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**IN THE  
COURT OF APPEALS OF INDIANA**

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ALANA JEFFERSON,  
Appellant-Defendant,

vs.

STATE OF INDIANA,  
Appellee-Plaintiff.

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No. 49A05-0902-CR-71

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APPEAL FROM THE MARION SUPERIOR COURT  
The Honorable Heather Welch, Judge  
The Honorable Marc Rothenberg, Judge  
The Honorable Richard Sallee, Senior Judge<sup>1</sup>  
Cause No. 49F09-0804-FD-46573

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**September 21, 2009**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**VAIDIK, Judge**

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<sup>1</sup> Judge Heather Welch presided over the bench trial, Judge Marc Rothenberg presided over the sentencing hearing, and Senior Judge Richard Sallee presided over the restitution hearing.

## **Case Summary**

Alana Jefferson appeals her convictions for criminal recklessness as a Class D felony, battery as a Class A misdemeanor, and criminal mischief as a Class A misdemeanor following a bench trial. Jefferson contends: (1) the trial court abused its discretion by excluding Jefferson's evidence regarding the complaining victim's credibility; (2) her convictions for criminal recklessness and battery violate the prohibition against double jeopardy contained in the Indiana Constitution; and (3) the trial court was without jurisdiction to hold a post-sentencing restitution hearing and erred by not allowing or considering evidence regarding her ability to pay. Concluding that Jefferson has waived appellate review of any argument regarding the exclusion of evidence and, waiver notwithstanding, the evidence was not admissible under the Rules of Evidence, her criminal recklessness and battery convictions do not violate double jeopardy, and the trial court had retained authority to hold a post-sentencing restitution hearing, we affirm Jefferson's convictions. However, because the trial court's restitution order is not clear whether it was to be entered as a condition of probation or as a judgment, we remand the restitution order with instructions.

## **Facts and Procedural History**

On January 27, 2008, Shanice Gowdy, who was driving her sister's car, parked in the street next to an apartment building in Marion County. Gowdy is the girlfriend of the father of Jefferson's children. Three cars drove up, surrounded Gowdy's car, and boxed it in so that Gowdy could not drive away. Jefferson and some other women, with bats

and crowbars in hand, exited the cars and started breaking the windows of Gowdy's car. Jefferson broke out the passenger's side window and hit Gowdy with a bat while she sat in the car. Meanwhile, two other women, who were on the driver's side, broke the windows, reached in the car and tried to grab the keys, hit Gowdy in the head, and pulled out some of the braids from her head. As Gowdy tried to kick Jefferson to prevent her from hitting Gowdy with the bat, Jefferson and Kenya Radford grabbed Gowdy by her legs, dragged her out of the broken passenger car window, "proceeded to beat on" her, and eventually left the scene. Tr. p. 25. Gowdy's injuries included scratches and bruises, cuts on her hands and face, and a bruised toe, which Gowdy believed was broken.

The State charged Jefferson with criminal recklessness as a Class D felony,<sup>2</sup> battery as a Class A misdemeanor,<sup>3</sup> and criminal mischief as a Class A misdemeanor.<sup>4</sup> Judge Heather Welch presided over Jefferson's bench trial. During trial, Jefferson's defense was that she did not attack Gowdy and that Gowdy made up the allegations against her. Gowdy testified about the details of the attack against her and stated it cost her \$1500 to replace the broken car windows. Jefferson's counsel cross-examined Gowdy about details of her trial testimony that differed from her two statements to police and her testimony from co-defendant Radford's trial. Specifically, Jefferson's counsel questioned Gowdy about inconsistencies regarding the number of people who attacked her, whether the people who attacked her used crowbars, and whether her braids were pulled out. Jefferson's counsel attempted to ask Gowdy about a December 2007 incident

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<sup>2</sup> Ind. Code § 35-42-2-2.

<sup>3</sup> Ind. Code § 35-42-2-1.

<sup>4</sup> Ind. Code § 35-43-1-2.

in which Gowdy alleged Jefferson had pushed her way into Gowdy's home and attacked Gowdy and her child. Apparently, charges were brought against Jefferson for this event but later dismissed by the State. The State objected to the relevancy of Jefferson's inquiry into the December 2007 event. After the trial court warned Jefferson about opening the door to prior acts, counsel withdrew the question.

Jefferson testified on her own behalf and denied attacking Gowdy on January 27, 2008. Jefferson claimed she was at her friend Tiffany's house with one of her children, but she did not present any alibi testimony. Jefferson also testified that she had not been attacking or fighting with Gowdy.

The State called Gowdy back to the stand as a rebuttal witness and asked her what Jefferson has done to Gowdy since the January 2008 incident. Jefferson objected, and the State responded that Jefferson had opened the door by saying she has not attacked or fought with Gowdy. The trial court overruled Jefferson's objection, and Gowdy testified that since the January 2008 incident, Jefferson had, among other things, chased Gowdy with her car on multiple occasions, made harassing phone calls, and threatened Gowdy.

During cross-rebuttal-examination, Jefferson's counsel asked Gowdy if she had alleged that Jefferson pushed her way into Gowdy's house on December 19, 2007, and if that case had been dismissed. Gowdy responded that she did make such an allegation, and the State objected to the relevancy of such questioning. Jefferson's counsel insinuated that the dismissal was relevant because it showed it was a false allegation. The trial court told counsel that a dismissal did not equate to a false allegation and instructed counsel to rephrase her question. Jefferson then asked Gowdy if she had called

Jefferson on the phone, and Gowdy responded that she did not remember calling Jefferson. Jefferson's counsel attempted to refresh Gowdy's memory by playing a voicemail from Jefferson's phone, and the State objected because it had not received the voicemail in discovery. The trial court recessed the trial to allow Jefferson to put the voicemail on a tape and provide it to the State.

When the bench trial reconvened, Jefferson's counsel asked Gowdy if she had alleged that Jefferson had attacked her on December 19, 2007. The State objected that this incident was outside the scope of Gowdy's rebuttal testimony, which covered only the contact with Jefferson since the January 2008 incident. The trial court agreed and asked Jefferson how evidence of the December 2007 incident was relevant. Jefferson claimed that the December 2007 incident was a false allegation and that it was relevant to "whether [Gowdy was] making a false allegation this time." *Id.* at 75. Jefferson argued that the voicemail and evidence regarding the December 2007 incident should be admissible under Evidence Rule 404(b), claiming Gowdy had "made a false allegation here, she's made a 404(B) false allegation of more false contact . . . [a]nd there is a 404(B) – a reverse 404(B) that [she] had prior contact that's false as well [that is] relevant to show a pattern of false statements about what [Jefferson] has done." *Id.* at 77. During Jefferson's offer of proof, her counsel stated that she wanted to present evidence regarding the December 2007 incident to establish an alibi for Jefferson for that incident and to show that Gowdy had made a false allegation against Jefferson at that time. The evidence Jefferson sought to present included a taped telephone call where Jefferson confronted Gowdy about making a false allegation and where Gowdy responded "your

[sic] gonna go down” and testimony from two witnesses who would say that Jefferson was at a Christmas pageant on December 19, 2007. *Id.* at 80. The trial court stated:

You know what your [sic] doing . . . you can present your offer of proof. But I’m gonna [sic] make it real clear for the Court of Appeals, your [sic] trying to try another case and the law does not allow that. And, you know, what may have happened or may not have happened in another case is not at all relevant in this particular case. Um – certainly you have the right to impeach a witness but we don’t have the right to listen to specific instances of misconduct – um – in another case – um from witnesses and tapes, I mean its [sic] just not admissible.

*Id.* at 81. The trial court sustained the State’s objection, excluded Jefferson’s evidence, and found Jefferson guilty as charged.

Jefferson’s sentencing hearing was presided over by Judge Marc Rothenberg.<sup>5</sup> When sentencing Jefferson, the trial court ordered her sentences to be served concurrently and sentenced her to an aggregate term of 545 days with 541 days suspended. Specifically, for the criminal recklessness conviction, the trial court sentenced Jefferson to 545 days with four days executed, 541 days suspended, and 365 days on probation. For the battery conviction, the trial court sentenced Jefferson to 365 days with four days executed, 361 days suspended, and no probation. For the criminal mischief conviction, the trial court sentenced Jefferson to 365 days with four days executed, 361 days suspended, no probation, and restitution to be determined at a later hearing. The trial court delayed ordering restitution on the criminal mischief conviction and scheduled a restitution hearing for a later date to allow Jefferson time to challenge a

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<sup>5</sup> Judge Rothenberg became the presiding judge of the trial court in January 2009.

window repair receipt that was attached to the presentence investigation report (PSI).<sup>6</sup> Jefferson's counsel agreed to the delayed restitution hearing.

During Jefferson's restitution hearing, which was presided over by Senior Judge Richard Sallee, Gowdy testified that she paid \$1500 to get the car windows fixed. Jefferson challenged whether Gowdy should receive any ordered restitution because the car belonged to Gowdy's sister. Jefferson also challenged Gowdy's restitution request for lost wages. Senior Judge Sallee ordered Jefferson to pay \$1500 in restitution to Gowdy but did not include restitution for Gowdy's lost wages. When Jefferson's attorney then stated that "[t]hat would conclude this matter" and "[t]hat was just the only open issue was restitution" and informed the trial court that she had filed her notice of appeal, Senior Judge Sallee inquired whether Jefferson had an executed sentence or had been placed on probation. *Id.* at 133. Once Senior Judge Sallee heard that Jefferson had been placed on probation, he stated, "I'm not going to interfere. If she's already started probation then part of that probation order is to pay this fifteen hundred dollars." *Id.* at 134. Jefferson's attorney then requested to offer some testimony regarding Jefferson's ability to pay. Senior Judge Sallee initially agreed to the request but then denied it. He stated he was "not going to get into the ability to pay" because "[t]hat's already been determined" and Jefferson "probably waived" or implied she had an ability to pay when she agreed to have a restitution hearing separate from sentencing. *Id.* at 135. Senior Judge Sallee said that if Jefferson could not pay, that issue could be determined later at a probation violation hearing. He then offered Jefferson the option of entering the

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<sup>6</sup> This receipt is not attached to the PSI contained in the Appellant's Appendix.

restitution order as judgment but ultimately stated it would be part of her probation. Jefferson now appeals.

### **Discussion and Decision**

Jefferson raises three issues on appeal. First, she argues the trial court erred by not allowing her to introduce evidence relating to Gowdy's credibility. Second, she contends her convictions for criminal recklessness and battery constitute double jeopardy. Third, she argues the trial court was without authority to hold a post-sentencing restitution hearing and erred by not allowing or considering evidence regarding her ability to pay.

#### **I. Exclusion of Evidence**

Jefferson contends that the trial court erred by excluding evidence of a specific instance of conduct regarding Gowdy's truthfulness. Specifically, Jefferson wanted to present evidence regarding allegations Gowdy had made in December 2007 against Jefferson that resulted in criminal charges that were later dismissed by the State. Jefferson claims that these allegations were false and that she should have been allowed to present evidence regarding the December 2007 events to "impugn the veracity and . . . the credibility of Ms. Gowdy[.]" Appellant's Br. p. 12.

Generally, the admission or exclusion of evidence is a determination entrusted to the discretion of the trial court. *Carpenter v. State*, 786 N.E.2d 696, 702 (Ind. 2003). We will reverse a trial court's decision only for an abuse of discretion, that is, when the trial court's decision is clearly erroneous and against the logic and effect of the facts and circumstances before the court. *Id.* at 702-03.

On appeal, Jefferson argues that the trial court's exclusion of her evidence was erroneous pursuant to Indiana Evidence Rule 607, which provides that "[t]he credibility of a witness may be attacked by any party, including the party calling the witness." However, at trial, Jefferson did not argue the evidence was admissible under Evidence Rule 607 and instead relied on Evidence Rule 404(b). Because Jefferson's argument on appeal is different than her argument at trial, she has waived any claim of error in the trial court's exclusion of evidence. *See Small v. State*, 736 N.E.2d 742, 747 (Ind. 2000) ("A defendant may not raise one ground for objection at trial and argue a different ground on appeal.").

Additionally, Jefferson has waived review of this issue because she failed to provide a cogent argument in support of her assertion that the evidence in question should have been admitted into evidence. Jefferson contends the evidence was admissible under Evidence Rule 607 but makes no argument why Evidence Rule 608,<sup>7</sup> which provides limitations to Rule 607, does not apply. Indeed, Jefferson does not even acknowledge

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<sup>7</sup> Indiana Evidence Rule 608 provides:

**(a) Opinion and Reputation Evidence of Character.** The credibility of a witness may be attacked or supported by evidence *in the form of opinion or reputation*, but subject to these limitations: (1) the evidence may refer only to character for truthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

**(b) Specific Instances of the Conduct of a Witness.** For the purpose of attacking or supporting the witness's credibility, other than conviction of a crime as provided in Rule 609, *specific instances may not be inquired into or proven by extrinsic evidence*. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

(Emphasis added).

Rule 608. “A party waives an issue where the party fails to develop a cogent argument or provide adequate citation to authority and portions of the record.” *Davis v. State*, 835 N.E.2d 1102, 1113 (Ind. Ct. App. 2005), *trans. denied*; *see also* Ind. Appellate Rule 46(A)(8) (requiring that contentions in appellant’s briefs be supported by cogent reasoning and citations to authorities, statutes, and the appendix or parts of the record on appeal). Therefore, Jefferson has waived this claim by failing to provide a cogent argument in support of her claim.

These waivers notwithstanding, the evidence was not admissible under Evidence Rule 607 or 608. Indiana Evidence Rule 608 provides that the credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation for truthfulness but that specific instances may not be inquired into or proven by extrinsic evidence.<sup>8</sup> Ind. Evidence Rule 608(a), (b). Jefferson’s evidence was not in the form of opinion or reputation and, therefore, not admissible under Rule 608(a). Instead, Jefferson attempted to introduce specific instances of Gowdy’s conduct (that is, her allegation against Jefferson and phone conversation with Jefferson), and Rule 608(b) specifically prohibits inquiring into or proving specific instances by extrinsic evidence. Additionally, the limited exception referenced in the last sentence of Rule 608(b) is not applicable because Gowdy did not testify as to the truthfulness of another witness. Accordingly, the trial court did not abuse its discretion by excluding Jefferson’s evidence. *See Beaty v. State*, 856 N.E.2d 1264, 1269 (Ind. Ct. App. 2006) (“Indiana cases have consistently held

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<sup>8</sup> Rule 608(b) does allow impeachment by specific instances with regard to a conviction of a crime under Rule 609, but that exception is not applicable here.

that Evidence Rule 608(b) prohibits the introduction of evidence regarding specific instances of misconduct.”), *trans. denied*.

## II. Double Jeopardy

Jefferson next argues her convictions for criminal recklessness and battery violate the prohibition against double jeopardy contained in the Indiana Double Jeopardy Clause. Specifically, Jefferson argues that there is a reasonable possibility that the trial court may have used the same evidence to support the essential elements of both convictions, and she asks us to vacate both convictions.<sup>9</sup>

Article 1, Section 14 of the Indiana Constitution provides that “[n]o person shall be put in jeopardy twice for the same offense.” The Indiana Supreme Court has explained that two or more criminal offenses are the “same offense” in violation of the Indiana Double Jeopardy Clause, if, with respect to either the statutory elements of the challenged crimes or the actual evidence used to convict, the essential elements of one challenged offense also establish the essential elements of another challenged offense. *Richardson v. State*, 717 N.E.2d 32, 49 (Ind. 1999). Jefferson acknowledges that her convictions do not violate the statutory elements test; thus, we will focus on the actual evidence test.

Under the actual evidence test, the actual evidence presented at trial is examined to determine whether each challenged offense was established by separate and distinct facts. *Id.* at 53. To show that two challenged offenses constitute the “same offense” in a claim

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<sup>9</sup> Although we find no double jeopardy violation in this case, we note that when two convictions are found to contravene double jeopardy principles, the proper remedy is to either: (1) vacate one—not both—of the convictions; or (2) reduce one of the convictions to a less serious form of the same offense if doing so will eliminate the violation. *See Richardson v. State*, 717 N.E.2d 32, 54 (Ind. 1999).

of double jeopardy, a defendant must demonstrate a reasonable possibility that the evidentiary facts used by the fact-finder to establish the essential elements of one offense may also have been used to establish all of the essential elements of a second challenged offense. *Spivey v. State*, 761 N.E.2d 831, 833 (Ind. 2002). “[T]he proper inquiry is not whether there is a reasonable probability that, in convicting the defendant of both charges, the [trier of fact] used *different* facts, but whether it is reasonably possible it used the *same* facts.” *Bradley v. State*, 867 N.E.2d 1282, 1284 (Ind. 2007) (internal quotations omitted). When applying this actual evidence test, we are required to “identify the essential elements of each of the challenged crimes and to evaluate the evidence from the [trier of fact’s] perspective . . . .” *Spivey*, 761 N.E.2d at 832. To determine what facts were used, we consider the evidence, charging information, final jury instructions (if there was a jury), and arguments of counsel. *Lee v. State*, 892 N.E.2d 1231, 1234 (Ind. 2008).

The charging information for criminal recklessness alleged:

On or about January 27, 2008, in Marion County, State of Indiana, the following named defendant Alana Jefferson, did recklessly, knowingly or intentionally perform an act that created a substantial risk of bodily injury to Shanice Gowdy, said act being described as striking Ms. Gowdy, and further that when the named defendant committed said act the defendant was armed with a deadly weapon, to-wit: baseball bat.

Appellant’s App. p. 19.<sup>10</sup> The charging information for battery alleged:

On or about January 27, 2008, in Marion County, State of Indiana, the following named defendant Alana Jefferson, did knowingly in a rude, insolent or angry manner touch Shanice Gowdy, another person, and further

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<sup>10</sup> The charging information originally provided that Jefferson’s act of criminal recklessness was “striking Ms. Gowdy while she was on the ground[.]” Appellant’s App. p. 19. However, at the beginning of the bench trial, the trial court granted the State’s motion to amend the charging information and strike the “while she was on the ground” language.

that said touching resulted in bodily injury to the other person, specifically: pain and/or small lacerations.

*Id.* at 20. Under these charging informations, it appears that the act charged as criminal recklessness (striking the victim with a baseball bat) would constitute an act of battery, but the battery as charged would not necessarily constitute criminal recklessness. The State differentiated between the criminal recklessness and the battery by specifying that the act of battery charged resulted in pain and/or small lacerations.

As this case was a bench trial, there were no jury instructions. While counsels' arguments were mainly focused on Jefferson's claim that she was not involved in the crimes and that Gowdy fabricated the events as well as addressing any inconsistencies in Gowdy's testimony, the prosecutor did reference Jefferson's acts of hitting Gowdy with a bat and pulling Gowdy out of the car. Additionally, the evidence presented during the bench trial reveals that the criminal recklessness and the battery were two separate acts. Gowdy testified that Jefferson and some other women surrounded Gowdy as she sat in her car and broke the windows with baseball bats. Jefferson broke the passenger window of Gowdy's car and struck Gowdy with a baseball bat as she sat in the car while two other women were on the driver's side hitting Gowdy and pulling out her braids. As Gowdy tried to kick Jefferson away from her, Jefferson and another woman grabbed Gowdy by her legs and pulled her out of the car through the broken passenger window and continued to beat her. Gowdy testified that her injuries included cuts on her face and cuts on hands from the broken glass. The evidence regarding Jefferson hitting Gowdy with a bat supports her criminal recklessness conviction, while the evidence regarding Jefferson pulling Gowdy through the broken car window supports her battery conviction.

Jefferson's main argument regarding double jeopardy is that the trial court was required to specifically explain what evidentiary facts it used to convict Jefferson of each offense. We disagree. If this was a jury trial, we would not have any such explanation on the record. Further, the proper inquiry is whether there is a reasonable possibility that the trial court found her guilty of both counts by using the same facts. *See Bradley*, 867 N.E.2d at 1284. We generally presume trial courts know and follow the applicable law. *Thurman v. State*, 793 N.E.2d 318, 321 (Ind. Ct. App. 2003). Here, we do not believe there is a reasonable possibility that the trial court used the same actual evidence to find that Jefferson committed criminal recklessness and battery. Because Jefferson's convictions for criminal recklessness and battery are not the same offense, there is no violation of the Indiana Double Jeopardy Clause.

### **III. Restitution**

Finally, Jefferson argues that the trial court erred by ordering restitution because (1) it was without jurisdiction to bifurcate the restitution hearing from the sentencing hearing and (2) it did not allow or consider evidence regarding her ability to pay.<sup>11</sup>

#### *A. Bifurcation*

Jefferson argues the trial court was without jurisdiction to bifurcate the restitution hearing from the sentencing hearing and, in support of such argument, cites to *Wilson v. State*, 688 N.E.2d 1293 (Ind. Ct. App. 1997).

In *Wilson*, the trial court sentenced the defendant on his burglary and theft convictions and ordered restitution as a condition of probation on the defendant's

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<sup>11</sup> Jefferson does not challenge the amount of restitution ordered by the trial court.

burglary conviction. 688 N.E.2d at 1294. After the defendant's burglary conviction was reversed on appeal, the trial court entered a restitution order as part of the defendant's theft conviction. *Id.* The defendant appealed the restitution order, arguing the trial court was without authority to enter a restitution order on the theft conviction because it failed to do so at the time he was originally sentenced. *Id.* This Court explained that "[a]fter a final judgment a court retains only such continuing jurisdiction *as is permitted by the judgment itself*, or as is given the court by statute or rule." *Id.* at 1295 (citations omitted) (emphasis added). We held that the trial court was without authority to enter a restitution order on the defendant's theft conviction one year after it had entered a sentence on that conviction because the trial court did not retain any continuing jurisdiction at the time of sentencing and because there was no statutory authority to enhance a sentence after it has already been pronounced. *Id.*

Here, unlike in *Wilson*, the trial court did retain continued jurisdiction to enter a restitution order after sentencing. When sentencing Jefferson, the trial court explained that it was ordering restitution as part of Jefferson's criminal mischief conviction but that the restitution hearing would be held at a later date to allow Jefferson time to challenge a window repair receipt attached to the PSI. Furthermore, Jefferson's counsel agreed to delaying the restitution hearing. Accordingly, we conclude the trial court had authority to bifurcate the restitution hearing.

#### *B. Ability to Pay*

Jefferson contends the trial court erred by ordering her to pay restitution because it failed to consider her ability to pay. Both Jefferson and the State indicate that Jefferson

was ordered to pay restitution as part of probation, and they agree that, because restitution is a condition of probation, this case should be remanded for a restitution hearing for the trial court to consider Jefferson's ability to pay.

When restitution is ordered as a condition of probation or a suspended sentence, the trial court must inquire into the defendant's ability to pay restitution in order to prevent indigent defendants from being imprisoned because of a probation violation based on the defendant's failure to pay restitution. *Pearson v. State*, 883 N.E.2d 770, 772 (Ind. 2008), *reh'g denied*; *see also* Ind. Code § 35-38-2-2.3(a)(5) ("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."). However, when restitution is ordered as part of an executed sentence, and therefore is not a condition of probation or a suspended sentence, an inquiry into the defendant's ability to pay is not required. *Pearson*, 883 N.E.2d at 772-73; *see also* Ind. Code § 35-50-5-3(a) (authorizing a trial court to impose "in addition to any sentence imposed" an order that the defendant "make restitution to the victim of the crime . . ."). "In such a situation, restitution is merely a money judgment, *see* I.C. § 35-50-5-3(b), and a defendant cannot be imprisoned for non-payment." *Pearson*, 883 N.E.2d at 773.

Here, we have conflicting information regarding whether the order of restitution was to be part of Jefferson's probation or executed sentence. During the sentencing hearing, Judge Rothenberg indicated that restitution would be "in addition" to the sentenced imposed, Tr. p. 116, and stated that the restitution was ordered as part of her sentence for criminal mischief, which did not include probation. Additionally, the trial

court's Order of Judgment of Conviction specifies a number of conditions that apply during Jefferson's probation for the criminal recklessness conviction, but the order that she pay restitution is not one of them. Also, the Order of Probation does not contain a provision that Jefferson pay restitution as part of probation. Nevertheless, during the restitution hearing, which was presided over by Senior Judge Sallee, the trial court stated that it would not be necessary to look at her ability to pay if the restitution was entered as a judgment. However, the trial court then indicated that it was going to enter the restitution as a condition of probation and that if Jefferson did not have the ability to pay, she could raise that issue at a probation revocation hearing.

Given the apparent confusion regarding whether restitution was to be part of Jefferson's probation, we will remand to the trial court for clarification. If the trial court meant for the restitution order to be a condition of probation, it must make a proper inquiry into Jefferson's ability to pay. On the other hand, if the trial court did not intend the restitution order to be a condition of probation, then it should specify that it is entered solely as a money judgment against Jefferson. Under this latter option, the trial court would not be required to inquire into Jefferson's ability to pay, as she could not be imprisoned for her failure to pay.

Affirmed in part and remanded.

BAILEY, J., and BRADFORD, J., concur.