**UNREPORTED**

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2802

September Term, 2013

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D. G.

v.

STATE OF MARYLAND, et al.

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Meredith,
Nazarian,
Raker, Irma S.
(Retired, Specially Assigned),

JJ.

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Opinion by Meredith, J.

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Filed: June 16, 2015

After Michael David Brochu, appellee, was convicted of sexually abusing a child who lived next door, the child — D.G., appellant — filed a petition for restitution in the Circuit Court for Prince George's County seeking $25,000 to cover the projected cost of five years of anticipated counseling expenses. The trial judge declined to order the requested restitution. The judge explained that "Mr. Brochu does not have the ability to pay the judgment of restitution of the $25,000 that the plaintiff is seeking in this case," adding, "I think that would be unreasonable." The victim then noted this appeal.[1]

## QUESTION PRESENTED

Appellant presents a single question for our review:

> Did the trial court improperly deny D.G.'s request for restitution for future counseling expenses when Maryland law permits an award of future restitution, D.G. presented competent evidence, and [Brochu] failed to offer appropriate evidence contesting the reasonableness or necessity of the expenses or reasonably demonstrating his inability to pay?

Because we answer "no" to that question, we will affirm the judgment of the circuit court.

## FACTS AND PROCEDURAL HISTORY

Brochu was convicted by a Prince George's County jury of child sexual abuse, second degree sexual offense, and unnatural and perverted sexual practices, based upon Brochu's contact with D.G. when the child was eight years old. Brochu was appellant's next door

[1] Although the State of Maryland is also nominally an appellee, the State has not filed a brief, and all references in this opinion to "appellee" refer only to Mr. Brochu.

neighbor, a trusted, longtime family friend, and appellant's brother's godfather.[2] For the crimes against appellant, Brochu was sentenced to 41 years' executed prison time.[3]

Appellant filed a petition for restitution pursuant to Maryland Code (2001, 2008 Repl. Vol.), Criminal Procedure Article ("CP"), § 11-603, asking that Brochu be ordered to pay $420.00 for counseling appellant had already received, plus $25,000.00 to fund the anticipated cost of five years of counseling appellant had not yet received. Brochu agreed to pay the $420.00 for the counseling appellant had already received, but argued that appellant was not entitled to an order of restitution to cover counseling that had not yet occurred. Brochu also argued that, in light of the fact that he would not even be eligible for parole consideration until he was in his seventies, he had no ability to pay any restitution.

On October 17, 2013, the parties appeared for a hearing. Appellant introduced a letter from a therapist, who had conducted 32 counseling sessions with him, indicating that appellant "will probably need weekly ongoing therapy for at least 5 years. . . . In current market conditions this will cost the family at least $5000/yr."

[2] Appellant's older brother, R.G., was another of Brochu's victims. Brochu was separately convicted of a number of sexual offenses relating to his molestation of R.G.

[3] In his brief, Brochu urges this Court to take judicial notice of the fact that he is "facing a total period of executed incarceration of 47 years," as a result of his convictions in this case, R.G.'s case, and yet another case. Brochu has appealed his criminal convictions in all three cases.

In addition to questioning the adequacy of appellant's proof of the estimated counseling expense, Brochu's counsel represented to the court that Brochu had no ability to pay the requested amount in any event. Counsel stated to the court:

> As a practical matter, this man is indigent. You sentenced him to 41 years. . . . I had him sign a pro se notice of appeal. He can not hire me or any other private attorney for appeal. He has no more retirement. It's gone. He has no income. He has no public benefits. He has absolutely no money.
>
> . . . There is no money. I have paid a thousand dollars for this case out-of-pocket for my investigator and for a transcript. I will pay for an additional out-of-pocket expense by me. I'm his attorney for the third trial.
>
> He is completely, 100 percent out of money. He has no income potentially whatsoever, serving 41 years. This counseling for five years is not coming from my client, guaranteed. Not a penny. . . .
>
> * * *
>
> There is a provision in here, [CP §] 11-605, "a court need not issue a judgment of restitution under part one of this subtitle if the [c]ourt finds, one, that the restitution obligor [d]oes not have the ability to pay the judgment [of] restitution." One hundred [percent] applicable. He does not have the ability to pay the restitution. He won't have the ability. Let's say he gets paroled in 21 years. They treated these events as extremely serious. He's going to have to do seventy percent of 41 years. That's 28 years before he is going to be able to get out. . . . The first provision [in CP § 11-605] is — should be the end of this discussion. The restitution obligor does not have the ability to pay the judgment of restitution. . . . Or, there are extenuating circumstances that make a judgment restitution inappropriate. Forty-one years.

Counsel further asserted to the court:

> [T]he Court knows and can take judicial notice that the court imposed a sentence of 41 years executed incarceration.
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> The Court can take judicial notice of the pro se notice of appeal. The Court can be provided with my letter to Brian Saccenti, chief of the public

> defender appeal division, to say my client is completely without funds. And if the Court does not accept my representations, I can provide you with that letter in a few moments.

At the conclusion of the hearing, the trial court rendered an oral decision denying D.G.'s petition for restitution. The court explained that the claim for restitution of expenses to be incurred in the future gave it "pause." But the court found that, in any event, Brochu had no ability to pay any restitution. The court explained:

> [BY THE COURT]: Given that [*i.e.*, the fact that Brochu would be, at a minimum, 74 years old at the time of his first eligibility for parole], the Court would find in this case under [CP §] 11-605 that Mr. Brochu does not have the ability to pay the judgment of restitution of the $25,000 that the plaintiff is seeking in this case. I think that would be unreasonable.

This appeal followed, in which D.G. asserts that the court "improperly den[ied]" his petition because (a) an award of restitution for future expenses is permitted under the law, (b) he "presented competent evidence" of his entitlement to it, and (c) Brochu "failed to offer appropriate evidence contesting the reasonableness or necessity of the expenses or reasonably demonstrating his inability to pay."

## STANDARD OF REVIEW

This phase of the criminal case was tried without a jury, and our review is therefore governed by Maryland Rule 8-131(c), which provides:

> When an action has been tried without a jury, the appellate court will review the case on both the law and the evidence. It will not set aside the judgment of the trial court on the evidence unless clearly erroneous, and will give due regard to the opportunity of the trial court to judge the credibility of the witnesses.

As this Court observed in *Mayor and Council of Rockville v. Walker*, 100 Md. App. 240, 256 (1994):

> It is hornbook law, memorialized in Md. Rule 8-131(c), that "[w]hen an action has been tried without a jury, the appellate court . . . will not set aside the judgment of the trial court on the evidence unless clearly erroneous, and will give due regard to the opportunity of the trial court to judge the credibility of witnesses." This means that if, considering "the evidence produced at trial in a light most favorable to the prevailing party . . . ," there is evidence to support the trial court's determination, it will not be disturbed on appeal. *Maryland Metals, Inc. v. Metzner*, 282 Md. 31, 41, 382 A.2d 564 (1978). Moreover, "[i]f there is any competent, material evidence to support the factual findings below, we cannot hold those findings to be clearly erroneous." *Staley v. Staley*, 25 Md. App. 99, 110, 335 A.2d 114, *cert. denied*, 275 Md. 755 (1975).

**DISCUSSION**

In Maryland, a trial court is vested with discretion to award restitution to victims of crime in appropriate cases pursuant to CP § 11-603, which provides, 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**:
>
> (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;
>
> (iii) loss of earnings; or
>
> (iv) expenses incurred with rehabilitation;

(3) the victim incurred medical expenses that were paid by the Department of Health and Mental Hygiene or any other governmental unit;
(4) a governmental unit incurred expenses in removing, towing, transporting, preserving, storing, selling, or destroying an abandoned vehicle as defined in § 25-201 of the Transportation Article;
(5) the Criminal Injuries Compensation Board paid benefits to a victim; or
(6) the Department of Health and Mental Hygiene or other governmental unit paid expenses incurred under Subtitle 1, Part II of this title.

(b) 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.

(Emphasis added.)

As we said in *McDaniel v. State*, 205 Md. App. 551, 558 (2012)[4]:

> Restitution under this section "is a *criminal sanction*, not a civil remedy." *Grey v. Allstate Ins. Co.*, 363 Md. 445, 451, 769 A.2d 891 (2001) (emphasis in original). It serves the familiar penological goals of retribution and deterrence, and especially rehabilitation. See *Anne Arundel County v. Hartford Accident & Indem. Co.*, 329 Md. 677, 685, 621 A.2d 427 (1993); *see also Grey*, 363 Md. at 450–61, 769 A.2d 891 (discussing the purposes of restitution). Predominantly and traditionally, however, the point of the restitution statute is to compensate the victim for the expenses and losses caused directly by the defendant. See *Chaney v. State*, 397 Md. 460, 470, 918 A.2d 506 (2007). "The objectives of restitution do not include that the victim must be made whole by the full reimbursement of the victim's loss, but they

[4]In *McDaniel*, we affirmed an award of restitution based on estimated future dental expenses. The Court of Appeals granted McDaniel's petition for writ of *certiorari*, 429 Md. 81 (2012), but the parties dismissed the case prior to oral argument, 429 Md. 528 (2012).

> do not preclude that possibility **if the defendant has the ability to pay**." *Hartford Accident & Indem. Co.*, 329 Md. at 685–86, 621 A.2d 427.

(Bold emphasis added.)

With respect to the defendant's ability to pay, CP § 11-605 provides:

> (a) **A court need not issue a judgment of restitution** under Part I of this subtitle **if the court finds**:
>
> (1) **that the restitution obligor does not have the ability to pay the judgment of restitution; or**
> (2) **that there are extenuating circumstances that make a judgment of restitution inappropriate.**
>
> (b) A court that refuses to order restitution that is requested under Part I of this subtitle shall state on the record the reasons.

(Emphasis added.)

Most of D.G.'s brief is devoted to his argument that CP § 11-603 "permits the court to order restitution for reasonably certain future counseling expenses for a victim of child sexual abuse." Appellant places great reliance upon *McDaniel, supra*, 205 Md. App. 551. D.G. contends that the trial court "disregarded" *McDaniel* in denying his petition.

But, in our view, the trial court did not base its denial of the restitution petition upon any disagreement with the principles established in *McDaniel*. Rather, the dispositive reason the court denied restitution in the exercise of its discretion pursuant to CP § 11-605(a)(1) was

that it was persuaded that Brochu did not have the ability to pay any judgment of restitution. That is an explicitly-permitted basis for a court to deny a petition for restitution.[5]

Accordingly, we agree with appellee's argument that the dispositive question for this Court is whether the trial court abused its discretion in denying the petition on the basis of its finding that Brochu could not pay restitution. "[A]n abuse of discretion occurs when a decision is 'well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable.'" *King v. State*, 407 Md. 682, 711 (2009) (internal quotation marks and citation omitted). In *Touzeau v. Deffinbaugh*, 394 Md. 654, 669 (2006), the Court of Appeals said:

> We have defined abuse of discretion as "discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *Jenkins v. City of College Park*, 379 Md. 142, 165, 840 A.2d 139, 153 (2003) (emphasis not included). See also *Garg v. Garg*, 393 Md. 225, 238, 900 A.2d 739, 746 (2006) ("'The abuse of discretion standard requires a trial judge to use his or her discretion soundly and the record must reflect the exercise of that discretion. Abuse occurs when a trial judge exercises discretion in an arbitrary or capricious manner or when he or she acts beyond the letter or reason of the law.'") quoting *Jenkins v. State*, 375 Md. 284, 295-96, 825 A.2d 1008, 1015 (2003); *In re Adoption/Guardianship No. 3598*, 347 Md. 295, 312, 701 A.2d 110, 118-19 (1997) ("There is an abuse of discretion 'where no reasonable person would take the view adopted by the trial court,' or when the court acts 'without reference to any guiding rules or principles.' An abuse of discretion may also be found where the ruling under consideration is 'clearly against the logic and effect of facts and inferences before the court,' or when the ruling is 'violative of fact and logic.'") (citations omitted).

[5] Although the trial judge expressed other concerns about granting the victim's request, the court expressly determined that appellant did not have the ability to pay. Because that was a sufficient reason to deny the petition, we need not address the judge's other bases.

Appellant complains that the representations made by Brochu's counsel at the hearing did not provide an adequate basis for the trial court's finding of Brochu's inability to pay. Appellant contends the court failed to conduct a "reasoned inquiry" into Brochu's financial position, citing *In re Don Mc.*, 344 Md. 194 (1996). We are not persuaded that reversal is required by *Don Mc.* In that case, the Court of Appeals discussed a court's discretion regarding an award of restitution, stating:

> The standard of review is whether the [juvenile] master abused his discretion in recommending restitution against Petitioner and his mother. The term "discretion" means the absence of a hard and fast rule. *Langnes v. Green*, 282 U.S. 531, 544, 51 S.Ct. 243, 248, 75 L.Ed. 520 (1931). Judicial discretion has been defined as follows:
>
> > Judicial discretion is a composite of many things, among which are conclusions drawn from objective criteria; it means a sound judgment exercised with regard to what is right under the circumstances and without doing so arbitrarily or capriciously. Where the decision or order of the trial court is a matter of discretion it will not be disturbed on review except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.
>
> *State ex rel. Carroll v. Junker*, 79 Wash.2d 12, 482 P.2d 775, 784 (1971). When a court must exercise discretion, the failure to do so is error. *Maus v. State*, 311 Md. 85, 108, 532 A.2d 1066, 1077–78 (1987).

In *Don Mc.*, a juvenile stole and then wrecked a car; the car's owner was insured by GEICO. Don Mc. was adjudicated delinquent for having committed the theft of the automobile. At the restitution hearing, the master heard testimony from a representative of

GEICO that the insurer had paid $4,800 to the car's owner on the claim. The master then engaged in a cursory colloquy with Don Mc. and his mother:

> [BY THE MASTER]: What's your position with that ma'am?
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> [BY MOTHER]: I cannot afford it.
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> [BY THE MASTER]: Ma'am, that may be. I'm not saying you've got to pay it out at one time. I'm sure that GEICO would be—
>
> [MOTHER]: I'm on a fixed income.
>
> [BY THE MASTER]: Well, ma'am, that may be, but they're entitled to their money the same as if somebody's broke into your house and stole your property, you'd want the victim — that person to pay you for what you had lost. They're the same thing. They're the victim in this case.
>
> [MOTHER]: I wouldn't charge that much money.
>
> [BY THE MASTER]: Well ma'am, maybe you wouldn't, but the $4800.00 we're talking about is less than they paid out. I mean, they're going to have to, in essence, they can't get any other monies from Juvenile Court (inaudible) a restitution. Whether they can get that money some other way is really not my problem. That's their problem.

With that, the master recommended that Don Mc. and his mother be ordered to pay $4,800.00 in restitution. A judge of the circuit court signed an order approving the master's recommendation, and Don Mc.'s exceptions were overruled. This Court affirmed the judgment, finding that Don Mc. had waived, by failing to raise at the hearing, the contention he made on appeal about the master's inadequate inquiry into his (and his mother's) ability to pay. Exercising its discretion to excuse non-preservation in an appropriate instance, the Court of Appeals overturned the restitution order, finding that the master's brief colloquy

with the mother fell short of what was required under the Juvenile Causes Act, which required a court, before ordering restitution, to "first consider the age and circumstances of the child. The ability of the child to pay is a relevant factor for the court to consider when assessing the circumstances of the child." *Id.* at 202. Ultimately, the Court held: "The court clearly abused its discretion in this case when it awarded restitution in the amount of $4800.00. **The court did not consider the age or circumstances of the child, or the ability of the child or the child's parent to pay** the restitution before ordering the parties to pay $4800.00." *Id.* at 203-04 (emphasis added). *See also Coles v. State*, 290 Md. 296, 306 (1981) ("Should the court choose to impose restitution, this fundamental objective of promoting rehabilitation comes to the fore and the court in ordering such a condition ordinarily should not exceed the defendant's ability to comply.").

In the present case, the trial court had more information about Brochu's inability to pay than the master received in *Don Mc*. Here, appellant acknowledges that the court took judicial notice of the undisputed fact that Brochu, who was 53 years old as of the time of the restitution hearing, was going to be in prison until he was in his mid-seventies before he would even be eligible for parole. *See* Maryland Rule 5-201. That fact clearly provided support for the court's finding of an inability to pay. The court also heard the unrefuted representations of Brochu's counsel, who indicated in open court: Brochu was destitute; he

was going to be represented on appeal by the Public Defender[6]; he had no retirement or other sources of income; and his incarceration meant he had no way to earn any income. Accordingly, in this case, we are persuaded that the court expressly considered Brochu's age, circumstances, and ability to pay.

Appellant's complaint on appeal, distilled to its essence, is that the representations of Brochu's counsel about Brochu's inability to pay restitution were not sufficient evidence to have satisfied the requirement of a "reasoned inquiry" by the court. But the question before us is not whether the court could have made a more extensive investigation of Brochu's ability to pay. Instead, the dispositive question is whether there was a sufficient basis for the court to conclude that Brochu did not have the ability to pay the requested restitution. Under CP § 11-605(a), the court "need not" order restitution — even if the victim has otherwise demonstrated his entitlement to it — if the court finds "that the restitution obligor does not have the ability to pay the judgment of restitution[.]" As noted above, the lengthy sentence and advanced age of the defendant were undisputed matters of record in the case, and, in the absence of any evidence to the contrary, provided some basis for the court to conclude there was no ability to pay the requested restitution. Further, given the professional obligation of attorneys to "not knowingly . . . make a false statement of fact" to a trial judge, *see* Rule 3.3

[6] We note that there is a docket entry in the circuit court's file reflecting that, on August 22, 2013: "Notice of Appeal filed by Defendant. This case is being referred to the Public Defenders Office." As noted above, the hearing on the restitution petition was held on October 17, 2013. Appellee is in fact also being represented in the present appeal by the Office of the Public Defender.

of Maryland Lawyers' Rules of Professional Conduct, it was not clearly erroneous for the trial court to accept the proffers of appellee's counsel regarding Brochu's lack of financial assets and the fact that appellee qualified for appellate representation by the Office of the Public Defender. Under these circumstances, the denial of appellant's restitution request was not an abuse of discretion.

**JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.**