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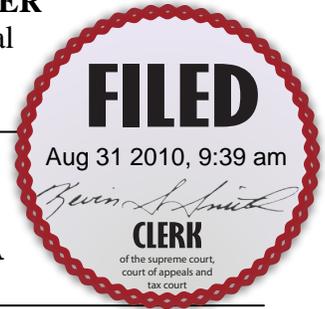
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**IN THE  
COURT OF APPEALS OF INDIANA**

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BRANDON LEWIS, )  
)  
Appellant-Defendant, )  
)  
vs. )  
)  
STATE OF INDIANA, )  
)  
Appellee-Plaintiff. )

No. 49A04-0910-CR-576

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APPEAL FROM THE MARION SUPERIOR COURT  
The Honorable Lisa F. Borges, Judge  
Cause No. 49G04-0902-FA-22824

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**August 31, 2010**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BROWN, Judge**

Brandon Lewis appeals his convictions for robbery as a class A felony<sup>1</sup> and criminal confinement as a class B felony,<sup>2</sup> and his sentence for robbery as a class A felony, criminal confinement as a class B felony, and residential entry as a class D felony.<sup>3</sup> Lewis raises three issues, which we revise and restate as follows:

- I. Whether the evidence is sufficient to support his conviction for criminal confinement as a class B felony;
- II. Whether his convictions for robbery and criminal confinement violate Indiana's prohibition against double jeopardy; and
- III. Whether the evidence is sufficient to support the trial court's order of restitution.

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

The relevant facts follow. At around noon on December 13, 2008, sixty-two year old Rodger Smith, who weighed 120 pounds and had recently undergone surgeries for a broken hip, was alone in his apartment in Marion County, Indiana, preparing dinner in his crock pot when he heard a knock at his front door. Smith went to the door and looked out of the peephole, but his view was blocked by a Christmas wreath which he had placed on the outside of the door. The person at the door identified himself as "maintenance." Transcript at 73. Although Smith had not requested maintenance, he was aware that maintenance personnel would occasionally visit his apartment if there was a problem in

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<sup>1</sup> Ind. Code § 35-42-5-1 (2004).

<sup>2</sup> Ind. Code § 35-42-3-3 (Supp. 2006).

<sup>3</sup> Ind. Code § 35-43-2-1.5 (2004).

an apartment unit on a level above his, and Smith unlocked and began to open the apartment door.

As he did so, Lewis, who was twenty-eight years old, approximately six feet tall, and larger than Smith, came through the door very quickly and struck Smith with his fist. Lewis grabbed Smith, pulled him into the kitchen, and threw Smith down onto the floor causing Smith to suffer a broken clavicle and broken rib. After Smith was on the floor, Lewis turned Smith's head to one side and struck him in the head, and then turned and struck Smith on the other side of the head. All of the bones around Smith's eyes were broken. Lewis grabbed a knife out of the drainer and told Smith that he was "trying to decide where to cut [him]," and then cut Smith "by [his] eye." Id. at 76-77, 92.

Lewis cut the cord to Smith's phone and tied Smith's wrists with it, and then used the cord to Smith's cell phone to tie his ankles. Lewis told Smith several times not to "make a sound." Id. at 99. Lewis demanded money from Smith, but Smith did not say anything because he did not want to aggravate Lewis. Lewis also asked Smith where his trash bags were, and Smith replied that the bags were in the utility room. At about that time, Smith passed out.

At some point, Smith regained consciousness, listened to make sure that he did not hear Lewis, and then managed to untie himself, scooted from the kitchen to the front door and locked it, and called the police. Smith noticed that some of the presents which were located around his Christmas tree were missing from his apartment, that one of the presents was located outside of the apartment door, and that Lewis had left his jacket on

the apartment floor. The criminal episode occurred over the course of approximately thirty minutes.

In February 2009, the State filed an information charging Lewis with: Count I, robbery as a class A felony; Count II, criminal confinement as a class B felony; Count III, criminal confinement as a class B felony; and Count IV, residential entry as a class D felony. Following a jury trial, Lewis was found guilty on all four counts as charged. The trial court vacated Lewis's conviction under Count III for criminal confinement as a class B felony due to double jeopardy concerns and, after finding aggravating circumstances and a mitigating circumstance, sentenced Lewis to forty years for Count I, ten years for Count II, and 545 days for Count IV. The court ordered Lewis's sentence for Count II to be served consecutive to Count I and his sentence for Court IV to be served concurrent with Counts I and II for an aggregate sentence of fifty years. In addition, the trial court ordered Lewis to pay restitution in the amount of \$3,874.62 to Smith for medical costs incurred by Smith but not covered by his medical insurance.

#### I.

The first issue is whether the evidence is sufficient to sustain Lewis's conviction for criminal confinement as a class B felony. When reviewing claims of insufficiency of the evidence, we do not reweigh the evidence or judge the credibility of witnesses. Jordan v. State, 656 N.E.2d 816, 817 (Ind. 1995), reh'g denied. Rather, we look to the evidence and the reasonable inferences therefrom that support the verdict. Id. We will

affirm the conviction if there exists evidence of probative value from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. Id.

Ind. Code § 35-42-3-3 provides in part:

A person who knowingly or intentionally:

- (1) confines another person without the other person's consent; or
- (2) removes another person, by fraud, enticement, force, or threat of force, from one (1) place to another;

commits criminal confinement, a Class D felony. However, the offense is a . . . Class B felony if it . . . results in serious bodily injury to another person.

“Serious bodily injury” means bodily injury that creates a substantial risk of death or that causes serious permanent disfigurement, unconsciousness, extreme pain, permanent or protracted loss or impairment of the function of a bodily member or organ, or loss of a fetus. Ind. Code § 35-41-1-25.

The State's charging information for criminal confinement stated:

Brandon Lewis, on or about December 13, 2008, did knowingly confine Ro[d]ger Smith, without the consent of Ro[d]ger Smith, by tying Ro[d]ger Smith up with a phone cord, which resulted in serious bodily injury, that is: broken bones around eyes and/or broken clavicle and/or broken rib and/or facial injuries, to Ro[d]ger Smith . . . .

Appellant's Appendix at 24.

Lewis argues that the evidence is insufficient to sustain his conviction for criminal confinement as a class B felony because “the serious bodily injuries must have resulted from the physical restraint . . . ,” the State did not allege that serious injuries occurred to Smith's wrists or ankles, and Smith did not suffer serious injuries as a result of his wrists

and ankles being restrained. Appellant's Brief at 8. The State appears to concede that the "record indicates that no injury resulted from the fact that [Smith] was tied up with a phone cord" and that "this case is like those cases in which our Supreme Court has held that the evidence of injury must flow from the removal in cases of confinement by removal." Appellee's Brief at 8 (citations omitted). Later in its brief, the State indicates that it "recognizes that the confinement did not result in serious bodily injury and thus, Defendant is only guilty of Class D felony confinement." Id. at 11.

Evidence presented at Lewis's trial did not indicate that Smith suffered or incurred serious bodily injury as a result of being tied up with a phone cord or as a result of removing the phone cord. Additionally, the injuries identified in the State's charging information for criminal confinement, which included "broken bones around eyes and/or broken clavicle and/or broken rib and/or facial injuries," were not injuries which resulted from Lewis's conduct as specified in the charging information of tying Smith up "with a phone cord." See Appellant's Appendix at 24.

Based upon the evidence presented at Lewis's trial and the charging information, we conclude that the evidence is insufficient to permit a jury to conclude beyond a reasonable doubt that Smith's injuries as charged resulted from the offense of criminal confinement by tying Smith up with a phone cord. Accordingly, we remand with instructions to vacate Smith's conviction and sentence for criminal confinement as a class B felony and to impose conviction and an appropriate sentence for criminal confinement as a class D felony. See Long v. State, 743 N.E.2d 253, 259 (Ind. 2001) (holding that the

evidence was insufficient to permit a jury to find beyond a reasonable doubt that the victim's injuries resulted from the charged criminal offense of criminal confinement by removing the victim from one place to another and vacating the defendant's conviction for criminal confinement as a class B felony and imposing conviction for criminal confinement as a class D felony), reh'g denied.

## II.

The next issue is whether Lewis's convictions for robbery as a class A felony and criminal confinement as a class D felony violate Indiana's prohibition against double jeopardy. The Indiana Constitution provides that "[n]o person shall be put in jeopardy twice for the same offense." IND. CONST. art. 1, § 14. The Indiana Supreme Court has held that "two or more offenses are the 'same offense' in violation of Article I, Section 14 of the Indiana Constitution, 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).

Lewis argues that his convictions for robbery and criminal confinement violate Indiana's prohibition against double jeopardy based upon the actual evidence test.<sup>4</sup> Under the actual evidence test, the evidence presented at trial is examined to determine whether each challenged offense was established by separate and distinct facts. Lee v. State, 892 N.E.2d 1231, 1234 (Ind. 2008). To show that two challenged offenses

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<sup>4</sup> Indeed, this court has noted that "[s]imultaneous convictions of robbery and confinement charges do not violate Indiana's statutory elements test." Merriweather v. State, 778 N.E.2d 449, 454 (Ind. Ct. App. 2002) (citation omitted).

constitute the “same offense” in a claim 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 the essential elements of a second challenged offense. Id. The Indiana Supreme Court has determined the possibility to be remote and speculative and therefore not reasonable when finding no sufficiently substantial likelihood that the jury used the same evidentiary facts to establish the essential elements of two offenses. Hopkins v. State, 759 N.E.2d 633, 640 (Ind. 2001) (citing Long, 743 N.E.2d at 261; Redman v. State, 743 N.E.2d 263, 268 (Ind. 2001)); Griffin v. State, 717 N.E.2d 73, 89 (Ind. 1999), cert. denied, 530 U.S. 1247, 120 S. Ct. 2697 (2000).

Application of this test requires the court to identify the essential elements of each of the challenged crimes and to evaluate the evidence from the fact-finder’s perspective. Lee, 892 N.E.2d at 1234. “[U]nder the . . . actual evidence test, the Indiana Double Jeopardy Clause is not violated when the evidentiary facts establishing the essential elements of one offense also establish only one or even several, but not all, of the essential elements of a second offense.” Spivey v. State, 761 N.E.2d 831, 832-833 (Ind. 2002). In determining the facts used by the fact-finder to establish the elements of each offense, it is appropriate to consider the charging information, jury instructions, and arguments of counsel. Lee, 892 N.E.2d at 1234; Spivey, 761 N.E.2d at 832. Generally, double jeopardy does not prohibit convictions of confinement and robbery when the facts indicate that the confinement was more extensive than that necessary to commit the

robbery. Merriweather v. State, 778 N.E.2d at 449, 454 (Ind. Ct. App. 2002) (citing Hopkins, 759 N.E.2d at 639; Thy Ho v. State, 725 N.E.2d 988, 993 (Ind. Ct. App. 2000)).

The State’s charging information for robbery stated:

Brandon Lewis, on or about December 13, 2008, did knowingly take from the person or presence of Ro[d]ger Smith property, that is: Christmas gifts, by putting Ro[d]ger Smith in fear or by using or threatening the use of force on Ro[d]ger Smith which resulted in serious bodily injury, that is: broken bones around eyes and/or broken clavicle and/or broken rib and/or facial injuries, to Ro[d]ger Smith . . . .

Appellant’s Appendix at 24. The State’s charging information for criminal confinement stated:

Brandon Lewis, on or about December 13, 2008, did knowingly confine Ro[d]ger Smith, without the consent of Ro[d]ger Smith, by tying Ro[d]ger Smith up with a phone cord, which resulted in serious bodily injury, that is: broken bones around eyes and/or broken clavicle and/or broken rib and/or facial injuries, to Ro[d]ger Smith . . . .

Id.

Lewis specifically argues that “insufficient evidence exists for the ‘tying up’ portion of the State’s confinement charge” and that “only the ‘physically restraining’ portion needs to be scrutinized.” Appellant’s Brief at 10. Lewis argues that “exactly the same evidentiary facts were alleged for the serious bodily injury in each count” and that the facts as alleged in the charging information, the preliminary jury instructions, and the State’s closing comments show a reasonable possibility that the same facts were used by the jury to establish the elements of both charges. Id.

The State argues that if this court finds “that the evidence only proves Class D felony confinement, double jeopardy does not exist, for there is no question but that the

confinement was beyond what was necessary for the robbery.” Appellee’s Brief at 9. The State further argues that after Lewis completed the robbery, “he left [Smith] tied up on the floor of his kitchen—an act of confinement that was more extensive than needed to accomplish the robbery,” that Lewis “could have easily freed [Smith] before he fled, especially since [Smith] was unconscious,” and that “the confinement was not entirely coextensive with the robbery—the confinement persisted well past the end of the robbery.” Id. at 11-13.

Robbery consists of taking property “by using or threatening the use of force” or “by putting any person in fear.” Ind. Code § 35-42-5-1. Criminal confinement consists of confining a person or removing the person by fraud, enticement, force, or threat of force from one place to another. Ind. Code § 35-42-3-3. The information for robbery alleged that Lewis took Smith’s property by putting Smith in fear or using or threatening the use of force, and the information for criminal confinement alleged that Lewis confined Smith by tying him up with a phone cord.

The Indiana Supreme Court has stated that “where the confinement of a victim is greater than that which is inherently necessary to rob them, the confinement, while part of the robbery, is also a separate criminal transgression.” Hopkins, 759 N.E.2d at 639. Here, the evidence shows that Lewis’s confinement of Smith extended beyond what was necessary to rob him in that Lewis struck Smith upon entering Smith’s apartment, forced him into the kitchen and threw him on the floor, resulting in Smith’s broken clavicle and rib, demanded money, beat Smith on both sides of his head breaking the bones around his

eyes, cut Smith near his eye, and tied his wrists and ankles. In light of the numerous actions taken by Lewis to use or threaten force, it was not necessary for Lewis to further tie up Smith or force him to remain tied up after Smith passed out in order to rob him. The actions taken by Lewis to effectuate the robbery and the action of tying up Smith to confine him were separate criminal transgressions.

We observe that the evidence used to establish the confinement could not have also proved robbery because it would not have proven the taking element. See id. at 640 (holding that “[o]bviously, the evidence used to establish the confinement could not have also proved robbery because it would not have proven the taking element.”). With respect to whether the evidence proving the essential elements of robbery may have been used also to establish the essential elements of criminal confinement, we note that the jury could have found that the “using or threatening the use of force” element of robbery as charged could have occurred at various points during the protracted criminal episode, including (1) when Smith was forced into the kitchen and thrown to the floor, resulting in a broken clavicle and rib, (2) when Smith was beaten on both sides of his head, resulting in broken bones around his eyes, (3) when Smith obtained a knife from the drainer, stated that he was trying to decide where to cut Smith, and cut Smith near one of his eyes, or (4) when Lewis tied Smith’s wrists and ankles with phone cords before Lewis passed out. Only the last of the events described above (when Lewis tied Smith’s wrists and ankles) may implicate the actual evidence test, and we reiterate that double jeopardy will be found only when it is reasonably possible that the jury used the same evidence to

establish two offenses, not when that possibility is speculative or remote. See Hopkins, 759 N.E.2d at 640; Griffin, 717 N.E.2d at 89. Further, we note that the preliminary jury instructions and the prosecutor’s closing remarks highlighted by Lewis did not require the jury—or suggest to the jury that it was required—to base its decision regarding whether Lewis’s actions constituted the “use of force” element of the robbery as charged upon the same evidence which it would use to support the “force” element of the criminal confinement charge against Smith, i.e., upon the fact that Lewis had tied Smith’s wrists and ankles with a phone cord.<sup>5</sup>

Under the circumstances of this case including the protracted nature of the criminal episode and the use or threatened use of force upon Smith at various points during the incident, we find no sufficient substantial likelihood, and thus cannot say that Lewis has demonstrated a reasonable possibility, that the jury based its determination of guilt on the confinement count upon the evidence used to find Lewis guilty of robbery. See Merriweather, 778 N.E.2d at 455-456 (noting that, although the defendant committed confinement simultaneously with the robbery, the evidence showed a confinement separate and apart from the robbery); Thy Ho, 725 N.E.2d at 993 (holding that the defendant failed to demonstrate a reasonable possibility that the same evidentiary facts

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<sup>5</sup> Consistent with the charging information, the preliminary instructions included an instruction that to convict Lewis of robbery the State must prove beyond a reasonable doubt that Lewis knowingly took property from Smith “[b]y using or threatening the use of force on Rodger Smith” and that to convict Lewis of criminal confinement the State must prove that Lewis knowingly “[c]onfined Rodger Smith without his consent.” See Appellant’s Appendix at 105-106.

In its closing comments, the State argued that it was evident that force was used to accomplish the robbery and referenced the evidence showing that Smith was pushed, punched, forced to the floor, passed out, and tied up, and that there was blood splatter all over the kitchen.

may have been used to establish the essential elements of both robbery and confinement where the evidence showed that the victim's confinement was more extensive than necessary to commit the robbery); cf. Vanzandt v. State, 731 N.E.2d 450, 454-455 (Ind. Ct. App. 2000) (concluding that the defendant's convictions for robbery and criminal confinement violated double jeopardy because the defendant's action to compel the victims to lie on the floor was not separate and apart from the force used to effect the robbery), trans. denied.<sup>6</sup>

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<sup>6</sup> Lewis also argues that his convictions of robbery and criminal confinement violate Ind. Code § 35-38-1-6 because confinement is a lesser included offense of robbery under the facts of this case. Ind. Code § 35-38-1-6 protects defendants charged with an offense and an included offense from being found guilty of both charges. An offense may be either inherently or factually included in another offense for purposes of the statute. Harvey v. State, 719 N.E.2d 406, 411 (Ind. Ct. App. 1999). An offense is inherently included in another when it may be established by proof of the same material elements or less than all the material elements defining the more serious crime charged. Id. An offense is factually included in another when the charging instrument alleges the means used to commit the crime charged include all of the elements of the alleged lesser included offense. Id.

In support of his arguments, Lewis cites to Tingle v. State, 632 N.E.2d 345 (Ind. 1994), and Wethington v. State, 560 N.E.2d 496 (Ind. 1990). In those cases, the Court noted that the factual allegations contained in the charging information with respect to robbery and criminal confinement were essentially identical and that as a result the defendants' confinement convictions were vacated. Specifically, in Tingle, the information charging the defendant with robbery and confinement alleged that the defendant knowingly confined the victim without his consent while armed with a deadly weapon. The Court concluded that "[d]ue to the manner of charging the factual allegations in the robbery and confinement informations, the latter offense thus was included in the former and cannot stand . . . ." Tingle, 632 N.E.2d at 350. In Wethington, the Court concluded that because the acts alleged by the State to substantiate a necessary element of the robbery charge, i.e., the force that was used to effectuate the taking, were "precisely coextensive with the acts alleged as constituting a violation of the criminal confinement statute," the convictions on both counts cannot stand. Wethington, 560 N.E.2d at 508. The Court expressly stated that its holding "is limited to instances such as this one where criminal confinement is charged along with another crime, the commission of which inherently involves a restraint on the victim's liberty" and "where the language of the charging instruments makes no distinction between the factual basis for the confinement charge and the facts necessary to the proof of an element of the other crime." Id. As previously discussed, such is not the case here.

### III.

The next issue is whether the evidence is sufficient to support the trial court's order of restitution in the amount of \$3,874.62 for medical costs incurred by Smith and not covered by his medical insurance.

Lewis argues that “[t]he problem with the restitution order . . . is that no evidence was presented to substantiate Smith’s claims,” that “the only evidence of the extent of injury was the unsworn documents submitted to the trial court,” and that “[n]o medical bills, insurance payments, or property vouchers were submitted to the trial court so it could make an accurate determination of the actual cost of property repair and out-of-pocket medical expenses Smith personally paid.” Appellant’s Brief at 19. Lewis asks that we remand to the trial court for a hearing on this issue.

The State argues that Lewis “has waived appellate review of his claim that the trial court improperly ordered him to pay restitution to the victim because he failed to object when the trial court entered the order at the sentencing hearing.” Appellee’s Brief at 13. The State further argues that the presentence investigation report (PSI) included information which supported the court’s restitution order, including a request signed by Smith that the property stolen was worth \$400.00, the property damaged was worth \$2,711, and that he incurred \$363.62 in out-of-pocket medical costs. The State argues, in the alternative, that the issue of restitution should be remanded to the trial court.

Indiana Code Section 35-50-5-3(a) governs restitution and provides in relevant part that “[i]n addition to any sentence imposed . . . the court may . . . order the person to

make restitution to the victim of the crime” and that “[t]he court shall base its restitution order upon a consideration of: (1) property damages of the victim incurred as a result of the crime . . . [and] (2) medical and hospital costs incurred by the victim . . . .” 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. 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).

We initially note that Lewis did not object to the trial court’s restitution order at the sentencing hearing. However, this court has addressed restitution issues, despite the lack of any objection, on the grounds of fundamental error. See Lohmiller v. State, 884 N.E.2d 903 (Ind. Ct. App. 2008) (noting the trend in recent caselaw to review restitution orders on grounds of fundamental error where the trial court exceeds statutory authority in its order). “The vast weight of the recent caselaw in this state indicates that appellate courts will review a trial court’s restitution order even where the defendant did not object based on the rationale that a restitution order is part of the sentence and it is the duty of

the appellate courts to bring illegal sentences into compliance.” Kimbrough, 911 N.E.2d at 639 n.9 (quotations marks and citation omitted).<sup>7</sup>

Having reviewed the record, it is unclear how the trial court arrived at the amount of restitution, that is, the actual loss suffered by Smith. The record shows that a victim’s impact statement and a statement of restitution information, which appears to have been attached to the PSI, indicated that the value of property stolen was \$400 and that the value of property damage was \$2,711. However, when adding those amounts together under “Total Claim for Restitution,” the victim’s impact statement showed a total of \$3,511 instead of \$3,111 (the sum of \$400 and \$2,711). Further, Smith included his insurance information which indicated a deductible of \$500. It is not clear whether the insurance policy covered the property stolen or the property damage or whether either amount claimed should be reduced by insurance proceeds.

In addition, the record shows that an email to the probation officer, which also appears to have been attached to the PSI, stated that Smith incurred unreimbursed medical expenses in the amount of \$363.62. Even assuming that this amount is added to the two other specifically identified expenses of \$400 and \$2,711, the total amount is \$3,474.62 and not \$3,874.62 as identified by the trial court.

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<sup>7</sup> See also Rich v. State, 890 N.E.2d 44, 48-49 (Ind. Ct. App. 2008) (citing Cherry v. State, 772 N.E.2d 433, 440 (Ind. Ct. App. 2002) (citing Golden v. State, 553 N.E.2d 1219, 1223-1224 (Ind. Ct. App. 1990), trans. denied), trans. denied; Lohmiller, 884 N.E.2d at 916; Kline v. State, 875 N.E.2d 435, 438 (Ind. Ct. App. 2007); Laker v. State, 869 N.E.2d 1216, 1220 (Ind. Ct. App. 2007); Bennett v. State, 862 N.E.2d 1281, 1287 (Ind. Ct. App. 2007); Johnson v. State, 845 N.E.2d 147, 153 (Ind. Ct. App. 2006), reh’g denied, trans. denied; Ware v. State, 816 N.E.2d 1167, 1179 (Ind. Ct. App. 2004); Green v. State, 811 N.E.2d 874, 877 (Ind. Ct. App. 2004)), trans. denied.

Based upon the record, we cannot account for the \$400 difference between the amount the trial court awarded and the sum of the individually identified expenses. Further, we observe that at the sentencing hearing the trial court stated that the amount of \$3,874.62 was awarded “for unpaid medical costs,” but the email referenced above stated that Smith incurred unreimbursed medical expenses in the amount of \$363.62. Transcript at 311. Because it is unclear what evidence the trial court considered in arriving at the specific amounts ordered, we reverse the court’s restitution order and remand with instructions to conduct a hearing to determine the proper amount of restitution considering evidence of the amounts which were incurred by Smith as a result of Lewis’s crimes and which were not reimbursed by any medical or property insurance proceeds.

For the foregoing reasons, we remand with instructions to vacate Smith’s conviction and sentence for criminal confinement as a class B felony, to impose conviction and an appropriate sentence for criminal confinement as a class D felony, and to conduct a hearing to determine an appropriate amount of restitution. In all other respects, we affirm Lewis’s convictions.

Affirmed in part, reversed in part, and remanded.

NAJAM, J., and VAIDIK, J., concur.