

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHRISTOPHER MATTHEW CORNELL,

Defendant-Appellant.

UNPUBLISHED

October 15, 1999

No. 207160

Roscommon Circuit Court

LC No. 96-003123 FH

Before: Murphy, P.J., and Gage and Wilder, JJ.

PER CURIAM.

Defendant appeals by leave granted from a post-judgment order of restitution holding him liable for restitution in the amount of \$413,000. Defendant and two accomplices broke into a house in search of valuables. Somehow, during commission of the offense, the house burned to the ground. Defendant pleaded guilty to breaking and entering with the intent to commit larceny, MCL 750.110; MSA 28.305, and was sentenced to four to ten years' imprisonment with the amount of restitution to be determined at a later time. We affirm.

Defendant first argues that the trial court's use of replacement cost as the measure of value of the burned house was incorrect. We note that by not suggesting a different measure of value and citing no authority for his contention that replacement cost is an improper measure, defendant has failed to properly present this issue on appeal. A party may not merely announce a position and leave it to this Court to discover and rationalize the basis for that position. *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998). Nonetheless, we conclude that replacement cost was an appropriate measure of value in this case.

Seven months after defendant was sentenced the trial court conducted an evidentiary hearing to determine restitution. In determining the amount of restitution to order, the trial court must consider the amount of the loss sustained by the victim. MCL 780.767(1); MSA 28.1287(767)(1). The prosecutor bears the burden of demonstrating the loss by a preponderance of the evidence. MCL 780.767(4); MSA 28.1287(767)(4). Where loss or destruction of property is the result of the crime, the statute

directs that the court may order a defendant to pay an amount equal to the greater of the value of the property on the date of the loss or the value of the

property on the date of sentencing. MCL 780.766(3)(b); MSA 28.1287(766)(3)(b).¹ The statute, however, is silent regarding how to measure value.

This Court has held that amount of the loss sustained by the victim should be based upon the evidence. *People v Guajardo*, 213 Mich App 198, 200; 539 NW2d 570 (1995). At the evidentiary hearing the prosecutor presented evidence that the replacement cost of the house was \$413,140. The prosecutor also presented evidence that the house was of historical value and had been built with high quality materials. Additionally, the owner of the house was planning on restoring the house to its original condition for the purpose of opening a bed and breakfast. Though defendant objected to this valuation, he failed to offer *any evidence* supporting a different measure of value. The trial court thus ordered restitution in the amount of \$413,000. Under the facts presented, and given that an evaluation of the replacement cost was the only evidence proffered, we find the determination of the loss sustained by the victim to be reasonable and based on the evidence.

Defendant also argues that the trial court erred by not considering his ability to pay the restitution ordered, as required by MCL 780.766(13); MSA 28.1287(766)(13) and MCL 780.767(1); MSA 28.1287(767)(1).² When defendant raised the question of his ability to pay the trial court expressly refused to consider the issue, holding that its consideration of this factor was not relevant until such time as defendant was no longer incarcerated and stating that it would defer any ruling until such time. Under the version of the statute in effect at the time of this December 1996 hearing, the court's refusal to consider defendant's finances was arguably error. *People v Law*, 223 Mich App 585, 590-592; 568 NW2d 90 (1997). However, the court's acknowledgment that it would hold an additional hearing at the time of defendant's release, when his obligation to begin payment took effect, renders any error harmless.

Entering into the plea agreement to secure withdrawal of his pending arson charge defendant was aware that restitution would be ordered. MCL 780.766(2); MSA 28.1287(2); *People v Ronowski*, 222 Mich App 58, 61; 564 NW2d 466 (1997). Defendant's agreement to pay restitution constitutes a "special circumstance" having a strong bearing on his ability to pay. MCL 780.766(13); MSA 28.1287(766)(13); *People v Hart*, 211 Mich App 703, 708; 536 NW2d 605 (1995). Moreover, the court reasonably can consider the restitution agreement as establishing a rebuttable presumption that a defendant has considered his own financial situation and has determined that he has or will have the ability to pay the amount ordered by the court. *Id.*

That the court postponed the time for considering any evidence defendant could produce that might overcome this presumption was perhaps not intended by the statute, but it will likely be more problematic for the court than it will cause harm to defendant. While the need to hold another hearing will entail the investment of additional time and expense on the part of the court, defendant will be able to present a more relevant and accurate picture of his financial circumstances at the time pertinent to his initiation of payments. We find no error prejudicial to defendant. Furthermore, we note that pursuant to additional provisions of the act,³ other procedural safeguards exist that ensure that defendant will be afforded due process in the eventual

enforcement of the restitution order. *People v Gahan*, 456 Mich 264, 277; 571 NW2d 503 (1997); see also *People v Grant*, 455 Mich 221, 241, n 26; 565 NW2d 389 (1997).

Affirmed.

/s/ William B. Murphy

/s/ Hilda R. Gage

/s/ Kurtis T. Wilder

¹ 1996 PA 562, effective June 1, 1997, amended the Crime Victim's Rights Act. At the time of the evidentiary hearing this provision was found at MCL 780.766(4)(b); MSA 28.1287(766)(4)(b).

² We note that pursuant to the 1996 amendment a defendant's ability to pay restitution is no longer a factor in the court's analysis. For the purpose of resolving this claim of appeal, however, we will analyze this issue under the procedural standards in effect at the time of defendant's hearing.

³ MCL 780.766(11); MSA 28.1287(766)(11), previously subsection 14; MCL 780.766(12); MSA 28.1287(766)(12), previously subsection 15; MCL 780.766(14); MSA 28.1287(766)(14), previously subsection 17. We opine that the trial court likely focused on these provisions when conducting the evidentiary hearing, resulting in its mistaken view that defendant's ability to pay was irrelevant at the time restitution was ordered.