UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1098

September Term, 2014

DERRICK LYNN GOINES

v.

STATE OF MARYLAND

Meredith,
Berger,
Kenney, James A., III
(Retired, Specially Assigned),

JJ.

Opinion by Berger, J.

Filed: July 15, 2015

A jury in the Circuit Court for Frederick County found Derrick Lynn Goines, appellant, guilty of failing to comply with a peace order and second-degree assault.[1] The circuit court sentenced appellant to serve five years in prison, all but three years suspended, for second degree assault, and a concurrent term of ninety days for failure to comply with a peace order. The court ordered appellant to serve three years of supervised probation following appellant's release from incarceration, as a condition of which, the court ordered appellant to pay $180 in restitution, $145 in court costs, and a total of $750 in fines.

In his timely filed appeal, appellant raises three questions for our consideration, which we rephrase:

1. Did the court err in giving the jury a flight instruction?

2. Did the court err in ordering appellant to pay $180 in restitution?

3. Did the court err in refusing to instruct the jury that it could consider whether the appellant and his girlfriend had reconciled in deciding the charge of failure to comply with a peace order?

Discerning no reversible error or abuse of discretion, we shall affirm the judgments of the circuit court.

[1] The jury acquitted appellant on the charge of malicious destruction of property.

FACTS AND PROCEEDINGS

On the evening of October 5, 2013, Ms. Chiku Howard was visiting the home of her friend, Jamyila Palm, in Frederick, Maryland.[2] Sometime between 11:00 p.m. and 1:00 a.m., Howard met appellant as he entered Palm's house. Appellant and Palm were engaged in an ongoing romantic relationship, but Palm had told Howard that appellant was violent. Appellant proceeded to go upstairs to Palm's bedroom, where Palm was asleep.

Howard followed appellant upstairs and observed as appellant and Palm engaged in a conversation that escalated into a verbal altercation. As the argument escalated, Howard also became involved. At some point during the argument, appellant displayed a gun. In the course of the altercation, appellant repeatedly slapped Howard across the face with his open hand. Appellant then assaulted Palm. Howard, scared for her safety and the safety of Palm, pushed appellant away and attempted to call 911, but appellant wrestled her phone away from her and threw it down the stairs. Howard's phone broke into pieces at the bottom of the stairs. Appellant left the house through the back door. Howard ran out the front door and to Palm's neighbors' house and asked them to call 911.[3]

Howard waited outside until the police and an ambulance arrived, just after 2:00 a.m. on the morning of October 6, 2013. Howard was treated for injuries to her face and mouth

[2] Ms. Palm resided with her mother, who was traveling in India at the time of the relevant events.

[3] Ms. Palm was uncooperative with Ms. Howard's efforts to find a phone in the house, and later was uncooperative when she was questioned by the police.

and bruising of her right hand, but declined to be transported to the hospital for additional medical treatment.

At the time of the assault, there was a peace order in effect, ordering appellant to stay away from Palm and her residence. In an interview with the police following his arrest, appellant indicated that he understood his rights and that he was willing to talk to the officer, but that he did not want his interview to be recorded. The officer who conducted the interview testified at appellant's trial that after the video recorder was turned off, appellant said that Palm was his girlfriend, but confirmed that she had a peace order against him. Appellant indicated that he stayed at Palm's house when her mother was working or away. Appellant admitted to the officer that he was at Palm's house on the night in question, and that they were fighting. Appellant said that one of Palm's female friends was there and admitted that when she tried to call the police, he "grabbed" the phone away from her ear and threw it on the ground.

Appellant testified in his own defense at his trial. He attested that he had been staying with his girlfriend, Palm, for a week or two before October 6, 2014. Appellant confirmed that Palm had obtained a peace order against him in July of 2013, but indicated that it was Palm's mother, who didn't like appellant, who had insisted that Palm get the peace order against him. Appellant testified that, on or around the afternoon of October 5, 2014, he and Palm got into a heated argument, in which Howard became involved. He said that when Howard indicated she was going to call the police, he took her phone, went upstairs to get

his shoes, then slid Howard's phone back to her as he left the house. Appellant denied returning to the house at any time on October 6, 2014. He further denied hitting Howard or breaking her phone.

I. Flight Instruction

After both parties rested, while they were discussing jury instructions with the court, the following colloquy occurred:

> THE COURT: . . . Instructions 3.24 dealing with flight or concealment of the Defendant. The State was requesting the Defendant was not – is that still needed, [State's Attorney]?
>
> [State's Attorney]: Your Honor, I would request it.
>
> [Defense Counse]: Your Honor, I would object. I, I, I, I would respectfully suggest that this instruction is appropriate where someone runs away from the police or something like that. Um, there, it is a question of fact whether or not when [appellant] was actually ever there. Uh, if the jury believes [appellant's] testimony he wasn't anywhere near there at 2:00 in the morning on October 6th.
>
> THE COURT: Well, I think, uh, [Defense Counsel], that would be certainly proper scope of argument. I think the State has offered evidence of the, uh, Defendant's flight from the premises. Um, I would expect you to, uh, take issue with that in your closing statements, but I do think that, uh, based on the evidence presented by the State that this would be an appropriate instruction to give, but only with regard to the issue of flight not concealment.
>
> [Defense Counsel]: Thank you.
>
> [State's Attorney]: Yes, sir. Thank you, Your Honor.

> [Defense Counsel]: Just have Court to note my objection for the record.
>
> THE COURT: Thank you, [Defense Counsel] . . . .

Defense counsel renewed his objection to the trial court's proposed instruction at the end of the bench conference, and after the trial court instructed the jury.

Appellant contends that the trial court abused its discretion by instructing the jury that his flight could be considered as consciousness of guilt evidence. Appellant asserts that the flight instruction was not generated by the facts of the case because there was no evidence that appellant fled the scene to avoid the police. Instead, appellant suggests that the evidence indicates when appellant left, he had no reason to believe that the arrival of the police was imminent, and therefore, the evidence shows "mere departure."

We review a trial court's decision to provide a challenged jury instruction for abuse of discretion. *Stabb v. State*, 423 Md. 454, 465 (2011). In determining whether the trial court properly exercised its discretion, we consider whether the instruction (1) is a correct statement of law, (2) was generated by the evidence, and (3) was not fairly covered by the court's other instructions. *Dickey v. State*, 404 Md. 187, 197-98 (2008); *Fleming v. State*, 373 Md. 426, 433 (2003).

Appellant does not contend that the flight instruction provided by the trial court was not a correct statement of the law or that the substance of the flight instruction was adequately covered in other instructions. The only question before us, then, is whether the instruction was generated by the evidence. So long as the requesting party has produced

"some evidence" implicating the instruction, the trial court properly exercised its discretion in propounding the instruction. *Bazzle v. State*, 426 Md. 541, 551 (2013). The threshold of demonstrating "some evidence" is very low. *Id*. *See also Arthur v. State*, 420 Md. 512, 526 (2011) ("Some evidence is not strictured by the test of a specific standard. It calls for no more than what it says-'some,' as that word is understood in common everyday usage. It need not rise to the level of 'beyond reasonable doubt' or 'clear and convincing' or 'preponderance."'). In determining whether "some evidence" exists, the trial court views the facts in the light most favorable to the party requesting the instruction, in this case the State. *McMillan v. State*, 428 Md. 333, 355 (2012).

Viewing the evidence in the light most favorable to the State, we are persuaded that there was at least "some evidence" to support the inference that appellant fled from Palm's home in order to avoid the police. Howard testified that when appellant stopped hitting her and began to assault Palm, she pulled her cell phone from her pocket and dialed 911. Appellant, knowing that Howard was calling the police, wrestled her to the ground, took her phone, and threw it down the stairs. Appellant then left through the back door of the house. Within minutes after the assault, Howard checked to be sure that Palm was okay and then ran out the front door to ask the neighbors to call the police. The police officer who responded to Palm's house following the assault confirmed that there were two calls to 911 from the area on that night -- the first was disconnected and the second was from the neighbor, who at Howard's request, reported a domestic dispute at Palm's house.

Based on this evidence, the jury could reasonably infer that although appellant had successfully thwarted Howard's first attempt to call 911, he expected that Howard would soon find another phone and call the police in order to report the assaults and to obtain treatment for her injuries. The jury could further infer that appellant expected the imminent arrival of the police at Palm's house and that he fled the house to avoid being arrested for assaulting Howard and Palm.

As the trial court recognized, the evidence presented of appellant's flight was susceptible to multiple interpretations, all of which the parties were permitted to argue in closing. Ultimately, whether appellant was present at Palm's house that night, and whether appellant fled to avoid the police, were factual determinations to be made by the jury. We discern no error in the trial court's finding that there was some evidence supporting the State's theory that appellant fled the scene to avoid the police. We conclude, therefore, that the trial court did not abuse its discretion by providing the flight instruction to the jury.

This case is distinguishable on its facts from *Shim v. State*, 418 Md. 37 (2011), and *Hoerauf v. State,* 178 Md. App. 292 (2008), upon which appellant relies. Unlike in the instant case, in *Shim,* a first-degree murder case, there were no witnesses to the murder which occurred in a closed business, late at night. Therefore, the perpetrator had no reason to believe that anyone was immediately likely to call the police. The Court of Appeals held that, under the circumstances, the trial court improperly exercised its discretion in giving the flight instruction. The Court reasoned that "[t]he rational inferences to be drawn from the

evidence demonstrated only that the shooter left the Fed Ex facility after the shooting. There was no evidence that the shooter fled." *Id*. at 59. In the instant case there was eye-witness testimony indicating that the appellant left to avoid the police.

Similarly, in *Hoerauf*, this court determined that there was no evidence of flight where the defendant was part of a group of teenagers, some of whom assaulted and stole items from another group of teenagers following an altercation at a metro station. 178 Md. App. at 297-300. After the altercation, the defendant walked away with some of the individuals who had participated in the robbery. *Id.* The defendant, himself, however, had not participated in the assaults or robberies, and therefore, had no guilty knowledge. *Id.* This Court reasoned:

> [A]ppellant simply walked away from the scene of the crime with the group of individuals who had just perpetrated the robberies. When appellant left the scene, police had not arrived, nor was their arrival imminent. There was no evidence that appellant attempted to flee the neighborhood or to secret himself from public view to avoid apprehension.

Id. at 326. In the instant case, after physically assaulting Howard and Palm and destroying Howard's cell phone, appellant left, knowing that Howard intended to call the police. It was reasonable to infer that appellant's flight was motivated by a desire to avoid the police because he knew his actions were illegal.

II. Restitution

As a condition of appellant's probation, the trial court ordered him to pay $180 in restitution to Howard for the damage to her cell phone. Appellant contends that the circuit

court's restitution order constituted an illegal sentence. Appellant asserts that the damage caused to Howard's cell phone was not a direct result of the assault for which he was convicted. Appellant further asserts that the circuit court had no factual basis upon which it could determine the value of Howard's cell phone.

Pursuant to Section 11-603(a)(1) of the Criminal Procedure Article, a trial court may order a defendant to pay restitution to a victim if the victim's property was damaged as a "direct result" of the crime for which the defendant was convicted. Md. Code (2001, 2008 Repl. Vol., § 11-603(a)(1) of the Criminal Procedure Article ("Crim. Pro."). We review for abuse of discretion, a trial court's determination that damage was a "direct result" of the actions underlying the offense for which the defendant was convicted. *State v. Stachowski*, 440 Md. 504, 512-13 (2014). Because the phrase "direct result" is not defined in the statute, we apply the "natural and ordinary meaning" of the phrase, "employing basic principles of common sense" and "considering the express and implied purpose of the statute" to discern the meaning the words are intended to convey. *Goff v. State*, 387 Md. 327, 344 (2005); *see also Pete v. State*, 384 Md. 47, 60-61 (2004) (stating that, when considering whether to award restitution, courts do not engage in a tort causal relationship analysis to determine whether damages are a "direct result" of the defendant's actions).

We find the Court of Appeals' opinion in *Goff v. State*, 387 Md. 327, to be instructive in this case. In *Goff*, the defendant assaulted the victim in the victim's apartment. *Goff*, 387 Md. at 332. The assault ended in the victim's bathroom, where the shower insert was broken

in the course of the assault. *Id*. The Court of Appeals held that the trial court did not abuse its discretion by ordering the defendant to pay restitution for the cost of the broken shower insert. *Id*. at 344. The Court explained that "[n]o intervening agent or occurrence caused the damage. Additionally, no time lapsed between the criminal act and the resulting damage caused." *Id*.

Similarly, in the instant case, there was no intervening agent or occurrence between appellant's assault on Howard and the damage to Howard's cell phone. Appellant assaulted Howard, then assaulted Palm, then again assaulted Howard when he realized that she was calling the police, wrestling her to the ground and throwing her cell phone down the stairs, causing the phone to break into pieces. We are persuaded that the destruction of Howard's cell phone was a "direct result" of the appellant's ongoing assault of Howard, for which he was convicted. We conclude, therefore, that the circuit court did not abuse its discretion by ordering appellant to pay restitution to Howard for the damage to her phone.

This case is distinguishable on its facts from *Pete v. State*, 384 Md. 47, where the damages for which the defendant was ordered to pay restitution occurred almost two hours after the assault for which the defendant was convicted, after an intervening police pursuit during which the defendant was driving recklessly. *Id*. at 49-51. The *Pete* Court held that the damage to the police cruiser was not a direct result of the assault that occurred nearly two hours earlier. *Id*. at 66.

Nor are we persuaded that the trial court abused its discretion in ordering appellant to pay restitution, simply because the jury acquitted appellant of malicious destruction of property. In order to find appellant guilty of malicious destruction of property, the jury would have had to conclude that appellant specifically intended to destroy Howard's cell phone when he threw it down the stairs. *Hurd v. State*, 190 Md. App. 479, 495 (2010). It is possible that the jury, instead, believed that appellant's intent was not to destroy the phone, but just to keep Howard from calling the police. Nonetheless, the damage to Howard's phone occurred during the assault.

Appellant next contends that there was no evidence of the value of Howard's phone to support the circuit court's restitution award. A claim challenging the sufficiency of evidence as to amount of restitution is distinct from a claim asserting that the damage entitling a victim to restitution was a direct result of the crime of which the defendant was convicted. If a court orders a defendant to pay restitution for damages that are not a direct result of the crime for which the defendant was convicted, the order of restitution would be illegal. *Walczak v. State*, 302 Md. 422,433 (1985); *see also Pete v. State*, 384 Md. at 47. By contrast, there is no "inherent illegality" in the imposition of restitution where a defendant challenges only the sufficiency of the evidence as to value, so long as the amount of restitution the court ordered is permitted. *See Chaney v. State*, 397 Md. 460, 466-67 (2007) ("There is nothing intrinsically illegal about either condition here.... [Chaney's] complaint is that those 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."); *see also Cunningham v. State*, 397 Md. 524, 526 (2007) (reiterating the Court's holding in *Chaney* and declining to exercise its discretion to review the restitution order because "[t]he alleged deficiencies go only to the amount and to whether the recipients were persons entitled to restitution").

Further, we note that appellant did not object to the imposition of restitution, or the amount of the restitution ordered at his sentencing hearing. We conclude, therefore, that this issue was not properly preserved for appellate review. *See* Md. Rule 8-131(a) ("Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court. . ."). We therefore decline to further consider his arguments regarding the amount of restitution imposed by the court.

III. Instruction Regarding Reconciliation of Parties to a Peace Order

At trial, appellant conceded that prior to October 6, 2013, a court issued a peace order that required, *inter alia*, that appellant stay away from Palm and her residence. Appellant testified, however, that he and Palm had reconciled, and that appellant had been staying with Palm at her home while her mother was not there.

After both parties rested, defense counsel requested that the trial court add additional language to the proposed jury instruction regarding the offense of failing to comply with a peace order. Among other things, defense counsel requested that the judge instruct the jury that the terms of a peace order could be modified by the conduct of the parties. The court

rejected that part of the instruction requested by defense counsel, finding that the proposed instruction was not a correct statement of the law. As to the offense of failure to comply with a peace order, the court instructed the jury:

> The Defendant has been charged with failing to comply with a peace order. In order to convict the Defendant, the State must prove beyond a reasonable doubt that there was a valid peace order in effect at the time of this incident; that the Defendant had been served with the order and was aware of the terms of the order; and that the Defendant acted in a way which violated the terms of the peace order.

Defense counsel renewed his objection to the trial court's proposed instruction at the end of the bench conference and after the trial court instructed the jury.

Appellant contends that the trial court abused its discretion by refusing to instruct the jury that they could consider appellant's reconciliation with Palm in deciding if he was guilty of violating the peace order. In support of his assertion, appellant cites the Court of Appeals decision in *Torboli v. Torboli*, 365 Md. 52 (1999).

As we noted above, when we consider whether a trial court properly exercised its discretion by declining to provide a given jury instruction, we consider whether the proposed instruction (1) is a correct statement of law, (2) was generated by the evidence, and (3) was not fairly covered by the court's other instructions. *Dickey v. State*, 404 Md. 187, 197-98 (2008); *Fleming v. State*, 373 Md. 426, 433 (2003).

In *Torboli*, a wife sought to enforce the emergency support provisions of an expired protective order against her estranged husband. 365 Md. at 54. During the term of the

protective order, the parties reconciled. *Id*. The protective order, however, was never officially modified or rescinded by the court. *Id*. The Court of Appeals held that where a petitioner seeks to enforce the terms of a protective order in a civil action, the reconciliation of the parties subject to the order may be raised as a defense. *Id*. at 63-64.

The *Torboli* Court recognized that pursuant to Section 4-507(a) of the Family Law Article ("F.L."), "modification or rescission of a protective order must occur, by the court that issued it, during the term of the order and after notice and a hearing."[4] *Id*. at 63. The Court noted, however, that the action before it was not an action to modify or rescind a protective order, but instead, to enforce it. *Id*. While the statute, "prescribes the method by which a protective order may be modified or rescinded, by whom and when," the Court held, "it does not address an enforcement action[,]" nor does it limit the defenses that may be offered in such an action. *Id*. at 64.

The Court reasoned that if the parties have reconciled, presumably, there is no longer any need for the protective order. *Id*. at 63. Whether the nullification of the protective order's usefulness was reflected in a court's order modifying or rescinding the order or not, the impact of the parties' reconciliation was the same. *Id*. The Court concluded, therefore, that a party defending against a civil action for enforcement of a protective order need only

[4] As the trial court in the instant case recognized, Section 3-1506(a) of the Court's and Judicial Proceedings Article ("C.J.P."), which is applicable in the instant case, in language that is practically identical to that used in F.L. §4-507(a), also provides that modification or rescission of a protective order can only be accomplished by the court after proper notice and a hearing.

establish "a reason for the court not to allow enforcement[,]" which, in the case before the *Torboli* Court, included the fact of the parties' reconciliation. *Id*. at 64. Underlying the Court's opinion in *Torboli* is the principle that a party to a protective order who voluntarily reconciles with the other party to the order, cannot later petition to enforce the terms of the protective order.

As the *Torboli* Court opined, "[t]here is a difference between an action to modify or rescind a protective order and one to enforce a protective order[,]" with different defenses available in the different actions. *Id*. at 63-64. We are persuaded that there is also a significant difference between a criminal action charging violation of a protective order and a civil action, arising in equity, to enforce the terms of a protective order, with different defenses available in the different actions.

A protective order is an order of the court, not an order of the parties thereto. In a civil enforcement action the petitioner is seeking an equitable remedy, the enforcement of the terms of the protective order against the defendant. In a criminal case charging violation of a protective order, the State is the party seeking to enforce the terms of the court's order. While a petitioner who voluntarily reconciles with a defendant may be equitably estopped from later petitioning the court to enforce the terms of a protective order in a civil case, the same equities are not at play in a criminal action brought by the State. Because the State is not a party to the parties' reconciliation, the parties' reconciliation cannot limit the State's rights to enforce the court's order in a criminal action. While reconciliation may be a defense

to a civil enforcement action in which the petitioner seeks an equitable remedy in enforcing the terms of a protective order, reconciliation is not a defense to a criminal charge of violation of a peace order brought by the State.

The only question before the jury at appellant's criminal trial was whether appellant had violated the terms of a valid protective order. The actions of the petitioner, Palm, including any reconciliation between Palm and appellant, were not relevant to this determination. We conclude, therefore, that the trial court did not abuse its discretion by refusing to instruct the jury that it could consider the parties' reconciliation in deciding appellant's guilt for the offense of violating a protective order.

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