Circuit Court for Harford County
Case No. C-12-CR-18-000340

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2122

September Term, 2019

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JAYSON JOHN FRICKE

v.

STATE OF MARYLAND

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Fader, C.J.,
Beachley,
Eyler, James R.
(Senior Judge, Specially Assigned),
JJ.

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Opinion by Beachley, J.

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Filed: February 5, 2021

After a jury trial in the Circuit Court for Harford County, Jayson John Fricke, appellant, was convicted of one count of theft of property having a value of less than $1,000 for events that transpired on September 18, 2017; one count of theft of at least $1,000 but less than $10,000 for events that transpired on September 29, 2017; one count of theft of at least $100 but less than $1,500 for events that transpired on October 10, 2017; and, two counts of theft of at least $1,500 but less than $25,000 for events that transpired on November 16 and 27, 2017.[1] The court sentenced appellant to a total of eleven-and-a-half years' imprisonment, with all but one year suspended, to be served in the Harford County Detention Center. The court also ordered restitution in the amount of $11,758.30. This timely appeal followed.

## QUESTIONS PRESENTED

Appellant presents the following two questions for our consideration:

> I. Was the evidence sufficient to convict [a]ppellant?
>
> II. Where [a]ppellant was acquitted of theft on one date and not charged with theft on a second date, did the court err in ordering him to make restitution for money allegedly stolen on those dates?

For the reasons set forth below, we shall reverse and remand the order of restitution. In all other respects, the judgments shall be affirmed.

[1] Appellant was charged with and convicted of various thefts in violation of § 7-104 of the Criminal Law Article. Two of the charges involved thefts alleged to have occurred on September 18 and 29, 2017, and the remaining charges involved thefts alleged to have occurred after October 1, 2017. Effective October 1, 2017, as a result of the Justice Reinvestment Act, 2016 Md. Law Ch. 515, the penalties for theft were altered. This amendment was reflected in the amounts alleged for the thefts that occurred in September and those that occurred thereafter.

## FACTUAL AND PROCEDURAL BACKGROUND

Patrick and Kelly Cullum own Best Friends Fur Ever, Inc. ("BFFE"), a pet day care and overnight facility that provides a wide range of pet care services.[2] The company has two locations, one in Joppa, in Harford County, which opened in 2004, and another in Cockeysville, in Baltimore County, which opened in 2012. BFFE employs approximately 45 people at each location, although that number changes seasonally. On August 28, 2017, appellant was hired as the site leader for the Harford County location. His responsibilities included managing the daily operations of the facility, ensuring that procedures and checklists were followed, keeping track of daily revenue, preparing a weekly spreadsheet, and depositing checks and cash into BFFE's account at PNC Bank.

Appellant's direct supervisor was Michelle Selby, the director of operations, whose responsibilities included payroll and onboarding new employees. On appellant's third day of employment, Selby provided training for him pertaining to the company's "financials" and its computer software.

Beginning in late April or early May 2017, BFFE began using a computer program known as Ginger that tracked many of the company's business functions such as client contact information, reservations, and revenue, including all cash, check, and credit card transactions. Ginger was also used to generate various financial reports.

[2] Although Patrick Cullum is a co-owner of BFFE, he maintained other employment until 2017, leaving Kelly Cullum to take care of the day-to-day operations. In late 2017, Patrick Cullum retired from his other place of employment and began working at BFFE on a full-time basis.

At the end of each shift, front desk employees collected credit card receipts, checks, and cash. They filled out a drop form itemizing those items, confirmed that the total revenue on the drop form matched information in Ginger, and put the drop form, cash, and checks into BFFE's safe. Appellant, who had the combination to the safe, was responsible for collecting the drop sheets, cash, and checks from the safe, validating the information, preparing a spreadsheet that was sent to the company's accountant, and depositing the checks and cash in BFFE's bank account. If there was a discrepancy, it was appellant's responsibility to "raise a flag." Kristin Powers, the front desk manager, testified that typically there were no discrepancies between the cash in the register at the end of the day, and Ginger's revenue log for that same day. When there were discrepancies, however, they were generally less than $50. Kelly Cullum, Selby, and appellant had the combination to the safe.

The company's week, for financial purposes, ran from Sunday to Sunday. Typically, the books were reconciled and deposits were made on Mondays. Selby was not aware that anyone made deposits on appellant's behalf and testified that "it was 100 percent [appellant's] responsibility to ensure that the deposit was made."

After BFFE began using Ginger, a need arose to have petty cash on hand. The petty cash was used for a variety of purposes, including reimbursing employees who used their personal vehicles for a work purpose, purchasing food for dogs, and providing tips for groomers in cases where a client provided for a tip on a credit card. At one point, the washer and dryer at the Harford County location broke down and BFFE spent two to three hundred dollars several times per week at a laundromat. The money used for the

laundromat was taken from the petty cash box. According to Kelly Cullum, using petty cash to pay for laundry was a common occurrence at BFFE.

The petty cash box started with $300. Initially, a log book similar to a checkbook ledger was placed in the petty cash box. Front desk workers would log in the amount of money they were withdrawing, as well as the purpose for their withdrawal. If there was money returned to the petty cash box, it was logged in. Several employees, including appellant, had the code required to open the petty cash box. The petty cash was replenished from the weekly cash drops, and that amount was to be deducted from the amount deposited at the bank and noted on the weekly revenue spreadsheets that were sent to the accountant.

After appellant was hired, he eliminated the log book used to record petty cash transactions and replaced it with a system that required sticky notes to be placed in the petty cash box. The same information that was collected in the log book was supposed to be included on the sticky notes. Powers described the petty cash box containing the sticky notes as "a mess" and said that she did not have a firm handle on what was going in and out.

Throughout appellant's employment, there were problems reconciling the company's books with the information provided by Ginger. Sometimes the books comported with the information provided by Ginger and sometimes they did not. BFFE's accountant advised Kelly Cullum in late October 2017 that there were discrepancies between the information provided by Ginger and the bank records. Initially, the investigation focused on whether Ginger was properly recording transactions, as it was a new system.

On a weekly basis, Kelly Cullum communicated with Selby, who in turn communicated with appellant about the accounting problems. Ultimately, appellant was never able to master the process. According to Selby, appellant initially made multiple deposits instead of a single weekly deposit, but he was apparently able to correct the issue after she spoke with him. Other problems with the deposits persisted, including that they were not made on Mondays, did not correlate to a single day's revenue, and were lower than the figures provided by Ginger. Selby communicated her concerns to appellant throughout his employment.

In preparation for appellant's ninety-day employment review on December 2, 2017, Patrick Cullum spoke to appellant's superiors and other employees to see how they viewed appellant as a leader. At that time, Patrick and Kelly Cullum and Selby began investigating the deposits that appellant was supposed to have made and the financial information obtained from Ginger. They also reviewed security camera footage, but the system maintained only ten days of footage before the files were recorded over. They discovered missing cash deposits over the course of several months. Initially, they believed that $7,000 to $8,000 was missing, and they concluded that appellant was "the only person that had access to that level of cash and had that responsibility for deposits." Later, after further analysis, the deficiencies from the expected deposits increased.

Selby did not find any documentation to show that money from the cash deposits had been used to replenish the petty cash. Selby discovered the following discrepancies between the deposits made and the amount that should have been deposited according to Ginger: (1) on September 18, 2017, $3,412 was deposited but the amount that should have

been deposited was $4,275.25; (2) On September 29, 2017, $1,755 was deposited but the amount that should have been deposited was $3,280.25; (3) on October 10, 2017, $2,636 was deposited but the amount that should have been deposited was $3,610.30; (4) on October 28, 2017, $2,915 was deposited but the amount that should have been deposited was $4,274.74; (5) on November 8, 2017, $1,171 was deposited but the amount that should have been deposited was $4,515.86; (6) on November 16, 2017, $2,090 was deposited but the amount that should have been deposited was $3,823.10; and, (7) on November 27, 2017, $1,107.50 was deposited but the amount that should have been deposited was $3,065.30.

In late September and early October 2017, around the time of the September 29, 2017 deposit, appellant, Selby, and Kelly Cullum attended a professional conference in Florida. At trial, Kelly Cullum was questioned about the dates of that conference as follows:

> Q. Okay. Now, Ms. Cullum, do you recall a period from approximately September 27th through October 5th that you attended a conference in Jacksonville, Florida?
>
> A. Yes.
>
> Q. Okay. And Mr. Fricke was at that conference with you, correct?
>
> A. Yes.

Selby was also questioned about the dates of the conference:

> Q. Now, I'd like to take a second to discuss September 29th with you. Do you know where you were on September 29th?

A. On September 29th, I was getting ready to go to IBPSA [the International Boarding Pet Services Association conference]. I was not home yet. I was still home, but I had not yet left.

* * *

Q. Who went to the IBPSA?

A. [Appellant] went with me, and Kelly, the owner, met us down there.

Q. Do you know when that training was? The conference, sorry. When that conference was?

A. We left for the conference on the 30th. Our flight was Southwest in the morning and we came back Friday, were home around midday.

On December 2, 2017, the date originally scheduled for appellant's ninety-day performance review, the Cullums spoke with appellant about his job performance and the missing money, and then terminated his employment. Appellant commented that he "actually figured this is why we were meeting today[.]" Appellant brought his company property, including a laptop and credit card, to the meeting, and following his termination, he returned the items. Appellant denied taking any money and said that he thought it was coming out of petty cash. He also said that he felt responsible because he was the site leader and that the monies went missing on his watch.

## DISCUSSION

### I.

Appellant contends that the evidence was insufficient to sustain his convictions because the State's evidence, at most, created a mere suspicion of his guilt. According to appellant, "[t]he data in Ginger reflected directly not how much money the business made but, rather, what information had been entered manually into the system." He argues that

a receptionist might have erroneously recorded revenue. Appellant acknowledges that he failed to record when he replenished the petty cash with revenues, but he argues that "that does not permit the inference . . . that he did not use the revenues for this purpose and instead stole the money." He maintains that other employees had access to BFFE's money and that the State failed to present any "firm evidence" that he made all of the "short deposits or that he ever possessed any of the allegedly missing money." In support of his argument, appellant points to conflicting evidence as to whether he was attending a conference in Florida on the date one of the September 2017 deposits was made. He also directs our attention to the State's failure to produce copies of bank deposit slips, evidence showing deposits into his own bank account, evidence of large purchases made by him, and surveillance footage. We are not persuaded by appellant's sufficiency argument.

In considering a challenge to the sufficiency of the evidence, we must 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." *State v. Thomas*, 464 Md. 133, 152 (2019) (quotation marks omitted) (quoting *Albrecht v. State*, 336 Md. 475, 499 (1994)). "That standard applies to all criminal cases, regardless of whether the conviction rests upon direct evidence, a mixture of direct and circumstantial, or circumstantial evidence alone." *Smith v. State*, 415 Md. 174, 185 (2010) (citing *State v. Smith*, 374 Md. 527, 534 (2003)).

"[W]e defer to the fact finder's 'resolution of conflicting evidence, and, significantly, its opportunity to observe and assess the credibility of witnesses.'" *Riley v. State*, 227 Md. App. 249, 256 (2016) (quoting *State v. Suddith*, 379 Md. 425, 430 (2004)).

This is because weighing "the credibility of witnesses and resolving conflicts in the evidence are matters entrusted to the sound discretion of the trier of fact." *In re Heather B.*, 369 Md. 257, 270 (2002) (quoting *In re Timothy F.*, 343 Md. 371, 379-80 (1996)). The jury is free to "accept all, some, or none" of a witness's testimony. *Correll v. State*, 215 Md. App. 483, 502 (2013) (quoting *Allen v. State*, 158 Md. App. 194, 251 (2004)), *cert. denied*, 437 Md. 638 (2014). "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 any inference, but whether the inference [it] did make was supported by the evidence.'" *Suddith*, 379 Md. at 447 (quoting *Smith*, 374 Md. at 557). The limited question before us "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." *Allen v. State*, 158 Md. App. 194, 249 (2004) (quoting *Fraidin v. State*, 85 Md. App. 231, 241), *aff'd* 387 Md. 389 (2005).

Appellant was charged with numerous thefts in violation of § 7-104 of the Criminal Law Article ("CR"). Previously, the General Assembly consolidated a number of common law theft offenses "into a single . . . statutory offense known as theft." *Counts v. State*, 444 Md. 52, 58 (2015) (quoting *Jones v. State*, 303 Md. 323, 326-37 (1985)). The theft statute is currently codified at CR §§ 7-101 through 7-110. The general theft provisions are found in CR § 7-104, which sets forth five ways in which theft may be committed, including obtaining or exerting unauthorized control over property. Section 7-104(a) provides:

> (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.

When viewed in the light most favorable to the State, the jury could have reasonably inferred that appellant was guilty of the thefts of money from BFFE. The evidence established that appellant was responsible for keeping track of the daily intake of revenue, preparing weekly revenue reports, and reconciling that information with the data obtained from Ginger. Appellant was also responsible for replenishing the petty cash and he was required to indicate on his weekly report if cash from the company's revenue was used for that purpose. Selby's testimony established that appellant's deposits did not match the revenue reflected in Ginger, and that appellant did not report those discrepancies. With respect to the September 29, 2017 deposit, the jury was free to credit Selby's specific testimony that she and appellant left to attend the conference in Florida on September 30, 2017.

Appellant's contention that the revenue information was manually entered into the Ginger system is unsupported by the evidence. Both Kelly Cullum and Selby testified that Ginger was an automated system that tracked every sale. Kelly Cullum testified:

> The way that Ginger works, it captures every single transaction, cash, credit card and check. There's nowhere for the funds to go other than to what the customer spent with the company. So, it was critical to make sure that all of those matched up, matched up in those categories so that that deposit matched up what our software was telling us we took in.

Similarly, Selby explained:

> Ginger is the program that we utilize. It tracks everything from all of the dogs who come to who owns them, owner's contact information,

> reservations, future reservations, past reservations. It's also utilized to check the dogs in, and it will total, you know, total revenues for whatever services they were there for. Automatically does that.

The front desk employees prepared daily drop sheets on which they recorded the cash and checks received. They placed that sheet along with the cash and checks into BFFE's safe. Appellant was responsible for verifying the drop sheet before making a deposit and, as we have already noted, for reporting any discrepancies in his own weekly report, including any cash used to replenish the petty cash. Notably, the revenue slips admitted into evidence indicated that appellant never used any of the cash from BFFE's daily revenue to replenish the petty cash. The jury could infer that the money missing from the deposits was not being used to replenish the petty cash reserve—but that appellant was stealing it.

Appellant's arguments that there was no "firm evidence" that he made all of the "short deposits," and that other employees had access to the petty cash box, are unavailing. Depositing the checks and cash was appellant's job and the testimony established that he was solely responsible for that task. He was also responsible for tracking the revenue that was kept in the safe and reporting discrepancies. Both Kelly Cullum and Selby testified that there were no discrepancies between the revenue and the amounts listed in Ginger before or after appellant's employment. In fact, during appellant's employment, BFFE did not experience any similar financial discrepancies at the Cockeysville location, which also used the Ginger system. The jury was free to infer from appellant's failure to regularly make deposits on Mondays, failure to report discrepancies, failure to report his replenishment of petty cash, and his discontinuation of the log book used for the petty cash

box that he was attempting to conceal his thefts. That appellant "did not act surreptitiously or in a manner suggesting consciousness of guilt" is immaterial to whether there was sufficient evidence for the jury to find him guilty of theft.

Lastly, appellant's contention that other people could access the petty cash box is irrelevant. The cash and checks received as revenue were kept in a safe, not in the petty cash box. If appellant used some of the cash from the safe to replenish the petty cash, he was responsible for indicating that on his weekly report. Having reviewed the evidence presented by the State, we are persuaded that there was sufficient evidence from which a rational juror could find beyond a reasonable doubt that appellant was guilty of the thefts.

**II.**

Appellant contends that the trial court erred in ordering restitution in the amount of $11,758.30. Specifically, he challenges the $4,704.60 of restitution for thefts that allegedly occurred on October 23 and November 8, 2017, because he was not convicted of any thefts that occurred on those dates. The State agrees and so do we.

At trial, Selby testified that on October 28, 2017, the bank deposits were short by $1,359.74, and that on November 8, 2017, they were short by $3,344.86. Appellant was not charged with a theft on October 28, 2017. Appellant was charged with a theft on October 23, 2017, but there was no evidence that that deposit was short and the jury acquitted appellant of that charge. Appellant was not charged with a theft on November 8, 2017.

We review a trial court's restitution order for an abuse of discretion, *In re G.R.*, 463 Md. 207, 213 (2019) (citing *In re Cody H.*, 452 Md. 169, 181 (2017)). We may review an

order for restitution even if not objected to at the trial level, because an illegal sentence may be corrected at any time. *Hughes v. State*, 243 Md. App. 187, 203 (2019).

The penalty provisions in Maryland's theft statute provided before October 1, 2017, as they do now, that a person convicted of theft "shall restore the property taken to the owner or pay the owner the value of the property or services[.]" *See* CR § 7-104(g). In addition, Md. Code (2001, 2018 Repl. Vol.), § 11-603 of the Criminal Procedure Article ("CP") provides that restitution may be ordered as part of a sentence. Section 11-603(a) 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[.]

In this case, it appears that, in calculating the amount of restitution, the trial court used the combined amount of money alleged to have been stolen from BFFE rather than the amount of money associated with each theft for which appellant was convicted. Because the amount ordered as restitution must be a direct result of the thefts for which appellant was convicted, the sentencing court abused its discretion in imposing restitution in the amount of $11,758.30 and reversal is required.

**JUDGMENTS OF CONVICTIONS AFFIRMED. JUDGMENT OF RESTITUTION REDUCED BY $4,704.60 TO $7,053.70. CASE REMANDED TO THE CIRCUIT COURT FOR HARFORD COUNTY FOR ENTRY OF REVISED JUDGMENT OF RESTITUTION. COSTS TO BE DIVIDED EQUALLY BETWEEN APPELLANT AND HARFORD COUNTY.**