

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

AMOS KNOLL,

Defendant-Appellant.

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UNPUBLISHED

November 22, 1996

No. 172776

LC No. 89-90728 FH

Before: Reilly, P.J., and Sawyer and W.E. Collette,\* JJ.

PER CURIAM.

Defendant was convicted by a jury of fraudulent use of a building contract fund, MCL 570.152; MSA 26.332. He was placed on three years of probation and, in the original order of probation, was ordered to pay \$54,590.57 restitution and “any further restitution, if any to be determined by the Court.” He appeals as of right. We affirm the conviction, but remand for a restitution hearing.

In February 1987, the complainant gave defendant, a general contractor, a \$90,000 check that the complainant testified was intended as a down payment on the construction of a new home. The complainant also paid defendant a \$5,000 retainer and \$10,000 for defendant’s interest in the lot on which the home was built. Construction on the home began. Subsequently, the complainant was notified that a lien had been placed on the house by Adobe Walls, one of the subcontractors, because defendant had not paid it. The complainant contacted the police. After an investigation was conducted, defendant was charged with fraudulent use of a building contract fund.

Defendant claimed that the money was given to him by the complainant as a loan. Defendant admitted using some of the money for an investment, but claimed that he did so with the complainant’s consent. The jury’s verdict indicates that it rejected defendant’s explanation.

Defendant first argues that the trial court erred in refusing to give a jury instruction that defendant requested. We disagree. The instruction requested by defendant was: “If you find from the evidence that the monies received by the defendant from [the complainant] was a loan and not a deposit, you

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\* Circuit judge, sitting on the Court of Appeals by assignment.

must find no intent to defraud and you must find the defendant not guilty.” Although the trial court refused to give the specific instruction requested by defendant, the court’s instructions repeatedly indicated that an intent to defraud was required and that a contractor is considered a trustee of funds “paid to him for building construction purposes.” Consequently, considered in their totality, the instructions sufficiently advised the jury of the issues and protected defendant’s rights. *People v Head*, 211 Mich App 205, 210-211; 535 NW2d 563 (1995). We are not persuaded that the jury’s questions to the court during deliberations indicate the necessity of defendant’s requested instruction.

Defendant next argues that the trial court erred in failing to sua sponte instruct the jury on the law regarding the interpretation of ambiguous writings. Again, we disagree. MCL 768.29; MSA 28.1052 dictates that “[t]he failure of the court to instruct on any point of law shall not be ground for setting aside the verdict of the jury unless such instruction is requested by the accused.” Because defendant did not request an instruction on the interpretation of ambiguous writings, the lack of such an instruction cannot be the basis for overturning the jury’s verdict. *People v Hendricks*, 446 Mich 435, 440-441; 521 NW2d 546 (1994).

Finally, defendant argues that an amended restitution order was excessive because it required defendant to pay more in restitution than defendant received from the complainant. Because the record does not contain sufficient facts for us to evaluate this claim, we order the court to conduct a restitution hearing to determine the amount of the complainant’s loss.

In this case, the parties indicate<sup>1</sup> that defendant was sentenced on January 10, 1994 and at that time, the court ordered that defendant pay \$54,590.57 as restitution. The order of probation, filed January 25, 1994, states in pertinent part:

Respondent shall pay restitution of \$54,590.57. Respondent shall pay \$10,000 forthwith and shall pay the balance of \$44,590.57 by September 9, 1994 or serve six (6) months in Oakland County Jail. Respondent shall pay any further restitution, if any, to be determined by the Court.

Although the reason for the court’s determination of the \$54,590.57 amount is unclear, the amount is consistent with the balance shown on a document titled “DISBURSEMENT AGREEMENT.” This document purports to show disbursements (e.g. permit fees, blueprints, survey and stake out, excavation) totaling \$50,409.43 from the \$105,000 deposit from the complainant, leaving a balance of \$54,590.51.

The claim of appeal was filed on February 18, 1994. On April 8, 1994, at a hearing on defendant’s motion for a new trial, the prosecutor asked the court for a restitution hearing. The prosecutor explained that at sentencing, the court ordered that further restitution was to be determined, that there was a determination by the probation department that defendant should pay “certain additional monies”, but that defendant did not agree to that. The Court agreed to hold a restitution hearing which occurred on April 29, 1994.

During the course of the restitution hearing, it became apparent that defense counsel and the court disagreed about the purpose of the hearing. Representatives of Adobe Walls and Buchman Brothers, two companies that worked on the construction of complainant's home, testified at the hearing about the amounts that they were owed by defendant. Defense counsel conceded that the amount owed to Adobe Walls and Buchman Brothers was not substantially contradicted and totaled \$37,459. Defense counsel also conceded that defendant's corporation received a total of \$105,000 from the complainant. Defense counsel asserted that the issues were (1) who, the complainant or defendant, should be responsible for payment to Adobe Walls and Buchman Brothers, and (2) how much money defendant is entitled to subtract from the \$105,000 received from the complainant for the expenses defendant paid for the partial construction of the complainant's home. When defense counsel attempted to introduce evidence on those issues, a lengthy discussion ensued in which it became apparent that the court did not share defense counsel's view of the purpose of the hearing. The following excerpts illustrate the disagreement:

[Defense counsel]: Isn't the purpose of today's hearing to determine the amount?

THE COURT: No, the purpose of today's hearing as I indicated is to determine if these gentlemen have been paid, and if not, why not; otherwise, if they had been paid, we wouldn't be here; and they both indicated on the stand, they haven't been paid a penny.

[Defense counsel]: The first [issue] is one of responsibility and particularly responsibility of [sic] how much my client owes as a total.

THE COURT: Well, I think we just ended that. The jury determined that he owes the entire amount and that was placed before them to make a determination and that's the amount. Period.

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[Defense counsel]: I think we can agree with all due respect that if he's guilty of a penny, then a penny is to be paid back. If he's guilty of a dollar, then a dollar is to be paid back. The question here today is the amount.

THE COURT: No, it's not. The hearing here is to determine if the gentlemen have been paid, and if the gentlemen have not been paid and why not that's the two questions; and the gentlemen have testified that they have not been paid.

Defense counsel's direct examination of defendant was focused on showing that defendant should not be ordered to pay more in restitution than he allegedly wrongfully retained from the complainant, e.g. that defendant was entitled to credits for the amounts he expended and for a portion of profit on the partial construction of the complainant's home. Defendant testified that of the \$105,000 received from the complainant, approximately \$55,000 "actual cash outlayed" [sic] was attributable to payments for "the architecture . . . engineering . . . part of the lumber, excavation, sewer, water,

permits, the commission . . . .” Defendant also testified that he works on a thirty percent mark up on the work and supplies. Thus, according to defendant, the profit to which he would have been entitled from the work that was completed was thirty percent of approximately \$175,000 worth of work, or \$52,500.

At the conclusion of the hearing, the court concluded that defendant must pay \$37,459 total in restitution to Adobe Walls and Buchman Brothers. When defense counsel asked if that amount was the total amount of restitution to be paid, the prosecutor asserted the amount to the Adobe Walls and Buchman Brothers should be in addition to the “some \$54,000” owed to the complainant. Despite the fact that the complainant did not appear at the hearing to testify about his losses, the court agreed with the prosecutor.

An amended order of restitution referring to the hearing on April 29, 1994, stated that defendant owed restitution to Buchman Brothers and Adobe Walls in the amounts of \$13,169 and \$24,290, respectively and that the order did not “supersede any other Orders issued in the case regarding restitution.” This order, signed by Judge Kern, rather than Judge Balkwill, who presided at the hearing, was not filed until July 1, 1994. In the meantime, on June 7, 1994, Judge Tyner entered an order amending the order of probation. The amendment stated:

The amount of restitution in this case has been re-determined.

Respondent shall pay additional restitution in the amount of \$38,409 by June 9, 1995; making total restitution in this case in the amount of \$92,999.57.

The circuit court docket entries do not indicate that a hearing was held before this amendment was entered.

The last amendment of the order of probation contained in the record before us was entered July 11, 1995, by Judge Tyner following a probation violation hearing on January 6, 1995. This amendment states as follows:

At a Probation Violation Hearing on January 6, 1995, Judge Tyner ordered:

1. That the total restitution is \$92,999.57.
2. That the defendant shall pay \$7,131 towards restitution forthwith.
3. That including the \$7,131, the defendant shall be credited with \$54,590.57 paid toward restitution.
4. That the Reimbursement Division shall hold all restitution until the Court orders disbursement.
5. All other conditions of probation shall remain in effect.

We agree with defendant that the amendments to the order of probation appear to order restitution in excess of the total loss suffered by the complainant, Adobe Walls, and Buchman Brothers.<sup>2</sup> With respect to restitution for the complainant, the prosecution did not contend that defendant must repay the complainant the entire \$105,000 deposit. Instead, the prosecution appears to have taken the position that restitution to the complainant should be the amount of the deposit less the expenses incurred and paid for the partial construction. When defendant was ordered to pay Adobe Walls and Buchman Brothers directly, the amount he was ordered to pay should have been treated in the same manner as the other expenses incurred in the construction, e.g. the amount should have been subtracted from the amount he is required to reimburse the complainant. If the complainant is reimbursed for all the money that he gave defendant that was not actually spent by defendant on the construction of the home, and then defendant is also ordered to pay additional expenses toward the house directly, i.e. to Adobe Walls and Buchman Brothers, then the complainant received the benefit of the subcontractors' services without paying for them.

A prerequisite to adequate appellate review of restitution orders is disclosure of the purpose of the payments and the manner in which the amount of restitution has been determined. *People v Pettit*, 88 Mich App 203; 276 NW2d 878 (1979). In the present case, the record does not indicate how the complainant's loss was calculated. Obviously, the complainant is not entitled to restitution of the full \$105,000 paid to defendant inasmuch as the complainant derived some benefit from the purchase of defendant's interest in the land and defendant and the subcontractors' services in the partial construction of the house. However, because of the trial court's view of the limited scope of the restitution hearing on April 29, 1994 and the complainant's failure to appear, the record does not establish the extent of the complainant's loss. From the record before us, it appears that defendant was ordered to pay Adobe Walls and Buchman Brothers for the work done on plaintiff's home, but was not given credit for that amount against the amount owed to the complainant. Accordingly, we conclude that, before the amount of restitution can be reviewed on appeal, a full restitution hearing is necessary.

The conviction is affirmed and the case is remanded for a restitution hearing. Defendant shall cause a transcript of the hearing to be prepared and filed within twenty-one days after completion of the proceedings. Defendant shall also file with the Clerk of this court copies of all orders entered in this cause on remand. We retain jurisdiction.

/s/ Maureen Pulte Reilly

/s/ David H. Sawyer

/s/ William E. Collette

<sup>1</sup> The circuit court docket entries do not indicate that a hearing was held on January 10, 1994, and a transcript of the proceeding is not part of the record.

<sup>2</sup> Defendant does not dispute that the court had the authority to order restitution to Buchman Brothers and Adobe Walls. See MCL 780.766(1), (2); MSA 28.1287(765)(1), (2).