

Circuit Court for Wicomico County
Case Nos. Case No. 22-J-16-000061, Case No. 22-J-16-000062

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 700

September Term, 2016

IN RE: D.M.

Woodward,
Leahy,
Davis, Arrie W.,
(Senior Judge, Specially Assigned)

JJ.

Opinion by Davis, J.

Filed: January 26, 2017

* 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.

On March 24, 2016, two delinquency petitions were filed in the Circuit Court for Wicomico County (Sarbanes, J.) charging appellant, D.M., with armed robbery, robbery, theft of goods valued under \$1,000, second degree assault and reckless endangerment. At an adjudicatory hearing on May 17, 2016, appellant entered a plea of involved as to the robbery count in one case and the court found that appellant committed the delinquent act of robbery. The State entered a *nolle prosequi* on all other counts.

On May 31, 2016, at a sentencing hearing, the court (Seaton, J.) committed D.M. to the Department of Juvenile Services for non-community based residential treatment and ordered him to pay restitution of \$1,075.49.

Appellant filed the instant appeal and asks our review of the following issue, which we quote:

Where [D.M.] was found to have committed the delinquent act of robbery, did the court err in arbitrarily awarding restitution for a two-year-old cell phone, a purse, and a wallet based on half of the original retail cost of the items without any evidence that such amounts represented the items' fair market values, and, when given a range of the amount of cash taken, in awarding the greater amount?

FACTS AND LEGAL PROCEEDINGS

Adjudicatory Hearing

Appellant was charged with two robberies in two separate juvenile petitions leading to two circuit court cases: No. 22-J-16-000061 (“Case 1”), victim: Tony LaRose; and No. 22-J-16-000062 (“Case 2”), victim: Jennifer Mak. The cases were called together. After the court accepted appellant's plea of involved to the robbery count in Case 2, the State entered a *nolle prosequi* as to all the other counts. The State also entered a *nolle prosequi*

of the counts in Case 1 “pursuant to the agreement on restitution” to pay the victim, Tony LaRose.

The facts in support of the plea provide that appellant approached Jennifer Mak as she was walking toward her apartment building at 9:04 p.m. on March 22, 2016, put a BB gun to her head and told her to give him her money. Ms. Mak gave appellant “a black Samsung Galaxy S4 smartphone, a pink leather purse, a yellow leather wallet, approximately \$200 in currency and numerous credit cards and gift cards.” A search incident to appellant's arrest revealed that he was in possession of Ms. Mak's smartphone.

Disposition/ Restitution Hearing

Ms. Mak testified at the restitution hearing that the following items were taken during the robbery: “about \$250” in cash, various gift cards totaling \$258, a Kate Spade wallet for which she paid “about \$85” “maybe a year” ago, a Kate Spade purse for which she paid \$90 “probably like six months” ago, a driver's license, which cost \$20 to replace, a Samsung Galaxy smartphone that cost \$599.99 when she bought it two years prior to the hearing and “a bunch of credit cards.” With respect to the smartphone, when asked if she had an estimate of the fair market value for the device, which was two years old, Ms. Mak replied: “I'm not very sure. I'm not. I'm not familiar with the market. I don't know how much is going, maybe half of it. I don't know. A two years ago phone.” She testified that the phone was in good condition when it was taken but, “I don't know about it now because it's still with the police.” She further testified that the police informed her that the smartphone “has a crack and [one] can't really use it.” Ms. Mak testified that the police

retained the stolen phone. She estimated the total amount for the items taken from her at \$1,302.00 and that that amount includes the "[f]ull value of the phone" because she did not "know the value of the two years." On cross-examination, Ms. Mak testified that she had not personally seen the stolen smartphone and did not personally know whether it was useable. She indicated that, after her phone was taken, she resumed use of her prior phone, an iPhone S4 smartphone.

Regarding the cash amount, Ms. Mak testified that she told the police officer, on the night of the incident, that she had "about \$200" in cash in her wallet but came up with the \$250 cash amount for restitution purposes because she normally keeps "about 200 or \$250" in her wallet.

The court ordered restitution in the amount of \$1,075.49 based on the following assessments:

- \$250 - cash
- \$258 - gift cards
- \$299.99 - smartphone (half of retail cost)
- \$45 - purse (half of price victim paid)
- \$42.50 - wallet (half of price victim paid)
- \$20 - driver's license replacement fee
- \$160 - restitution to Tony LaRose in Case 1, by agreement

With respect to the value assigned to the smartphone, wallet and purse, the court's computation was as follows:

THE COURT: . . . The phone was valued at 599. I'm going to cut that in half, so that will give her 299.50, plus the 508, for the phone is what I'm going to give her because she said, she was trying as guess [sic] she could to guesstimate and she said maybe half.

For the wallet and the purse, I'm going to do the same thing. For the wallet, I'm going to give her 42.50 and for the phone, I'll give her \$90.

* * *

The purse should have been \$45. I'm sorry. So that comes to a total of \$915.45. I find—I depreciated as best I could the phone, the wallet and the purse.

STANDARD OF REVIEW

In reviewing juvenile restitution orders, we articulated, in *In re Earl F.*, 208 Md.

App. 269, 275 (2012), that

[w]e review the juvenile court's restitution for an abuse of discretion. *In re Delric H.*, 150 Md. App. 234, 240 (2003). The juvenile court's legal determination is subject to *de novo* review, because we must ascertain whether the amount is permitted by law. *See generally Walczak v. State*, 302 Md. 422, 425–27 (1985).

DISCUSSION

Appellant addresses the awards for restitution in three sections: the smartphone, the remaining stolen items (“other stolen items”) and the stolen currency. Regarding the smartphone, appellant first argues that it was error for the court to award restitution for the item, which had been recovered and was in police possession, without evidence that it was actually damaged beyond use, *i.e.*, economic loss. Alternatively, appellant argues that, if the court did not err in awarding restitution, the amount awarded was arbitrarily depreciated, not based on competent evidence. Appellant also argues that the other stolen items were arbitrarily depreciated and that the restitution awarded was not based on

competent evidence. Finally, appellant argues that the restitution amount awarded for the stolen cash was based on the highest estimate testified to by the victim, which constituted guesswork, not competent evidence provided by the State. Therefore, appellant requests that “the appeal be remanded for a new restitution hearing.”

The State responds that the juvenile court did not abuse its discretion; it properly ordered restitution based upon Ms. Mak’s testimony and a determination of reasonable depreciation. The State maintains that appellant’s reliance upon *Champagne v. State*, 199 Md. App. 671 (2011) is misguided. In its brief, quoting *Champagne*, the State asserts that, “[i]n contrast to used computer equipment, there is no support for [appellant’s] reading of *Champagne* to suggest that cell phones are ‘subject to accelerated obsolescence’ or that manufacturers are ‘constantly releasing new, improved technology,’ much less doing so ‘at lower prices.’” In sum, the State argues that “[t]he record and controlling authority refute” appellant’s claim that the juvenile court ordered restitution based on “guesstimates” rather than competent evidence. Accordingly, the State requests that the restitution order be affirmed.

The Other Stolen Items

“Maryland law confers upon a juvenile court broad discretion to order restitution.” *In re Don Mc.*, 344 Md. 194, 201 (1996). However, “[t]he juvenile court only has the ability to award restitution for reasonable sums that have already been incurred that are causally related to the juvenile’s delinquent acts.” *In re John M.*, 129 Md. App. 165, 185 (1999), *superseded by statute on other grounds, as stated in McDaniel v. State*, 205 Md. App. 551

(2012).

Md. Code Ann., Crim. Proc. (CP) § 11–603 governs the award of adult and juvenile restitution and provides, in relevant part:

(a) 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;

(2) as a direct result of the crime or delinquent act, the victim suffered:

(i) actual medical, dental, hospital, counseling, funeral, or burial expenses or losses;

(ii) direct out-of-pocket loss;

* * *

(b) A victim is presumed to have a right to restitution under subsection (a) of this section if:

(1) the victim of the State requests restitution; and

(2) the court is presented with *competent evidence* of any item listed in subsection (a) of this section.

(Emphasis supplied). “‘Competent evidence’ is simply evidence that is reliable and admissible.” *Juliano v. State*, 166 Md. App. 531, 540 (2006).

Furthermore, we have “consistently held that the only amount of restitution which the statute authorizes is the fair market value of the stolen or destroyed property.” *In re Christopher R.*, 348 Md. 408, 412 (1998). “‘Fair market value’ is ‘the price in cash which property will bring when it is offered for sale by one who desires but is not obligated to

sell and is bought by one who desires but is not obligated to buy.’” *In re William George T.*, 89 Md. App. 762, 776 (1992) (quoting *In re Trevor A.*, 55 Md. App. 491, 501 (1983)).

In determining the fair market value of items for purposes of restitution, generally “[t]he present market value of stolen property may be proven by direct or circumstantial evidence and any reasonable inferences drawn therefrom.” *Champagne*, 199 Md. App. at 676 (citing *Wallace v. State*, 63 Md. App. 399, 410 (1985)). Therefore, “a property owner’s testimony regarding the original purchase price is ‘circumstantially relevant to the present market value’ of that property.” *Id.* Moreover, a court’s award of restitution “should 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.” *Wallace*, 63 Md. App. at 411.

In *Trevor A.*, 55 Md. App. at 501, the trial court was deemed to have appropriately considered the fair market value of the stolen items when it “properly considered the owner’s testimony as to replacement value and as to the age and condition of each item . . . and then took judicial notice of appreciation or depreciation of each item in arriving at what it considered to be fair market value.” (Citations omitted). *See also Kares v. State*, 4 Md. App. 366, 368 (1968) (citations omitted) (“The owner’s appraisal had probative force . . . and the trier of fact could, aided by the relatively recent purchase prices, estimate the value of these ordinary articles, each of which had been precisely described without the help of expert testimony.) We noted in *Trevor A.* that, “[a]lthough we may not agree with the amounts that the trial court placed on each and every item, we cannot hold that the trial

court was clearly erroneous” when compliant with the fair market value standard. 55 Md. App. at 501–02.

In the case *sub judice*, the court did not abuse its discretion in its award of restitution for the other stolen items. As the owner, Ms. Mak’s testimony regarding the original retail purchase price of the other stolen items was probative. *Kares, supra*. The juvenile court, aided with this information, estimated the depreciation of the items and, thereby, derived their fair market value. Although another court may disagree with the amount, as *Wallace, supra*, instructs, the restitution award should not be overturned because the court arrived at its estimate without direct evidence of the fair market value. The court drew fair inferences of the other stolen items’ fair market value based on Ms. Mak’s testimony concerning the purchase price. We affirm the juvenile court’s award of restitution for the other stolen items.

Stolen Smartphone

Although circumstantial evidence may suffice in determining the fair market value of stolen items, as it pertains to the market value of computer equipment, testimony solely of the original purchase price is generally insufficient. It is “common knowledge that in the field of computer technology advances are constantly being made so that used equipment depreciates in value over relatively short periods of time.” *Christopher R.*, 348 Md. at 412–13. Therefore, ““testimony as to the manner in which the [technology] items ha[ve] been used, [their] general condition and quality, or [their] depreciation percentage” are generally warranted. *Champagne*, 199 Md. App. at 676–77 (quoting *Doane v. State*,

847 So. 2d 1015, 1018 (Fla. 5th Dist. Ct. App. 2003)).

In the instant case, the only evidence provided, as it pertains to the condition of the recovered smartphone, was victim Ms. Mak’s testimony that the police told her “it has a crack and [one] can’t really use it.” However, Ms. Mak also testified that she has not seen the phone since its recovery and could not personally confirm the extent of damage to the item or if it was usable. Therefore, the sole evidence provided by the State to support an award of restitution for the recovered smartphone was Ms. Mak’s testimony as to what the police told her, which constitutes hearsay testimony evidence, which is typically inadmissible without an exception to permit its admission.

We held, in *Delric H.*, 150 Md. App. at 249, that “a juvenile court has the discretion, in the interest of justice, to decline the strict application of the Maryland Rules of Evidence (§ 5–101 *et seq.*) in a restitution hearing.” However, “even though a court may decline to require a strict application of evidentiary rules, there still exists an inherent reliability/credibility requirement which a proponent of the offered evidence must satisfy.” *Id.* at 248–49. Appellant has not asserted, in his brief, that he objected at the hearing or that Ms. Mak’s testimony, concerning what the police told her, was contrary to the interests of justice. Nor does appellant claim that this issue is preserved for our review. Accordingly, we hold that Ms. Mak’s testimony that the police told her the smartphone was not usable, was permissible, competent evidence. The circuit court was within its discretion to find the testimony credible and a proper basis for restitution.

However, the *amount* of the award for restitution is a different matter. The court

clearly based the amount of restitution awarded for the smartphone solely upon Ms. Mak’s testimony regarding its original purchase price and the phone’s current condition, as suggested to her by the police. Although this may suffice for a nontechnology item, it does not for a technological device. Without testimony or evidence as to the depreciation value, it is difficult to determine the fair market value of a piece of technology.

The State, asserts that the requirements of *Champagne, supra*, are inapplicable here, because there “is no support for [appellant’s] reading of *Champagne* to suggest that cell phones are ‘subject to accelerated obsolescence’ or that manufacturers are ‘constantly releasing new, improved technology,’ much less doing so ‘at lower prices.’” The device at issue, however, is more than just a basic cell phone. It is uncontested that the device at issue, a Samsung Galaxy S4, is a smartphone. Smartphones incorporate more computer technology than a traditional cell phone and, in many instances, function like portable computers.¹ *See Riley v. California*, 134 S.Ct. 2473, 2489 (2014) (“The term ‘cell phone’ is itself misleading shorthand; many of these devices are in fact minicomputers that also happen to have the capacity to be used as a telephone.”).

Furthermore, anyone who has recently purchased a smartphone understands that the feeling of having the “latest technology” is short-lived. It is axiomatic that technology

¹ CAMBRIDGE DICTIONARY ONLINE (last visited Dec. 19, 2016), *available at*: <http://dictionary.cambridge.org/us/dictionary/english/smartphone>. “A mobile phone that can be used as a small computer and that connects to the internet.” MERRIAM-WEBSTER DICTIONARY ONLINE (last visited Dec. 19, 2016), *available at*: <https://www.merriam-webster.com/dictionary/smartphone>. “A cell phone that includes additional software functions (as e-mail or an Internet browser).”

companies consistently and frequently release newer models, rendering the previous versions, much to their owners' dismay, obsolete. Accordingly, we hold that appellant's smartphone does function like a computer for evidentiary purposes under *Champagne* and, therefore, testimony or evidence pertaining to the depreciation of the value of the device was warranted. We note that price listings for two-year old smartphone models are readily available online and would have sufficed to fulfill the State's burden.

Stolen Cash

Finally, appellant argues that the restitution amount for the stolen cash is arbitrary because the juvenile court awarded the highest estimate provided by the testimony of the victim. We disagree. The court, as the finder of fact, has the authority to weigh the evidence presented and deem testimony credible. In listening to Ms. Mak's testimony, the juvenile court found that her estimate of \$250 cash to be credible. We accord deference to a trial court's assessment of the facts and will reverse only upon a clear abuse of discretion. *Titus v. State*, 423 Md. 548, 557–58 (2011). Upon our review of the record, no such abuse exists. Accordingly, we hold that the juvenile court's award of restitution for the \$250 stolen cash to be based on competent evidence, *i.e.*, owner witness testimony, and, therefore, permitted under law.

CONCLUSION

In sum, we hold that restitution regarding the cash and the stolen items, other than the smartphone, was properly awarded by the circuit court. Restitution regarding the amount awarded for the phone was made in error without testimony as to the depreciation

value of the smartphone, a technological instrument. Therefore, the order of restitution for the phone is vacated and the case is remanded to the circuit court for a hearing regarding the depreciation of the recovered smartphone.

**JUDGMENT OF THE CIRCUIT COURT
FOR WICOMICO COUNTY VACATED
IN PART AND AFFIRMED IN PART.**

**COSTS TO BE PAID TWO-THIRDS BY
APPELLANT AND ONE-THIRD BY
THE STATE.**