UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2693

September Term, 2015

ADAM W. GENSLER, SR.

v.

STATE OF MARYLAND

Meredith,
Leahy,
Beachley,

JJ.

Opinion by Beachley, J.

Filed: December 14, 2016

A jury in the Circuit Court for Howard County convicted appellant Adam W. Gensler, Sr., of theft of property with a value at or above $100,000; conspiracy to commit theft of property with a value at or above $100,000; conspiracy to take a motor vehicle; and unlawfully taking a motor vehicle. Appellant was sentenced to a term of forty-five years' imprisonment, with all but fifteen years suspended. In this appeal, appellant presents the following questions for our review:

1. Is the evidence of value sufficient to sustain the convictions of theft and conspiracy to commit theft of property greater than $100,000?

2. Did the circuit court err or abuse its discretion in admitting evidence regarding items seized from Appellant's home and box truck more than three weeks after the offense date?

We find no error and affirm.

BACKGROUND

On July 12, 2014, at approximately 11:45 p.m., Howard County Police Detective Joseph Pugliese was conducting physical surveillance of a warehouse parking lot in Baltimore City. He observed an individual he knew, Cokie Joe Gopshes, walking near a tractor-trailer that was parked on the lot. Within moments, a yellow box truck registered to appellant parked next to the tractor-trailer. Appellant exited the box truck with his son and a man later identified as "Kyle." Appellant told his son to "start working on the front right tire" and instructed Kyle to "get to the rear tire and start working." Appellant then walked to the back of the box truck, climbed inside, and exclaimed, "who . . . ripped my gun. I'm going to have to do the . . . lug nuts . . . by hand now." Detective Pugliese

observed two of the men approach the front right tire of the tractor-trailer, and heard "metal on metal" and "some type of power tools or a car being worked on."

Coincidentally, a Baltimore City Police helicopter patrolling the area shined a spotlight in the direction of Detective Pugliese and the box truck. After the spotlight had scanned the entire lot, Detective Pugliese observed a person throwing objects, later identified as lug nuts, in his direction. The box truck left the lot shortly thereafter.

As he was returning to his vehicle, Detective Pugliese observed a Chevy Suburban, also registered to appellant, stop near the warehouse parking lot. The detective then observed Mr. Gopshes standing near a fence inside the lot. Approximately ten minutes later, Detective Pugliese heard the tractor-trailer drive away. He located the tractor-trailer approximately one-half mile away and saw Mr. Gopshes exit the driver's side of the tractor. Mr. Gopshes disengaged the trailer from the tractor. He returned to the tractor and drove away, leaving the trailer behind. Detective Pugliese and other detectives attempted to follow Mr. Gopshes, but lost sight of the tractor. Approximately an hour later, while continuing the search for the tractor, Detective Pugliese observed Mr. Gopshes getting picked up by the yellow box truck. Eventually, the detectives found the tractor in a nearby parking lot. Inspecting the tractor, Detective Pugliese noticed "lug nuts kind of sitting on the ground next to some of the tires," and that some of the tires were missing their lug nuts.

On July 13, 2014, Detective Pugliese notified a colleague, Detective Ryan Gregory, of the incident. During his investigation, Detective Gregory learned that the tractor taken from the lot had been leased by Penske Leasing Company ("Penske") to Capital Produce Company. Detective Gregory contacted a representative at Capital Produce, who

confirmed that the company was missing a tractor. The missing tractor was later identified as the same one recovered by Detective Pugliese.

Approximately three weeks later, Detective Gregory executed a search warrant of appellant's residence. Officers executing the warrant recovered several tools and pieces of machinery, including bolt cutters, drills, impact guns, reciprocating saws, toolboxes, wooden blocks, a mallet, a floor jack, and an air compressor. Detective Gregory searched appellant's yellow box truck and discovered an air hose reel, a gas air compressor, various tools and machinery, and three large truck tires. Appellant was ultimately arrested and charged with crimes related to the theft of the Penske tractor.

At appellant's trial, Brett Sauerberger, a representative of Penske, testified about the value of the tractor. Mr. Sauerberger established that the company paid approximately $101,000 for the tractor, but that the company had received "about a 15 percent discount" for buying in bulk. Although he could not determine the exact date of the purchase, Mr. Sauerberger indicated that the tractor was put "in-service" in June of 2014. After factoring in estimated depreciation based on the in-service date, Mr. Sauerberger determined the value of the tractor on July 12, 2014 to be "anywhere between $90,000 and $100,000." The State asked Mr. Sauerberger, "did that number calculate the 15 percent discount you mentioned earlier?" Mr. Sauerberger replied, "Yes."

During its case, the State introduced photographs of the tools and machinery recovered from appellant's home and box truck as well as testimony from Detective Gregory related to those items. Appellant objected, arguing that the evidence was irrelevant and prejudicial. The trial court disagreed, overruling the objection.

Appellant was convicted of the theft-related crimes noted above and sentenced to an executed term of fifteen years of imprisonment. Appellant timely noted this appeal.

DISCUSSION

I.

Appellant first argues that the evidence was insufficient to sustain his convictions for theft and conspiracy to commit theft of property over $100,000. Appellant maintains that the only evidence of the tractor's fair market value was provided by Mr. Sauerberger, who put the value at "anywhere between $90,000 and $100,000." Appellant avers that the State did not establish a necessary element of the theft crimes, specifically that the fair-market value of the stolen property exceeded $100,000.[1]

"The test of appellate review of evidentiary sufficiency is 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.'" *Donati v. State,* 215 Md. App. 686, 718 (2014), *cert. denied*, 438 Md. 143 (2014) (internal citations omitted). "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) (internal citations omitted). "We give due regard to the [fact finder's] findings of facts, its resolution of

[1] Md. Code (2002, 2012 Repl. Vol.) § 7-104(g)(1)(iii) of the Criminal Law Article provides for a penalty of 25 years and/or $25,000.00 fine if the property is valued at $100,000.00 or more. In this case, the trial court instructed the jury that the State was required to prove the property had a value *over* $100,000.00. The verdict sheet was consistent with the jury instruction. The trial court's error in this regard is immaterial to our analysis on evidentiary sufficiency.

conflicting evidence, and significantly, its opportunity to observe and assess the credibility of witnesses." *State v. Suddith*, 379 Md. 425, 430 (2004) (alteration in original) (quoting *State v. Smith*, 374 Md. 527, 534 (2009)) (internal quotation marks omitted). "[T]he finder of fact has the 'ability to choose among differing inferences that might possibly be made from a factual situation.'" *Smith v. State*, 415 Md. 174, 183 (2010) (internal citation omitted). "We defer to any possible reasonable inference [the trier of fact] could have drawn from the admitted evidence and need not decide whether [the trier of fact] could have drawn other inferences from the evidence, refused to draw inferences, or whether we could have drawn different inferences from the evidence." *State v. Mayers*, 417 Md. 449, 466 (2011). "Further, we do not 'distinguish between circumstantial and direct evidence because [a] conviction may be sustained on the basis of a single strand of direct evidence or successive links of circumstantial evidence.'" *Donati,* 215 Md. App. at 718 (alteration in original) (internal citations omitted).

Under Section 7-103(a) of the Maryland Criminal Law Article, the value of stolen property 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." Md. Code (2002, 2012 Repl. Vol.) § 7-103(a) of the Criminal Law Article. Maryland courts define market value as "the price which a purchaser willing, but not compelled, to buy would pay, and which an owner willing, but not compelled, to sell would accept, for the property." *In re Christopher R.*, 348 Md. 408, 412 (1998) (quoting *Marchant v. Mayor and City Council of Baltimore*, 146 Md. 513, 527 (1924)). Market value "may be proven

by direct or circumstantial evidence and any reasonable inferences drawn therefrom." *Champagne v. State,* 199 Md. App. 671, 676 (2011). The owner of property is "presumptively qualified" to testify as to its value. *Pitt v. State,* 152 Md. App. 442, 465 (2003), *aff'd*, 390 Md. 697 (2006). Evidence of the original purchase price of property is relevant to its present market value. *Champagne,* 199 Md. App. at 676 (internal citations omitted). When property is purchased at a discount, however, the market value may exceed the purchase price. *Cf. Jewell v. State*, 216 Md. 110 (1958) (holding that though the owner of a stolen gun purchased it at a "bargain," his testimony that it was worth more than the purchase price on the open market was sufficient to sustain a conviction for a higher grade of larceny).

Here, only Mr. Sauerberger testified as to the value of the tractor. He initially testified that Penske paid "around $101,000" for the tractor, but received a 15% discount on the retail price for buying in bulk. He also testified that the tractor was placed "in-service" on Penske's books in June 2014 (the month before the crime) and that the tractor depreciated $987 for each month in service. He later testified, however, that the value of the tractor was between $90,000 and $100,000 on the date it was stolen. According to Mr. Sauerberger, those figures represented "what it was on Penske's books for," and "calculate[d] the 15 percent discount."

Mr. Sauerberger's testimony is subject to multiple interpretations. The jury could have concluded that the market value of the tractor in June 2014 was the purchase price ($101,000) plus 15%, or approximately $118,823 ($118,823 - $17,823 [15%] = $101,000). Given that the theft occurred on July 12, 2014 (i.e. within approximately one and a half

months of the in-service date), and using a depreciation rate of $987.00 per month, the jury could have concluded that the market value of the tractor was well above $100,000 on the date it was stolen. Alternatively, the jury could have understood Mr. Sauerberger's testimony placing the value between $90,000 and $100,000, "calculat[ing] the 15% discount," to mean the market value was 15% more than those figures, or between $105,882 and $117,647. On the other hand, the jury could have found appellant not guilty of theft over $100,000 by concluding that the market value was between $90,000 and $100,000 as Mr. Sauerberger testified. Though we acknowledge the plausibility of any of these interpretations, our standard of review mandates that we view the evidence in the light most favorable to the State, and defer to the finder of fact in its resolution of conflicting evidence. By convicting appellant in this case, the jury apparently concluded that the market value of the tractor exceeded $100,000. There was sufficient evidence in the record, therefore, to support the jury's verdict.

II.

Appellant next contends that the trial court erred in admitting evidence regarding tools and related items seized from appellant's home and box truck on August 7, 2014. Appellant claims that this evidence was not probative because "too much time had passed between the alleged offense on July 12, 2014, and the seizure of the tools." Appellant further argues that, even if probative, the evidence was "unfairly prejudicial because it suggested that he had all of those tools immediately available to him on July 12, 2014."

"It is frequently stated that the issue of whether a particular item of evidence should be admitted or excluded 'is committed to the considerable and sound discretion of the trial

court,' and that the 'abuse of discretion' standard of review is applicable to 'the trial court's determination of relevancy.'" *Ruffin Hotel Corp. of Md. v. Gasper,* 418 Md. 594, 619 (2011) (internal citations omitted). "Maryland Rule 5-402, however, makes it clear that the trial court does not have discretion to admit irrelevant evidence." *Id.* at 620. Consequently, a trial court's evidentiary ruling encompasses both a legal and a discretionary determination, which in turn implicates two separate standards of review: (1) a *de novo* standard, which we apply to the trial court's legal conclusion that the evidence was relevant; and (2) an abuse of discretion standard, which we apply to the trial court's determination whether the probative value of the evidence is outweighed by any substantial prejudice. *State v. Simms,* 420 Md. 705, 725 (2011).

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Md. Rule 5-401. In other words, evidence is relevant if it is both material and probative. "Evidence is material if it bears on a fact of consequence to an issue in the case." *Smith v. State,* 218 Md. App. 689, 704 (2014). "Probative value relates to the strength of the connection between the evidence and the issue . . . to establish the proposition that it is offered to prove." *Id.* (internal citations and quotations omitted). Generally speaking, evidence that is relevant is admissible; evidence that is not relevant is not admissible. *See* Md. Rule 5-402.

Legally relevant evidence, however, may still be excluded "if the probative value of such evidence is determined to be substantially outweighed by the danger of unfair

prejudice." *Andrews v. State,* 372 Md. 1, 19 (2002). We summarized the applicable principles in *Smith*:

> We determine whether a particular piece of evidence is unfairly prejudicial by balancing the inflammatory character of the evidence against the utility the evidence will provide to the jurors' evaluation of the issues in the case. In order to admit evidence of a "highly incendiary nature," the evidence must greatly aid the "jury's understanding of why the defendant was the person who committed the particular crime charged." A court should *not*, however, admit evidence possessing weak probative value if the evidence might produce a jury inference that the defendant "had a propensity to commit crimes" or "was a person of general criminal character." We exclude prejudicial evidence to avoid the possibility "that a jury will convict the defendant 'because of something other than what he did in that case . . . because of his criminal propensity.'"

218 Md. App. at 705 (alteration in original) (internal citations omitted). The decision whether to admit evidence under Rule 5-403 is "left to the sound discretion of the trial judge and will be reversed only upon a clear showing of abuse of discretion." *Malik v. State,* 152 Md. App. 305, 324 (2003).

We hold that the trial court in this case did not err in admitting photographs of the tools recovered from appellant's home and box truck. The primary fact at issue – appellant's involvement in the theft – hinged on Detective Pugliese, who testified that appellant and his co-conspirators removed the lug nuts from the tractor while it was still in the parking lot. That appellant possessed the necessary tools to perform this task, particularly in the box truck observed at the scene, is relevant to prove that appellant was involved in the commission of the crimes. Moreover, Detective Pugliese testified that he heard "some type of power tools" and that appellant made references to other tools during the theft. Thus, appellant's possession of similar tools, including compression and

hydraulic tools which were not observed on July 12, is probative to determine appellant's criminality. Detective Gregory's testimony concerning the possible uses for a floor jack, reciprocating saw and an impact gun is likewise probative to the theft crimes charged.

Appellant challenges the relevance of the tools on multiple grounds. First, appellant argues that the evidence was not relevant because "too much time had passed" between the theft and the police seizure of his tools. We have said that a "trial court should act sparingly in excluding evidence on the basis of remoteness in time, however, because 'remoteness ordinarily affects the weight, rather than the admissibility, of evidence.'" *Gray v. State*, 137 Md. App. 460, 500-01 (2001), *rev'd on other grounds*, 368 Md. 529 (2002) (quoting *Purviance v. State*, 185 Md. 189, 198 (1945)). For evidence to be relevant, the State did not need to prove that appellant used these tools to commit the crime. Rather "a probability of connection of proffered evidence with a crime is enough to make it admissible, its weight being for the trier of fact to evaluate." *Spriggs v. State*, 226 Md. 50, 52 (1961). Here, the trial court properly admitted the evidence, thereby permitting the jury to weigh the significance of the tools found three weeks after the theft.

Appellant further challenges the relevance of the seized tools because "police had seized receipts showing that many of the tools were purchased after July 12, 2014." As an initial matter, we hold that this argument is not preserved for our review. We will not ordinarily decide an issue "unless it plainly appears by the record to have been raised in or decided by the trial court." Md. Rule 8-131(a). In this case, while appellant did timely object on relevancy grounds when evidence of the tools was admitted, he did not argue the evidence was irrelevant due to the receipts. Rather, the receipts were first mentioned and

admitted into evidence during appellant's cross-examination of Detective Gregory, which occurred after the trial court had ruled that evidence concerning the tools was admissible. As we have said before, "When we determine whether the trial judge committed an error in admitting or rejecting evidence . . . we do so on the basis of the record as of the time the ruling was made, not on the basis of facts later developed." *Duncan v. State*, 64 Md. App. 45, 52 (1985). The receipts were not submitted to the trial court contemporaneously with the ruling on the admissibility of evidence. Therefore, appellant did not preserve this argument for our review.

Assuming *arguendo* that the issue were properly before us, appellant fails to indicate which, if any, of the tools admitted into evidence would be made irrelevant based on those receipts. "We cannot be expected to delve through the record to unearth factual support favorable to appellant and then seek out law to sustain his position." *Van Meter v. State*, 30 Md. App. 406, 408 (1976).

Finally, appellant argues that the admission of evidence related to the tools should have been excluded because it was unfairly prejudicial. We disagree. Appellant's possession of the tools merely indicates that appellant had access to tools that could have been used during the theft (and, inferentially, that he knew how to operate those tools). There was no suggestion that these tools were acquired illegally, that they were used in other crimes, or that they were indicative of some ongoing criminal enterprise. That this evidence was prejudicial in the sense that it hurt appellant's case "is not the undesirable prejudice referred to in Rule 5-403." *Odum v. State,* 412 Md. 593, 615 (2010) (internal citation omitted). In other words, all evidence is, in some respect, "prejudicial" to one side

or the other; otherwise there would be little point in presenting it to the fact-finder for consideration. The question is not whether the evidence was prejudicial, but whether its probative value was *substantially* outweighed by the danger of *unfair* prejudice. Although there is little doubt that the challenged evidence prejudiced appellant, there is nothing to suggest that such prejudice was unfair or that it substantially outweighed its probative value. Accordingly, the trial court did not abuse its discretion in admitting evidence concerning the tools and other items found in appellant's home and box truck.

CONCLUSION

We hold that there was sufficient evidence to sustain appellant's theft convictions based on property with a value of $100,000 or more. We further hold that the trial court did not err in admitting evidence of tools and other items found in appellant's home and box truck three weeks after the theft was committed. We accordingly affirm.

JUDGMENT OF THE CIRCUIT COURT FOR HOWARD COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.