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IN THE
COURT OF APPEALS OF INDIANA

GEORGE LOWMAN,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 64A03-1009-CR-513
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE PORTER SUPERIOR COURT #5
The Honorable Mary R. Harper, Judge
Cause No. 64D05-0703-FD-1926

August 2, 2011

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Defendant, George Lowman (Lowman), appeals the trial court's denial of his motion to correct errors.

We affirm in part, reverse in part, and remand with instructions.

ISSUES

Lowman raises one issue on appeal, which we restate as the following two issues:

(1) Whether the trial court abused its discretion in ordering that he pay restitution in the amount of $30,100.00; and

(2) Whether the trial court abused its discretion in ordering that he make payments of $300 every month towards his restitution as a condition of his probation.

FACTS AND PROCEDURAL HISTORY

Lowman was a member of the Boone Grove Christian Church for around fifty years and served as church treasurer for approximately ten years. As treasurer, Lowman managed the church's bank account, counted and deposited the weekly offerings, and wrote checks on behalf of the church to pay bills and employee wages. Lowman also made monthly reports to the church's board of directors regarding the church's finances. The reports were supposed to include information regarding the church's income and each church expenditure.

In 2001, Lowman failed to pay withholding taxes for the church minister when he submitted the church's tax forms for the year. As a result, the Internal Revenue Service (IRS) determined that the church still owed money for the withheld taxes. The IRS placed a levy on the church's general fund, but Lowman failed to inform the board of directors about

the issue in his monthly reports. Then, in 2006, the minister of the church, Pastor Lyn Childers (Pastor Childers), asked the board chairperson, Monica Nibbe (Nibbe), for help with his taxes. Nibbe asked Lowman about the church's taxes, and Lowman admitted that he was having problems with the IRS. Consequently, Nibbe asked to see the IRS papers and told Lowman that he needed to inform the board of directors about the situation. At that point in time, the church owed the IRS $10,000, mostly due to fines and penalties. Lowman and Nibbe met with the IRS together, and Lowman paid the IRS $2,500. Lowman also worked out a payment plan with the IRS whereby the church agreed to pay the IRS $500 every month until it satisfied its debt.

As a result of Lowman's dealings with the IRS, the board members asked him to resign as treasurer in July 2006. When the new treasurer, Nancy Hughes (Hughes), took his place, she realized that the church's finances were questionable and the balance in their general fund was negative rather than positive. Hughes went to the bank to question the account, and the bank showed her checks written from the account while Lowman was treasurer. In total, Lowman had written $43,800 in checks to his wife and $1,000 to cash that he had not reported to the board of directors.

Next, both police and a certified public accountant, Richard Serletic (Serletic), reviewed the church's bank statements and financial records from 2002 through July 2006 and compared those records to Lowman's monthly reports to the board of directors. They discovered that during that time period, Lowman had deposited at least $21,000 more in the church's bank account than he had accounted for in his monthly treasurer's reports. In

addition, they found that Lowman had paid for a number of bills with cash and checks that were not documented in the church's bank records.

On March 1, 2007, the State filed an Information charging Lowman with theft, a Class D felony, Ind. Code § 35-43-4-2. A jury trial was held from December 15-18, 2008. At trial, Lowman argued that the unexplained $21,000 deposited in the church's bank account represented deposits and payments made from his personal funds. According to Lowman, the checks he had written to his wife and to cash were reimbursement for loans to the church and church expenses he had paid from his personal funds. Lowman provided documentation of five such payments, totaling $14,705.05.[1] However, Lowman also testified that he deliberately failed to report expenses to the board of directors to hide the bank account's diminishing balance. At the conclusion of the evidence, the jury found Lowman guilty of theft as a Class D felony.

On April 30, 2009, the trial court held a sentencing hearing and sentenced Lowman to three years in the Indiana Department of Correction, with all but 62 days suspended to probation. The trial court also ordered that Lowman pay $30,100 in restitution to Boone Grove Christian Church. After applying Lowman's $10,000 bond towards his restitution, the trial court examined Lowman's finances and determined that he had the ability to pay $300 per month towards his restitution as a condition of his probation.

[1] Lowman documented the following five payments to or on behalf of the church: 1) a $2,000 cashier's check from his bank account made out to the church dated October 15, 2003; 2) a $6,000 cashier's check from his bank account dated August 17, 2004; 3) a $3,500 payment for a copy machine for the church on November 22, 2004; 4) a $2,900 payment to the IRS on February 25, 2005; and 5) a $305.05 payment to the IRS dated October 19, 2005.

On May 30, 2009, Lowman filed a motion to correct errors requesting that the trial court recalculate his restitution to reflect his testimony about the additional payments he claimed to have made to the church from his personal bank account. On August 17, 2010, the trial court held a hearing and denied Lowman's motion.

Lowman now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

On appeal, Lowman argues that the trial court inappropriately ordered that he pay $30,100.00 restitution. His argument has two components; first, he contends that he should not have to pay $30,100.00 because that amount exceeds the church's actual losses. Second, he asserts that the trial court did not properly clarify the manner of his $300 dollars a month payment towards his restitution. We will address these arguments in two separate sections.

When reviewing a trial court's decision, we recognize that sentencing issues are left to the trial court's sound discretion, and we will reverse the trial court's decision only upon a showing of abuse of discretion. *Bunch v. State*, 937 N.E.2d 839, 851 (Ind. Ct. App. 2010), *trans. denied.* An abuse of discretion occurs where the decision is clearly against the logic and effects of the facts and circumstances before the court. *Sneed v. State*, 946 N.E.2d 1255, 1257 (Ind. Ct. App. 2011).

I. *The Amount of Lowman's Restitution*

In Indiana, a trial court may, as a condition of probation or without placing the person on probation, require a defendant to pay restitution to the victim of his or her crime. I.C. § 35-50-5-3(a). The principal purpose of restitution is to vindicate the rights of society and to

impress upon the defendant the magnitude of loss the crime has caused. *Pearson v. State,* 883 N.E.2d 770, 772 (Ind. 2008). Restitution also serves to compensate the offender's victim. *Id.* However, the amount of restitution ordered must reflect only the actual costs incurred by the victim, as determined by the presentation of evidence. *Kimborough v. State,* 911 N.E.2d 621, 639 (Ind. Ct. App. 2009); *Bennett v. State,* 862 N.E.2d 1281, 1286 (Ind. Ct. App. 2007).

Here, Lowman argues that the trial court should not have ordered him to pay $30,100 in restitution because it did not credit the payments he claims to have made to the church or on behalf of the church. When these payments are taken into account, he contends, the church does not have actual losses of $30,100. We agree with Lowman's argument, although not on the premise he suggests.

In support of his claim, Lowman advances Serletic's findings that Lowman only owed the church $3,861. At trial, though, the following exchange occurred between Lowman's lawyer and Serletic:

> Q: But counting the adjustments, and not even considering the copy machine and other things, they would owe him $3,840?
> A: Correct.
>
> ***
>
> Q: [] Can you read that—well, could you identify what that is?
> A: It's a bank check from Allegius Credit Union dated 10/15/2003 in the amount of $2,000 made out to Boone Grove Christian Church.
> A: Correct.
> Q: Okay. We did [not] have either of those documents at that time that you were deposed, right?
> A: I have never seen these to my recollection.
> Q: Could you turn the next page[?]
>
> ***
>
> Q: Could you identify what that is?

> A: That is a cashier's check from Allegius Credit Union dated 8/17/2004 in the amount of $6,000 made out to Boone Grove Christian Church.
> Q: Again, as the rest of us know, those are from George Lowman's records, and you did [not] have that, is that correct?
> A: Correct.
>
> ***
>
> Q: In addition, you did [not] include in here the $3,500 for the copy machine, right?
> A: No, I did not.
>
> ***
>
> Q: [Y]ou never even considered, because we did [not] have all the checks at the time, how much money was [not] paid to the pastor out of the church account, or how much was [not] paid to the custodian, or how much was [not] paid to the nursery monitor, or [] the phone bill, right?
> A: I had no records or information.

(Appellant's App. pp. 60-3). Instead of advancing Lowman's arguments, we find that this passage indicates the perils of relying on Serletic's conclusions. As Serletic states, he did not have all of the relevant information. He did not have evidence of Lowman's payments to the church, and he did not include payments to the pastor, the custodian, or the nursery monitor in his evaluations. By extension, it is possible that the other charges he relied on are not credible or complete. In its sentencing hearing, the trial court indicated that it chose to rely on evidence it deemed more credible—evidence of payments that were actually documented and submitted to the trial court, or proven through testimony. It stated that:

> As to the restitution, I hear many claims of monies paid in cash. . . . I find that which is in some way, shape, or form verified by written document, record, receipt, charge slip, or such to be the type that has credibility to the point of believability. It's very, very easy to say somebody paid "X" amount of money in cash, but when I see a receipt, for example, for a copy machine, then I know, in fact, that it is accurate. I do give the greatest credibility to records—to the written record, particularly in a case with such great numbers and such different representations and presentations regarding the numbers that were involved throughout the entire process between trial testimony and testimony today. Several of the cash payments that are indicated[,] and for which

> [Lowman] seeks credit, for example, and I'm looking at the pastor payment right now, [were] paid in cash. [Lowman] dealt directly with the church's cash. He had the absolute ability to take that cash right from the till when it was being counted so that he could pay him—the pastor[—] directly, and that would not necessarily be reflected in the receipts of the day. So he worked hands-on with the church's cash, which put him in the position to make any number of cash payments, but it would not have been from his money[.] [I]t would have been from the church money. So I will—looking to what [] I think can be *substantiated* with the various exhibits that have been admitted and the credible testimony in the case[—][order] a restitution figure in the amount of $30,100.

(Appellant's App. pp. 93-4) (emphasis added).

In light of these factors, we conclude that the trial court did not abuse its discretion in crediting only the payments that Lowman could substantiate—$14,705.05 in total. However, we do find one fault with the trial court's restitution order. The difference between $44,800 and $14,705.05 is $30,094.95, which is $5.05 less than the restitution that the trial court ordered. As a trial court may not require a defendant to pay an amount of restitution greater than the victim's actual losses, we remand to the trial court with instructions for the trial court to impose restitution of $30,094.95.

II. *Lowman's Ability to Pay Restitution*

A trial court may order restitution as a condition of probation. I.C. § 35-38-2-2.3(a)(5). If a trial court takes this approach, however, Indiana Code section 35-38-2-2.3(a)(5) specifies that the trial court must "fix the manner of performance" of the payment of restitution. The phrase "manner of performance" can refer to the amount and time frame in which a defendant must make periodic payments. *See McGuire v. State,* 625 N.E.2d 1281, 1281 (Ind. Ct. App. 1993); *Laker v. State,* 869 N.E.2d 1216, 1221 (Ind. Ct. App. 2007).

Here, Lowman argues that the trial court did not properly fix the manner of his repayment of restitution because if he pays $300 per month as ordered by the trial court, he will still owe almost $10,000 at the conclusion of his probation.

However, in *Pearson* the Indiana Supreme Court confronted a similar issue. In *Pearson*, the trial court ordered Pearson to pay $52,685.97 as restitution in increments of at least $150.00 per month. *Pearson*, 883 N.E.2d at 772. On appeal to our supreme court, Pearson argued that the trial court did not properly determine whether he had the ability to pay the restitution amount during his one-year probationary period. *Id.* In response, the supreme court stated that:

> Implicit in Pearsons's argument is the assumption that his obligation to make restitution terminates upon the end of his probationary term. However, this is not so. As a general proposition once a term of probation has expired, the trial court loses all jurisdiction over the defendant and is powerless to enforce any conditions of probation, even though it is aware that the defendant has failed to meet a condition. But the expiration of a probationary period does not terminate an obligation to make restitution to a crime victim.
>
> The expiration of Pearson's one-year probationary term does not terminate his obligation to pay restitution. And because Pearson does not challenge the amount of restitution or his ability to pay $150.00 per month in discharge of his obligation, there is no need to remand this case to the trial court.

Id. at 773-74 (internal citations omitted).

Similarly, Lowman does not dispute his ability to make $300 monthly payments; he merely disputes the fact that the trial court did not set a deadline for his final restitution payment. Since, as stated above, payment of restitution does not end at the end of the probationary period as Lowman suggests, the end date of the restitution is implicit in the trial

court's order. Accordingly, we conclude that by clarifying that Lowman must make $300 payments every month, the trial court adequately specified the manner of performance of the payments and did not abuse its discretion in sentencing Lowman to pay $300 a month.

CONCLUSION

Based on the foregoing, we conclude that (1) the trial court abused its discretion in ordering that Lowman pay $30,100.00 restitution; and (2) the trial court did not abuse its discretion in ordering that Lowman make payments of $300 per month towards his restitution as a condition of his probation. We remand to the trial court with instructions to impose restitution in the amount of $30,094.95 instead of $31,100.

Affirmed in part, reversed in part, and remanded with instructions.

DARDEN, J., and BARNES, J., concur.