2016 IL App (2d) 130599-U
No. 2-13-0599
Order filed March 16, 2016

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. ROBERT NORTON, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Winnebago County. No. 11-CF-1763 Honorable Gary V. Pumilia, Judge, Presiding.

JUSTICE McLAREN delivered the judgment of the court.
Justices Jorgensen and Spence concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court's restitution award both was based on insufficiently precise evidence of the victim's damages and lacked a payment schedule as required; thus, we vacate the award and remand for a new restitution hearing.

¶ 2 Defendant, Robert Norton, appeals, challenging the restitution order entered as part of the sentence imposed for his conviction of aggravated domestic battery (720 ILCS 5/12-3.3(a) (West 2010)). We previously dismissed his appeal as untimely. Now, pursuant to a supreme court supervisory order, we address the appeal on the merits. We conclude that the evidence was insufficient to support the imposition of a $150,000 restitution order and that, in any event, the

order was incomplete because it lacked a payment schedule. We therefore vacate the restitution order and remand for imposition of a new order consistent with this decision.

¶ 3 I. BACKGROUND

¶ 4 Defendant, who had a bench trial, was convicted of two counts of aggravated domestic battery (720 ILCS 5/12-3.3(a) (West 2010)). His sentencing hearing took place on May 11, 2012. At the hearing, the victim, Lisa M., testified about the treatment she received to repair the damage to her jaw, to which defendant's attack had caused multiple fractures. She said that she had had four surgeries and that she expected to have more. The State asked, "Do you have an idea of how much your medical bills have been so far?" Lisa responded, "Well, the first one was [$]150,000, and that was pretty major. I think probably all of them are around that area." The State asked Lisa if she knew how much the cost was estimated to be of dental surgery that she expected to have after her jaw surgeries were complete; Lisa said that she had been told that it would cost $22,000. After asking her about the dental surgery, the State asked whether she had insurance. She said, "No."

¶ 5 The State argued for a sentence at the more severe end of the available range, asserting, among other things, "[Lisa] has had four surgeries, she's on to her fifth" and that "[s]he's $622,000 in debt in medical bills alone because of [defendant's] actions." The court imposed a maximum sentence of imprisonment and ordered defendant to pay $150,000 in restitution to Lisa.

¶ 6 At the June 29, 2012, hearing on the motion to reconsider, the court allowed defendant personally to raise an objection to the amount of restitution. He asserted that Lisa "ha[d] a medical card" and that the money for her treatment "didn't come out of her pocket." The court stated that it understood her to have been billed that much. The court denied the motion that day.

¶ 7 Defendant then filed at least one motion seeking a new trial on the basis that counsel had been ineffective, and defendant filed a notice of appeal immediately upon the court's denial of the motion. We dismissed the appeal as untimely (*People v. Norton*, 2015 IL App (2d) 130599, ¶¶ 7-8), but recognized that the result was unsatisfactory in that that the court had effectively misled defendant as to when his appeal should have been filed (*Norton*, 2015 IL App (2d) 130599, ¶ 9). The supreme court by supervisory order has now directed that we decide the appeal on its merits.

¶ 8 II. ANALYSIS

¶ 9 On appeal, defendant asserts first that "the State presented no evidence that Lisa *** actually incurred any out-of-pocket expenses," so that the court erred in imposing the $150,000 restitution award. He also argues that the court erred in entering the order without considering defendant's ability to pay or including a payment schedule. He asks us to remand the matter for a new hearing on restitution. The State argues that the evidence was sufficient to sustain the restitution award. However, it agrees that a restitution award that lacks a payment schedule is incomplete and therefore agrees that we must remand the matter, but only for completion of the order.

¶ 10 We hold that, given the vagueness of Lisa's statement of the medical-bill amount, the restitution award was arbitrary as a measure of Lisa's out-of-pocket expenses, losses, damages, or injuries under the restitution statute. We therefore vacate the award and remand the cause for a new hearing on the award.

¶ 11 We will not alter a trial court's determination on restitution absent an abuse of discretion. *E.g.*, *People v. Cameron*, 2012 IL App (3d) 110020, ¶ 35. Furthermore, the rules of evidence are relaxed for that determination:

> "[T]he rules of evidence that govern the guilt or innocence phase of a trial are not applicable at sentencing. Instead, a sentencing judge has broad discretionary power to consider various sources and types of information so that he can make a sentencing determination within the parameters outlined by the legislature. [Citation.] Evidence is admissible in a sentencing hearing provided the proffered evidence is relevant and reliable." *People v. Williams*, 149 Ill. 2d 467, 490 (1992).

Nevertheless, a restitution award must be consistent with the applicable statutory provision, and we review *de novo* whether the award is indeed consistent. *Cameron*, 2012 IL App (3d) 110020, ¶ 35. Section 5-5-6(b) of the Unified Code of Corrections (Code) limits restitution awards to net "actual out-of-pocket expenses, losses, damages, and injuries suffered by the victim named in the charge and any other victims who may also have suffered out-of-pocket expenses, losses, damages, and injuries proximately caused by the same criminal conduct of the defendant, and insurance carriers who have indemnified the named victim or other victims for the out-of-pocket expenses, losses, damages, or injuries." 730 ILCS 5/5-5-6(b) (West 2010).

¶ 12 Despite the relaxed standards of evidence and deferential review, a restitution award still must be supported by reliable evidence. *Williams*, 149 Ill. 2d 490. The State failed to present such evidence here. The State asked Lisa if she had "an idea of how much [her] medical bills [had] been," and Lisa responded with the figure of $150,000. In other words, the State asked a question that allowed a ballpark answer and received in answer what was almost certainly a round-number figure. Beyond that, the questioning did not clarify whether the $150,000 figure was the amount she was billed or was actually an out of pocket expense. Part of the interpretive problem is that, although Lisa denied having insurance, she was never asked if she was a Medicaid recipient, that program being classifiable as medical insurance only in a loose sense.

Given the limitations of Lisa's testimony, treating the figure of $150,000 as the measure of her out-of-pocket expenses, losses, damages, or injuries is arbitrary.

¶ 13 Our decision here is consonant with existing cases. In *People v. Guajardo*, 262 Ill. App. 3d 747, 770-71 (1994), a first district panel held that the trial court erred in awarding $750 for counseling expenses when it had made no attempt to calculate the costs the victim would incur. In *People v. Sharp*, 185 Ill. App. 3d 340, 343, 346-47 (1989), a fifth district panel held that general testimony relating to lost wages of a dead victim and possible lost wages of his surviving spouse was insufficient to support a restitution award of $50,000. Both courts make clear that an attempt to quantify the loss is necessary.

¶ 14 The State responds that a victim's testimony is enough to prove expenses. We agree as a general matter, but not that the testimony here was sufficient. The State's questions were not formulated to, nor did they actually, elicit reasonably relevant and material answers. To ask a person if he or she has "an idea" of a cost invites the most general of estimates. In response to that question, her response of $150,000 could without deceptiveness mean something as vague as "more than $100,000 and less than $200,000." Reliance on the statement was not a real attempt at quantification. The strong suggestions in the evidence—in the form of testimony concerning other surgeries—that $150,000 is an underestimate of the compensable injury to Lisa do not alter this conclusion. Indeed, that the court included the cost of only one of Lisa's surgeries in the restitution award is a mark of the award's lack of a serious attempt at quantification.[1]

[1] We note that, of course, the court cannot increase defendant's sentence on remand even if the facts prove to support a higher award. See 730 ILCS 5/5-5-4(a) (West 2010) (a sentence that a reviewing court has set aside may be increased on remand only if the increase is based on "conduct on the part of the defendant occurring after the original sentencing").

¶ 15 Because the court will likely impose a new restitution award on remand, we address defendant's argument that the court should not have awarded restitution to Lisa for medical bills that did not produce out-of-pocket expenses for her. To the extent that defendant is simply arguing that the court should not compensate Lisa for care paid for by another, he is obviously correct. However, to the extent that defendant is suggesting that Lisa should not be compensated for debt—particularly uncollectable debt—that she was forced to incur as the result of his actions, the argument goes against both the spirit and the words of the restitution provision. As we noted, a victim may be compensated for "actual out-of-pocket expenses, losses, damages, and injuries." 730 ILCS 5/5-5-6(b) (West 2010). The adjective "out-of-pocket" can modify only the noun "expenses." Although it might make sense to talk about an *uncompensated* loss or injury or *uncompensated* damages, one would not call these "out-of-pocket." Reading only "expenses" as modified by "out-of-pocket" is consistent with the purpose of the restitution provision: "to make victims whole and to make defendants pay any costs incurred as a result of their actions." *People v. Harris*, 319 Ill. App. 3d 534, 536 (2001). It would be a strange form of economic discrimination to allow compensation only where a victim has been able to pay to mitigate the harms of a crime. We thus conclude that the court may properly award restitution to Lisa for medical care for which she was billed but has not paid.

¶ 16 We note that the parties agree that the restitution order was defective in that it failed to set a schedule for defendant's payment of the award. We agree that, without such a schedule, the restitution order was fatally incomplete for failure to comply with section 5-5-6(f) of the Code (730 ILCS 5/5–5–6(f) (West 2010)), which requires consideration of defendant's ability to pay and a payment schedule. See, *e.g.*, *In re Estate of Yucis*, 382 Ill. App. 3d 1062, 1067 (2008). Thus, on remand the court must include such a schedule with any restitution order that it enters.

¶ 17 III. CONCLUSION

¶ 18 For the reasons stated, we vacate the restitution order and remand the cause for further proceedings consistent with this decision.

¶ 19 Vacated and remanded with directions.