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**IN THE
COURT OF APPEALS OF INDIANA**

CHARLES ALLEN,)
)
Appellant-Defendant,)
)
vs.) No. 25A03-0608-CR-345
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

APPEAL FROM THE FULTON SUPERIOR COURT
The Honorable Wayne E. Steele, Judge
Cause No. 25D01-0602-CM-81

November 30, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Appellant-defendant Charles Allen (“Allen”) appeals the trial court order for restitution in conjunction with his guilty plea for Leaving the Scene of a Personal Injury Accident, a Class A misdemeanor.¹ We reverse and remand.

Issue

Allen raises three issues, which we consolidate into the singular issue of whether the trial court erred in calculating the restitution Allen was ordered to pay for the victim's medical bills and loss of property as a condition of his probation.²

Facts and Procedural History

On February 24, 2006, Allen struck Mary Moreau’s (“Moreau”) parked truck as she was getting her mail in front of her home. Allen left the scene after the accident. Moreau suffered physical injuries as a result of the accident, which prohibited her from working for a few weeks. Moreau’s truck, used in her husband’s electronic business, along with the tools inside the truck, was severely damaged.

The State charged Allen with Leaving the Scene of a Personal Injury Accident as a Class A misdemeanor. Allen entered into a plea agreement with the State agreeing to a one year suspended sentence and one year of probation.

The trial court accepted the plea agreement and ordered Allen to pay \$11,000 in restitution as a condition of his probation. Allen now appeals the calculation of the restitution order.

¹ Ind. Code § 9-26-1-8(a).

² Allen also challenges the trial court’s inquiry into Allen’s ability to pay and failure to fix the method of performance of payments. However, we do not review these issues, because on remand, the trial court will ultimately address them.

Discussion and Decision

On appeal, Allen contends that there was insufficient evidence presented regarding the dollar value of loss to Moreau. An order of restitution is a matter within the sound discretion of the trial court, and we will only reverse upon a showing of an abuse of discretion. Huddleston v. State, 764 N.E.2d 655, 657 (Ind. Ct. App. 2002).

The State correctly notes that Allen failed to preserve this issue by failing to challenge the restitution order at his sentencing. A failure to preserve an issue for appeal usually results in waiver. Johnson v. State, 845 N.E.2d 147, 153 (Ind. Ct. App. 2006), reh'g denied, trans. denied. However, a reviewing court may remedy an unpreserved error upon finding that the trial court committed fundamental error. Id. An improper sentence constitutes fundamental error that cannot be ignored on review. Id.

Under Indiana Code Section 35-50-5-3(a), a trial court may order a defendant to make restitution to the victim of the crime. In pertinent part, the statute requires the court to base the calculation of restitution on:

- (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);
- (2) medical and hospital costs incurred by the victim (before the date of sentencing) as a result of the crime; . . .
- (4) earnings lost by the victim (before the date of sentencing) as a result of the crime including earnings lost while the victim was hospitalized or participating in the investigation or trial of the crime; . . .

Ind. Code § 35-50-3(a). It is well settled that only actual expenses incurred by the victim prior to the date of sentencing may be included in the calculation of restitution. Mitchell v. State, 730 N.E.2d 197, 200 (Ind. Ct. App. 2000), trans. denied. The amount of actual loss is a factual matter that can be determined only upon presentation of evidence. Id.

The only evidence before the trial court supporting its calculation of restitution was a Victim Statement and Restitution Information form completed by Moreau and submitted to the Fulton County Probation Department. The form was completed as follows:

1. Your total loss and/or expenses resulting from the offense:
 - a. Value of Property Stolen: \$ 4,500 Still pending
 - b. Value of Property Damage (Cost to Repair) \$ Truck 4,000/ Tools 2,500
 - c. Medical/Counseling Expenses Incurred \$ Still Pending
 - d. Loss of Wages \$ Still Pending
- TOTAL CLAIM FOR RESTITUTION \$ Still Pending
2. The amount of your loss covered by insurance \$ 4,000 & Still Pending

Appellant's Appendix at 78. The only other evidence is a one-page victim statement describing how the accident generally affected Moreau. No testimony of Moreau was taken as to how these figures were determined nor are there any documents in the record to substantiate the estimates. Furthermore, Moreau listed an amount for "Value of Stolen Property," which does not correlate to restitution based on a car accident. The record lacks a claim or evidence of stolen property, so it is unclear why Moreau listed any amount in this category. This scant and unclear presentation of evidence lacks a sufficient factual basis to calculate restitution. Therefore, we conclude that it was error to impose restitution based upon this record. Accordingly, we reverse the order of restitution and remand for a new sentencing hearing in accordance with this opinion.

Reversed and remanded.

MAY, J., concurs.

RILEY, J., concurs in result.