



**In The  
Court of Appeals  
Sixth Appellate District of Texas at Texarkana**

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No. 06-17-00067-CR

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JOHNNY ELTON MITCHELL, Appellant

V.

THE STATE OF TEXAS, Appellee

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On Appeal from the 354th District Court  
Hunt County, Texas  
Trial Court No. 31,359

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Before Morriss, C.J., Moseley and Burgess, JJ.  
Memorandum Opinion by Justice Moseley

## MEMORANDUM OPINION

Johnny Elton Mitchell was sentenced to fifteen months' imprisonment after a jury convicted him of evading arrest or detention with a motor vehicle, which the jury found constituted a deadly weapon. While evading arrest, Mitchell drove off the road and crashed his vehicle into a fence located on property owned by Cindy Ricks. Ricks testified that the accident damaged her fence, dog house, lawn mower, and weed eater, and that an insurance adjuster "eyeballed" the "appraisal" at \$3,056.00, without obtaining any estimates. Consequently, the trial court's judgment also ordered Mitchell to pay \$3,056.00 in restitution to Ricks.

In his sole point of error on appeal, Mitchell argues that the evidence is insufficient to support the amount of the restitution award. First, he argues that the insurance company only compensated Mitchell \$341.00 for her property loss and that the amount of restitution should be reduced by this amount. Article 42.037(f)(1) of the Texas Code of Criminal Procedure states, "The court may not order restitution for a loss for which the victim has received or will receive compensation only from a source other than the compensation to victims of crime fund." TEX. CODE CRIM. PROC. ANN. art. 42.037(f)(1) (West Supp. 2016). The State concedes error on this point.

Next, Mitchell argues that (1) Ricks testified that she had lived on the property for thirteen years, indicating that the damaged property might be thirteen years old, (2) the Texas Code of Criminal Procedure requires that the amount of restitution should be calculated based on actual value, instead of replacement value, and (3) thus, the trial court mistakenly used evidence of replacement value.

We review challenges to restitution orders under an abuse of discretion standard. *Cartwright v. State*, 605 S.W.2d 287, 288–89 (Tex. Crim. App. [Panel Op.] 1980). A trial court abuses its discretion when it acts in an arbitrary or unreasonable manner. *Montgomery v. State*, 810 S.W.2d 372, 380 (Tex. Crim. App. 1990).

“Restitution serves multiple purposes, including restoring the victim to the status quo and forcing an offender to address and remedy the specific harm that he has caused.” *Hanna v. State*, 426 S.W.3d 87, 91 (Tex. Crim. App. 2014). “A broad interpretation of the restitution statutes provides judges with ‘greater discretion in effectuating opportunities for rehabilitating criminals, deterring future harms, and efficiently compensating victims.’” *Id.* (quoting *Lemos v. State*, 27 S.W.3d 42, 45 (Tex. App.—San Antonio 2000, pet. ref’d)). “However, the legislature has also recognized limits on the right to restitution: the amount of restitution must be just; [and] it must have a factual basis in the record . . . .” *Id.*

In relevant part, Article 42.037 of the Texas Code of Criminal Procedure states:

(b)(1) If the offense results in damage to or loss or destruction of property of a victim of the offense, the court may order the defendant: . . .

(B) if return of the property is impossible or impractical or is an inadequate remedy, to pay an amount equal to the greater of:

(i) the value of the property on the date of the damage, loss, or destruction; or

(ii) the value of the property on the date of sentencing, less the value of any part of the property that is returned on the date the property is returned.

TEX. CODE CRIM. PROC. ANN. art. 42.037(b)(1) (West Supp. 2016). Per Article 42.037(b), “restitution does not include cost of repair; it [only] includes the value of the property on the date of the damage . . . .” *Miller v. State*, 343 S.W.3d 499, 503 (Tex. App.—Waco 2011, pet. ref’d).

The record demonstrates, and the State acknowledges, that Ricks did not testify at trial that she had personal knowledge of the value of the property on the date of the damage. Rather, Ricks testified that her insurance adjuster filled out a form for the Greenville Police Department containing a space for the value of the property by “eyeballing” it. The form did not specify whether the value was calculated by using “the value of the property on the date of the damage,” instead of replacement cost, and the insurance adjuster did not testify at trial to provide a factual basis for the amounts listed in the form.<sup>1</sup>

The prosecution bears the burden of proving the amount of loss sustained by the victim by a preponderance of the evidence in order to support a restitution order. TEX. CODE CRIM. PROC. ANN. art. 42.037(k) (West Supp. 2016). On this record, we conclude that the State failed to prove, by a preponderance of the evidence, the value of the property on the date of the damage in such a manner that it provided the factual basis required to support the amount of restitution.<sup>2</sup> No objection was raised to the introduction of the adjuster’s form.

We conclude that the evidence was legally insufficient to support a restitution award. Mitchell’s point of error is sustained.

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<sup>1</sup>Moreover, the form demonstrated that the adjuster initially valued the damage to the fence at \$2,000.00, but later modified the amount to \$2,500.00. At trial, Ricks testified that only two portions of the fence were damaged and that she repaired the damage to the fence with the assistance of her family in a few hours.

<sup>2</sup>See *Cartwright*, 605 S.W.2d at 288 n.2.

Here, the State’s only prayer asks this Court to abate the appeal and remand the matter to the trial court for a hearing to determine the proper amount of restitution. Recently, the Texas Court of Criminal Appeals has stated that “if there is a lack of a sufficient factual basis—appellate courts should vacate [a restitution order] and remand the case for a restitution hearing because the trial judge is authorized to assess restitution, but the amount of restitution is not (yet) supported by the record.” *Burt v. State*, 445 S.W.3d 752, 758 (Tex. Crim. App. 2014) (citing *Barton v. State*, 21 S.W.3d 287, 290 (Tex. Crim. App. 2000)); *Cartwright*, 605 S.W.2d at 289.

We vacate the restitution order and remand the case for a hearing to determine the proper amount of restitution, in accord with this opinion.

Bailey C. Moseley  
Justice

Date Submitted:      October 6, 2017  
Date Decided:        October 9, 2017

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