



Christopher Hickey (“Hickey”) was convicted in Starke Circuit Court of Class B felony burglary. The trial court sentenced Hickey to thirteen years incarceration and ordered him to pay \$22,810 in restitution. Hickey appeals and argues: (1) that his sentence is inappropriate, and (2) that the trial court erred in ordering restitution.

We affirm the sentence, but reverse and remand with regard to restitution.

### **Facts and Procedural History**

On the afternoon of December 1, 2007, Elizabeth Chesak and her then-fiancé locked their home and left to attend a birthday party. When the couple arrived home later that evening, the front door had been kicked in, the house had been ransacked, and several items had been stolen. Among the items stolen were Christmas presents which had been wrapped and placed under the Christmas tree. The burglar had unwrapped the presents, sorted through them, and stole the more valuable ones. When the police arrived to investigate the burglary, they discovered blood on one of the pieces of wrapping paper. A DNA sample obtained from the blood matched Hickey’s DNA profile in a database, and a subsequent DNA sample obtained directly from Hickey confirmed the match.

On July 16, 2008, the State charged Hickey with Class B felony burglary, and a jury trial was held on September 23, 2009. At trial, the State submitted a personal property loss itemization Ms. Chesak had prepared for her insurer. This form indicated that the total value of the items stolen and lost was \$10,575 and that the insurer paid Ms. Chesak \$8,619. Appellant’s App. pp. 10-12. On cross-examination of Ms. Chesak, Hickey introduced into evidence the restitution form that Ms. Chesak had prepared for the prosecutor’s office. This form listed a total property loss of \$31,329, for which she

received \$8,519 from her insurer, for a total claim of \$22,810. Appellant's App. p. 13. Ms. Chesak explained that the difference between the amount of loss she claimed for insurance purposes and the amount she claimed for restitution purposes represented the value of jewelry that had been stolen but was not covered by her insurance policy. Tr. pp. 38-40. At the conclusion of the trial, the jury found Hickey guilty as charged.

The trial court then held a sentencing hearing on October 1, 2009. At this hearing, the trial court took judicial notice of the insurance claim form that had been admitted at trial. Hickey did not object. The trial court found Hickey's prior criminal history to be an aggravating factor. Specifically, Hickey had two prior burglary convictions, a conviction for possession of a stolen vehicle, and had been arrested numerous times for property crimes. Further, Hickey was on probation when he committed the instant burglary. The court found as mitigating that Hickey was only twenty years old, but concluded that the aggravating factors outweighed this mitigating factor. The trial court sentenced Hickey to thirteen years, which is three years above the advisory sentence, but made no mention of restitution until it entered its written sentencing order. In the sentencing order, the trial court ordered Hickey to pay \$22,810 in restitution. Hickey now appeals.

### **I. Inappropriate Sentence**

Hickey first claims that his sentence is inappropriate. Even when the trial court has acted within its lawful discretion in determining a sentence, the Indiana Constitution authorizes independent appellate review and revision of a sentence imposed by the trial court. Anglemyer v. State, 868 N.E.2d 482, 491 (Ind. 2007), clarified on reh'g, 875

N.E.2d 218. This appellate authority is implemented through Appellate Rule 7(B), which provides that the “Court may revise a sentence authorized by statute if, after due consideration of the trial court’s decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender.” Anglemyer, 868 N.E.2d at 491.

“It is on this basis alone that a criminal defendant may now challenge his or her sentence where the trial court has entered a sentencing statement that includes a reasonably detailed recitation of its reasons for imposing a particular sentence that is supported by the record, and the reasons are not improper as a matter of law, but has imposed a sentence with which the defendant takes issue.” Id. Although we have the power to review and revise sentences, “[t]he principal role of appellate review should be to attempt to leaven the outliers, and identify some guiding principles for trial courts and those charged with improvement of the sentencing statutes, but not to achieve a perceived ‘correct’ result in each case.” Cardwell v. State, 895 N.E.2d 1219, 1225 (Ind. 2008). On appeal, it is the defendant’s burden to persuade us that the sentence imposed by the trial court is inappropriate. Anglemyer, 868 N.E.2d at 494.

Considering the nature of the offense, we note that Hickey, like the Grinch himself, broke into a residence during the holiday season and stole Christmas presents. Moreover, Hickey’s sentence is appropriate in light of his character alone. As recognized by the trial court, Hickey has a substantial criminal history, which includes convictions for Class C and Class B felony burglary. In other words, this is Hickey’s third burglary conviction. And Hickey was on probation for his Illinois conviction for possession of a

stolen vehicle at the time he committed the instant offense. It is clear that, despite his prior convictions, Hickey remains unwilling or unable to comport his behavior to the requirements of the law. Under these facts and circumstances, and giving due consideration to the trial court's decision, we cannot say that Hickey's thirteen-year sentence is inappropriate.

## II. Restitution Order

Hickey also claims that the trial court erred in ordering him to pay \$22,810 in restitution. The State concedes that the trial court's restitution order was not supported the evidence.<sup>1</sup> The purpose of a restitution order is to impress upon the defendant the magnitude of the loss he has caused and to defray costs to the victims caused by the offense. Bennett v. State, 862 N.E.2d 1281, 1286 (Ind. Ct. App. 2007). An order of restitution is within the trial court's discretion and will not be reversed absent an abuse of that discretion. Id. An abuse of discretion occurs if the court's decision is clearly against the logic and effects of the facts and circumstances before it or when the trial court misinterprets or misapplies the law. Id. The trial court may consider only those expenses incurred by the victim prior to the date of sentencing in formulating its restitution order, and the amount of actual loss is a factual matter that can be determined only upon the presentation of evidence. Id.

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<sup>1</sup> Hickey briefly claims that the trial court's restitution order is improper because the trial court failed to inquire into his ability to pay any restitution. But Hickey does not further develop this argument, and it is therefore waived. See Ind. Appellate Rule 46(A)(8)(a). We nevertheless note that when restitution is ordered as part of an executed sentence, and not as a condition of probation, the trial court is *not* required to inquire into the defendant's ability to pay restitution, because in such cases restitution is merely a money judgment and a defendant cannot be imprisoned for non-payment. See Pearson v. State, 883 N.E.2d 770, 773 (Ind. 2008).

With regard to restitution, the trial court's sentencing order refers to Defendant's Exhibit A, which is the restitution claim form in which the victim listed her damages as \$22,810. However, no evidence was submitted at the sentencing hearing to support the amount listed in the claim form. The State concedes that the trial court's restitution order was therefore improper. Thus, we reverse the trial court's restitution order and remand with instructions to conduct a hearing at which the proper amount of restitution damages may be determined based on evidence submitted by the parties.

### **Conclusion**

Hickey's thirteen-year sentence is not inappropriate in light of the nature of the offense and the character of the offender, but the trial court's restitution order was not properly supported by evidence. We therefore reverse the restitution order and remand with instructions to conduct a hearing at which the proper amount of restitution will be determined.

Affirmed, reversed, and remanded with instructions.

RILEY, J., and BRADFORD, J., concur.