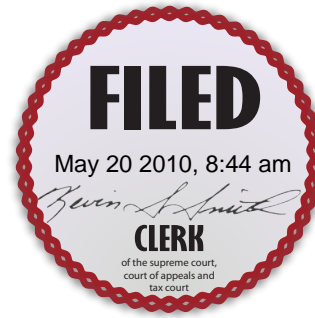


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

DONALD KELLER,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 67A01-1001-CR-23

APPEAL FROM THE PUTNAM CIRCUIT COURT
The Honorable Matthew L. Headley, Judge
Cause No. 67C01-0905-FD-67

May 20, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BROWN, Judge

Donald Keller appeals the trial court's order that he pay restitution in the amount of \$5,600. Keller raises one issue, which we revise and restate as whether the trial court abused its discretion in ordering Keller to pay restitution in the amount of \$5,600. We affirm.

The relevant facts follow. Between April 1, 2008, and April 12, 2008, Keller knowingly exerted unauthorized control over copper pipes and wires from a mobile home owned by Russell Williams. Williams used the mobile home as a rental property. Keller "ripped the plumbing out of" the mobile home, "pulled the pump up and stripped all the wiring off of the pump," "pulled a gas line coming under the trailer and the wiring coming under the trailer and just literally gutted it," and "pulled the wiring . . . right out of the paneling." Restitution Hearing Transcript at 5, 7.

On May 12, 2009, the State charged Keller with theft as a class D felony. Keller pled guilty as charged pursuant to a plea agreement. The plea agreement included the following provision: "The Defendant agrees to pay restitution due to any losses caused as a result of this theft as a term of probation." *Id.* at 13. After a sentencing hearing on September 14, 2009, the trial court sentenced Keller pursuant to the plea agreement to one and one-half years, all of which was suspended to probation, and ordered Keller to complete forty hours of community service.

Williams received two estimates regarding the cost of the repairs needed to restore the mobile home due to the damage. One of the estimates, which was related to certain electrical and plumbing repairs, was for \$3,450, and the other estimate, which was related to the replacement of a pump, was for \$2,150. The estimate related to the pump stated

that it was “[b]ased on the assumption pump can be pulled out of well [and] nothing has been dropped in hold.” Appellant’s Appendix at 22. The two estimates together totaled \$5,600.

On October 15, 2009, the court held a restitution hearing. During the hearing, the State submitted the two estimates received by Williams in connection with the repair of the mobile home. Williams testified that the total cost to repair the home would be more than the estimate if there was “trouble with the pump” or if it would be necessary to “re-drive it,” and that there was damage to the home’s wall/paneling for which he had not obtained an estimate. Restitution Hearing Transcript at 6. During cross examination, Williams testified that the home was “tore up so bad” that he was “going to have to replace it.” Id. at 8. Williams also testified on cross examination that he “could have spent a lot more than [the amount of the estimates] to rebuild that trailer and that would have cost a lot more money than replacing it.”¹ Id. at 11. When asked what he was “asking for the reimbursement based on,” Williams testified that “[o]n the damage . . . done to what [he] had there at the time.” Id. at 12. On October 26, 2009, the trial court entered a restitution order which required Keller to pay restitution in the amount of \$5,600 to Williams.

The issue is whether the trial court abused its discretion in ordering Keller to pay restitution in the amount of \$5,600. Keller argues that the trial court abused its discretion

¹ Williams also testified that “[i]nsurance valued [the home] at ten thousand dollars,” that it was difficult to find “something approximately like what [he] had,” that “the cheapest thing [he] found was like . . . [s]even thousand five hundred” but that he would have “had to move it.” Restitution Hearing Transcript at 13-14.

“in assessing restitution . . . where the loss was not actual and only an estimate of the cost to repair damage” and “where the claimant did not actually effect the repairs for which the estimates were given and did not replace the property.” Appellant’s Brief at 2. Keller further argues that “[t]estimony by the claimant was insufficient to support this award based only upon two submitted estimates” and that “[t]he estimates submitted were insufficient to support actual losses or replacement where no replacement had been done.” Id. at 3-4. The State argues that “[t]he fact that Williams decided it would be more cost effective to replace the unit than to try to repair it does not change the financial loss that he suffered from the theft” and that Williams “will still have to pay at least \$5,600 to return the property to the condition it was in before the theft, regardless of whether he repairs or replaces the unit.” Appellee’s Brief at 5. The State also argues that “Williams submitted estimates of the actual cost of repairs as required by statute” and that “[t]he fact that [Williams] has chosen to apply the money toward replacement rather than repair is irrelevant.” Id.

Ind. Code § 35-50-5-3 gives authority to a trial court to order a person sentenced for a felony or misdemeanor to make restitution to the victim of the crime. Ind. Code § 35-50-5-3(a) provides in part:

[I]n addition to any sentence imposed under this article for a felony or misdemeanor, the court may, as a condition of probation or without placing the person on probation, order the person to make restitution to the victim of the crime The court shall base its restitution upon a consideration of:

- (1) property damages of the victim incurred as a result of the crime, based on the actual cost of repair (or replacement if repair is inappropriate); [and]

- (4) earnings lost by the victim (before the date of sentencing) as a result of the crime

The principal purpose of restitution is to vindicate the rights of society and to impress upon the defendant the magnitude of the loss the crime has caused. Pearson v. State, 883 N.E.2d 770, 772 (Ind. 2008) (citing Haltom v. State, 832 N.E.2d 969, 971 (Ind. 2005)), reh'g denied. Restitution also serves to compensate the offender's victim. Id. A restitution order must be supported by sufficient evidence of actual loss sustained by the victim or victims of a crime. Rich v. State, 890 N.E.2d 44, 49 (Ind. Ct. App. 2008), trans. denied. "The amount of actual loss is a factual matter which can be determined only upon the presentation of evidence." Id. (quotation omitted). A restitution order is within the trial court's discretion and will be reviewed for an abuse of that discretion. Roach v. State, 695 N.E.2d 934, 943 (Ind. 1998), reh'g denied. "Under an abuse of discretion standard, we will affirm the trial court's decision if there is any evidence supporting the decision." Kellett v. State, 716 N.E.2d 975, 980 (Ind. Ct. App. 1999).

Here, Williams testified at the restitution hearing, that the estimates he received from two contractors to make repairs to the pump, electrical and plumbing systems of the mobile home totaled \$5,600. The estimates from the two contractors were admitted into evidence at the restitution hearing. Williams also testified that he was asking for reimbursement based on "the damage . . . done to what [he] had there at the time." Restitution Hearing Transcript at 6, 12. In addition, while Williams may elect to replace the mobile home rather than make all of the repairs necessary to restore it to its previous condition, Williams testified that it was "going to cost more than [the] estimate" to "fix

[the home] back up” and that he “kn[ew] it’s going to cost that much and then some,” id. at 6,² and that replacing the mobile home would cost more than \$5,600.³

Based upon our review of the record, we cannot say that the trial court abused its discretion in ordering Keller to pay restitution in the amount of \$5,600. See Collins v. State, 676 N.E.2d 741, 744-745 (Ind. Ct. App. 1996) (affirming the trial court’s order requiring the defendant to pay \$700,000 in restitution where the fire that the defendant set caused an estimated \$700,000 in damage to the facility and there was testimony by the owner of the business that approximately two to three million dollars would be needed to rebuild and restart operation of the facility); see also Miller v. State, 648 N.E.2d 1208, 1209 (Ind. Ct. App. 1995) (affirming trial court’s order of restitution requiring the defendant to pay \$846 in restitution to the victim where the sum represented the estimate of the value of the stolen items which were not recovered and the expense of repairing the damage to his residence), trans. denied.

For the foregoing reasons, we affirm the trial court’s order that Keller pay restitution in the amount of \$5,600.

Affirmed.

² As previously mentioned, Williams testified that the total cost to repair the home would be more than the estimate if there was “trouble with the pump” or if it would be necessary to “re-drive it,” and that there was damage to the home’s wall/paneling for which he had not obtained an estimate. Restitution Hearing Transcript at 6. Also as previously mentioned, the estimate related to the pump stated that it was “[b]ased on the assumption pump can be pulled out of well [and] nothing has been dropped in hold.” Appellant’s Appendix at 22.

³ Williams testified, as previously mentioned, that “[w]hat [he] was looking for was something approximately like what [he] had and they are getting more scare [sic] all the time. So it’s either trying to find something that’s more expensive and that’s hard to do.” Restitution Hearing Transcript at 14. Williams also testified that “the cheapest thing [he] found was like . . . [s]even thousand five hundred” but that he would have “had to move it.” Id.

NAJAM, J., and VAIDIK, J., concur.