20190319

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STATE OF NORTH DAKOTA

In the Supreme Court of the State of North Dakota

State of North Dakota Appellee, Plaintiff	))	
v	)	20190319
Kevin Kenneth Michel Appellant, Defendant	)	

Appellee's Brief

Michel appeals the guilty verdict and the Criminal Judgment in case number 47-2018-CR-00850, District Court, Stutsman County, Judge LeFevre presiding.

ORAL ARGUMENT REQUESTED

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1. Whether the trial court erred in denying Michel's Rule 29 motion.

2. Whether there was sufficient evidence supporting the jury's guilty verdict.

3. Whether the trial court erred in answering the jury's question.

4. Whether the trial court erred in ordering the amount of restitution it did.

Statement of the Case and Nature of the Case

5. Michel was found guilty of theft by knowingly receiving stolen property valued at over $1,000.

6. Michel claims the state failed to prove Michel knew the tires were stolen. *Brief of Appellant* at ¶¶ 54-55 [hereinafter ATB]. The State contends direct and circumstantial evidence proved Michel knew the tires were stolen.

7. Michel claims the State failed to prove value of the tires exceeded $1,000. ATB, ¶ 8. The State contends the testimony of the manager of Northwest Tire and Auto (Northwest) established the value of Northwest's three stolen tires at $702; and the testimony of the owner of J&L Service established the value of J&L's four stolen tires at $632. The combined total valuation for the seven tires Michel turned over to police was established as $1,334. The parties dispute the method of valuation.

8. Michel claims the prosecution is required to prove Michel knew that the value of the tires was more than $1,000 and failed to do so. ATB ¶¶ 50-51. The State counters that it is required to prove that the tires had a value of over $1,000 but not that the defendant knew the value of the tires was over $1,000.

9. The jury asked a question and the trial court responded along the lines, *the jury is*

to follow the instructions already given and apply them to the facts. Michel argues the trial court erroneously failed to address confusion about the law. ATB, ¶ 37. Michel proposed an instruction that would have re-presented to the jury the elements of the offense, the definition of *owner*, and the definition of *intentionally*; all of which had already been given to the jury, but would have "isolated" those instructions. ATB, ¶ 38. The State contends since the elements of and those definitions had already been provided to the jury in the closing instructions, the trial court's decision to refrain from twice giving the same instruction, albeit it in an isolated fashion the second time, is not error. *Instructions to the Jury*, (elements) at 9, (definition of *intentionally*) at 10, and (definition of *owner*) at 13; [Appellant's] *Appendix* at 26, 27, and 30 [hereinafter ATA].

10. Michel claims the basis for the restitution order was that the tires received in evidence have all been returned to the victims and that at the time of the restitution hearing the tires were improperly considered to be valueless. ATB ¶ 14. The State counters the Defense has provided no evidence the tires have been returned to the victims. The tires were received in evidence and the Defense provides no order, entry from the Register of Actions, or other information from the record indicating the tires have been received by the victims.

Course of Proceedings and Disposition Below

11. The jury found Kevin Michel guilty of C felony theft by knowingly receiving stolen property valued at over $1,000. T 193:23. Polled, the jury confirmed the

verdict. T 194:10. The trial court sentenced Michel and the sentenced included $702 in restitution to Northwest Tire and Auto (Northwest). *Transcript of Proceedings Sentencing*, September 23, 2019 [hereinafter T Sentencing] T 15:24; *Criminal Judgment*, ATA, 43.

Statement of facts

12. On the 3rd of October 2017, T 32:24, an employee of Northwest reported to Jamestown Police Department that 27 of Northwest's pickup truck tires had been stolen. T 31:19. A padlock had been cut off a cold storage shed behind the Northwest's building. T 31-32. Northwest's reported value for the 27 tires was $5,600. T 32:17; 33:10.

13. About a year after the 03 October 2017 theft, Jamestown Police Department's Detective LeRoy Gross received a tip indicating Thomas Melland and a person named Kevin may have been involved in the tire theft. T 34:10; 34:23; 55:15. Detective Gross testified he questioned Thomas Melland and Andrew Heckelsmiller and that Melland and Heckelsmiller each acknowledged being involved with the other in taking tires from Northwest Tire and Auto. T 34-35: 55:18. Gross testified on cross exam that Heckelsmiller lead Gross to Kevin Michel. T 55:8. Gross testified on cross that Heckelsmiller said he had taken the tires to Kevin Michel's. T 62:7. Gross testified Heckelsmiller pled guilty to tire theft. T 35:13. Gross testified Melland indicated to Gross that Melland had also taken some tires from J&L Service. T 35:10.

14. After interviewing Melland and Heckelsmiller, Gross spoke with Defendant

Kevin Michel. T 35:16. Gross testified he told Kevin Michel why Gross was there to speak with Kevin Michel. T 35:19. Gross testified on cross examination he told Michel, "I said, hey, Andrew Heckelsmiller and Tom Melland told on themselves they've been bringing you some tires. There's going to be a lot of restitution these two boys are going to have to come up with unless we can get some tires back." T 51:23. Gross testified on direct "Kevin Michel said that Tom Melland and Andrew Heckelsmiller had been bringing him some tires." T 35:23. Gross testified Michel said he had sold some of the tires from Heckelsmiller and Melland but still had some others. T 35:23; 52:3. Gross testified Michel had said he sold some of the tires to a Mexican man and that Michel did not know the name of the Mexican. T 36:4; 39:15.

15. Gross testified he asked Michel whether Michel would give the tires Michel still had to Gross and that Michel said if Gross would wait right there Michel would go get the remaining tires. T 36:9. Gross testified Michel drove away in his pickup while Gross waited in the parking lot to Michel's repair shop. T 36:17; 52:8; 53:5. Gross testified Michel drove off to the west and about 15 minutes later returned from the east. T 36:18. Gross testified when Michel returned, Michel had seven brand new tires in the bed of Michel's pickup truck. T 36:21. Gross testified Michel turned over the seven brand new tires to Gross and Gross gave Michel a receipt. T 36:24.

16. Gross testified he asked Michel a couple times how much Michel had paid Heckelsmiller and Melland for the tires, explaining if we end up in court Gross

wanted to ensure Michel got restitution, because obviously Michel had been buying stolen tires. T 37:5; 46:18. Gross testified Michel replied "I'm not worried about it. I'll take the loss." T 37:9; 46:24; 54:2.

17. Gross testified there was room in Kevin Michel's shop on the compound Michel shared with his uncle for the tires. T 66:18. Gross described the repair shop compound where he waited while Michel drove to retrieve the tires. The compound had two buildings and lots of cars. T 37-38. Kevin runs a repair shop out of the back building and Kevin's uncle runs a repair shop out of the front building. T 37-38. Michel's uncle has a wrecking yard across the highway from the repair shops. T 38. Gross testified he believed Kevin's shop building was 120' x 60' and that Kevin had a little apartment on the second floor of the building. T 38. Gross testified ". . . at least the last time I was there he [Kevin] had a semitrailer. He's got at least one semitrailer that he could store, engines, mufflers, tires, anything of that sort. He's got a lot of space out there." T 38; 48-49; 66:3.

18. Gross testified when he was giving Michel the receipt for the tires, Michel brought up a reward he had seen for tires. T 40:9. Gross testified Michel told Gross, "I stopped buying tires from them after I saw the reward. After I saw the 500 dollar." T 40:10; 54:4. Gross clarified Michel meant Michel had stopped buying tires from Heckelsmiller and Melland. T 40:12.

19. Gross testified he loaded up the seven tires from Michel and took them to Casey Elhard at Northwest Tire and Auto to see if Elhard could identify the seven tires as Northwest's. T 41:22. The seven tires were received in evidence. T 42, 44.

20. Casey Elhard testified in October of 2017 a padlock was broken off the side door of an outdoor storage container and more than a dozen tires were missing. T 99-100. Elhard testified Northwest was missing three Duck Commander tires valued at $255.99 a piece. T 101:21; 107:19. Elhard testified the value of the Mud Claw tires Northwest was missing is $189.99 each. T 102:21; 107:19. According to the testimony of Elhard, the combined value of the two Duck Commander tires and the one Mud Claw is $701.97. Gross testified the value of the two Duck Commanders from Northwest Tire was two thirds of $768 [$512], T 60:23, and the value of the Mud Claw was one third of $570 [$190]. T 60:18. Gross and Trial Defense Counsel DePuydt went back and forth on the arithmetic and formed a consensus that $702 was Northwest's declared combined loss value for the two Duck Commanders and one Mud Claw recovered from Kevin Michel. T 61.

21. Gross testified he retrieved from Casey Elhard, T 41:8, the manager of Northwest Tire & Auto a copy of the reward posted on Facebook reward. T 99:9. The Facebook reward was received in evidence as State's Exhibit 1. T 41. Elhard testified State's Exhibit 1 is the Facebook posting Elhard had run. T 104. State's Exhibit 1 reads:

> Casey Elhard
> October 4, 2017 - Jamestown -
> $500 REWARD! Be on the lookout for new tires we had stolen from our NW Tire auto location here in Jamestown. Most of them being large mud sizes and some of them in 3's so needing a fourth. NW Tire is offering a $500 reward leading to the prosecution of people involved and/or the return of our tires. Any information you can contact me through Facebook, stop at Northwest tire, or call NW Tire at 701-252-8646, ask for Casey. Thank you.....please

share post to spread the word.
13 16 Comments 226 Shares
Like Comment Share

State's Exhibit 1, ATA, 16.

22. Gross testified Elhard identified three tires as Northwest 's: two Duck Commanders and a Mud Claw; but that Elhard said the four Hercules tires were not Northwest's. T 43. Gross testified Elhard said J&L Service was the only place in town Elhard knew of that carried Hercules tires. T 43:25.

23. Gross testified he went to J&L Service. T 44. "I went to the counter, asked to talk to Troy Nelson, the owner of the business, and I said, 'Troy, are you missing any tires?' And he named off the exact four tires that I had in the back of the truck; same brand, same style, width, radius. Everything of the tires, he named them." T 44:6.

24. Troy Nelson, the owner of J&L Service, T 78:5, testified Gross came to J & L and asked Nelson whether Nelson was missing tires and Nelson knew what Gross was talking about: four Hercules Terra Trac AT II's Load Range E. T 83:18. Nelson said it was the only set he'd ever had stolen or missing. T 84:1. When the prosecutor asked Nelson whether Gross had brought the tires to Nelson to identify, Nelson testified Gross had not. The prosecutor asked, "So this is the first time you've seen them since they went missing?" Nelson answered it was. T 87:22. Nelson looked at them in the court room and testified, "Without a doubt they're mine. It's the only four tires I've ever lost." T 89:11.

25. Nelson explained the theft testifying the Hercules tires were unloaded off the

delivery truck, set in the alley adjacent to J&L Service, and checked off on the invoice. T 79-81. Nelson left to pick up the truck on which the Hercules tires were to be mounted and returned after about 45 minutes. T 79-81. When he returned, the Hercules tires were unaccounted for. T 79-81.

26. Nelson testified, "My cost, 160 a piece, 158 and 160 a piece." T 86:24. Gross testified Nelson had given the value of $147 for each of the four Hercules tires. T 46:5.

27. Gross testified on redirect the four tires Kevin Michel obtained from Heckelsmiller and Melland that Michel sold to the unidentified Mexican would have had a value of at least $400. T 63:14.

28. Heckelsmiller testified he pled guilty to stealing the tires from Northwest Tire and Auto. T 137:11; T 140-14 (Gross testified Heckelsmiller admitted to Gross Heckelsmiller had been convicted of theft of the tires valued at over $1,000). Heckelsmiller testified he and Tom Melland ". . . used to go to the used tire bins and get tires, so it wasn't nothing out of the ordinary for him [Melland] to say I need help loading some tires." T 136:1. Heckelsmiller testified the last couple times he had brought Kevin Michel tires, Heckelsmiller had delivered his tires "to the front door" of Kevin Michel's shop on the property Kevin Michel shared with his uncle. T 130. Heckelsmiller clarified he would drop the tires off by setting ". . . them out of the car right there. . . .", T 130:18, "on his driveway", T 131:8, "and then he [Kevin Michel] would come out." T 130:1.

29. Heckelsmiller testified he once traded Michel four 18 inch tires in exchange for

four 14 inch tires Heckelsmiller planned to install on his girlfriend's car. T 130:3. Heckelsmiller testified Michel had the four 14 inch tires right there in his shop. T 131:16.

30. Heckelsmiller testified on the night of the Northwest theft, Melland came to Heckelsmiller's abode after midnight when Heckelsmiller's son was already asleep and Heckelsmiller himself was already half sleeping. T 136:6. A girl who was with Melland went into Heckelsmiller's abode and watched Heckelsmiller's child, who was already asleep. T 134:11; 135:2. Melland asked Heckelsmiller to go with Melland to pick up some tires. T 135:24. Heckelsmiller testified he did not expect to get any money from Melland for helping pick up the tires from Northwest. T 135:23. Heckelsmiller testified he never did get any money from it. T 135:18. Heckelsmiller testified Melland drove and Heckelsmiller helped load Northwest's tires into Melland's truck. T 134:18. Heckelsmiller had to get back to his son. T 134:18. Heckelsmiller testified Melland told Heckelsmiller that Melland took the tires out to a place five or six miles west of Michel's place. T 135:9.

Standard of review for denial of a Rule 29 motion and sufficiency of the evidence.

31. This Court has explained, "a motion for judgment of acquittal under N.D.R.Crim.P. 29 at the close of the State's case-in-chief preserves the issue of sufficiency of the evidence for appeal." *State v. Hinojosa*, 2011 ND 116, ¶ 16, 798 N.W.2d 634.

Our review of the district court's denial of a motion for judgment

of acquittal is well-established:

> "Under N.D.R.Crim.P. 29(a), the district court is authorized, upon the defendant's motion, to 'enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction.' " *State v. Blunt*, 2010 ND 144, ¶ 12, 785 N.W.2d 909 (quoting N.D.R.Crim.P. 29(a)). To grant a motion for judgment of acquittal under N.D.R.Crim.P. 29, " 'a trial court must find the evidence is insufficient to sustain a conviction of the offenses charged.' " *Id*. (quoting *State v. Maki*, 2009 ND 123, ¶ 7, 767 N.W.2d 852). "When considering a motion for judgment of acquittal, 'the trial court, upon reviewing the evidence most favorable to the prosecution, must deny the motion if there is substantial evidence upon which a reasonable mind could find guilt beyond a reasonable doubt.' " *Id*. (quoting *State v. Hammeren*, 2003 ND 6, ¶ 6, 655 N.W.2d 707). To successfully challenge the sufficiency of the evidence on appeal, "the defendant must show the evidence, when viewed in the light most favorable to the verdict, permits no reasonable inference of guilt." *State v. Gonzalez*, 2000 ND 32, ¶ 14, 606 N.W.2d 873.

State v. Herzig, 2012 ND 247, ¶ 12, 825 N.W.2d 235. In reviewing a sufficiency of the evidence challenge, we have further explained:

> When the sufficiency of evidence to support a criminal conviction is challenged, this Court merely reviews the record to determine if there is competent evidence allowing the [trier of fact] to draw an inference reasonably tending to prove guilt and fairly warranting a conviction. The defendant bears the burden of showing the evidence reveals no reasonable inference of guilt when viewed in the light most favorable to the verdict. When considering insufficiency of the evidence, we will not reweigh conflicting evidence or judge the credibility of witnesses.... A [trier of fact] may find a defendant guilty even though evidence exists

> which, if believed, could lead to a verdict of not guilty.
>
> *State v. Bruce*, 2012 ND 140, ¶ 16, 818 N.W.2d 747 (quotations omitted). "When the verdict is attacked and the evidence is legally sufficient to sustain the verdict, we will not disturb the verdict and judgment even though the trial included conflicting evidence and testimony." *State v. Nakvinda*, 2011 ND 217, ¶ 12, 807 N.W.2d 204.

State v. Romero, 2013 ND 77, ¶ 24, 830 N.W.2d 586, 592–93.

Argument

The trial court correctly denied Michel's Rule 29 motion asserting the State had failed to establish the tires were valued at over $1,000.

32. Michel made a Rule 29 motion for dismissal arguing the State failed to prove the tires were worth more than $1,000. T 116:10. Michel argues that the trial court erred by denying his Rule 29 motion for acquittal. ATB, ¶¶ 47-51. Michel acknowledges there was testimony about the value of the tires, but argues valuing the tires by the retail value results in an invalid valuation. ATB, ¶¶ 47-51. Michel argues the only reasonable value is wholesale value and that retail value is unfair to Michel. ATB, ¶¶ 47-51. Michel argues the method of valuation is completely invalid, that the State failed to prove the tires were worth more that $1,000, and that the trial court should have granted his Rule 29 motion. ATB, ¶¶ 47-51.

33. Casey Elhard, manager of Northwest Tire and Auto, testified that the Duck Commander tires retail for $255.99 each, T 101:21; 107:19, and that the Mud Claws retail for $189.99. T 102:21; 107:19. Two Duck Commander tires and one Mud Claw tire were recovered from Defendant Michel. T 60:6. Based on the

Elhard's testimony, $701.97 is the combined retail value of the two Duck Commanders and the one Mud Claw.

34. Troy Nelson, owner of J&L Service, testified, "My cost, 160 a piece, 158 and 160 a piece." T 86:24. At $158 each, Nelson's four Hercules tires had a combined wholesale cost of $632.

35. $1,333.97 is the combined value for the seven stolen tires Michel had in his possession. This is a valuation arrived at with mixed methods. Elhard's valuation is retail and Nelson's valuation is wholesale.

36. North Dakota Century Code § 12.1-23-05(7) provides: "[f]or purposes of grading, the amount involved in a theft under this chapter is the highest value by any reasonable standard . . ."

37. In *State v. Erickstad*, the Court held the trial court did not err when it allowed use of Kelley Blue Book's market valuation as evidence of the value of a stolen pickup. *State v. Erickstad*, 2000 ND 202, ¶ 34, 620 N.W.2d 136, 146. In *State v. Ensz*, the defendant claimed the only reasonable standard for valuing the property is market value. *State v. Ensz*, 503 N.W.2d 236, 238 (N.D. 1993). The *Ensz* Court noted North Dakota had followed the Model Penal Code in consciously allowing valuation to be based on the highest of any reasonable means of valuation. *Id*.; see also *State v. Goldmann*, 2013 ND 105, ¶¶ 13-17, 831 N.W.2d 748, 752 (declining Goldmann's contention market value was the sole reasonable valuation); *State v. Ebach*, 1995 ND 5, ¶12, 589 N.W.2d 566 (pointing out original value and replacement value could also be legitimate ways of valuing

stolen property).

38. The valuation the trial court used for the tires, a mixture of retail from Northwest and wholesale from J&L, was reasonable. The cases tend to look at the value of the interest invaded. *State v Ensz*, 503 N.W.2d 236, 239 (citing *State v. Lovejoy*, 464 N.W.2d 386, 388).

39. For the first time on appeal, Michel advances a special argument about valuation. Michel argues on appeal ". . . *there was no evidence presented to give reason to believe that Michel had reason to know the sticker price for the tires at either business*" and ". . . *there is no evidence that the defendant had knowledge of the sticker price, the only reasonable valuation is the wholesale cost*." ATB ¶¶ 49-50. Apparently Michel is now arguing that the State is required to prove that the defendant knew that the value of the property he possessed was over $1,000. ATB, ¶¶ 49-50.

40. This Court need not address Michel's new argument. "The purpose of an appeal is to review the actions of the trial court, not to grant the appellant an opportunity to develop and expound upon new strategies or theories." *Beeter v. Sawyer Disposal LLC*, 2009 ND 153, ¶ 20, 771 N.W.2d 282. This Court has declined to address new theories offered on appeal. *Morris v. State*, 2019 ND 166, ¶ 15, 930 N.W.2d 195, 200, reh'g denied (July 30, 2019). "Arguments raised for the first time on appeal generally will not be considered by this court." *Edwardson v. State*, 2019 ND 297, ¶ 11, 936 N.W.2d 376, 379 (quoting *Berlin v. State*, 2000 ND 13, ¶ 20, 604 N.W.2d 437).

41. Michel offers no authority for the suggestion that the State must prove the defendant knew the value of the stolen property in order to sustain a conviction on a theft charge dependent on proof that the stolen property was of a certain value or higher.

42. North Dakota Century Code section 12.1-23-02(3) requires the State to prove the defendant "[k]nowingly receives, retains, or disposes of property of another which has been stolen, with intent to deprive the owner thereof." The mens rea of knowingly does not apply to the value *circumstance* which is found in N.D.C.C. § 12.1-23-05(3)(a). Section 12.1-23-05(3)(a) does not contain the word knowingly. When in Title 12.1, the mens rea is absent, the law imputes a willful level of intent. N.D.C.C. § 12.1–02–02(2). *State v. Knowels*, 2002 ND 62, ¶ 12, 643 N.W.2d 20, 24. Furthermore, subsection 12.1-23-05(7) mentions that for purposes of grading the theft offense, the actor's knowledge of the value of the property is not a factor that needs to be considered.

> For purposes of grading, the amount involved in a theft under this chapter is the highest value by any reasonable standard, *regardless of the actor's knowledge of such value*, of the property or services which were stolen by the actor, or which the actor believed that the actor was stealing, or which the actor could reasonably have anticipated to have been the property or services involved. . . .

N.D.C.C. § 12.1-23-05(7) (emphasis added).

43. Other jurisdictions have recognized that the knowing level of intent in their statutes applies to stealing or possessing stolen property; but not to the value of the stolen property. *Andress v. State*, 351 So. 2d 350, 351 (Fla. Dist. Ct. App.

1977) ("Clearly the State must prove the value of stolen property to be $100.00 or more in order to sustain a verdict of grand larceny; but we are aware of no authority for the proposition that the defendant must know the value of the stolen goods at the time of taking."); *State v. Houle*, 157 Vt. 640, 640–41, 596 A.2d 1292, 1293–94 (1991) ("The intent to commit grand larceny is not conditioned on a showing that the defendant was specifically aware of the value of the object stolen . . ."); *People v. Shannon*, 269 A.D.2d 839, 839, 703 N.Y.S.2d 764 (2000) ("There is no requirement with respect to Penal Law § 165.45 that the People prove that defendant knew the value of the property."); *State v. Simonov*, 358 Or. 531, 542, 368 P.3d 11, 17 (2016) (citing *State v. Jones*, 223 Or.App. 611, 621, 196 P.3d 97 (2008), rev. den., 345 Or. 618, 201 P.3d 909 (2009) (holding that, under a prior version of the first-degree theft statute requiring proof that the value of the property was over $750, the state was not required to prove that the defendant knew that the value of the property exceeded $750); *State v. Johnson*, 188 Wash. 2d 742, 752–53, 399 P.3d 507, 512–13 (2017) ("In discussing the essential elements of attempted first degree theft, this court rejected the defendant's argument that the State must prove he knew the value of the property stolen.").

44. The information in the record regarding valuation of the stolen tires is competent evidence and a reasonable method of valuation. The court's denial of the Michel's Rule 29 motion regarding valuation was proper. There was sufficient competent evidence upon which the jury could find that the tires were valued at over $1,000.

The trial court correctly denied Michel's Rule 29 motion asserting the State failed to show Michel knew the tires were stolen.

45. In his Rule 29 motion Michel argued, "*I don't believe the State has presented even circumstantial evidence that establishes knowledge of the threat of the fact.*" T 122:6. The context indicates Michel was arguing the State had failed to prove Michel knew the tires were stolen. T 121-122. Michel sharpened his argument to this Court. ATB ¶¶ 57-58. Now, Michel acknowledges the State had some circumstantial evidence and that the court is to consider it in a light favorable to the State, but he argues the trial court improperly ". . . *assume[d] the correctness of the State's extrapolations from the evidence*." ATB, ¶ 57. This Court's prior explanations indicate an openness to considering all reasonable inferences that favor the guilty verdict.

> When reviewing challenges to the sufficiency of the evidence, we must draw all inferences in favor of the verdict. *State v. Curtis*, 2008 ND 93, ¶ 5, 748 N.W.2d 709; *State v. Barendt*, 2007 ND 164, ¶ 9, 740 N.W.2d 87. We will reverse a criminal conviction only if, after viewing the evidence and all reasonable evidentiary inferences in the light most favorable to the verdict, no rational fact finder could have found the defendant guilty beyond a reasonable doubt. *Curtis*, at ¶ 5; *Barendt*, at ¶ 9.

State v. Curtis, 2008 ND 108, ¶ 28, 750 N.W.2d 438, 445; *State v. Granrud*, 301 N.W.2d 398, 401 (N.D. 1981); *State v. Helton*, 2007 ND 61, ¶¶ 4, 9, 730 N.W.2d 610, 612; *State v. Smokey's Steakhouse, Inc.*, 478 N.W.2d 361, 362 (N.D. 1991).

46. Michel argues on appeal that "the State's case was built on a singular fact, i.e. Michel's reference to a Facebook post regarding the reward." The State contends

the case against Michel contained several more incriminating facts.

47. Michel had seven stolen tires in his possession. North Dakota recognizes "[i]t is well settled that possession of recently stolen property, unless satisfactorily explained, is a circumstance that tends to show guilt and is to be considered with other evidence in determining the guilt or innocence of the accused." *State v. Smith*, 51 N.D. 130, 199 N.W. 187, 191 (1924), citing 17 R. C. L. 71, *State v. Ross*, 46 N. D. 167, 179 N. W. 993 (N.D. 1920); *State v. McCarty*, 194 N. W. 335 (N. D. 1923).

48. Michel refrained from telling Gross how much Michel had paid Melland and/or Heckelsmiller for the brand new tires. T 46:18; 47:1; 57:6. The law recognizes that "[p]roof of the purchase or sale of stolen property at a price substantially below its fair market value, unless satisfactorily explained, gives rise to an inference that the person buying or selling the property was aware of the risk that it had been stolen." N.D.C.C. § 12.1-23-09(3)(c). The Defense's position was that Michel did not have to tell the detective what Michel paid for the tires. T 57:11. Although legally true, the position can easily be seen as alienating the jury. A juror can reasonably infer Michel did not want to mention to Gross how much Michel had paid for the tires because Michel had not paid what the tires were worth and if Michel mentioned to Gross that Michel had paid less than fair market value for the tires it would induce suspicion.

49. Michel presents himself as an unwitting good-faith purchaser. But it is unusual for a good-faith purchaser, a businessman, to make a $1,300 purchase and never

offer proof of purchase when the detective visits about stolen property. Troy Nelson, owner of J & L Service, on the other hand, testified that during the tire delivery process, he checked off the tires on the invoice. T 81. Invoice ATA, 13. It is predictable that a jury would readily question the legitimacy of Michel's transaction involving over $1,300 worth of brand new tires when there is no receipt, invoice, or writing memorializing the purchase.

50. Michel refrained from pursuing any restitution. T 46:21; 54:1. Michel told Gross Michel wasn't going to worry about it and would take the loss. T 37:9; 46:24; 54:2. A jury can reasonably find Michel's abandonment of his interest inconsistent with normal behavior of a good-faith buyer of goods valued at $1,333.97. The fact that without protest Michael immediately forfeited any claim to legitimate ownership and restitution in the tires gives rise to a reasonable inference Michel wanted to distance himself from an illegal transfer and cauterize any suspicion Gross might harbor that Michel was a fence for stolen tires.

51. Although Michel ran a repair business on the compound he shared with his uncle, Michel kept the seven brand new stolen tires off the compound. Heckelsmiller testified that when Heckelsmiller had traded four 18 inch tires to Michel for four 14 inch tires, Michel had the four 14 inch tires right there in his shop. T 131:16. A jury could reasonably expect a good-faith purchaser trying to sell tires to have them out where customers can see them and where he can show them to an interested potential buyer. Gross testified there was room for the seven tires in Michel's repair shop and the last time Gross had been in the semitrailer used for

storage on the compound there would have been room in it for the tires. T 38; 48-49; 66:3; 66:18. The jury could have reasonably inferred one reason Michel did not want seven brand new tires at the shop where he does business is Michel knew they were stolen.

52. Michel admitted to Detective Gross that Michel had seen Northwest's Facebook reward offered for truck tires stolen from Northwest. T 40:10; 54:3. Michel told Gross that because of the Facebook post, Michel stopped accepting tires from Heckelsmiller and Melland. T 54:9. Michel was admitting to Gross that Michel believed there was a possibility that Heckelsmiller and Melland had brought him stolen tires. The theft was reported on the 3rd of October 2017. T 23:6. According to Gross' testimony regarding Heckelsmiller and Melland's admissions, on the same night as the theft, Northwest's tires were taken by Melland to either a ditch south of town (Melland) or to Kevin Michel's (Heckelsmiller). T 61:23. The Facebook post is dated October 4, 2017. ATA, 16. So it is possible Michel saw the post in the days, not weeks or months, after he accepted the stolen tires. Regardless of when Michel saw the Facebook reward, he kept the tires that fit the description given in the Facebook post until the police showed up at his door and told him Melland and Heckelsmiller confessed to sending the stolen tires to him. At that point, Michel claimed he was an unwitting patsy. A juror can reasonably infer Michel minimized his level of mental culpability and that Michel knew the brand new truck tires he'd received from Melland and Heckelsmiller were the tires for which Northwest was offering a reward.

53. Michel admitted he had sold four tires Melland and Heckelsmiller had brought to Michel to a Mexican man that Michel had no information on. A jury can reasonably find the lack of information about this transaction conveniently involving an untraceable foreigner to be true to the extent that four Heckelsmiller/Melland tires were sold but untrue in regard to Michel's claim he did not know the identity of the buyer.

54. The trial court deciding a Rule 29 motion for acquittal ". . . must view the evidence in the light most favorable to the State . . ." *State v. Hafner*, 1998 ND 220, ¶ 21, 587 N.W.2d 177, 182. "Circumstantial evidence may often be the only method of proving criminal intent." *State v. Lovejoy*, 464 N.W.2d 386, 389 (N.D. 1990). Combining the circumstantial evidence in favor of the State, there is substantial evidence that Michel knew the seven tires were stolen. The trial court correctly denied Michel's Rule 29 motion.

There was sufficient competent evidence for the guilty verdict.

55. The State has outlined several reasonable inferences that the judge and the jury could have made from the evidence that are potent support for a finding of guilt. Michel was in possession of the stolen brand new tires. He did not give the price he had paid, indicating he had underpaid for stolen property and couldn't mention that price or it would reveal he knowingly received stolen tires. He had no receipt for them even though they had a combined value of about $1,300 and he is a businessman. He did not keep them at the shop where he did business, even though he had space to do so, had kept other tires on there, and could be expected

to keep new tires at his shop so he could make a sale. He acted as if he had been duped and offered as a *should have know better* recollection that he'd seen a reward on Facebook for tires that was jarring enough to him that he'd discontinued taking tires from Heckelsmiller and Melland. He did not ask for restitution when prompted twice.

56. The State offers the above material from the facts section and argument in support of the denial of the Rule 29 motion in opposition to Michel's argument that there was insufficient evidence to warrant a guilty verdict. Michel's argument, that the inferences the jury made from the evidence are unreasonable, fails.

The trial court correctly denied Michel's requested instruction.

57. Michel argues on appeal that the trial court erred when it declined to give the instruction Michel suggested to a jury question. ATB, ¶¶ 33-41.

58. The Court has provided the following standard of review for jury instructions.

> Jury instructions are fully reviewable on appeal. *State v. Wilson*, 2004 ND 51, ¶ 11, 676 N.W.2d 98. This Court reviews jury instructions as a whole and determines whether they correctly and adequately inform the jury of the applicable law, even though part of the instructions standing alone may be insufficient or erroneous. Id. Reversal is appropriate only if the instructions, as a whole, are erroneous, relate to a central subject in the case, and affect a substantial right of the accused. *State v. Huber*, 555 N.W.2d 791, 793 (N.D. 1996).

State v. Landrus, 2019 ND 162, ¶ 7, 930 N.W.2d 176, 179

59. The jury's question is in the [Appellant's] Appendix. ATA, 50; 47-2018-CR-00850, Index # 68. The jury's question was read by the trial court judge. T 184. The Clerk did not enter either party's proposed instruction into the portion of the

Register of Actions that is viewable to the public. The trial court judge read the State's proposed instruction. T 189:14. The trial court judge summarized Michel's proposed jury instruction. T 189:21.

60. Trial Defense Counsel acknowledged that her proposed instruction was comprised of a prefatory sentence followed by two definitions and the elements of the offense; all of which were contained in the instructions the jury had already been given. T 189-190. Michel's prefatory sentence was along the lines: "The Court is not able to answer questions of fact. Only the jury may do that. In light of the above reiteration of the law . . . may provide the jury with the direction sought." T 189:22. This was followed with the definitions of "owner" and "intentionally" and the elements of the crime. T 190. The elements and the two definitions had already been provided to the jury in the court's closing instructions. *Instructions to the Jury*, (elements) at 9, (definition of *intentionally*) at 10, and (definition of *owner*) at 13; ATA, 26, 27, and 30.

61. North Dakota has addressed the impropriety of re-presenting an instruction that has already been given to the jury. "The court is not required to needlessly repeat instruction. Needless repetition is to be avoided. When the instructions are complete and intelligible, there is no necessity for repetition; in fact, repetition may be confusing, and can be of such a nature at times as to overemphasize one fact of the case to the detriment of the rights of the other side in the prosecution." *State v. Turner*, 59 N.D. 229, 229 N.W. 7, 9 (N.D. 1930).

62. Other jurisdictions have found that a trial court's refusal to give a redundant

instruction is not error. *League v. Commonwealth*, 9 Va. App. 199, 210, 385 S.E.2d 232, 239 (1989), on reh'g, 10 Va. App. 428, 392 S.E.2d 510 (1990) (A 'refusal to grant instructions covering principles of law upon which the jury has already been properly instructed is not error.' " In fact, trial courts should avoid giving redundant or repetitive jury instructions.); *State v. Broulik*, No. C6-98-989, 1999 WL 171518, at *2 (Minn. Ct. App. Mar. 30, 1999), aff'd, 606 N.W.2d 64 (Minn. 2000) quoting *State v. Auchampach*, 540 N.W.2d 808, 816 (Minn.1995)(The supreme court has explained that if the "substance of a particular instruction is already contained in a court's instructions to the jury, the court is not required to give the requested instruction."); *Montana v. State*, 822 So.2d 954, 961 (Miss. 2002) ("A trial judge is under no obligation to grant redundant instructions," and "[t]he refusal to grant an instruction which is similar to one already given does not constitute reversible error."); *State v. Griffin*, 2014-Ohio-4767, ¶ 5, 141 Ohio St. 3d 392, 394, 24 N.E.3d 1147, 1149 (No purpose is served, for instance, by requiring courts to present redundant jury instructions or instructions that are so similar to other instructions to be presented as to be confusing.); *Porter v. Lincoln*, 282 Ark. 258, 261–E, 668 S.W.2d 11, 15 (1984) (The appellant also complains that the trial court refused to give two instructions requested by the appellant. Both were repetitious. A trial court is not required to give repetitious instructions.).

63. The State contends the trial court properly refrained from providing the instruction Michel submitted because Michel's proposed instruction would have re-presented

instructions that had already been given. This is unnecessary. Michel's contention that isolating the certain instructions and re-presenting them would somehow make them more meaningful or relevant is unpersuasive.

64. Michel contends there was a consensus that the jury's question showed the jury was confused about the law. ATB, ¶ 36. Michel misstates the State's position at trial. The State's position had to do with intent, but the jury wanted the court to help decide the facts that were the key to the issue of intent. T 185. The state's attorney elaborated, "I really think they're asking us to decide the facts for them." T 185:14. It seems that the jury wanted to know whether they ought to properly consider Heckelsmiller or Melland as the owner and if they did, then they had the answer that Michel was a bona-fide, or at least an unwitting, purchaser in good-faith. The determination of whether Michel thought Heckelsmiller and/or Melland were legitimate owners was matter of fact for the jury.

65. Michel argues if the jury was confused in the fashion he suggests, then ". . . *there is a undiscountable possibility that the jury found Michel guilty without deciding the element of mens rea.*" ATB, ¶ 40. The State disagrees with Michel's lack of confidence in the jury's ability to follow instructions. ATB, ¶40. "A jury is generally presumed to follow instructions." *State v. Majetic*, 2017 ND 205, ¶ 23, 901 N.W.2d 356, 363. The jury was instructed on the elements as follows.

> **Theft of Property**
>
> A person who knowingly receives or retains property of another which has been stolen, with the intent to deprive the owner of the property is guilty of Theft.
>
> **Essential elements of offense**

> The State's burden of proof is satisfied if the evidence shows, beyond a reasonable doubt, the following essential elements:
> 1. From on or about the October 4th, 2017, to on or about August 29th, 2018, in Stutsman County, North Dakota, the Defendant, Kevin Michel, knowingly received or retained or disposed of certain stolen property, namely one or more tires;
> 2. That the tires were the property of NW Tire and /or J & L Service; and
> 3. The Defendant acted with intent to deprive the owner of the property; and
> 4. The Defendant did not honestly believe to have had a claim to the property; and
> 5. That the property stolen exceeded one thousand dollars in value but not more than ten thousand dollars.

47-2018-CR-00850, Index # 45; ATA 26. The instruction clearly require the jury to make the finding that the tires belonged to Northwest or J&L. Further, element four requires a finding that the Defendant have no claim to the property. Each of the jurors was polled and verified that it was his or her individual intent that the Defendant be found guilty of the charge. T 194:10. To find all these elements satisfied, which, when polled, the jurors reassured the court they had, the jurors would have had to entirely ignore elements two and four. Supposing the jury ignored their instructions is unwarranted.

The trial court legally imposed $702.00 in restitution.

66. Michel argues "All tires ever alleged to have been in Michel's possession have been returned to the respective businesses and, therefore, those businesses have been made whole in regards to the actions by Michel." ATB, ¶ 66. Michel provides no citation to the record to support this contention.

67. Contrary to Appellant's claim, the record indicates the tires may not have been

returned to the businesses. T 198. After the verdict was received, and prior to sentencing, the trial court judge brought up the issue of what to do with the tires received in evidence. T 196:14. The judge and the prosecuting attorney realized the clerk of court does not care for dealing with such cumbersome exhibits. T 196:25. The prosecuting attorney pointed out that there was another co-defendant, Thomas Melland, whose case had not been resolved. T 196:23. Consequently, the prosecuting attorney asked the court to release the tires from the Clerk's custody back to the Jamestown Police Department to be held in the Department's evidence. T 197:5. The trial court asked the Defense whether they objected to the tires being released from the clerk of court back to the custody of law enforcement. T 197:18. The Defense indicated there was no objection. T 197:22. The court released the tires to the custody of the Jamestown Police Department for the time being. The court recognized the tires might be needed for a future trial or if there was a successful appeal. T 198:3. Michel has appealed.

68. At Michel's sentencing, it was still unclear whether Melland had pled guilty and been sentenced. T 15:4. At sentencing, the State moved for release of the tires back to their respective victims. T Sentencing, 6:25. The trial court mentioned, " . . . all of the tires will be returned to the proper owners." T Sentencing, 15:15. However, there is nothing in the record that indicates that transfer was completed.

69. Michel argues the court erred in awarding $702.00 in restitution to Northwest for the two Duck Commander tires and the one Mud Claw tire. ATB, ¶ 66. Casey Elhard, manager at Northwest, testified the Duck Commanders were discontinued,

that the manufacturer does not make the tire anymore. T 113:1. That makes sale of the two remaining Duck Commanders difficult. Both the Mud Claw and the Duck Commanders are no longer in sets of four. This makes selling each of them more difficult. The Defense argues this perspective is speculative. ATB, ¶ 66. It is speculative, but it is also reasonable and sound. A court deciding restitution may take into account diminution of value. *State v. Pagenkopf*, 2020 ND 33, ¶9, ___ N.W.2d ___.

70. The Standard of review for restitution orders was reiterated recently in *State v. Pagenkopf*.

> 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. 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 reasoned determination, or if it misinterprets or misapplies the law.

State v. Pagenkopf, 2020 ND 33, ¶6, ___ N.W.2d ___.

71. This Court recognized in *State v. Gordon* the difficulty of setting a value on recovered shoplifted items.

> Trial courts have a wide degree of discretion when determining restitution awards. Tupa, 2005 ND 25, ¶ 8, 691 N.W.2d 579. "Evidentiary imprecision on the amount of damages does not preclude recovery." Keller v. Bolding, 2004 ND 80, ¶ 21, 678 N.W.2d 578. When the quantity of damages awarded "may be hard to prove, the amount of damages is to be left to the sound discretion of the finder of facts." B.W.S. Invs. v. Mid–Am Restaurants, 459 N.W.2d 759, 764 (N.D.1990).
>
> . . .

> The valuation of shoplifted merchandise that has later been recovered can be difficult to precisely determine. It is not uncommon for merchandise to sell for less than the amount listed on the price tag, and it is impossible to determine with certainty what merchandise would have sold for had it not been stolen. It is impractical to expect shoplifting victims to track recovered merchandise to determine the ultimate sale price. Given the difficulties inherent in calculating such measures of damages, the determination is "left to the sound discretion of the finder of facts."

State v. Gordon, 2008 ND 70, ¶¶8-9, 747 N.W.2d 125, 128-129.

72. In this instance, the idea the tires have been returned to the business is an assumption of fact not in the record. It is also an unfounded assumption that when or if Northwest does recover its tires from the police department's evidence, that Northwest will be able to make any sale at all with all the tires being short their matches and two of the three out of production.

73. Michel argues he is not responsible for the Duck Commanders and the Mud Claw being taken out of each's set of four and therefore should not be penalized for their diminished value. ATB, ¶ 66. At sentencing, Michel said, "I apologize for buying them and hanging on to them as long as I did." T Sentencing, 13:12. Michel did not mitigate the damage by returning the tires as early as he could have. Michel was not held responsible for any of potential loss on the set of four Hercules tires from J & L.

74. The State contends given the difficulties inherent in calculating such measures of damages, the determination of the valuation of the three tires ought to be "left to the sound discretion of the finder of facts." There was a reasonable basis for the trial court's decision and it should not be disturbed.

Conclusion

75. The State asks this Court to find the lower court's denial of the rule 29 motion was correct, that the jury's verdict was supported by sufficient competent evidence, that the trial court correctly refused to provide Michel's requested instruction, and that the restitution order was legal.

Rule 28(h) of the North Dakota Rules of Appellate Procedure explanation of why oral argument would be helpful to the court.

76. The State submits that the Appellant's issues are not all succinctly contained and that argument may ensure they are clarified.

Rule 32(e) of the North Dakota Rules of Appellate Procedure Certificate of Page Number Compliance.

77. This *Appellee's Brief* complies with the 38 page limit in Rule 32(a)(8)(A) of the North Dakota Rules of Appellate Procedure. This brief is 36 pages.

Dated 20 February 2020.

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CERTIFICATE OF SERVICE

78. On 20 February 2020, the *Appellee's Brief* was served by e-mail to Mary DePuydt, attorney for the Appellant, at depuydt.m@gmail.com

79. On 20 February 2020, the *Appellee's Brief* was filed electronically with the Clerk of the North Dakota Supreme Court by e-mailing to:

supclerkofcourt@ndcourts.gov

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