

## 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

Robert Gibson,  
*Appellant-Defendant,*

v.

State of Indiana,  
*Appellee-Plaintiff,*

January 18, 2022

Court of Appeals Case No.  
21A-CR-1702

Appeal from the Noble Circuit  
Court

The Honorable Michael J. Kramer,  
Judge

Trial Court Cause No.  
57C01-2011-F4-18

**Robb, Judge.**

## Case Summary and Issue

- [1] Robert Gibson pleaded guilty to two counts of sexual misconduct with a minor as Level 4 felonies and to being a repeat sex offender. The trial court sentenced Gibson to twelve years with ten years to be served in the Indiana Department of Correction (“DOC”) and two years suspended to probation. As a condition of his probation, the trial court ordered Gibson to pay restitution in an amount determined by the Noble County Probation Department.
- [2] Gibson now appeals, raising one issue for our review which we restate as whether the trial court committed fundamental error by delegating its authority to impose restitution to the probation department. Concluding the trial court did not err because it maintained its discretionary authority over the amount and manner of performance of Gibson’s restitution, we affirm.

## Facts and Procedural History

- [3] On November 6, 2020, the State charged Gibson with two counts of sexual misconduct with a minor, both Level 4 felonies, and alleged that Gibson was a repeat sex offender. Subsequently, Gibson pleaded guilty to both charges and the repeat sex offender enhancement. Gibson’s plea agreement did not have a provision regarding restitution; however, it did provide that “[a]ll terms of sentencing not specified herein are left to the sound discretion of the Court.” Appellant’s Appendix, Volume II at 58.

[4] The trial court accepted Gibson’s plea agreement and sentenced him to twelve years with ten years to be served in the DOC and two years suspended to probation. At Gibson’s plea and sentencing hearing, the trial court ordered Gibson to “pay restitution for any expenses the victim has had for counseling.” Transcript, Volume 2 at 27. In its written order, the trial court stated:

The Court further finds the Defendant shall pay restitution to the victim in this cause in an amount as determined by the Noble County Probation Department. The Noble County Probation Department is directed to advise the Court of the amount of restitution and a judgment shall be entered against the Defendant accordingly.

Appealed Order at 2. Gibson’s probation order also states that he “shall pay restitution as ordered by the court[.]” Appellant’s App., Vol. II at 65. Gibson now appeals.

## Discussion and Decision

### I. Standard of Review

[5] Generally, we review an order of restitution for an abuse of discretion. *Roach v. State*, 695 N.E.2d 934, 943 (Ind. 1998). However, Gibson concedes he did not object below to the restitution provision of the sentencing order. When a defendant fails to object to entry of restitution, his claims are waived unless he can make the heightened showing of fundamental error. *See Bennett v. State*, 862 N.E.2d 1281, 1288 (Ind. Ct. App. 2007).

[6] Fundamental error is an extremely narrow exception that allows a defendant to avoid waiver of an issue. *Cooper v. State*, 854 N.E.2d 831, 835 (Ind. 2006). It is error that makes “a fair trial impossible or constitute[s] clearly blatant violations of basic and elementary principles of due process . . . present[ing] an undeniable and substantial potential for harm.” *Id.* (citation omitted).

## II. Restitution

[7] The trial court has the authority to order a defendant to make restitution to the victim of a crime as part of his sentence or as a condition of probation. Ind. Code § 35-50-5-3(a). Courts use restitution to impress upon the defendant the extent of the loss they have caused and that they are responsible for remedying the loss as fully as possible. *Kotsopoulos v. State*, 654 N.E.2d 44, 46 (Ind. Ct. App. 1995), *trans. denied*.

[8] Gibson acknowledges this authority. However, Gibson argues that the trial court committed fundamental error when it “delegate[d] to the Noble County Probation Department the authority to determine the restitution amount[.]”<sup>1</sup> Brief of Appellant at 7. Under Indiana Code section 35-38-2-2.3(a)(6):

When restitution or reparation is a condition of probation, *the court shall fix the amount, which may not exceed an amount the*

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<sup>1</sup> The State argues that Gibson’s claim is not ripe for review because no actual restitution amount has been set and therefore, Gibson has suffered no actual harm. *See* Brief of Appellee at 7-8. However, Gibson does not challenge the amount of restitution; rather, his appeal challenges the trial court’s delegation of calculating the restitution to the probation department which occurred at the time of the trial court’s order. Therefore, we conclude that Gibson’s claim is ripe for review.

person can or will be able to pay, and shall fix the manner of performance.

(Emphasis added.)

[9] We have stated that “ordering the probation department to fix the amount and manner of payment does not comply with the statute.” *McGuire v. State*, 625 N.E.2d 1281, 1282 (Ind. Ct. App. 1993). In *McGuire*, the trial court gave the probation department complete authority to set restitution under a certain dollar amount. *Id.* However, we differentiate this case from *McGuire*.

[10] Here, although the trial court ordered the probation department to determine the amount of restitution, it “directed [the probation department] *to advise* the Court of the amount of restitution and a judgment shall be entered against the Defendant accordingly.” Appealed Order at 2 (emphasis added). The probation department’s determination is merely a recommendation for the trial court to consider. Because the trial court needed to review the restitution determination by the probation department and issue a subsequent final judgment, it maintained its discretionary authority over the amount and manner of performance of the restitution in accordance with Indiana Code section 35-38-2-2.3(a)(6).

## Conclusion

[11] We conclude that the trial court did not impermissibly delegate its authority to impose restitution to the probation department. Accordingly, we affirm.

[12] **Affirmed.**

Riley, J., and Molter, J., concur.