

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
March 19, 2013

v

WILLIAM JOSEPH COLEMAN, JR.,

Defendant-Appellant.

No. 309234
Saginaw Circuit Court
LC No. 11-036127-FH

Before: BORRELLO, P.J., and M. J. KELLY and BOONSTRA, JJ.

PER CURIAM.

Defendant William Joseph Coleman, Jr. appeals by right the order of restitution entered after a jury convicted him of possessing counterfeit audio or video recordings with the intent to sell, MCL 752.1052; MCL 752.1054(2), possession of less than 25 grams of cocaine, MCL 333.7403(2)(a)(v), and operating a motor vehicle without a license, second offense, MCL 257.904(3)(b). On appeal, Coleman’s only argument is that the trial court erred when it ordered him to pay \$2,299 in restitution to the Motion Picture Association of America and \$234.88 in restitution to the Recording Industry Association of America (collectively the Associations). We conclude that there was no competent evidence to support the order of restitution and that Coleman’s lawyer was ineffective for failing to object to the order on that basis. For these reasons, we vacate Coleman’s sentence to the extent that includes an order to pay restitution to either Association.

I. BASIC FACTS

Coleman’s convictions arose from evidence seized after a police officer pulled him over for speeding. After the initial stop, the officer discovered that Coleman was driving without a license and arrested him. He then searched Coleman’s car and discovered a small amount of cocaine and over 100 counterfeit video and audio discs.

At trial, James Schoenherr testified that he worked for a company that investigates counterfeiting for the Associations. He stated that he examined a sampling of the discs found in Coleman’s car and determined that they were counterfeit. He also testified that the Motion Picture Association had “assigned” a “standard price” of \$19 per DVD. And, on that basis, he concluded that the movies—excluding those from the adult entertainment industry—had “a retail value of \$2,299, which is a direct loss to the Motion Picture Association of America.” He did

not testify about the value—standard or otherwise—of the audio recordings found in Coleman’s car.

In Coleman’s presentence investigation report, the author indicated that Schoenherr verified that the counterfeit movies had a total value of \$2,299 and that the counterfeit audio recordings had a value of \$234.88. The trial court, apparently in reliance on these figures, ordered Coleman to pay a total of \$2,533.88 in restitution to the Associations. Coleman’s lawyer did not object to the restitution order.

II. RESTITUTION

A. STANDARD OF REVIEW

This Court reviews de novo the proper interpretation and application of statutes, such as those governing restitution. *People v Cannon*, 481 Mich 152, 156; 749 NW2d 257 (2008). However, this Court reviews the factual findings underlying a trial court’s decision to order restitution for clear error. *People v Allen*, 295 Mich App 277, 281; 813 NW2d 806 (2012). “A finding is clearly erroneous if this Court is left with the definite and firm conviction that a mistake has been made.” *Id.*

B. ANALYSIS

When sentencing a defendant, trial courts must order the defendant to make full restitution to any victim of the defendant’s course of conduct. *Id.* at 281-282, quoting MCL 780.766(2). In determining the amount of restitution, the trial court must “consider the amount of the loss sustained” by the victim. MCL 780.767(1). That is, the court must order restitution to be paid to the victim on the basis of that victim’s *actual* losses. See *People v Bell*, 276 Mich App 342, 347; 741 NW2d 57 (2007) (“The amount of restitution to be paid by a defendant must be based on the actual loss suffered by the victim, not the amount paid by an insurer or other entity.”). Moreover, the prosecutor bears the burden of proving that the victim suffered a loss as a result of the defendant’s criminal conduct and the amount of the actual loss by a preponderance of the evidence. See *People v Gahan*, 456 Mich 264, 276; 571 NW2d 503 (1997); MCL 780.767(4). It follows that the trial court may not order the defendant to pay restitution to a victim for a loss suffered by a different victim, may not order restitution for a hypothetical loss, and may not order a defendant to pay restitution that exceeds the amount actually established by a preponderance of the evidence.

Here, Schoenherr testified that the Motion Picture Association suffered a “direct loss” of \$2,299. However, he also testified that he derived that figure by multiplying the number of discs found in Coleman’s car by \$19 per movie, which figure was not an *actual* retail value for the items; rather, he testified that the \$19 per disc figure was adopted as an industry standard. Thus, the actual retail value of the movies might have been significantly less than the industry standard.

In addition to the fact that Schoenherr calculated his client’s losses on the basis of standardized value rather than the actual value, he did not testify as to whether and to what extent his clients—the Associations—had an actual proprietary interest in the counterfeited titles. He also did not identify the amount of each sale at retail that normally results in profit to his clients after deducting the costs of manufacturing, distributing, and retailing the discs, which might be

significantly less than the full retail value. Indeed, it is quite possible that the Associations themselves would derive no profits from the sale of the identified titles and, for that reason, suffered no actual losses (at least in the form of lost sales). He also did not testify that the Associations have been empowered by the owners of the copyrights—or any other stakeholder—to collect restitution on their behalf. Finally, there was no additional information contained in the presentence report that alleviated any of these deficiencies in Schoenherr’s testimony. Indeed, the report merely characterizes these amounts as the value of the recordings (both video and audio), without stating the basis for deriving this value. Because the presentence report merely listed the value of the recordings without purporting to state the amount of any actual loss to a particular victim, the trial court could not rely on the report alone. Cf. *Gahan*, 456 Mich at 276 n 17 (stating that, when ordering restitution, trial courts may normally rely on the presentence report because it is presumed accurate in the absence of an effective challenge).

Although Coleman did not object to the restitution order at his sentencing, we nevertheless conclude that it was plain error affecting Coleman’s substantial rights for the trial court to order restitution in the amount that it did. See *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). There was no evidence from which the trial court could find that the Association suffered a specific, identifiable loss as a result of Coleman’s possession of counterfeit recordings. Even if the \$19 figure represented the actual retail value of the recordings, which it did not, there was no evidence that the appropriate owner would be entitled to 100% of that amount had the items sold at retail. Similarly, there was no evidence that the Associations—as opposed to some other victim or victims—would be entitled to collect all or some of that amount. Thus, we must conclude that the trial court erred when it ordered Coleman to pay restitution to the Associations without any evidence that the Associations suffered an actual loss as result of his criminal conduct. Similarly, it erred when it ordered an amount of restitution that was not premised on an actual loss, but on a standardized retail value adopted by the recording industries.

C. INEFFECTIVE ASSISTANCE

We also agree with Coleman’s contention that he did not receive the effective assistance of counsel at his sentencing. On this record, the deficiencies in the evidence used to support the restitution order are so patent that we cannot conceive of a situation where a reasonable lawyer would refrain from objecting. See *People v Gioglio (On Remand)*, 296 Mich App 12, 22-23; 815 NW2d 589 (2012) (explaining that, when reviewing an ineffective assistance claim, courts must entertain the range of possible reasons for the act or omission and conclude that the act or omission fell within the range of reasonable conduct if there might have been a legitimate strategic reason for acting or failing to act), vacated not in relevant part 493 Mich 864. Therefore, we conclude that the failure to object to this order fell below an objective standard of reasonableness under prevailing professional norms and that there is a reasonable probability that, but for the error, the outcome would have been different. *Id.* at 22. Consequently, he is entitled to relief on that basis as well.

III. CONCLUSION

The trial court erred when it ordered Coleman to pay restitution to the Associations without evidence that the Associations suffered a loss as a result of his criminal conduct or were empowered to collect restitution for a person or entity that did suffer such a loss. The trial court also erred when it ordered Coleman to pay an amount of restitution that was premised on a standardized retail price without any evidence that the standard price reflected actual losses. Finally, Coleman's lawyer's failure to object to the restitution on those bases fell below an objective standard of reasonableness under prevailing professional norms and prejudiced Coleman's sentencing. For these reasons, we vacate Coleman's sentence to the extent that it included orders to pay restitution to either Association and remand this case to the trial court to enter an amended judgment of sentence consistent with this opinion. In all other respects, we affirm.

Nothing in this opinion should be construed to preclude the prosecutor, or any victim, from moving for an evidentiary hearing in order to present evidence to prove that one or more victims suffered an actual loss as a result of Coleman's criminal course of conduct. MCL 780.766(22).

Affirmed in part, vacated in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Stephen L. Borrello
/s/ Michael J. Kelly
/s/ Mark T. Boonstra