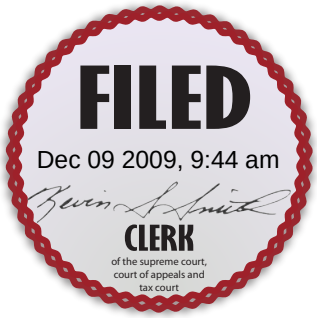

ATTORNEY FOR APPELLANT:

VICTORIA L. BAILEY
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

MONIKA PREKOPA TALBOT
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

DAMIAN BAILEY,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0907-CR-663
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Kimberly J. Brown, Judge
Cause No. 49G16-0810-PC-240882

December 9, 2009

MEMORANDUM DECISION – NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Damian Bailey appeals from the trial court's order that he pay restitution to Portia Alred. Bailey raises two issues for our review, which we restate as follows:

1. Whether the trial court erred by not determining his ability to pay restitution.

2. Whether the trial court's restitution award should be remanded for clarification.

We affirm in part and reverse and remand in part.

FACTS AND PROCEDURAL HISTORY

On December 12, 2008, Bailey pleaded guilty to charges of battery, as a Class C felony; criminal confinement, as a Class D felony; criminal recklessness, as a Class D felony; and battery, as a Class A misdemeanor. Pursuant to the terms of the plea agreement, Bailey was to serve six years executed followed by two years suspended to probation and two years suspended without probation. Bailey also owed restitution to Portia Alred, one of his battery victims. The restitution was a condition of his probation, and the amount of restitution was to be determined by the trial court.

On April 13, 2009, the court held a restitution hearing. Alred testified that she had incurred out-of-pocket medical expenses in the amount of $2,397.34 as a result of Bailey's battery. On cross-examination, Bailey's attorney asked Alred what had happened to some of Bailey's property that had been in her possession. Alred responded, "I lost some of my income. I had to sell it. And whatever I didn't sell, um, it got thrown away." Transcript at 40. Alred then testified that she "made enough to pay [her] bills" from the sale of Bailey's property. Id. The trial court, without inquiring into Bailey's

ability to pay restitution, then ordered him to pay to Alred $2,397.34. This appeal ensued.

DISCUSSION AND DECISION

Issue One: Ability to Pay

Bailey first asserts that the trial court committed reversible error by not determining his ability to pay restitution. The State does not dispute that, "when the trial court enters an order of restitution as part of a condition of probation, the court is required to inquire into the defendant's ability to pay." Pearson v. State, 883 N.E.2d 770, 772 (Ind. 2008) (citing I.C. § 35-38-2-2.3(a)(5)). Rather, the State responds that the law does not require that determination to be made immediately, especially since Bailey is to spend several years in prison before the terms of his probation take effect. We agree with the State.

In Whedon v. State, 765 N.E.2d 1276, 1279 (Ind. 2002), our Supreme Court held that "a defendant's financial resources are more appropriately determined not at the time of initial sentencing but at the conclusion of incarceration, thus allowing consideration of whether the defendant may have accumulated assets through inheritance or otherwise." Thus, we cannot say that the trial court erred when it did not hold a hearing to determine Bailey's ability to pay the restitution. See Kimbrough v. State, 911 N.E.2d 621, 638-39 (Ind. Ct. App. 2009).

Issue Two: Amount of Restitution

Bailey also challenges the amount of restitution the court ordered him to pay to Alred. We will not reverse a restitution order unless the trial court abuses its discretion.

Id. at 639. 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. Additionally, while a civil judgment does not bar the entry of a restitution order, a victim is entitled to only one recovery. Id. (citing I.C. § 35-50-5-3; Haltom v. State, 832 N.E.2d 969, 971-72 (Ind. 2005)). Thus, if a defendant has already paid all or part of a civil judgment, the amount of restitution must be offset by the amount already recovered. Id. (citing Myers v. State, 848 N.E.2d 1108, 1110-11 (Ind. Ct. App. 2006)).

The State concedes that remand of this issue is appropriate. The undisputed evidence demonstrates that Alred incurred $2,397.34 in medical bills due to Bailey's criminal behavior, along with an unspecified amount of lost income. But the undisputed evidence also shows that Alred sold some of Bailey's property to recoup some of her losses. Specifically, she testified that she had recovered from the sale of Bailey's personal property enough to "pay [her] bills." Transcript at 40. The trial court, without comment, ordered Bailey to pay Alred $2,397.34.

By all appearances, the trial court's restitution order provides for a duplicated recovery to Bailey, which is prohibited. See Kimbrough, 911 N.E.2d at 639 (citing I.C. § 35-50-5-3; Haltom, 832 N.E.2d at 971-72; Myers, 848 N.E.2d at 1110-11). Misapplication of the law is an abuse of discretion. Id. We must, therefore, reverse the trial court's order. We remand this issue to the trial court so that it may clarify the amount of lost income suffered by Alred and the amount Alred has already recovered from Bailey through the sale of his property. We note that the trial court may also, based

on the evidence, order Bailey to pay restitution directly to Alred's medical insurance provider, which has sustained losses in excess of $4,000. See Little v. State, 839 N.E.2d 807, 810 n.2 (Ind. Ct. App. 2005).

Affirmed in part and reversed and remanded in part.

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