

## IN THE SUPREME COURT

## STATE OF NORTH DAKOTA

State of North Dakota,	)	
	)	
Plaintiff and Appellee,	)	
	)	Supreme Court No. 20220059
vs.	)	
	)	District Court No. 08-2020-CR-01444
Benjamin Greff,	)	
	)	
Defendant and Appellant.	)	

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**BRIEF OF DEFENDANT AND APPELLANT GREFF**

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APPEAL FROM THE DISTRICT COURT'S JANUARY 21, 2022  
AMENDED ORDER DEFERRING IMPOSITION OF SENTENCE  
BURLEIGH COUNTY, NORTH DAKOTA  
SOUTH CENTRAL JUDICIAL DISTRICT  
HONORABLE PAMELA NESVIG

STEVEN BALABAN (ND BAR ID# 05204)  
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Attorney for Defendant and Appellant Greff

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#### **STATUTES:**

N.D.C.C. § 12.1-23-02	2, 3
N.D.C.C. § 12.1-32-08	11, 12
N.D.C.C. § 29-32.1-14	9

#### **RULES:**

N.D.R.App.P. 32	14
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#### **CONSTITUTIONS:**

N.D. Const. Art. VI, § 2	9
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## STATEMENT OF THE ISSUES

- [¶1] Did the District Court act beyond statutory limitations and abuse its discretion in awarding \$5,075 in restitution?

## STATEMENT OF THE CASE

[¶2] Defendant and Appellant Benjamin Greff (Greff) was charged in Burleigh County case 08-2020-CR-01444 with one count of Theft of Property under N.D.C.C. § 12.1-23-02(1), a Class C Felony. (R1). Greff pled guilty on or about October 15, 2021, and the District Court issued an Order Deferring Imposition of Sentence for a period of six months on that same date. (R61). The issue of restitution was left open for a period of sixty days. Id. A hearing was held before the District Court on or about January 21, 2022, and the Court ordered restitution in the amount of \$5,075 in its Amended Order Deferring Imposition of Sentence of the same date. (R74). Greff appeals from the restitution ordered by the District Court. (R75-78).

## STATEMENT OF THE FACTS

[¶3] Defendant and Appellant Benjamin Greff (Greff) was charged in Burleigh County case 08-2020-CR-01444 with one count of Theft of Property under N.D.C.C. § 12.1-23-02(1), a Class C Felony. (R1). It was alleged that Greff committed theft of a boat in July 2019. (R1). It was further alleged that damage was done to the boat and various items of property were missing after the boat was located by law enforcement. (R64).

[¶4] Greff pled guilty to the Class C Felony charge of Theft of Property on or about October 15, 2021. The District Court issued an Order Deferring Imposition of Sentence on that same date, reserving the issue of restitution for a period of sixty days. (R61). Restitution figures were submitted to the Court and a restitution hearing was held on or about January 21, 2022, before the Hon. Pamela Nesvig via Zoom. (R64).

[¶5] The District Court heard testimony from the victim's girlfriend. (R82:3). The victim's girlfriend testified as to the value of crankbaits that were allegedly missing from the boat. (R82:4-5). She testified that there were approximately 450 crankbaits missing that she valued at \$9 each for a total of \$4,050. Id. She testified as to the value of Columbia rain gear that was allegedly missing with a value of \$525. (R82:5). She testified that there was \$500 of reassembly work that had to be done to the boat. (R82:5-6). Her testimony as to the property value damaged or missing summed to \$5,075 that was ordered by the District Court.

[¶6] On cross examination, the victim's girlfriend admitted that she did not have an accurate count of the actual number of crankbaits allegedly missing and that she did not have any receipts to back up her claim for the number or value of any of the crankbaits. (R82:7-8). She was unable to list the specific crankbaits she was claiming to find an actual

value for them. Id. She was unable to supply a receipt for the value of the Columbia rain gear that was allegedly missing or the model of rain gear in order to find the actual value of it. (R82:8). She was unable to provide any written estimate for repairs to the boat and admitted that the verbal estimate she testified to was from an individual who never even viewed the boat and she did not even know the individual's name. (R82:8-9). The State did not call any other witnesses to corroborate the victim's girlfriend's testimony or give an accurate valuation of alleged property missing or damaged.

[¶7] Greff testified on his own behalf. (R82:10). He stated that there were no crankbaits in the boat, and he never took or received any crankbaits from the boat. (R82:11-12). He testified that there was no Columbia rain gear in the boat, and he never took or received any rain gear from the boat. Id. He indicated that there was no miscellaneous personal property on the boat when he took possession of it. Id. The State did not offer any rebuttal evidence.

[¶8] Upon conclusion of the hearing and after hearing argument from counsel for the State and Greff, the District Court ordered restitution in the amount of \$5,075. (R82:16). The District Court took the victim's girlfriend's approximate numbers and valuations of property and gave no credence to Greff's testimony. (R82:14-16). The District Court issued an Amended Order Deferring Imposition of Sentence to that effect on that same date. (R74). Greff appeals. (R75-78).

## ARGUMENT

### STANDARD OF REVIEW

[¶9] This Court has jurisdiction under N.D. Const. Art. VI, §§ 2 and 6, to have appellate jurisdiction and act as a court of appeals, and under N.D.C.C. § 29-32.1-14. The issue on appeal involves review of a restitution order by the District Court.

When reviewing a restitution order, we look to whether the district court acted within the limits set by statute, which is a standard similar to our abuse of discretion standard. Kostelecky, 2018 ND 12, ¶ 6, 906 N.W.2d 77 (quoting State v. Tupa, 2005 ND 25, ¶ 3, 691 N.W.2d 579). "A district court abuses its discretion if it acts in an arbitrary, unreasonable, or unconscionable manner, if its decision is not the product of a rational mental process leading to a reasonable determination, or if it misinterprets or misapplies the law." Id. We review questions of law de novo in determining whether the district court abused its discretion through misapplication or misinterpretation of the law. Id.

State v. Harstad, 2020 ND 151, ¶7, 945 N.W.2d 265.



## LAW AND ARGUMENT

[¶10] Did the District Court act beyond statutory limitations and abuse its discretion in awarding \$5,075 in restitution?

[¶11] Greff argues that the District Court acted beyond the limits set by statute and abused its discretion by arbitrarily concluding the amount of restitution to be ordered as the amount was calculated by the victim's girlfriend without any receipts or paperwork to verify the amounts claimed and thus misapplied the law. "When reviewing a restitution order, we look to whether the district court acted within the limits set by statute, which is a standard similar to our abuse of discretion standard." State v. Clemens, 2021 ND 176, ¶ 1, 965 N.W.2d 408, citing State v. Harstad, 2020 ND 151, ¶ 7, 945 N.W.2d 265.

Before imposing restitution or reparation as a sentence or condition of probation, the court shall hold a hearing on the matter with notice to the prosecuting attorney and to the defendant as to the nature and amount of restitution. The court, when sentencing a person adjudged guilty of criminal activities that have resulted in pecuniary damages, in addition to any other sentence the court may impose, shall order that the defendant make restitution to the victim or other recipient as determined by the court.

N.D.C.C. § 12.1-32-08(1) (part). Furthermore:

In determining the amount of restitution, the court shall take into account the reasonable damages sustained by the victim or victims of the criminal offense, which damages are limited to those directly related to the criminal offense and expenses actually incurred as a direct result of the defendant's criminal action.

Id. The District Court held a hearing and ordered restitution as per statute. The District Court took into account the estimates of damages claimed by the victim's girlfriend. However, by not requiring any evidence beyond estimates with no receipts or paperwork, and by ignoring Greff's testimony, the District Court did not determine the "expenses *actually* incurred as a direct result of the defendant's criminal action" as required by statute. Id. (Emphasis added).

[¶12] Harstad involved restitution ordered by the District Court for property that was not related to his conviction for possession of stolen property, and the North Dakota Supreme Court held that an order for such restitution was an abuse of discretion. Harstad at ¶13-14. Unlike Harstad, Greff pled guilty to theft of property rather than possession of stolen property. Unlike Harstad, Greff does not contest that he may owe restitution for the theft. However, Greff contests the amount of restitution ordered by the District Court and the arbitrary means the District Court used to ascertain that amount. Greff argues that the plain statutory language limiting restitution to “expenses *actually* incurred” under N.D.C.C. §12.1-32-08(1) was not followed by the District Court as no receipts, paperwork or documentation of property alleged to be missing or damaged were presented to the District Court. The District Court solely relied upon the testimony of the victim’s girlfriend and her memory of approximate numbers and values of property and a repair estimate. Greff argues that the District Court abused its discretion by arbitrarily determining the amount of restitution contrary to N.D.C.C. § 12.1-32-08(1) and misapplied the law under that statute.

## CONCLUSION

[¶13] From the arguments set forth above, and from the Record in this matter, Greff requests that this Court hold that the District Court abused its discretion in ordering restitution in the amount of \$5,075. Greff respectfully requests that this Court reverse the portion of the District Court’s Order granting restitution in the amount of \$5,075 and remand the matter back to the District Court for a proper finding on restitution.

# CERTIFICATION OF COMPLIANCE

[¶14] Steven Balaban, the attorney for Defendant and Appellant in the above action, hereby certifies that the form of the Brief is in compliance with N.D.R.App.P. 32(d). Specifically, under N.D.App.P. 32(a)(8), the Brief of Defendant and Appellant Greff consists of 12 pages and thus does not exceed the 38-page limit.

[¶15] Dated this Tuesday, May 03, 2022.

/s/ Steven Balaban

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Attorney for Defendant and Appellant Greff

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STATE OF NORTH DAKOTA

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Plaintiff and Appellee,	)	District Court No. 08-2020-CR-01444
	)	
vs.	)	<b>CERTIFICATE OF SERVICE</b>
	)	
Benjamin Greff,	)	
	)	
Defendant and Appellant.	)	

¶1 Steven Balaban, the attorney for Defendant and Appellant in the above action, hereby certifies under N.D.R.Civ.P. 5(f), that on Tuesday, May 3, 2022, he served the attached:

**BRIEF OF DEFENDANT AND APPELLANT GREFF**

upon Justin Schwarz, Burleigh County Assistant States Attorney, attorney for Plaintiff and Appellee, State of North Dakota, by e-mail to the addresses JJSchwarz@nd.gov and bc08@nd.gov as listed on the North Dakota Supreme Court Website on Tuesday, May 3, 2022,

and upon Benjamin Greff, Defendant and Appellant, by US Mail, with sufficient postage attached to the address:

Benjamin Greff  
2234 Sherman Drive  
Bismarck ND 58504

/s/ *Steven Balaban*  
\_\_\_\_\_  
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Attorney for Defendant and Appellant Greff

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	)	CORRECTIONS
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2234 Sherman Drive  
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/s/ Steven Balaban

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