Circuit Court for Cecil County
Case No.: C-07-CR-20-1127

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1285

September Term, 2021

ROBIN LYNN CASULA

v.

STATE OF MARYLAND

Beachley,
Shaw,
Ripken,

JJ.

Opinion by Shaw, J.

Filed: August 24, 2022

Appellant, Robin Lynn Casula, was indicted in the Circuit Court for Cecil County and charged with second degree burglary, two counts of fourth degree burglary, malicious destruction of property, two counts of theft, and trespassing on private property. Appellant was tried by a jury and, after the court granted her motion for judgment of acquittal on the malicious destruction count, she was convicted of fourth degree burglary by breaking and entering a storehouse, theft of goods with a value between $100 and $1500, and trespassing.[1] She was sentenced to three years' incarceration, with all but 60 days suspended for fourth degree burglary, a concurrent 60 days, all suspended for theft, and a concurrent 60 days, all suspended, for trespass. Appellant was also ordered to pay $1,500 in restitution, as well as supervised probation following her release for three years. On this timely appeal, Appellant presents the following questions for our review:

1. Was the evidence insufficient to support the theft conviction?

2. Did the court err in imposing $1,500 in restitution?

For the following reasons, we shall vacate the order of restitution included as a condition of probation and remand for a new restitution hearing. Otherwise, the judgments are affirmed.

BACKGROUND

On November 12, 2020, John Keating, Jr. reported that his residence, located at 294 Appleton Road in Elkton, Maryland, had been broken into and he was missing several items. Maryland State Trooper Jared Reeves responded to the scene and, after speaking

[1] The jury could not agree on the count charging fourth degree burglary of a storehouse with intent to steal, thus the State decided to *nolle prosequi* that count.

with Keating, went inside and noticed that the back door to the residence was broken. He also saw mail addressed to Appellant on the kitchen table and female clothing in one of the bedrooms that had not been there previously, according to Keating. Keating told Trooper Reeves he had been receiving Facebook messages from Appellant for the last three to five weeks before the crime. He also informed him there were renovations made to the residence without his knowledge or approval.

About nine days after the crime was reported, Keating contacted Trooper Reeves to tell him that Appellant appeared to be staying at a residence located across the street at 289 Appleton Road. Trooper Reeves then went to the location, found Appellant, and advised her of her rights pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966). After she waived those rights, Trooper Reeves asked Appellant why her mail was located inside Keating's residence. Appellant replied that, approximately three to five weeks earlier, she noticed that Keating's house appeared abandoned. She then contacted Keating via Facebook and informed him she wanted to renovate the house. She admitted that she entered the residence and, while staying therein, attempted to make renovations over the course of four days and nights.

On cross-examination, Trooper Reeves stated that he was aware a realtor, Charlie Rosa, was associated with Keating's property. Trooper Reeves spoke with Rosa on the day the crime was reported, *i.e.*, November 12, 2020, and Rosa stated that he learned of these events from Keating about two weeks prior to the reported break in. Trooper Reeves further testified Appellant was arrested pursuant to a warrant and, although he could not

"fully recall," she may have produced receipts associated with her defense at that time. Trooper Reeves agreed he did not bring any such items with him to trial.

John Keating testified he owned the property in question for about three years. He purchased it with his cousin as an investment property, with the help of Charlie Rosa, a realtor he had worked with in the last four to five years when purchasing other such properties.[2] Prior to November 12, 2020, he last visited the property in August of 2020. Keating agreed that some maintenance needed to be performed, including cutting the grass, cleaning out the belongings of the prior owner, and alleviating water in the basement, but otherwise, "[t]here was no problems with it." When he last visited, Keating left two toolboxes full of tools, a Honda gas-powered water trash pump in the basement, and other hand tools. He testified the Honda trash pump was valued at $1,100 and his other tools were valued at around $500 to $600. The property was locked when he left.

On or around October 2, 2020, Appellant contacted his business via Facebook. Appellant indicated that she wanted to go inside the house to clean it up. As the house was not listed for sale at that time, and because Keating planned on "rehabbing" the house himself, Keating informed Appellant, possibly through one of his employees or contractors, she did not have permission to be in the house and was "to leave the property immediately." Keating testified, "[s]he's not a valid contractor in the state of Maryland. She's not welcome in the house. I made that very clear." He further testified that he

[2] Many of the details concerning the chronology of pertinent events were developed during Keating's cross-examination. As Appellant has raised an issue as to sufficiency, we consider the facts in the light most favorable to the prevailing party. *See Beckwitt v. State*, 477 Md. 398, 429 (2022), *recons. denied* (Mar. 25, 2022).

messaged Appellant directly through Facebook and told her "you cannot come in the house, no [sic], at all. You're not welcome in the house."[3]

About three weeks later, Appellant sent him pictures of the back bedroom. The room had been painted, items removed, and a canopy bed and a big screen television had been installed. After he received these pictures, Keating had Rosa inspect the property. Keating, himself, went there a few days after. The locks had been changed, his keys did not work, and he noticed a broken front window.[4] Items left inside the house in August were now outside of the house, other items he left in the living room were missing, and all the items in the shed, located on the property, were gone. Pertinent to the issues raised on appeal, Keating testified that his tools and the water trash pump were gone.

At some point, Keating spoke to Appellant about the water trash pump, testifying:

> She said she had a mechanic friend of hers look at the pump. It wasn't working. Which was not true. It was working fine. It wasn't that old. And she said she had it sitting outside, which there was no reason for her to take it out of the house. And then she said she didn't know where it was. More specifically, Keating testified on cross-examination as follows:
>
> Q. And did you continue to have any further back and forth with Ms. Casula on Facebook after that date?
>
> A. She continued to send more messages.
>
> Q. Did you ever respond?

[3] Although not entirely clear when, it appears Keating communicated with Appellant on October 23, 2020 via Facebook and instructed her "[p]lease do not enter the house. It is not safe at this point" and that "the property is not for rent."

[4] Keating testified the cost to repair the window was $300.

A. Yes.

Q. Now, I would ask you to look at Page 5.

A. Yes.

Q. There appears to be some messages from Artscape LLC. Do you see that in the middle of the page there?

A. Correct.

Q. "Hello, Robin. I was down at the house today."

A. Yes.

Q. Did you write that?

A. Yes. My trash pump and tools were missing.

Q. All right. On Page 7, did you write, "Find my pump, please"?

A. Yes, I did, because it was in the house when she broke into it.

Q. And there was more that you wrote?

A. Yes. She tried to say there was other people at the property, which I don't know if she invited or what. They were not invited by me nor were they allowed on the property.

Q. Okay. Well, what was it that you wrote then about find my pump, please?

A. "Do you know the guys that were there?"

Q. That wasn't all, right?

A. "It should not have been taken out of the house for any reason." She said she had taken it out of the house.

Q. Okay. And what else was written?

A. "That is my house and my partner and I would appreciate if you would track it down and find it because I will make a complaint with the police."

> Q. Okay. And then you wrote something right after that?
>
> A. Yes. "It has a Honda motor in it so I know the pump was not seized up."[5]

Keating eventually sold the house to Elmer Justice on November 24, 2020. He agreed that prior to the sale, and prior to November 12, 2020, the date at issue, Justice had visited the property with Rosa, Keating's realtor. Justice was not allowed inside the house.

Appellant testified on her own behalf. She knew of the house in question because a friend lived across the street. One day, Appellant noticed the back door was not locked and she testified she "went over and checked it out." She admitted she entered the property at some point. She also admitted she spent a "couple" nights inside the house.

After further investigation, she learned the property was owned by Keating and Michelle Meadows. She eventually contacted John Yearsley, a person she thought was connected to Keating, and told him that she was interested in the property. Appellant told Yearsley that she "wanted to go in and fix it up for free." She offered to "clean it, paint it, do something with the yard, pump out 32,000 gallons of water in the basement after sanitizing it, find the water leak, clean gutters" and also "move some furniture in, take old TV's, etc. to the dump." She testified that Yearsley told her that he would contact Keating.

According to Appellant, the first time Keating told her she did not have permission to be in the property was on October 23, 2020. She had shown him pictures of what she did inside the house, testifying that she "pumped out probably 25,000 gallons of water, and

[5] The Facebook messages were identified, but apparently not admitted, as Defendant's Exhibits 1 and 2. They are included with the record on appeal.

cleaned the gutters, started to mow the lawn, removed vines from the concrete so you could get to the door. . .” She also testified she threw out several bags filled with trash she found in the bathtub. Appellant denied breaking any windows or the door.

Appellant further testified when she spoke to Keating and told him she removed an air conditioner from the window, he told her “it’s not safe to be in there.” She also agreed Keating told her “[p]lease do not enter the house. It’s not safe at this point.” When she told him she had already been inside the house, Keating replied, according to Appellant, “[p]lease do not go in the house. You don’t have permission.” She maintained this admonition occurred, for the very first time, on October 23, 2020. Appellant claimed she then “started to take my stuff out.”

Appellant also testified she met Elmer Justice sometime in October, after she had been in the property for “a couple weeks doing stuff.” Justice brought two people to mow the grass and clear the yard. According to Appellant, Justice and his two workers were there every day for a week.

With respect to the water trash pump, Appellant agreed she saw the pump “in a box in the kitchen.” She then “tried to see if it would work.” A friend told her that the hoses were old and she needed to pour water into the pump to prime it. When she tried to start it, “rust came out the other side” and she alleged the pump was not operable. She acquired a different pump to pump out the basement water. When Appellant was asked what happened to the pump she found in the kitchen, she testified: “Well, it sat in the kitchen for probably at least a couple days. And then when my cousin, Vinny, came over I had him

carry it to the red barn out back because I wanted to clean up the kitchen. I had already cleaned the rest of the house."

She testified that was the last time she saw the pump and that she did not take it. She also testified she never saw Keating's toolboxes and she only saw one screwdriver and one wrench in the back bedroom. She put a lock on the kitchen door because "things were disappearing" while Justice and his workers were on the property. She further claimed one of Justice's workers broke her generator.

Appellant agreed that she spoke to Keating on November 11, 2020, and Keating told her he could not find his pump. Appellant testified: "I told him that it didn't work and that I had put it outside." Appellant concluded her direct examination by testifying that she did not enter 294 Appleton Road with the intent to steal anything; she did not steal anything, including the pump in question or Keating's tools; and she did not break any windows or doors.

On cross-examination, Appellant admitted "[b]eginning October 2nd, probably a couple times a week I would go over and I would clean and, you know, paint and do the yard." She conceded again that she saw Keating's pump in the kitchen and she directed her cousin to take it outside the house and put it in the shed. She agreed she moved into the home before she ever had permission to do so. Once she sent photographs to Keating, on or around October 23, 2020, she agreed she was told she was not permitted to be inside the house. She also confirmed that she was told to get out on November 11, 2020. Finally, Appellant agreed she changed the locks on the back kitchen door and a bedroom door after October 23, 2020.

We shall include additional detail in the following discussion.

DISCUSSION

I.

In *State v. Wilson*, 471 Md. 136, 159 (2020), we described the standard of review of the sufficiency of evidence as follows:

> In determining whether the evidence is legally sufficient, we examine the record solely to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. In examining the record, we view the State's evidence, including all reasonable inferences to be drawn therefrom, in the light most favorable to the State.

Appellant first contends the evidence was insufficient to sustain her theft conviction because the State failed to prove the identity of the culprit. The State responds that the jury was permitted to make rational inferences from the evidence, both direct and circumstantial, that Appellant was the thief. We agree.

> In reviewing the evidence, we consider "whether the verdict was supported by sufficient evidence, direct or circumstantial, which could convince a rational trier of fact of the defendant's guilt of the offenses charged beyond a reasonable doubt." *White v. State*, 363 Md. 150, 162 (2001) (citation omitted). "Circumstantial evidence may support a conviction if the circumstances, taken together, do not require the trier of fact to resort to speculation or conjecture, but circumstantial evidence which merely arouses suspicion or leaves room for conjecture is obviously insufficient." *Smith v. State*, 415 Md. 174, 185 (2010) (cleaned up). "It must afford the basis for an inference of guilt beyond a reasonable doubt." *Id.* at 185 (cleaned up).

Beckwitt v. State, 477 Md. 398, 429 (2022), *recons. denied* (Mar. 25, 2022).

Appellant was charged and convicted of theft of a Honda 4-inch pump, drainage hoses and a toolbox including the tools belonging to Keating, valued between $100 and $1,500. Section 7-104 (a) of the Criminal Law Article provides, in pertinent part:

> (a) A person may not willfully or knowingly obtain or exert unauthorized control over property, if the person:
>
> > (1) intends to deprive the owner of the property;
> >
> > (2) willfully or knowingly uses, conceals, or abandons the property in a manner that deprives the owner of the property; or
> >
> > (3) uses, conceals, or abandons the property knowing the use, concealment, or abandonment probably will deprive the owner of the property.

Md. Code (2002, 2021 Repl. Vol.) § 7-104 of the Criminal Law ("Crim. Law") Article.

Consistent with this statute and the pattern instruction, the jury was instructed:

> The defendant is also charged with the crime of theft over $100 but less than $1,500. In order to convict the defendant of that count of theft, the State must prove that the defendant willfully or knowingly obtained or exerted unauthorized control over property of the owner, that the defendant had the purpose of depriving the owner of the property, and the value of the property was over $100 but less than $1,500.
>
> Property means anything of value.
>
> Owner means a person other than the defendant who has possession of or any interest in the property and without whose consent the defendant has no authority to exert control over the property.
>
> Deprive means to withhold property of another permanently for such a period as to appropriate a portion of its value with the purpose of restoring it only upon payment of a reward or other compensation or to dispose of the property or use it or deal with it as to make it unlikely that the owner will ever recover it.

> Exert control means to take, carry away or appropriate to a person's own use, or to sell, convey or transfer title to an interest in or possession of the property.
>
> Value means market value of the property or service at the time and place of the crime. Or if market value cannot be satisfactorily ascertained, the cost of the replacement of the property or service within a reasonable time after the crime.

See Maryland State Bar Ass'n, *Maryland Criminal Pattern Jury Instructions* 4:32, at 1046-47 (2d ed. 2021) ("MPJI-Cr").

Appellant argues the evidence was insufficient to prove beyond a reasonable doubt she was the person who stole Keating's property, namely the water pump and his tools. The State disagrees, noting: (1) Appellant was a trespasser on Keating's property, admitting she entered the house and slept overnight there on occasion, and Keating told her to leave; (2) She was "connected" to the stolen property, in that she admitted she moved the water pump outside the house and claimed it was not working; (3) Appellant disposed of other items inside the house, including an air conditioner, bags of clothing found in the bathtub, and these "liberties with Keating's property" allowed the jury to infer she did something similar with the items identified in the indictment; and (4) Appellant simply was not credible as "[h]er testimony was vague, and the timing and extent of others' entry onto the property and into the house was not altogether clear."

The State's argument is that a rational fact finder, the jury in this case, could consider this evidence to find that Appellant took Keating's property. Appellant contends the State did not disprove someone else might be responsible. Both these arguments are for the factfinder and are inappropriate for appellate review. "Choosing between

competing inferences is classic grist for the jury mill." *Cerrato-Molina v. State*, 223 Md. App. 329, 337 (2015), *cert. denied*, 445 Md. 5 (2015).

In *Neal v. State*, this Court observed that with respect to competing inferences, "An inference need only be reasonable and possible; it need not be necessary or inescapable . . . ." 191 Md. App. 297, 318 (2010) (internal quotations and citation omitted). "The possibility of raising conflicting inferences from the evidence does not preclude allowing the fact finder to determine where the truth lies." *Id*. *See also Cerrato-Molina*, 223 Md. App. at 338. "Inferences, of course, are of infinite variety. Some are virtually iron-clad inductions from the careful examination of extensive data. Others are but the voicing of imagined possibilities that are little more than evanescent[.]" *Freeman v. State*, 249 Md. App. 269, 303 (2021).

Appellant directs our attention to *Wilson v. State*, 319 Md. 530 (1990) and *Warfield v. State*, 315 Md. 474 (1989). In *Wilson*, the Court of Appeals held the evidence was insufficient to sustain Wilson's convictions of the theft of three rings from a bedroom in a house he was cleaning. *Wilson*, 319 Md. at 538-39. One witness testified that she had tried on the rings between 9:00 and 10:00 a.m. on the day in question, but found them missing at 10:30 p.m. that night. *Id.* at 533. The witness remembered a man cleaning the house that day, but she could not remember if Wilson was that man, because four or five people had cleaned the house on prior occasions. *Id.* Another witness identified Wilson as the cleaning person on the day in question, and was "pretty sure" that he was the only cleaning person there that day, but the witness also remembered a visitor who had used the bathroom adjacent to the bedroom where the rings were last seen. *Id.* at 534.

The Court of Appeals noted the substance of the circumstantial evidence against Wilson consisted of the fact that Wilson was present at the residence on the date of the theft, he had cleaned near the bedroom where the rings were kept, and he had access to them. *Id*. at 537. The evidence also showed, however, that five other people were present in the residence and had access to the rings. *Id.* The Court held "[w]hile a defendant's presence at the scene of a crime is a very important factor to be considered in determining guilt, it is elementary that mere presence is not, of itself, sufficient to establish that that person was either a principal or an accessory to the crime." *Id.* (citations and quotations omitted). Because there was no evidence other than his presence to implicate Wilson as the person who stole the rings, the evidence was insufficient to sustain his convictions. *Id.* at 538-39. The Court explained:

> Considering the circumstantial evidence adduced in this case, we conclude that it would not permit a rational fact-finder to find, beyond a reasonable doubt, that it was inconsistent with any reasonable hypothesis of Wilson's innocence. On the record before us, it was at least a reasonable hypothesis that someone in the house on March 10 other than Wilson took the rings. In this regard, the State did not present any evidence to negate such a hypothesis.

Id. at 538.

In *Warfield*, *supra*, the victim testified that she kept two cans of coins in her garage, and although she could not remember the last time she saw them, she was sure Warfield was the person who took them because she saw him come out of her unlocked garage during the time he was shoveling snow from her sidewalks, and thereafter, noticed the coins were missing. 315 Md. at 480-81. The Court of Appeals reversed Warfield's convictions,

and stated that his presence at the scene of the crime, alone, was not enough to support a conviction. *Id.* at 491-93. Although Warfield had the opportunity to steal the coins from the unlocked garage, others had the same opportunity, and there was no evidence of the coins being in his possession when confronted by the victim as he came out of the garage, nor evidence of how he might have disposed of them so quickly. *Id.* at 492. Regarding Warfield's various statements on his reasons for entering the garage, the Court commented: "[T]he explanations were not that inconsistent or contradictory. He could have been in the garage for all three reasons. Each of the explanations was innocent in itself and could reasonably explain his presence." *Id.* at 492.

Unlike *Wilson* and *Warfield*, this was not a case of mere presence. Appellant essentially squatted in Keating's house for several days, removed items, cleaned others, added furniture, all the while sleeping in the house for several days and nights. Further, as the State points out in its brief, *Wilson* and *Warfield* relied on the now discredited legal theory known as the "reasonable hypothesis of innocence" doctrine.

Ultimately, "[i]t is not our role to retry the case" because the finder of fact has "the unique opportunity to view the evidence and to observe first-hand the demeanor and to assess the credibility of witnesses during their live testimony." *State v. Mayers*, 417 Md. 449, 466 (2010) (internal quotations omitted) (quoting *Smith, supra*, 415 Md. at 174, 185). As we explained in a similar context:

> Virtually every crime testified to by multiple witnesses could give rise to half a dozen conceivable scenarios or different stories. That is why we have factfinders. We, on the other hand, are not concerned with those other possible stories, because we are not factfinders. The factfinding job has already

> been done by someone else. All that matters at this juncture is that the factfinding judge believed the victim's story. Unless clearly erroneous (a rare phenomenon, indeed), [the trial judge's] findings of fact are the only facts in the case as far as we are concerned. There are no other stories. No other facts or factual scenarios even exist and it is pointless, therefore, to bring them up. In assessing legal sufficiency, we are required to take that version of the evidence most favorable to the prevailing party. What then is the Appellant seeking to do by beguiling us with "different stories" which are immaterial to the only legal issue before us? An appraisal of legal sufficiency is not a proper venue for jury argument. Appellate concern is not with what *should* be believed, but only with what *could* be believed.

Travis v. State, 218 Md. App. 410, 422-23 (2014) (emphasis in original).

We hold that the evidence was sufficient to sustain Appellant's conviction.

II.

Appellant next argues the court erred by: (1) ordering restitution based on the replacement costs of the items stolen, and (2) finding that the fair market value of the items stolen was sufficiently established. The State responds, to the extent not waived, the court correctly ordered $1,500 in restitution to Mr. Keating. In the alternative, the State suggests, should we conclude the value of the stolen items was not established, we remand this case for a restitution hearing. As we will explain, we concur in this alternative recommendation.

Appellant asserts "[i]n a theft case, restitution is governed by two statutes: § 7-104 of the Criminal Law Article, which is specific to theft convictions, and § 11-603 of the Criminal Procedure Article, which applies generally." As discussed under Appellant's first question presented, Crim. Law § 7-104 (a) states, in relevant part, that a person may not take the property of another if the person: "(1) intends to deprive the owner of the property;

(2) willfully or knowingly uses, conceals, or abandons the property in a manner that deprives the owner of the property; or (3) uses, conceals, or abandons the property knowing the use, concealment, or abandonment probably will deprive the owner of the property." Crim. Law § 7-103 indicates that value is determined by "(1) the market value of the property or service at the time and place of the crime; or (2) if the market value cannot satisfactorily be ascertained, the cost of the replacement of the property or service within a reasonable time after the crime."

As for the restitution statutes, the General Assembly has enacted the provisions currently set forth in Subtitle 6 of Title 11 of the Criminal Procedure Article. Md. Code (2001, 2008 Repl. Vol.) §§ 11-601 - 11-619 of the Criminal Procedure ("Crim. Proc.") Article. Crim. Proc. § 11-603 governs the determination of restitution and states in pertinent part:

> (a) *Conditions for judgment of restitution*. - A court may enter a judgment of restitution that orders a defendant or child respondent to make restitution in addition to any other penalty for the commission of a crime or delinquent act, if:
>
> (1) 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;
>
> * * *
>
> (b) *Right of judgment of restitution*. - A victim is presumed to have a right to restitution under subsection (a) of this section if:
>
> (1) the victim or the State requests restitution; and
>
> (2) the court is presented with competent evidence of any item listed in subsection (a) of this section.

Crim. Proc. § 11-603.

"Competent evidence" as set forth in Section 11-603(b)(2), is evidence that is "reliable, admissible, and established by a preponderance of the evidence." *McDaniel v. State*, 205 Md. App. 551, 559 (citing *Juliano v. State*, 166 Md. App. 531, 540 (2006)), *appeal dismissed*, 429 Md. 528 (2012); *see also In Re: Delric H.*, 150 Md. App. 234, 248-49 (2003) (recognizing that "even though a court may decline to require a strict application of evidentiary rules [in a restitution hearing], there still exists an inherent reliability/credibility requirement which a proponent of the offered evidence must satisfy"). We recognize the "owner of goods is presumptively qualified to testify to the value of his goods." *Pitt v. State*, 152 Md. App. 442, 465 (2003), *aff'd on other grounds*, 390 Md. 697 (2006). "Generally, an appellate court reviews a circuit court's order of restitution for abuse of discretion." *In re G.R.*, 463 Md. 207, 213 (2019) (citing *In re Cody H.*, 452 Md. 169, 181 (2017)). "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*. (alteration in original) (quoting *Goff v. State*, 387 Md. 327, 337-38 (2005)).

Here, at sentencing, the State requested restitution in the amount of $2,571 based on an adjusted proposal prepared on behalf of the victim by a company identified as Gap

Power.[6] Defense counsel responded Appellant was only convicted of theft of between $100 and $1,500 and the limit on restitution should be in accordance therewith.[7]

Additionally, and pertinent to our discussion, defense counsel observed that the proposal included the value for a *new* trash pump. Counsel argued "the test for value is fair market value at the time" of the theft, and "[t]hat we don't know. Nothing's been presented to the court about what that value of that pump was at that time. The value of a new pump is irrelevant to that situation." Counsel added that it was his client's contention that the pump found on the property did not work. Based on these objections, defense counsel proposed calling witnesses on the restitution issue.

The State objected to the court hearing any testimony as to restitution. The prosecutor stated: "this property – it's a proposal sheet, not by Mr. Keating, but by Gap Power Association, which is simply giving the list of the items to replace the goods in this matter." The State reminded the court, who later acknowledged that she presided over trial, that Appellant was also convicted of trespass and fourth degree burglary. Defense counsel maintained the objection, replying:

[6] On March 15, 2022, this Court granted Appellant's unopposed motion to correct the record with the proposal sheet generated by Gap Power. A copy of the proposal is appended to the motion in the appellate record.

[7] The State ultimately agreed and the court limited restitution to $1,500. As Appellant has not raised this aspect on appeal, and although there are cases on point to the contrary, we do not decide the issue here. *See generally Ingram v. State*, 461 Md. 650, 656, 670-71 (2018) (affirming a restitution order of $18,964.55, in a case where defendant pleaded guilty to theft between $1,000 and $10,000); *In re Earl F.*, 208 Md. App. 269, 279 (2012) (concluding Appellant was not denied due process when the court admitted evidence of loss, for purposes of restitution, greater than that set forth in the delinquency petition).

> [W]hat we have here is a list of replacement items, as the state's attorney's [sic] just said, new items. That's not the value that the court has the authority to impose; and there's no evidence upon which the court can establishment [sic] fair market value of the items at the time and at the place that we're talking about here. So – and, again, I think your Honor is limited to $1,500 max anyway.

After the State amended its restitution request to $1,500, defense counsel again asked for a hearing because, at most, the victim was only entitled to "the fair market value of items that existed at that time and place" and the replacement value of a new pump was inappropriate. Defense counsel asserted, "I think the court needs much more information to be able to tell just exactly what the fair market value of things were before a number can be imposed. I'm asking your Honor for that." The following then ensued:

> THE COURT: Did Mr. Keating purchase all these items?
>
> MR. KEATING: Yes.
>
> [PROSECUTOR]: Yes.
>
> THE COURT: From Gap Power --
>
> [PROSECUTOR]: Yes.
>
> THE COURT: -- for the prices stated?
>
> [DEFENSE COUNSEL]: Okay. So those are -- those are new prices -- - prices of new --
>
> MR. KEATING: The products that I had in the house were also new.
>
> THE COURT: But if these replaced and he's purchased these items -- -
>
> [DEFENSE COUNSEL]: Well, the limit is still 1500.
>
> THE COURT: I understand. After defense counsel addressed the court

with respect to sentencing, and following Appellant's allocution, the court imposed sentence. The court declined to hold a restitution hearing and ordered Appellant to pay Keating $1,500 through the Department of Parole and Probation. The court stated: "I find based on the information presented by Mr. Keating that he has replaced these items, and restitution is appropriate for replacement costs." The court concluded:

> The court does not feel a restitution hearing is needed. Mr. Keating has testified to his replacement items. The court clearly believes that the court has the right to provide for restitution up to $1,500 in accordance with the jury's verdict in this matter.[8]

Initially, the State makes a waiver argument which is premised on defense counsel's statement at the conclusion of the argument that "the limit is still $1500." We recognize a challenge to an order of restitution may be waived absent an objection. *See Brecker v. State*, 304 Md. 36, 41-42 (1985) (holding that a failure to make timely objection to order of restitution constitutes waiver). We are not persuaded defense counsel's statement waived the issue concerning valuation of the amount subject to restitution. Moreover, the restitution order was a condition of probation and, as part of the Appellant's sentence, its alleged illegality may be raised at any time. *See* Md. Rule 4-345(a); *see also McDaniel*, *supra*, 205 Md. App. at 556 n.2 ("An order to pay restitution as a probation condition is part of a criminal sentence. If such a condition exceeds the authority of the court, it is an

[8] We note, although the court reporter's certificate indicates that testifying witnesses were sworn, the sentencing transcript does not indicate that Keating was ever sworn or "testified" at the hearing.

illegal sentence, and a challenge to it can be raised initially at any time, including on appeal") (citation omitted). The issue is properly before us.

On the merits, the parties dispute whether the court could consider replacement value to determine restitution for the items the jury found Appellant stole from Keating. To reiterate, Crim. Law § 7-103 defines "value" as "the market value of the property or service at the time and place of the crime" *or*, "if the market value cannot satisfactorily be ascertained, *the cost of the replacement of the property* or service within a reasonable time after the crime." Crim. Law § 7-103(a)(1), (2) (emphasis added). *See generally, Ingram v. State*, 461 Md. 650, 670 (2018) (recognizing that "an order of restitution is linked inextricably to the underlying theft charge (which requires proof of the value of the property stolen and restitution to be made)"). Plainly, the statute contemplates replacement value under some circumstances.

As for case law on this issue, we first consider *Wallace v. State*, 63 Md. App. 399 (1985), *cert. denied*, 304 Md. 301 (1985), cited by both parties. There, Wallace challenged the court's admission of evidence of the value of goods, stolen from a vacant apartment, to support his felony theft conviction of stealing items valued in excess of $300. *Id.* at 402. Wallace argued the court erred in admitting evidence from the owner that the original purchase price of the stolen items was $1,288, on the grounds that "evidence of an owner's cost is inadmissible to prove the value of stolen goods. According to Appellant, the only permissible measure is fair market value." *Id.* at 410. Although we concluded the issue was not preserved, we addressed the merits, ultimately disagreeing with Wallace's contention. *Id*. at 410-11.

Recognizing the primary test for the value of stolen goods is generally fair market value, we stated "proof of market value 'may be indirect as well as direct.'" *Id.* at 410 (citation omitted). Moreover, the victim's "recollection of his cost was certainly circumstantially relevant to present market value." *Id*. Noting "[t]he factor of depreciation goes to the weight of the evidence not its admissibility[,]" we also stated "an owner of goods is presumptively qualified to testify to the value of his goods." *Id*. at 410-11 (citations omitted). In addition, the fact that the value of the stolen items exceeded $300 would not be overturned "merely because there was no direct evidence of market value, since the court could draw a fair inference, from evidence of the original purchase prices, that the items were worth more than $300.00." *Id.* at 411 (citation omitted).

Two other cases, again both cited by the parties in their respective briefs, also inform our analysis. Appellant directs our attention to *In re Christopher R.*, 348 Md. 408 (1998). There, the Court of Appeals considered the appropriate amount of restitution for a stolen computer and related equipment that were less than three years old. The juvenile court found it had "absolutely no way to know what rate of depreciation should be used for computers," and ordered restitution based on the original purchase price. *Id*. at 410. After this Court affirmed in an unreported opinion, the Court of Appeals reversed. Applying the statute that specifically provided for liability for acts of a child, which expressly capped the amount at "the lesser of the fair market value of the property or $5,000," the Court of Appeals held it was error, under that statute, to base "restitution on the purchase price of the stolen property rather than its fair market value at the time of the theft." *Id*. at 412-13. The Court reasoned that advances in the field of computer technology "are constantly being

made so that used equipment depreciates in value over relatively short periods of time." *Id.*[9]

The State argues here that *Christopher R.* is distinguishable on the ground that the case concerned the interpretation of plain language in a statute applicable to juvenile cases that has since been superseded. The State then directs our attention, *inter alia*, to *Champagne v. State*, 199 Md. App. 671 (2011). There, this Court relied on *Christopher R.*'s reasoning in concluding that the State failed to prove the value element in the crime of property theft over $500. *Id*. at 673. In reviewing the evidentiary record, we recognized the burden was on the State to establish beyond a reasonable doubt the value of a stolen three-year-old laptop, in accordance with Crim. Law § 7-103. *Id*. at 675.

However, we also recognized "[t]he present market value of stolen property may be proven by direct or circumstantial evidence and any reasonable inferences drawn therefrom." *Id*. at 676. We noted "a property owner's testimony regarding the original purchase price is 'circumstantially relevant to the present market value' of that property." *Id*. Accordingly, citing *Christopher R.*'s instruction about depreciation of computer technology, as well as similar language from out-of-state cases, we held that the purchase price of the laptop was "circumstantially relevant to the present market value' of that

[9] Former Md. Code (1957, 1996 Repl. Vol.) § 3-829(c)(1) of the Courts and Judicial Proceedings Article (superseded), provided, in pertinent part, that "[a] judgment rendered under this section may not exceed: (i) As to the property stolen, destroyed, converted, or unlawfully obtained, the lesser of the fair market value of the property or $5,000." That statute was transferred to Article 27 § 808 by 1996 Md. Laws ch. 585, and that Section 808 was ultimately repealed by 1997 Md. Laws chs. 311, 312. As indicated, the current statutes applicable to this case are Crim. Proc. § 11-603, as supplemented by Crim. Law § 7-103.

property," but not sufficient by itself to establish the value of the computer at the time of the theft was over $500. *Id*. at 676-77 (citation omitted).[10]

The lesson we take from these cases is consistent with our reading of Crim. Law § 7-103. In determining value, for purposes of addressing restitution following a theft conviction, the court should base its decision on market value, or, if market value cannot be satisfactorily ascertained, the cost of the replacement value of the property within a reasonable period of time following the theft. Direct and circumstantial evidence are relevant to both types of valuation, and an owner is qualified to testify as to value. It is the State's burden, by a preponderance of the evidence, to provide competent evidence of value consistent with these factors.

Returning to the present case, we are unable to conclude that the State met its burden. As indicated, restitution needs to be supported by competent evidence, as this Court has stated that "in every case the record should clearly reflect the basis for the amount of restitution ordered." *Juliano*, 166 Md. App. at 544. *See generally*, Murphy & Murphy, *Maryland Evidence Handbook*, § 600 at 295 (5th ed. 2020) (stating that "the competency issue focuses upon the inherent reliability of the evidence being offered. Evidence that passes the relevancy and materiality tests will be admitted unless it is incompetent or privileged"). A prosecutor's mere representations of loss do not qualify as "competent evidence":

[10] We also recognized, although *Champagne* was not such a case, that "there are cases, of course, where the value of a stolen item is so obvious or so clearly within the common knowledge and experience of the jury . . . that such evidence is unnecessary." *Champagne*, 199 Md. App. at 677 (collecting cases, internal citations omitted).

> We hold that the prosecutor's representations during the sentencing phase of Appellant's trial do not constitute "competent evidence" of [a victim's] loss. *See, e.g., State v. Shelton*, 167 N.C.App. 225, 605 S.E.2d 228, 233-34 (2004) (holding that a prosecutor's unsworn statement of economic loss during sentencing was insufficient to sustain an award of restitution, particularly when the record did not include any evidence supporting the statement); *Winborn v. State*, 625 So.2d 977, 977 (Fla.Dist.Ct.App.1993) (reversing a restitution order on the ground that a prosecutor's statement regarding the victim's loss in a grand theft case was not "competent evidence" sufficient to establish the victim's loss).

Juliano, 166 Md. App. at 543-44.

Here, although the GAP proposal sheet was identified, and Keating briefly spoke on the record, there is no indication that the evidence was admitted or that the witness was sworn. Thus, there was no "competent evidence" as to restitution before the court to support the order. As Appellant notes, even were we to consider the trial evidence, Keating testified to conflicting values for the stolen items, testifying on direct that the Honda trash pump was valued at $1,100 and his other tools were valued at around $500 to $600. He also acknowledged that he might have told Trooper Reeves that the pump was only worth $500 and his tools were only worth $200. Accordingly, we shall vacate the portion of the probation order as it pertains to restitution and remand so the court may conduct further proceedings consistent with this opinion. *See generally* Maryland Rule 8-604(d).

STANDARD CONDITION OF PROBATION CONCERNING RESTITUTION VACATED AND CASE REMANDED FOR A HEARING AS TO RESTITUTION.

JUDGMENT OTHERWISE AFFIRMED.

COSTS TO BE ASSESSED 2/3 TO APPELLANT AND 1/3 TO CECIL COUNTY.