Circuit Court for Prince George's County
Case No. CT-21-0166X

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND**

No. 1856

September Term, 2021

EDWARD SWAILS

v.

STATE OF MARYLAND

Wells, C.J.
Ripken,
Battaglia, Lynne A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Battaglia, J.

Filed: February 3, 2023

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

**At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Special Appeals of Maryland to the Appellate Court of Maryland. The name change took effect on December 14, 2022.

Edward Swails, Appellant, was convicted, after a jury trial in the Circuit Court for Prince George's County, of theft between $25,000 and $100,000 in violation of Section 7-104 of the Criminal Law Article, Maryland Code (2002, 2012 Repl. Vol., 2020 Supp.).[1]

[1] Section 7-104 of the Criminal Law Article provides, in pertinent part:

Unauthorized control over property

(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.

* * *

Possessing stolen personal property

(c) (1) A person may not possess stolen personal property knowing that it has been stolen, or believing that it probably has been stolen, if the person:

(i) Intends to deprive the owner of the property;

(ii) Willfully or knowingly uses, conceals, or abandons the property in a manner that deprives the owner of the property; or

(iii) Uses, conceals, or abandons the property knowing that the use, concealment, or abandonment probably will deprive the owner of the property.

* * *

Penalty

(g) (1) A person convicted of theft of property or services with a value of:

…

(ii) at least $25,000 but less than $100,000 is guilty of a felony and:

1. Is subject to imprisonment not exceeding 10 years or a fine not exceeding $15,000 or both; and
2. Shall restore the property taken to the owner or pay the owner the value of the property of services[.]

(continued…)

Judge Lawrence V. Hill, Jr. of the Circuit Court for Prince George's County sentenced Swails to ten years in prison, with all but two years suspended, to be followed by five years' supervised probation.

Swails presents three questions for our review:

1. Did the trial court err in admitting evidence regarding GPS tracking of the stolen vehicle?
2. Did the trial court err in permitting the prosecutor to engage in improper closing argument?
3. Is the evidence sufficient to sustain Mr. Swails's conviction for theft between $25,000 and $100,000?

We shall hold that the trial judge did not err in admitting testimony regarding the GPS tracker, that he did not abuse his discretion in permitting the prosecutor to present an argument during rebuttal closing and that the evidence was sufficient to sustain Swails's conviction for theft between $25,000 and $100,000.

FACTS & PROCEDURAL HISTORY

On November 25, 2020, Trudy Ayton reported that her car had been stolen in Capitol Heights, Maryland and that the vehicle was equipped with onboard GPS tracking which was accessed through "Bouncie," a device that plugs into a car's on-board diagnostics port and provides real-time driving data, including the location of the vehicle,

(…continued)

All statutory references to the Criminal Law Article are to Maryland Code (2002, 2012 Repl. Vol., 2020 Supp.).

Swails was acquitted of motor vehicle theft in violation of Section 7-105 of the Criminal Law Article, unauthorized removal of property in violation of Section 7-203 of the Criminal Law Article and breaking and entering a motor vehicle in violation of Section 6-206(b) of the Criminal Law Article.

through a user's mobile phone application. Police used Ms. Ayton's report, as well as her "Bouncie" tracker, to locate her vehicle, follow it for over two hours, and ultimately, arrest the driver, who turned out to be Swails.

On October 5 and 6, 2021, a jury trial was held before Judge Lawrence V. Hill, Jr. of the Circuit Court for Prince George's County. During the trial, Ms. Ayton testified that her car was a 2019 Kia Cadenza and that she had purchased it two months prior to the theft, in September 2020, for "right under $40,000."

During the trial, Sergeant Tariq Hall of the Auto Theft Unit of the Prince George's County Police Department also testified. Sergeant Hall related that he had contacted Ms. Ayton after he received her stolen vehicle report, and she disclosed that her car was equipped with a tracker that provided the real-time location of her vehicle through the "Bouncie" mobile application, which later assisted him and other officers in locating the automobile. During this testimony, Swails's counsel objected regarding the authenticity of the onboard GPS tracker, arguing that the testimony was "unauthenticated systems hearsay," related to what information the GPS tracker relayed:[2]

[2] Swails's counsel reiterated the same objection during the testimony of Detective Jason Jones of the Auto Theft Unit of the Prince George's County Police Department. Detective Jones testified that he had kept visual surveillance of Swails from the time he got out of the driver's seat until he was arrested. Detective Jones also related that there was an individual in the passenger's seat of the car with Swails, and once Swails left the car, the other person drove the car away. Detective Jones stated that police continued to track the car through Ms. Ayton's application and located the car in the District of Columbia. defense counsel again objected to testimony about GPS tracking, Judge Hill overruled the objection.

[Prosecutor]: So when you gained knowledge of the stolen vehicle, what, if anything, did you do as a result of knowing the vehicle was stolen without saying what anyone said?

[Sgt. Hall]: I gained access to the onboard GPS tracking capability from Kia, logged into that tracking device software and was able to live monitor the actual location of the vehicle.

[Prosecutor]: And what, if anything, did you do after that?

[Sgt. Hall]: I responded to the area of the GPS location. One of the first locations was off of Eastern Avenue.

[Defense Counsel]: Your, Honor, I'm going to object.

(Counsel approach the bench, and the following ensued.)

[Defense Counsel]: Your Honor, this is referring to essentially what is an unauthenticated systems hearsay. There's been no authentication of the way that the app works. There's no indication. The complainant says that she never used it before. So, I just want to be clear that my objection is as to him indicating the truth of the matter being relayed by the GPS system. So, if he wants to discuss what he did and that he was getting reliance on his belief that this is how the system works, that's one thing; but for him to assert the car was at this location, the car was at that location, that is now going out of the bounds of explaining his actions and into reliance on the information being relayed by the GPS system, which has not been authenticated for the truth of the matter asserted.

[Prosecutor]: Yes, Your Honor. The State in response, the State has the most recent case law on GPS tracking and the possibility of a witness to give testimony based on that without authentication, and the case is *Martez Johnson v. The State of Maryland*, decided February 21st, 2018. In that case it was a Baltimore case. There was an officer accused of rape and assault. That officer, at that time, had the GPS tracking system on them. The Defense counsel objected, and the Court was very clear in its ruling. The Court offered that the average layman is not required in matters of which the jurors would be aware of virtual common knowledge. And then the Court went to that if a witness is testifying something, like, about the time on a clock, the time on a clock may be – in the beginning, was an issue, but the time on the clock is common knowledge. If the hands on the clock are in a certain way, it's not up to the witness to authenticate that the clock really works, because it's common knowledge now with clocks. So, herein, today in modern technology, as the State has alluded to Big Brother, a GPS is a common item,

> and the court has already ruled that a layman can testify on the reliance on what the GPS does. And I do have copies for the Defense and do the Court that his testimony can be received on the GPS tracking of the car.

Judge Hill overruled the objection.

Sergeant Hall then testified that after having initially located the car, he physically followed it for over two hours, until Swails got out of the driver's seat. After a short chase in which Detective Michael Stargel of the Auto Theft Unit of the Prince George's County Police Department participated, Swails was arrested. When Sergeant Hall was asked on cross-examination about whether he was in uniform, he stated he was in "plain clothes with my tactical vest."

Detective Michael Stargel of the Auto Theft Unit of the Prince George's County Police Department also testified that he encountered Swails after having assisted Sergeant Hall in his pursuit. Detective Stargel related that he was not in uniform.

After the State rested, defense counsel moved for judgment of acquittal on all counts, including that the State failed to sufficiently establish that the value of the car exceeded $25,000, as charged in the criminal information. Judge Hill denied the motion.

Prior to closing, Judge Hill instructed the jurors that closing arguments by counsel were not to be considered evidence. Judge Hill then provided instructions to the jury, which included, among others, Maryland Criminal Pattern Jury Instruction § 3:00, "What Constitutes Evidence," from which he explicitly iterated, "Opening statements and closing arguments of lawyers are not evidence…. Therefore, if your memory of the evidence differs from anything the lawyers or I may say, you must rely on your own memory of the evidence."

During closing, the prosecutor did not allude to the chase of Swails by the police. Swails's attorney, however, argued that the jury should not infer guilt from Swails running from police,[3] because "there's nothing suspicious about running when an unmarked plain-clothes uniforms try trapping you and following you down," and that "there's no indication [the police] even said they were police." In rebuttal, the prosecutor asserted that Sergeant Hall *was* in uniform, rather than plain clothes, because he was wearing a "flat vest—protective vest:"

> [Prosecutor]: Now, Defense Counsel said don't take anything from the Defendant running when encountered by law enforcement, and Defense Counsel stated that all—that the officers were in plain clothes. Well, the same Defense Counsel asked Detective Stargel, "Were you in uniform?" and Detective Stargel said, "No, I was in plain clothes." He asked Officer Tariq Hall was he in uniform, and Tariq Hall said, "I was in uniform," and that he was in a flat vest—protective vest, and that he was, in fact, in uniform, and he, in fact, said he encountered. So, the inconsistency—

At this point, defense counsel objected, and counsel approached the bench. During a lengthy discussion, the prosecutor stated that she had a "good faith belief" that Sergeant Hall testified that he was wearing a protective vest with "police" written on the front and "WAVE" written on the back, demonstrating that he was in uniform:

> [Defense Counsel]: The testimony was very clear that he said he was in plain clothes wearing a vest. He had said it was over his clothes. He had not said he had a uniform. He said plain clothes.
>
> [The Court]: He said plain clothes and he said with the tactical vest.
>
> [Prosecutor]: With "police" on the front, Your Honor.
>
> [The Court]: I don't remember that.

[3] The record reflects that the State did not submit a request for a flight instruction, nor did the judge provide such a flight instruction.

> [Prosecutor]: I do recall he said it. He said it has "police" on the front and I believe "WAVE" on the back.
>
> [The Court]: I don't remember any of that.
>
> [Defense Counsel]: He didn't even testify that he was wearing a vest over his clothes, and he specifically said plain clothes. To say "uniform" is highly misleading.
>
> [The Court]: I mean, he definitely said "plain clothes[,]" but he said with tactical vest. So, I don't recall him saying police on the front or definitely not WAVE on the back. I think that – all right. State, again, the memory of the jury controls. You can say that's what he said if you have honest belief that's what he said.
>
> [Prosecutor]: I do have an honest belief that's what he said because I listened to what he said and was one of the reasons he didn't get out of Popeyes.
>
> [The Court]: Wait a minute. Say what? Are you saying—are you arguing that's why he didn't, or are you saying he said that's why he didn't get out?
>
> [Prosecutor]: No, Your Honor, I'm not arguing. That is my good-faith belief that he testified that he had on the flat visit [sic] and the flat vest had "police" on the front and "WAVE" on the back.
>
> [Defense Counsel]: You know, maybe if these are things that she learned during prep, but they didn't come out during trial.
>
> [The Court]: Again, the memory of the jury controls. So, State, you can argue that his vest constitutes, you can argue that he's in uniform, that's part of his uniform, but that he was not—he was not in, let's say, dressed blues. Make sure, you know, that is clear.

Before the prosecutor continued, Judge Hill then reiterated to the jury that closing arguments are not evidence, and the memory of the jury controls:

> [The Court]: Madam State, you can continue. I'll just, again, remind the jury that what either attorney says in closing arguments is not evidence. And you listened to the evidence, you were taking notes, you remember what the testimony was, and that is what controls. So, go ahead Madam State.

The prosecutor then continued with her closing, referring to Sergeant Hall's testimony of him wearing a protective vest:

> [Prosecutor]: So, the Officer Hall testified that he had on a flat vest or his protective vest and it had "police" on the front and "WAVE" on the back. Detective Stargel testified that he was in civilian clothes. Detective Jones, there was never—no testimony was solicited as to whether or not he had on private clothes or whether or not he was in uniform….

The jury ultimately convicted Swails of theft between $25,000 and $100,000. Subsequently, the court sentenced Swails to ten years' imprisonment, with all but two years suspended, and five years' supervised probation upon release. Swails timely filed this appeal.

DISCUSSION

In his first question, Swails argues that the trial court improperly admitted evidence about the system of "GPS tracking" associated with Ms. Ayton's car, about which he had objected during Sergeant Hall's and Detective Jones's testimony, without establishing its authenticity. The State argues that, because no evidence of the GPS tracking was admitted into evidence, authentication was not required, and even were it to be required, the fact that the officers located the car satisfies that the GPS system was reliable.[4]

With respect to authentication, Maryland Rule 5-901(a) provides, "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent

[4] The State initially argues that Swails did not preserve his authenticity objection because he did not object each time there was a mention of the GPS tracker. Our review of the record, including defense counsel's exploration of the issue with the trial judge, supports our conclusion that Swails did preserve his objection. *See State v. Robertson*, 463 Md. 342, 365-67 (2019) (holding that defense counsel's initial objection sufficed to preserve his objection for appeal because there was a determinative bench conference, the court provided an explanation for overruling the objection, and further objections would be "futile" and serve only to "spotlight for the jury the remarks").

claims." "Authentication refers to a process of 'laying a foundation for the admission of such nontestimonial evidence such as documents and objects.'" *Jackson v. State*, 460 Md. 107, 115-16 (2018) (quoting Hornstein & Weissenberger, *Maryland Evidence: 2002 Courtroom Manual*, at 306). *See* ROBERT P. MOSTELLER ET AL., 2 MCCORMICK ON EVIDENCE § 221 (8th ed. 2020) ("[I]n all jurisdictions the requirement of authentication applies to all tangible and demonstrative exhibits.").

It is difficult to devise how authentication would apply to testimonial evidence, as here. No evidence about GPS coordinates was offered; rather, the officers testified only with regard to what they did in reliance on the tracking, as defense counsel had admonished during his initial objection.

Assuming *arguendo* that authentication could apply to solely testimonial evidence, the function of authenticity is to establish a connection between the evidence offered and the relevant facts of the case. *Sublet v. State*, 442 Md. 632, 656 (2015). Generally, the threshold to authenticate evidence is low. *Jackson*, 460 Md. at 116. "The burden of proof for authentication is slight, and the court need not find that the evidence is necessarily what the proponent claims, but only that there is sufficient evidence that the jury ultimately do so." *Sykes v. State*, 253 Md. App. 78, 91 (2021) (quoting *Darling v. State*, 232 Md. App. 430, 455 (2017)).

Here, the trial judge did not abuse his discretion in admitting the officers' testimony. The officers testified about what they did in reliance on the information they accessed from the tracker, which was built into Ms. Ayton's car, and that they followed the automobile for over two hours, before they eventually apprehended Swails, who got out of the driver's

seat of the vehicle before a chase. The fact that the car was physically located and recovered in reliance on the information from the GPS tracker certainly corroborates and supports the officers' reliance on the information gleaned from the tracker. As a result, the trial judge did not err.

In his second question, Swails argues that the trial judge abused his discretion by allowing the prosecutor to argue facts not in evidence during closing, specifically that Sergeant Hall was wearing a vest with "police" on the front and "WAVE" on the back. The State concedes that Sergeant Hall did not testify accordingly, but argues that the prosecutor made a good faith mistake, and the judge did not err by permitting the comment rather than striking it, especially because he gave a curative instruction that closing arguments are not evidence and the memory of the jury controls.

It is axiomatic that during closing arguments, "lawyers have wide latitude to draw reasonable inferences from the evidence, and discuss the nature, extent, and character of evidence." *Smith v. State*, 367 Md. 348, 354 (2001); *see Lee v. State*, 405 Md. 148, 162 (2008); *Lawson v. State*, 389 Md. 570, 591 (2005); *Spain v. State*, 386 Md. 145, 152-53 (2005); *Degren v. State*, 352 Md. 400, 429 (1999). "Summation provides counsel with an opportunity to creatively mesh the diverse facets of the trial, meld the evidence presented with plausible theories, and expose the deficiencies in his or her opponent's argument." *Henry v. State*, 324 Md. 204, 230 (1991), *cert. denied*, 503 U.S. 972 (1992). Nevertheless, "[t]here are limits to a prosecutor's creative license, and a trial judge has discretion to set appropriate boundaries." *Id.*

"The determination whether counsel's 'remarks in closing were improper and prejudicial, or simply permissible rhetorical flourish, is within the sound discretion of the trial court to decide.'" *Sivells v. State*, 196 Md. App. 254, 271 (2010) (quoting *Jones-Harris v. State*, 179 Md. App. 72, 105, *cert. denied*, 405 Md. 64 (2008)). "Because a trial court is in the best position to evaluate the propriety of closing argument as it relates to the evidence adduced in a case, the exercise of its broad discretion to regulate closing argument will not be overturned unless there is a clear abuse of discretion that likely injured a party." *Carroll v. State*, 240 Md. App. 629, 663 (2019) (quoting *Anderson v. State*, 227 Md. App. 584, 589 (2016)). *See Whack v. State*, 433 Md. 728, 742 (2013); *Ingram v. State*, 427 Md. 717, 726-27 (2012).

In determining whether there was an abuse of discretion when, as here, a trial judge permitted a prosecutor to argue a belief based on good faith during closing, we are guided by what our Supreme Court (at the time named the Court of Appeals of Maryland[5]), has stated in *Henry v. State*, 324 Md. 204 (1991) and *Wilson v. State*, 370 Md. 191 (2002). In *Henry*, Henry was convicted by a jury of murder, use of a handgun, and related offenses. 324 Md. at 212. During closing arguments, the defense asserted that there were many theories of the case that could be manufactured from the evidence and that the State's

[5] At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Appeals to the Supreme Court of Maryland. The name change took effect on December 14, 2022. *See also* Md. Rule 1-101.1(a) ("From and after December 14, 2022, any reference in these Rules, or, in any proceedings before any court of the Maryland Judiciary, any reference in any statute, ordinance, or regulation applicable in Maryland to the Court of Appeals of Maryland shall be deemed to refer to the Supreme Court of Maryland….").

theory was just one, holding no more weight than any other theory. *Id.* at 228. In rebuttal, the prosecutor argued that his theory of the case was not created "out of thin air," but rather based upon the evidence of the case, and further stated, if "[the defense] has a theory I'm more than willing to hear it." *Id.* at 229. The defense objected to the prosecutor's last statement, and the trial court overruled the objection without providing a curative instruction but having instructed the jury regarding the State's burden of proof and the requirement that the verdict must be based on evidence. *Id.* On appeal, Henry argued that the State's remark created the impression that the defense had some obligation to prove a "theory" of the case, suggesting that the defense carried a burden of proof. *Id.* at 232.

In resolving the issue in favor of the State, the *Henry* Court referred to the American Bar Association's (ABA) *Standards for Criminal Justice*, in force at the time, in which the ABA recommended prosecutorial standards for closing arguments. *Id*. at 230 n.6. The Second Edition of the *Standards for Criminal Justice*, to which the Court referred stated, "It is unprofessional conduct for the prosecutor intentionally to misstate the evidence or mislead the jury as to the inferences it may draw." *Id.* (quoting American Bar Association, *Standards for Criminal Justice* § 3-5.8 (2d ed. 1980)).

In *Wilson v. State*, 370 Md. 191 (2002), Wilson was convicted by a jury of first-degree murder of one of his two children, each of them having died within their first year of life, with autopsies having declared their deaths as the result of Sudden Infant Death Syndrome ("SIDS"). *Id.* at 196-97. During the trial, two experts relied on the original autopsies and statistical evidence of SIDS to calculate the probability that two children in the same family could have succumbed to SIDS. *Id.* at 198-200. The probability that the

second child died from SIDS was calculated to be 1 in 100,000,000 by the first expert and 1 in 4,000,000 by the second expert. *Id.* The prosecutor, despite having known that he was prohibited from using statistics to calculate the probability of Wilson's innocence because of a trial ruling, argued in closing: "If you multiply [the expert's] numbers, instead of 1 in 4 million, you get 1 in 10 million that the man sitting here is innocent." *Id.* at 213. Defense moved for a mistrial based upon the State's alleged improper use of statistical evidence, and the trial court denied the motion. *Id.* Wilson then asked for a curative instruction that "statistics cannot be used to compare the burden of proof or reasonable doubt," but the trial court declined that instruction and reiterated the original instruction that testimony about statistical probabilities may only be used to evaluate the weight given to the experts' testimony. *Id.* at 212, 214. On appeal, Wilson argued that the State's comments were improper and required reversal of the verdict. *Id.* at 212.

In reversing, the *Wilson* Court explained that, while "counsel is permitted wide latitude in closing…[i]t is self-evident that an attorney may not argue inferences that are improper or are not warranted by the evidence." *Id.* at 215. The Court again referenced the *Standards for Criminal Justice*, which, at the time in the Third Edition, provided, "The prosecutor should not intentionally misstate the evidence or mislead the jury as to the inferences it may draw." *Id*. at 215 n.11 (quoting American Bar Association, *Standards for Criminal Justice* § 3-5.8 (3d ed. 1993)). The Court concluded that, "[t]he State's Attorney was well aware that the statistical evidence could not be used to calculate the probability of petitioner's innocence. The colloquy at the bench makes this crystal clear." *Id.* at 214.

A subsequent version of the ABA Standards, in force at the present time, entitled *Criminal Justice Standards for the Prosecution Function* § 3-6.8 (4th ed. 2017), provides greater clarity regarding the distinction between a knowing misstatement and a good faith, although mistaken, belief, on the part of the prosecutor regarding evidence made manifest during closing argument: "The prosecutor should not knowingly misstate the evidence in the record, or argue inferences that the prosecutor knows have no good-faith support in the record." American Bar Association, *Criminal Justice Standards for the Prosecution Function* § 3-6.8 (4th ed. 2017), archived at https://perma.cc/4W4V-ZCNE. The contrast between a knowing misstatement and a good faith belief on the part of the prosecutor regarding trial evidence is pivotal here and supports the conclusion that the trial judge did not abuse his discretion when he permitted the prosecutor to argue her good faith belief regarding Sergeant Hall's testimony.

Judge Hill also immediately gave a curative instruction in which he iterated that closing arguments are not evidence and the juror's memories control, and in the jury instructions themselves he reiterated the same. Such curative measures have been remedial even in situations in which an improper closing argument was given. *See Spain*, 386 Md. at 160 (concluding that, even when there has been impropriety, the judge's contemporaneous instruction that closing arguments are not evidence eliminated "the jury's potential confusion about what it just heard and therefore ameliorated any prejudice to the accused.").

Accordingly, Judge Hill did not abuse his discretion in permitting the prosecutor to argue what she had a good faith belief about the evidence.

In his final question, Swails argues that the evidence was insufficient to sustain his conviction for theft between $25,000 and $100,000, because, he avers, the State had failed to sufficiently establish the value of the stolen car at the time of the theft. The State argues that Ms. Ayton's testimony was sufficient to satisfy the value element of the theft statute.

In reviewing the sufficiency of evidence, an appellate court must decide "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Derr v. State*, 434 Md. 88, 129 (2013) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). In applying this test, "[w]e defer to the fact finder's 'opportunity to assess the credibility of witnesses, weigh the evidence, and resolve conflicts in the evidence[.]'" *Neal v. State*, 191 Md. App. 297, 314 (2010) (quoting *Sparkman v. State*, 184 Md. App. 716, 740 (2009)). "The test is 'not whether the evidence *should have or probably would have* persuaded the majority of fact finders but only whether it *possibly could have* persuaded *any* rational fact finder.'" *Painter v. State*, 157 Md. App. 1, 11 (2004) (quoting *Mora v. State*, 123 Md. App. 699, 727 (1998), *aff'd on other grounds*, 355 Md. 639 (1999)).

Section 7-104(g)(1) of the Criminal Law Article reflects the value element of the theft statute and establishes the status of the crime in issue as a felony:

> **Penalty**
>
> (g) (1) A person convicted of theft of property or services with a value of:
>
> …
>
> (ii) at least $25,000 but less than $100,000 is guilty of a felony and:
>
> 1. Is subject to imprisonment not exceeding 10 years or a fine not exceeding $15,000 or both; and
> 2. Shall restore the property taken to the owner or pay the owner the value of the property of services[.]

For purposes of the theft statute, "value" is defined 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." Section 7-103(a) of the Criminal Law Article.

Market value may be established by direct or indirect evidence, and any reasonable inferences therefrom. *Wallace v. State*, 63 Md. App. 399, 410 (1985). "Moreover, a property owner's testimony regarding the original purchase price is circumstantially relevant to the present market value of that property." *Champagne v. State*, 199 Md. App. 671, 676 (2011) (citing *Wallace*, 63 Md. App. at 410). *See Pitt v. State*, 152 Md. App. 442, 465 (2003) ("An owner of goods is presumptively qualified to provide testimony regarding the value of his goods.").

Ms. Ayton testified, without objection, that she originally bought her 2019 Kia Cadenza two months prior to the theft, for "right under $40,000." Photographic evidence of the exterior of the car, which showed no damage, was also admitted. Ms. Ayton's testimony about the make, model, and year of her car, as well as its purchase price, supported by evidence of the car's condition, was sufficient under our jurisprudence to establish that the car's value was at least $25,000 at the time of the theft. *See Stone v. State*, 178 Md. App. 428, 442 (2008).

Swails argues, however, that several of our sister jurisdictions have suggested that "sufficient evidence of value must include more than merely the purchase price of the vehicle." He cites to *Walker v. Commonwealth*, 704 S.E.2d 124 (Va. 2011); *State v. McCammon*, 250 P.3d 838 (Kan. Ct. App. 2011); *People v. Brown*, 713 N.Y.S.2d 726, 727

(N.Y. App. Div. 2000); *State v. Jones*, 757 A.2d 689 (Conn. App. Ct. 2000); *State v. Nicholas*, 735 So.2d 790 (La. Ct. App. 1999) to illustrate that "some evidence of current market value from readily-available, well-known sources" needed to have been introduced as evidence of value. While the cases Swails cites to all involve instances where evidence of value included the National Automobile Dealers Association (NADA) Guide Book values, none of the jurisprudence evident in the jurisdictions referenced, eviscerates the evidentiary relevance of testimony of value as presented in the instant case.

In *Walker v. Commonwealth*, 704 S.E.2d 124 (Va. 2011), the prosecution relied on the NADA value of a car to prove that the value of the stolen car exceeded $200. In Virginia, proof by use of NADA values or similar valuation services, is expressly authorized by statute as evidence of "fair market value" of an automobile, but it is not an exclusive vehicle, and it may be modified by evidence adduced at trial. *Walker*, 704 S.E.2d at 125 (citing VA. CODE ANN. § 8.01-419.1 (2006)). In fact, Virginia's intermediate appellate court has held that an owner's testimony as to the value of their vehicle may also establish sufficient evidence of market value. *Otey v. Commonwealth*, 839 S.E.2d 921, 925 (Va. Ct. App. 2020).

Similarly, in *State v. McCammon*, 250 P.3d 838 (Kan. Ct. App. 2011), NADA value of a car was used to establish market value, without any discussion. In prior case law, however, the Supreme Court of Kansas has accepted that testimony of purchase price, along with the make, model, price, date of purchase, and condition of the car, is sufficient evidence of the car's value. *State v. Johnson*, 871 P.2d 1246, 1250 (Kan. 1994).

Swails also cites to *People v. Brown*, 713 N.Y.S.2d 726, 727 (N.Y. App. Div. 2000), in which testimony about NADA value, in combination with the owner's testimony about the vehicle's good condition, was deemed to be sufficient evidence of value. Testimony of the owner's cost, when coupled with the make, model, date of purchase, and condition of the car, was also sufficient to establish the value of the stolen car in a later case from the same court. *People v. Chacon*, 782 N.Y.S.2d 172, 173 (N.Y. App. Div. 2004) (car owner's testimony about the make, model, date purchased, price, and good condition of the car was sufficient evidence of value).

Similarly, in Connecticut, owner's testimony, supplemented by NADA value, has been deemed to be sufficient evidence of market value, in *State v. Jones*, 757 A.2d 689 (Conn. App. Ct. 2000). The absence of NADA value, however, has not been viewed as a problem, where the owner testified about the make, model, price, and date of purchase of the car by the same court. *State v. Felder*, 897 A.2d 614, 623-24 (Conn. App. Ct. 2006).

Finally, Swails cites to *State v. Nicholas*, 735 So.2d 790 (La. Ct. App. 1999), in which an owner's testimony about the make, age, year, price, and miles on the odometer, coupled with the fact that the NADA value of the car would have supported a bank loan of $3,800, was deemed sufficient evidence of value of the theft statute. In subsequent jurisprudence, *State v. Bailey*, 180 So.3d 442, 447-48 (La. Ct. App. 2015), held that testimony of the make, model, price, and date of purchase, as well as the amount spent on repairing the car and the owner's valuation of the car, was sufficient evidence to establish value for purposes of the theft statute, even though NADA value was not in evidence.

In the present case, Ms. Ayton testified that she bought her 2019 Kia Cadenza for $40,000 in September 2020, two months prior to the theft, and that her car had not been damaged; photographs were admitted that demonstrated that there was no exterior damage. Not only does our jurisprudence clearly support that such testimony is sufficient to establish the value of a stolen car pursuant to the theft statute, but our sister jurisdictions upon which Swails relies, also do.

Swails also argues that any depreciation of the vehicle since its purchase needed to be considered, because it is "common knowledge" that vehicles diminish in value, relying on *Champagne v. State*, 199 Md. App. 671 (2011). In *Champagne*, Champagne argued that the evidence was insufficient to support his conviction for theft of goods over $500, because the owner of a stolen laptop testified that he had purchased the laptop for approximately sixteen to eighteen hundred dollars three years prior. *Id.* at 674. This court acknowledged, on review that, although the victim's testimony as to the original purchase price was relevant to the market value, it alone was insufficient to establish that the value of the laptop, purchased three years prior exceeded $500 at the time of the theft. *Id.* at 676. We also expressed that "it is 'common knowledge'" that "computer technology advances are constantly being made so that used equipment depreciates in value over relatively short periods of time." *Id.* (citing *In re Christopher R.*, 348 Md. 408, 412-13 (1998)).

The present case is remarkably different, however, because Ms. Ayton's testimony regarding the original purchase price of $40,000 for her car, based upon a time lapse of only two months prior to the theft, coupled with a stable physical condition of the car,

supported the inference that could be drawn that the value of the Kia, at the time of the theft, met the statutory threshold of $25,000, which is $15,000 less than the purchase price.

CONCLUSION

In conclusion, we hold that the trial judge did not err in admitting testimony regarding the GPS tracker, nor did he abuse his discretion in permitting the prosecutor to argue what she, in good faith, believed during closing and that the evidence was sufficient to sustain Swails's conviction for theft of Ms. Ayton's car of a value between $25,000 and $100,000. Accordingly, we affirm.

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.