

# MEMORANDUM DECISION

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# IN THE COURT OF APPEALS OF INDIANA

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Rhonda R. Parkevich,  
*Appellant-Defendant,*

v.

State of Indiana,  
*Appellee-Plaintiff.*

March 2, 2022

Court of Appeals Case No.  
21A-CR-1385

Appeal from the Cass Superior Court

The Honorable James K.  
Muehlhausen, Judge

Trial Court Cause No.  
09D01-2012-F6-399

**Darden, Senior Judge.**

## Statement of the Case

[1] Rhonda Parkevich appeals the trial court's order regarding the payment of restitution upon her conviction of theft as a Level 6 felony.<sup>1</sup> We affirm in part, reverse in part, and remand.

## Issues

[2] Parkevich presents three issues for our review, which we restate as:

- I. Whether the trial court erred by ordering Parkevich to pay restitution without inquiring into her ability to pay.
- II. Whether the trial court erred by ordering Parkevich to pay restitution without fixing the manner of payment.
- III. Whether the trial court erred by including in the order of restitution an amount not authorized by statute.

## Facts and Procedural History

[3] For several years prior to December 2020, Parkevich cleaned the home of jewelry store owners Angela and Bill Minglin. During that period, Parkevich stole items of jewelry from the Minglins' home and later pawned them at a local pawn shop. When the theft was discovered, the State charged Parkevich with one count of theft as a Level 6 felony on December 3, 2020.

[4] On April 22, 2021, Parkevich entered a plea of guilty to the charge pursuant to a plea agreement. The agreement provided for a sentence of 545 days, suspended to probation, and for Parkevich to make restitution as a condition of

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<sup>1</sup> Ind. Code § 35-43-4-2 (2019).

her probation. The plea agreement contains the notation “TBD” in the blank space for insertion of the amount of restitution to be paid, Appellant’s App. Vol. II, p. 23, which the court and the parties understood to mean the amount of restitution was “to be determined” at a later date. *See* Tr. Vol. II, pp. 7, 4. To that end, the State later requested a restitution hearing to determine the amount of restitution to be paid.

[5] On June 3, 2021, the trial court held a restitution hearing. Angela Minglin testified, without objection, that for many years she had paid Parkevich cash to clean her house. Beginning in March 2019, the parties agreed that going forward, in lieu of being paid in cash for cleaning the Minglins’ home, Parkevich would be paid with valuable jewelry she selected from the Minglins’ jewelry store. Angela maintained a ledger of the value of the jewelry that Parkevich obtained and would credit or debit its value against the home cleaning services Parkevich provided. That business relationship ended when the theft by Parkevich was discovered. It is undisputed that during the period of their relationship, Parkevich had obtained jewelry of value that exceeded the value of the home cleaning services she provided, resulting in her owing to the Minglins an outstanding balance of \$1,396.80. The State also submitted evidence that the value of the stolen items was \$36,632. The court then issued an order of restitution in the amount of \$38,018.80 (\$36,632 + \$1,396.80) and made restitution a condition of probation. Parkevich now appeals.

# Discussion and Decision

## I. Ability to Pay

- [6] As a threshold matter, we address the State’s argument that Parkevich waived her right to appeal the restitution order as to her ability to pay even though the trial court did not inquire into her ability to pay. While we reach the conclusion that Parkevich did indeed waive her right to appeal the restitution order as to her ability to pay, we do so on different grounds than those asserted by the State.
- [7] The trial court may impose restitution as a condition of probation or as part of an executed sentence. Ind. Code § 35-50-5-3(a) (2018); *See Pearson v. State*, 883 N.E.2d 770, 772-73 (Ind. 2008). When the trial court imposes restitution as a condition of probation, it is required to inquire into the defendant’s ability to pay. Ind. Code § 35-38-2-2.3(a)(6) (2018) (mandating that “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”). This inquiry is required in order to prevent an indigent defendant from being imprisoned because of a probation violation based on the defendant’s failure to pay restitution. *Archer v. State*, 81 N.E.3d 212, 217 (Ind. 2017). Conversely, when restitution is ordered as part of an executed sentence, an inquiry into the defendant’s ability to pay is not required because, in such a situation, restitution is merely a money judgment, and a defendant cannot be imprisoned for non-payment. *Pearson*, 883 N.E.2d at 773.

[8] Further, we will not reverse a restitution order unless the trial court has abused its discretion. *Baker v. State*, 70 N.E.3d 388, 390 (Ind. Ct. App. 2017), *trans. denied*. An abuse of discretion occurs when the trial court misinterprets or misapplies the law. *Id.*

[9] Parkevich's plea agreement provides, in pertinent part:

3. The Court will impose the following sentence: 545 days in the Cass County Jail, suspended to probation. Defendant shall make restitution as a condition of probation. Restitution is ordered in the amount of \$ TBD.

Appellant's App. Vol. II, p. 23. The parties agree, and the record confirms, that Parkevich's restitution obligation is a condition of her probation. Accordingly, the trial court was obligated to inquire into her ability to pay before imposing restitution. *See* Ind. Code § 35-38-2-2.3(a)(6); *Archer*, 81 N.E.3d at 217.

[10] While Section 35-38-2-2.3(a)(6) requires some form of inquiry, it sets forth no particular procedure the trial court must follow to determine a defendant's ability to pay. In *Bell v. State*, 59 N.E.3d 959 (Ind. 2016), our Supreme Court acknowledged this statutory void and stated that the trial court may consider such factors as the defendant's financial information, health, and employment history. *Id.* at 963. The Court also cautioned that "where neither the defendant nor the State has provided any information or testimony regarding the defendant's ability to pay, the trial court must make the necessary inquiry to meet its statutory obligation." *Id.* at 964.

- [11] Nevertheless, in defining the parties' burdens under Section 35-38-2-2.3(a)(6), the Court stated that "in 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. A bald claim of indigency, without more, is insufficient to preserve this issue for appeal." *Id.* Once there is evidence of a defendant's inability to pay, the burden shifts to the State to rebut such evidence. *Id.* A restitution order without any evidence that a defendant can or will be able to pay cannot stand. *Id.*
- [12] Here, at the restitution hearing, Parkevich failed to object and provided no evidence regarding her financial status or information concerning her ability to pay restitution. Consequently, she failed to satisfy her initial burden and preserve the issue for appeal. *See id.*
- [13] Waiver notwithstanding, the trial court did not abuse its discretion in ordering Parkevich to pay restitution because she had agreed in the plea agreement to pay restitution and, by doing so, acknowledged that she can, or will in the future, be able to pay something. *See Archer*, 81 N.E.3d at 218 (distinguishing *Bell* because Bell did not agree to pay restitution and presented evidence she had not worked in over twenty years, and finding that statutory language "can or will be able to pay" was key to determining trial court had not abused its discretion in determining Archer had ability to pay restitution where, although amount of restitution was left blank in plea agreement and Archer was in very difficult financial position, Archer had agreed to pay restitution in plea

agreement and evidence showed she was able to work and hoped to secure employment in the future). Thus, while Parkevich may not be able to pay at present—for example, she pointed out in her brief that she qualified for a public defender at every phase of this case—she agreed to pay restitution, indicating she can or will be able to pay, and there is evidence that she has been employed recently.

[14] We pause here to note it appears that some portion of Parkevich’s argument concerning her ability to pay is based on her incorrect assumption that her obligation to make restitution terminates upon the end of her probationary term of 545 days. It is true that, generally, once a term of probation has expired, the trial court loses all jurisdiction over the defendant and is powerless to enforce any conditions of probation even if it is aware the defendant has failed to meet a condition. *Pearson*, 883 N.E.2d at 773. However, the expiration of a probationary period does not terminate an obligation to make restitution to a crime victim. *See* Ind. Code § 35-50-5-3(f) (2018) (“Regardless of whether restitution is required . . . as a condition of probation or other sentence, the restitution order is not discharged by the completion of any probationary period or other sentence imposed for a felony or misdemeanor.”); *see also Pearson*, 883 N.E.2d at 773-74 (upholding a restitution order in the amount of \$52,685.97 as term of one-year probation because under Ind. Code § 35-50-5-3(f) expiration of probationary term does not terminate defendant’s obligation to pay restitution). Thus, the expiration of Parkevich’s probationary term does not terminate her obligation to pay restitution.

## II. Manner of Payment

[15] Parkevich also contends that the trial court was required to establish the manner of payment of the restitution it ordered. Section 35-38-2-2.3(a)(6) states that when restitution is a condition of probation, “the *court* . . . shall fix the manner of performance.” (Emphasis added). Here, the court ordered restitution in the amount of \$38,018.80 without fixing a schedule for payments or the amount of each payment. Instead, it delegated this task to the probation department:

DEFENSE: Is there a . . . sorry to interrupt you Judge. Is there a certain amount she could pay or [is] that to be decided by probation?

COURT: By probation and it would be something I would ask probation to talk to the Minglin[]s about and see what they’re interested in. In fact why don’t [sic] the probation officer get ahead of the Minglin[]s, would you do that?”

Tr. Vol. II, pp. 43-44. This was error. *See* Ind. Code § 35-38-2-2.3(a)(6); *McGuire v. State*, 625 N.E.2d 1281, 1282 (Ind. Ct. App. 1993) (holding that trial court’s order that probation department fix manner of payment did not comply with statutory requirements).<sup>2</sup>

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<sup>2</sup> We note too that Parkevich’s Conditions of Probation state, “You shall pay restitution through the Clerk of this Court, *at a rate established by the Probation Officer* . . . .” Appellant’s App. Vol. II, p. 29 (emphasis added). This directive is erroneous and should be revised. *See* Ind. Code § 35-38-2-2.3(a)(6).



### III. Amount of Restitution

[16] Finally, Parkevich argues that the trial court erred by impermissibly awarding restitution for a loss that is not authorized by the restitution statute. Indiana Code section 35-50-5-3(a)(1)-(5) authorizes the trial court to order restitution for loss incurred as a result of a crime. The trial court is bound to comply with this statute when ordering restitution. *Morgan v. State*, 49 N.E.3d 1091, 1094 (Ind. Ct. App. 2016). Further, because restitution is penal in nature, this statute must be strictly construed against the State to avoid enlarging it beyond the fair meaning of the language used. *Baker*, 70 N.E.3d at 390. “Accordingly, a restitution order must reflect a loss sustained by the victim ‘as a direct and immediate result’ of the defendant’s criminal acts.” *Id.* (quoting *Rich v. State*, 890 N.E.2d 44, 51 (Ind. Ct. App. 2008), *trans. denied*).

[17] At the restitution hearing, the State questioned Angela about her pre-theft arrangement with Parkevich in which she sold Parkevich jewelry from the Minglins’ jewelry store on credit, in exchange for which Parkevich cleaned the Minglins’ house. Angela testified that, at the time of the hearing, Parkevich owed a balance of \$1,396.80 as a result of this arrangement. Defense counsel objected to this evidence as “not part of the criminal case” and as having “nothing to do with what . . . she’s plead[ed] guilty to,” but the trial court overruled his objections and included the amount in the restitution order. Tr. Vol. II, pp. 21, 22.

[18] For its part, the State concedes this amount does not reflect a loss that is a direct and immediate result of Parkevich's theft and was thus improperly included as restitution in this case. We agree.

## Conclusion

[19] Based on the foregoing, we conclude that Parkevich waived her right to dispute her ability to pay the ordered restitution by failing to present any evidence of her inability to pay. Nonetheless, the trial court did not abuse its discretion in finding she had the ability to pay. Finally, the trial court abused its discretion by failing to fix the manner of payment and by awarding restitution for a loss that is not the direct and immediate result of the offense in this case.

Accordingly, we remand with instructions to impose restitution in the amount of \$36,632 rather than \$38,018.80 and to determine a payment schedule and fix the amount of the payments.

[20] Affirmed in part, reversed in part, and remanded with instructions.

May, J., and Altice, J., concur.