

NOTICE

This Order was filed under Supreme Court Rule 23 and is not precedent except in the limited circumstances allowed under Rule 23(e)(1).

2023 IL App (4th) 220263-U

NO. 4-22-0263

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED

February 10, 2023
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
Plaintiff-Appellee,)	Circuit Court of
v.)	Mercer County
JOHN F. SULLIVAN,)	No. 19CF12
Defendant-Appellant.)	
)	Honorable
)	Peter W. Church,
)	Judge Presiding.

PRESIDING JUSTICE DeARMOND delivered the judgment of the court. Justices Zenoff and Knecht concurred in the judgment.

ORDER

- ¶ 1 *Held:* The appellate court affirmed and remanded with instructions, finding the trial court did not abuse its discretion in ordering restitution in the amount of \$2000, but remand was warranted because the restitution order did not comply with section 5-5-6(f) of the Unified Code of Corrections.
- ¶ 2 Following an August 2019 bench trial, defendant, John F. Sullivan, was found guilty of theft and obstruction of justice (720 ILCS 5/16-1(a)(1), 31-4(a)(1) (West 2018), sentenced to 24 months' probation, and ordered to pay \$8064 in restitution. The appellate court affirmed defendant's theft conviction and probation term, but reversed defendant's obstruction of justice conviction, and vacated the restitution order. *People v. Sullivan*, No. 3-20-0086 (2021) (unpublished summary order under Illinois Supreme Court Rule 23(c)).

¶ 3 On remand, the trial court ordered restitution in the amount of \$2000, but it did not establish whether defendant should pay in a lump sum or in installments, nor did it set a date by which the amount was to be paid in full.

¶ 4 Defendant appeals, arguing (1) the trial court abused its discretion by ordering him to pay \$2000 in restitution and (2) the trial court failed to comply with section 5-5-6(f) of the Unified Code of Corrections (Unified Code) (730 ILCS 5/5-5-6(f) (West 2020)).

¶ 5 I. BACKGROUND

¶ 6 On June 30, 2019, the State charged defendant by amended information with theft and obstruction of justice, alleging defendant knowingly obtained unauthorized possession of a horse trailer belonging to Robin McGee, intending to deprive McGee of the trailer's use, and defendant knowingly furnished false information to the investigating detective. 720 ILCS 5/16-1(a)(1), 31-4(a)(1) (West 2018). After a bench trial, the trial court found defendant guilty on both counts.

¶ 7 On October 21, 2019, the trial court sentenced defendant to 24 months' probation and ordered defendant to pay \$8064 in restitution. Testimony during the sentencing hearing showed defendant sold the trailer to a salvage yard for \$576.15, and it purportedly "smelled like mice" and "looked like it had been abandoned." However, the court found the price defendant received for scrapping the trailer did not represent its fair market value.

¶ 8 On November 26, 2019, the trial court ordered defendant to make monthly payments of \$500, due on the second Wednesday of each month, beginning in January 2020, until his restitution obligation was satisfied. The payment plan was subsequently adjusted to \$50 monthly payments, due on the first Wednesday of each month, beginning on August 5, 2020.

¶ 9 On appeal, the appellate court affirmed defendant’s theft conviction and probation sentence, but it reversed defendant’s obstruction conviction and vacated the restitution order, finding the evidence was insufficient to support either. *Sullivan*, No. 3-20-0086, at 4, 6.

¶ 10 On March 22, 2022, the trial court conducted a second restitution hearing. McGee testified she paid \$2000 for the trailer, but she insisted its fair market value was greater, saying she received a good deal because she purchased it from a family friend. The State argued restitution in the amount of \$13,500 was appropriate based on comparable trailer models. Defense counsel argued the State did not present sufficient evidence to establish the trailer’s fair market value, saying, “[T]he only real facts I think we have here is the amount [McGee] paid for it. *** [N]othing’s been substantiated as to the fair market value of it. But, if Your Honor is going to disagree with that, I would say \$2,000 is the best can be ordered.”

¶ 11 The trial court found, based on the trailer’s purchase price, the evidence supported a \$2000 restitution order. The court did not indicate how the restitution was to be paid, nor did it set a deadline by which defendant was to pay the restitution amount.

¶ 12 This appeal followed.

¶ 13 **II. ANALYSIS**

¶ 14 On appeal, defendant argues (1) the trial court abused its discretion by ordering restitution in the amount of \$2000 and (2) the court did not comply with section 5-5-6(f) of the Unified Code. We disagree with defendant regarding the restitution amount but agree regarding the court’s compliance with the Unified Code.

¶ 15 **A. Waiver**

¶ 16 As a preliminary matter, the State contends defendant affirmatively waived his restitution amount argument when defense counsel said, “[I]f Your Honor is going to disagree with that, I would say \$2,000 is the best can be ordered.” We disagree.

¶ 17 Waiver is the “ ‘voluntary relinquishment of a known right.’ ” *Hill v. Cowan*, 202 Ill. 2d 151, 158, 781 N.E.2d 1065, 1069 (2002); see also *People v. Blair*, 215 Ill. 2d 427, 444 n.2, 831 N.E.2d 604, 615 n.2 (2005). The waiver doctrine “prevents a party from taking one position at trial and a different position on appeal.” *Sakellariadis v. Campbell*, 391 Ill. App. 3d 795, 800, 909 N.E.2d 353, 358 (2009); see also *People v. Lowe*, 153 Ill. 2d 195, 199, 606 N.E.2d 1167, 1169 (1992) (“[A]n accused may not ask the trial court to proceed in a certain manner and then contend in a court of review that the order which he obtained was in error.”).

¶ 18 The record shows defense counsel argued, during the second restitution hearing, the State did not present sufficient evidence to establish the trailer’s fair market value, which is what defendant now argues on appeal. Defense counsel’s position below did not differ from defendant’s position on appeal. Instead, defense counsel presented a contingency argument when he said, “[I]f Your Honor is going to disagree with that, I would say \$2,000 is the best can be ordered,” which the trial court could consider if it found the State presented sufficient evidence to set a restitution amount. Defense counsel merely argued a less favored alternative to his suggestion the State’s evidence was insufficient to establish any restitution value. This does not constitute waiver. Because defendant did not voluntarily relinquish a known right and does not take a position on appeal differing from his position below, defendant did not waive his restitution amount argument. See *Cowan*, 202 Ill. 2d at 158; *Sakellariadis*, 391 Ill. App. 3d at 800.

¶ 19 B. Restitution Amount

¶ 20 Defendant asserts the trial court abused its discretion by not considering the trailer's fair market value at the time of the offense when it entered its restitution order.

¶ 21 A trial court may order a defendant to pay restitution for an economic loss caused by his criminal conduct as part of that defendant's sentence. 730 ILCS 5/5-5-6(a) (West 2020); *People v. Birge*, 2021 IL 125644, ¶ 47, 182 N.E.3d 608. We will not reverse a trial court's restitution order on appeal absent an abuse of discretion. *People v. Stites*, 344 Ill. App. 3d 1123, 1125, 802 N.E.2d 303, 305 (2003).

¶ 22 When setting a restitution amount, a trial court "shall assess the actual out-of-pocket expenses, losses, damages, and injuries suffered by the victim." 730 ILCS 5/5-5-6(b) (West 2020). "The court must determine the actual costs incurred by the victim; a guess is not sufficient." *People v. Dickey*, 2011 IL App (3d) 100397, ¶ 25, 961 N.E.2d 816. "Restitution should be determined by using the fair market value of the property at the time the property was damaged or destroyed." *People v. Jones*, 145 Ill. App. 3d 835, 839, 495 N.E.2d 1371, 1373 (1986). "Alleged losses which are unsupported by the evidence must not be used as a basis for awarding restitution." *People v. Jones*, 206 Ill. App. 3d 477, 482, 564 N.E.2d 944, 947 (1990).

¶ 23 The record shows McGee paid \$2000 for the trailer. While McGee testified she paid less than the trailer's full market value, and she argued its fair market value was \$13,500 based on similar models, the trial court rejected McGee's estimate. The State made no effort to support this self-serving estimate with information from an objective source, except with a hearsay document the trial court found inadmissible. Defense counsel acknowledged that, if the court determined sufficient evidence existed to set a specific restitution amount, "\$2,000 [was] the best can be ordered." Based on the evidence presented during the second restitution hearing,

McGee's losses constituted at least \$2000. Thus, the court did not abuse its discretion in ordering defendant to pay that amount in restitution.

¶ 24 Defendant argues the \$2000 restitution amount did not represent the trailer's fair market value, pointing to testimony from the first restitution hearing that the trailer "looked like it had been abandoned" and "smelled like mice." Notably, the trial court rejected this argument when it set the initial restitution amount, and defendant did not reraise his condition-of-the-trailer argument during the second restitution hearing. Further, McGee's un rebutted testimony during the second hearing discussed the trailer's various amenities, as well as its purported condition. Other than asking how long it had been since McGee had seen the trailer before it was taken, defense counsel did not rebut her testimony. Thus, the testimony defendant highlights was not before the court when it made its second restitution determination, and even if it were, the court had already found that evidence unpersuasive at the first restitution hearing. We cannot find the court abused its discretion when it relied on McGee's testimony regarding the trailer's purchase price to order restitution in the amount of \$2000. See *Stites*, 344 Ill. App. 3d at 1125; *Dickey*, 2011 IL App (3d) 100397, ¶ 25.

¶ 25 C. Section 5-5-6(f) of the Unified Code of Corrections

¶ 26 Defendant also argues the trial court failed to comply with section 5-5-6(f) of the Unified Code, which provides a trial court "shall determine whether restitution shall be paid in a single payment or in installments, and shall fix a period of time not in excess of 5 years, *** not including periods of incarceration, within which payment of restitution is to be paid in full." 730 ILCS 5/5-5-6(f) (West 2020). Compliance with this statute is mandatory, and a restitution order is fatally incomplete if it does not specify a particular time for the payment of restitution. *People v. Hibbler*, 2019 IL App (4th) 160897, ¶ 82, 129 N.E.3d 755. A trial court's compliance with

statutory procedure is a question of law, which we review *de novo*. *People v. Munz*, 2021 IL App (2d) 180873, ¶ 14, 193 N.E.3d 219.

¶ 27 While the trial court made the requisite determinations during the initial restitution hearing, the appellate court vacated the first restitution order for insufficient supporting evidence. *Sullivan*, No. 3-20-0086, at 6. “The effect of a vacated order is that of a void order.” *Kelch v. Watson*, 237 Ill. App. 3d 875, 877, 604 N.E.2d 971, 973 (1992). By vacating the first restitution order, the appellate court positioned the parties as though the first order was never entered. See *Kelch*, 237 Ill. App. 3d at 877. Because the appellate court vacated the first restitution order, the trial court was statutorily required to institute a new payment structure and deadline pursuant to section 5-5-6(f) during the second restitution hearing. See 730 ILCS 5/5-5-6(f) (West 2020); *Hibbler*, 2019 IL App (4th) 160897, ¶¶ 81-83.

¶ 28 Defendant urges us to vacate the second restitution order and remand for further proceedings. In *Hibbler*, when faced with a similar situation, we found the trial court erred in not specifying the date by which the defendant was to pay restitution or specifying whether defendant was to pay in a lump sum or by installment. *Hibbler*, 2019 IL App (4th) 160897, ¶¶ 81-83. We concluded, “because we agree that the trial court was required by statute to include when and how the restitution was to be paid, we remand the case to the trial court for the limited purpose of compliance with the requirements of the Unified Code regarding restitution.” *Hibbler*, 2019 IL App (4th) 160897, ¶ 81. In accordance with *Hibbler*, we remand this case to the trial court for the limited purpose of compliance with section 5-5-6(f) of the Unified Code. See *Hibbler*, 2019 IL App (4th) 160897, ¶¶ 83, 105.

¶ 29

III. CONCLUSION

¶ 30 For the foregoing reasons, we affirm the restitution amount and remand this matter to the trial court for the limited purpose of conducting a hearing to determine when and how the restitution is to be paid.

¶ 31 Affirmed and remanded with instructions.