

UNREPORTED  
IN THE COURT OF SPECIAL APPEALS  
OF MARYLAND

No. 2410

September Term, 2013

---

CHARLES R. WEBSTER, SR.

v.

STATE OF MARYLAND

---

Meredith,  
Kehoe,  
Friedman,

JJ.

---

Opinion by Kehoe, J.

---

Filed: December 19, 2014

Following a jury trial in the Circuit Court for Harford County, Charles Webster was convicted of unlawful use of a motor vehicle pursuant to Md. Code Ann. (2002, 2012) § 7-105 of the Criminal Law Article (“Crim.”). The trial court sentenced appellant to 23 months in prison, with all but 10 months suspended, and three years probation, and ordered him to pay \$615 in restitution. On appeal, Mr. Webster presents two issues, which we have re-worded:

I. Was the trial court’s order that appellant pay restitution improper?

II. Did the trial court commit reversible error by admitting testimony that the appellant did not pay highway tolls when he drove the vehicle from New Jersey to Maryland?

We will affirm the court’s judgment.

### **BACKGROUND**

Because appellant does not challenge the sufficiency of the evidence, we will limit our discussion of the facts to those necessary to provide context for the issues raised in this appeal. *See, e.g., Joyner v. State*, 208 Md. App. 500, 503 n.1 (2012).

Frank Yon owns a mobile advertising company based in Florida. He hires individuals to drive the company’s vehicles, emblazoned with advertisements, around various locales for specific periods of time. Mr. Yon either flies one of his company’s regular employees to the contracted location or contracts with a local to drive the vehicle. All of his vehicles are equipped with GPS tracking systems.

In August, 2011, Mr. Yon hired appellant to drive an advertising truck around Somerset, New Jersey for several weeks. Appellant received \$500 at the outset of the

contract period as an advance to pay for expenses, such as highway tolls and repairs. Appellant was to be paid the contract price at the end of the contract period; the details of which are not relevant to the outcome of this dispute.

After he had been working for one day, appellant requested an advance in order to pay a personal expense. When Mr. Yon refused to do so, appellant told him “[I]f you don’t pay me the money in advance, then I have to go back to Maryland.” To this, Mr. Yon responded: “Please have a relative come and get you. I will fly a driver into Newark and have [another employee] drive him to the truck.” Appellant responded that he did not have anyone who could pick him up.

After that conversation, Mr. Yon tracked the company vehicle via the GPS system. The GPS readings indicated that the vehicle went south on Interstate Route 95 toward Maryland. In his journey from New Jersey to Maryland, appellant did not pay any highway tolls. Mr. Yon, as the owner of the truck, eventually received tickets for failing to pay the tolls. Mr. Yon reported the matter to the police and a Harford County sheriff’s deputy eventually recovered the truck from appellant’s possession at a storage facility in Edgewood, Maryland.

## **ANALYSIS**

### **I. The Order for Restitution**

At sentencing, the trial court ordered appellant to pay \$615 in restitution as a condition for probation. The restitution was calculated by taking into account: fuel, tolls, and

certain costs allegedly incurred by Mr. Yon to recover the truck and return it to New Jersey, including taxi charges, hotel costs, and airfare to fly the replacement driver from Florida to Maryland.

Appellant argues that the trial court's order of restitution was improper for two reasons: first, the trial court's order was not based on competent evidence and second, it was an illegal sentence.

**– A Lack of Competent Evidence?–**

Appellant contends that we should vacate the restitution portion of his sentence in its entirety because there was no competent evidence before the trial court as to the appropriate amount of restitution. He points out, correctly, that all of the evidence before the court as to restitution came from Mr. Yon and that he was not placed under oath during the sentencing hearing.

Appellant concedes that his trial counsel failed to raise an objection during the sentencing proceeding. Appellant asserts that we should review his appellate contention under the plain error doctrine. We decline to do so. "Plain error review is a rarely used and tightly circumscribed method by which appellate courts can, at their discretion, address unpreserved errors by a trial court which 'vitally affect[ ] a defendant's right to a fair and impartial trial.'" *Malaska v. State*, 216 Md. App. 492, 524, *cert. denied*, 439 Md. 696 (2014) (quoting *Diggs v. State*, 409 Md. 260, 286, (2009)). In *Puckett v. United States*, 556 U.S. 129, 135 (2009), the Supreme Court described the plain error review process as:

involving four steps, or prongs. First, there must be an error or defect—some sort of [d]eviation from a legal rule—that has not been intentionally relinquished or abandoned, i.e., affirmatively waived, by the appellant. Second, the legal error must be clear or obvious, rather than subject to reasonable dispute. Third, the error must have affected the appellant's substantial rights, which in the ordinary case means he must demonstrate that it affected the outcome of the [trial] court proceedings. Fourth and finally, if the above three prongs are satisfied, the court of appeals has the discretion to remedy the error—discretion which ought to be exercised only if the error seriously affect[s] the fairness, integrity or public reputation of judicial proceedings. Meeting all four prongs is difficult, as it should be.

The *Puckett* formulation has been expressly adopted by the Court of Appeals. *See State v. Rich*, 415 Md. 567, 578–79, 3 A.3d 1210 (2010).

Appellant's contention that Mr. Yon was incompetent to be a witness was not affirmatively waived during the sentencing proceeding. However, appellant fails to satisfy the requirement that the trial court's suppositional error was "clear or obvious, rather than subject to reasonable dispute." We are hard-pressed to find any error, much less clear error.

Mr. Yon testified under oath at trial. After the jury returned a verdict, the court took a lunch recess and then reconvened for sentencing. After the court reconvened, Mr. Yon was recalled to the stand and he testified to his out-of-pocket expenses. He was not re-sworn.

Md. Rule 5-603 requires that witnesses be sworn in before testifying. Nothing in Rule 5-603 suggests that witnesses must be re-sworn every time they re-take the stand in the same proceeding, nor that they be re-sworn if they testify at multiple stages of the trial, e.g., trial and sentencing. Even if such a requirement is embedded in Rule 5-603, we conclude that such a requirement is not obvious. Because appellant fails to satisfy the requirement "clear

or obvious” error, we are precluded from exercising our discretion to exercise plain error review.

– An Illegal Sentence? –

Appellant contends that the trial court imposed an illegal sentence by ordering him to pay restitution of \$615 as a condition for probation. The basis for this contention is Md. Code Ann. (2001, 2008) § 11-603 of the Criminal Procedure Article (“CP”). CP § 11-603 only allows restitution for expenses or losses that are a “direct result of the crime.”<sup>1</sup> The State contends that the sentence was not illegal because the restitution was based on out-of-pocket expenses that were the “direct result” of appellant’s unauthorized use of the truck.

The Court of Appeals has stated that when “the trial court has allegedly imposed a sentence not permitted by law, the issue should ordinarily be reviewed on direct appeal even if no objection was made in the trial court.” *Walczak v. State*, 302 Md. 422, 427 (1985). However, this exception to the general requirement of preservation is very narrow: it is

---

<sup>1</sup> CP § 11-603 states in pertinent 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:

.....

- (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;
  - (iii) loss of earnings; or
  - (iv) expenses incurred with rehabilitation[.]

limited to “those situations in which the illegality inheres in the sentence itself; i.e., there either has been no conviction warranting any sentence for the particular offense or the sentence is not a permitted one for the conviction upon which it was imposed and, for either reason, is intrinsically and substantively unlawful.” *Chaney v. State*, 397 Md. 460, 466 (2007).

We review a trial court’s decision to order restitution under the abuse of discretion standard. *Silver v. State*, 420 Md. 415, 427 (2011). However, the trial court’s discretion to order restitution is subject to the statutory limitations contained in CP § 11-603. Specifically, only those expenses arising as a “direct result” of the crime are recoverable. CP § 11-603(b)(2); *see also*, *State v. Stachowski*, \_\_\_ Md. \_\_\_, No. 15, 2014 Term, filed November 20, 2014, slip op. at 8 (“Our cases are clear that restitution may be compelled only where the injury results from the actions that made the defendant’s conduct criminal.”).

The Court of Appeals has considered whether costs incurred by a victim are the “direct result” of the relevant conviction on several occasions, including *Pete v. State*, 384 Md. 47 (2004), *Goff v. State*, 387 Md. 327 (2005), and *Williams v State*, 385 Md. 50 (2005). Read together, these cases convince us that the trial court did not err in deciding the appropriate amount of restitution.

In *Pete*, the Court found that the restitution order was an illegal sentence because the order was for damage caused to a police vehicle while the defendant was engaged in reckless driving—but the conviction for which the restitution was ordered was for an assault inflicted

on a different victim earlier in the day. 384 Md. at 61. Thus, the Court concluded that the damage to the police cruiser was not the “direct result” of Pete’s earlier assault. *Id.* at 66.

In *Goff*, the defendant was convicted of assault and the Court considered whether the trial court properly awarded restitution to repair damage to the victim’s home which occurred during the course of the assault. 387 Md. at 343. Goff argued that only costs associated with the injuries to the victim could be a “direct result” of the crime, and that costs associated with damage to the residence, which was damaged only incidentally, were not a “direct result” of the crime. *Id.* at 343–44. The Court concluded that restitution for damage to the shower was proper, stating: “It is clear that [the appellant] damaged the shower during and because of the assault on [the victim]. No intervening agent or occurrence caused the damage.” *Id.* at 344.

In *Williams*, the defendant stole three motorcycles from the victim, which, after their theft, were recovered by police and placed in an impound lot. 385 Md. at 52. When the victim went to the impound lot to recover the vehicles, the victim identified the vehicles, but the lot would not return the motorcycles because they were not properly titled in the victim’s name. *Id.* at 52–53. The trial court allowed the victim to recover the value of the motorcycles as restitution, concluding that, but for the theft, the victim would still have the motorcycles. *Id.* at 53.

The Court of Appeals applied the reasoning in *Pete*, stating that:

[The victim’s] inability to reclaim the undamaged motorcycles was not the direct result of William’s theft of them. While there is undeniably a causal link

between the theft in Baltimore County and the motorcycles ending up in the Baltimore City impoundment lot, that nexus does not partake of the directness required by the statute.

*Id.* at 62.

In the present case, appellant contends that none of the expenses that were used to calculate the restitution order were direct results of the crime. He argues that the expenses related to the replacement driver, including the taxi charges, airfare, and hotel costs,<sup>2</sup> arose out of Mr. Yon’s independent choice to avoid a breach of contract—not from the crime of an unauthorized taking of a vehicle. Secondly, he contends that the highway tolls and fuel were not a direct result of the crime. The premise of appellant’s arguments for the tolls and fuel costs is that the crime for which he was convicted—unauthorized use—was complete when he drove away from the hotel in New Jersey, and that only those costs that “immediately ensue[d]” from appellant’s taking of the vehicle are direct results of that crime.

The State argues that unauthorized use is a continuing crime until the vehicle in question is recovered by the owner. The State reasons that any expenses incurred while appellant was exerting unauthorized control over the truck were therefore a direct result of the crime. The State also asserts that the costs associated with the replacement driver were appropriate as these costs were “associated with returning the truck to New Jersey” and “[r]egardless of whether the victim wants his car returned because of a business or personal

---

<sup>2</sup>Specifically, the airfare was to fly the replacement driver from Florida to Maryland. The taxi costs were to get the replacement driver from the airport to Edgewood, and the hotel cost was to provide the replacement driver a place to sleep before he transported the vehicle back up to New Jersey the next day.

obligation . . . he is entitled to the expenses associated with returning the vehicle to the place where it was taken.”

We agree with the State.

In *In re Landon G.*, 214 Md. App. 483, 509 (2013), this Court examined the legislative history of Crim. § 7-105. Citing Charles E. Moylan, MARYLAND’S CONSOLIDATED THEFT LAW AND UNAUTHORIZED USE, we explained that the purpose of Crim. § 7-105 was to elevate the “unauthorized use” law, codified under Crim. § 7-203, into a felony in cases of the unauthorized use of a motor vehicle. *Id.* at 509–10. Thus, we concluded that “[Crim. § 7-105(b)] and [Crim. § 7-203(a)] proscribe the same conduct when the subject property is a motor vehicle.” *Id.* at 512. Under Maryland law, the crime of unauthorized use continues so long as someone with the intent to deprive the owner of possession continues to use the vehicle after an original taking. *See Annelo v. State*, 201 Md. 164, 167–68 (1952) (“[I]ntent to deprive the owner of his possession includes future possession and is not limited . . . to a taking out of present possession. Therefore, participation in the *continued use* of the car after the original taking would manifest an intent to deprive the owner of his possession during such participation.”) (emphasis added). Appellant’s premise that the crime of unauthorized use was complete once he drove away from the hotel in New Jersey is incorrect and skews his analysis of what should properly be considered as expenses incurred by the victim as the direct result of his crime.

Thus, we conclude that appellant's crime of unauthorized use continued up until the point where the truck was recovered by the deputy. By analogy to *Goff*, any out-of-pocket costs and expenses that the victim incurred "during and because" of this unauthorized use are recoverable under CP § 11-603. 387 Md. at 344. This category of expenses would certainly include the tolls, because they were incurred during appellant's actual commission of the crime as he drove the vehicle from New Jersey to Maryland.

The trial court's restitution award included some, but not all, of the expenses claimed by Mr. Yon.<sup>3</sup> We perceive no error in the trial court's conclusion that the expenses allowed, namely, the fuel expenses, a portion of the cost of the airplane ticket to transport the driver to Aberdeen, taxi charges, and hotel costs, directly resulted from appellant's unauthorized use of the vehicle.

Appellant also asserts:

A court may award restitution only if property damage or other losses are a direct result of the crime, *i.e.*, only if no "intervening agency, instrumentality, or influence" gave rise to the expense. *Goff*, 387 Md. at 344 n.9, 875 A.2d at 142 n.9. In *Williams*, an intervening cause of the alleged damages was the victim's inability to provide documentation that he owned the motorcycles. *Williams*, 385 Md. at 56, 867 A.2d at 309. Here, the intervening cause was Mr. Yon's independent act of hiring a replacement driver.

(Footnote omitted.)

---

<sup>3</sup>The trial court awarded a total of \$615. The State requested a total of \$2,915. The State's request included reimbursement for damage to the truck but the trial court concluded that there was no evidence showing that the damage to the truck occurred during appellant's unauthorized use of the vehicle. Additionally, the court reduced Mr. Yon's claim for reimbursement for airplane tickets for the replacement driver because the substitute driver was flown to BWI Airport at a cost of \$450, instead of to Newark, at a cost of \$200. The court subtracted the cost of the Newark ticket from the BWI ticket, for a total of \$250.

Appellant’s argument is unpersuasive. Mr. Yon had the right to recover his property and to return it to where it was located before appellant’s criminal act. Yon’s completely reasonable arrangements to do so cannot be considered an “intervening agency, instrumentality, or influence[.]” Nothing in *Goff, Williams*, or the Court of Appeals’ other decisions regarding the proper scope of restitution suggests otherwise.

## **II. Evidence As to Appellant’s Failure to Pay Tolls**

Appellant contends that the trial court committed reversible error by allowing the prosecution to admit evidence of the fact that appellant did not pay tolls while driving the truck from New Jersey to Maryland. Appellant asserts that this evidence was not relevant and inadmissible as a matter of law.

The State counters that evidence of appellant’s failure to pay tolls was part of the “same criminal transaction,” and thus admissible.<sup>4</sup>

We conclude that appellant’s contentions are unpersuasive. He asserts that the prosecution’s line of questioning was irrelevant, and thus inadmissible, because:

To prove an unlawful taking of a motor vehicle, the State had to show that [appellant] ‘knowingly and willfully [took the truck] out of the owner’s lawful custody, control, or use without the owner’s consent.’ Whether [appellant] thereafter failed to pay tolls had no tendency to prove or disprove that he unlawfully took the truck in the first place.

---

<sup>4</sup>The State also raises a preservation argument based on the sequence of question, answer and objection. The State has a point, *see, e.g., Ware v. State*, 170 Md. App. 1, 19 (2006) (“[A]n objection must be made when the question is asked or, if the answer is objectionable, then at that time by motion to strike.”) (internal citations omitted), but we will look past the issue of preservation and address the merits of appellant’s contention.

Appellant elaborates that the evidence is not relevant because it does not make any fact of consequence more or less probable than without the evidence, as required under Rule 5-401.<sup>5</sup> We disagree.

The evidence of the highway tolls was relevant for two reasons. First, the evidence corroborates the fact that, while appellant was exerting control over the vehicle, he took the vehicle from New Jersey to Maryland. As we discussed *supra*, a violation of Crim. § 7-105(b) is a continuing crime, and it was relevant to introduce evidence that pertained to where the vehicle was driven during the time that appellant exerted unauthorized control over it.

Second, the defense counsel, in his opening and closing statements, emphasized that it was not clear to appellant that he had been fired. The relevance of the non-payment of the highway tolls was probative of appellant's state of mind when he was driving the truck from New Jersey to Maryland. A reasonable fact-finder might conclude that a person who believes he or she is still employed would not drive the employer's vehicle through tolls without paying, especially as appellant was given \$500 for the express purpose of covering those costs.

---

<sup>5</sup>Rule 5-401 defines relevant evidence as:

[E]vidence having 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.

Thus, we conclude that the evidence was relevant. Under Rule 5-403, relevant evidence may still be excluded if “its probative value is *substantially* outweighed by the danger of unfair prejudice[.]” (emphasis added). Appellant contends that the evidence of his failure to pay highway tolls was highly prejudicial because the jury could infer from such evidence that he is a “bad person” and thus convict him even if the evidence is lacking.

The cases that appellant cites pertain to evidence of “other crimes” or “bad acts” as described in Rule 5-404(b).<sup>6</sup> In *Copeland v. State*, 196 Md. App. 309, 316 (2010), this Court described the discretion invested in the trial court to admit evidence of “other crimes” or “bad acts.” We stated:

The admission of ‘other crimes’ evidence is vested within the sound discretion of the trial court and we will not overrule the decision of the trial court unless there has been an abuse of discretion. Likewise, we may not overturn a trial court’s admission of evidence over objection that the evidence is unduly prejudicial unless the admission constituted an abuse of discretion.

*Id.*

The trial court determined that appellant’s failure to pay tolls was part of the “entire transaction” of appellant’s crime, and found that the probative value did not substantially

---

<sup>6</sup> Rule 5-404(b) states in pertinent part:

Evidence of other crimes, wrongs, or acts including delinquent acts as defined by Code, Courts Article, § 3-8A-01 is not admissible to prove the character of a person in order to show action in conformity therewith. Such evidence, however, may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, common scheme or plan, knowledge, identity, or absence of mistake or accident.

outweigh its prejudicial value. We do not see any reason to disturb the trial court's exercise of its discretion in this matter.

**THE JUDGMENT OF THE CIRCUIT  
COURT FOR HARFORD COUNTY IS  
AFFIRMED. APPELLANT TO PAY COSTS.**