

IN THE SUPREME COURT
 OF THE STATE OF NORTH DAKOTA

State of North Dakota,)	
)	
Plaintiff/Appellee,)	Supreme Court No. 20190278
)	
-vs-)	Burleigh County Case No.
)	08-2019-CR-00614
Samy Lee Benson,)	
)	
Defendant/Appellant)	

BRIEF OF PLAINTIFF - APPELLEE
STATE OF NORTH DAKOTA

APPEAL FROM ORDER FOR RESTITUTION AND AMENDED CRIMINAL
 JUDGMENT ENTERED ON AUGUST 19, 2019

Burleigh County District Court
 South Central Judicial District
 The Honorable Daniel Borgen, Presiding

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NORTH DAKOTA CONSTITUTION

Paragraph No.

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ISSUES PRESENTED FOR REVIEW

[¶1] Whether the District Court's order for restitution was proper.

STATEMENT OF THE FACTS

[¶2] On March 4, 2019 in Bismarck, North Dakota, Officer Weiland responded to CK Auto for a burglary in progress. The owner of the business had security cameras that were taking pictures of the suspect, Samy Benson (hereinafter “Benson”) and sending them directly to his phone. Benson was apprehended, placed under arrest and read his Miranda rights. Register of Actions, Index #2.

[¶3] Upon searching Benson incident to arrest, a Sawzall, two drills, and a headlamp flashlight was found in his backpack. Benson matched the description of the photos from the security cameras. Benson stated he was behind the fence to get out of the wind on his way to work while riding his bike in below freezing weather. The fence Benson was behind was approximately eight feet tall, had barbed wire along the top all the way around, was secured, and Benson did not have permission to be on the secured lot. Register of Actions, Index #2.

[¶4] On July 23, 2019, Benson plead guilty to the charged offense of burglary and was sentenced to serve three years in prison. Register of Actions, Index #31. The matter of restitution was to be determined at a later date.

[¶5] The hearing on restitution was heard on August 16, 2019 and during that hearing, Devin Ohlhauser, sales manager for CK Auto, testified that during the burglary there was damage to four different vehicles. Catalytic converters were cut off of two pickup trucks, a fender was damaged from the door belonging to the car next to it swinging open and striking it, and a radio was broken out of the other vehicle with the wires being cut. Tr. 4-9. Mr. Ohlhauser prepared estimates for the damages done to each vehicle by using an

Audatex system, which is a nationwide system that writes estimates for auto body repair and mechanic work. Tr. 10:14-16.

[¶6] The estimates were offered with no objections and entered as Exhibits 1-4. Tr. 6-9. Register of Actions, Index # 36-39. The total cost of repair for the four vehicles was \$16,446.03. Tr. 16:23-25.

[¶7] On August 19, 2019, the district court entered an Order for Restitution and an Amended Criminal Judgment in the amount of \$16,446.03 to be paid in restitution. Register of Actions, Index #41-42.

ARGUMENT

I. WHETHER THE DISTRICT COURT’S ORDER FOR RESTITUTION WAS PROPER.

A. Standard of Review

[¶8] This Court has previously stated:

“A trial court when ordering restitution is exercising statutory powers. Consequently, appellate review of such an exercise will be confined to whether the trial court acted within the limits prescribed by the statute. This standard of review in a similar context has been called the abuse of discretion standard.”

State v. Vick, 1998 ND 214, ¶ 4, 587 N.W.2d 567.

B. The district court’s order for restitution was proper

[¶9] In North Dakota restitution is governed by the North Dakota Constitution, Art. I, §25(1)(n), which states:

The right to full and timely restitution in every case and from each offender for all losses suffered by the victim as a result of the criminal or delinquent conduct. All monies and property collected from any person who has been ordered to make restitution shall be first applied to the restitution owed to the victim before paying any amounts owed to the government.

[¶10] At the restitution hearing the burden of proof is on the State to provide an amount of restitution by a preponderance of the evidence. In State v. Gendron, 2008 ND 70, 747 N.W.2d 125, the defendant had stolen merchandise from Kohl’s. At the restitution hearing the trial court asked the loss-prevention manager of Kohl’s about what happens to the merchandise that was deemed unmerchantable, when the defendant returned it. The witness stated that it is sent off to a distribution center and does not know what happens with it from there. The defendant argued that some of the merchandise returned can be sold and may provide a minimal salvage value. However, this Court had stated in that instance that, “[w]hile the court could have considered a salvage value, we cannot say the district

court abused its discretion by not doing so.” Id. ¶9. This Court also stated that, “[g]iven the difficulties inherent in calculating such measures of damages, the determination is ‘left to the sound discretion of the finder of facts.’” Id. (quoting B.W.S. Invs. V. Mid-Am Restaurants, 459 N.W.2d 759, 764 (N.D. 1990)). This Court found that “[t]he district court therefore did not act arbitrarily, unreasonably or unconscionably by failing to account for the value of merchandise returned but considered unmarketable by Kohl’s.” Id. The defendant in Gendron then argued that some of the values for merchandise were not precise as some were grouped together. Id. ¶10. On the journal roll entry and receipt system it was noted that it contains approximate values for the merchandise instead of exact. Id. This Court then stated, “we cannot conclude the district court acted arbitrarily, unreasonably or unconscionably by allowing the restitution amount to be based partially on approximate values.” Id.

[¶11] In the case at bar, Benson is arguing that the amount of restitution ordered was improper based on the fact that there could be a resale amount on the 2 exhaust systems and the radio and the fact that the repairs might not cost as much as the estimates are stating. However, the district court, nor the victim in this case knew if or what the value of the salvage items would be. Benson also claims that the victim should just weld the exhaust systems back together rather than put in a whole new exhaust system. However, if it weren’t for Benson’s criminal act, the victim would have been able to sell the vehicles with the exhaust systems fully done and not welded up. Now just because Benson caused damaged the victim should have to suffer a potential loss of revenue when selling the vehicles because of a welded exhaust. This Court has stated in State v. Strom, 2019 ND 9, ¶7, 921 N.W.2d 660, “[t]o award less than the amount required to make the victim whole

would not be “full” restitution.” If the victim were to sell the vehicles and lose money because of a welded exhaust system and not a fully fluent exhaust system that does not make the victim whole in this case.

[¶12] In State v. Kostelecky, 2018 ND 12, 906 N.W.2d 77, Benson argues that the Court previously held that a district court misapplied the law in determining restitution beyond what is necessary to make the victim whole. However, Kostelecky provided the district court with evidence at the hearing showing that a refurbished model of a copy machine was less than a new model. As previously mentioned, the burden of proof regarding restitution lies with the State.

This burden consists of two elements: “the burden of going forward with the evidence and the burden of persuasion.” Helbling v. Helbling, 541 N.W.2d 443, 445 (N.D. 1995). “When the party with the burden of proof establishes a prima facie case, ‘the burden of going forward with the evidence shifts...to the defendant’... [and the] party will prevail unless the opposing party offers ‘proof contrary.’” Id at 446 (quoting Midland Oil and Royalty Co. v. Schuler, 126 N.W.2d, 149, 152-53 (N.D. 1964)). To make a showing of proof to the contrary, the defendant must present evidence sufficient to equalize “the weight of the plaintiff’s evidence.” Midland Oil, 126 N.W.2d, at 153.

State v. Clayton, 2016 ND 131, ¶10, 881 N.W.2d 239. Here, Benson provided no evidence to the district court showing that the repairs to the damaged vehicles would make the victim beyond whole, or any evidence at all to dispute the estimates provided by the victim. The victim used a nationwide cost estimator to get the estimates of damaged vehicles. Benson offered nothing but mere speculation as to what credit if any might be given for salvage value of the cut off catalytic converters and radio.

[¶13] In State v. Tupa, 2005 ND 25, 691 N.W.2d 579, the defendants had damaged multiple items of personal property. The defendant’s counsel presented evidence at the

restitution hearing that would offset some of the costs the victim was claiming. This Court then stated, “[w]here, as here, an array of losses occur, we will not require the trial court to itemize each intricate, individual calculation. The trial judge’s restituting award is within the range of reasonableness and is supported by a preponderance of the evidence, and, therefore, the trial court acted within the confines of the restitution stated and did not abuse its discretion.” Id., ¶9. The same goes for the case at bar. The state proved by preponderance of the evidence that this is the amount that would make the victim whole based on the estimates that were generated. Once again, Benson provided no evidence to dispute the estimates only that there might be some resale value in the two exhaust systems and the radio but Benson did not have a resale value for those items either. The trial judge based the restitution order after what was presented at the hearing. There was nothing provided that proved that the costs would be less or more than what was offered.

CONCLUSION

[¶14] For these reasons, the State respectfully requests that this Court affirm the South Central District Court’s Order for Restitution.

RESPECTFULLY SUBMITTED:

Dated this ____ day of December 2019.

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CERTIFICATE OF COMPLIANCE

[¶ 1] COMES NOW Wayne Goter of Bismarck, North Dakota, and hereby certifies that the attached Brief of the Appellee is in compliance with Rule 32(a)(8)(A), North Dakota Rules of Appellate Procedure.

[¶ 2] The number of pages in the principal Brief, excluding any addenda, is ten (10) pages, according to the page count of the filed electronic document.

Dated this _____ day of December 2019.

/s/ Wayne Goter

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COUNTY OF BURLEIGH)

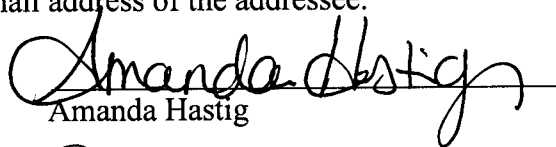
Amanda Hastig, being first duly sworn, depose and say that I am a United States citizen over 21 years old, and on the 30 day of December, 2019, I served the following:

1. Brief of Plaintiff-Appellee
2. Certificate of Compliance
3. Affidavit of Service

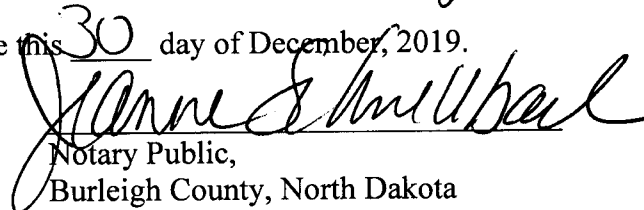
on the following electronic transmission to the listed email address of:

Russell J Myhre
Defense Attorney
efile@myhrelaw.com

which address is the last known email address of the addressee.


Amanda Hastig

Subscribed and sworn to before me this 30 day of December, 2019.


Notary Public,
Burleigh County, North Dakota

