for abuse of discretion." *In re G.R.*, 463 Md. 207, 213 (2019) (citations omitted). "However, where a circuit court's order involves an interpretation and application of Maryland statutory and case law, we review its decision *de novo*." *Id.* (cleaned up).

Restitution is "full or partial compensation paid by a criminal to a victim . . . ordered as part of a criminal sentence or as a condition of probation." Restitution, Black's Law Dictionary (11th ed. 2019). "[R]estitution is a criminal sanction, not a civil remedy." *State v. Stachowski*, 440 Md. 504, 512 (2014) (*citing Grey v. Allstate Ins. Co.*, 363 Md. 445, 451

[8] The parties raise other arguments on appeal. Ms. Johnson asserts that even if Wilmington Trust is a victim, the State failed to prove that the harm Wilmington Trust experienced was the direct result of Ms. Johnson's crimes. She also argues that the circuit court erred in ordering $238,000 in restitution because restitution is intended to be rehabilitative, not punitive, and the circuit court failed to consider Ms. Johnson's financial circumstances before imposing the amount it did. The State argues that restitution was mandatory in this case. Because Ms. Johnson's first argument—that the court erred in ordering her to pay restitution to a victim of a crime for which she was not convicted—is dispositive and because we agree with Ms. Johnson, we do not address the remaining arguments.

(2001)). "'It is not a judicially imposed gift to the victim, but reimbursement that the defendant, personally, must pay.'" *Shannon v. State*, 241 Md. App. 233, 247 (2019) (*quoting Chaney v. State*, 397 Md. 460, 470 (2007)).

Restitution is governed by Maryland Code (2001, 2018 Repl. Vol.), § 11-603 of the Criminal Procedure Article ("CP"), "which ties restitution to the *victim's* injuries and losses[.]" *Wiredu v. State*, 222 Md. App. 212, 227 (2015) (emphasis in original). For example, a court may order that a defendant pay restitution to a victim 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[.]" CP § 11-603(a)(1). A court may also order restitution if "as a direct result of the crime or delinquent act, the victim suffered (i) actual medical . . . expenses or losses; (ii) direct out-of-pocket loss; (iii) loss of earnings; or (iv) expenses incurred with rehabilitation[.]" CP § 11-603(a)(2)(i)–(iv).

A lawful restitution order "must meet the minimum requirements of: (1) a victim with property damage of the type enumerated in § 11-603, and (2) the damage to the victim be the direct result of the crime for which the defendant was convicted and for which it was directed." *Pete v. State*, 384 Md. 47, 65 (2004). For purposes of restitution, a victim is "a person who suffers death, personal injury, or property damage or loss as a direct result of a crime" or "if the person is deceased, the personal representative of the estate of the person." CP § 11-601(j)(1)–(2). In other words, the statute "limits victims for purposes of restitution generally to only those injured as a direct result of the acts that made the conduct

illegal." *In re Tyrell A.*, 442 Md. 354, 372 (2015) (citations omitted).

This appeal turns on the principle that a court may not order a criminal defendant to pay restitution to a victim of a crime for which the defendant was not convicted. *Walczak v. State*, 302 Md. 422 (1985), provides a useful starting point. Mr. Walczak was charged with two counts of robbery with a weapon and related charges stemming from an incident in which he and three other individuals robbed two women. *Id.* at 424. "Pursuant to an agreement between [Mr.] Walczak and the State," Mr. Walczak was tried and convicted only of robbing one of them. *Id.* The court, however, ordered him to pay restitution to both. *Id.*

On appeal, Mr. Walczak "challenged . . . the authority of the trial judge to order the payment of restitution to a victim of a crime of which he had not been convicted." *Id.* at 425. The Court of Appeals agreed, stating that "restitution is punishment for the crime of which the defendant has been convicted. Restitution depends on the existence of that crime, and the statute authorizes the court to order restitution only where the court is otherwise authorized to impose punishment." *Id.* at 429. And because Mr. Walczak was not convicted of robbing the other victim, the Court of Appeals held that "the trial court was not authorized under [the then applicable restitution statute] to impose any order of restitution under the counts charging [Mr.] Walczak with [her] robbery." *Id.* at 430. The Court did, however, note "a narrow exception in cases in which a defendant has entered a plea agreement for restitution of greater amounts than those involved in the crime for which conviction was had." *Id.* at 432 n.3.

The Court had the opportunity to consider that narrow exception the following year, in *Lee v. State*, 307 Md. 74 (1986). Mr. Lee was charged with forgery of a check and theft. *Id.* at 76. "Pursuant to plea negotiations between the parties, [Mr.] Lee agreed to plead guilty to the forgery count; in return, the prosecutor agreed to nol-pros the theft count." *Id.* During the plea hearing, the State proffered facts "to establish [Mr.] Lee's guilt of both the forgery and the theft count." *Id.* Mr. Lee indicated that he agreed with the State's proffer and told the court that he wanted to make restitution payments. *Id.* As a condition of probation, the court ordered him to pay restitution regarding the *nol prossed* theft count. *Id.*

Mr. Lee cited to *Walczak* and argued that "he could not be ordered to pay restitution of the [] loss alleged in the theft count because he had not been convicted of that offense." *Id.* at 77. The Court of Appeals disagreed, distinguishing *Walczak* because that case did not involve a plea agreement. *Id.* at 81. The Court noted that "we anticipated cases like that now before us when, in *Walczak*, . . . we pointed to the narrow exception to the general rule which we have here applied." *Id.* The Court held that the trial court did not err in entering the restitution order because "in addition to the forgery conviction, there was a judicial admission of guilt to the criminal acts underlying the theft loss, together with [Mr.] Lee's consent to make restitution in the full amount—all as part of a plea agreement between the parties." *Id.*[9]

[9] The Court of Appeals had the opportunity to distinguish *Walczak* again in *Goff v. State*, 387 Md. 327 (2005). In that case, the Court held that the trial court did not err in ordering Mr. Goff to pay restitution because "the court ordered Mr. Goff to pay

And that brings us to *Silver v. State*, 420 Md. 415 (2011). The Silvers were charged with three counts of animal cruelty towards three horses, one of which died. *Id.* at 424. They entered *Alford* pleas as to the count of animal cruelty against the deceased horse. *Id.* The State *nol prossed* the other two counts involving the surviving horses. As a condition of probation, the circuit court ordered restitution to both the "veterinarian who euthanized one horse and to the rescue farm for the costs of caring for the surviving horses." *Id.* at 419. The Silvers appealed.

The Court of Appeals held "that the court was not permitted to order restitution for the other horses with regard to whom the defendants were not convicted of a crime. . . ." *Id.* at 420. The Court recounted the rule laid out in *Walczak* and the narrow exception applied in *Lee*, reasoning that those cases "instruct that 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 restitutions to victims of the other, alleged crimes as part of a plea agreement." *Id.* at 430. Applying those principles, the Court held that the trial court "was only permitted to order restitution relating to the crimes of which each of the Silvers was convicted." *Id.* Importantly, the Court concluded that "[w]here . . . the defendant does not agree to pay restitution to the victims of other alleged crimes, the State must charge *and* convict the defendant of those crimes before requesting restitution." *Id.* at 432

restitution as punishment for the crime of which he was convicted—assault, which resulted in damage to [the victim's] person and property." *Id.* at 348.

(emphasis added).

And that distinction drives the outcome here. As in *Walczak* and *Silver*, the restitution ordered in this case fell outside the scope of CP § 11-603 when the court ordered Ms. Johnson to pay restitution to Wilmington Trust. Ms. Johnson never agreed freely and voluntarily to pay restitution to Wilmington Trust as part of a plea agreement. She never agreed to pay restitution to the victims of other alleged crimes, including Wilmington Trust. The State, therefore, was required to charge *and* convict Ms. Johnson of theft from Ms. McCallister's estate before requesting restitution on behalf of Wilmington Trust.

We agree with the State that Bank of America was a victim of the scheme. Bank of America held a lien of the Property on April 17, 2013, the date the Property was conveyed fraudulently from Ms. McCallister's estate to Ms. Staggs. And we also agree that because Bank of America assigned the mortgage note to Wilmington Trust, Wilmington Trust stands in Bank of America's shoes for purposes of considering restitution. But Ms. Johnson was acquitted of fraudulently conveying the Property from the estate of Ms. McCallister to Ms. Staggs. The jury found Ms. Johnson not guilty of counts one through seven—all the charges relating to the estate of Ms. McCallister.[10] If the jury had convicted Ms. Johnson

[10] We recognize that in *Lee* and *Silver*, the court imposed restitution stemming from charges that were nol-prossed, whereas here the court imposed restitution stemming from charges for which Ms. Johnson was acquitted. But this distinction doesn't detract from our analysis. If anything, it makes Ms. Johnson's claim stronger, because a fact-finder's decision to acquit is more final than the State's decision to enter a *nolle prosequi*. "In Maryland, once the jury or the judge intentionally renders a verdict of not guilty, the verdict is final . . . ." *Harris v. State*, 160 Md. App. 78, 100 (2004) (cleaned up). The jury acquitted Ms. Johnson of all counts related to theft of property from the estate of Ms. McCallister because it found that "the prosecution failed to prove the

of any of the first seven counts, Wilmington Trust would be a proper victim entitled to restitution. But it didn't. In the context of this particular verdict, the court could order restitution only to the victims of counts eight and nine—theft over $100,000 from Metro and conspiracy to commit theft over $100,000 from Metro—and Wilmington Trust was not a victim as to those charges.

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY REVERSED. APPELLEE TO PAY COSTS.

defendant's guilt beyond a reasonable doubt." Not Guilty, Black's Law Dictionary (11th ed. 2019). A nol-pros, however, "is *not* . . . the equivalent of an acquittal." *Simms v. State*, 232 Md. App. 62, 69 (2017) (emphasis in original). So long as a final judgment has not been entered, the State's decision to nol-pros a charge "does not preclude a prosecution for the same offense under a different charging document or different count." *Ward v. State*, 290 Md. 76, 84 (1981).