

## MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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## IN THE COURT OF APPEALS OF INDIANA

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Derrick Gist,  
*Appellant-Defendant,*

v.

State of Indiana,  
*Appellee-Plaintiff.*

July 30, 2021

Court of Appeals Case No.  
21A-CR-100

Appeal from the St. Joseph  
Superior Court

The Honorable John M.  
Marnocha, Judge

Trial Court Cause No.  
71D02-1904-F5-64

**Brown, Judge.**

- [1] Derrick Gist appeals his conviction for theft as a level 6 felony. Gist claims the evidence is insufficient to sustain his conviction and the trial court abused its discretion in ordering restitution. We affirm.

### ***Facts and Procedural History***

- [2] Gist worked as a personal trainer at ICE Athletic Center. In September 2017, the head personal trainer looked at the company's scheduling system, Mindbody, noticed that Gist had scheduled multiple training sessions for several clients during the pay period, reviewed prior pay periods, and discovered that Gist's prior personal training sessions had been deleted. ICE Athletic Center hired an accountant, William Miller, to review its payroll and Mindbody records related to Gist's work. The investigation revealed that the company had paid Gist for approximately 2,000 personal training sessions between December 2014 and September 2017 for which he did not earn payment and which were subsequently canceled in or deleted from the Mindbody system. According to Miller, the total loss to ICE Athletic Center was \$50,066.
- [3] The State charged Gist, as amended, with four counts of theft as level 6 felonies.<sup>1</sup> The court held a jury trial at which testimony was presented that

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<sup>1</sup> The State initially charged Gist with one count of theft as a level 5 felony alleging the property over which he exerted unauthorized control had a value in excess of \$50,000 and four counts of theft as level 6 felonies each alleging he exerted unauthorized control over property having a value of at least \$750 and less than \$50,000, with each of the level 6 felony counts relating to a different calendar year. At the State's request, the court dismissed the level 5 felony theft charge.

customers of ICE Athletic Center purchased personal training packages consisting of multiple training sessions, the personal trainers scheduled sessions with their clients in the company's computer system during each payroll period, and when a trainer went back into a session in the trainer's calendar in the system and marked the session as completed then the trainer was paid for the session following the end of the pay period. The jury also heard testimony that, if a training session was canceled in the computer system after the end of a payroll period and the trainer had already received payment for the session, the computer system adjusted the client's account to reflect that the session had not been used by the client but the trainer's payment was not affected without further input from the trainer. The jury heard testimony that Gist had been paid for numerous scheduled training sessions which were later canceled, and there were no other trainers who were paid for sessions which were subsequently canceled. The court admitted payroll and Mindbody records.

[4] Miller testified that he was a certified public accountant, had been hired by ICE Athletic Center to review its records related to Gist, and reviewed a purchases journal and cancellation report through Mindbody and payroll check stubs. He testified that he found inconsistencies with respect to payments and cancellations based on the documentation provided and, specifically, that there had been payment for appointments which were later noted as canceled. He testified that he created a schedule showing each appointment during the period of December 2014 through September 2017 "for each client, documenting the date . . . the visit was scheduled and that is matched with – that was canceled

that matched with the payroll.” Transcript Volume II at 242. He testified, “[o]ut of all the clients, we checked payroll for the period . . . , compared the payroll records of appointments completed that were included on those payroll records, and compared it back to this cancellation scheduled through the Mindbody software.” Transcript Volume III at 16. When asked “how many of those clients – those line-by-line clients did you go through,” he indicated “34 of them.” *Id.* When asked, “based upon the analysis, of which included a comparison and contrast between payroll and cancellation, what was . . . the total amount of loss to the ICE Athletic Center,” he replied “[i]t was just a few dollars over 50,000. 50,066.” *Id.* at 16-17. Miller testified: “My professional opinion . . . is that approximately 2,000 appointments were paid and then subsequently canceled through the Mindbody software . . . [a]nd that the appointments were never met.” *Id.* at 19.

[5] On cross-examination, Miller indicated that he did not check the accuracy of any computer software program which generated the information he received from the company. When asked if he had been provided any visitation or appointment lists, he replied “I don’t remember that,” and when asked how, without those lists, he could “reach a conclusion [Gist] got paid in error,” Miller testified he reached his conclusion “based on what [Gist] was paid and what the cancellation lists from software show.” *Id.* at 26-27.

[6] On redirect examination, Miller indicated that his report included sessions for which Gist was paid but were subsequently canceled, and the report did not include sessions for which Gist was paid and which were not canceled as those

payments were truly earned and valid. When asked “[i]t’s not a legitimate payment if . . . there is a payment and then a subsequent cancellation,” he answered “[c]orrect.” *Id.* at 54. When asked “do you know whether or not he actually trained those people per the payroll,” Miller stated “[p]er the payroll, yes.” *Id.* When asked “could those payments have been fictitious” and “[c]ould [] Gist have claimed payments for work he didn’t actually complete,” he replied “[y]es.” *Id.* at 54-55. When asked, “[i]f there wasn’t this payment and then a cancellation, would that have been indicated on your report,” he answered “[n]o,” and when asked “how many of these schemes did you say happened,” he stated “[a]pproximately 2,000.” *Id.* at 55.

[7] On recross-examination, when asked “[y]ou don’t know whether they’re fictitious or not because you weren’t provided the information to confirm whether or not he actually . . . performed the work; correct,” Miller answered “[n]ot correct. I verified through the cancellation records whether those were . . . fictitious or not.” *Id.* at 57. When further asked “[b]ut he may have trained the individual anyway on another day and somehow didn’t make it into the system; correct,” he answered: “Like a cancellation? No. He . . . could’ve had an appointment; and if it wasn’t – if he got paid for it and wasn’t in a cancellation records, then it’s fine. That was not included on my report.” *Id.* at 57-58.

[8] The jury found Gist guilty of four counts of theft as level 6 felonies. The court entered a judgment of conviction on one count of theft and imposed a suspended sentence of twenty-four months and one day. The court ordered that

Gist be placed on probation for twenty-four months and that he pay restitution of \$50,066.<sup>2</sup>

### *Discussion*

#### I.

[9] Gist first asserts the evidence is insufficient to support his conviction. 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.*

[10] Gist argues that Miller's conclusion was based solely on a comparison of Gist's pay records and the cancellation list and that Miller did not recall reviewing client visit or appointment lists. He argues: "Testimony that [he] 'could' have falsified his payroll records to get paid for services he did not perform, was met with the admission that [he] could have in essence been paid appropriately is evidence that does not constitute proof beyond a reasonable doubt." Appellant's Brief at 14.

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<sup>2</sup> The court declined to make payment of restitution a term of probation.

[11] Ind. Code § 35-43-4-2 provides that a person who knowingly or intentionally exerts unauthorized control over property of another person, with intent to deprive the other person of any part of its value or use, commits theft, and that the offense is a level 6 felony if the value of the property is at least \$750 and less than \$50,000. A person engages in conduct “knowingly” if, when he engages in the conduct, he is aware of a high probability that he is doing so. Ind. Code § 35-41-2-2(b).

[12] The record reveals that evidence was before the jury from which it could reasonably conclude that Gist scheduled personal training sessions, marked certain sessions as completed in Mindbody even though he did not perform the training services, was paid for the sessions, and canceled the sessions so that the customers’ accounts were unaffected. Miller was thoroughly examined and cross-examined regarding his examination of the payroll and Mindbody records related to Gist’s work. His analysis revealed that the company had improperly paid Gist for approximately 2,000 personal training sessions. Although Miller did not remember if he had been provided with appointment lists, he testified that his analysis was based on the amounts Gist was paid and the cancellation lists. He indicated that the payments to Gist could have been fictitious and Gist could have claimed payments for work he did not complete, that he determined through the cancellation records which sessions were fictitious, and that his report included only those sessions for which Gist was paid but were canceled and did not include sessions which were valid. The evidence also established that a trainer was required to mark a session as “completed” in Mindbody

before the trainer would be paid. *See* Transcript Volume II at 174. The jury as the trier of fact was able to reasonably infer from the facts and circumstances as presented that Gist knowingly exerted unauthorized control over property of ICE Athletic Center with intent to deprive it of its value or use. Based upon the record, we conclude the State presented evidence of a probative nature from which a reasonable trier of fact could find that Gist committed theft as charged.

## II.

[13] Gist next asserts the only support for the award of restitution was Miller's testimony. He also argues the level 5 felony theft count against him was dismissed. The primary 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. *Gonzalez v. State*, 3 N.E.3d 27, 29 (Ind. Ct. App. 2014). Restitution also serves to compensate the offender's victim. *Id.* An order of restitution is generally within the trial court's discretion. *Id.* at 30. Indiana law authorizes the trial court to order restitution for damages incurred as a result of the crime. *See* Ind. Code § 35-50-5-3. Any loss proven to be attributable to the defendant's charged crimes is recoverable as restitution. *Smith v. State*, 990 N.E.2d 517, 520 (Ind. Ct. App. 2013), *trans. denied*. Under our abuse of discretion standard, we will affirm the trial court's decision if there is any evidence supporting the decision. *Id.* We will not reweigh the evidence. *Id.*

[14] The record reveals that Miller testified at length regarding his analysis of ICE Athletic Center's records including its payroll and cancellations records, and he



was thoroughly cross-examined.<sup>3</sup> He testified regarding his examination of each appointment for multiple clients, how he matched the training sessions for which Gist was paid with the cancellations records, and his attention to including in his report only payments for sessions which were canceled and for which Gist was paid. He testified that, based on his analysis of the payroll and cancellations records, ICE Athletic Center suffered a loss of \$50,066. The evidence supports the conclusion the loss was attributable to Gist's theft and thus recoverable as restitution. We will not reweigh the evidence and will affirm if any evidence supports the order. *See Smith*, 990 N.E.2d at 520. Based upon the record, we find no abuse of discretion.

[15] For the foregoing reasons, we affirm Gist's conviction for theft as a level 6 felony and the trial court's order of restitution.

[16] Affirmed.

Bradford, C.J., and Vaidik, J., concur.

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<sup>3</sup> The Mindbody and payroll records, which reflect Gist's pay rate, were before the court.