

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 0479

September Term, 2014

JAYSON EDWARDS

v.

STATE OF MARYLAND

Woodward,
Friedman,
Thieme, Raymond G., Jr.
(Retired, Specially Assigned),

JJ.

Opinion by Thieme, J.

Filed: October 20, 2015

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

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Following a jury trial in the Circuit Court for Prince George’s County, Jayson Edwards, appellant, was convicted of attempted robbery, second degree assault, and attempted theft. As part of his sentence, the court ordered appellant to pay \$7,710 in restitution to Adeola Adeduro. Appellant filed a timely appeal and challenges only the court’s determination as to restitution.

QUESTION PRESENTED

Appellant presents one question for our review:

Did the lower court abuse its discretion in ordering Appellant to pay \$7,710 in restitution?

As this issue is not preserved, however, we will affirm the judgment of the circuit court.

FACTS AND PROCEDURAL HISTORY

The underlying facts of this case are not at issue on appeal, but we provide them here for contextual purposes. On the evening of May 22, 2013, Adeola Adeduro was walking around his neighborhood in Hyattsville. Appellant, one of his neighbors, approached him and asked if Mr. Adeduro could make change for three \$20 bills. Mr. Adeduro, believing the bills to be counterfeit, refused. Appellant became visibly agitated and started yelling, but Mr. Adeduro turned to walk away and was hit in the back of the head, losing consciousness. When he regained consciousness, Mr. Adeduro discovered that he was missing his wallet, which contained some cash, and his cell phone. Additionally, Mr. Adeduro sustained severe injury to his jaw, which required multiple surgeries.

Appellant was indicted for attempted robbery, first degree assault, second degree assault, and attempted theft of property valued under \$1,000. Following trial from January 7-8, 2014, a jury convicted appellant of attempted robbery, second degree assault, and attempted theft of property valued under \$1,000. On March 19, 2014, the court conducted a sentencing hearing. The parties agreed with the court's determination that the convictions for second degree assault and attempted theft merged for sentencing purposes with the attempted robbery conviction. The court sentenced appellant to a term of imprisonment of fifteen years, with all but three years suspended, followed by a five year period of probation. Additionally, the court ordered appellant to pay \$7,710 in restitution to Mr. Adeduro. This timely appeal followed.

DISCUSSION

Appellant contends that the court abused its discretion in ordering him to pay restitution in the amount of \$7,710 to Mr. Adeduro because appellant is unable to pay that amount. Appellant avers that the court even remarked that he may not be able to pay the restitution, and part of the court's determination for restitution, pursuant to Maryland Code (2001, 2008 Repl. Vol.), Criminal Procedure Article ("CPA"), § 11-605(a)(1), is an investigation into the defendant's ability to pay.

CPA § 11-603(a)(2) permits a court to enter a judgment for restitution where a victim, as a direct result of the crime, suffered medical or dental expenses, direct out-of-pocket losses, loss of earnings, or rehabilitation expenses. In this case, the State requested

restitution in the amount of \$7,710 for Mr. Adeduro, who underwent extensive surgical procedures to repair his jaw, as well as other therapy. Appellant does not contest the court’s decision to award restitution. Rather, on appeal appellant challenges the amount of restitution.

During the sentencing phase, appellant spoke as follows regarding the State’s request for restitution:

Regarding the restitution, **we’re not arguing against that. We agree that that is correct.** We believe the victim is entitled to the restitution. The State has submitted the receipts and the information, the backup as to why that is the correct amount, and **so we’re not, we’re not opposing any of the restitution. I think that they are correct.**

(Emphasis added). Accordingly, appellant did not simply fail to object to the court’s determination as to restitution, but appellant actively agreed with the State’s request for and the amount of restitution. Appellant’s behavior goes beyond lack of preservation of the issue and enters into affirmative waiver.

Appellant contends that this issue is properly before this Court pursuant to Rule 8-131(a), which states, in part: “Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court” Appellant argues that the court implicitly made a determination as to his inability to pay restitution with the following remarks:

And [the restitution amount is] to be paid over the course of probation. And I’m not sure he’s going to ever have the ability to pay that because his history shows he has not really been successfully employed any long period of time, but I will order that, his restitution.

We are not persuaded that the court’s passing remark about appellant’s job history is to be construed as a determination that appellant lacks the ability to pay the restitution amount. Moreover, the court’s remarks do not overcome the fact that appellant explicitly agreed with the State’s request for and the amount of restitution. Appellant ought not be permitted to agree wholeheartedly with the State’s request for restitution at trial and then challenge it for the first time on appeal. *See Olson v. State*, 208 Md. App. 309, 365 (2012) (citing cases) (noting that defendant who invites or creates an error should not obtain a benefit from the error).

In response to the court’s remarks, appellant could have objected or taken the court’s invitation to analyze appellant’s ability to pay restitution. This, however, he failed to do. *See Reiger v. State*, 170 Md. App. 693, 701-02 (2006) (remarking that defendant had ample opportunity to respond to court’s discussion of sentencing factors and failure to object constituted waiver of issue on appeal). Accordingly, we are persuaded that this issue is not preserved for our review. *See also McDaniel v. State*, 205 Md. App. 551, 566-67 (2012) (holding that defendant did not preserve challenge to court’s determination as to ability to pay restitution because defendant did not raise this issue with the trial court). Stated succinctly, “[w]hen a court orders a defendant to make restitution to a crime victim, and the defendant believes that the court either fails to inquire into his ability to pay or errs in determining his ability to pay, **the defendant must make a timely objection to the order,**

else the issue is waived.” *Id.* at 566 (emphasis added) (citing *Reiger, supra*, 170 Md. App. at 699-701).

**JUDGMENT OF THE CIRCUIT
COURT FOR PRINCE GEORGE’S
COUNTY AFFIRMED. COSTS TO BE
PAID BY APPELLANT.**