

Affirmed and Memorandum Opinion filed November 30, 2010.



In The

Fourteenth Court of Appeals

NO. 14-09-00670-CR

NO. 14-09-00671-CR

NO. 14-09-00672-CR

BRUCE EDWARD MASON, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 212th District Court

Galveston County, Texas

Trial Court Cause Nos. 07CR1370, 07CR1371, 07CR1372

MEMORANDUM OPINION

Appellant Bruce Edward Mason challenges the trial court's restitution orders rendered during his sentencing hearing for three offenses of theft by deception. In three issues, he asserts that there was insufficient evidence of his financial resources and ability to pay restitution, the trial court denied him due process by adding restitution without considering the statutory factors, and the trial court erred by failing to submit an instruction in its punishment charge to the jury that appellant could be ordered to pay restitution. We affirm.

BACKGROUND

A jury found appellant guilty of three felony charges of theft by deception. These thefts involved a scheme in which appellant represented himself as a retired investment banker. He convinced the three complainants that he was purchasing stock for their accounts and took money from them to that end. In fact, no stock was ever purchased. The jury assessed his punishment at two years' imprisonment and a \$3,000 fine for the first charge and seven years' imprisonment and a \$5,000 fine for each of the other two charges. At the sentencing hearing, the trial court sentenced appellant accordingly and additionally ordered appellant to pay restitution of (a) \$15,990.20 to the first complainant, (b) \$23,955.15 to the second complainant, and (c) \$33,933.00 to the third complainant. Appellant filed a motion for new trial, which was overruled by operation of law. This appeal timely followed.

ANALYSIS

A. Governing Law and Standard of Review

“In addition to any fine authorized by law, the court that sentences a defendant convicted of an offense may order the defendant to make restitution to any victim of the offense. . . .” Code Crim. Pro. Ann. art. 42.037(a) (Vernon Supp. 2009). The trial court is charged with resolving disputes about the proper amount of restitution by a preponderance of the evidence. *Id.* art. 42.037(k). The State bears the burden of demonstrating the amount of the loss sustained by a victim; the defendant must demonstrate his financial resources and needs, as well as the financial needs of his dependents. *See id.*

We review challenges to a trial court's restitution orders for an abuse of discretion. *See Cartwright v. State*, 605 S.W.2d 287, 288–89 (Tex. Crim. App. [Panel Op.] 1980); *Bailey v. State*, 171 S.W.3d 639, 641 (Tex. App.—Houston [14th Dist.] 2005, no pet.). A trial court abuses its discretion when its decision lies outside the zone of reasonable disagreement. *Bailey*, 171 S.W.3d at 641.

B. Application

In his first issue, appellant asserts that there was insufficient evidence of his financial resources and ability to pay restitution. But the Legislature amended the Code of Criminal Procedure in 2005 to omit provisions that required the trial court to consider the “financial resources of the defendant” and the “financial needs and earning ability of the defendant and the defendant’s dependents” in determining whether to order restitution. *See* Act of May 27, 1993, 73rd Leg., R.S., ch. 806, § 1, 1993 Tex. Gen. Laws 3207, *amended by* Act of May 25, 2005, 79th Leg., R.S., ch. 969, § 1, 2005 Tex. Gen. Laws 3244, 3245 (current version at Code Crim. Proc. Ann. art. 42.037). The current statute does not require consideration of these issues, and, even if these factors were appropriate, appellant had the burden to demonstrate his financial resources and abilities.¹ Accordingly, we overrule appellant’s first issue.

In issue two, appellant contends that the trial court denied him due process by ordering him to pay restitution at sentencing without considering the statutory factors. Specifically, appellant complains that the trial court failed to consider “the amount paid to or on behalf of the victim by the compensation to victims of crime fund[.]” *Id.* art. 42.037(c). First, we note that appellant did not object to the trial court’s restitution order on this basis. Thus, he has not preserved this issue for our review. *See* Tex. R. App. P. 33.1(a)(1); *see also Jimenez v. State*, 32 S.W.3d 233, 235 (Tex. Crim. App. 2000) (“A party is not excused from the procedural requirements for objecting at trial merely because an error involves a constitutional right.”). Moreover, even had he preserved this issue, the complainants in this case do not qualify for recovery from the victims of crime fund because they were neither “victims” nor harmed by “criminally injurious conduct.” *See* Code Crim. Pro. Ann. arts. 56.32(a)(11) (Vernon Supp. 2009) (defining “victim” to include only individuals who suffer personal injury or death resulting from “criminally injurious conduct”), 56.32(a)(4) (defining “criminally injurious conduct” as conduct

¹ *See* Code Crim. Pro. Ann. art. 42.037(k) (placing burden on defendant to demonstrate financial resources and needs).

posing a substantial threat of personal injury or death), 56.34 (Vernon 2006) (providing that only pecuniary loss arising from “criminally injurious conduct” may be compensated by the fund). We overrule appellant’s second issue.

In his third issue, appellant argues that the trial court erred in not instructing the jury that appellant could be ordered to pay restitution. When considering jury charge issues, we must first determine whether error exists. *Ngo v. State*, 175 S.W.3d 738, 743 (Tex. Crim. App. 2005). It is only if we find error that we review the record for harm.² *See id.* at 743–44. Here, we conclude that the trial court did not err by failing to instruct the jury that appellant could be ordered to pay restitution. As discussed above, article 42.037 of the Code of Criminal Procedure provides that the *sentencing court* may order the defendant to make restitution in addition to any fine authorized by law. Code Crim. Pro. Ann. art. 42.037(a). Because restitution is not a jury issue, the trial court’s charge was not erroneous. We overrule appellant’s third issue.

Having overruled each of appellant’s issues, we affirm the judgments of the trial court.

/s/ Adele Hedges
Chief Justice

Panel consists of Chief Justice Hedges, Justice Yates, and Senior Justice Mirabal.*

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² We note that appellant did not object to the trial court’s charge on this basis.

* Senior Justice Margaret Garner Mirabal sitting by assignment.