

ORIGINAL

IN THE SUPREME COURT OF OHIO

Case No.

12-0302

STATE OF OHIO

:

Appellee

:

-vs-

:

DANIEL LALAIN

:

Appellant

:

On Appeal from the  
Cuyahoga County Court  
of Appeals, Eighth  
Appellate District Court  
of Appeals  
CA: 95857

**NOTICE OF APPELLANT DANIEL LALAIN OF CERTIFICATION OF CONFLICT  
BY THE EIGHTH DISTRICT COURT OF APPEALS**

COUNSEL FOR APPELLEE:

WILLIAM D. MASON, ESQ.  
Cuyahoga County Prosecutor  
Justice Center - 8th Floor  
1200 Ontario Street  
Cleveland, Ohio 44113  
(216) 443-7730

COUNSEL FOR APPELLANT:

JOHN HILDEBRAND, SR. (0025124)  
Attorney at Law  
21430 Lorain Road  
Fairview Park, Ohio 44126  
(440) 333-3100

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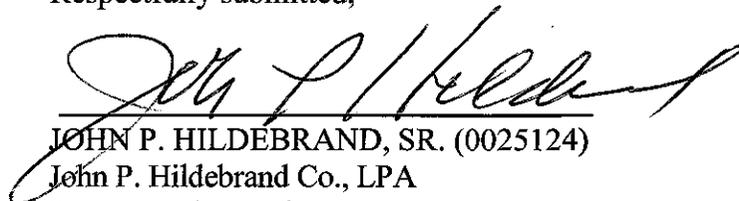
Appellant's Notice of Conflict Certification

Pursuant to Supreme Court Rule of Practice IV, Sec. 1, Appellant Daniel Lalain hereby gives notice that, on January 23, 2012, the Eight District (Cuyahoga County) Court of Appeals certified that its decision in the captioned matter, *State v. Lalain*, 8<sup>th</sup> Dist. No. 95857, 2011-Ohio-4813, is in conflict with the decision in Case No. 10-CA-61 of the Second District (Clark County) Court of Appeals in *State v. Ratliff*, 194 Ohio App.3d 202, 2011-Ohio-2313, 955 N.E.2d 425 (2<sup>nd</sup> Dist.), on the following question:

Whether, despite the defendant's failure to object, it is error for the trial court to order a defendant to pay an amount of restitution in the absence of a specific plea agreement and without a hearing or evidence substantiating the economic loss claimed by the plaintiff?

Copies of the Eighth District order of certification in the captioned matter, the opinion of the Eighth District Court of Appeals in the captioned matter, and the opinion of the Second District Court of Appeals in *Ratliff* are attached hereto.

Respectfully submitted,



JOHN P. HILDEBRAND, SR. (0025124)

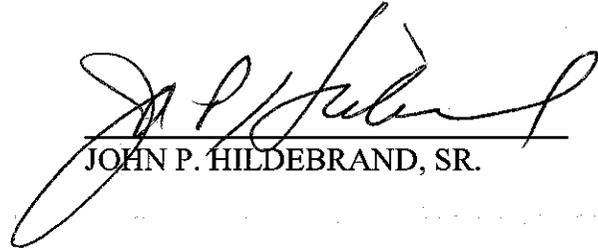
John P. Hildebrand Co., LPA

21430 Lorain Road

Fairview Park, Ohio 44126; (440) 333-3100

**SERVICE**

I hereby certify that one true copy of the foregoing NOTICE OF APPELLANT DANIEL LALAIN OF CERTIFICATION OF CONFLICT BY THE EIGHTH DISTRICT COURT OF APPEALS was served via U.S. mail, postage pre-paid, on William D. Mason, Cuyahoga County Prosecutor, or his duly authorize representative, 9<sup>th</sup> Floor, Justice Center, 1200 Ontario Street, Cleveland, Ohio 44113, on this 21st day of February, 2012.



JOHN P. HILDEBRAND, SR.

# Court of Appeals of Ohio, Eighth District

County of Cuyahoga  
Gerald E. Fuerst, Clerk of Courts

STATE OF OHIO

Appellee

COA NO.  
95857

LOWER COURT NO.  
CP CR-524732

COMMON PLEAS COURT

-vs-

DANIEL LALAIN

Appellant

MOTION NO. 448229

Date 01/23/12

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### Journal Entry

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Motion by appellant to certify a conflict is granted. This court's decision in State v. Lalain, Cuyahoga App. No. 95857, 2011-Ohio-4813, is in conflict with the following decision from the Second District Court of Appeals: State v. Ratliff, Clark App. No. 10-CA-61, 2011-Ohio-2313.

This court hereby certifies the following question to the Ohio Supreme Court pursuant to App.R. 25(A) and Article IV, Section 3(B)(4) of the Ohio Constitution for resolution of the following issue:

Whether, despite the defendant's failure to object, it is error for the trial court to order defendant to pay an amount of restitution in the absence of a specific plea agreement and without a hearing or evidence substantiating the economic loss claimed by the plaintiff?

Judge COLLEEN CONWAY COONEY,  
CONCURS IN JUDGMENT ONLY

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Judge SEAN C. GALLAGHER, Concur

---

**RECEIVED FOR FILING**

JAN 23 2012

GERALD E. FUERST  
CLERK OF THE COURT OF APPEALS  
BY *C. Prusak* DEP.

*Mary Eileen Kilbane*  
Presiding Judge  
MARY EILEEN KILBANE

COPIES MAILED TO COUNSEL FOR ALL PARTIES - COSTS PAID

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
No. 95857

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**STATE OF OHIO**

PLAINTIFF-APPELLEE

vs.

**DANIEL LALAIN**

DEFENDANT-APPELLANT

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**JUDGMENT:  
AFFIRMED**

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Criminal Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CR-524732

**BEFORE:** Kilbane, A.J., Cooney, J., and S. Gallagher, J.

**RELEASED AND JOURNALIZED:** September 22, 2011

**ATTORNEY FOR APPELLANT**

John P. Hildebrand, Sr.  
John P. Hildebrand Co., L.P.A.  
21430 Lorain Road  
Fairview Park, Ohio 44126

**ATTORNEYS FOR APPELLEE**

William D. Mason  
Cuyahoga County Prosecutor  
James D. May  
Assistant County Prosecutor  
The Justice Center - 9th Floor  
1200 Ontario Street  
Cleveland, Ohio 44113

*[Faint, illegible text and a handwritten signature are visible in this area.]*

MARY EILEEN KILBANE, A.J.:

Defendant-appellant, Daniel Lalain (Lalain), appeals his restitution order. Finding no merit to the appeal, we affirm.

In June 2009, Lalain was charged with one count of theft, a first degree felony. The indictment provided that the value of the property or services stolen was \$1,000,000 or more. Pursuant to a plea agreement, Lalain pled guilty to an amended count of theft, a fifth degree felony. As a fifth degree felony, the value of the property or services stolen was amended to \$500 or more and less than \$5,000.

In September 2010, the trial court sentenced Lalain to four years of community control sanction and ordered that he pay \$63,121 as restitution to the victim, who was Lalain's former employer, Aero-Instruments (Aero). At the sentencing hearing, the trial court stated that it has "a letter dated September 21st, 2010, from Mr. Ryan Mifsud from [Aero] relating to the loss in this case. And the court states that these documents plus any written or oral statements made to the court today shall be preserved as part of the record in this case."

The letter states in pertinent part:

**"We have been asked to provide information regarding the financial impact on the company regarding the theft of property and the subsequent process that was undertaken to identify and value the property that was recovered by Cleveland Police[.] We have calculated the cost to [Aero] for**

the time spent by its employees in support of this case to be \$55,456.00. This estimate does not include any costs for materials and supplies associated with the sorting, filing and copying of the more than 9,000 pages of documents and over 100 items recovered by the Cleveland Police from [Lalain's] possession.

In order to provide the County Prosecutor's Office with an accurate valuation of the property that was recovered, [Aero] contracted with Meaden and Moore and their Forensic Accounting department to determine a valuation of the property that was taken from the company. The cost associated with this activity was \$7,665.00. [Aero] is looking for restitution in the form of repayment by [Lalain] for these costs."

The trial court then asked defense counsel "if there is any reason we should not go forward with the hearing this morning." Defense counsel replied, "No, your Honor. We can proceed." When discussing mitigation, defense counsel stated, "I don't think [Lalain] should be held responsible for any of [the Meaden and Moore] cost" because the report was generated in furtherance of a civil lawsuit Aero initially filed against Lalain and later dismissed, in order to proceed with the criminal prosecution. After Lalain addressed the court, the court asked defense counsel if there was anything further. Defense counsel replied, "No, your Honor."

The State then advised the court "[t]he reason \* \* \* this case had to be prosecuted [was] because Aero has a national security clearance. They produce aerospace engineering products \* \* \*." With respect to the Meaden and Moore

accounting, the State indicated the "accounting was taken on by Aero \* \* \* so that they could discuss how this case could actually be \* \* \* valuated and evaluated. So that people could understand how much money this information, these prototypes, [and] data involved is actually worth to a company that's on the cutting edge of technology \* \* \*. We find that there are special circumstances in this case which leads the State to allow a plea to a felony of the fifth degree and the victim has also agreed with that."

The trial court then sentenced Lalain to four years of community control sanction and ordered \$63,121 as restitution. In determining the loss to Aero, the trial court calculated "the degree of damage done and \* \* \* the accounting \* \* \* necessary to do that." The trial court added \$55,456 for Aero's economic loss and \$7,665 for the Meaden and Moore accounting to obtain \$63,121. The court concluded the hearing by asking defense counsel if "there are any other matters to be referenced on the record." Defense counsel replied, "Nothing further, your Honor."

Lalain now appeals, raising the following three assignments of error for review.

#### ASSIGNMENT OF ERROR ONE

"The trial court erred when it ordered restitution in the amount of \$63,121 without any basis to conclude that this

amount was the 'economic loss' suffered by [Aero] as the direct and proximate result of the theft."

#### ASSIGNMENT OF ERROR TWO

"The trial court erred in failing to hold an adequate restitution hearing when [Lalain] disputed the restitution amount."

#### ASSIGNMENT OF ERROR THREE

"The trial court erred in ordering restitution in an amount greater than \$4,999.99 because [Lalain] was only convicted of a fifth degree felony."

#### Standard of Review

On appeal, we review a lower court's order of restitution for an abuse of discretion. *State v. Marbury* (1995), 104 Ohio App.3d 179, 661 N.E.2d 271; see, also, *State v. Berman*, Cuyahoga App. No. 79542, 2002-Ohio-1277. An abuse of discretion "implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140, quoting *State v. Adams* (1980), 62 Ohio St.2d 151, 404 N.E.2d 144.

#### Restitution Award and Hearing

In the first assignment of error, Lalain argues the trial court erred when it ordered \$63,121 as restitution because the costs Aero claimed were not incurred as a direct and proximate result of the theft. Rather, he claims that Aero requested reimbursement for money it spent to develop a case against him.

In the second assignment of error, Lalain argues the trial court erred by not holding a hearing on the restitution amount. He claims he objected to the restitution amount set forth in Aero's letter. In the third assignment of error, Lalain argues the trial court erred when it ordered restitution in an amount greater than \$4,999.99 because he pled guilty to a fifth degree felony.

However, Lalain did not object at his sentencing hearing to the order of restitution or the amount ordered. Thus, he waived all but plain error. *State v. Jarrett*, Cuyahoga App. No. 90404, 2008-Ohio-4868, ¶13, citing *Marbury*.

Under Crim.R. 52(B), “[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.” “Notice of plain error under Crim.R. 52(B) is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice.” *State v. Long* (1978), 53 Ohio St.3d 91, 372 N.E.2d 804, paragraph three of the syllabus. For the reasons that follow, we do not find plain error.

R.C. 2929.18 governs restitution and provides that financial sanctions may include:

**“Restitution by the offender to the victim of the offender’s crime \* \* \* in an amount based on the victim’s economic loss. \* \* \* If the court imposes restitution, at sentencing, the court shall determine the amount of restitution to be made by the offender. If the court imposes restitution, the court**

may base the amount of restitution it orders on an amount recommended by the victim, the offender, a presentence investigation report, \* \* \* and other information, provided that the amount the court orders as restitution shall not exceed the amount of the economic loss suffered by the victim as a direct and proximate result of the commission of the offense. If the court decides to impose restitution, the court shall hold a hearing on restitution if the offender, victim, or survivor disputes the amount.” Id. at (A)(1).

“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 loss of income due to lost time at work because of any injury caused to the victim, and any property loss, medical cost, or funeral expense incurred as a result of the commission of the offense. ‘Economic loss’ does not include non-economic loss or any punitive or exemplary damages.” R.C. 2929.01(L).

In the instant case, a review of the record reveals that Lalain stated he understood that he could be ordered to pay restitution as part of his sentence. At the sentencing hearing, the trial court asked Lalain’s counsel on three occasions if he had any objections or anything to add. Each time, defense counsel replied “no.” The trial court then ordered Lalain to pay Aero the exact amount requested in its letter. At no time did Lalain or his counsel object to restitution or dispute the amounts requested by the Aero. At oral argument, Lalain’s counsel conceded that he did not place an objection on the record at the sentencing hearing.

R.C. 2929.18(A)(1) states, “[i]f the court decides to impose restitution, the court shall hold a hearing on restitution if the offender, victim or survivor disputes the amount.” This court has held that a separate hearing is not required if the defendant or defense counsel fail to “object to restitution or dispute the amounts requested by the victims.” *Jarrett* at ¶18. Since Lalain and defense counsel failed to object to restitution or dispute the amount requested by Aero, the trial court was not required to hold a separate hearing on restitution.

Furthermore, R.C. 2929.01(L) defines economic loss as any economic detriment suffered by a victim as a direct and proximate result of the commission of an offense. Here, Aero had to complete an accounting to determine value because of the unique nature of the intellectual property involved. In addition, as stated above, Lalain understood as part of his plea agreement that he could be required to pay restitution and failed to dispute the amount. “Finally, justice and sensibility should prevent [Lalain] from prevailing on a error which he invited. By agreeing to the restitution award in exchange for pleading guilty, he received the benefit of his bargain: a reduced charge.” *State v. Stewart*, Wyandot App. No. 16-08-11, 2008-Ohio-5823, ¶13 (where the Third District Court of Appeals affirmed the trial court’s restitution award to a government agency when such award was made pursuant to an

express plea agreement between the State and the defendant). Therefore, the trial court's restitution order of \$63,121 was not an abuse of discretion.

The dissent relies on *State v. Moore-Bennett*, Cuyahoga App. No. 95450, 2011-Ohio-1937, and *State v. Wickline*, Logan App. No. 8-10-20, 2011-Ohio-3004, to support the argument that the trial court did not have the authority to impose any amount of restitution beyond \$4,999. Respectfully, our reading of these cases reveals differences that render their holdings distinguishable from the instant case.

In *Moore-Bennett*, this court found that “[a] trial court abuses its discretion in ordering restitution in an amount that exceeds the economic loss resulting from the defendant’s crime.” *Id.* at ¶18, citing *State v. Rivera*, Cuyahoga App. No. 84379, 2004-Ohio-6648. In *Wickline*, the Third District Court of Appeals found that under the express terms of the plea agreement, the defendant “could not be ordered to pay more restitution than he could have been ordered to pay if he had been convicted of the original offense[,]” which was a fifth degree felony (a theft offense involving property valued at \$500 or more, but less than \$5,000). *Id.* at ¶17.

In the instant case, Lalain agreed to pay restitution as part of his plea agreement in exchange for a reduced charge, and at the restitution hearing, he

failed to object to the restitution award. The issue of waiver was neither raised nor discussed in *Moore-Bennett* and *Wickline*.

Furthermore, the defendant in *Moore-Bennett* proceeded to a jury trial, whereas Lalain entered into a plea agreement. While Lalain did not execute an express plea agreement like the defendant in *Wickline*, under *Wickline's* rationale, the trial court in the instant case did not err because it ordered Lalain to pay restitution in an amount less than if he had been convicted of the original offense, which was a first degree felony (a theft offense involving property or services valued at \$1 million or more).

Thus, based on the foregoing, we find that the trial court's restitution order did not violate Lalain's substantial rights. Therefore, we do not find plain error.

Accordingly, the first, second, and third assignments of error are overruled.

Judgment is affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

*Mary Eileen Kilbane*

MARY EILEEN KILBANE, ADMINISTRATIVE JUDGE

COLLEEN CONWAY COONEY, J., CONCURS

SEAN C. GALLAGHER, J., DISSENTS (SEE SEPARATE DISSENTING OPINION)

SEAN C. GALLAGHER, J., DISSENTING:

I respectfully dissent from the majority decision. I write separately to address concerns about awards of restitution at sentencing where the terms and amounts are unclear at the time of the plea.

In this instance, we have an initial allegation of theft with a value in excess of \$1,000,000. In the end, the plea is to a theft offense with a stated value of more than \$500, but less than \$5,000. While Lalain indicated that he understood he could be ordered to pay restitution as part of his sentence, no specific amount of restitution was agreed to as part of his plea agreement.

Ordinarily, the amount of restitution ordered by a trial court must bear a reasonable relationship to the loss suffered and is limited to the actual loss caused by the offender's criminal conduct for which he was convicted. As this court recognized in *State v. Moore-Bennett*, Cuyahoga App. No. 95450,

2011-Ohio-1937, ¶ 18: “R.C. 2929.28(A)(1) requires that when restitution is imposed as part of a criminal sanction for misdemeanor offenses, ‘the amount the court orders as restitution shall not exceed the amount of the economic loss suffered by the victim as a direct and proximate result of the commission of the offense.’ Ohio courts have recognized that the amount of restitution ordered by a trial court must bear a reasonable relationship to the loss suffered and is limited to the actual loss caused by the offender’s criminal conduct for which he was convicted. A trial court abuses its discretion in ordering restitution in an amount that exceeds the economic loss resulting from the defendant’s crime. An appellate court may modify a sentence when it finds by clear and convincing evidence that the sentence is contrary to law. R.C. 2953.08(G)(2).” (Internal citations omitted.) See, also, *State v. Rivera*, Cuyahoga App. No. 84379, 2004-Ohio-6648.

It has been recognized that nothing in R.C. 2929.18(A)(1) prohibits an award of restitution greater than the maximum associated with the degree of offense when the defendant has agreed to pay more as part of a plea agreement. *State v. Wickline*, Logan App. No. 8-10-20, 2011-Ohio-3004, ¶ 14-15. However, as was the case in *Wickline*, the defendant herein never agreed to pay restitution in an amount exceeding the value for the offense of which he was convicted.

Therefore, the trial court had no authority to impose any amount of restitution beyond \$4,999. See *id.* at ¶ 17.

I also note that the figure of \$63,121 appears for the first time on the date of sentencing or shortly before in a letter, dated September 21, 2010, from a representative of the victim. This letter does not contain a detailed accounting of these costs. The appellant at the hearing raised concerns that these were actually costs related to civil litigation the victim was pursuing against appellant contemporaneous with the criminal proceedings.

While it is not always possible to know of, or address all economic losses at the time of a plea or finding of guilt, it is the better practice to put a figure of restitution on the record and afford the parties an opportunity to address the merits of the figures at sentencing in a meaningful way. Too often, restitution is treated as an afterthought. In my view, the specific figures from the September 21, 2010 letter should have been available and incorporated into the plea agreement to avoid surprise or conflicts over what is expected in terms of making the victim whole.

In any event, because Lalain did not specifically agree to pay any amount of restitution greater than the value for the offense of which he was convicted, I would reduce the restitution order to \$4,999.

**IN THE COURT OF APPEALS OF OHIO  
SECOND APPELLATE DISTRICT  
CLARK COUNTY**

THE STATE OF OHIO,	:	
	:	Appellate Case No. 10-CA-61
Appellee,	:	
	:	Trial Court Case No. 10-CR-0131(B)
v.	:	
	:	(Criminal Appeal from
RATLIFF,	:	Common Pleas Court)
	:	
Appellant.	:	

.....  
OPINION

Rendered on the 13th day of May, 2011.

.....  
D. Andrew Wilson, Clark County Prosecuting Attorney, and Amy M. Smith, Assistant Prosecuting Attorney, for appellee.

Flanagan, Lieberman, Hoffman & Swaim and Brock A. Schoenlein, for appellant.

.....  
FAIN, Judge.

{¶ 1} Defendant-appellant, Audrey Ratliff, appeals from her conviction and sentence for theft, following a guilty plea. Ratliff offers three challenges to the amount of restitution the trial court ordered. Ratliff contends that the trial court erred in ordering restitution of \$121,000, when she pleaded guilty to a theft of less than \$100,000. She also contends that the trial court abused its discretion in failing to hold a hearing regarding the amount of restitution and in failing to consider her ability to pay.

{¶ 2} We conclude that the trial court did consider Ratliff's ability to pay restitution. But because Ratliff disputed the amount of money she stole, we conclude that the trial court abused its discretion in ordering restitution without holding a hearing. Additionally, we conclude that in the absence of a specific plea agreement to the contrary, the amount of any order of restitution may not exceed the maximum amount that is an element of the theft offense for which the defendant was convicted. Accordingly, the trial court's order of restitution is reversed, and the cause is remanded to the trial court for a hearing on that issue.

## I

{¶ 3} In February 2010, Ratliff was indicted on two counts of theft, one count of extortion, and one count of impersonating a peace officer. The charges arose from events that occurred during the previous several months, when Ratliff repeatedly deceived her 78-year-old victim, causing him to loan her large sums of money that she promised to repay but did not.

{¶ 4} Pursuant to a plea agreement, Ratliff pleaded guilty to theft from an elderly person of \$25,000 or more, but less than \$100,000, in violation of R.C. 2913.02(B)(3). Ratliff was sentenced to serve seven years in prison and to pay \$121,000 in restitution to her victim. From her sentence, Ratliff appeals.

## II

{¶ 5} Ratliff's sole assignment of error is as follows:

{¶ 6} "The trial court erred in rendering its order of restitution."

{¶ 7} Ratliff first contends that because she pleaded guilty to a theft of less than

\$100,000, the trial court erred in ordering her to pay \$121,000 in restitution. She also argues that the trial court erred in ordering any restitution without holding a hearing, after she objected to the amount, and that the trial court failed to consider her ability to pay any restitution.

{¶ 8} The state argues that Ratliff waived any error by failing to object to the amount of restitution. The state also argues that there was no information in the presentence-investigation report that would have led the court to doubt Ratliff's expressed intent to repay her victim.

{¶ 9} A trial court abuses its discretion when it orders restitution that does not bear a reasonable relationship to the actual financial loss suffered. *State v. Williams* (1986), 34 Ohio App.3d 33. Therefore, we review a trial court's order of restitution under an abuse-of-discretion standard. See, e.g., *State v. Naylor*, Montgomery App. No. 24098, 2011-Ohio-960, ¶ 22. The abuse of discretion standard is defined as “ '[a]n appellate court's standard for reviewing a decision that is asserted to be grossly unsound, unreasonable, illegal, or unsupported by the evidence.' ” *State v. Boles*, Montgomery App. No. 23037, 2010-Ohio-278, ¶ 18, quoting Black's Law Dictionary (8th Ed.2004) 11.

{¶ 10} R.C. 2929.18(A)(1) allows a trial court to order, as a financial sanction, an amount of restitution to be paid by an offender to his victim “based on the victim's economic loss. \* \* \* If the court imposes 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, provided that the amount the court orders as restitution shall not exceed the

amount of the economic loss suffered by the victim as a direct and proximate result of the commission of the offense. If the court decides to impose restitution, the court shall hold a hearing on restitution if the offender, victim, or survivor disputes the amount.”

{¶ 11} We begin by addressing Ratliff’s claim that the trial court failed to consider her ability to repay her victim before ordering restitution. The record does not support her claim.

{¶ 12} R.C. 2929.19(B)(6) imposes a duty upon the trial court to “consider the offender’s present or future ability to pay” before imposing any financial sanctions under R.C. 2929.18. See, e.g., *State v. Martin* (2000), 140 Ohio App.3d 326, 338, citing *State v. Stevens* (Sept. 21, 1998), Clinton App. No. CA98-01-001. However, the statute establishes no particular factors for the court to take into consideration, nor is a hearing necessary before making this determination. *Id.* A trial court may comply with R.C. 2929.19(B)(6) by considering a presentence-investigation report, which includes information about the defendant’s age, health, education, and work history. *Id.*

{¶ 13} In this case, both the sentencing transcript and the judgment entry of conviction indicate that the trial court considered the presentence-investigation report prior to ordering Ratliff to pay restitution. Furthermore, Ratliff insisted at sentencing that she intended to repay her victim. Under these circumstances, we conclude that the trial court did not fail to consider Ratliff’s present or future ability to pay restitution.

{¶ 14} A defendant who does not dispute an amount of restitution, request a hearing, or otherwise object waives all but plain error in regards to the order of restitution. *State v. Cochran*, Champaign App. No. 09CA0024, 2010-Ohio-3444, ¶ 19, citing *State v. MacQuarrie*, Montgomery App. No. 22763, 2009-Ohio-2182. At the plea hearing, defense

counsel stated, “I don’t know that we ever came to the conclusion, at least from our perspective, that the amount involved was more than \$100,000, but we do agree that it was between \$25,000 and \$100,000.” Furthermore, at the sentencing hearing, counsel again explained, “Audrey has always contended that she never took over \$100,000 from Mr. Madison, and she said in her PSI that she believes it to be more in the neighborhood of \$86,000.” Thus, despite the state’s claim to the contrary, Ratliff did dispute the amount of restitution, and she has not waived any error in this regard.

{¶ 15} “ ‘For due process reasons, the amount of restitution must bear a reasonable relationship to the loss suffered. Accordingly, to ensure a lawful award, there must be competent, credible evidence in the record to support the trial court’s order of restitution “to a reasonable degree of certainty.” The amount of restitution requested should, if necessary, be substantiated through documentary or testimonial evidence.’ *State v. Bender*, Champaign App. No. 2004 CA 11, 2005-Ohio-919, at ¶ 10.” *State v. Summers*, Montgomery App. No. 21465, 2006-Ohio-3199, ¶ 44. See also *Naylor*, 2011-Ohio-960, ¶ 20-21, citing *State v. Warner* (1990), 55 Ohio St.3d 31, 69.

{¶ 16} The presentence-investigation report sets forth three significantly different amounts of financial loss to the victim: the victim estimated his loss at \$160,000, the prosecutor reviewed unspecified financial records of the victim and estimated the victim’s loss to be \$126,000, and Ratliff’s version of events estimated the amount she stole to be \$86,000. With no further evidence or testimony, the trial court accepted the prosecutor’s estimate of \$126,000, as reported in the presentence-investigation report, reduced that amount by \$5,000, reflecting restitution ordered to be paid to the victim by one of Ratliff’s codefendants, and

ordered Ratliff to pay \$121,000. But R.C. 2929.18(B)(1) requires the trial court to hold a hearing in order to determine the appropriate amount of restitution when, as in this case, the defendant disputes the amount.

{¶ 17} Finally, “the right to order restitution is limited to the actual damage or loss caused by the offense of which defendant is convicted.” (Emphasis added.) *State v. Clifton* (1989), 65 Ohio App.3d 117, 123. Orders of restitution may not include losses associated with dismissed counts. *State v. Radway*, Franklin App. No. 06AP-1003, 2007-Ohio-4273, ¶ 14. In *Clifton*, for example, because the defendant was convicted of theft of property valued between \$300 and \$5,000, the court held that the defendant could not be ordered to pay restitution of more than \$5,000. *Clifton* at 123-124. See also *State v. Rivera*, Cuyahoga App. No. 84379, 2004-Ohio-6648. By the same reasoning, since Ratliff pleaded guilty to stealing less than \$100,000, she cannot be ordered to pay more than \$100,000 in restitution.

{¶ 18} For the foregoing reasons, we conclude that the restitution order in the amount of \$121,000 is not supported by competent, credible evidence. Therefore, the trial court abused its discretion in ordering restitution without holding a hearing to determine the appropriate amount of that restitution.

{¶ 19} In this case, we need not decide, and we do not decide, whether a defendant who has, as an express part of a negotiated plea agreement or stipulation, agreed to restitution in an amount in excess of the elements of the offense for which the defendant has been convicted, or has agreed to restitution relating to additional counts that are being dismissed, may be ordered to pay restitution accordingly.

{¶ 20} Ratliff’s sole assignment of error is sustained.

III

{¶ 21} Ratliff's sole assignment of error having been sustained, the order of restitution is reversed, and this cause is remanded for a hearing on the issue of restitution.

Judgment reversed  
and cause remanded.

HALL and BROGAN, JJ., concur.

BROGAN, J., retired, of the Second District Court of Appeals, sitting by assignment.