Circuit Court for Cecil County
Case No: C-07-CR-20-000380

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND*

No. 2072

September Term, 2022

DAVID ARLON BROWN, SR.

v.

STATE OF MARYLAND

Nazarian,
Ripken,
Kenney, James A., III,
(Senior Judge, Specially Assigned),

JJ.

Opinion by Kenney, J.

Filed: January 16, 2024

*This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Rule 1-104(a)(2)(B).

This case arises from an order of restitution entered by the Circuit Court for Cecil County against David Arlon Brown, Sr., appellant. In November 2021, appellant entered an *Alford* plea to one count of first-degree burglary. He was sentenced to incarceration for a period of ten years with all but eighteen months suspended. After a hearing on June 24, 2022, appellant was ordered to pay restitution in the amount of $24,975.47 to the victim of the burglary. Appellant filed an application for leave to appeal which we granted on February 1, 2023.

ISSUE PRESENTED

The sole issue presented for our consideration is whether the circuit court erred in awarding restitution based on the replacement value of the items taken in the burglary rather than the fair market value. For the reasons set forth below, we shall affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Appellant was charged in the circuit court with a number of crimes including first-degree burglary of the dwelling house of his neighbor, Candace Hemrick-Gooch ("Ms. Hemrick"). On November 29, 2021, he entered an Alford plea to a single count of first-degree burglary. After appellant was sentenced, the circuit court held a contested hearing on the issue of restitution.

The victim, Ms. Hemrick, testified at the restitution hearing that, on or about January 8, 2020, there was a burglary in her rented apartment when she was staying with relatives following surgery. According to Ms. Hemrick, the entire place was cleared out: "[w]e lost, like, everything." She reported the loss to her insurance company. With help from an insurance agent, Ms. Hemrick prepared a loss inventory sheet that included, among other

things, the identity and quantity of each item stolen, the item's age and condition, and the pre-tax replacement cost. She provided her insurer with photographs, receipts, and items that were recovered from pawn shops. The loss inventory sheet included a loss of $7,608 that was comprised of $6,008 for lost jewelry, $1,100 for cash, and $500 for gift cards. The total amount of the loss claimed was $40,275.47. According to Ms. Hemrick, the insurance agent adjusted some of the amounts claimed and "appraised everything, I guess, at the value that it would be at the time it was stolen." Her policy limits were $15,800 with a $500 deductible.

On cross-examination, Ms. Hemrick was questioned about an email sent by Travelers to the prosecutor several days prior to the restitution hearing. In that email, the insurer did not use the loss of $40,275.47 claimed on the loss inventory sheet. Rather, it estimated her loss to be $32,322.18, and then deducted $7,102.36 for depreciation. That results in a total loss of $25,219.82, which was $9,419.82 over the limits of Ms. Hemrick's insurance policy. Ultimately, she received a check from her insurer in the amount of $15,300, which represented the full amount payable under her insurance policy.

Ms. Hemrick sought restitution from appellant in the amount of $24,975.47, which was the difference between what she received from her insurer and $40,275.47, the total amount of her claimed loss resulting from the burglary. On cross-examination, the court inquired as to why the insurer estimated the total loss to be $32,322.18 instead of the $40,275.47 listed on the loss inventory. Ms. Hemrick speculated that the insurer applied additional depreciation. The prosecutor stated it was "for internal reasons[,]" but he did not "have any documentation on that[.]" According to Ms. Hemrick, some of the items

that had been pawned were returned to her "damaged and broken[.]" As to the application for statement of charges that indicated a loss in the amount of $12,556.94, she testified that that amount represented only "the stuff that they actually recovered" from pawn shops. The loss inventory sheet, on the other hand, contained everything that "was claimable on [her] insurance."

The State argued that it had met its burden of proving a loss in the amount of $24,975.47. In response, defense counsel made the following arguments:

> Your Honor, there are always – these cases always put the defendant at a disadvantage, because the people go back over, they have an original set of facts, and then two years later or whatever, it has grown immensely from what it was originally. And this is, this is one of those cases.
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> The rest of it, and, I mean, this thing has gotten three times bigger than it was originally from the first – from the 12,000 – whatever-it-was in the – and I know that's just a, you know – we don't usually have the luxury of going back and adding all these things up, receipts or no receipts. And I don't know – it sounds like the insurance company did its due diligence in whatever was ultimately submitted. If they'd submitted a $12,000 – then submitted $12,000-some claim, even a $15,000 claim originally, she would have been made whole, whole. And you've got years that have gone on because of the COVID delays in this case and so on and so forth. And now we come up to a $40,000, you know. I don't know what – it just – it defies logic.
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> I understand that the rules for prima facie showing – you can say anything you want. You can show anything. And the insurance company doesn't agree, obviously, on the 40. They came up with 32 based on, I guess, the evidence that she presented to them, and then depreciated it by 7,000 down to 25 or so, if we're going to talk in whole numbers. And either way it seems – it seems outrageous.
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> And I know that he pled to the thing, and there was no limit on the – it's a burglary first degree. I don't know who else had access to the – we don't know. He's going to get stuck with the bill regardless at this point.

> There's nobody else on the hook. So I'm asking the Court to consider, at the bottom, $500, at the top, the 9,000. That's the difference between what the insurance company would have paid if she had a full policy and what she claimed.
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> * * *
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> I don't know how old these things are, you know, this long list. Some of these things – item age on this, 13 years old, 10 years old, 20 years old. In real life at a yard sale, some of these things, they'd be worthless.
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> * * *
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> We're, you know, we understand it's up to the Court and the State's done its job, and I think we've done our job. There is no real way to determine what the loss is, but that's it.

The court found Ms. Hemrick "to be very credible" and noted that the loss inventory was prepared close in time to the burglary. The court determined that Ms. Hemrick's loss was the amount listed on the loss inventory sheet less the $15,300 received from the insurance company. The court entered a judgment of restitution against appellant in the amount of $24,975.47.

STANDARD OF REVIEW

In Maryland, a court's authority to enter an order of restitution against a criminal defendant is statutory. *See* § 11-603 (authorizing restitution order as part of a sentence) and § 6-221 (authorizing restitution order as a condition of probation) of the Criminal Procedure Article of the Maryland Code ("CP"). Restitution is a criminal sanction, not a civil remedy. *State v. Stachowski*, 440 Md. 504, 512 (2014). In *Pete v. State*, 384 Md. 47, 55 (2004), the Court of Appeals recognized that restitution:

> serves at least three distinct purposes. First, it "is a form of punishment for criminal conduct." *Songer v. State*, 327 Md. 42, 46 (1992). Second, it is

> intended to rehabilitate the defendant. *Anne Arundel County v. Hartford Accident and Indem. Co.*, 329 Md. 677, 685 (1993) (citing *Lee v. State*, 307 Md. 74, 78 (1986)). Lastly, it affords "the aggrieved victim recompense for monetary loss." *Id.* (quoting *Lee v. State*, 307 Md. 74, 78 (1986)).

Ordinarily, we review both the decision to award and the amount of restitution for abuse of discretion. *See In re Cody H.*, 452 Md. 169, 181 (2017) (citing *Silver v. State*, 420 Md. 415, 427 (2011)); *see also Wiredu v. State*, 222 Md. App. 212, 228 (2015) ("The decision to order restitution pursuant to CP § 11-603 and the amount lie within the trial court's sound discretion and we review the trial court's decision on the abuse of discretion standard."). In doing so, we "'give due regard to the fact finder's finding of facts, its resolution of conflicting evidence, and, significantly, its opportunity to observe and assess the credibility of witnesses.'" *Angulo-Gil v. State*, 198 Md. App. 124, 151 (2011) (quoting *Ashton v. State*, 185 Md. App. 607, 613 (2009)). Accordingly, "[f]irst-level findings of fact are reviewed for clear error." *In re A.B.*, 230 Md. App. 528, 531 (2016). However, when a restitution order involves the interpretation or application of Maryland law, we review the order *de novo*. *In re G.R.*, 463 Md. 207, 213 (2019) (citing *Goff v. State*, 387 Md. 327, 337-38 (2005)).

DISCUSSION

Appellant contends that in reaching its restitution award of $24,975.47, the court erroneously used the replacement value of the stolen items instead of the fair market value of the goods. That issue was not preserved properly for our consideration. Md. Rule 8-131(a) ("Ordinarily, an appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court[.]"). Our review

of the record makes clear that appellant did not argue in the circuit court that restitution should be calculated using the fair market value as opposed to the replacement value of the stolen goods. Appellant's argument at the restitution hearing focused generally on the difficulty in determining the actual value of the loss. Defense counsel stated, "we understand it's up to the Court and the State's done its job, and I think we've done our job. There is no real way to determine what the loss is, but that's it." Other than a passing reference to the value of some of those things at a yard sale, the defense did not offer any evidence of the fair market value of any specific items that were stolen or make any argument that such values should be used by the court to calculate the appropriate amount of restitution. We recognize that there were questions raised about the value of items under an insurance policy and coverage for particular items, but on this record, we decline to consider appellant's argument with respect to the circuit court's determination of the amount of restitution.

Appellant encourages us to exercise our discretion and grant plain error review. "Plain error is 'error which vitally affects a defendant's right to a fair and impartial trial.'" *Diggs v. State*, 409 Md. 260, 286 (2009) (quoting *State v. Daughton*, 321 Md. 206, 211 (1990)). To be sure, appellate courts have discretion under Md. Rule 8-131(a) to address an unpreserved issue, but it is rarely done because:

> considerations of both fairness and judicial efficiency ordinarily require that all challenges that a party desires to make to a trial court's ruling, action, or conduct be presented in the first instance to the trial court so that (1) a proper record can be made with respect to the challenge, and (2) the other parties and the trial judge are given an opportunity to consider and respond to the challenge.

Chaney v. State, 397 Md. 460, 468 (2007).

Plain error review "'1) always has been, 2) still is, and 3) will continue to be a rare, rare phenomenon.'" *Kelly v. State*, 195 Md. App. 403, 432 (2010) (quoting *Hammersla v. State*, 184 Md. App. 295, 306 (2009)), *cert. denied*, 417 Md. 502, *cert. denied*, 563 U.S. 947 (2011). We review an unpreserved error under the plain error doctrine "only when the unobjected to error [is] compelling, extraordinary, exceptional or fundamental to assure the defendant a fair trial." *Id.* (quotation marks and citations omitted). In the case at hand, the applicable statute, CP § 11-603, does not require a particular method to be used for calculating the amount of restitution. As there was no clear error in the circuit court's decision to base the restitution award on the evidence presented by the State, we are not persuaded to exercise our discretion to review for plain error.

Although not necessary to our decision in this case, we note that even if the issue presented had been preserved properly for our consideration, appellant would fare no better. We review a circuit court's restitution order for abuse of discretion. *Silver*, 420 Md. at 427. The award of restitution in the instant case is governed by CP § 11-603, which provides, in part, that a court may enter a judgment of restitution if, "as a direct result of the crime . . . property of the victim was stolen, damaged, destroyed, converted, or unlawfully obtained, or its value substantially decreased[.]" CP § 11-603(a)(1). "A victim is presumed to have a right to restitution under subsection (a) of this section if: (1) the victim or the State requests restitution; and (2) the court is presented with competent evidence of any item listed in subsection (a) of this section." CP § 11-603(b). The plain

and unambiguous language of the statute[1] requires only that the court be presented with "competent evidence" of the stolen items.[2] To be competent to support a restitution award, the evidence must be "reliable, relevant, admissible, and trustworthy." *In re Cody H.*, 452 Md. at 192. It does not require the court to use a specific method for calculating the amount of restitution.

At the hearing, Ms. Hemrick, whom the court found "very credible," testified that the insurance company adjusted the amounts listed on the loss inventory sheet to reflect the value of the items at the time they were stolen, and that its payment was limited to the insured items. The circuit court was presented with competent evidence supporting its restitution award, including Ms. Hemrick's testimony, the loss inventory sheet, and evidence of the insurance payment. *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

[1] Appellant argues that the rule of lenity should apply and require the use of fair market value in determining the amount of restitution. The rule of lenity is a principle of statutory construction used to resolve statutory ambiguity in a criminal statute. *Oglesby v. State*, 441 Md. 673, 681 (2015). "'It is a tool of last resort, to be rarely deployed and applied only when all other tools of statutory construction fail to resolve an ambiguity.'" *Johnson v. State*, 467 Md. 362, 390 (2020) (quoting *Nichols v. State*, 461 Md. 572, 602 (2018)). The rule does not apply in the instant case because there is no ambiguity in CP § 11-603. That statute does not identify the use of any particular valuation method for a restitution award. It merely requires that the determined value be based on "competent evidence."

[2] In support of his argument that the circuit court should have used the fair market value in calculating the restitution award, appellant relied, in part, on a former statute that applied to juvenile cases and various cases involving that statute. The former juvenile statute and cases that interpreted and applied it are not applicable to the case at hand. Appellant also referenced the method for determining value used by the theft statute, § 7-103(a) of the Criminal Law Article. That statute applies only to theft crimes and is not applicable to the crime of first-degree burglary.

[or her] goods."), *aff'd on other grounds*, 390 Md. 697 (2006). Although there was some evidence suggesting that the insurer used lower values than those listed on the loss inventory in order to account for depreciation on the covered items, that was simply speculation; there was no competent evidence presented as to how the insured values were actually determined. In short, we perceive neither legal error nor an abuse of discretion in the court's restitution award.[3]

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

[3] We find no merit in appellant's argument that some items were returned to the victim. Ms. Hemrick testified that, although several items were returned to her, they were damaged and broken. In addition, although there were differences between the values listed on the statement of charges and the loss inventory sheet, Ms. Hemrick testified that the statement of charges did not cover everything that was taken and the court credited her testimony.