J-A21015-13

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
KENNETH SAMUEL GETZ, III,	:	
	:	
Appellant	:	No. 2153 EDA 2011

Appeal from the Order Entered June 24, 2011,
In the Court of Common Pleas of Lehigh County,
Criminal Division, at No. CP-39-CR-0001054-2010.

BEFORE: SHOGAN, WECHT & COLVILLE*, JJ.

MEMORANDUM BY SHOGAN, J.: **FILED SEPTEMBER 19, 2013**

Appellant, Kenneth Samuel Getz, III, appeals from the judgment of sentence entered following his convictions of theft by deception, receiving stolen property, and criminal conspiracy. We affirm.

The trial court summarized the factual history of this case as follows:

> On December 13, 2009, the Whitehall Township Police Department was contacted by Cole Mangum, Distribution Manager for Bell Nursery. Bell Nursery is a family business which supplies nursery merchandise to approximately 180 Home Depot stores. Bell Nursery's main location is in Maryland, with a distribution center in Whitehall, Lehigh County, Pennsylvania. Mr. Mangum began to work at the Whitehall distribution center on August 1, 2009.
>
> Because of the nature of Bell Nursery's business, it utilizes thousands of nursery storage carts to transport the live plants to the various Home Depot stores of a large, multistate area. At trial it was established that Bell Nursery had approximately 25,000 carts in circulation, between its distribution centers and

*Retired Senior Judge assigned to the Superior Court.

various Home Depot locations. Each cart is comprised of four wheels, 2 ladder side panels, and shelves that slide into the ladder "rungs." The carts are configurable, with the number and height of the shelves placed in the frame variable to account for different plant heights. The majority of the carts used by Bell Nursery were painted purple and stamped with the company's name in order to allow Bell Nursery to distinguish its carts from similar carts used by other suppliers of plants. Bell Nursery purchased the carts from Wellmaster, a Canadian company that shipped the carts to Bell Nursery in parts to be constructed by Bell Nursery, depending on its needs. Each cart cost between $220 and $260. A cart containing one ladder and five shelves weighed approximately 200 pounds. No inventory of the carts was maintained by Bell Nursery. If a cart broke, it was sent to the facility in Maryland and either repaired or sent out to be scrapped. When not in use, the carts were stacked together to conserve space in the warehouse.

Bell Nursery employed numerous drivers and warehouse workers in its Whitehall location, along with one administrative assistant, an assistant warehouse manager (John Pfeiffly), and Mr. Mangum. The Appellant and his coconspirator were employed as drivers and were supervised by Mr. Pfeiffly. While working in the office on December 11, 2009, Mr. Mangum received a call from an individual working at South Whitehall Auto Salvage who reported that purple carts had been dropped off at the salvage yard and that he had scrapped them. Mr. Mangum did not authorize the scrapping of these carts, except for one occasion in December of 2009 where the company only received $100.00 for the scrapped metal carts.

Mr. Mangum reported to the salvage yard and spoke to Bernard Uphold, the owner of South Whitehall Auto Salvage. Mr. Mangum learned that two drivers, the Appellant and Mr. Scott Hendell, had been bringing purple carts to the salvage yard for some time, without Bell Nursery's approval, and that there were no carts available to be retrieved. Mr. Mangum was able to review a two page printout from the salvage yard which referenced the purple carts being salvaged and that checks were made out to either the Appellant or Mr. Hendell for the scrap metal value.

> When contacted by Bell Nursery, Mr. Uphold performed a search of his records regarding the Appellant and Mr. Hendell. Mr. Uphold and an employee of the salvage yard, Dave Demaree, were able to specifically remember interacting with both individuals and that they brought in purple carts to be salvaged. They also recalled that the carts had been transported in large box trucks with the Bell Nursery logo on them. Mr. Uphold discovered that over 60 checks had been issued to the Appellant and Mr. Hendell. If the Appellant and Mr. Hendell were together (which was most often the case), the checks were made out to Mr. Hendell; in sum, only 6 checks were made out to the Appellant.
>
> The Appellant was summoned to the warehouse and questioned about the scrapping of the carts. The Appellant asked Mr. Mangum and Mr. Pfeiffly what would happen to him and became upset and began to cry. The Appellant stated that he took the carts to be scrapped without authorization because he needed extra cash. When asked if anyone else was involved, the Appellant stated that Mr. Pfeiffly was the "mastermind" behind the criminal enterprise. Mr. Mangum called the chief executive officer of Bell Nursery and eventually called the Whitehall Police.
>
> Because no inventory of carts was performed by Bell Nursery, Mr. Mangum learned that 628,608 pounds of metal (carts) were scrapped and that the scrap yard paid $5.00 per 100 pounds of metal. Based on these figures and accounting for weight variances between the carts depending on how they were assembled when scrapped, Mr. Mangum estimated that the number of carts stolen was between 2,500 and 5,000.

Trial Court Opinion, 12/7/11, at 3-6.

The trial court further set forth the procedural history of this case as follows:

> On April 19, 2010 the Appellant was arraigned on one count of Theft by Deception (18 Pa.Con.Stat.Ann. §3922 (A)(1)), one count of Receiving Stolen Property (18 Pa.Con.Stat.Ann. §3925), and one count of Criminal Conspiracy

> (18 Pa.Con.Stat.Ann. §903). After Jury Trial on January 7-11, 2011, the Appellant was convicted of all three counts. A sentencing hearing was held on February 11, 2011 and the Appellant was sentenced to undergo a term of imprisonment of not less [than] thirty (30) months nor more than sixty (60) months and was ordered to pay restitution in the amount of $665,359.50, jointly and severally liable with the co-conspirator, Scott Hendell.
>
> A Motion to Reconsider Sentence and Award of Restitution was filed on February 22, 2011. On May 10, 2011, after hearing on the matter, the Commonwealth requested a certified copy of the Indemnity Agreement between the victim in this case and its insurer. On that same date, the Court entered an Order denying the Appellant's motion to modify sentence and a further restitution hearing was scheduled for June 24, 2011.
>
> Following the hearing on June 24, 2011, the Court issued an order modifying the restitution in this matter to the amount of $330,643.22 to National Union Fire Insurance Company of Pittsburgh, PA and $10,000.00 to Bell Nursery. The restitution amounts are jointly and severally liable between the Appellant and his co-conspirator, Mr. Hendell.

Trial Court Opinion, 12/7/11, at 2-3.

On July 15, 2011, Appellant filed a *pro se* appeal to the Commonwealth Court. In an order dated July 25, 2011, the Commonwealth Court transferred the appeal to this Court. On August 29, 2011, the trial court issued an order directing Appellant to file, within twenty-one days, a statement of errors pursuant to Pennsylvania Rule of Appellate Procedure 1925(b). On September 16, 2011, Appellant filed a *pro se* Rule 1925(b) statement which listed the following issues:

1. Restitution Sentence
2. Sentence

Pro Se Statement of Errors Complained of on Appeal, 9/16/11, at 1 (*verbatim*).

On October 7, 2011, the trial court issued an order granting Appellant an extension of time, of twenty-one days, to file an amended Rule 1925(b) statement. On October 25, 2011, Appellant filed a second Rule 1925(b) statement which listed the following issues:

> 1. Sentencing Court erred by ordering restitution that was speculative, excessive and not proved by the record.
>
> 2. Sentencing Court erred by admitting into evidence a insurance check that was speculative and not proved by the record.
>
> 3. Sentencing Court erred by admitting deductable into restitution that was speculative and not proved by the record.
>
> 4. Sentencing Court erred by admitting into evidence a Indemnity Agreement that was incomplete, uncertified and proved by the record.
>
> 5. Sentencing Court erred by enhancing the sentence because of restitution order.
>
> 6. Sentencing Court erred by putting the burden of proof on Appellant after Commonwealth failed to provide any evidence to prove entitlement for restitution order.

Pro Se Statement of Errors Complained of on Appeal, 10/25/11, at 1-2 (*verbatim*).

The trial court drafted its opinion pursuant to Rule 1925(a) on December 7, 2011, and forwarded the certified record on appeal to this Court. Initially, Appellant filed a *pro se* brief with this Court on January 30,

2012. On April 27, 2012, the Commonwealth filed with this Court a motion for remand to the trial court, due to appointed counsel's apparent abandonment of Appellant in the appeal process, indicating that a ***Grazier*** hearing[1] was necessary. This Court entered an order remanding this matter to the trial court for a ***Grazier*** hearing on May 22, 2012. Concurrently, instant counsel for Appellant filed an entry of appearance on Appellant's behalf and an answer to the Commonwealth's motion for remand, thereby making the need for a ***Grazier*** hearing moot. This Court then established a new briefing schedule for the parties and the matter is now ripe for our consideration.

In his counseled brief, Appellant presents the following issues for our review:

> I. WHETHER OR NOT THE TRIAL COURT ERRED IN ORDERING RESTITUTION IN THE AMOUNT OF $330,643.22, WHERE THE JUDGE, IN A THEFT CASE: (1) NEVER TOLD THE JURY THAT VALUE OF THE STOLEN PROPERTY MUST BE PROVEN BEYOND A REASONBLE [sic] DOUBT; AND (2) FAILED TO REQUEST A SPECIFIC FINDING FROM THE JURY ABOUT THE ACTUAL VALUE OF THE STOLEN ITEMS; AND (3) THE COURT NEVER GAVE THE JURY THE OPTION OF CHECKING BOX "VALUE UNDETERMINED"?
>
> II. WHETHER OR NOT CONSISTENT WITH THE MANDATE OF JONES V. UNITED STATES, SUPRA., THE TRIAL COURT MAY ORDER RESTITUTION IN A SPECIFIC AMOUNT IN EXCESS OF $2,000.00 WHEN THE JURY NEVER TENDERED A SPECIFIC [sic]?

[1] ***See Commonwealth v. Grazier***, 713 A.2d 81 (Pa. 1988) (requiring an on-the-record inquiry to determine whether the appellant's waiver of counsel is knowing, intelligent and voluntary).

> III. WHETHER OR NOT THE TRIAL COURT ERRED IN ORDERING RESTITITUION [sic] IN THE AMOUNT OF $330,643.22, WHERE THERE WAS NOT SUFFICIENT FACTUAL BASIS IN THE EVIDENCE TO ORDER RESTITUTION UNDER 18 Pa. C.S. § 1106?
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> IV. WHETHER OR NOT THE ORDER OF RESTITUTION IS SPECULATIVE AS EVIDENCED BY THE TRIAL COURT'S OWN STATEMENTS AND IS FAR IN EXCESS OF THE $2,000 DETERMINATION BY THE JURY?

Appellant's Brief at 5.

Initially, we observe that Appellant frames several of his issues on appeal as challenges to the legality of the restitution provision of his sentence. Prior to considering those issues, however, we clarify whether Appellant's claims are addressed to the legality or the discretionary aspects of his sentence. Specifically, as our Supreme Court has explained:

> there has been some confusion as to whether an appeal of an order of restitution implicates the legality or the discretionary aspects of a particular sentence in a criminal proceeding. Where such a challenge is directed to the trial court's authority to impose restitution, it concerns the legality of the sentence; however, where the challenge is premised upon a claim that the restitution order is excessive, it involves a discretionary aspect of sentencing.

In re M.W., 725 A.2d 729, 731 n.4 (Pa. 1999). Furthermore, in ***Commonwealth v. Stradley***, 50 A.3d 769 (Pa. Super. 2012), we explained that "[a]n appeal from an order of restitution based upon a claim that a restitution order is unsupported by the record challenges the legality, rather than the discretionary aspects, of sentencing." ***Id***. at 771-772 (citing ***Commonwealth v. Redman***, 864 A.2d 566 (Pa. Super. 2004)). In this

matter, Appellant's issues challenge either the trial court's authority to order his sentence of restitution or assert that the restitution is not supported by the record. Therefore, Appellant's issues challenge the legality of Appellant's restitution sentence.

Issues relating to the legality of a sentence are questions of law for which our standard of review is *de novo* and our scope of review is plenary. ***Commonwealth v. Leverette***, 911 A.2d 998, 1001-1002 (Pa. Super. 2006). "In the context of a criminal case, restitution may be imposed either as a direct sentence, or as a condition of probation. When imposed as a sentence, the injury to the property or person for which restitution is ordered must directly result from the crime." ***In re M.W.***, 725 A.2d at 731-732 (internal citations omitted). Furthermore, an order of restitution must be based upon statutory authority. ***Id***. (citing ***Commonwealth v. Harner***, 617 A.2d 702 (Pa. 1992)).

In his first issue, Appellant attempts to argue that the trial court somehow erred in allowing the jury to determine that the value of the property in question was in excess of $2,000.00, which resulted in the grading of the crime of theft as a felony of the third degree. It seems that Appellant believes that the trial court never informed the jury that the value of the property needed to be proven beyond a reasonable doubt, failed to request a specific finding from the jury regarding the value of the stolen

items, and never gave the jury the option of choosing a finding of "value undetermined."

An error in the grading of an offense implicates the legality of sentencing. ***Commonwealth v. Sanchez***, 848 A.2d 977, 986 (Pa. Super. 2004). "Such issues are non-waivable." ***Id***. (citation omitted).

Section 3903 of the Crimes Code governs the grading of theft offenses, and provides, in relevant part, as follows:

> **§ 3903. Grading of theft offenses.**
>
> * * *
>
> **(a.1) Felony of the third degree. –** [T]heft constitutes a felony of the third degree if the amount involved exceeds $2,000, or if the property stolen is an automobile, airplane, motorcycle, motorboat or other motor-propelled vehicle, or in the case of theft by receiving stolen property, if the receiver is in the business of buying or selling stolen property.
>
> * * *
>
> **(b) Other grades. --** Theft not within subsection (a), (a.1) or (a.2), constitutes a misdemeanor of the first degree, except that if the property was not taken from the person or by threat, or in breach of fiduciary obligation, and:
>
> (1) the amount involved was $50 or more but less than $200 the offense constitutes a misdemeanor of the second degree; or
>
> (2) the amount involved was less than $50 the offense constitutes a misdemeanor of the third degree.
>
> **(c) Valuation. --** The amount involved in a theft shall be ascertained as follows:
>
> (1) Except as otherwise specified in this section, value means the market value of the property at the time and place of

> the crime, or if such cannot be satisfactorily ascertained, the cost of replacement of the property within a reasonable time after the crime.
>
> * * *
>
> (3) When the value of property cannot be satisfactorily ascertained pursuant to the standards set forth in paragraphs (1) and (2) of this subsection its value shall be deemed to be an amount less than $50. Amounts involved in thefts committed pursuant to one scheme or course of conduct, whether from the same person or several persons, may be aggregated in determining the grade of the offense.

18 Pa.C.S.A. § 3903(a.1), (b), & (c).

Thus, "[u]nder Section 3903, theft is presumptively graded as a misdemeanor with the burden placed on the Commonwealth to produce evidence for the fact-finder if it seeks to increase the seriousness of the offense for grading purposes." ***Commonwealth v. Coto***, 932 A.2d 933, 939 (Pa. Super. 2007). When the Commonwealth fails to present sufficient evidence of the value of the property, we are compelled to presume that the value is less than fifty dollars, and the theft offense cannot be graded any higher than as a misdemeanor of the third degree. ***Commonwealth v. Dodge***, 599 A.2d 668, 672 (Pa. Super. 1991).

In addressing Appellant's claim, we are mindful of our decision in ***Commonwealth v. Goins***, 867 A.2d 526 (Pa. Super. 2005), wherein the appellant was convicted of theft offenses following a bench trial. ***Id***. at 527. This Court remanded for resentencing after determining the appellant's "convictions should be downgraded from first-degree misdemeanors to third-

degree misdemeanors because the Commonwealth did not offer any evidence as to the value of the property." ***Id***. at 529 (emphasis added). "The only potential evidence in the record [wa]s that the package contained a DVD duplicating machine. However, the evidence in the record [did] not indicate whether it was a new or used machine or whether it was a discontinued and discounted item." ***Id***. Therefore, this Court could not conclude that the property was worth more than fifty dollars and determined that the appellant's offenses could be graded no higher than third-degree misdemeanors. ***Id***.

After careful review of the record before us in this case, we conclude the Commonwealth presented sufficient evidence that the value of the stolen property exceeded $2,000.00. The facts of the instant case are distinguishable from those in ***Goins***, which concerned the theft of only one item of property. In the instant case, the testimony at trial indicated that the stolen items consisted of multiple metal carts, which were sold to a salvage yard for scrap metal. Based on the number and nature of the items stolen, *i.e.*, the multiple metal carts taken to the salvage yard, there was a basis upon which to conclude the items' aggregate value exceeded $2,000.00. Accordingly, we conclude the Commonwealth met its burden of presenting sufficient evidence that the value of the stolen property was in excess of $2,000.00. Therefore, Appellant's contrary claim lacks merit.

With regard to Appellant's claim that the trial court failed to request a specific finding from the jury regarding the value of the stolen items, and never gave the jury the option of choosing a finding of "value undetermined," our review of the record belies Appellant's contention. Specifically, the trial court gave the following instructions to the jury with regard to the verdict slip and determination of the value of the property:

> I want to talk to you about the verdict slip. And you will have it in your hands soon enough, but I think I can show you enough right now from where I sit. This is one of the defendant's verdict slip[s]. Each defendant's slip went on to two pages. . . . the caption, and then the three charges are listed, Count 1, theft, Count 2, receiving stolen property, Count 3, criminal conspiracy. . . . [A]nd there's a line here, guilty or not guilty of Count 1, theft. It then goes on, if guilty, value of property check one. . . . [T]he categories are, if guilty, value of property in excess of $2,000.00, and a check box, between $200.00 and $2,000.00 and a check box, between $50.00 and $199.00, a check box, less than $50.00 and a check box and then unable to determine value and a check box. So, you have to make that determination for each defendant for each count because each count is a theft related crime. So, over again, guilty or not guilty of theft, if guilty, the appropriate check box. . . . Let me reinforce. Unable to determine value is not intended for -- I know it's within this range, but I can't come up with a particular figure. It's not intended for that. **Unable to determine value is can't determine value, can't determine level of value, a range of value, whether it's above or below, we just don't know. There's not been enough evidence presented for us to determine any value.** That's when you use that. So, they are mutually exclusive. You're going to check one box for value.
>
> On to the second page, again, the line guilty or not guilty of receiving stolen property, if guilty, again, the value.
>
> And third, guilty or not guilty of criminal conspiracy to commit theft. If guilty, value again, check box.

N.T., 1/11/11, at 45-47 (emphasis added).

Our further review of the record reflects that the verdict slip, completed by the jury, indicated the following with regard to each of the three crimes charged:

> If guilty, value of property (check one):
> In excess of $2,000.00 ___
> Between $200.00 and $2,000.00 ___
> Between $50.00 and $199.00 ___
> Less than $50.00 ___
> Unable to determine value ___

Verdict Slip, 1/11/11, at 1-2. Thus, although presented with the option to choose "Unable to determine value," it is undisputed that the jury marked the option "In excess of $2,000.00" for each of the three convictions. ***Id***. By determining that the value of the property was in excess of $2,000.00, the jury's verdict rendered the offense of theft a third-degree felony. Hence, Appellant's allegation that the jury was prevented from making a determination that the value of the property was not ascertainable is disproven by the record.

In addition, Appellant alleges that the jury was required to determine facts supporting the grading of the offense, pursuant to ***Apprendi v. New Jersey***, 530 U.S. 466 (2000). After careful review, we disagree because we conclude that Appellant's reliance on ***Apprendi*** is erroneous.

> We have previously described the holding of ***Apprendi*** as follows:

> In ***Apprendi***, the United States Supreme Court was called upon to determine whether a jury finding was required before a penalty could be imposed under a New Jersey statute that provided for an extended sentence of ten to twenty years in addition to the sentence for the underlying offense if the crime was deemed to have been a hate crime. ***Id***. at 469[]. The Court held that any fact, other than a prior conviction, that enhances the penalty for a crime beyond the statutory maximum must be submitted to a jury. ***Id***. at 490[]. As the present case concerns the propriety of the grading of the offense which thereby establishes the maximum penalty, and not an enhancement to the sentence beyond the statutory maximum penalty for the theft offenses, we conclude that ***Apprendi*** does not apply.
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> ***Commonwealth v. Shamberger***, 788 A.2d 408, 418[] n.11 (Pa. Super. 2001) (*en banc*), *appeal denied*, [] 800 A.2d 932 (Pa. 2002).

Commonwealth v. Chambers, 852 A.2d 1197, 1200 (Pa. Super. 2004).

Our review of the record reveals the bill of information filed in this matter graded the instant theft offense as a felony of the third degree, and indicated that the value of the items stolen was in excess of $100,000.00. Thus, Appellant was on notice that the offense was to be graded as a felony of the third degree. The record also reveals Appellant's counsel did not object to the jury charge regarding the theft offense. However, theft constitutes a felony of the third degree if the amount involved exceeds $2,000.00. 18 Pa.C.S.A. § 3903(a.1). As previously noted, the jury made the determination that the value of the loss attributable to Appellant's crimes exceeded $2,000.00. The statutory maximum sentence for a felony of the

third degree is seven years of imprisonment. 18 Pa.C.S.A. § 1103(3). The record further reflects that the trial court imposed a sentence of two and one-half to five years of incarceration for the theft conviction, which was well within the statutory maximum. Hence, the theft offense was charged as a felony of the third degree and did not change for the purpose of sentencing. Also, the grading of the offense as a felony of the third degree established the maximum penalty and was not an enhancement to the statutory maximum penalty. Because his sentence did not exceed the statutory maximum, Appellant's reliance upon ***Apprendi*** is misplaced, and his claim has no merit. Accordingly, the decision in ***Apprendi*** is not applicable.

In addition, we are aware that this Court has stated that "[d]uring jury trials it is the custom to charge the jury that one of its functions is to establish the value of the goods stolen so that the *court* can determine the grade of the offense for sentencing purposes." ***Commonwealth v. Sparks***, 492 A.2d 720, 725 (Pa. Super. 1985) (citation omitted, emphasis in original). However, we have never held that the question of value **must** be submitted to the jury in any particular fashion. As previously addressed in this memorandum, the Commonwealth presented sufficient evidence from which the jury could reasonably conclude the value of the stolen property exceeded $2,000.00. Thus, we conclude the trial court did not err in grading the theft offense as a felony of the third degree.

In his second issue, Appellant again argues that the trial court should not have ordered restitution without the jury making a determination of the specific amount of the value of the items stolen. Initially, we observe that Appellant reiterates his claim that it was necessary for the jury to make a finding as to the amount of restitution. Essentially, we have addressed this claim in our discussion of Appellant's first issue on appeal and concluded that it lacks merit.

Moreover, to the extent Appellant is arguing that the imposition of restitution is in violation of ***Apprendi***, we again note that such a claim is misplaced. In ***Apprendi***, the United States Supreme Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." ***Apprendi***, 530 U.S. at 490. Under ***Apprendi***, the court must examine whether: (1) a defendant's sentence exceeds the statutory maximum sentence, and (2) if so, whether the enhanced sentence was based on the fact of a prior conviction. ***Commonwealth v. Gordon***, 942 A.2d 174, 182 (Pa. 2007). As the Court explained in ***Apprendi***,

> At stake in this case are constitutional protections of surpassing importance: the proscription of any deprivation of liberty without "due process of law," Amdt. 14, and the guarantee that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury," Amdt. 6. Taken together, these rights indisputably entitle a criminal

> defendant to "a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt."

Apprendi, 530 U.S. at 476-477. A sentence of restitution is incompatible with the concepts underlying ***Apprendi***, because restitution does not have a "statutory maximum" beyond which the court may not sentence. Instead, restitution is a product related to the monetary injury to the victim which varies in every case. ***See*** 18 Pa.C.S.A. § 1106(c)(2)(i) (addressing mandatory restitution to be imposed at the time of sentencing and explaining the court should consider the extent of injury suffered by the victim). Accordingly, we conclude that Appellant's claim lacks merit.

In addition, we observe that Appellant argues the trial court erred in failing to make a determination regarding Appellant's ability to pay restitution. Appellant's Brief at 19-20. However, it is well settled that Pennsylvania criminal courts have the authority to impose restitution as part of a sentence. 18 Pa.C.S.A. § 1106. Following the amendments to the Sentencing Code in 1995, the sentencing court is **not** required to consider evidence of a defendant's ability to pay when imposing restitution; such ability need only be considered upon default. ***Commonwealth v. Colon***, 708 A.2d 1279, 1282 (Pa. Super. 1998). Accordingly, Appellant is entitled to no relief as his ability to pay is irrelevant unless and until he defaults on the restitution order. ***Id***. at 1284. Thus, Appellant's contrary claim lacks merit.

In his third issue, Appellant claims that the trial court erred in ordering an amount of restitution of $330,643.22 because there was not a sufficient factual basis for that amount. Appellant attempts to argue that the trial court erred in determining the amount of restitution, which was based upon the payment made by the insurance company to Bell Nursery as reimbursement for the criminal conduct of Appellant.

Section 1106(c) of the Crimes Code provides, in relevant part, as follows:

> (1) The court shall order full restitution:
>
> > (i) Regardless of the current financial resources of the defendant, so as to provide the victim with the fullest compensation for the loss. The court shall not reduce a restitution award by any amount that the victim has received from the Crime Victim's Compensation Board or other governmental agency but shall order the defendant to pay any restitution ordered for loss previously compensated by the board to the Crime Victim's Compensation Fund or other designated account when the claim involves a government agency in addition to or in place of the board. The court shall not reduce a restitution award by any amount that the victim has received from an insurance company but shall order the defendant to pay any restitution ordered for loss previously compensated by an insurance company to the insurance company.
> >
> > (ii) If restitution to more than one person is set at the same time, the court shall set priorities of payment. However, when establishing priorities, the court shall order payment in the following order:
> >
> > (A) The victim.

> (B) The Crime Victim's Compensation Board.
>
> (C) Any other government agency which has provided reimbursement to the victim as a result of the defendant's criminal conduct.
>
> (D) Any insurance company which has provided reimbursement to the victim as a result of the defendant's criminal conduct.

18 Pa.C.S.A. § 1106(c)(1)(i), (ii).

In addition, for purposes of section 1106, the term "victim" includes "the Crime Victim's Compensation Fund if compensation has been paid by the Crime Victim's Compensation Fund to the victim and **any insurance company that has compensated the victim for loss under an insurance contract**." 18 Pa.C.S.A. § 1106(h) (emphasis added). Thus, an "insurance company that has compensated the victim for loss under an insurance contract" qualifies as a victim for purposes of section 1106.

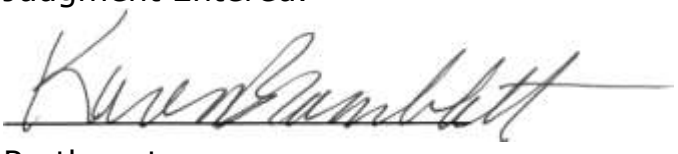
Here, the record reflects that Bell Nursery received compensation from its insurance carrier for the criminal conduct of Appellant related to the loss of the metal nursery carts. N.T., 6/24/11, at 3, 25. National Union Fire Insurance Company is the insurance company that provided coverage to Bell Nursery, which suffered losses as a result of Appellant's conduct. The insurance company compensated Bell Nursery for Appellant's conduct in the amount of $330,643.22. Accordingly, the trial court, under the applicable

statute, correctly concluded that restitution was due to the insurance company for the reimbursement it expended, and Appellant's contrary claim lacks merit.

In his fourth issue, Appellant again argues that it was necessary for the jury to make a determination as to the value of the items stolen, and not the trial court. Although the argument portion of Appellant's issue in this regard is complete with discussion pertaining to the history of the right to trial by jury in the United States, Appellant basically contends that the Commonwealth was limited to request an order of restitution in the amount of $2,000.00. However, Appellant seems to ignore the fact that the jury's verdict indicated that the items stolen were in excess of $2,000.00. As we have previously discussed in this memorandum, the trial court, at the time of sentencing, was permitted to make the determination as to the correct amount of restitution. Thus, Appellant's contrary claim lacks merit.

Judgment of sentence affirmed.

Judgment Entered.



Prothonotary

Date: 9/19/2013