

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2016 CA 1561

STATE OF LOUISIANA

VERSUS

WADE J. YBARZABAL

Judgment Rendered: SEP 21 2017

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On Appeal from the 22nd Judicial District Court
In and for the Parish of St. Tammany
State of Louisiana
Trial Court No. 562027

The Honorable Raymond S. Childress, Judge Presiding

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Wade J. Ybarzabal

Higginbotham, J. concurs.

BEFORE: HIGGINBOTHAM, HOLDRIDGE, AND PENZATO, JJ.

PENZATO, J.

The defendant, Wade Ybarzabal, entered a plea of guilty to a charge of misapplication of payments by a contractor, a violation of La. R.S. 14:202. The trial court deferred imposition of sentence under the provisions of La. Code Crim. P. art. 893, and placed the defendant on probation for a period of five years. In addition to the general conditions of probation, the trial court imposed restitution as a special condition of probation. Following a restitution hearing, the trial court issued a judgment awarding \$79,103.86 in restitution. It is from this judgment that the defendant appeals.

STATEMENT OF FACTS

Since the defendant pled guilty, the facts were not fully developed in this case. However, the following facts were established at the restitution hearing. On December 1, 2013, Stephen and Janna Perret (the victims) contracted with the defendant for the construction of a new home. The original contract price was for \$279,331.70. Four amendments were made to the original contract: the addition of a garage for \$24,983.80; foundation work in the amount of \$7,607.00; an HVAC upgrade in the amount of \$2,923.00; and the addition of a chair rail in the dining room for \$1,333.00.

In December 2014, the Perrets were served with a petition for garnishment that asserted that a money judgment in the amount of \$142,733.41 had been rendered against Ybarzabal Contractors, LLC in favor of Andrew Leblanc. The defendant acknowledged that he had been sued, and that garnishments were filed to satisfy the judgment. He testified that as a result of that lawsuit, he could not get a contractor license or insurance, and had no choice but to leave the Perret job. He further admitted that he did not use money received for the Perret job to pay for materials related to the project.

The defendant abandoned the Perret construction job around the end of

December of 2014. On January 14, 2015, the Perrets sent a letter to the defendant, cancelling the December 1, 2013 construction contract.

At issue in the restitution hearing was the amount of restitution due to the Perrets as a result of the defendant's abandonment of the construction project. The parties stipulated that there were three unpaid liens, and attorney's fees related to the liens, in the amount of \$52,633.66. The defendant acknowledged that the Perrets were entitled to restitution in the amount of the liens.

Mrs. Perret testified that the defendant was owed \$32,157.18 under the contract at the time that he abandoned the project. She further testified that the Perrets had to pay \$58,627.38 to complete the project. Thus, she calculated that in addition to the stipulated amount, the Perrets were due \$26,470.20 (\$58,627.38 less \$32,157.18) to complete the project. The State introduced into evidence documents in support of that amount.

The defendant also testified at the hearing. He testified that he was to be paid in five draws of \$51,676.24 for the project. He testified that at the time he abandoned the project he had not gotten the fifth draw, and that he had \$22,000.00 of work into the project for which he was not paid. Thus, he did not believe that he owed any of the \$26,470.20 claimed by Mrs. Perret.

Following the testimony, the trial court indicated that it would have to take the matter under advisement. The parties were allowed to submit post-hearing briefs. Thereafter, on May 6, 2016, the trial court issued a judgment concluding that, "[c]onsidering the evidence supporting Mrs. Perret's testimony, the Court will award a total of \$79,103.86 in restitution, which represents \$26,470.20 in additional money paid by the victim to complete the project, and \$52,633.66 as referenced in the stipulation."

On May 25, 2016, the defendant's probation officer filed a motion and order for a hearing to revoke the defendant's probation. The motion indicated that the

defendant would not sign the restitution payment plan, as he “states he can not pay the court ordered amount of \$79,103.86.” A revocation hearing was held on June 22, 2016. The defendant was present at the hearing, with his counsel. A conference was held off-the-record, after which counsel for the defendant indicated that the defendant would pay a minimum of \$500.00 per month in restitution.

Before the revocation hearing was held, the defendant timely filed the pending motion for appeal of the May 6, 2016 judgment of restitution. The defendant alleges on appeal that the trial court erred in awarding more than the stipulated amount, which were the liens filed against the victim’s house; that the sentence imposed as to the amount of restitution was unconstitutionally excessive and unduly harsh; and that the trial court erred in not crediting the defendant for work that was done for which he was not paid.

REVIEW FOR ERROR

This court has conducted an independent review of the entire record in this matter, including a review for error under La. Code Crim. P. art. 920(2).

As indicated above, the trial court set the amount of restitution by written judgment dated May 6, 2016. Although the defendant was present at the initial restitution hearing, the trial court took the matter under advisement. The defendant was also present at the revocation hearing where a payment schedule for the payment of restitution was established. However, the record does not reflect that the defendant was present at the time the trial court imposed restitution.

Louisiana Code of Criminal Procedure article 835 requires in a felony case that the defendant always be present when sentence is pronounced. If a sentence is improperly pronounced in the defendant’s absence, he shall be resentenced when his presence is secured. La. Code Crim. P. art. 835. Pursuant to La. Code Crim. P. art. 883.2, restitution is “a part of any sentence that the court shall impose” in cases in which the court finds an actual pecuniary loss to a victim. The imposition of

restitution is considered a part of the defendant's sentence, for which the defendant must be present. *State v. Baronet*, 2013-986 (La. App. 3 Cir. 2/12/14), 153 So. 3d 1112, 1114 (citing *State v. Thomas*, 2005-1051 (La. App. 3 Cir. 3/1/06), 924 So.2d 1146).

CONCLUSION

The trial court's imposition of restitution outside of the presence of the defendant failed to comply with the provisions of La. Code Crim. P. art. 835. The judgment of restitution is vacated, and we remand this matter to the trial court for resentencing in the defendant's presence. Consideration of the defendant's assignments of error is pretermitted at this time. *See Baronet*, 153 So2d at 1114.

JUDGMENT OF RESTITUTION VACATED; REMANDED WITH INSTRUCTIONS.