

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 1508

September Term, 2014

IN RE: RAYMOND C.

Woodward,
Friedman,
Zarnoch, Robert A.
(Retired, Specially Assigned),

JJ.

Opinion by Woodward, J.

Filed: July 15, 2016

*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.

Raymond C., appellant, entered a plea of “involved” to a charge of delinquent conduct that, if committed by an adult, would constitute theft of a cellular phone valued under \$1,000. At the conclusion of the disposition hearing, the Circuit Court for Prince George’s County, sitting as a juvenile court, ordered appellant to pay \$270 in restitution, committed him to Level C placement, and ordered him to complete 75 hours of community service.

At the disposition hearing and in this appeal, appellant has conceded that the victim is entitled to restitution for her stolen iPhone 4. The sole appellate issue is whether the juvenile court “used the wrong standard in determining the amount of restitution owed,” when it ruled that the victim “was entitled to the original purchase price of the iPhone 4 so that she could be made ‘whole.’” We conclude that the juvenile court erred by basing the amount of restitution on the original purchase price of the phone, rather than the replacement cost for the phone, which would have reflected depreciating market factors, including the availability of newer models such as the iPhone 5. Accordingly, we shall vacate the restitution order and remand for a new restitution proceeding.

FACTUAL BACKGROUND

Pursuant to an agreed statement of facts, appellant entered a plea of involved to the May 2014 theft of an iPhone 4. At a July 22, 2014 hearing, the State sought restitution for the victim, Schina McKinnon Shields. Shields testified that on February 14, 2013, she purchased two new iPhone 4 cell phones for her daughters, paying a total of \$540, or \$270

for each. She produced store receipts showing a deposit of \$94, plus a paid balance of \$445.97. According to Shields, the phone stolen by appellant was working and in good condition. Moreover, the price paid for the phone did not include a phone contract, because the family already had purchased a plan.

Citing this evidence, the State requested restitution in the amount of \$270, representing the purchase price for the stolen phone. Defense counsel argued that the court was required to take into account the depreciated market value of the phone. The following colloquy ensued:

[DEFENSE COUNSEL]:

If the Court were to take the witness at perhaps her misunderstood word that each phone was \$270, in the world of cell phones, a depreciation of a year is going to be substantial.

When it comes to the replacement, as she testified of an iPhone 4 in the spring of this year, there are additional models of an iPhone 5 where newer technology exists and so I would ask the Court to take into account the fact that depreciation is going to occur rather rapidly in that kind of case. And so, if the Court is inclined to grant restitution based on that, then it should consider that the phones are going to be worth substantially

less than \$275. We would ask in the neighborhood of \$100 –

THE COURT: Let me ask you, if you bought a new one, it would be substantially more?

[DEFENSE COUNSEL]: If you were to buy a brand new iPhone, the latest iPhone 5, it would be substantially more.

THE COURT: Today?

[DEFENSE COUNSEL]: Today.

THE COURT: Replacement cost.

[DEFENSE COUNSEL]: Your Honor, the replacement cost would be the replacement for the item that was taken, not the latest and greatest.

THE COURT: Replacement cost.

[DEFENSE COUNSEL]: It would be for – it would be for the phone that was taken.

THE COURT: And that was a new phone that was purchased. Why must she now go buy a used phone?

[DEFENSE COUNSEL]: Because your Honor what was taken was a used phone. A new phone was not taken.

THE COURT: But they have to buy a phone now.

[DEFENSE COUNSEL]: **And on the used market, I am not sure what the market rate for a used iPhone 4 is but the respondent, the witness is not entitled to replacement of a brand new phone.**

THE COURT: **Yes, she is. She is entitled to be made whole.**

[DEFENSE COUNSEL]: **To be made whole. Absolutely.**

THE COURT: **With an item.**

[DEFENSE COUNSEL]: **And in that case, that was an iPhone 4.**

THE COURT: She didn't purchase a used phone.

[DEFENSE COUNSEL]: She did not purchase a used phone.

THE COURT: Okay.

[DEFENSE COUNSEL]: She purchased a brand new phone a year before –

THE COURT: Replacement cost.

[DEFENSE COUNSEL]: – this incident occurred.

THE COURT: Replacement cost.

[DEFENSE COUNSEL]: And so what was taken was a used phone.

(Emphasis added).

The juvenile court concluded that Shields should receive the original purchase price of the stolen phone, as follows:

The Court has had an opportunity to review these two exhibits here, Madam Clerk, 1 and 2 which have been marked for identification and admitted. I don't believe Ms. Shields was confused. Her testimony was clear to me. And on the record she paid \$94 for a deposit, \$446.02 [sic] for the phone[s] after she purchased them and it is the Court's understanding that . . . each phone was \$270.

Madam Clerk, the Court will in fact order restitution in the amount of \$270.

Standards Governing Review of Juvenile Restitution Orders

Juvenile courts may order restitution to “compensate victims who have been injured or who have suffered property loss as a result of the wrongful acts of a minor, although ‘a court’s concern that the victim be fully compensated should not overshadow its primary duty to promote the rehabilitation of the defendant.’” *In re Earl F.*, 208 Md. App. 269, 276 (2012) (quoting *In re Don Mc.*, 344 Md. 194, 203 (1996)). Restitution promotes rehabilitation of the juvenile by impressing upon him “the gravity of harm he has inflicted upon another, and provides an opportunity for him to make amends.” *In re Herbert B.*, 303 Md. 419, 427 (1985); see *In re Earl F.*, 208 Md. App. at 276.

In both juvenile and criminal cases, restitution is governed by Md. Code, (2001, 2008 Repl. Vol.), § 11-603 of the Criminal Procedure Article (“Crim. Proc.”), which provides in pertinent part:

(a) *Conditions for judgment of restitution.* – 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;

* * *

(b) *Right of victims to restitution.* – 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.

See also Md. Code, § 3-8A-28 of the Courts & Judicial Proceedings Article (“The court may enter a judgment of restitution against the parent of a child, the child, or both as provided under Title 11, Subtitle 6 of the Criminal Procedure Article.”).

This Court reviews a juvenile court’s restitution order de novo for legal error as to the standards applied, for clear error as to any first-level findings of fact, and for abuse of discretion as to the ultimate decision to require a payment and the amount of that payment. *See In re Earl F.*, 208 Md. App. at 275 & n.2; *In re Delric H.*, 150 Md. App. 234, 240 (2003); *see also Silver v. State*, 420 Md. 415, 427 (2011); *McCrimmon v. State*, 225 Md. App. 301, 306 (2015).

DISCUSSION

Appellant argues that the juvenile court committed legal error in ordering restitution to “make the victim whole,” rather than to rehabilitate him, and by improperly awarding the amount of the original purchase price, rather than the depreciated replacement value of the device, which was no longer new and had been technologically superceded by the iPhone 5.

We agree with the State that the juvenile court did not err or abuse its broad discretion by expressing the purpose of a restitution order under Crim. Proc. § 11-603(a) as making the victim “whole” by ordering restitution in the amount of the “replacement value” of her stolen phone. As this Court has recognized, in *In re Earl F.*, 208 Md. App. at 276, the statutory restitution scheme expressly authorizes compensation of “victims who have . . . suffered property loss as a result of the wrongful acts of a minor” because such payments can promote rehabilitation by demonstrating to the juvenile the actual consequences of his behavior and by requiring him to take corrective action.

At the heart of this appeal, then, is appellant’s complaint that the juvenile court abused its discretion in ordering restitution based on the original purchase price of the stolen phone. Throughout the hearing, the court insisted that restitution should be premised on replacement cost, which is what it would take to make Shields “whole.” Such a replacement cost necessarily would have reflected any depreciation in the market value of the iPhone 4

as a result of the introduction of more advanced technology and devices, including the iPhone 5. Yet the State presented no evidence of the replacement cost for the iPhone 4. Instead, it offered only the original purchase price of \$270 that Shields paid for the phone fifteen months before it was stolen. In the absence of any other evidence of value, the court ordered restitution in that amount.

Appellant argues that the juvenile court’s ruling was either an erroneous application of an incorrect legal standard or an abuse of discretion in setting the amount of the restitution. Appellant relies primarily on two Maryland decisions recognizing that the value of stolen computers should take into account the depreciating effect of more advanced models hitting the market.

In *In re Christopher R.*, 348 Md. 408, 444 (1998), the Court of Appeals considered the appropriate amount of restitution for a stolen computer and related equipment that was less than three years old. The juvenile court, stating that it had “absolutely no way to know what rate of depreciation should be used for computers,” ordered restitution based on the original purchase price. *Id.* at 410. Applying the predecessor to Crim. Proc. § 11-603, which expressly capped the amount at “the lesser of the fair market value of the property or \$5,000,” the Court of Appeals held that it was error to base “restitution on the purchase price of the stolen property rather than its fair market value at the time of the theft.” *Id.* at 412-13. The Court reasoned that advances in the field of computer technology “are

constantly being made so that used equipment depreciates in value over relatively short periods of time.” *Id.*

In *Champagne v. State*, 199 Md. App. 671, 676-78 (2011), this Court relied on *Christopher R.*’s reasoning in concluding that the State failed to prove the value element in the crime of property theft over \$500. *Id.* at 673. In reviewing the evidentiary record, we recognized that the burden was on the State to establish beyond a reasonable doubt the value of a stolen three-year-old laptop, in accordance with Md. Code, § 7-103(a) of the Criminal Law Article, which defines “value” to mean “the market value of the property . . . at the time and place of the crime” or “if the market value cannot satisfactorily be ascertained, the cost of the replacement of the property . . . within a reasonable time after the crime.” *Id.* at 675. We also recognized that “[t]he present market value of stolen property may be proven by direct or circumstantial evidence and any reasonable inferences drawn therefrom.” *Id.* at 676. Citing *Christopher R.*’s instruction about depreciation of computer technology, as well as similar language from out-of-state cases, we held that the purchase price of the laptop was “‘circumstantially relevant to the present market value’ of that property,” but not sufficient by itself to establish that the value of the computer at the time of the theft was over \$500. *Id.* at 676-78 (citation omitted). As a result, we vacated that conviction and directed a guilty verdict on the lesser included offense of theft of property worth less than \$500. *Id.* at 678.

Applying the teachings of *Christopher R.* and *Champagne*, we agree with appellant that the juvenile court erred by rejecting defense counsel’s argument “that the fifteen month

old iPhone was subject to the same accelerated rate of devaluation as any other electrical device.”

The State attempts to distinguish *Christopher R.* on a number of factual and legal grounds. First, the State argues that in appellant’s case, the juvenile court did not mistakenly believe that it was required to base the amount of restitution on the original purchase price, and the State did not take the position that replacement value was irrelevant. Neither of these proffered differences is material to whether the juvenile court erred in ordering restitution based on the original purchase price of the phone.

Alternatively, the State points out that unlike the predecessor statute applied in *Christopher R.*, the current version of Crim. Proc. § 11-603 does not expressly limit restitution orders to “fair market value” and requires only “competent evidence” to support the amount of the restitution. We are not persuaded that the holding or rationale in *Christopher R.* would be different under the current version of Crim. Proc. § 11-603. Although the statute no longer contains the “fair market value” language, “a victim’s entitlement to a restitution award and the amount of the award are facts that the State must establish by a preponderance of the evidence.” *Juliano v. State*, 166 Md. App. 531, 540 (2006). It is the State’s burden to “introduce ‘competent evidence’ to carry its burdens of production and persuasion that the victim is entitled to restitution, and if so, the amount of it.” *Id.* As recognized in *Christopher R.* and *Champagne*, when restitution is ordered for stolen computers and comparable electronic devices that are commonly subject to market

depreciation, including “smart phones” like the iPhone models, the State cannot satisfy its burden of production merely by presenting evidence of the original purchase price.

Here, there was no dispute that Shields is entitled to restitution for her stolen phone. When the State offered evidence of the original purchase price, defense counsel challenged that evidence, because it did not account for the depreciation in market value during the fifteen months Shields used it before the theft, during which newer technology and devices, became available.¹ Neither side offered any evidence of what a new or used iPhone 4 would cost. Despite the juvenile court’s insistence that the appropriate measure of restitution was the cost to replace the stolen phone, there was no evidence of that replacement cost.

Under the analytical framework of Crim. Proc. § 11-603, the question here is whether the original purchase price of Shields’s stolen phone, by itself, established the appropriate restitutionary measure of her loss. *See Juliano*, 166 Md. App. at 540 (2006). Following the decision and rationale in *Christopher R.*, and the rationale in *Champagne*, we conclude that the answer is no. It was the State’s burden, inherent in its obligation to prove the amount of restitution by a preponderance of the evidence, to present admissible evidence showing the replacement cost for the iPhone 4 as of the date of the theft..

In this case, that proof might have been as simple as proffering the price of an iPhone 4 from an online retailer. Indeed, cell phones are widely available and standardized tools of

¹ The State refers to evidence not in the record that the iPhone 5 had been released as of the date of Shield’s purchase of the iPhone 4 in February of 2013, but that iPhones 5c and 5s were not released until after such purchase.

modern life, for which replacement costs may be rather easily determined.² Instead, the State relied solely on the original purchase price, and the juvenile court erred in basing its restitution order solely on that evidence.³ Therefore, we will vacate the order of restitution and remand the case to the juvenile court so that it may conduct a restitution hearing, at which the State must establish, by competent evidence, the appropriate amount of restitution for the stolen phone. *See Juliano*, 166 Md. App. at 544.

RESTITUTION ORDER VACATED. CASE REMANDED TO THE CIRCUIT COURT FOR PRINCE GEORGE’S COUNTY FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY PRINCE GEORGE’S COUNTY.

² In May of 2016, two iPhones were available for purchase - iPhone 5s (certified pre-owned), 16GB, for \$312, and the new iPhone 6S, 16GB for \$649.99 at www.verizonwireless.com.

³ Moreover, the State might have challenged the amount or rate of depreciation based on the belatedly offered arguments in its brief to this Court, regarding the release of iPhone models. We express no opinion regarding the portion of the State’s brief that asserts new evidence not presented to the juvenile court, concerning when different models of the iPhone were released, except to point out that this is the type of evidentiary proffer that must be presented in the first instance to the juvenile court. In any event, the State failed to proffer in its brief the availability, *vel non*, of a new or used iPhone 4 as of the date of the theft, and the cost thereof.