ATTORNEYS FOR APPELLANT:

WILLIAM S. FRANKEL, IV
CHRISTOPHER K. AIMONE
Wilkinson, Goeller, Modesitt,
Wilkinson & Drummy, LLP
Terre Haute, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

ARTURO RODRIGUEZ II
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

MITCHELL W. TICKLE,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 84A01-0908-CR-379
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE VIGO SUPERIOR COURT
The Honorable David R. Bolk, Judge
Cause No. 84D03-0602-FD-661

April 30, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Mitchell W. Tickle appeals his conviction for Theft, as a Class D felony, and the restitution order imposed following a jury trial. Tickle presents two issues for review:

1. Whether the evidence is sufficient to support his conviction.

2. Whether the trial court abused its discretion when it ordered restitution in the amount of $14,217.

We affirm in part, reverse and vacate in part, and remand with instructions.

FACTS AND PROCEDURAL HISTORY

In the spring of 2005, seventy-eight-year-old Wilbur Ambs inquired at the Lighthouse Mission in Terre Haute whether someone there might be interested in helping him clean up his property and tear down condemned portions of his home. Tickle volunteered and worked with other people from the mission on Ambs' project.

Tickle continued to visit with Ambs, the two men became friends, and Tickle eventually moved into Ambs' home. Subsequently, Tickle's fiancee and her five children also moved into the home. Ambs also gave Tickle power of attorney, made Tickle a beneficiary in his will, and signed an authorization for Tickle to access Ambs' safe deposit box at Old National Bank in Terre Haute.

On November 18, 2005, Ambs sold some real estate for which he received a check in the amount of $11,486.25. On the same day, Ambs negotiated the check at the Old National Bank branch where his safe deposit box was located. Dana Vanness, the assistant branch manager, assisted Ambs with the transaction. Ambs deposited $3,300 into his checking account, and he paid Tickle $1,000 from the proceeds "for work he had done[.]" Trial Transcript at 82. Tickle and Ambs accessed the safe deposit box on

November 21, but only Ambs signed the "Record of Safe Entries." State's Exh. 8 at 3. Vanness, who had facilitated Ambs' access to the box, watched Ambs count out cash, place the cash in an envelope, and place the envelope in the box. The Record of Safe Entries shows that Tickle accessed the safe deposit box on December 6.

On December 16, Ambs received a check in the amount of $9,031.34, again for the sale of real estate. Ambs negotiated the check at the usual Old National Bank branch and deposited $500 of the proceeds in his checking account. Tickle accessed the safe deposit box on that date and again on December 19.

At some point Vanness mentioned to Ambs that Tickle had been coming to the bank without Ambs. Vanness was concerned because she knew that Ambs had placed a large sum of cash in the box and that Tickle was authorized to access the box. On December 20, Ambs went to the bank to access the safe deposit box but found that his safe deposit box key was not on his key ring. Ambs returned home and asked Tickle about the key. Tickle replied that he had taken it to access the safe deposit box but had then lost the key. Ambs opined that Tickle's "features changed and distorted" during the conversation and that "it was almost slightly demonic[.]" Trial Transcript at 104. Tickle left Ambs' home following the conversation about the key, and Ambs did not see him again until trial.

After the conversation with Tickle, Ambs retrieved an extra key from a hiding place and returned to the bank. He and Vanness accessed the safe deposit box but found no cash in the box. The State charged Tickle with theft, as a Class D felony. A jury found Tickle guilty as charged, and the trial court entered judgment of conviction

accordingly. The court held the sentencing hearing on June 15, 2009. No evidence was offered at the hearing. Following arguments by counsel, the court sentenced Tickle to two years executed at the Department of Correction, with credit for time served. The court also ordered Tickle to pay restitution in the amount of $14,217. Tickle now appeals.

DISCUSSION AND DECISION

Issue One: Sufficiency of Evidence

Tickle challenges the sufficiency of the State's evidence underlying his conviction. In particular, he argues that the trial court should have granted his motion for a directed verdict. The standard of review for a denial of a motion for judgment on the evidence is the same as that for a challenge to the sufficiency of the evidence. Hornback v. State, 693 N.E.2d 81, 84 (Ind. Ct. App. 1998). When reviewing a claim of sufficiency of the evidence, we do not reweigh the evidence or judge the credibility of the witnesses. Jones v. State, 783 N.E.2d 1132, 1139 (Ind. 2003). We look only to the probative evidence supporting the verdict and the reasonable inferences that may be drawn from that evidence to determine whether a reasonable trier of fact could conclude the defendant was guilty beyond a reasonable doubt. Id. If there is substantial evidence of probative value to support the conviction, it will not be set aside. Id.

Where circumstantial evidence is used to establish guilt, the question for the reviewing court is whether reasonable minds could reach the inferences drawn by the jury; if so, there is sufficient evidence. Klaff v. State, 884 N.E.2d 272, 274-75 (Ind. Ct. App. 2008) (citation and quotation marks omitted). Furthermore, we need not determine

whether the circumstantial evidence is adequate to overcome every reasonable hypothesis of innocence, but rather whether inferences may be reasonably drawn from that evidence which supports the verdict beyond a reasonable doubt. Id. at 275 (citations and quotation marks omitted).

The jury found Tickle guilty of theft, as a Class D felony. The offense of theft is governed by Indiana Code Section 35-43-4-2, which provides that "[a] person who knowingly or intentionally exerts unauthorized control over property of another person, with intent to deprive the other person of any part of its value or use, commits theft, a Class D felony." Thus, to convict Tickle of theft, the State needed to prove that he knowingly or intentionally exerted unauthorized control over Ambs' cash, with intent to deprive Ambs of any part of the value or use of the money.

Here, the evidence is without dispute that, on November 16, 2005, Ambs negotiated a check in the amount of $11,486.25, and he deposited $3,300 from that check into his checking account. Further, Ambs testified that he paid $1,000 to Tickle for work done. Both Ambs and Vanness, the bank's assistant branch manager, testified that Ambs placed the remaining cash into Ambs' safe deposit box. According to Vanness and the Record of Safe Entries, Ambs placed the cash in the box on November 18, although Ambs testified that he had placed the cash in the box on November 16, immediately after cashing it. Ambs also testified that he negotiated a check in the amount of $9,031.34 on December 16 and deposited $500 of the proceeds into his checking account. The Record of Safe Entries shows that Tickle accessed the safe deposit box on that same date.

Tickle had authorization to access Ambs' safe deposit box at all relevant times. The Record of Safe Entries shows that he accessed the box on December 6, 16, and 19. Vanness testified that she became concerned because Tickle had come to the bank several times without Ambs and he had authorization to access Ambs' safe deposit box, which she knew held a large amount of cash. The evidence is circumstantial, but, again, we need not determine whether this evidence is adequate to overcome every reasonable hypothesis of innocence. See Klaff, 884 N.E.2d at 275. Inferences reasonably drawn from this evidence support the verdict beyond a reasonable doubt. See id. The evidence here is sufficient to support Tickle's conviction for theft.[1]

Issue Two: Restitution

Tickle next contends that the trial court abused its discretion when it ordered him to pay restitution in the amount of $14,217. We will not reverse a restitution order unless the trial court abuses its discretion. Kimbrough v. State, 911 N.E.2d 621, 639 (Ind. Ct. App. 2009). An abuse of discretion occurs when the trial court misinterprets or misapplies the law. Id. The amount of restitution that is ordered must reflect the actual loss incurred by the victim. Id.

The State argues that Tickle waived any argument regarding the restitution order because he did not object to that order at the sentencing hearing. But we have held that "appellate courts will review a trial court's restitution order even where the defendant did not object based on the rationale that a restitution order is part of a sentence, and it is the

[1] Although the Safe Deposit Signature Card provides that Tickle, as a co-renter of the box, had the "right of access to the box, and the right to remove all or any part of the contents[,]" Appellant's App. at 18, the contract right to remove the contents of the box did not give Tickle the additional right to exercise unauthorized control over Ambs' property in the box or to deprive Ambs of the value or use of that property.

duty of the appellate courts to bring illegal sentences into compliance." Rich v. State, 890 N.E.2d 44, 48 (Ind. Ct. App. 2008) trans. denied (internal quotation marks and citations omitted). Thus, we consider Tickle's claim on the merits.

Tickle contends that the evidence does not support the amount of restitution ordered by the trial court. Specifically, he claims that the record does not indicate how much cash was in Ambs' safe deposit box and that the State even conceded at sentencing that the exact amount of the theft is unknown. The State concedes on appeal that the record is "unclear as to the amount of money that was placed inside of the safe deposit box[.]" Appellee's Brief at 8. As such, the trial court abused its discretion because the evidence does not support the amount of restitution ordered. See Kimbrough, 911 N.E.2d at 639.

We reverse and vacate the restitution order or judgment, as the case may be, and remand for the trial court to hold a hearing on restitution and enter a new order on restitution based on the evidence offered at that hearing. The State further argues that the restitution order does not clearly state whether it is a money judgment or part of Tickle's sentence. On remand, the trial court shall also specify the nature of the restitution order.

Affirmed in part, reversed and vacated in part, and remanded with instructions.

FRIEDLANDER, J., and BRADFORD, J., concur.