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IN THE
COURT OF APPEALS OF INDIANA

NATALIE LONG,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 57A03-1009-CR-494
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE NOBLE SUPERIOR COURT
The Honorable Robert E. Kirsch, Judge
Cause No. 57D01-0911-FD-285

March 16, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

BROWN, Judge

Natalie Long appeals the trial court's order of restitution in connection with her conviction for theft as a class D felony. Long raises three issues, which we revise and restate as whether the court abused its discretion in ordering Long to pay restitution. We affirm in part and remand in part.

The relevant facts follow. Long was employed at Low Bob's Discount Tobacco in Ligonier, Indiana, from May 22, 2008 to May 5, 2009. Tracy Wright, an owner and the operations manager of several convenience stores including the Ligonier Low Bob's prepared quarterly statements with respect to the Ligonier store and noticed that the store was performing poorly. After discovering the store's poor performance, Wright noticed that the company was purchasing more lottery tickets at the Ligonier store than it did for other store locations. Wright checked into the lottery tickets sales and purchases at the Ligonier store and "saw huge losses . . . in lottery tickets and it looked like there was some theft going on." Transcript at 72. Long was ultimately fired due to theft.

On November 17, 2009, the State charged Long with theft as a class D felony.[1] On March 9, 2010, Long pled guilty to theft as a class D felony. At the guilty plea hearing, Long admitted that she knowingly or intentionally exerted unauthorized control over an undetermined amount of Hoosier Lottery tickets owned by Low Bob's Discount Tobacco Store with the intent to deprive the owner of the value and use. Long indicated that she believed the amount "was somewhere between Two to Three Thousand Dollars"

[1] The charging information alleged that Long exerted unauthorized control over an "[u]ndetermined amount of Hoosier Lottery Tickets totaling an estimated loss of $50,000.00." See Appellant's Appendix at 12.

and the State believed that the amount was approximately $50,000. Id. at 16. The court sentenced Long to three years in the Indiana Department of Correction, all of which was suspended except for sixty days.

On August 31, 2010, the court held a restitution hearing at which Wright's testimony and other evidence was presented. The court ordered Long to pay restitution in the total amount of $47,214.09 as a condition of probation.[2]

The issue is whether the court abused its discretion in ordering Long to pay restitution. Ind. Code § 35-50-5-3(a) governs restitution and provides in relevant part that "[i]n addition to any sentence imposed . . . the 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 principal purpose of restitution is to vindicate the rights of society and to impress upon the defendant the magnitude of the loss the crime has caused. Pearson v. State, 883 N.E.2d 770, 772 (Ind. 2008) (citing Haltom v. State, 832 N.E.2d 969, 971 (Ind. 2005)), reh'g denied. Restitution also serves to compensate the offender's victim. Id.

"[W]e will not reverse a restitution order unless the trial court abuses its discretion." Kimbrough v. State, 911 N.E.2d 621, 639 (Ind. Ct. App. 2009). An abuse of discretion occurs when the trial court misinterprets or misapplies the law. Id. The amount of restitution that is ordered must reflect the actual loss incurred by the victim.

[2] Low Bob's received insurance proceeds of $25,000 in connection with the theft. As a result, the court ordered a restitution judgment in favor of Low Bob's in the amount of $22,214.09 and in favor of Low Bob's insurer in the amount of $25,000.

Id. "The amount of actual loss is a factual matter which can be determined only upon the presentation of evidence." Kellett v. State, 716 N.E.2d 975, 980 (Ind. Ct. App. 1999).

Long argues that the court abused its discretion in (A) failing to inquire into Long's ability to pay; (B) failing to specify the manner of performance; and (C) finding the evidence sufficient to support the amount of the restitution order.

A. Ability to Pay

Long first argues that the court abused its discretion in failing to inquire into her ability to pay before ordering her to pay restitution. Specifically, Long argues that the court failed to follow Ind. Code § 35-38-2-2.3(a)(5) in failing to question Long about her financial circumstances prior to pronouncing its order of restitution and that, even if the court did question Long, it was evident that Long was unable to pay the amount of $47,214.09.

Ind. Code § 35-38-2-2.3 governs conditions of probation and provides that as a condition of probation, the court may require a person to "[m]ake restitution or reparation to the victim of the crime for damage or injury that was sustained by the victim. When restitution or reparation is a condition of probation, the court shall fix the amount, *which may not exceed an amount the person can or will be able to pay*, and shall fix the manner of performance." Ind. Code § 35-38-2-2.3(a)(5) (emphasis added). The trial court must determine a defendant's ability to pay the amount of restitution ordered. Walsman v. State, 855 N.E.2d 645, 654 (Ind. Ct. App. 2006) (citing Miller v. State, 502 N.E.2d 92, 96 (Ind. 1986)), reh'g denied.

Here, the court ordered Long to pay restitution during the term of her probation in the amount of $47,214.09. However, the court made no finding regarding Long's ability to pay. Immediately after imposing the restitution order, the court asked Long if she was currently employed and Long stated "No." Transcript at 117. The court asked if Long had "any income at all," and Long replied that her "mother helps [her] out." Id. Long also indicated, upon questioning by the court, that she lived with her mother, had no money in the bank or cash on hand, and that she did not own anything of value. Long's counsel also stated that Long desired to appeal and that she was indigent, and the court stated that it would appoint an attorney to represent Long on appeal. The court erred when it failed to determine on the record Long's ability to pay restitution. We remand with instructions for the court to determine Long's ability to pay and fix the amount of restitution so that it does "not exceed an amount [Long] can or will be able to pay" as required by Ind. Code § 35-38-2-2.3(a)(5). See Walsman, 855 N.E.2d at 654 (noting that the trial court made no finding regarding the defendant's ability to pay and in fact noted that the defendant was indigent, concluding that the court erred when it failed to determine on the record the defendant's ability to pay restitution, and remanding with instructions for the court to determine the defendant's ability to pay).

B. Manner of Payment

Long next argues that the court abused its discretion in failing to fix the manner of payment under Ind. Code § 35-38-2-2.3. The State concedes that "[t]he trial court's restitution order does not fix a manner of payment, and thus, does not comply with

Indiana Code Section 35-38-2-2.3(a)(5)." Appellee's Brief at 5. Ind. Code § 35-38-2-2.3(a)(5) provides that "[w]hen restitution or reparation is a condition of probation, the court shall fix the amount, which may not exceed an amount the person can or will be able to pay, and *shall fix the manner of performance*." (Emphasis added).

Here, after determining the restitution amount at the restitution hearing the court stated that it would "leave up to [the] Probation Department to try to monitor [Long's] compliance with the payment of the restitution." Transcript at 118. In addition, the court's restitution order did not set forth a payment schedule or other manner of performance. We agree that the court's restitution order did not fix the manner of performance as required by Ind. Code § 35-38-2-2.3(a)(5). We remand with instructions for the court to fix and set forth in an amended restitution order the manner of performance. See Garrett v. State, 680 N.E.2d 1, 3 (Ind. Ct. App. 1997) (noting that the trial court did not fix the manner of payment and thus did not comply with Ind. Code § 35-38-2-2.3(a)(5) where the court's order required the defendant to make a "good faith effort" to pay restitution of $90,000 "as determined by the probation department"); McGuire v. State, 625 N.E.2d 1281, 1282 (Ind. Ct. App. 1993) (noting in part that the trial court's order that the probation department fix the manner of payment does not comply with the statute and remanding for a hearing to determine the manner of performance).

C. Amount of Loss

Long also argues that the court abused its discretion in ordering her to pay restitution in the amount of $47,214.09. Specifically, Long argues that the evidence presented by the State does not establish that the store's loss of $47,214.09 "is attributable to [Long's] theft of lottery tickets." Appellant's Brief at 7. Long argues that the court erred in requiring her to disprove the accuracy of the State's restitution evidence. Long further argues that Wright did not keep separate reports related solely to lottery tickets sales and that the evidence fails to demonstrate that Long's theft caused the store's loss. The State argues that "[t]he entire loss of $47,214.09 occurred during [Long's] employment" and caused the store to notice "huge losses in lottery tickets" and that "there was some theft going on." Appellee's Brief at 6.

Ind. Code § 35-50-5-3(a) provides in part that a "court shall base its restitution order upon a consideration of . . . property damages of the victim incurred as a result of the crime . . . ." The amount of the actual loss is a factual matter to be determined upon the presentation of evidence. Kellett v. State, 716 N.E.2d 975, 980 (Ind. Ct. App. 1999). Here, the record shows that Long testified and argued that she stole approximately $3,000 to $3,500 of lottery tickets. However, Wright testified that Low Bob's experienced an "actual costs loss" of $47,214.09[3] during Long's employment due to the loss of lottery tickets. See Transcript at 80. When questioned by the court regarding whether the loss represented the "actual[] money that [Low Bob's] paid to the Lottery Commission for the purchase of tickets," Wright testified that it "was the money paid to them less our sales

[3] Wright testified that the retail amount of the stolen tickets was $49,962 and that the store "multipl[ied] that out by the factor that the lottery gives [it] which is .945 . . . and so [the] actual costs loss" is $47,214.09. Transcript at 80.

and returns and our inventories on hand" and that Low Bob's "did a full P & L on lottery tickets only." Id. at 90. Low Bob's quarterly reports for the first quarter of 2008 through the second quarter of 2009 were admitted into evidence. The reports included receipts showing Low Bob's cost for the purchase of lottery tickets from the Hoosier Lottery, sales of lottery tickets by category, and lottery ticket inventory levels. The court was able to weigh the evidence presented at the restitution hearing and determine the value of the lottery tickets stolen by Long from the Ligonier Low Bob's store during the period of Long's employment. See Lang v. State, 911 N.E.2d 131, 136 (Ind. Ct. App. 2009) (concluding that the trial court did not abuse its discretion in determining the amount of restitution). We nevertheless note that the court on remand may reduce the amount of the restitution order based upon its findings as to an amount Long can or will be able to pay as discussed in part A above.

For the foregoing reasons, we remand with instructions to inquire into Long's ability to pay and modify the restitution order as appropriate and to set the manner of payment.

Affirmed in part and remanded.

ROBB, C.J., and RILEY, J., concur.