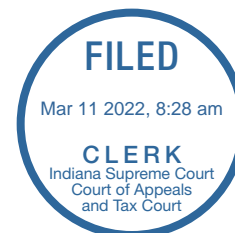


MEMORANDUM DECISION

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.



ATTORNEY FOR APPELLANT

Eric P. Overpeck
Noblesville, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana

Nicole D. Wiggins
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

Robert Dean Knipp,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

March 11, 2022

Court of Appeals Case No.
21A-CR-1223

Appeal from the Hamilton
Superior Court

The Honorable Gail Z. Bardach,
Judge

Trial Court Cause No.
29D06-2010-F6-6296

Altice, Judge.

Case Summary

- [1] Robert Dean Knipp appeals his convictions for theft, a Level 6 felony, and home improvement fraud, a Class A misdemeanor, challenging the sufficiency of the evidence. Knipp also contends that the trial court erred in ordering him to pay restitution to the victims as a condition of probation because there was no inquiry regarding his ability to pay.
- [2] We affirm.

Facts and Procedural History

- [3] In September 2019, John and Kala Graves (collectively, Graveses) contacted Knipp, a contractor, to construct a patio for them at their Fortville residence. Shortly thereafter, Knipp submitted a design and a proposal for the project to the Graveses. There is no dispute that the cost of the design was \$1,250. The parties also agreed on a total price for the project of \$36,500, and Knipp told the Graveses that it would take approximately two months to complete the project. Knipp stated to John that he would begin the work “within a couple of weeks,” toward the beginning of November. *Transcript Vol. II* at 121.
- [4] On October 15, 2019, the Graveses wrote Knipp a check for \$20,000 as a down payment on the project. Knipp did not begin work on the patio until December 4, 2019, because the Graveses’ homeowners’ association had not approved the

project until the last week of November. Knipp hired three laborers to assist with the project, had gravel delivered to the residence, and dropped off some “heavy equipment,” including a bobcat and two pavers at the Graveses’ home. *Id.* at 127.

[5] The only work that Knipp performed on the project was “dig[ging] out some dirt and put[ting] down some rocks.” *Id.* at 148. Also, while Knipp claimed that his laborers routinely helped with the project, it was established that Knipp appeared at the residence “by himself ninety percent of the time.” *Id.*

[6] Although the Graveses made another payment of \$6,000 toward the project on January 20, 2020, Knipp performed no additional work on the patio. As a result, the Graveses’ backyard became a “muddy mess.” *Id.* at 126, 148-49. The Graveses inquired of Knipp numerous times over several months regarding the status of the work. Knipp offered multiple excuses about his continued absence and lack of work, including his health, the weather, and various equipment issues.

[7] On March 31, 2020, the Graveses sent Knipp a text demanding completion of the project by May 10, 2020. As no further work had been performed, the Graveses sent Knipp a letter on May 7, 2020, threatening Knipp with both criminal and civil action. Five days later, Knipp removed his equipment from the Graveses’ property. Knipp ceased all communication with the Graveses and never offered to refund any of the money that they had paid toward the project.

- [8] In June 2020, the Graveses hired another contractor, who completed the project in three weeks. The Graveses paid \$45,000 to the new contractor to build the patio and “fix [Knipp’s] mess.” *Transcript Vol. III* at 23. That contractor had to purchase replacement gravel because the material that Knipp had delivered “was all wrong” and had to be taken away and “dropped off at a landfill.” *Id.* at 45. The subsequent contractor also “laid a line for the gas line,” even though Knipp represented that he had already done so. *Id.* at 46. The Graveses’ drainage pipes had to be “redone” because the “whole yard was flooded” and the pipes that Knipp claimed to have installed “obviously weren’t working.” *Id.*
- [9] On October 14, 2020, the State charged Knipp with theft, a Level 6 felony, and home improvement fraud, a Class A misdemeanor. Following a jury trial on March 31, 2021, Knipp was found guilty on both counts. Knipp was subsequently sentenced to an aggregate term of 910 days, with 270 days executed and 640 days suspended.
- [10] At the sentencing hearing, the trial court reviewed the presentence investigation report (PSI), heard testimony from Knipp and the Graveses, and ordered Knipp to pay \$24,750 in restitution to the Graveses during his period of probation. In making the restitution determination, the trial court reasoned that Knipp could sell the equipment he had purchased for the project but never used.
- [11] Knipp now appeals.

Discussion and Decision

I. Sufficiency of the Evidence

[12] Knipp claims that the evidence is insufficient to support his convictions because he “was in the process of completing the contracted work” and he therefore lacked the “requisite criminal intent” to commit the offenses. *Appellant’s Brief* at 6. More specifically, Knipp contends that the evidence established—at most—a failure to complete the work in a timely fashion. Thus, with regard to the home improvement fraud charge, Knipp maintains that his conviction must be reversed because the statute does not criminalize untimely work. As for the theft charge, Knipp argues that the conviction must be reversed because he intended to complete the construction project and, as a result, did not exert unauthorized control over the Graveses’ funds.

[13] When reviewing a challenge to the sufficiency of the evidence, we consider only the evidence most favorable to the verdict and any reasonable inferences that may be drawn from that evidence. *Baker v. State*, 968 N.E.2d 227, 229 (Ind. 2012). We will not reweigh the evidence or judge the credibility of witnesses. *McCallister v. State*, 91 N.E.3d 554, 558 (Ind. 2018). The conviction will be affirmed unless no reasonable factfinder could find the elements of the crime proven beyond a reasonable doubt. *Reust v. State*, 139 N.E.3d 1056, 1063 (Ind. Ct. App. 2019). Further, when we are confronted with conflicting evidence, we consider the evidence that is most favorable to the trial court’s ruling. *Drane v. State*, 867 N.E.2d 144, 146 (Ind. 2007). We will find sufficient evidence to

support a conviction “if an inference may reasonably be drawn from it to support the verdict.” *Id.* at 147.

[14] To convict Knipp of home improvement fraud, the State was required to prove beyond a reasonable doubt that Knipp, a home improvement supplier, entered into a home improvement contract with the Graveses, and knowingly promised performance that he did not intend to perform or knew would not be performed. Ind. Code § 35-43-6-12.¹

[15] 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). A person engages in conduct “intentionally” if, when he engages in the conduct, it is his conscious objective to do so. I.C. § 35-41-2-2(a). A defendant’s intent may be inferred from the surrounding circumstances. *Hightower v. State*, 866 N.E.2d 356, 368 (Ind. Ct. App. 2007), *trans. denied*.

[16] In this case, the evidence adduced at trial established that seven months after entering into the contract for the project, Knipp only had dug a hole in the Graveses’ backyard and delivered some gravel to the residence. Knipp covered that area in tarps and abandoned it, resulting in water retention and a “muddy mess” in the Graveses’ yard for several months. *Transcript Vol. II* at 126, 148-

¹ This statute was repealed, effective July 1, 2021.

49. In short, Knipp completed almost none of the work that he had agreed to perform.

[17] Knipp accepted \$20,000 from the Graveses in October 2019 and an additional \$6000 on January 20, 2020. Knipp initially told the Graveses that he would complete the project within two months and later reassured them that the project would be completed within six weeks after the second payment had been made. Although the Graveses repeatedly asked Knipp over the course of several months about his lack of work, Knipp rarely appeared at the residence and offered a variety of excuses for his absence and nonperformance. While Knipp promised to complete the project, he never did.

[18] Knipp retained all the funds he was paid, and he never offered the Graveses a refund for his failure to make even the slightest progress on the project. After the Graveses became totally exasperated with Knipp's lack of progress and nonattention to the project, they threatened legal action against him. In response, Knipp went to the residence five days later, removed his equipment and ceased all communication with the Graveses. As a result, the Graveses were compelled to hire a different contracting firm at a substantial cost to complete the project and "fix [Knipp's] mess." *Transcript Vol. III* at 23.

[19] In light of these circumstances, we conclude that the State presented sufficient evidence to prove beyond a reasonable doubt that Knipp "promise[d] performance" that he did "not intend to perform or [knew] [would] not be

performed.” I.C. § 35-43-6-12. Thus, we decline to disturb the jury’s verdict on the home improvement fraud charge.

[20] To convict Knipp of theft as a Level 6 felony, the State was required to prove beyond a reasonable doubt that Knipp knowingly or intentionally exerted unauthorized control over the property of [the Graveses] with the intent to deprive them of any part of the use or value of the property. *See* I.C. § 35-43-4-2(a)(1). The State’s charging information alleged that Knipp intended to deprive the Graveses of “currency . . . having a value of at least seven hundred fifty dollars. . . .” *Appendix Vol. II* at 9.

[21] As noted above, the Graveses wrote Knipp two separate checks totaling \$26,000 as prepayment towards the \$36,500 agreed-upon price for the project. Knipp did very little work on the project over the course of nearly eight months in derogation of the agreed-upon deadlines, made numerous excuses about why he was not working, and altogether ignored the Graves’s inquiries about the project. This is sufficient evidence to prove that Knipp committed the offense of theft as a Level 6 felony. *See, e.g., Ruest*, 139 N.E.3d at 1063 (holding that evidence the defendant contractor did not refund any of the \$20,000 advanced to him by the plaintiff-consumer for work on a home construction site when defendant performed only \$4500 of work, was sufficient to support the defendant’s conviction for theft).

II. Restitution

- [22] Knipp argues that the restitution order must be set aside. Although Knipp challenges neither the amount he was ordered to pay nor his ability to pay, he maintains that the restitution order cannot stand because the trial court did not make a satisfactory inquiry about his ability to pay. Thus, Knipp claims that this cause must be remanded for a new restitution hearing.
- [23] An order of restitution is within the trial court's discretion and will be reversed only upon a finding of abuse of discretion. *Ault v. State*, 705 N.E.2d 1078, 1082 (Ind. Ct. App. 1999). An abuse of discretion occurs when the trial court misinterprets or misapplies the law. *Baker v. State*, 70 N.E.3d 388, 390 (Ind. Ct. App. 2017), *trans. denied*.
- [24] A trial court may order a defendant, as a condition of probation, to make restitution to the victim of the crime for damage or injury that was sustained by the victim. Ind. Code § 35-38-2-2.3(a)(6). However, the amount fixed to be repaid must not exceed an amount the person can or will be able to pay. *Id.*
- [25] 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." *Bell v. State*, 59 N.E.3d 959, 964 (Ind. 2016). The trial court must inquire into the defendant's ability to pay to prevent indigent defendants from being imprisoned because of their inability to pay. *Pearson v. State*, 883 N.E.2d 770, 772 (Ind. 2008).

[26] While such an inquiry is required under I.C. § 35-38-2-2.3(a)(6), the extent of that inquiry is not specified, nor is a precise procedure set forth for determining a defendant's ability to pay. *Kays v. State*, 963 N.E.2d 507, 509 (Ind. 2012).

"[S]ome sort of inquiry is required," however, such as the defendant's "financial information, health, and employment history." *Id.*

[27] In this case, Knipp testified at the sentencing hearing that the value of the project design he presented to the Graveses was \$1250. Knipp also testified that he spent \$8800 of the Graves's down payment to purchase heavy equipment for the project. Knipp never used that equipment, and the evidence established that the equipment was still in his possession at the time of sentencing. After hearing all the evidence, the trial court ordered Knipp to pay \$24,750, which represented the \$26,000 that the Graveses paid him, less \$1250 for the project design. The trial court commented that Knipp could "make a dent" in the restitution order by selling the materials and machinery that he never used in the project. *Id.* at 61.

[28] In addition, the trial court noted that it had reviewed Knipp's PSI report that set forth information about Knipp's finances and his ability to pay restitution. In our view, the totality of the evidence presented at the sentencing hearing, along with the trial court's review of the PSI, satisfied the inquiry requirement of I.C. § 35-38-2-2.3(a)(6), as to Knipp's ability to make restitution. *See, e.g., Mitchell v. State*, 559 N.E.2d 313, 314-315 (Ind. Ct. App. 1990) (holding that the trial court's review of the PSI that contained information about the defendant's employment, finances, and health, was "adequate" to meet the statutory

requirement of inquiring into the defendant's ability to pay restitution), *trans. denied*.

[29] In sum, Knipp's argument that the trial court did not conduct an inquiry into his financial status regarding his ability to pay restitution is unavailing. Also, because Knipp has not challenged the amount of restitution he was ordered to pay and does not contend that he is unable to pay, the restitution order stands and there is no need to remand this cause to the trial court. *See Pearson*, 883 N.E.2d at 774 (holding that remand was not required when the defendant challenged neither the amount of restitution ordered nor his ability to pay the amount ordered).

[30] Judgment affirmed.

Bailey, J. and Mathias, J., concur.