

**IN THE SUPREME COURT
OF THE STATE OF NORTH DAKOTA**

State of North Dakota,)	
)	Supreme Court No. 20170226
Plaintiff-Appellee,)	
)	Criminal No. 51-2015-CR-02729
)	
vs.)	
)	
Aaron Bruce,)	
)	
Defendant-Appellant.)	

BRIEF OF PLAINTIFF-APPELLEE

**Appeal from Amended Criminal Judgment Entered on May 24, 2017
In District Court, Ward County, State of North Dakota
The Honorable Todd L. Cresap, Presiding**

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[¶ 2] STATEMENT OF THE ISSUE

[¶ 3] Whether the trial court erred in ordering restitution in the amount of \$7,157.20.

[¶ 4] STATEMENT OF THE CASE

[¶ 5] On December 8, 2015, the State charged Aaron Bruce (hereinafter “Bruce”) with Unlawful Manufacture/Delivery/Possession with Intent to Deliver Heroin, a Class A Felony; Manslaughter, a Class B Felony; Tampering in Criminal Investigation, a Class C Felony; Ingestion of a Controlled Substance, a Class A Misdemeanor; and Theft of Property a Class A Misdemeanor. See Appellant’s App. pp. 8-9.

[¶ 6] Bruce made his Initial Appearance on all charges on December 9, 2015. Id. at p. 2.

[¶ 7] On January 14, 2016, a Preliminary Hearing was held. Id. at p. 3. The District Court found probable cause existed, and the State filed an Information. Id. at pp. 10-11.

[¶ 8] On March 11, 2016, Bruce filed a Motion to Dismiss Count 2. See Appellant’s App. p. 12. The State filed a response resisting Bruce’s Motion to Dismiss on March 38, 2016. See Appellee’s App. pp. 1-7. On May 18, 2016, the District Court issued an Order Denying Motion to Dismiss Count 2. See Appellant’s App. pp. 13-17.

[¶ 9] A Pretrial Conference was held on April 27, 2016. Id. at p. 4. The District Court issued a Notice of Trial on June 13, 2016, ordering that trial would commence December 15, 2016. See Appellee’s App. p. 8. On November 18, 2016, the District Court ordered the trial be continued. See Appellant’s App. pp. 5, Doc ID# 111. The District Court issued an Amended Notice of Trial on January 23, 2017, ordering that trial would commence on May 8, 2017. See Appellee’s App. p. 9.

[¶ 10] On February 28, 2017, a Change of Plea hearing was scheduled to occur on March 1, 2017. Id. at p. 10. Also on February 28, 2017, Jonathan Vanderhoef filed a letter with the District Court in which he informed the District Court that he had asserted his Marsy's Law rights. Id. at 11.

[¶ 11] On March 1, 2017, at the Change of Plea hearing and pursuant to a plea agreement, the State filed a Motion to Amend the Information, the District Court ordered the Information be amended, and the State filed an Amended Information with the District Court. See Transcript of Sentencing Hearing pp. 10-11, 34-35; see also Appellee's App. pp. 12-13, and Appellant's App. pp. 18-20. Bruce entered pleas of guilty to Count 1: Unlawful Manufacture/Delivery/Possession with Intent to Deliver Heroin and Count 2: Negligent Homicide. See Transcript of Sentencing Hearing pp. 33-37. In return for those pleas of guilty, the State dismissed Count 3: Tampering in Criminal Investigation; Count 5: Ingestion of a Controlled Substance; and Count 6: Theft of Property. See Appellee's App. pp. 14-15.

[¶ 12] The District Court entered Criminal Judgment on March 1, 2017, and reserved jurisdiction to determine restitution for 90 days. See Appellant's App. pp. 21-25.

[¶ 13] The State filed a motion requesting Bruce be ordered to pay restitution in the amount of \$7,157.20 to Jon Vanderhoef. Id. at pp. 26-29. Bruce objected to the State's motion and requested a restitution hearing. Id. at pp. 30-31. A restitution hearing was held on May 16, 2017. Id. at p. 6. The District Court ordered Bruce to pay restitution in the amount of \$7,157.20 to Jon Vanderhoef on May 18, 2017. Id. at p. 32. An Amended Criminal Judgment was issued by the District Court on May 23, 2017. Id. at pp. 33-34.

[¶ 14] Bruce filed a timely Notice of Appeal from the Amended Criminal Judgment. See Appellant's App. p. 35.

[¶ 15] **STATEMENT OF THE FACTS**

[¶ 16] On December 8, 2015, the State charged Aaron Bruce (hereinafter "Bruce") with Unlawful Manufacture/Delivery/Possession with Intent to Deliver Heroin, a Class A Felony; Manslaughter, a Class B Felony; Tampering in Criminal Investigation, a Class C Felony; Ingestion of a Controlled Substance, a Class A Misdemeanor; and Theft of Property a Class A Misdemeanor. See Appellant's App. pp. 8-9.

[¶ 17] On February 28, 2017, a Change of Plea hearing was scheduled to occur on March 1, 2017. Id. at p. 10. Also on February 28, 2017, Jonathan Vanderhoef filed a letter with the District Court in which he informed the District Court that he had asserted his Marsy's Law rights. Id. at 11.

[¶ 18] On March 1, 2017, at the Change of Plea hearing and pursuant to a plea agreement, the State filed a Motion to Amend the Information, the District Court ordered the Information be amended, and the State filed an Amended Information with the District Court. See Transcript of Sentencing Hearing pp. 10-11, 34-35; see also Appellee's App. pp. 12-13, and Appellant's App. pp. 18-20. Bruce entered pleas of guilty to Count 1: Unlawful Manufacture/Delivery/Possession with Intent to Deliver Heroin and Count 2: Negligent Homicide. See Transcript of Sentencing Hearing pp. 33-37. In return for those pleas of guilty, the State dismissed Count 3: Tampering in Criminal Investigation; Count 5: Ingestion of a Controlled Substance; and Count 6: Theft of Property. See Appellee's App. pp. 14-15.

[¶ 19] After Bruce entered pleas of guilty and prior to imposing judgment, the District Court requested that a factual basis be provided by the State. See Transcript of Sentencing Hearing pp. 37-47. The State provided a detailed factual basis which showed that on July 4, 2015, Bruce (1) negligently caused the death of Aidan Vanderhoef by providing care which involved a gross deviation from acceptable standards of conduct, and (2) delivered heroin to another individual. Id. The factual basis also demonstrated that Bruce admitted he had been purchasing and selling quantities of heroin with Aidan Vanderhoef, and that prior to law enforcement arriving on July 4, 2015, Bruce had removed drugs and Aidan Vanderhoef's phone from his person. Id. The sole fact Bruce disputed was that he actually handed the drugs to Brett Rosenquist on July 4, 2015. See Appellant's App. pp. 46-47.

[¶ 20] The District Court entered Criminal Judgment on March 1, 2017, and reserved jurisdiction to determine restitution for 90 days. See Appellant's App. pp. 21-25.

[¶ 21] The State filed a motion requesting Bruce be ordered to pay restitution in the amount of \$7,157.20 to Jon Vanderhoef. Id. at pp. 26-29. Bruce objected to the State's motion and requested a restitution hearing. Id. at pp. 30-31. A restitution hearing was held on May 16, 2017. Id. at p. 6. At the restitution hearing, the State called two witnesses: Jason Kraft and Jonathan Vanderhoef. See Transcript of Restitution Hearing. Jason Kraft testified that Bruce had Aidan Vanderhoef's phone after Aidan was deceased, and that Bruce never turned the phone over to law enforcement. Id. at pp. 1-3. Jonathan Vanderhoef testified on direct that he was the father of Aidan Vanderhoef, and that his portion of funeral costs for Aidan were \$6,165.00, his cost for transportation to and from the court proceedings for this matter was \$492.20, and that he had purchased the phone

Bruce had taken off of Aidan and the phone's approximate value was \$500.00. Id. at 4-6. On cross examination, Jonathan Vanderhoef testified that a life insurance policy was applied to pay the \$6,165.00 of funeral costs. Id. at 6-10. Jonathan Vanderhoef also testified on cross examination that he utilized Google to determine the \$500.00 valuation of the phone taken by Bruce. Id. Bruce testified at the restitution hearing and indicated that he did not have the ability, at the time of the hearing, to pay any restitution. See Appellant's App. pp. 11-12.

[¶ 22] The District Court ordered Bruce to pay restitution in the amount of \$7,157.20 to Jon Vanderhoef on May 18, 2017. Id. at p. 32. An Amended Criminal Judgment was issued by the District Court on May 23, 2017. Id. at pp. 33-34.

[¶ 23] Bruce filed a timely Notice of Appeal from the Amended Criminal Judgment. See Appellant's App. p. 35.

[¶ 24] LAW AND ARGUMENT

[¶ 25] **A. Whether the trial court erred in ordering restitution in the amount of \$7,157.20.**

1. Standard of Review.

[¶ 26] On appeal, "[t]his Court's review of a restitution order is limited to whether the district court acted within the limits set by statute, which is similar to an abuse of discretion standard." State v. Tupa, 2005 ND 25, ¶ 3, 691 N.W.2d 579 (citing State v. Bingaman, 2002 ND 210, ¶ 4, 655 N.W.2d 57; State v. Kensmoe, 2001 ND 190, ¶ 7, 636 N.W.2d 183). "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." Id.

2. The trial court did not err in ordering restitution in the amount of \$7,157.20.

[¶ 27] “The district court may order restitution as part of a criminal defendant’s sentence after a hearing on the matter.” State v. Putney, 2016 ND 135, ¶ 6, 881 N.W.2d 663 (citing N.D.C.C. § 12.1-32-08(1)). “District courts have a wide degree of discretion when determining restitution awards.” State v. Putney, 2016 ND 135, ¶ 6, 881 N.W.2d 663 (citing State v. Gendron, 2008 ND 70, ¶ 8, 747 N.W.2d 125). “In ordering restitution, the court shall consider: (1) the reasonable damages sustained by the victims, (2) the ability of the defendant to pay monetary reparations, and (3) the likelihood that attaching a condition relating to restitution will serve a valid rehabilitation purpose.” State v. Putney, 2016 ND 135, ¶ 6, 881 N.W.2d 663 (citing N.D.C.C. § 12.1-32-08(1)).

[¶ 28] “The State has the burden to prove the amount of restitution by a preponderance of the evidence.” State v. Putney, 2016 ND 135, ¶ 6, 881 N.W.2d 663 (citing State v. Kleppe, 2011 ND 141, ¶ 28, 800 N.W.2d 311). “Evidentiary imprecision on the amount of damages does not preclude recovery.” State v. Putney, 2016 ND 135, ¶ 6, 881 N.W.2d 663 (quoting State v. Gendron, 2008 ND 70, ¶ 8, 747 N.W.2d 125). “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.’” Id.

[¶ 29] Bruce first asserts the district court did not consider an amount of restitution that he could or would be able to pay. “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, unless the court states on the record [...] the reason it does not order restitution or orders only partial restitution.” State v.

Gendron, 2008 ND 70, ¶ 8, 747 N.W.2d 125 (quoting N.D.C.C. § 12.1-32-08(1)). “[A]ll victims shall be entitled to the following rights, beginning at the time of their victimization: [...] 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.” N.D. Const. Art. I, § 25.

[¶ 30] The district court acknowledged that Bruce did not have a job, did not have any savings, and did not have any money available to pay toward restitution at the time of the restitution hearing. See Transcript of Restitution Hearing p. 23. However, the district court reasoned that the amount of restitution being sought was not an outrageous amount, and that Bruce could certainly pay off the amount after he was released and on supervised probation.

[¶ 31] The district court acted within the limits set by statute. “Under the restitution statute, a restitution payment can be based on what one ‘can or will be able to pay,’ which implies consideration of future factors.” State v. Tupa, 2005 ND 25, ¶ 15, 691 N.W.2d 579 (quoting N.D.C.C. § 12.1-32-08(1)). See State v. Tupa, 2005 ND 25, 691 N.W.2d 579 (Although the defendants may not currently possess the means to pay \$500 per month, they can nonetheless seek gainful employment and begin repayment.); State v. Keener, 2008 ND 156, 755 N.W.2d 462 (finding that the district court did not abuse its discretion when it acknowledged that the defendants would probably never be able to pay the entire amount of restitution, but concluded that a failure to impose restitution would ignore the possibility the defendants might find employment, inherit property, or otherwise receive financial windfall). The district court did not act in an arbitrary,

unreasonable, or unconscionable manner, as its decision was the product of a rational mental process leading to a reasoned determination.

[¶ 32] Bruce next asserts that restitution for funeral costs in the amount of \$6,165.00 are inappropriate because a life insurance policy was utilized to pay the full amount. “In determining whether to order restitution the court shall take into account [t]he reasonable damages sustained by the victim or victims of the criminal offense, which damages must be limited to those directly related to the criminal offense and expenses actually incurred as a direct result of the defendant’s criminal action.” State v. Pippin, 496 N.W.2d 50, 52 (N.D. 1993).

[¶ 33] The district court found that Bruce should not receive windfall from Jonathan Vanderhoef’s foresight to purchase life insurance. See Transcript of Restitution Hearing pp. 18-19. The district court reasoned, “if you go to the Collateral Source Statutes, insurance that is paid for privately is not a collateral source [...] [t]hat is just foresight on the part of individuals so that they don’t suffer a potential catastrophic loss.” Id. at 18. Under the collateral-source rule, “wrongdoer should not benefit at the expense of an innocent party, even where the injured party subsequently receives reimbursement from someone other than the wrongdoer. If an injury has occurred it is subject to specific remuneration.” Nelson v. Trinity Medical Ctr., 419 N.W.2d 886, 893 (N.D. 1988) (quoting Keller v. Gama, 378 N.W.2d 867 (N.D. 1985)). “The general rule is well settled, at least in the case of an action founded in tort, that the recovery of damages by the owner of property injured or destroyed by the fault of another is, as to the person in fault, absolutely unaffected by the fact that he may have already received full payment for his loss by insurance—the payment from the insurer having effect neither to preclude

a recovery nor to minimize the amount of the damages.” Regent Coop. Equity Exch. v. Johnston’s Fuel Liners, 122 N.W.2d 151, 155 (N.D. 1963) (quoting 81 A.L.R. 320). The Court found that the collateral-source rule was also applicable when recovery is limited to actual damages. Regent Coop. Equity Exch. v. Johnston’s Fuel Liners, 122 N.W.2d 151, 155 (N.D. 1963) (citing Jeffords v. Florence County, 165 S.C. 15, 162 S.E. 574 (Sup. Ct. S.C. 1932)).

[¶ 34] It does not appear that the North Dakota Supreme Court has addressed the applicability of the collateral-source rule to the ordering of restitution in a criminal matter. However, the question has come before other jurisdictions. See Harris v. State, 542 So. 2d 1312 (Ala.Cr.App.1989) (finding that the fact that an insurance company actually paid the funeral expenses does not prevent the trial judge from awarding restitution in the same amount); Varner v. State, 497 So. 2d 1135 (Ala.Cr.App. 1986) (applying the collateral source doctrine to a criminal case to determine that damages recovered by a victim are not diminished because the injured party has been compensated for the loss by insurance or other such payment); Brown v. State, 657 So. 2d 1280 (Fla.App. 1995) (“whether the source of any portion of the funeral expenses was life insurance benefits is immaterial in assessing these expenses against the defendant; a victim is entitled to restitution whether the funeral expenses were paid out of wages, savings, or a death benefit”).

[¶ 35] The district court acted within the limits set by statute, as the \$6,165.00 was an actual loss of Jonathan Vanderhoef, even if the \$6,165.00 he spend came from funds he received from a life insurance policy. The district court did not act in an arbitrary,

unreasonable, or unconscionable manner, as its decision was the product of a rational mental process leading to a reasoned determination.

[¶ 36] Bruce next asserts that the district court erred in finding the value of the phone was \$500.00. “Evidentiary imprecision on the amount of damages does not preclude recovery.” State v. Putney, 2016 ND 135, ¶ 6, 881 N.W.2d 663 (quoting State v. Gendron, 2008 ND 70, ¶ 8, 747 N.W.2d 125). “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.’” Id. The district court was presented with testimony from Jonathan Vanderhoef that the value of the phone taken by Bruce was \$500.00. The district court also heard that Jonathan Vanderhoef arrived at that value by performing an internet search utilizing the Google search engine. No other testimony was put forth to dispute or discount that value. The district court was very clear, the only value for the phone that was presented was the value of \$500.00. See Transcript of Restitution Hearing p. 22. The district court did not act in an arbitrary, unreasonable, or unconscionable manner, the district court simply arrived at its conclusion based upon the only evidence put before the court.

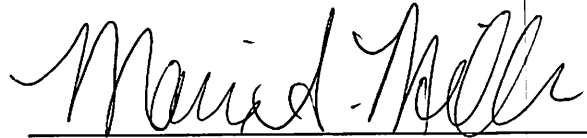
[¶ 37] Bruce, for the first time, asserts that the restitution ordered for the phone is inappropriate because it is not a direct consequence of Bruce’s convicted crimes. “One who fails to raise an appropriate objection at the trial court level waives his right and cannot raise the issue for the first time on appeal.” State v. Palmer, 2002 ND 5, ¶ 8, 638 N.W.2d 18 (citing State v. Olander, 1998 ND 50, 575 N.W.2d 658). It is inappropriate for Bruce to now raise the issue for the first time on appeal.

[¶ 38] Finally, Bruce asserts that it was inappropriate for the district court to order restitution in the amount of \$492.20. Bruce's sole assertion is that the district court did not find a direct connection between Jonathan Vanderhoef's mileage to and from court hearings and Bruce's criminal conduct. "In determining whether to order 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." N.D.C.C. § 12.1-32-08(1)(a). "[A]ll victims shall be entitled to the following rights, beginning at the time of their victimization: [...] 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." N.D. Const. Art. I, § 25. Jonathan Vanderhoef, via statute and via the North Dakota Constitution, is entitled to be reimbursed for transportation expenses to and from court hearings, when, but for Bruce's criminal conduct, he would not have been a victim and would not have incurred, or needed to incur those expenses. The district court's finding that the mileage expenses incurred by Jonathan Vanderhoef were the direct result of Bruce's criminal actions are supported by the evidence in the record, and the district court did not abuse its discretion in imposing \$492.20 restitution for those expenses.

[¶ 39] CONCLUSION

[¶ 40] The district court acted within the limits set by statute, did not act in an arbitrary, unreasonable, or unconscionable manner, and its decision was the product of a rational mental process leading to a reasoned determination. As such, the restitution ordered in the amount of \$7,157.20 and the Amended Criminal Judgement should be affirmed.

Dated this 19th day of October, 2017.



Marie A. Miller (ND Bar ID #06617)
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AFFIDAVIT OF SERVICE

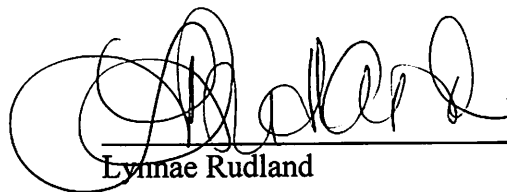
Lynnae Rudland, being first duly sworn, deposes and says:

That she is a citizen of the United States of America, over the age of twenty-one years, and is not a party to nor interested in the above entitled action; that on the 20th day of October, 2017, this Affiant provided a true and correct copy of the following documents in the above entitled action:

BRIEF OF PLAINTIFF-APPELLEE

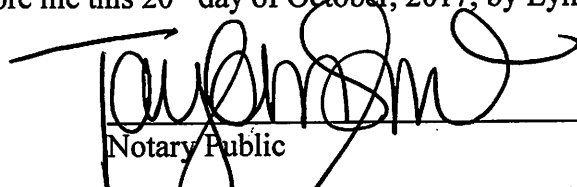
By ELECTRONIC SERVICE to the following:

KYLE M. MELIA
ATTORNEY AT LAW
bismanpublicdefender@nd.gov



Lynnae Rudland

Subscribed and sworn to before me this 20th day of October, 2017, by Lynnae Rudland



Notary Public

TAYLOR M SHORT
Notary Public
State of North Dakota
My Commission Expires Oct. 22, 2021

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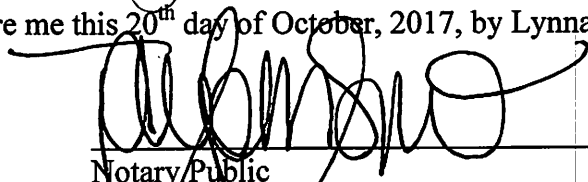
RUSSELL MYHRE
ATTORNEY AT LAW
efile@myhrelaw.com



Lynnae Rudland

Subscribed and sworn to before me this 20th day of October, 2017, by Lynnae Rudland

TAYLOR M SHORT
Notary Public
State of North Dakota
My Commission Expires Oct. 22, 2021



Notary Public