UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0849

September Term, 2014

JOHN SCHENE

v.

STATE OF MARYLAND

Graeff,
Friedman,
Sharer, J. Frederick
(Retired, Specially Assigned),

JJ.

Opinion by Sharer, J.

Filed: February 22, 2016

A jury sitting in the Circuit Court for Harford County, convicted John M. Schene, appellant, on charges of theft of property valued less than $1,000; theft of property valued between $1,000 and $10,000; continuing theft scheme for property valued less than $1,000, and continuing theft scheme for property valued between $1,000 and $10,000.[1] The court sentenced Schene to ten years incarceration, all but seven years suspended, to be followed by five years of supervised probation, for his conviction for theft scheme for property valued between $1,000 and $10,000. The court merged the other convictions for the purposes of sentencing. Schene was also ordered to pay $22,079 in restitution as a condition of probation.

In his timely appeal, Schene raises two questions for our consideration, which we have recast for clarity:

1. Was the evidence sufficient to sustain the convictions for theft and theft scheme?

2. Did the sentencing court err in ordering restitution in the amount of $22,079?

Discerning neither error nor abuse of discretion, we shall affirm the judgments of the circuit court.

FACTUAL and PROCEDURAL HISTORY

The evidence, framed in the light most favorable to the State, reveals that between May 2011 and October 2011, approximately 25,000 pounds of steel building materials were

[1]Schene was acquitted on charges of theft of property valued between $10,000 and $100,000, and continuing theft scheme for property valued between $10,000 and $100,000.

stolen from a construction site on Red Pump Road in Harford County. The stolen property was owned by Lee Foundation Company ("Lee"), which was constructing concrete foundations for a sewage pumping station for the Harford County Department of Public Works.

Daniel Hart, the project manager for Lee, first noticed materials missing from the site in June 2011. Additional materials went missing over the next several months. The replacement cost of the stolen materials was $12,836.60. All of the materials that were taken, including scrap steel and various sizes of rebar,[2] could be easily carried by an individual.

On Sunday, July 25, 2011,[3] Hart was leaving the worksite when he encountered a man he later identified as Schene, driving a black Dodge pickup truck, with red lettering on the door. Schene told Hart that he used to live in the area and just wanted to "check out" what was being built. Hart advised Schene that the project was on private property and that he should not enter. Schene said he was just going to drive down the entrance road before leaving. Hart characterized Schene as "very, very, very suspicious" and a "little nervous" during the encounter. Hart recorded the truck's license tag and a description of the driver. Schene returned to the worksite outside of normal working hours on other occasions,

[2] "Rebar" is a contraction for reinforcing bar, steel rods that are utilized in construction to reinforce and strengthen concrete structures.

[3] Lee employees were working weekends because the missing materials caused a delay until replacement materials were ordered or repurposed from other job sites. The company would have been penalized if the pumping station was not completed on schedule.

including on October 2, 2011, when he and his truck were recorded in surveillance photographs.

Hart reported the theft to Detective John Brown of the Harford County Sheriff's Office in September 2011. Hart subsequently provided Brown with the surveillance photos of Schene's truck, as well as the license plate number and driver description he had noted after his encounter with Schene on July 25, 2011. Hart later identified Schene in a photo array as the man he had encountered entering the worksite without authorization. Brown confirmed that Schene was the registered owner of a black, 1997 Dodge pickup truck and that he was frequently listed in the "regional pawn database" as having scrapped material similar to that which was taken from the Lee jobsite.

Melissa Campbell, a secretary for Banks Auto Recyclers, testified that Schene was a frequent visitor at her business, where he scrapped metal like that taken from the Lee jobsite. Campbell confirmed that, at 9:30 a.m. on October 2, 2011, Schene, driving his black pickup truck, sold 1,020 pounds of scrap metal, for which he was paid $140. Schene cashed the check within minutes of receiving it.

On February 2, 2012, after his arrest, Schene was interviewed by Brown. Initially, Schene denied having any knowledge of the worksite on Red Pump Road. When advised that Brown had photographs of his truck at the site, Schene admitted that he knew about the worksite, but denied he had ever been confronted by anyone there. After being told that Hart had identified him in a photo array, Schene admitted that he had run into someone "a while

back." Schene finally acknowledged that he had been to the worksite eight to ten times, but denied any involvement in the thefts.

DISCUSSION

I. Sufficiency of the Evidence

Defense counsel moved for judgment of acquittal, at the end of the State's case, and again at the close of the evidence, arguing that the evidence was insufficient to send the case to the jury. In each instance, the motion was denied.

On appeal, Schene renews his argument that the evidence was insufficient to support the guilty verdicts. As a fall-back argument, Schene asserts that, even if the evidence was sufficient to convict him of theft, it was insufficient to prove the value of the materials stolen from the worksite. Thus, he concludes, the court's restitution order must be set aside.

We review sufficiency of the evidence to determine "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." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (emphasis in original); *Derr v. State*, 434 Md. 88, 129 (2013). In assessing the sufficiency of the evidence, "[t]he 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) (emphasis in original) (citation omitted); *see also State v. Mayers*, 417 Md. 449, 466 (2010)("We defer to any possible reasonable inferences the jury could have drawn from the

admitted evidence and need not decide whether the jury could have drawn other inferences from the evidence, refused to draw inferences, or whether we would have drawn different inferences from the evidence."). Deference must be given to the fact-finder's "opportunity to assess the credibility of witnesses, weigh the evidence, and resolve conflicts in the evidence." *Pinkney v. State*, 151 Md. App. 311, 329 (2003). Moreover, a conviction may be supported by circumstantial evidence, provided the circumstances support rational inferences from which the trier of fact could be convinced beyond a reasonable doubt of the guilt of the accused. *Chow v. State*, 163 Md. App. 492, 510 (2005), *rev'd on other grounds*, 393 Md. 431 (2006).

Schene, after initially denying any knowledge of the Red Pump Road worksite, admitted that he visited the Lee worksite eight to ten times. Hart's testimony placed Schene at the worksite, acting suspiciously, in July. Surveillance photographs from October show Schene at the worksite, picking up pieces of steel, and leaving the worksite with his truck bed full of construction materials.

Bank's Recycling employee, Campbell, testified that Schene frequently brought scrap metal of the same kind that was taken from the Lee worksite to the local scrap yard during the relevant time period. Considering the circumstances, we are persuaded that, based on the sum total of all of the evidence presented, viewed in the light most favorable to the State, a rational trier of fact could reasonably conclude that Schene was responsible for the theft of materials from the Lee worksite.

Regarding the value of the stolen materials, the evidence demonstrated that the replacement cost of the materials for the Lee worksite was $12,836, or approximately $1,000 per ton. Schene admitted visiting the site eight to ten times during the period from May to October 2011. Recalling that Hart placed Schene at the worksite on one occasion, that the surveillance photos placed him there – with his truck – on numerous other occasions, the testimony of Campbell that he sold in excess of 1,000 pounds of metal, and the testimony as to the replacement cost, the jury could have easily concluded that the value of the stolen materials exceeded $1,000.

While Schene contends that the evidence was, at best, sufficient to show that he was present at the worksite in only July and October, the jury could have reasonably concluded that he was there and took materials on at least eight to ten other occasions. The defense was afforded the opportunity to examine the State's witnesses as to any inconsistencies in their testimony and to argue their competing theories to the court. Clearly, the jury chose to credit the State's position as to Schene's numerous visits to the site.

It is not the function of an appellate court to resolve conflicting evidentiary inferences. *See Neal v. State*, 191 Md. App. 297 (2010) ("The primary appellate function in respect to evidentiary inferences is to determine whether the trial court made reasonable, *i.e.*, rational, inferences from extant facts. Generally, if there are evidentiary facts sufficiently supporting the inference made by the trial court, the appellate court defers to the fact-finder . . . ." (quoting *State v. Smith*, 374 Md. 527, 547 (2003))); *State v. Suddith*, 379 Md. 425, 447

(2004) ("Where it is reasonable for a trier of fact to make an inference, we must let them do so, as the question is not whether the [trier of fact] could have made other inferences from the evidence or even refused to draw an inference, but whether the inference [it] did make was supported by the evidence."). "Although the [fact-finder] could have drawn an inference more favorable to appellant, it was not required to do so." *McDonald v. State*, 141 Md. App. 371, 380 (2001). A verdict should not be overturned simply because there are competing inferences, one or more of which would support an acquittal. *See, e.g., Suddith*, 379 Md. at 430-31 (holding that "this Court must give deference to all reasonable inferences the fact-finder draws, regardless of whether we would have chosen a different reasonable inference.").

We conclude, therefore, that the evidence was sufficient to support Schene's convictions.

II. Restitution

The circuit court ordered Schene to pay restitution to Lee in the amount of $22,079 – $9,999 for the value of the stolen materials, and $12,080 for the additional costs incurred as a direct result of the thefts. He asserts that the restitution order constitutes an illegal sentence because the evidence was insufficient to sustain the court's findings of value of the stolen materials and Lee's consequential damages.

A trial court may order 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) Crim. Pro. § 11-603(a)(1). Further, a person convicted of theft of property or services "shall restore the property taken to the owner or pay the owner the value of the property or services." Md. Code. (2002, 2012 Repl. Vol.) § 7-104(g)(1)(ii)(2) of the Criminal Law Article. This Court reviews a sentencing court's decision to order restitution and the amount of restitution for abuse of discretion. *Silver v. State*, 420 Md. 415, 427 (2011).

Schene did not object to the terms of the restitution order announced by the court at his sentencing hearing. His current argument, therefore, was not preserved for appellate review. Md. Rule 8-131. Nonetheless, he suggests that this Court may review the restitution order, pursuant to Md. Rule 4-345(a), which provides that "[t]he court may correct an illegal sentence at any time." Schene asserts that the evidence presented at his sentencing hearing was not sufficient to prove the amount of the losses or expenses incurred by Lee, or that those losses or expenses were a direct result of his criminal behavior.

An illegal sentence is a sentence that is not allowed by law. *See Tshiwala v. State*, 424 Md. 612, 618 (2012) (reiterating that an illegal sentence ordinarily occurs "where there is some illegality in the sentence itself or where no sentence should have been imposed" and that "trial court error during the sentencing proceeding" does not render a sentence illegal "where the resulting sentence or sanction is itself lawful") (quotations omitted). The circuit court was permitted to order restitution to Lee for the company's losses that occurred as a "direct result" of the theft of the building materials for which Schene was convicted. Crim.

Pro. §11-603(a)(1). The restitution order entered by the circuit court was not inherently illegal.

Schene asserts that the evidence was not sufficient to support the sentencing court's factual findings regarding the value of Lee's losses. That question has not been preserved and, thus, is not properly before this Court. *See Bryant v. State*, 436 Md. 653, 662-64 (2014) (explaining the "distinction between those sentences that are 'illegal' in the commonly understood sense, subject to ordinary review and procedural limitations, and those that are 'inherently' illegal, subject to correction 'at any time'" and rejecting a claim that a sentence is inherently illegal because the evidence was insufficient to support the sentencing court's factual findings).

In any event, the record indicates that the circuit court's valuation of Lee's losses was based on the testimony of William Lipinski, the owner of Lee Foundation. Lipinski explained in detail his calculation of the losses – the cost of replacement material, including transportation, as well as lost time during which wages were paid. His testimony was based on company records, including employee time sheets. "Competent evidence of entitlement to, and the amount of, restitution need only be reliable, admissible, and established by a preponderance of the evidence." *McDaniel v. State*, 205 Md. App. 551, 559 (2012) (citing *Juliano v. State*, 166 Md. App. 531, 540 (2006)).

The evidence presented by the State in support of Lee's request for compensation was competent, reliable, and admissible. We conclude, therefore, that the circuit court did not

err in ordering restitution for both the actual damages of $9,999[4] and consequential damages of $12,080 that the victim suffered as a result of the thefts.

Discerning neither error nor abuse of discretion, we affirm the circuit court's judgment of conviction and its award of restitution in the amount of $22,079.

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

[4]The sentencing court, in its discretion, limited the amount of actual damages to $9,999 because the jury had found Schene guilty of theft and theft scheme for goods valued under $1,000, and between $1,000 and $10,000, but acquitted Schene on the greater charge of theft of goods valued over $10,000. As this Court has previously suggested, however, the sentencing court would not have abused its discretion even had it ordered Schene to pay the full amount of Lee's losses competently proven by the State. *See, e.g., In re Earl F.*, 208 Md. App. 269, 278-79 (2012) (holding that a juvenile court did not abuse its discretion by ordering restitution that was based on the victim's actual losses stating "the amount of restitution is limited only by the State's proof of loss attributed to the offense or conduct in which the juvenile was adjudged to be involved").