MEMORANDUM DECISION

ATTORNEY FOR APPELLANT

Timothy J. Burns
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana

Myriam Serrano
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

Keith A. Morrow,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

June 14, 2022

Court of Appeals Case No. 22A-CR-134

Appeal from the Marion Superior Court

The Honorable Clark Rogers, Judge

Trial Court Cause No. 49D25-2012-CM-36773

Bradford, Chief Judge.

Case Summary

[1] On December 6, 2020, Keith Morrow wrecked his vehicle into four parked vehicles, one of which belonged to Lionel Hardin. Morrow submitted to a blood draw, the results of which revealed that Morrow had Fentanyl, Norfentanyl, and Benzoylecgonine[1] in his system. Morrow subsequently pled guilty to Class A misdemeanor operating a vehicle while intoxicated endangering a person. The terms of Morrow's plea agreement included the agreement that the amount of restitution owed, if any, would be determined by the trial court. The trial court accepted Morrow's plea agreement, imposed a 365-day sentence with credit for four days and the remaining 361 suspended to probation, and ordered Morrow to pay $470.00 in restitution to Hardin. Morrow challenges the trial court's restitution order on appeal. Concluding that the evidence is sufficient to support the restitution order but that the trial court erred by failing to inquire into Morrow's ability to pay restitution, we affirm in part, reverse in part, and remand to the trial court for further proceedings.

Facts and Procedural History

[2] On December 6, 2020, Morrow consumed narcotics before driving his vehicle, crashing into four parked vehicles. Indianapolis Metropolitan Police Officer

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[1] Benzoylecgonine "is the major metabolite of cocaine." https://pubchem.ncbi.nlm.nih.gov/compound/O-Benzoylecgonine (last visited May 20, 2022).

Mark McCardia responded to the scene of the crash and observed that Morrow appeared intoxicated, noting that Morrow's "balance was unsteady and he could not stay awake." Tr. Vol. II p. 8. Morrow submitted to a blood draw, the results of which revealed that Morrow had Fentanyl, Norfentanyl, and Benzoylecgonine in his system.

[3] One of the vehicles hit by Morrow's vehicle belonged to Hardin, who was in the process of purchasing the vehicle from Brian Burton. Insurance paid for the repairs for the damage done to the vehicle but did not pay the cost to tow the vehicle to the repair shop. Hardin paid the $470.00 tow fee out-of-pocket.

[4] On October 27, 2021, Morrow pled guilty to Class A misdemeanor operating a vehicle while intoxicated endangering a person. Pursuant to the terms of Morrow's plea agreement, the State agreed that the remaining misdemeanor charge would be dismissed and that Morrow should be sentenced to a term of 365 days, with credit for four days served and the remaining 361 days suspended to probation. Morrow's guilty plea also indicated that "[r]estitution shall be determined at a future [r]estitution [h]earing." Appellant's App. Vol. II p. 63. The trial court subsequently accepted Morrow's plea agreement, entered judgment of conviction, and sentenced Morrow pursuant to the terms of plea agreement. Following a restitution hearing, the trial court ordered Morrow to pay $470.00 in restitution to Hardin.

Discussion and Decision

[5] On appeal, Morrow challenges the trial court's order that he pay $470.00 in restitution to Hardin.

> As part of a sentence or as a condition of probation, a trial court may order a defendant to pay restitution to a victim. Traditional goals of restitution are to vindicate the rights of society, and to impress upon a criminal defendant the magnitude of the loss he has caused and his responsibility to make good that loss as completely as possible.
>
> Orders of restitution are within the trial court's discretion, and we will reverse only if the trial court has abused that discretion. An abuse of discretion occurs when the trial court misinterprets or misapplies the law.

Linville v. State, 120 N.E.3d 648, 655 (Ind. Ct. App. 2019) (internal citations and quotations omitted).

I. Sufficiency of the Evidence

[6] Morrow argues that the evidence is insufficient to support the trial court's order that he pay restitution to Hardin. "A restitution order must be supported by sufficient evidence." *Id.* "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.* (internal quotation omitted).

[7] The trial court ordered Morrow to pay $470.00 in restitution to Hardin. At the restitution hearing, Hardin testified that on the date in question, he had been in the process of purchasing the vehicle struck by Morrow's vehicle from Burton and "had one more payment on it." Tr. Vol. II p. 13. Hardin further testified

that while Morrow's insurance had paid for the damage to his vehicle, he had paid the $470.00 towing fee out-of-pocket. Hardin's testimony is sufficient to support the trial court's restitution order. Morrow's argument to the contrary is merely a request to reweigh the evidence, which we will not do. *See Smith v. State*, 990 N.E.2d 517, 520 (Ind. Ct. App. 2013).

II. Ability to Pay

[8] Morrow also contends that the trial court abused its discretion by failing to inquire into his ability to pay restitution. When restitution is ordered "as a condition of probation" or a suspended sentence, the trial court must inquire into the defendant's ability to pay restitution in order to prevent indigent defendants from being imprisoned because of their inability to pay. *Shaffer v. State*, 674 N.E.2d 1, 9 (Ind. Ct. App. 1996). However,

> [u]nlike when restitution is ordered as a condition of probation or a suspended sentence, when restitution is ordered as part of an executed sentence, and therefore is not a condition of probation or a suspended sentence, an inquiry into the defendant's ability to pay is not required. This is so because in such a situation, restitution is merely a money judgment and a defendant cannot be imprisoned for his failure to pay the restitution.

Guzman v. State, 985 N.E.2d 1125, 1130 (Ind. Ct. App. 2013) (internal citations omitted).

[9] In this case, restitution is not listed on the sentencing order as part of Morrow's sentence, even though various other fees are. Moreover, while the box indicating "Restitution: to:" is not checked and Hardin's name is not listed on

the trial court's probation order, which set forth the conditions of Morrow's probation, the terms of Morrow's probation indicate that Morrow "*shall* … *pay* all Court-ordered fines, costs, fees and *restitution* as directed." Appellant's App. Vol. II p. 68 (emphases added). In short, the record clearly indicates that the trial court ordered restitution as a condition of Morrow's probation, not as a part of his executed sentence. We therefore conclude that the trial court abused its discretion by failing to inquire into Morrow's ability to pay $470.00 in restitution to Hardin. On remand, we instruct the trial court to determine Morrow's ability to pay the court-ordered restitution.[2]

[10] The judgment of the trial court is affirmed in part, reversed in part, and remanded with instructions.

Najam, J., and Bailey, J., concur.

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[2] We acknowledge that the State cited to *Pearson v. State*, 883 N.E.2d 770, 773–74 (Ind. 2008). In that case, the Indiana Supreme Court held that because of the expiration of Pearson's probationary term coupled with the fact that Pearson did not challenge the amount of the restitution order or his ability to pay $150.00 per month in discharge of the obligation, there was "no need to remand this cause to the trial court." *Pearson*, 883 N.E.2d at 774. In this case, while Morrow did not explicitly challenge his ability to pay restitution before the trial court, he did challenge the amount of restitution ordered by the trial court. As such, we believe that the facts of this case can be distinguished from the facts of *Pearson* and that the best course of practice is to remand the matter to the trial court for a determination as to Morrow's ability to pay the $470.00 restitution order.