IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

NOVEMBER SESSION, 1995

STATE OF TENNESSEE,	)	**C.C.A. NO. 02C01-9507-CC-00195**
	)	
Appellee,	)	
	)	
	)	**MADISON COUNTY**
VS.	)	
	)	**HON. FRANKLIN MURCHISON**
REX BLANKENSHIP,	)	**JUDGE**
	)	
Appellant.	)	(Amount of Restitution)

ON APPEAL AS OF RIGHT FROM THE JUDGMENT OF THE CIRCUIT COURT OF MADISON COUNTY

FOR THE APPELLANT:

GEORGE MORTON GOOGE
District Public Defender

PAMELA J. DREWERY
Assistant Public Defender
227 W. Baltimore
Jackson, TN 38301

FOR THE APPELLEE:

CHARLES W. BURSON
Attorney General and Reporter

CHRISTINA S. SHEVALIER
Assistant Attorney General
450 James Robertson Parkway
Nashville, TN 37243-0493

JERRY WOODALL
District Attorney General

DON ALLEN
Assistant District Attorney General
P.O. Box 2825
Jackson, TN 38302

OPINION FILED _____

AFFIRMED

DAVID H. WELLES, JUDGE

OPINION

This is an appeal pursuant to Rule 3 of the Tennessee Rules of Appellate Procedure. Upon his plea of guilty, the Defendant was convicted of theft of property over the value of one thousand dollars. In conjunction with a community corrections sentence, the Defendant was ordered to make restitution to the victim in the amount of $10,000.00. As his sole issue on this appeal, the Defendant argues that the amount of restitution that he was ordered to pay is excessive and not supported by the evidence presented at the sentencing hearing. We affirm the judgment of the trial court.

The Defendant was employed as the manager of a business known as "All-Pro Transmission" in Jackson, Tennessee. After the Defendant had been there for a few months, the owner of the business noticed that sales had dropped dramatically yet expenses had increased. The owner sent someone in to work with the Defendant and the owner testified that "we started having people coming back with problems with their vehicles that we have no record that we had ever worked on them." It was then discovered that the Defendant had been directing some of the business's customers to make their checks payable to the Defendant personally. These checks were then cashed by the Defendant rather than being deposited to the account of the business.

The owner of the business was never able to establish exactly how much the Defendant stole from the business by having customers pay him personally for parts and labor provided by the business. The Defendant testified that it was no more than four thousand dollars. The owner of the business presented checks and receipts totaling four thousand, eight hundred, sixty-nine dollars and forty-five cents, paid by

customers to the Defendant that was not deposited in the business account. The owner of the business had no way of knowing how many other customers may have been handled in this manner, because the only ones he knew about were those who came back to the business for follow-up problems and yet, the business had no record of doing any work for the customers.

One of the purposes of our sentencing laws is to encourage restitution to victims when appropriate. Tenn. Code Ann. § 40-35-102. As part of our sentencing considerations, trial judges are encouraged to use alternatives to incarceration that include requirements of reparation and victim compensation. Tenn. Code Ann. § 40-35-103(6). One of the goals of community corrections programs is to promote accountability of offenders to their local communities by requiring financial restitution to victims of crimes. Tenn. Code Ann. § 40-36-104(2). A trial judge is authorized to sentence an eligible defendant to any appropriate community-based alternative to incarceration, under such additional terms and conditions as the court may prescribe. Tenn. Code Ann. § 40-36-106(e)(1).

Restitution may be ordered for a crime victim's "pecuniary loss." Tenn. Code Ann. § 40-35-304(b). A trial court should specify at the time of the sentencing hearing the amount, time, and manner of payment, but the payment schedule cannot extend beyond the statutory maximum term of probation that could have been imposed for the offense of which the Defendant was convicted. Tenn. Code Ann. § 40-35-304(c). In determining the amount and method of payment of restitution, the court should consider the financial resources and future ability of the Defendant to pay or perform. Tenn. Code Ann. § 40-35-304(d). "Pecuniary loss" means all special damages as substantiated by evidence in the record or as agreed to by the Defendant, but not to include general damages. Tenn. Code Ann. § 40-35-304(e)(1). Pecuniary loss also means reasonable out-of-pocket expenses incurred by the victim in the filing of the

charges or cooperating in the investigation and prosecution of the Defendant. Tenn. Code Ann. § 40-35-304(e)(2).

On this appeal, the Defendant argues that the trial court erred in ordering the Defendant to make restitution for any amount above the four thousand dollar range which was acknowledged by the Defendant to have been stolen. The Defendant argues that the ten thousand dollar restitution amount is based upon hearsay and testimony that is conclusory in nature and speculative. The Defendant argues that the proof presented was insufficient to establish the amount ordered and that the evidence is thus insufficient to support an order of restitution in the amount of ten thousand dollars. The Defendant does not argue that the amount was excessive in that it was beyond the Defendant's future ability to pay.

When the Defendant challenges on appeal the amount of restitution that he has been ordered by the trial court to pay, this court has held that our review of the amount of restitution and how it was computed shall be conducted de novo, on the record with a presumption that the determination made by the trial court is correct. State v. Frank Stewart, No. 01-C-01-9007-CC-00161, Maury County, (Tenn. Crim. App., Nashville, filed Jan. 31, 1990); see Tenn. Code Ann. § 40-35-401(d). In Stewart, we further held that our restitution law does not require the sentencing court to determine a defendant's criminal liability for restitution in accordance with the strict rules of damages applicable to a civil case.

The owner of the business testified that he had obtained actual checks made out to the Defendant, plus receipts that the Defendant had given customers totaling four thousand, eight hundred, sixty-nine dollars and forty-five cents, none of which had been deposited to the business's account. He stated that he had no way of knowing how much additional work had been done for other customers of whom he was unaware

and had no way of determining. While his testimony was confusing, he stated that he was able to conservatively estimate his loss from theft at eleven thousand, eight hundred, thirty-eight dollars and forty-five cents. In addition to the parts and supplies represented by the business attributed to the canceled checks and receipts, the owner testified that the business was short an additional seven thousand to eight thousand dollars in parts. Based upon all the information available to him, the owner estimated the total loss from the Defendant's criminal conduct was more "like $30,000.00 but that's taking the losses for the three months and all that I cannot substantiate . . . I mean, I can't do it."

The Defendant objected to much of the testimony presented by the owner of the business based on the fact that it was hearsay and that he was not the primary keeper of the actual records of his business. The trial judge stated that he was allowing the witness to testify because he was one of the owners of the business and as such, he could testify as to the losses the business had sustained. The State correctly argues that reliable hearsay is admissible at a sentencing hearing if the opposing party is accorded a fair opportunity to rebut any hearsay evidence admitted. Tenn. Code Ann. § 40-35-209(b). We conclude that a proper basis was established for the witness to testify about the losses sustained by the business and the method of calculating those losses.

The Defendant testified at length and admitted that he personally took payments from customers amounting to perhaps four thousand dollars that should have been deposited into the business account. He first tried to explain that he was told that it was permissible to do occasional "side jobs," but he admitted that he knew he did not have permission to have customers pay him personally for work done and parts supplied by the business.

In setting the amount of restitution the trial court stated, "I don't know how much the loss is here, but I know and I so find that it is in excess of $10,000. The plea of guilty was theft of an amount of money not less than one and not more than $10,000. Restitution accordingly is set at $10,000."

We have conducted a de novo review on the record of the amount of restitution ordered. We have conducted this review with a presumption that the determination made by the trial court is correct. There is certainly substantial evidence in this record to support the determination made by the trial court. We are thus unable to conclude that the trial court erred or abused his discretion in setting the amount of restitution.

The judgment of the trial court is accordingly affirmed.

_____
DAVID H. WELLES, JUDGE

CONCUR:

_____
PAUL G. SUMMERS, JUDGE

_____
WILLIAM M. BARKER, JUDGE