MEMORANDUM DECISION

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IN THE
COURT OF APPEALS OF INDIANA

Deborah Louise Claspell,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

August 22, 2022

Court of Appeals Case No.
21A-CR-2891

Appeal from the
Vanderburgh Superior Court

The Honorable
Molly E. Briles, Magistrate

Trial Court Cause No.
82D05-2101-CM-460

Molter, Judge.

[1] Deborah Louise Claspell was driving in a residential neighborhood, crashed into two vehicles within a matter of moments, and sped away from the scene.

Following a bench trial, Claspell was convicted of two counts of Class B misdemeanor leaving the scene of an accident. As part of its sentencing order, the trial court required Claspell to pay $500 in restitution to the owners of the vehicles damaged in the accident.

[2] On appeal, Claspell argues that her two convictions violate Indiana's prohibition on double jeopardy because they arise from just one accident, and she also challenges the trial court's restitution order. Because we find that Claspell's two convictions violate the double jeopardy prohibition but that she is not entitled to relief on her claims about restitution, we affirm in part, reverse in part, and remand to the trial court.

Facts and Procedural History

[3] On September 2, 2020, Claspell drove Nicole Clemons to Diana Glasper's home in Evansville. Tr. Vol. II at 5, 10. Clemons went inside and asked Glasper and Glasper's niece if they wanted to buy prescription pain medicine. Both declined, and Clemons returned to Claspell's car.

[4] Moments later, Glasper heard a loud bang. Glasper's niece looked outside and saw Claspell driving her car "on top of" Glasper's car. *Id*. at 7. Glasper rushed outside her house and saw Claspell drive her van into her neighbor, Danny Porter's, vehicle, which was parked behind Glasper's car. *Id*. at 7–8. Claspell then sped away. The damage to Glasper's car was extensive. For example, the force of the first collision knocked the back tire of Glasper's car onto the curb. The brakes and underside of the hood were damaged, and the driver's side

fender was "all smashed in" and "bent up." *Id*. at 8. Glasper's car was "totaled." *Id*. No one was injured in the accident.

[5] The State charged Claspell under Indiana Code section 9-26-1-1.1(a), (b) with two counts of Class B misdemeanor leaving the scene of an accident for crashing into and damaging the vehicles of both Glasper and Porter. Appellant's App. Vol. 2 at 9–10. The State did not allege that Claspell's actions injured or killed Glasper or Porter. On the morning of Claspell's bench trial, the State filed two requests for restitution, seeking $500 each for Glasper and Porter. *Id*. at 21–27. The State's requests included documents from Glasper's and Porter's insurance companies, showing that each policy had a $500 deductible and that the repairs to Porter's vehicle would cost about $2,600. Porter's claim summary listed September 1, 2020, as the date of the accident.

[6] Claspell was found guilty as charged, and the trial court immediately sentenced Claspell, ordering her to serve 180 days in jail, suspended to probation, and to pay $500 in restitution to both Glasper and Porter as a condition of her probation. *Id*. at 28–29; Tr. Vol. II at 31–32. Claspell now appeals.

Discussion and Decision

I. Double Jeopardy

[7] Claspell argues her two convictions for Class B misdemeanor leaving the scene of an accident violate Indiana's prohibition on double jeopardy. Her claim involves a situation where a single criminal act or transaction violates a single statute and results in multiple injuries or damage to more than one piece of

property. *See Wadle v. State*, 151 N.E.3d 227, 247-48 (Ind. 2020); *Powell v. State*, 151 N.E.3d 256, 263 (Ind. 2020). In this scenario, we ask whether "the same act may be twice punished" as "two counts of the same offense." *Powell*, 151 N.E.3d at 263. This presents a question of law, which we review de novo. *Id*. at 262.

[8] The legislature possesses inherent authority to define crimes and fix punishments. *Id*. at 263. To decide whether a statute allows multiple punishments for a single act, we determine whether the statute permits punishment for a single course of criminal conduct or for certain discrete acts—the "successive, similar occurrences"—within that course of conduct. *Id*. at 264. "Put differently, we ask whether—and to what extent—the applicable statute permits the fragmentation of a defendant's criminal act into distinct 'units of prosecution.'" *Id*.

[9] We apply a two-step process. First, we review the text of the statute, and if the statute—whether expressly or by judicial construction—indicates a unit of prosecution, we follow the legislature's guidance, and our analysis is complete. *Powell*, 151 N.E.3d at 264; *Hurst v. State*, 464 N.E.2d 19, 21 (Ind. Ct. App. 1984) (whether "multiple offenses of the same statute are committed during a single transaction" depends "on the definition of the particular crime involved"). But if the statute is ambiguous, we proceed to the second step of our analysis, which requires us to determine whether the facts—as presented in the charging instrument and as adduced at trial—reflect a single offense or whether they signify distinguishable offenses. *Powell*, 151 N.E.3d at 264. To answer this

question, we ask whether the defendant's actions are "so compressed in terms of time, place, singleness of purpose, and continuity of action as to constitute a single transaction." *Id*.

[10] Here, we find that the statute unambiguously sets forth only one unit of prosecution even if more than one car was damaged in the accident. Claspell was charged under Indiana Code section 9-26-1-1.1, which was enacted in 2014. It replaced a previous version of the statute—repealed that same year—which proscribed leaving the scene of an accident when injury or death resulted from an accident. Ind. Code § 9-26-1-1 (1991).[1] As with the statute at issue here, Indiana Code section 9-26-1-1 imposed certain duties on a person involved in an accident, such as providing identifying information and helping each person involved in the accident.

[11] In 1997, we determined this statute did not allow more than one conviction where a person almost simultaneously struck and injured two motorcyclists riding separate motorcycles. *See Nield v. State*, 677 N.E.2d 79, 81–82 (Ind. Ct. App. 1997). We observed that the statute did not frame a motorist's duties "in terms of the number of vehicles involved or the number of persons injured." *Id*. at 82. Instead, we found that the statute merely required the duties upon the occurrence of "an accident." *Id*. at 82. We explained:

[1] The statute did not address accidents that only involved property damage.

> Had the legislature chosen to impose separate duties for each vehicle or person injured in such an accident, it could have done so. However, we discern no such intent in the language of the statute, and therefore conclude that the essence of the statute is to remain at the scene of an accident and fulfill the enumerated duties, regardless of the number of persons injured.

Id. Therefore, we held that Nield's two convictions for leaving the scene of the accident violated Indiana's prohibition on double jeopardy. *Id*.

[12] In 2014, the legislature enacted Indiana Code section 9-26-1-1.1 as the new statute for the crime of leaving the scene of an accident. This statute was nearly identical to the statute at issue in *Nield* except it added two provisions, one creating an offense for leaving the scene of an accident where there was only property damage (subsection (a)) and another provision designating the severity of the offense based on attendant circumstances, fixing punishments from Class B misdemeanors (subsection (b)) to Level 6 through Level 3 felonies for offenses involving injury, serious bodily injury, or death to another person (subsections (b)(1)–(b)(4)). Nothing in this statute suggested that the legislature intended to repudiate the holding in *Nield* that an accident could not allow more than one conviction even if the accident affected more than one other person.

[13] The 2017 amendment to the statute *did* create separate units of prosecution for leaving the scene of an accident—but *only* for crimes involving bodily injury or death: "(c) An operator of a motor vehicle who commits an offense under subsection (b)(1), (b)(2), (b)(3), or (b)(4) *commits a separate offense for each person* whose bodily injury or death is caused by the failure of the operator of the

motor vehicle to comply with subsection (a)." Ind. Code § 9-26-1-1.1(c) (emphases added). This provision remains in the version of the statute under which Claspell was charged. By adding subsection (c) to the statute, the legislature created distinct units of prosecution based on the number of victims, but only for an accident resulting in bodily injury or death.

[14] As in *Nield*, there was only one accident here. While Claspell did not strike Glasper's and Porter's vehicles almost simultaneously—*cf. Nield*, 677 N.E.2d at 81–82—she collided into each one within a matter of moments. *See* Tr. Vol. II at 7–8, 19–20. To paraphrase *Nield*, had the legislature chosen to impose separate duties for each vehicle that a motorist damaged in an accident, it could have done so. 677 N.E.2d at 82. But as we explained, we discern no such intent in the statute.

[15] The State argues that Claspell's two convictions for leaving the scene of an accident do not violate Indiana's prohibition on double jeopardy because the essence of her crime was not leaving the scene of the accident but failing to fulfill the duties owed to each person impacted by the accident. The State observes that the statute requires the operator of a motor vehicle involved in an accident to give information to "any person involved in the accident." *See* Ind. Code § 9-26-1-1.1(a)(2)(A), (B). Thus, the State contends that because Claspell failed to meet these duties as to each Glasper and Porter, she committed two separate crimes, so convicting her of two crimes is permissible. Put differently, the State argues: "If a defendant is involved in a three-car accident, the statute obligates her to remain at the scene until she provides her personal identifying

information and shows her driver's license to both drivers." Appellee's Br. at 14. We agree the statute would require such a motorist to provide information to the other two persons in the accident.

[16] But we have already decided that leaving the scene of an accident is the essence of the crime. This conclusion is reinforced because Indiana Code section 9-26-1-1.1, when first adopted and in its current form, contains many provisions nearly identical to the provisions of the statute at issue in *Nield*. *See* 677 N.E.2d at 81–82. Both statutes do not allow a person to leave the scene of an accident until they have provided identifying information to other persons, help other motorists as needed, and notify appropriate authorities. *Compare* Ind. Code § 9-26-1-1 (repealed 2014) and Ind. Code § 9-26-1-1.1. Only when the legislature amended the statute in 2017 did it depart from *Nield* by creating separate units of prosecution for leaving the scene of an accident, but only when the crime results in bodily injury or death. That amendment did not evince an intent to redefine the essence of the crime.

[17] Finally, we reject the State's contention that the statute's use of the phrase "any person involved in the accident" for crimes involving property damage shows that the legislature intended to create distinct units of prosecution for the Class B misdemeanor version of the offense. The relevant language states:

> (a) The operator of a motor vehicle involved in an accident shall do the following:
>
> . . . .

> (A) Give[ ] the operator's name and address and the registration number of the motor vehicle the operator was driving to *any person* involved in the accident.
>
> (B) Exhibit[ ] the operator's driver's license to *any person* involved in the accident or occupant of or any person attending to any vehicle involved in the accident.

Ind. Code § 9-26-1-1.1(a) (emphases added).

[18] *Powell* disposes the State's argument. That case reviewed Indiana's attempted murder statute and observed that by prohibiting a person's attempt to kill "another human being," the statute calls for separate convictions where one act of attempting murder potentially victimized more than one person. 151 N.E.3d at 267. But the Court found that if the attempted murder statute had proscribed a person's attempt to kill "any human being," the statute arguably would have contemplated only a single offense despite harm to multiple victims. *Id*. Here, the words "any person" in subsection (a) of the leaving the scene statute are analogous to the phrase "any human being" in *Powell* and thus contemplate only a single offense even though Claspell collided with two vehicles.

[19] We thus find that Claspell's two convictions for leaving the scene of an accident violate Indiana's prohibition on double jeopardy. We remand this matter to the trial court and direct it to vacate one of Claspell's convictions for Class B misdemeanor leaving the scene of an accident. *See Thompson v. State*, 82 N.E.3d 376, 383 (Ind. Ct. App. 2017) (remanding case to trial court to vacate one of

defendant's battery convictions because reducing one conviction for battery would not eliminate double jeopardy violation), *trans. denied*.

II. Restitution

[20] Claspell challenges the trial court's restitution award of $500 to each Glasper and Porter. A restitution order is within the trial court's discretion, and we will reverse only on a showing of abuse of discretion. *J.H. v. State,* 950 N.E.2d 731, 734 (Ind. Ct. App. 2011). An abuse of discretion occurs when the trial court's decision is against the logic and effect of the facts before it. *Rose v. State*, 810 N.E.2d 361, 365 (Ind. Ct. App. 2004). A restitution order must be supported by sufficient evidence of actual loss sustained by the victim of a crime. *Garcia v. State*, 47 N.E.3d 1249, 1252 (Ind. Ct. App. 2015), *trans. denied*. "Evidence supporting a restitution order is sufficient if it affords a reasonable basis for estimating loss and does not subject the trier of fact to mere speculation or conjecture." *Id*. (quoting *J.H.,* 950 N.E.2d at 734).

[21] Claspell first claims the evidence was insufficient to support each restitution award. She contends the State presented no evidence about the actual losses sustained by Glasper and Porter. Claspell admits that Glasper testified that her vehicle was totaled, but she did not testify about the amount of her loss. Claspell likewise argues that Porter did not testify about the actual cost of his damages. Claspell also questions the reliability of Porter's insurance documents because those documents showed the date of the accident as September 1, 2020, instead of September 2, 2020.

[22] We find the evidence was sufficient to support the trial court's restitution awards to Glasper and Porter. The State filed two restitution claims before trial, each showing both Porter and Glasper had sustained losses of $500—the amount of their insurance deductibles. Appellant's App. Vol. II at 21, 25. Attached to those requests were two reports from Porter's and Glasper's insurance providers. Porter's report contained a detailed list of repairs conducted on his vehicle and listed the net cost of repairs as $2,139.13. It also reflected Porter's deductible as $500. Further, Glasper's insurance declaration report proved that her deductible was $500. Glasper testified that her car suffered extensive damage and was "totaled." Tr. Vol. II at 8.

[23] Claspell next argues that even if the evidence supported the $500 restitution awards to Glasper and Porter, the trial court abused its discretion in ordering restitution because it failed to ask her about her ability to pay the restitution award. In support, Claspell cites *Pearson v. State*, which requires a trial court to ask about a defendant's ability to pay restitution if restitution is ordered as a condition of probation. 883 N.E.2d 770, 772 (Ind. 2008).

[24] We agree with Claspell that trial courts are required to make such inquiries—*see Bell v. State*, 59 N.E.3d 959, 962–64 (Ind. 2016)—but Claspell has waived this issue. "[I]n order to later challenge a trial court's ordered restitution based on a claimed inability to pay, the defendant has a burden to present some testimony or other evidence in support of his or her claimed inability to pay." *Id*. at 964. Claspell failed to present such evidence during the sentencing hearing, so she has failed to preserve this issue for appellate review. *See id*.

[25] Affirmed in part, reversed in part, and remanded.

Brown, J., concurs.
Mathias, J., dissents with a separate published opinion.

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21A-CR-2891

Mathias, Judge, concurring in part and dissenting in part.

[26] I concur in my colleagues' analysis of the double-jeopardy question. However, I respectfully dissent on the issue of the sufficiency of the evidence underlying the restitution order.

[27] As we have explained:

> "[T]he 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*, and that restitution also serves to compensate the victim." *Morgan v. State*, 49 N.E.3d 1091, 1093-94 (Ind. Ct. App. 2016) (quoting *Iltzsch v. State*, 981 N.E.2d 55, 56 (Ind. 2013)).

> Pursuant to Ind. Code § 35-50-5-3(a)(1), in ordering restitution, a trial court shall consider "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)." . . .
>
> Accordingly, a restitution order must reflect a loss sustained by the victim "as a direct and immediate result" of the defendant's criminal acts. *Rich v. State*, 890 N.E.2d 44, 51 (Ind. Ct. App. 2008), *trans. denied*. The amount of actual loss is a factual matter to be determined upon the presentation of evidence. *Id.* at 49. We review a trial court's order of restitution for an abuse of discretion. *Bockler v. State*, 908 N.E.2d 342, 348 (Ind. Ct. App. 2009). . . .

Baker v. State, 70 N.E.3d 388, 390 (Ind. Ct. App. 2017) (emphasis added; alteration original to *Baker*), *trans. denied*.

[28] A "restitution order must be supported by sufficient evidence *of actual loss sustained* by the victim of a crime." *Garcia v. State*, 47 N.E.3d 1249, 1252 (Ind. Ct. App. 2015) (emphasis added), *trans. denied*. Evidence that leads only to "mere speculation or conjecture" about a victim's actual loss is insufficient to sustain a restitution order. *Id.* For example, we have held that "estimates" of repair costs "with no additional evidence" of an *actual* loss are "mere speculation or conjecture." *Id.*

[29] Here, the only evidence offered by the State of the victims' losses were two documents.[2] One document was an "estimate" that Porter had suffered about $2,600 in damages to his vehicle, of which Porter would have to pay his $500 insurance deductible. Appellant's App. Vol. 2, pp. 22-24. The other document was Glasper's car insurance declarations page, which showed that she also had a $500 deductible for collisions. *Id.* at 26.

[30] The State's evidence is insufficient to support the restitution order for two reasons. First, neither of those documents demonstrates an actual loss, and neither of the victims testified to an actual loss. Porter never testified that he in fact spent $500 or any other sum to repair or replace his vehicle. *See* Tr. Vol. 2, p. 19. Similarly, Glasper testified that her car was "totaled," but she did not testify that she had in fact paid her $500 deductible or any other sum to repair or replace her vehicle. *Id.* at 8. Thus, the State's documents showed losses that Porter and Glasper only might have incurred.

[31] Second, the victims' insurance policies are not relevant to a criminal restitution order in any event. Indeed, in *Baker*, the defendant collided with the victim's car and totaled it. The victim's totaled car had an actual cash value of $1,718.81, which the victim's insurance company paid to the victim.[3] But the victim had to buy a replacement vehicle, which cost her $3,800. The trial court ordered the

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[2] Claspell did not object to the State's tendering of these documents or reliance on them in the trial court.

[3] It is not clear whether the actual cash value of the vehicle was determined based on its condition before or after the accident.

defendant to pay the victim the difference between the victim's replacement cost and the insurance payment, or about $2,000, in restitution.

[32] We held that the trial court abused its discretion. As we explained:

> the standard followed in Indiana is that restitution shall be based on the "actual cost of repair (or replacement if repair is inappropriate)." I.C. § 35-50-5-3(a)(1). . . . [F]or restitution purposes, *the replacement cost is the value of the destroyed item at the time of the loss*. Here, that amount would be the value of the [totaled car] at the time of the accident. The State's only evidence in this regard is the $1,718.81 amount paid by insurance. The trial court, however, improperly based its restitution order on the $3,800 cost of [the replacement vehicle] minus the insurance payment. The $1,718.81 paid by the insurance company may or may not represent the actual replacement cost of the destroyed item, but even if it does, [the defendant] is not entitled to a credit for the victim's insurance payment. . . .
>
> As observed by our Supreme Court, restitution is "part and parcel to our system of criminal punishment" and it cannot be precluded by civil settlements, or as in this case, insurance payments. *Haltom v. State*, 832 N.E.2d 969, 971 (Ind. 2005). [The defendant] may not now shield himself from a restitution order by arguing that the victim was already compensated in the form of insurance payments. Indeed, it seems incongruous with the purposes of restitution that the defendant should reap the benefits of the victim's insurance policy.

70 N.E.3d at 391;[4] *see also S.G. v. State*, 956 N.E.2d 668, 684 (Ind. Ct. App. 2011) ("[r]estitution is not a means by which a victim may obtain better or more state of the art equipment" but, rather, is a measure of "the actual replacement cost of" the damaged property), *trans. denied*. Thus, in *Baker*, we remanded with instructions for the trial court "to enter a restitution order for the value of the [totaled car] prior to the accident." 70 N.E.3d at 392.

[33] So too here. The "magnitude of the loss" incurred by Claspell's actions is the loss in fair market value of the two vehicles as a result of her collision with them. *Id.* at 390. As the State's evidence was insufficient to support the trial court's restitution order, I would remand with instructions for the court to hold a new restitution hearing to determine the victims' actual losses in accordance with this opinion. *See Garcia*, 47 N.E.3d at 1253.

[4] We added that criminal restitution orders need not provide a victim with a duplicate recovery, as restitution can be paid "directly to [the] insurance company." *Baker*, 70 N.E.3d at 391 (citing *Little v. State*, 839 N.E.2d 807, 810 (Ind. Ct. App. 2005)).