Circuit Court for Wicomico County
Case No. C-22-CR-20-000518

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND**

No. 0318

September Term, 2022

DENNIS WILLIAMS

v.

STATE OF MARYLAND

Leahy,
Beachley,
Sharer, J. Frederick
(Senior Judge, Specially Assigned),

JJ.

Opinion by Leahy, J.

Filed: June 22, 2023

*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.

**In the November 8, 2022, general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Special Appeals of Maryland to the Appellate Court of Maryland. The name change took effect on December 14, 2022.

This appeal arises from the circuit court's award of restitution in the amount of $10,000 to the victim of a stolen vehicle. In February 2020, the police apprehended the appellant, Dennis Williams, who was in a stolen pick-up truck that he had been operating until it crashed. The truck belonged to Eric Foskey.

The State charged Mr. Williams with the following counts: unlawful taking of a motor vehicle (Count I); illegal possession of ammunition (Count II); fourth-degree burglary/possession of burglary tools (bolt cutters, hammer, wire cutters) with the intent to use them in the commission of a burglary (Count III); theft of a motor vehicle valued between $1,500 to under $25,000 (Count IV); and theft of assorted tools and a Garmin GPS valued under $100 (Count V). On August 6, 2021, in exchange for the State agreeing to enter a *nolle prosequi* on Counts I, II, and IV, Mr. Williams agreed to take an *Alford* plea on Count III—fourth-degree burglary/possession of burglar's tools in violation of Maryland Code (2002, 2021 Repl. Vol), Criminal Law Article ("CR"), section 6-205; and that Mr. Williams would pay some restitution, in an amount to be determined at a future hearing.

At the restitution hearing in October 2021, Mr. Foskey testified that even though "[t]he truck is in operating order, [] it will never be what I had before-hand[.]" Nonetheless, the State sought restitution only for the expenses Mr. Foskey incurred in making repairs to his truck, which he estimated at $3,100 and for which he submitted receipts of $2,900.

Mr. Foskey testified during his direct examination that the insurance company "[totaled] out" the truck. When asked to clarify that statement on cross-examination, he

explained that his insurance company paid him $12,000 for the loss, which was "far less value than what the truck is actually worth in the used market world at that time[.]" Mr. Foskey stated:

> That exact truck right now is worth 24,000 on this market. I tried -- I argued the price for the insurance company as it was. The -- literally, the exact same truck, there's only one that was in the country at the time, and they wanted 22,000 for it, for the same mileage. . . . give or take a couple hundred miles.

In closing, the State observed that Mr. Foskey had "testified to documentation of his losses incurred[,] which were "reasonable," and asked the court to "award him restitution in kind." Mr. Williams, in turn, argued that Mr. Foskey had received a windfall because Mr. Foskey restored the truck to working order by spending only $3,000 of the $12,000 paid to him by the insurance company. Mr. Williams said that no amount of restitution could be lawfully ordered because "[t]he restitution statute doesn't allow for [it] -- it has to be out-of-pocket expenses. And in this case, the out-of-pocket expenses were deducted by the 12,000 that [Mr. Foskey] was paid by insurance." ***Id.* at 18.**

The court disagreed with both the State and Mr. Williams. Crediting Mr. Foskey's unsupported testimony that the replacement value of his truck was $22,000, the court ordered Mr. Williams to pay $10,000 in restitution, which was the difference in value between the amount Mr. Foskey received from his insurance company and the alleged replacement value of the truck.

On November 9, 2021, Mr. Williams filed a timely application for leave to appeal, which we granted. Mr. Williams presents one question for our review: "Did the circuit court err in ordering restitution in the amount of $10,000?"

We hold that, because Mr. Williams did not receive reasonable notice of the amount of restitution at stake and a fair opportunity to defend against that amount, we vacate the judgment of restitution and remand to the circuit court for further proceedings. The Supreme Court of Maryland has long recognized that "because restitution is part of a criminal sentence, as a matter of both Constitutional due process and Maryland criminal procedure, such an order may not be entered unless (1) the defendant is given reasonable notice that restitution is being sought and the amount that is being requested, (2) the defendant is given a fair opportunity to defend against the request, and (3) there is sufficient admissible evidence to support the request[.]" *Chaney v. State*, 397 Md. 460, 470 (2007).

BACKGROUND

On February 4, 2020, Dennis Williams was charged as noted, in the District Court of Maryland for Wicomico County. **R. 7-9.** Following Mr. Williams's demand for a jury trial, on October 28, 2020, the case was transferred to the Circuit Court for Wicomico County, Maryland. **R. 14.**

August 6, 2021, Plea & Sentencing Hearing

The status hearing scheduled for August 6, 2021, evolved into a Plea and Sentencing hearing after the court asked whether a plea offer had been extended to Mr. Williams. The Assistant State's Attorney replied:

> There has been a couple of different plea offers offered in this case. . . . [Mr. Williams's counsel] and I have discussed sort of creative solutions that would achieve [Mr. Williams's] goals as well as the goals of the State.
>
> Previously, outside of chambers, we had a discussion of a guilty plea to the burglary charge which I believe is . . . count number 3, and then at that point, the State would recommend a wholly suspended -- a sentence of 18 months. That would, essentially, be equivalent to a time served sentence.

Then, after Mr. Williams's counsel indicated that his client was interested in accepting "a time served plea to the fourth[-]degree burglary," and a treatment plan for his medical condition, defense counsel added:

> [MR. WILLIAMS'S COUNSEL]: -- and that would be appropriate. And so, ultimately, that's what we are asking for. **And I think the plea contemplates -- we don't know what restitution would be, so it would contemplate a restitution hearing.**
>
> THE COURT: Okay. All right. So help me understand. **He wants to accept the plea today?**
>
> [MR. WILLIAMS]: **Yes**.
>
> THE COURT: Do you need additional time to talk to [Mr. Williams] about the plea or anything like that, or does he understand the plea?
>
> [MR. WILLIAMS'S COUNSEL]: **I believe he understands the plea. We've talked at length about a lot of this case**, I think.

(Emphasis added). After confirming that the parties did not have "a written plea offer," the court asked the parties to place their agreement on the record. The Assistant State's Attorney recounted the plea agreement, noting "[t]he State will request a restitution hearing at a later date and time," and Mr. Williams's counsel confirmed. The court then addressed Mr. Williams directly:

> THE COURT: And that's what you want to do, enter a plea – an Alford plea[1] of guilt to that charge [of fourth-degree burglary]?
>
> [MR. WILLIAMS]: Yes, sir.
>
> * * *
>
> THE COURT: And you understand what the maximum penalty is, 3 years?
>
> [MR. WILLIAMS]: Yes, sir.
>
> THE COURT: Do you understand that I'm not bound by this plea agreement and the recommendation of the State? I can sentence you up to the maximum penalty for each offense to which you're entering an Alford plea of guilt. Do you understand?
>
> [MR. WILLIAMS]: Yes.
>
> THE COURT: Do you understand that should I choose to impose a higher sentence than what the State is recommending, you will not be entitled to withdraw your plea? Do you understand?
>
> [MR. WILLIAMS]: Yes.

Later in the hearing, the court asked for "a statement of facts supporting the plea[.]" The State proffered that, had the case gone to trial, the evidence would reflect that:

> . . . on February 2, 2020 at approximately 1008 hours, Trooper Graves was dispatched to 1400 Coulbourn Mill Road, Salisbury, Maryland for a report of stolen vehicle. Upon arrival at the residence, Trooper Graves made contact with the victim in this matter, Eric Foskey.
>
> Foskey advised that his vehicle, a 2004 Ford F-350 valued at approximately $7,000 was parked for the evening at 709 Snow Hill Road. It should be noted that located at that address is the Wicomico County Vault Company. Troopers would have described that building as a large steel warehouse with an attached gated yard.

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[1] *See North Carolina v. Alford*, 400 U.S. 25 (1970). The "functional equivalent of a guilty plea," an *Alford* plea is "a specialized type of guilty plea where the defendant, although pleading guilty, continues to deny his or her guilt, but enters the plea to avoid the threat of greater punishment." *Ward v. State*, 83 Md. App. 474, 478-80 (1990).

> Foskey stated that the vehicle was left with the keys inside of the vehicle inside of that lot. Foskey would have testified here today that that lot was locked and gated for the night when he left that vehicle in that property.
>
> Mr. Foskey would have also testified that he did not give anyone permission be in the lot or be in possession of the 2004 Ford F-350.
>
> After gathering information, Trooper Graves issued a be on the lookout for the vehicle in the region regarding the stolen truck. Trooper Graves also reviewed CCTV footage from the business located next door which captured the F-350 and a trailer being removed from the lot at approximately 2:50 hours on the morning of February 3, 2020. [2]
>
> Responsive to that be on the lookout for the aforementioned car, Trooper Graves was notified by Somerset County sheriffs that they were in possession of the vehicle and that the driver had still been operating the vehicle.
>
> The driver of that vehicle would have been identified as Dennis Williams as the defendant to the left of counsel at trial table today.
>
> Mr. Williams was found inside the vehicle, found operating the vehicle, and he was found to be in possession of burglar's tools, to wit: gloves, bolt cutters, hammer, and wire cutters.
>
> The victim in this matter would have testified that while the truck did belong to him, those were not his tools in any form or any fashion.
>
> All pertinent events did occur in Wicomico County, Maryland. That would be the State's facts and evidence.

[2] The transcript of the August 6 hearing reflects that the Assistant State's Attorney incorrectly stated that the security footage depicted the "F-350 and a trailer being removed from the lot at approximately 2:50 hours on the morning of February 3, 2020" instead of on the morning of February 2, 2020, which is the date that Trooper Graves responded to the report of a stolen vehicle. The indictment and statement of charges, however, support the February 2, 2020 date.

After granting defense counsel's request to strike "the driving out from the lot" from the statement of facts, the court found that there was "a sufficient factual basis to find [Mr. Williams] guilty beyond a reasonable doubt." The court "accept[ed Mr. Williams's] Alford plea of guilty to charge number 3, which is a fourth [degree] burglary charge" in "violation of Criminal Law Article 6-205(d)." Thereafter, per the plea agreement, the State entered a *nolle prosequi* on the remaining counts.

After hearing from both parties, the judge sentenced Mr. Williams as follows:

> THE COURT: So the sentence of the Court will be for this case, will be 3 years for the fourth degree burglary charge. I will suspend all but 18 months.
>
> He will be placed on a period of 3 years of supervised probation. He will have standard conditions of probation including the following special conditions. He will be assessed -- mental health assessment, substance use and abuse assessment, and then any treatment. That is mental health treatment and substance use and abuse including alcohol, any type of prescription medication.
>
> You'll have any treatment recommended by Parole and Probation. You will complete –
>
> [MR. WILLIAMS]: Yes, sir.
>
> THE COURT: Okay. Totally abstain from any alcohol, drugs, controlled dangerous substances, or abuse or any prescription medications.
>
> [MR. WILLIAMS]: Uh-huh.
>
> THE COURT: Okay. **And you'll have to pay restitution as ordered at a -- to be scheduled restitution hearing.**
>
> [MR. WILLIAMS]: **Right**.

(Emphasis added) (spacing altered in original).

With respect to the restitution hearing "to be scheduled," Mr. Williams's counsel noted earlier in the proceeding that he "need[ed] to represent [Mr. Williams] at the

restitution hearing so this case [wa]sn't fully closed" and later asked the court to "update [Mr. Williams's] mailing address so that . . . he gets the notice of the restitution hearing[.]" . The criminal hearing sheet docketed the same day reflected that a "[r]estitution hearing [was] to be scheduled." The court subsequently scheduled the restitution hearing for September 10, 2021, but it was postponed twice more until October 28, 2021.

October 28, 2021 Restitution Hearing

At the start of the restitution hearing on October 28, counsel for Mr. Williams made a preliminary motion, arguing that "restitution would [not] be appropriate in this case given that the conviction was for burglary tools" and the damage to Mr. Foskey's vehicle was not "a direct result of that crime." The Assistant State's Attorney responded that "the conversations I had with [Mr. Williams's] counsel is that restitution was to be a part of the plea and that we would have a restitution hearing to determine that." He further stated that "restitution can be made even in matters or for charges in and of themselves that would not require it so long as it is consented to" and "it was the State's understanding that it was consented to as part of the plea." After counsel for Mr. Williams conceded that "[i]t was part of the plea that we would have a contested restitution hearing," the court denied defense counsel's motion, finding that Mr. Williams "knowingly, intelligently, and voluntarily agreed to pay some form of restitution" the amount of which was "to be determined today at this hearing."

The court next asked whether the parties were able to reach an agreement on the amount of restitution, to which the Assistant State's Attorney replied that they had not, and

that he had "given a pair of documents to defense counsel. **Those documents are what we will be going off of today.**"[3] (Emphasis added). The State then called Eric Foskey to the stand.

After Mr. Foskey testified that he was the owner of the 2004 blue Ford F-350, the State introduced into evidence an exhibit from Cockey's Diesel Performance showing an invoice for $1,700. Mr. Foskey explained that after he received the truck back from the State, he discovered the truck "had a couple of issues with the motor," including "the high pressure oil pump." The invoice, Mr. Foskey stated, was for the cost of "repair and parts." Next, the State introduced into evidence a second exhibit that consisted of a handwritten "Receipt of Sale" for "Tires & Wheels" for $1,200. . Mr. Foskey explained that this document was for "a set of tires and wheels" he bought "from [a] friend" after Mr. Foskey and "a buddy" spotted the truck on the road shortly after it was stolen but before the police recovered the truck. When Mr. Foskey and his friend "attempted to stop [the] truck," however, the driver of the truck "jumped the curb and destroyed one of the wheels" on it.

When the State asked whether Mr. Foskey had incurred any other charges as a result of this incident, the following colloquy occurred:

> [MR. FOSKEY]: Yeah. I mean, the truck was totalled [sic]. The insurance company totalled [sic] it out. **I got a far less value than what the truck is actually worth in the used market world at the time, let alone this time.**

[3] The State later entered into evidence Exhibit No. 1: Invoice for "High pressure oil pump, ipr Valve, and Turbo gaskets" for $1,700 from Cockey's Diesel Performance and Exhibit No. 2: a handwritten Receipt of Sale for "Tires & Wheels" for $1,200 from Lee Serman.

> I had to replace the fender because it was totally damaged. The front lights were damaged. The passenger's side mirror was damaged.
>
> And then it had all down the side of the truck was all messed up, dents, scratches. I don't know what [Mr. Williams] went through, but it looked like a ditch to me because there's mud everywhere.
>
> [ASSISTANT STATE'S ATTORNEY]: Okay.
>
> [MR. FOSKEY]: And, of course, the back wheel.
>
> When I got the truck back, the insurance company had it totalled [sic] out. . . . **The truck is in operating order, but it will never be what I had before-hand**, because, like I said, it's --
>
> [ASSISTANT STATE'S ATTORNEY]: Okay.
>
> [MR. FOSKEY]: -- it still has the dents and scratches. There's no getting them out unless you want to pay more for --
>
> [ASSISTANT STATE'S ATTORNEY]: And so just for a point of clarity, could you -- what was totalled [sic] out and what wasn't by the insurance company?
>
> [MR. FOSKEY]: The truck was totalled [sic] out.
>
> * * *
>
> [ASSISTANT STATE'S ATTORNEY]: Do you have a -- do you have a total in the amount of restitution of these other items?
>
> [MR. FOSKEY]: It's triple at this point. I paid cash money for them, so I'm not going to have receipts. Like $100 for a fender, $100 for the mirrors – I'm not worried about that.
>
> * * *
>
> [ASSISTANT STATE'S ATTORNEY]: Anything else that you'd like to tell the Court?
>
> [MR. FOSKEY]: I mean, [Mr. Williams] **set me back three months on my excavation company because that truck was built for my excavation company**, for hauling the equipment and everything I had. So it set me back three months.

(Emphasis added). In addition to the above-mentioned expenses, Mr. Foskey also testified that his insurance company declined to cover the three flat tires on the trailer attached to

the stolen truck; Mr. Foskey indicated, however, that he was "not going after" those costs, it was "just time that I had to deal with."

It was only during Mr. Foskey's brief cross-examination that the $22,000 value for the truck was raised for the first time. Mr. Foskey explained:

> My truck was totalled [sic]. . . . I had gotten a payment [from the insurance company] that was less than the actual value for the truck.
>
> [MR. WILLIAMS'S COUNSEL]: How much did you get?
>
> [MR. FOSKEY]: I got 12,000 for it. That exact truck right now is worth 24,000 on this market. I tried -- I argued the price for the insurance company as it was. The -- **literally, the exact same truck, there's only one that was in the country at the time, and they wanted 22,000 for it, for the same mileage**. . . . Well, give or take a couple hundred miles.

(Emphasis added).

Apart from clarifying that Mr. Foskey received $12,000 from his insurance and that he made some repairs on the truck, counsel for Mr. Williams did not ask any further questions nor did he object to the alleged $22,000 value for a replacement truck. When the State rested, defense counsel did not call any witnesses to the stand or introduce any exhibits into evidence. Accordingly, following Mr. Foskey's testimony, the court heard arguments from both parties. The Assistant State's Attorney argued that "the State believes we've demonstrated our burden to show that the costs incurred by Mr. Foskey are reasonable" as Mr. Foskey was present and "testified to documentation of his losses incurred." The State asked the court to "award him restitution in kind."

Counsel for Mr. Williams responded that:

> I think [Mr. Foskey] would not be entitled to the extra money given that the insurance paid out the $12,000. They paid him $12,000 for a truck that was totalled [sic]. He, in essence, took that money and [made] repair[s].
>
> That, in essence, creates a windfall. Because he gets the 12,000 and the repair for approximately give or take $3,000, which creates a wind-fall of $9,000.
>
> The restitution statute doesn't allow for, you know, Mr. Williams -- it has to be out-of-pocket expenses. And in this case, the out-of-pocket expenses were deducted by the 12,000 that he was paid my insurance. . ..

In its oral ruling, the court disagreed with both the State and Mr. Williams. It held:

> The arguments that were made were that the State says that you're entitled to the amount that you requested with your bills.
>
> The defense says, well, insurance paid him and made him whole, therefore, he's not entitled to restitution.
>
> The way I look at it is a little different than both of you and it's this. **I took testimony from the witness. A witness may testify credibly if I accept his testimony or her testimony to the value of their loss and the value of their property.**
>
> He understood that value. I think he built the truck. It had a specific purpose for his excavation company. **He determined and testified credibly that the value of his vehicle was $22,000 at the time that the defendant wrongfully destroyed his vehicle.**
>
> That vehicle was totalled [sic]. An insurance company who had an interest in providing the value after the destruction by the defendant, the insurance company had an interest in accurately assessing value and said, well, now the truck is -- the value of the truck is zero.
>
> So he took a valueless truck, and he . . . made some repairs on it, $1700 and $1200. **But the way I'm assessing the restitution is the difference that he's owed -- he was paid 12,000 by the insurance company. His truck was 12 -- 22,000 -- the value of the truck was 22,000 at the time of the loss. He's out -- he's out $10,000.**
>
> So the restitution that I'm ordering is $10,000 in favor of the victim, Mr. Foskey.

(Emphasis added).

In response to the court's oral ruling, the parties did not make any further arguments or objections. The court entered a written order later that same day reflecting that Mr. Williams was to be released on his own recognizance and that Mr. Williams was to pay $10,000 in restitution to Mr. Foskey. On November 9, 2021, Mr. Williams filed an application for leave to appeal, which this Court granted on April 26, 2022.

STANDARD OF REVIEW

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 [Criminal Procedure Article] § 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.") (citation omitted). 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)). Further, We review the legality of a sentence pursuant to a plea agreement as a matter of law. *Bonilla v. State*, 443, Md. 1, 6 (2015) (citing *Cuffley v. State*, 416 Md. 568, 581 (2010))

DISCUSSION

I.

Legal Framework for Restitution

Under Maryland's general theft statute[4], a person convicted of theft of property or services with a value of at least $1,500 but less than $25,000 is guilty of a felony, is subject to imprisonment or fine, and "shall restore the property taken to the owner or pay the owner the value of the property or services[.]" CR § 7-104(g)(1)(i). A court may enter a judgment of restitution if, "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[.]" Maryland Code (2001, 2018 Repl. Vol.), Criminal Procedure Article ("CP"), § 11-603(a)(1).[5] While the "objectives of restitution do not include that the victim must be made whole by the full reimbursement of the victim's loss," they "do not preclude that possibility if the defendant has the ability to pay." *McDaniel v. State*, 205 Md. App. 551, 558 (2012) (quoting *Anne Arundel Cnty. v. Hartford Accident & Indem. Co.*, 329 Md. 677, 685-86 (1993)).

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[4] Mr. Williams's charge of theft of a motor vehicle valued between $1,500 to under $25,000 (Count IV) is a violation of CR § 7-104. This charge forms the basis for the circuit court's order of restitution, despite the State's entry of *nolle prosequi* for this charge under the plea agreement.

[5] Additional restitution, such as for "actual medical, dental, hospital, counseling, funeral, or burial expenses or losses;" "direct out-of-pocket loss;" "loss of earnings;" "or expenses incurred with rehabilitation;" that are a direct result of the crime or delinquent act, is available "exclusively" to victims of "crimes involving physical and/or mental injury." *Shivers v. State*, 256 Md. App. 639, 664-65 (2023) (citing CP § 11-603(a)(2)).

A victim is presumed to have a right to restitution if the victim or the State requests it, and the court is presented with competent evidence of the loss. CP § 11-603(b). A plea agreement under which "a criminal defendant agree[s] to pay restitution for related, though uncharged, crimes" is permissible if "the defendant freely and voluntarily agrees to pay such restitution[.]" *Silver v. State*, 420 Md. 415, 432 (2011). However, the amount of the victim's loss disclosed in the charging document does not limit the amount the court may award as restitution, so long as the respondent receives sufficient notice before the restitution hearing. *In re Earl F.*, 208 Md. App. 269, 279 (2012).

An order of restitution is a criminal sanction and is therefore constrained by the principles of constitutional due process and Maryland criminal procedure. *Chaney v. State*, 397 Md. 460, 470 (2007). "[S]uch an order may not be entered unless (1) the defendant is given reasonable notice that restitution is being sought and the amount that is being requested, (2) the defendant is given a fair opportunity to defend against the request, and (3) there is sufficient admissible evidence to support the request [.]" *Id.* (citations and footnote omitted).

"[T]he State must 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." *Juliano v. State*, 166 Md. App. 531, 540 (2006).[6] While there is a "presumption of reasonableness

[6] *But see Goff v. State*, 387 Md. 327, 336 (2005) (holding that "it is the burden of the Defendant to show that the suggested charges [to calculate restitution] by the State are not fair and reasonable").

afforded to 'a written statement or bill,'" the statute does not require that the State produce such a statement or bill, and "[c]ompetent evidence of entitlement to, and the amount of, restitution need only be reliable, admissible, and established by a preponderance of the evidence." *McDaniel*, 205 Md. App. at 559, 565 (citing CP § 11-615(a)-(b)) (citation omitted).[7] *See also In re Cody H.*, 452 Md. at 192. "Incompetent evidence refers to evidence that is inadmissible for reasons other than relevancy." *Grier v. State*, 351 Md. 241, 261 (1998) (citing *Clark v. State*, 332 Md. 77, 87 n.2 (1993)). *See also Juliano*, 166 Md. App. at 540 (quoting JOSEPH F. MURPHY, JR., *Maryland Evidence Handbook*, § 600 at 233 (3d ed. 1999) to say that "[t]he competency issue focuses upon the inherent reliability of the evidence being offered."). Notably, "the prosecutor's representations during the sentencing phase of appellant's trial do not constitute 'competence evidence' of [the victim's] loss." *Juliano*, 166 Md. App. at 543 (citing *North Carolina v. Shelton*, 605 S.E.2d 228, 233-34 (N.C. Ct. App. 2004)).

The Maryland criminal theft statute defines "value" as "(1) the market value of the property or service at the time and place of the crime; or (2) if the market value cannot satisfactorily be ascertained, the cost of the replacement of the property or service within a reasonable time after the crime." CR § 7-103(a). Section 11-603 of the Criminal Procedure

[7] "A written statement of expenses or a bill shall be taken as prima facie evidence at a restitution hearing[,]" Maryland Code (1973, 2020 Repl. Vol.), Courts and Judicial Proceedings Article ("CJP"), § 10-917, and where the restitution is "for medical, dental, hospital, counseling, funeral, or burial expenses[,]" "[a] person who challenges the fairness and reasonableness or the necessity of the amount on the statement or bill has the burden of proving that the amount is not fair and reasonable." CP § 11-615(b).

Article governing restitution determinations does not specify how stolen property should be valued, and we have observed that an award of restitution "is limited only by the State's proof of loss attributed to the offense or conduct in which the juvenile was adjudged to be involved." *In re Earl F.*, 208 Md. App. at 279. Still, the "fundamental objective" of restitution in criminal cases is promoting rehabilitation, and when imposing restitution, the court "ordinarily should not exceed the defendant's ability to comply." *Anne Arundel Cnty. v. Hartford Accident & Indem. Co.*, 329 Md. 677, 685 (1993) (quoting *Coles v. State*, 290 Md. 296, 306 (1981)).

II.

Consequence of Plea Agreement

Mr. Williams acknowledges that he agreed to "*litigate* the question of restitution" in a restitution hearing, but he does not concede that he agreed to pay restitution as part of his plea agreement. (Emphasis supplied by Mr. Williams). He argues that the circuit court's order of restitution in the amount of $10,000 "exceeded the sentencing court's statutory authority." He asserts that "the parties effectively agreed at the August 6, 2021 plea hearing that any restitution would be capped at $7,000[,]" and that the later-issued order in excess of that amount was illegal.

Mr. Williams draws upon *Chaney v. State*, 397 Md. 460, 470 (2007), to argue that restitution awards must conform to constitutional due process principles, such that: "(1) the defendant is given reasonable notice that restitution is being sought and the amount that is being requested, (2) the defendant is given a fair opportunity to defend against the request,

and (3) there is sufficient admissible evidence to support the request[.]" He observes that "the factual basis for a plea ideally establishes mutual understanding between the parties about the scope of the criminal conduct to which the defendant admitted guilt[,]" and notes that in this case the plea agreement was entirely verbal. From there Mr. Williams extrapolates the proposition that "the State or victim cannot request restitution above and beyond the value of losses expressed in the State's factual proffer at the plea hearing."

Mr. Williams notes that the sole fact proffered by the State regarding the truck's value was "Foskey advised [police] that his vehicle, a 2004 Ford F-350 valued at approximately $7,000 was parked for the evening at 709 Snow Hill Road." (Emphasis supplied by Mr. Williams). He further alleges that the "figure of $22,000 appeared in the record for the first time at the October 28, 2021 restitution hearing, when Foskey testified that he saw a similar truck on sale for that amount." Therefore, Mr. Williams argues, "defense counsel was only on notice that the State might seek up to $7,000 in restitution—the truck's worth proffered at the plea hearing—to cover the truck's value."

The State responds that the "sentencing court's restitution determination was not limited by an agreement between the parties." It argues that Mr. Williams's contention that the parties "effectively agreed" to cap restitution erroneously "relies on an isolated statement in the State's proffer" that Mr. Foskey's truck was "valued at approximately $7,000," the "only purpose of [which] was to show the evidentiary basis for Williams's fourth-degree burglary conviction." The State further claims that the court "did not bind

itself to the parties' proffers or recommendations with respect to sentencing" nor did the parties "make any express agreement on a restitution amount or limit."

Analysis

We review the circuit court's order awarding restitution in excess of the amount named in the State's proffer for plain error.[8] *See Chaney v. State*, 397 Md. 460, 463, 468 (2007). In *Chaney*, the Supreme Court of Maryland[9] held that restitution orders "may not be entered unless (1) the defendant is given reasonable notice that restitution is being sought and the amount that is being requested, (2) the defendant is given a fair opportunity to defend against the request, and (3) there is sufficient admissible evidence to support the request[.]" *Id.* at 470. Here, we determine whether Mr. Williams received reasonable notice of the restitution sought, and, consequently, a fair opportunity to defend against the sanction.

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[8] Appellant does not specify whether he challenges the restitution order as an illegal sentence under Maryland Rule 4-345(a) or simply alleges plain error in the circuit court's decision; however, he does not present grounds to support a claim of an illegal sentence. *See Chaney v. State*, 397 Md. 460, 467-68 (2007) (finding an appellant's assertion that "no evidentiary foundation was laid to support" the restitution amount of $5,000 as a condition of probation on a criminal charge "d[id] not make the condition[] intrinsically illegal" within the meaning of Maryland Rule 4-345(a).).

[9] In the November 8, 2022, general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Appeals of Maryland to the Supreme Court of Maryland. The name change took effect on December 14, 2022. *See also* Md. Rule 1-101.1(a) ("From and after December 14, 2022, any reference in these Rules or, in any proceedings before any court of the Maryland Judiciary, any reference in any statute, ordinance, or regulation applicable in Maryland to the Court of Appeals of Maryland shall be deemed to refer to the Supreme Court of Maryland . . . .").

In *In re Earl F.*, 208 Md. App. 269, 278 (2012), this Court held that the restitution ordered by a trial court is not capped by the amount requested by the State at the outset of the action. There, a State's Attorney brought a delinquency petition against a juvenile for a robbery in which he assaulted the owner of a produce stand and stole $900 in cash from his pockets. *Id.* at 273. The petition alleged that the property stolen by the juvenile was "in the amount less than $100." *Id.* at 271-72. The juvenile court ordered restitution in the amount of $600, and the juvenile appealed, arguing that "the amount of restitution must be limited to the amount of loss alleged in the juvenile petition, *viz.*, $10." *Id.* at 272 (footnote omitted). This Court affirmed the circuit court's decision, finding "no violation of [the Respondent's] due process rights." *Id.* at 279. We recounted at least four incidents of notice to the Respondent of the value of restitution sought by the State:

> 1. The State alerted the Respondent in advance of the adjudicatory hearing that it would "attempt to prove an amount of loss greater than the ten dollars cited in the delinquency petition."
> 2. The victim testified at the adjudicatory hearing to an amount of loss greater than ten dollars.
> 3. The greater amount ($900) was named at the subsequent disposition hearing.
> 4. The court held a separate restitution hearing on the Respondent's objection to the claim of that greater amount.

Id. at 279. The significance of these notices in *Earl F* are twofold: the State alerted the defendant of its intention to prove and pursue a greater amount of loss than charged, and it alerted the defendant to what that greater amount was likely to be.

By contrast, in the case at bar, the State never gave any indication before *or even during* the restitution hearing that it was seeking any restitution higher than the $7,000 named in its proffer. The greater amount was proposed *sua sponte* by the court and was voiced for the first time after counsel had concluded their arguments.

To be sure, the judge had warned Mr. Williams of the potential for *sua sponte* action, when it asked Mr. Williams at the August 6, 2021, Plea and Sentencing hearing, "Do you understand that I'm not bound by this plea agreement and the recommendation of the State? I can sentence you up to the maximum penalty for each offense to which you're entering an Alford plea of guilt. Do you understand?", to which Mr. Williams replied, "Yes." This disclosure, however correct, did not supply the missing information—the probability or the scale of an increased penalty—that was necessary for Mr. Williams to mount a defense against the much greater value identified by the court as Mr. Foskey's loss.

The restitution hearing opened with direct examination of Mr. Foskey, in which the State elicited evidence from testimony from Mr. Foskey that he had spent between $2,900 and $3,100 to repair his truck after the incident. Neither the State nor Mr. Foskey alluded to the $7,000 named in the proffer and the State did not question Mr. Foskey about the value of the truck. Likewise, neither indicated that they sought restitution greater than the cost of the repairs. The court acknowledged this at the close of the hearing, telling Mr. Foskey that "the State says that you're entitled to the amount that you requested with your bills[,]" before unveiling its own analysis. Mr. Foskey suggested an alternative value for

the truck for the first time on cross-examination when Mr. William's counsel asked him whether he received insurance compensation.

Therefore, from the plea negotiations through the midpoint of the sentencing hearing, Mr. Williams received no notice that a restitution assessment might exceed $7,000. This contrasts with the notice possessed by the respondent in *Earl F.*, who had both direct knowledge of the value of the currency he had stolen, and notice from the State of the amount it intended to seek, at least as early as the adjudication hearing. Unlike *Earl F.*, Mr. Williams did not receive sufficient notice of his jeopardy and was thereby deprived of a reasonable opportunity to be heard and to present evidence against Mr. Foskey's surprise testimony that his truck was valued at $22,000. Therefore, it was plain error to assess Mr. Williams an amount greater than the $7,000 of which he had notice before the restitution hearing.

II.

Calculation of Restitution

We address Mr. Williams's remaining contentions only to provide guidance for proceedings on remand. Mr. Williams argues that Mr. Foskey is not entitled to restitution beyond the repair costs that he supported with documentary evidence, or, alternatively, that he is entitled to no restitution at all. Both arguments rest on the contention that the court mis-identified the value of Mr. Foskey's initial loss as $22,000, rather than the $2,900 in repairs that he documented in exhibits. The court stated that it was "assessing the restitution [as] the difference that [Mr. Foskey was] owed -- he was paid [$]12,000 by the

insurance company. . . . the value of the truck was [$]22,000 at the time of the loss. He's out -- he's out $10,000." Mr. Williams asserts the State provided insufficient evidence to establish Mr. Foskey's initial loss as $22,000, and therefore the restitution order for $10,000 was not supported by competent evidence and must be vacated.

Specifically, Mr. Williams first argues that there was no competent evidence to "substantiate the circuit court's conclusion that the truck was worth $22,000 before the incident," because the only evidence Mr. Foskey offered was his testimony that he saw an offer for "the exact same truck," "for the same mileage," of which there was "only one that was in the country at the time,"[10] for $22,000. Mr. Williams notes that Mr. Foskey did not

[10] The following analysis, by the United States Court of Appeals for the Fourth Circuit, of replacement cost under the Mandatory Victim's Restitution Act ("MVRA"), 18 U.S.C. § 3663A, may be helpful to the court's analysis on remand, even if it is not binding:

> By contrast, replacement cost may be an appropriate measure of value when the fair market value is difficult to determine or would inadequately capture the value of the victim's actual losses. *See United States v. Simmonds*, 235 F.3d 826, 832 (3d Cir. 2000) (affirming the district court's use of replacement cost for furniture because "furniture often has a personal value to its owners that cannot be captured or accurately estimated by simply determining the market value of the furniture"); [*United States v.*] *Kaplan*, 839 F.3d [795,] 802–03 [(9th Cir. 2016)] (affirming the district court's use of replacement cost to value personal belongings like clothing, furniture, and home appliances because "fair market value would not have adequately captured the destroyed items' intangible, and perhaps sentimental, value to the victims"). Fair market value may be difficult to determine or an inadequate measure of loss where the "property is unique or lacks a broad and active market." *United States v. Genschow*, 645 F.3d 803, 814 (6th Cir. 2011); *accord* [*United States v.*] *Frazier*, 651 F.3d [899,] 904 [(8th Cir. 2011)] ("[I]f the actual cash value of the damaged, lost, or destroyed property is difficult to ascertain—because an item is unique, or because there is not a broad and active market for it, replacement cost rather than fair market value may better

attest to, nor did the State enter evidence to show, "the source of the sale, the accuracy of the $22,000 figure, the identity of the alleged seller, or the extent to which both the seller's truck and Foskey's truck were in similar condition—other than having similar mileage—before the incident giving rise to this case."

Mr. Williams challenges the State's argument that "the general principle that an owner's testimony [as] to the market value of their property is competent evidence of the item's market value," replying that "[n]o cases hold that that a property owner's testimony about the value of their property is always competent evidence, as a matter of law, in restitution cases." Mr. Williams urges that Mr. Foskey's testimony alone "was too thin a reed upon which to rule that the 2004 Ford F-350—a nearly 20-year-old truck—had a market value of $22,00 before the incident," therefore "[a]t most, then, Foskey was owed only $2,900 in restitution."

Mr. Williams next argues that while Mr. Foskey presented evidence that he spent at least $2,900 for repairs to bring his truck back to operating condition, Mr. Foskey's

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> compensate a victim for the full amount of his loss." (internal quotation marks and citation omitted)); [*United States v.*] *Boccagna*, 450 F.3d [107,] 109 [(2nd Cir. 2006)] ("[W]here property is unique or where no active market exists for its purchase, other measures of value may better serve the MVRA's compensatory purpose."). Courts, however, should be cautious when using replacement costs to calculate the value of lost property. Using replacement cost in inappropriate circumstances may incentivize victims to inflate their losses by replacing older, depreciated property with newer, more expensive property.

United States v. Steele, 897 F.3d 606, 612 (4th Cir. 2018).

insurance payout of $12,000 "meant that [he] received enough money to make him whole" and enjoy a windfall of $9,100. Mr. Williams observes that Mr. Foskey testified that he did not plan to replace the truck or to request compensation for any past or future repairs to the truck, beyond the $2,900 that he had documented in exhibits. From these observations Mr. Williams deduces that Mr. Foskey was not owed any restitution.

The State responds that the circuit court did not err in crediting Mr. Foskey's testimony as to the value of his truck prior to the incident, citing to "the general principle that an owner's testimony [as] to the market value of their property is competent evidence of the item's market value." In support, the State notes that Mr. Foskey "modified or 'built' the truck for excavation company's use;" and that the court recognized that "Foskey understood the market value of the truck and the modifications he had made to the truck."

Analysis

We observe that defense counsel made no objection to Mr. Foskey's testimony after he elicited it from him on cross-examination, nor moved to strike it from the record. Regardless, we further observe that the court had the benefit of observing Mr. Foskey's testimony and in its bench ruling explicitly credited the truth of the statement, stating:

> Mr. Foskey understood [the truck's] value. I think he built the truck. It had a specific purpose for his excavation company. *He determined and testified credibly that the value of his vehicle was $22,000* at the time that the defendant wrongfully destroyed his vehicle.

(Emphasis added). In light of our "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) (quotation omitted), and the general principle that a trial court may accept owners' testimony about the market value of their property, *see Cofflin v. State*, 230 Md. 139, 143 (1962); *Pitt v. State*, 152 Md. App. 442, 465-66 (2003), we discern no error by the trial court crediting Mr. Foskey's testimony, as it stood unchallenged.[11]

We reject, however, the circuit court's subtraction of the insurance payout from the any value of Mr. Foskey's vehicle to arrive at the restitution award. The Maryland Code of Criminal Procedure, Subtitle 6, Part I (Restitution), does not define "expense" or "loss," and this Court has held that "unlike 'expense,' the word 'loss' does not imply necessarily an action on the part of the one who incurs it: a victim my suffer a 'loss'—a harm or deprivation—through the actions of a criminal defendant; the victim will incur an 'expense' when he seeks to remedy or ameliorate that loss." *McDaniel v. State*, 205 Md. App. 551, 560 (2012). Therefore, Mr. Foskey's "loss" under the restitution statute is not limited to either his out-of-pocket expense or the net change in his bank balance as a result of the theft.

[11] Both parties reference, but neither challenges the general principle that victims of theft can provide competent evidence of the value of their loss. Likewise, neither party challenges that the receipts for repairs presented as evidence by the State are competent evidence of the value of Mr. Foskey's loss. These principles are well established in our decisional law. *See, e.g., Goff v. State*, 387 Md. 327, 336 (2005) (in which the Maryland Supreme Court upheld the circuit court's acceptance of the victim's testimony of the "the value of the materials and services needed to replace" a shower stall that the defendant had rendered non-functional as "adequate to establish" the value of the loss for receipts for repairs); *Stone v. State*, 178 Md. App. 428, 442 (2008) ("[T]he owner of personal property is presumptively qualified to testify about the value of his goods.") (citation omitted).

In accord with this principle, CP § 11-606(a)(1), (3)(ii) charges the court's discretion with directing the restitution award to, inter alia, "the victim", "an insurer", or "any other person that has . . . 1. compensated the victim for a property or pecuniary loss; or 2. paid an expense on behalf of a victim[.]" The statute goes on to provide that, "[i]f the victim has been fully compensated for the victim's loss by a third-party payor, the court may issue a judgment of restitution that directs the restitution obligor to pay restitution to the third-party payor." CP § 11-606(b)(2). These provisions demonstrate that the total amount of restitution to be paid by the defendant is unaffected by the present allocation of that loss between the victim and the victim's insurer.

In conclusion, we hold Mr. Williams did not receive the reasonable notice of the amount of restitution at stake and a fair opportunity to defend against that amount, as required by decisional law. Accordingly, we must vacate the judgment of restitution and remand to the circuit court for further proceedings.

JUDGMENT OF RESTITUTION VACATED; CASE REMANDED TO THE CIRCUIT COURT FOR WICOMICO COUNTY FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION; COSTS TO BE PAID BY APPELLEE.