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**IN THE  
COURT OF APPEALS OF INDIANA**

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THOMAS LANO,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 20A04-0608-CR-428

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APPEAL FROM THE ELKHART SUPERIOR COURT  
The Honorable James W. Rieckhoff, Judge  
Cause No. 20D05-0503-FD-110

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**February 14, 2007**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**CRONE, Judge**

## **Case Summary**

Thomas Lano appeals his conviction for class D felony theft. We affirm his conviction, but vacate and remand the restitution order.

## **Issues**

Lano raises three issues, which we restate as follows:

- I. Whether the evidence was sufficient to support the theft conviction;
- II. Whether sufficient evidence of venue was presented; and
- III. Whether the \$397 restitution order was proper.

## **Facts and Procedural History**

The facts most favorable to the conviction reveal that on the afternoon of January 25, 2005, Lano drove his 2002 Chevrolet Avalanche to ABC Warehouse (“ABC”). ABC is a store located in the Concord Mall, between Elkhart and Goshen. Dustin Shriver, Lano’s friend of approximately one year, rode with him, and the two men entered ABC together. Lano went to the small electronics section, where he asked to look at a blue iPod. Suzanne Wilmore, a sales clerk, assisted Lano by opening the display case, removing the blue iPod, and letting Lano hold it. After Lano examined the iPod, Wilmore asked if he wished to purchase it. Lano replied that he wanted to look at other items and then carried the blue iPod to the television section of the store. Shriver was in a separate part of the store.

From then on, both Wilmore and ABC’s manager attempted to keep an eye on Lano. Shortly thereafter, Wilmore saw Lano walk down the other side of the store, pass all points of purchase for store merchandise without buying anything, and exit through the front door of ABC. Wilmore, who had seen Lano carrying the iPod in his left hand, down at his side,

followed after him and yelled at him. Lano's response was to enter his truck and drive away. Meanwhile, Shriver, who had seen his ride departing, attempted to follow and headed toward the front of ABC. However, security detained and questioned him.

Detective John Hammel of the Elkhart Police Department was assigned to investigate the theft at ABC. On March 18, 2005, Lano was charged with class D felony theft. The information alleged that Lano "did knowingly exert unauthorized control over the property of [ABC], Elkhart County, Indiana, to-wit: Apple I Pod, [Lano] intending to deprive the owner of the use or value of said property; all of which is contrary to the form of Ind. Code 35-43-4-2." Appellant's App. at 6. In September 2005, Lano filed a belated notice of alibi in which he alleged that he was not at ABC on the date in question, but rather was working. *Id.* at 7.

At the conclusion of a trial held in June 2006, a jury found Lano guilty as charged. On July 10, 2006, the court held a sentencing hearing and issued a sentence of "18 months IDOC w/credit for -0- days served, Work Release recommended; costs; \$397 restitution." *Id.* at 21. Ultimately, the sheriff sent a letter indicating that Lano was not eligible for work release "due to a prior conviction for Dealing Cocaine as a B Felony. He also has a pending charge and hold out of St. Joseph County at this time." *Id.* at 22. Lano now appeals.

## **Discussion and Decision**

### ***I. Incredible Dubiosity***

In challenging the sufficiency of the evidence, Lano attempts to invoke the incredible dubiosity rule. Specifically, he contends that the testimony of Shriver and Wilmore was "incredibly dubious, convoluted and inherently improbable." Appellant's Br. at 7. He also argues that the State presented no evidence that an iPod was missing from ABC's inventory.

In resolving this issue, we initially observe that:

When reviewing a sufficiency of the evidence claim, we consider only the evidence most favorable to the judgment and all reasonable inferences to be drawn from that evidence. We neither reweigh the evidence nor judge the credibility of the witnesses. We will affirm a conviction upon finding substantial evidence of probative value from which the jury could find the defendant guilty beyond a reasonable doubt.

*Green v. State*, 756 N.E.2d 496, 497 (Ind. 2001) (citations omitted).

The testimony of a single eyewitness to a crime is sufficient to sustain a conviction. *See Emerson v. State*, 724 N.E.2d 605, 609-10 (Ind. 2000). Inconsistencies in testimony are factual issues for the jury to resolve. *See Miller v. State*, 770 N.E.2d 763, 774 (Ind. 2002). “The ‘incredible dubiousity’ doctrine applies where a sole witness presents inherently contradictory testimony that is equivocal or the result of coercion and there is a complete lack of circumstantial evidence of the defendant’s guilt.” *Thompson v. State*, 765 N.E.2d 1273, 1274 (Ind. 2002). Reversal under this rule is rare, and the testimony at issue must be “so incredibly dubious or inherently improbable that no reasonable person could believe it.” *Love v. State*, 761 N.E.2d 806, 810 (Ind. 2002).

The incredible dubiousity rule does not apply here because more than one witness testified and provided corroborating evidence, and there was no evidence of coercion. Moreover, contrary to Lano’s argument, there was evidence that an iPod was stolen. Indeed, ABC sales clerk Wilmore had “no doubt” that Lano took the iPod from ABC without paying for it on the afternoon in question. Tr. at 65. Shriver’s testimony corroborated Wilmore’s and filled in some of the blanks. Shriver indicated that he and Lano had been at ABC that day, that Lano was looking in the small, handheld electronics section, that a sales person was

talking with Lano and removed an iPod for Lano, that Lano left ABC without paying for anything -- and without his passenger, and that Lano called him after the incident.

As for any minor inconsistencies between the witnesses' testimony and prior statements, these are relevant only to the weight of testimony and do not render it inherently improbable such that no reasonable person could believe it. *See Williams v. State*, 741 N.E.2d 1209, 1213 (Ind. 2001) (holding that victim's identification of attacker was not inherently incredible where victim was initially unable to identify attacker in photo array on night of crime); *see also Corbett v. State*, 764 N.E.2d 622, 626 (Ind. 2003) (holding that inconsistencies between witness's statement to police and trial testimony do not render testimony inherently contradictory). Accordingly, we conclude that the State presented sufficient evidence of probative value from which the jury could find that Lano knowingly exerted unauthorized control over the iPod with intent to deprive ABC of its value or use. *See Ind. Code § 35-43-4-2(a)* (defining theft). To reach a different conclusion would be to reweigh evidence and/or substitute our judgment for the jury's.<sup>1</sup> This we cannot do.

## ***II. Venue***

In a related issue, Lano asserts that the State's evidence was insufficient to convict him because the State "failed to prove to the jury that the crime occurred in Elkhart County, Indiana." Appellant's Br. at 15. Here, Lano attempts to muddy the waters by claiming that Shriver's testimony was equivocal on the location of ABC.

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<sup>1</sup> The jury did hear conflicting evidence in the form of Lano's testimony; however, the jurors apparently did not give much credence to Lano's version. *See Tr.* at 179-81, 190. In light of the other evidence presented, the jury was free to disbelieve Lano. We may not second-guess such credibility determinations.

Lano has both a constitutional and a statutory right to be tried in the county where the crime was committed. *See Mullins v. State*, 721 N.E.2d 335, 337 (Ind. Ct. App. 1999), *trans. denied*; *see also* Ind. Code § 35-32-2-1(a). “Proof of proper venue by a preponderance of the evidence is essential to any crime.” *Eckstein v. State*, 839 N.E.2d 232, 233 (Ind. Ct. App. 2005). The State may meet its burden to establish proper venue by circumstantial evidence “if the facts and circumstances permit the trier of fact to infer that the crime occurred in the given county.” *Id.*

According to Wilmore, Shriver, and Elkhart Detective Hammel, the theft of the iPod occurred at ABC. Shriver testified that ABC is located in the Concord Mall, which is on the edge of both Elkhart and Goshen. Presented with this evidence, the jury “hardly could draw any conclusion other than the [crime] did occur within [Elkhart] County.” *Mitchell v. State*, 644 N.E.2d 102, 104 (Ind. 1994). Indeed, judicial notice could certainly be taken that both Elkhart and Goshen are situated in Elkhart County.<sup>2</sup> *See Nocutt v. State*, 633 N.E.2d 270, 272 (Ind. Ct. App. 1994); *Buhmeier v. State*, 206 Ind. 645, 647, 190 N.E. 857, 858 (1934) (concluding that testimony that burglary was committed in Evansville was sufficient evidence of venue, and noting, “[t]his court will take judicial notice of the fact that the city of Evansville is in Vanderburgh county, and that there is in the state of Indiana such a county as Vanderburgh county.”); *see also Dunlap v. State*, 205 Ind. 384, 389, 180 N.E. 475, 478 (1932) (“It is judicially known that Rensselaer is located in Jasper county and not in Newton county.”).

### *III. Restitution*

Finally, Lano challenges the restitution order, which requires him to pay \$397 – despite “any evidence tending to show or prove the value of the iPod.” Appellant’s Br. at 16. We see merit in his contention.

Indiana Code Section 35-50-5-3(a) provides that a court “may, as a condition of probation or without placing the person on probation, order the person to make restitution to the victim of the crime . . . . The court *shall* base its restitution order upon a consideration of: (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)[.]*” (Emphases added). “The purpose of a restitution order is to impress upon the criminal defendant the magnitude of the loss he has caused and to defray costs to the victims caused by the offense.” *Henderson v. State*, 848 N.E.2d 341, 346 (Ind. Ct. App. 2006). It is well settled that restitution must reflect actual loss incurred by a victim. *T.C. v. State*, 839 N.E.2d 1222, 1225 (Ind. Ct. App. 2005). “The amount of actual loss is a factual matter which can be determined only upon presentation of evidence.” *Smith v. State*, 471 N.E.2d 1245, 1248 (Ind. Ct. App. 1984), *trans. denied*.

An “order of restitution is within the trial court’s discretion” and will only be reviewed for an abuse of that discretion. *Roach v. State*, 695 N.E.2d 934, 943 (Ind. 1998). An abuse of discretion occurs if the court’s decision is clearly against the logic and effects of the facts and circumstances before it. *See Palmer v. State*, 704 N.E.2d 124, 127 (Ind. 1999).

At the sentencing hearing, the court heard evidence that Lano was willing and able to

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<sup>2</sup> See <http://www.elkhartcountyindiana.com> (last visited January 24, 2007) (official website of Elkhart County, which indicates that Goshen is the county seat, and that Elkhart is one of the incorporated

pay restitution. In fact, Lano’s counsel stated, “[Lano] does have the ability to repay any alleged damages in this case and would be more than glad to do that,” and shared that Lano “would do basically anything that it takes to stay out of the Department of Corrections[.]” Sent. Tr. at 2, 3. However, no evidence was presented as to the actual value of the stolen iPod. Accordingly, we must vacate the restitution order and remand this case to the trial court to hold a restitution hearing during which evidence shall be presented regarding the damages ABC incurred as a result of Lano’s theft, that is, the actual cost of replacement. *See, e.g., T.C.*, 839 N.E.2d at 1225-28; *see also Smith*, 471 N.E.2d at 1248.<sup>3</sup>

Affirmed in part and vacated and remanded in part.

SULLIVAN, J., and SHARPNACK, J., concur.

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cities/towns within Elkhart County).

<sup>3</sup> In *Smith*, we concluded that there was insufficient evidence to support the restitution order, and we therefore remanded. 471 N.E.2d at 1248-49. In so doing, we noted that: (1) the only evidence of the extent of injury was an “unsworn statement of the deputy prosecutor that medicals were \$284.80”; and (2) the defense “properly objected that there was no basis upon which restitution could be made.” *Id.* at 1249. In Lano’s case, no evidence of the actual amount of loss was presented, and thus there was no opportunity for Lano’s counsel to have objected. Given that the trial court simply set out the restitution amount (without reference to its source) when it announced the sentence, we do not fault Lano’s counsel for not lodging an objection. Sent. Tr. at 4. Moreover, Lano’s ability and willingness to pay does not constitute evidence of the amount of loss nor does it equate to an agreement to pay any unproven amount.