

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
WARREN COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2011-12-128
	:	<u>OPINION</u>
- vs -	:	7/16/2012
	:	
EARL DEAN HIPSHER,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM WARREN COUNTY COURT OF COMMON PLEAS
Case No. 11CR27636

David P. Fornshell, Warren County Prosecuting Attorney, Michael Greer, 500 Justice Drive, Lebanon, Ohio 45036, for plaintiff-appellee

Ronald E. Seibel, 2750 Ashwood Drive, Loveland, Ohio 45140, for defendant-appellant

RINGLAND, J.

{¶ 1} Defendant-appellant, Earl Dean Hipsher, appeals the order of restitution imposed by the Warren County Court of Common Pleas in his conviction and sentence for burglary and receiving stolen property.

{¶ 2} Appellant was convicted of burglary, a fourth-degree felony, and receiving stolen property, a first-degree misdemeanor, relating to acts committed at the residence of Stacie Webb. A sentencing hearing was held October 19, 2011, and a restitution hearing

was scheduled for November 10, 2011. At the restitution hearing, Webb testified that the items stolen from her residence included 24 books from the 1700s, tools, clothing, an assortment of real and costume jewelry, "fine colored glass items," a jug half-full of coins, and a cell phone. Webb estimated the value of the stolen property was \$6,000, based upon her research on the electronic auction website, eBay. At the conclusion of the hearing, the trial court ordered restitution in the amount of \$6,000. An amended sentencing entry containing the restitution order was filed November 17, 2011.

{¶ 3} Appellant appeals the trial court's order of restitution, raising the following two assignments of error:

{¶ 4} Assignment of Error No. 1:

{¶ 5} THE TRIAL COURT ERRED WHEN IT ORDERED RESTITUTION IN EXCESS OF LESS THAN \$500.

{¶ 6} Assignment of Error No. 2:

{¶ 7} THE TRIAL COURT ERRED WHEN IT ORDERED [APPELLANT] TO PAY RESTITUTION IN THE AMOUNT OF \$6,000.00 WITHOUT COMPETENT, CREDIBLE EVIDENCE.

{¶ 8} In his first assignment of error, appellant contends that, because the only charge relating to unlawful possession of the victim's property was a misdemeanor, the trial court could only order restitution in an amount less than \$500.

{¶ 9} A misdemeanor conviction of receiving stolen property involves the possession of stolen property with a value of less than \$500. See former R.C. 2913.51(C). As this court has previously held, when a defendant is convicted of the misdemeanor charge of receiving stolen property in violation of former R.C. 2913.51(A), "the amount of restitution to be paid to the victim of the offense must be less than \$500.00." *State v. Stiles*, 12th Dist. No. CA2011-01-003, 2011-Ohio-4173, ¶ 7; *State v. Henry*, 12th Dist. No. CA2009-12-081, 2010-Ohio-

4571, ¶ 22. However, the case at bar is distinguishable, as appellant was convicted of both a first-degree misdemeanor and a fourth-degree felony.

{¶ 10} R.C. 2929.18(A)(1) permits a trial court to order a convicted felon to make restitution to the victim of the offender's crime in an amount based on the victim's economic loss. See *State v. Coldiron*, 12th Dist. No. CA2008-06-062, 2009-Ohio-2105, ¶ 20. "Economic loss" is defined as "any economic detriment suffered by a victim as a direct and proximate result of the commission of an offense and includes * * * any property loss * * * incurred as a result of the commission of an offense." R.C. 2929.01(L).

{¶ 11} In this case, appellant pled guilty to the fourth-degree felony of burglary in violation of R.C. 2911.12(A)(4). As a direct and proximate result of the burglary, Webb suffered the loss of her property including books, tools, clothing, jewelry, and housewares. Therefore, R.C. 2929.18 is applicable, and the trial court did not err in imposing a financial sanction against appellant exceeding \$500. Accordingly, appellant's first assignment of error is overruled.

{¶ 12} In his second assignment of error, appellant argues that the trial court erred in ordering restitution in the amount of \$6,000 without competent, credible evidence. Specifically, appellant contends that Webb's testimony regarding the value of items stolen, without documentary evidence, did not reach the degree of certainty necessary for an order of restitution. Appellant further argues that the trial court's restitution order was arbitrary, as it lacked an itemization of the restitution or an explanation as to how the trial court arrived at a \$6,000 amount.

{¶ 13} "Prior to imposing a restitution order, a trial court must determine the amount of restitution to a reasonable degree of certainty, ensuring that the amount is supported by competent, credible evidence." *Coldiron*, 2009-Ohio-2105 at ¶ 21; *State v. Foster*, 12th Dist. No. CA2005-09-415, 2006-Ohio-4830, ¶ 8. The restitution ordered must "bear a reasonable

relationship to the actual loss suffered by the victim." *State v. Stamper*, 12th Dist. No. CA2009-04-115, 2010-Ohio-1939, ¶ 17. A restitution order that does not bear a reasonable relationship to the actual loss suffered by the victim is an abuse of a trial court's discretion. *Id.* "An abuse of discretion is more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Id.*; *State v. Jackson*, 107 Ohio St.3d 53, 89, 2005-Ohio-5981, ¶ 28.

{¶ 14} R.C. 2929.18(A)(1) provides that, when imposing restitution, "the court may base the amount of restitution it orders on an amount recommended by the victim, the offender, a presentence investigation report, estimates or receipts indicating the cost of repairing or replacing property, and other information[.] * * *" In this case, the trial court relied on the testimony of the victim to determine the value of the property stolen. Webb testified that the items stolen were worth approximately \$6,000 based on her research. As the trial court is in the best position to judge the credibility of witnesses, it did not abuse its discretion in finding a restitution amount of \$6,000 to be supported by competent and credible evidence. See *State v. Creech*, 12th Dist. No. CA2005-11-488, 2006-Ohio-3896. ¶ 3. Therefore, appellant's second assignment of error is overruled.

{¶ 15} Judgment affirmed.

POWELL, P.J., concurs.

PIPER, J., concurs separately.

PIPER, J., concurring separately.

{¶ 16} I concur with the judgment, but not in the rationale as applied. The amount of restitution to be paid to a victim of a misdemeanor offense should not be limited to \$499.99. Our current case does not need to be distinguished from our past decisions, but rather, our

past decisions need to be corrected.

{¶ 17} Pursuant to the statutes governing economic restitution, a victim is entitled to full restitution regardless of whether or not the crime charged is a misdemeanor or felony. The degree of the offense should have no bearing on the responsibility of a defendant to pay restitution for his criminal conduct and the economic harm caused a victim. *See State v. Stiles*, 12th Dist. No. CA2001-01-003, 2011-Ohio-4173 (Piper, J., dissenting).

{¶ 18} In *Stiles*, I dissented because the majority opinion reversed the trial court's restitution order of \$3,833 and limited recovery to \$499.99 because the crime for which the defendant pled guilty was a misdemeanor theft. I reasoned that there is clearly no wording in the restitution statute that limits the victim's economic loss to \$499.99. Instead, the trial court is limited only to restitution arising from the *actual damages* experienced by the victim for the particular offense. Any holding to the contrary not only limits a trial court's ability to make the victim whole, but also stands in contradiction to the plain language of the restitution statute.

{¶ 19} While the victim in this case was made whole, I write separately to renew my opposition to limiting a victim's restitution to \$499.99 in misdemeanor theft cases.