MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Michael L. Klopenstine,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

January 31, 2023

Court of Appeals Case No. 22A-CR-1288

Appeal from the Elkhart Superior Court

The Honorable Christopher J. Spataro, Judge

Trial Court Case No. 20D05-2110-CM-1706

Shepard, Senior Judge.

[1] The trial court determined in a bench trial that Michael L. Klopenstine was guilty of one count of criminal mischief, a Class B misdemeanor.[1] He had slashed his neighbors' tires. Klopenstine appeals his sentence, alleging error in the assessment of restitution, court costs, and fees. We affirm.

Issues

[2] Klopenstine raises three issues, which we consolidate and restate as:

I. Whether the trial court erred in ordering Klopenstine to pay restitution; and

II. Whether the court erred in ordering Klopenstine to pay court costs and fees.

Facts and Procedural History

[3] In October 2021, the State charged Klopenstine in the Elkhart Superior Court with two counts of criminal mischief, both Class B misdemeanors,[2] after a neighbor reported that Klopenstine had slashed the tires of her and her husband's vehicles. At the end of a bench trial, the court found Klopenstine not guilty of count I (slashing the tires of the neighbor's vehicle), but guilty of count II (slashing the tires of her husband's vehicle). At the May 4, 2022 sentencing hearing, the court ordered Klopenstine to serve 360 days, all suspended to probation. In addition, as we discuss in more detail below, the parties agreed

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[1] Ind. Code § 35-43-1-2 (2018).

[2] Klopenstine had previously been charged, tried, and convicted of the same offenses in the Goshen City Court, but he requested trial de novo in the Elkhart Superior Court.

Klopenstine would pay $398.92 in restitution on or before December 31, 2022. Finally, the court imposed $185 in court costs and fees. This appeal followed.

Discussion and Decision

I. Restitution

[4] Klopenstine claims the trial court erred in ordering him to pay restitution because: (1) the State failed to present evidence supporting the requested amount; and (2) the court failed to ask Klopenstine about his ability to pay. The State argues Klopenstine invited any error as to restitution. We agree with the State.

[5] A trial court may order a defendant to make restitution to the victim of a crime based on considerations including "property damages of the victim incurred as a result of the crime, based on the actual cost of repair." Ind. Code § 35-50-5-3(a)(1) (2018). Under the doctrine of invited error, "'a party may not take advantage of an error that she commits, invites, or which is the natural consequence of her own neglect or misconduct.'" *Wright v. State*, 828 N.E.2d 904, 907 (Ind. 2005) (quoting *Witte v. Mundy*, 820 N.E.2d 128, 133-34 (Ind. 2005)). The application of the invited error doctrine is "a question of law over which we exercise de novo review." *Durden v. State*, 99 N.E.3d 645, 650 (Ind. 2018).

[6] At the sentencing hearing in this case, when the trial court asked the State to identify the amount of restitution at issue, the prosecutor told the court the State and Klopenstine had "agree[d] with the amount for service charges, towing,

and the tires." Tr. Vol. 2, p. 160. She further stated she and Klopenstine's counsel had altered the calculations in the victims' impact statement so that restitution "only reflects the damage done to [one vehicle's] tires." *Id*.

[7] At that point, the court asked Klopenstine's counsel whether she found the State's requested amount "to be an appropriate restitution figure or have you shared that with Mr. Klopenstine?" *Id.* at 161. Defense counsel responded, "Yes, Mr. Klopenstine and I have discussed that and we are agreeable to that amount." *Id*. Thus, Klopenstine agreed with the restitution calculation and did not, in response to the court's question, argue inability to pay. He invited any error with respect to those two points.[3]

[8] In any event, the trial court did ask Klopenstine about his financial resources, in the context of setting a deadline for restitution to be paid, and Klopenstine claimed he had no income. But, given Klopenstine's agreement with the State as to the amount of restitution, the court was entitled to conclude he had, or would have, sufficient resources to pay restitution in the allotted time period.

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[3] Klopenstine argues the trial court fundamentally erred in ordering restitution in the absence of any evidence from the State to support the amount of the award. Even if the trial court's decision on this point amounted to fundamental error, Klopenstine invited the error by affirmatively agreeing with the State's calculation and cannot now obtain reversal. *See Durden*, 99 N.E.3d at 656 (trial court engaged in "structural error" by failing to follow correct process for dismissing juror after deliberations had begun, but defendant invited error by repeatedly agreeing to the trial court's process); *but see Collins v. State*, 835 N.E.2d 1010 (Ind. Ct. App. 2005) (reversing trial court's sentence, even though Collins requested that specific sentence, because the error, though invited, was fundamental).

[9] Finally, the trial court noted that if Klopenstine failed to pay restitution prior to the end of his probationary term, his failure would be a "technical violation." *Id.* at 172. If the State chose such a violation, Klopenstine would be allowed to argue inability to pay during probation revocation proceedings. *See Runyon v. State*, 939 N.E.2d 613 (Ind. 2010) (defendant in probation revocation proceeding bears burden of proving inability to pay). Klopenstine has failed to demonstrate the trial court erred in ordering restitution.

II. Court Costs and Fees

[10] Klopenstine argues the trial court erred in ordering him to pay costs and fees. We review sentencing decisions, including the imposition of fines, costs, and fees, for an abuse of discretion. *Meunier-Short v. State*, 52 N.E.3d 927 (Ind. Ct. App. 2016). An abuse of discretion occurs when the decision is clearly against the logic and effect of the evidence before the court or the reasonable inferences to be drawn therefrom. *Clemons v. State*, 105 N.E.3d 1139 (Ind. Ct. App. 2018).

[11] The General Assembly has provided, "For each action that results in a felony conviction under IC 35-50-2 or a misdemeanor conviction under IC 35-50-3, the clerk shall collect from the defendant a criminal costs fee of one hundred twenty dollars ($120)." Ind. Code § 33-37-4-1(a) (2018). The statute further sets forth other fees that a trial court may impose, such as a court administration fee and a document fee. Ind. Code § 33-37-4-1(b).

[12] Klopenstine argues the trial court failed to adequately explain the calculation of costs and fees. We disagree. The chronological case summary explains how

the $185 amount was calculated. Appellant's App. Vol. II, p. 19. He further argues the trial court should have considered whether he was able to pay the costs and fees. We again disagree. The court convicted Klopenstine of criminal mischief, a Class B misdemeanor, and sentenced him accordingly. *See* Ind. Code § 35-50-3-3 (1977) (sentencing guidelines for a Class B misdemeanor). He thus received a conviction and sentence under Indiana Code section 35-50-3, for purposes of Indiana Code section 33-37-4-1. The costs and fees mandated by Indiana Code section 33-37-4-1 are imposed by operation of law; the defendant's ability to pay is not considered. *Meunier-Short*, 52 N.E.3d 927. Klopenstine has failed to demonstrate the trial court abused its discretion in sentencing.

Conclusion

[13] For the reasons stated above, we affirm the judgment of the trial court.

[14] Affirmed.

Mathias, J., and Crone, J., concur.