

NOTICE

Decision filed 06/08/15. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

2015 IL App (5th) 130219-U

NO. 5-13-0219

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

NOTICE

This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Madison County.
	)	
v.	)	No. 10-CF-155
	)	
MARK S. LOHMAN,	)	Honorable
	)	James Hackett,
Defendant-Appellant.	)	Judge, presiding.

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JUSTICE WELCH delivered the judgment of the court.  
Justice Goldenhersh concurred in the judgment.  
Presiding Justice Cates specially concurred.

**ORDER**

¶ 1 *Held:* The order of restitution imposed by the circuit court is affirmed where the restitution was not based on a dismissed charge, but instead was based on a charge that the defendant pled guilty to in an open plea.

¶ 2 The defendant, Mark S. Lohman, appeals from an order of restitution entered by the circuit court of Madison County. The defendant argues that the restitution was based on a charge of aggravated battery that was dismissed in connection with his open plea of guilty to home invasion. The defendant argues that the court had no statutory authority to order restitution because the plea agreement did not provide for restitution for any of the dismissed charges. He argues that, because the court exceeded its statutory sentencing

authority, its order imposing restitution is void and must be vacated. For the reasons which follow, we affirm the restitution order of the circuit court.

¶ 3 In January 2010, the defendant was charged with two counts of attempted first-degree murder, home invasion, armed violence, residential burglary, three counts of aggravated battery, and aggravated domestic battery. The charges stemmed from an incident that occurred at the home of Ashley Gentry and that resulted in the stabbing of three people, Gentry, Kathryn Griffith, and Lloyd Adams. The defendant subsequently entered an open plea of guilty to home invasion in exchange for the State's agreement to dismiss the remaining charges. Following a sentencing hearing, the defendant was sentenced to 20 years' imprisonment and 3 years of mandatory supervised release, and he was ordered to pay \$5,000 in restitution to Griffith.

¶ 4 In February 2011, the defendant filed a motion to reconsider sentence, arguing that his sentence was excessive. The circuit court thereafter denied the motion. On appeal, this court vacated the circuit court's denial of the motion to reconsider sentence on the basis that the defendant's counsel failed to file a certificate of compliance in accordance with Illinois Supreme Court Rule 604(d) (eff. July 1, 2006) and remanded for strict compliance with Rule 604(d). *People v. Lohman*, 2012 IL App (5th) 110165-U. In January 2013, the defendant filed another motion to reconsider sentence, again arguing that his sentence was excessive. Thereafter, the circuit court denied the defendant's motion. The defendant appeals.

¶ 5 On appeal, the defendant contends that the circuit court's restitution order did not

comply with section 5-5-6(d) of the Unified Code of Corrections (Unified Code) (730 ILCS 5/5-5-6(d) (West 2012)) because it was based on a dismissed charge and was not contemplated as part of his plea agreement. Therefore, the defendant argues that the restitution order is void and must be vacated. In response, the State argues that the restitution order complied with section 5-5-6(d) of the Unified Code because it was "clearly" contemplated as part of the plea agreement. Therefore, the State argues that the order is voidable as opposed to void and that the defendant has forfeited any challenge to the restitution order because he failed to preserve the issue for appeal.

¶ 6 The determination of whether the circuit court's restitution order was authorized by section 5-5-6(d) is subject to *de novo* review. *People v. Felton*, 385 Ill. App. 3d 802, at 805 (2008). Section 5-5-6(d) of the Unified Code (730 ILCS 5/5-5-6(d) (West 2012)) provides as follows with regard to restitution based on dismissed charges:

"In instances where a defendant has more than one criminal charge pending against him in a single case, or more than one case, and the defendant stands convicted of one of more charges, a plea agreement negotiated by the State's Attorney and the defendants may require the defendant to make restitution to victims of charges that have been dismissed or which it is contemplated will be dismissed under the terms of the plea agreement, and under the agreement, the court may impose a sentence of restitution on the charge or charges of which the defendant has been convicted that would require the defendant to make restitution to victims of other offenses as provided in the plea agreement."

¶ 7 Accordingly, pursuant to the statute, the court is only authorized to order restitution related to a dismissed charge where a defendant's plea agreement provided for such restitution.

¶ 8 However, after carefully reviewing the record, we find that the restitution was not based on the dismissed charged of aggravated battery and was instead based on the home-invasion charge as Griffith's injuries were sustained as a result of the home invasion. The defendant entered into an open guilty plea for the home-invasion charge, and the circuit court had authority to order him to pay restitution for any injuries that resulted from that offense. See 730 ILCS 5/5-5-6 (West 2012) ("In all convictions for offenses in violation of the Criminal Code of 1961 or the Criminal Code of 2012 \*\*\* in which the person received any injury to his or her person or damage to his or her real or personal property as a result of the criminal act of the defendant, the court shall order restitution \*\*\*."). Accordingly, we conclude that the circuit court had authority to enter the restitution order under section 5-5-6 of the Unified Code (730 ILCS 5/5-5-6 (West 2012)). Thus, the restitution order is voidable and the defendant has forfeited any challenge to the order because he failed to preserve the issue for appeal. See *People v. Harris*, 319 Ill. App. 3d 534, 536 (2001) (voidable claims can be forfeited by a defendant).

¶ 9 For the foregoing reasons, we affirm the restitution order entered by the circuit court.

¶ 10 Affirmed.

¶ 11 PRESIDING JUSTICE CATES, specially concurring.

¶ 12 I concur with the majority affirming the order of restitution. Whether the defendant entered into an open plea, as he contends, or whether the restitution was "contemplated," as the State contends, is irrelevant in this case. The sentencing court ordered restitution on the charge of home invasion and section 5-5-6(d) did not apply. When the defendant pled guilty to the offense of home invasion, the sentencing court had statutory authority pursuant to section 5-5-6 to order restitution on the charge of home invasion, as Kathryn Griffith was injured during that criminal offense. If the sentencing court erred in the imposition of that sentence, which it did not, then the order would be voidable, not void. Furthermore, and more importantly, the defendant forfeited any claim of error regarding the imposition of the amount of restitution because he failed to preserve the issue for review.