

## IN THE SUPREME COURT OF NORTH DAKOTA

State of North Dakota,  
  
Plaintiff and Appellee,  
  
v.  
  
Brenda Lee Clemens,  
  
Defendant and Appellant.

Supreme Court File No.  
20210136  
Sargent County File No.  
41-2020-CR-00046

**APPELLANT BRIEF**

Appeal from the Criminal Judgment entered on May 10, 2021

Sargent County District Court, Southeast Judicial District, Oakes, North Dakota

The Honorable Mark Blumer Presiding

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ORAL ARGUMENT REQUESTED  
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### **Oral Argument:**

Oral argument has been requested to emphasize and clarify the appellant’s written arguments on their merits.

### **Abbreviations:**

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## STATEMENT OF THE ISSUE

[¶1] **ISSUE I.** Whether the court improperly ordered restitution of speculative losses of the alleged victim.

## NATURE OF THE CASE

[¶2] The criminal charge in this case is theft of property over \$50,000.00. To that charge Defendant/Appellant Brenda Lee Clemens (Ms. Clemens) plead guilty on 04/20/2021.

[¶3] This case began with a complaint and affidavit of probable cause that were filed on 09/17/2020.

[¶4] The order of the magistrate determining probable cause was filed on 09/17/2020 and on the same day a warrant of arrest was issued.

[¶5] Ms. Clemens made her initial court appearance on 09/29/2020.

[¶6] Ms. Clemens had originally plead not guilty. On 04/20/2021 she changed her plea to guilty.

[¶7] During the change of plea hearing a Restitution Hearing was also held. At the conclusion of the Restitution Hearing the trial judge decided the amount of restitution Ms. Clemens had to pay was \$326,618.00.

[¶8] Ms. Clemens thought the amount of restitution should have been \$96,190.00.

[¶9] The criminal judgment was filed on 04/20/2021 and an amended criminal judgment was filed on 05/05/2021.

[¶10] The notice of appeal and order for transcript were filed on 05/06/2021.

[¶11] The notice of filing the notice of appeal was filed on 05/06/2021.

[¶12] An amended judgment was filed on 05/10/2021.

[¶13] An amended notice of appeal was filed on 06/11/2021.

[¶14] The notice of filing the amended notice of appeal was filed on 6/16/2021.

[¶15] This case is now before the North Dakota Supreme Court.

#### STATEMENT OF FACTS

[¶16] The Defendant/Appellant Brenda Lee Clemens (Ms. Clemens) plead guilty in Sargent County, North Dakota, to the crime of Theft of Property over \$50,000. Such a theft is a violation of N.D.C.C. 12.1-23-02(1). This theft involved precious metals, silver and gold, that belonged to David Senger (Mr. Senger).

[¶17] When Ms. Clemens plead guilty to the theft, she admitted to taking silver that belonged to Mr. Senger and that the amount she took had a value of \$96,190.00. This amount was more than \$50,000.00 that was required by the statute and the trial court accepted her guilty plea.

[¶18] After the plea and before the sentencing the Restitution Hearing was held to determine how much restitution Ms. Clemens should have to pay to Mr. Senger. At that Restitution Hearing Ms. Clemens again admitted to taking \$96,190.00 of Mr. Senger's silver and put in Exhibit A to show she had taken \$96,190.00.

[¶19] Mr. Senger at this restitution hearing agreed that Ms. Clemens had taken his silver but he claimed she took much more of his silver than she admitted to and that she also took his gold. The total amount that Mr. Senger claimed Ms. Clemens had taken was \$326,618.00.

[¶20] Mr. Senger supported his claim with his testimony and Exhibit 1 – 10.

[¶21] Exhibit #1 shows the dates of purchases, the amount purchased, and the cost of each purchase. Exhibits 2 – 10 were proof of the individual purchases.

[¶22] Ms. Senger gave no testimony about what he did with or where he stored the silver and gold after any of the purchases and he didn't testify that he ever saw any of the silver and gold after he purchased it. Also, he gave no testimony as to where the silver and gold was located between January 2, 2013 and January 2, 2015 or when he found out that his silver and gold were missing.

[¶23] The trial judges sentencing of Ms. Clemens is found in the Tr. p. 44 L. 10 – 14:

“As to sentence, I'm going to somewhat split it as to time-wise, but I'm going to order that you serve 5 years, all but 30 months suspended. So, serve 30 months, the balance suspended, and that you serve 5 years supervised probation due to the amounts of money that are going to need to be repaid.”

[¶24] The trial judge's ruling on restitution is found in the Tr. p. 44 L. 15 to p. 45 L. 8:

“The State has provided testimony and evidence of an amount of \$326,618. Defense indicates that \$96,190 of that was, and the State agrees, was accounted for by cash receipts. Based on the testimony, though, I believe that there's a preponderance of the evidence that the total amount of coins and bullion were taken at or about the same time as immediate and intimate causal connection between the criminal conduct here and the loss of all of the bullion.

There's an argument others were involved. I don't know anything about if anybody else was involved. If somebody was, then it would be joint and several.

But I'm going to order restitution in the full amount requested, \$326,618. There's no indication that -- I mean, there's all indication that that was the amounts that were taken. No indication that it was some other person. Ms. Clemens denies that she took it, but, apparently, it was all taken at or about the same time as the crime that was pled to, which is Theft of Property Over \$50,000, only a portion of which has been accounted for.”

[¶25] Ms. Clemens is appealing the \$326,618.00 restitution order because she believes the restitution ordered should have been no more than \$96,190.00.

## STANDARD OF REVIEW

[¶26] According to *State v. Walker*, 2019 ND 292, 936 N.W.2d 45 (N.D. 2019)

the standard of review is well established:

“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. Rogers*, 2018 ND 244, ¶ 23, 919 N.W.2d 193 (citing *State v. Bruce*, 2018 ND 45, ¶ 4, 907 N.W.2d 773 (internal citations and quotation marks omitted)). “The district courts possess a ‘wide degree of discretion when determining restitution awards.’ ” *Rogers*, at ¶ 23 (citing *State v. Putney*, 2016 ND 135, ¶ 6, 881 N.W.2d 663). “But, ‘in determining whether or not the district court abused its discretion through misapplication or misinterpretation of the law,’ we apply a de novo standard of review.” *Rogers*, at ¶ 23 (citing *State v. Kostecky*, 2018 ND 12, ¶ 6, 906 N.W.2d 77). “A district court’s award of restitution to a crime victim is made under N.D. Const. art. I, § 25(1)(n) and N.D.C.C. § 12.1-32-08.” *Rogers*, at ¶ 23. “The ‘State has the burden of proving the amount of restitution by a preponderance of the evidence.’ ” *Rogers*, at ¶ 23 (quoting *State v. Kleppe*, 2011 ND 141, ¶ 28, 800 N.W.2d 311).”

## ARGUMENT

### **ISSUE I: Whether the court improperly ordered restitution of speculative losses of the alleged victim.**

[¶27] *State v. Harstad*, 2020 ND 151, 945 N.W.2d 265 (N.D. 2020) dealt with personal property that had no immediate and intimate causal connection between the criminal conduct and the loss of personal property. In the case now before the Court there is a causal connection between the criminal conduct and the loss of personal property. However, Ms. Clemens believes that in her case there were not sufficient facts presented by David Senger (Mr. Senger) at the Restitution Hearing to establish that he had \$326,618.00 of silver and gold in his possession at any time from January 2, 2015 to January 15, 2017 for her to take.

¶28 All that Mr. Senger proved at the Restitution Hearing is that he on seven different dates purchased amounts of silver and gold from 2007 to 2015 and that the purchases totaled \$326,618.00. His testimony didn't tell what he did with the gold and silver after any of the purchases. From Mr. Senger's testimony there is no way of knowing where the silver and gold was stored or the date or dates when he found out his silver and gold had been taken.

¶29 The dates alleged in the complaint when the silver and gold were taken was between January 2, 2015 and January 2, 2017. Exhibit #1 shows Mr. Senger last purchase of silver was 3/11/2015, which is over sixty-seven days after the date the complaint says Ms. Clemens is supposed to have begun her thefts of silver and gold. After the 3/11/2015 purchase of silver did Mr. Senger see his prior purchases of silver and gold when he stored the 3/11/2015 purchase?

¶30 According to the State v. Walker, 2019 ND 292, 936 N.W.2d 45 (N.D. 2019): "The 'State has the burden of proving the amount of restitution by a preponderance of the evidence.'" Rogers, at ¶ 23 (quoting State v. Kleppe, 2011 ND 141, ¶ 28, 800 N.W.2d 311).

¶31 In the case before the court all the state proved is the dates, amounts, and costs involved in Mr. Senger's purchase of silver and gold. Mr. Senger didn't testify he had \$326,618.00 worth of silver and gold and he knew its whereabouts on January 1, 2015.

### CONCLUSION

¶32 The evidence and testimony of Mr. Senger only shows he on seven different dates from 2006 to 2015 bought silver and gold and the total price he paid for the seven purchases was \$326,618.00. What he did with or where he put the silver or gold he



purchased after each of the seven different dates is unknown. Purchasing silver and gold on seven different dates over a nine-year period only proves Mr. Senger made seven different purchases. It doesn't prove that after the seventh purchase Mr. Senger still had in his possession \$326,618.00 worth of silver and gold.

[¶33] This case should be remanded to the district court with an order to reduce the restitution from \$326,618.00 to \$96,190.00 because there is no testimony or evidence that proves Mr. Senger had \$326,618.00 in silver and gold in his possession during January 2, 2013 to January 2, 2015 for Ms. Clemens to take.

Dated this 17<sup>th</sup> day of June, 2021.

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State of North Dakota,  
  
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v.  
  
Brenda Lee Clemens,  
  
Defendant and Appellant.

Supreme Court File No.  
20210136  
Sargent County File No.  
41-2020-CR-00046

**CERTIFICATE OF COMPLIANCE**

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[¶1] This appellant’s brief and appendix complies with the page limit of 38 for the brief and 100 pages for the appendix set forth in N.D. R. App. P. 32(a)(8)(A). The brief in this matter consists of 9 pages and appendix consists of 74 pages.

Dated this 17<sup>th</sup> day of June, 2021.

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IN THE SUPREME COURT OF NORTH DAKOTA

State of North Dakota,  Plaintiff/Appellee,  v.  Brenda Lee Clemens,  Defendant/Appellant.	District Court Case No.: 41-2020-CR-00046  Supreme Court Case No: 20210136  <b>CERTIFICATE OF SERVICE</b>
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[¶1] I certify that a true and correct copy of the following, specifically:

1. Appellant Appendix
2. Appellant Brief
3. Certificate of Compliance
4. Certificate of Service

by electronically serving the same through the North Dakota Supreme Court e-filing system and that e-filing will provide service to the following:

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and by U.S. postal service with proper postage affixed to:

Brenda Lee Clemens  
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440 McKenzie Street  
New England, ND 58647  
Defendant/Appellant.

Dated this 17<sup>th</sup> day of June, 2021.

/S/ Benjamin C. Pulkrabek  
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IN THE SUPREME COURT  
STATE OF NORTH DAKOTA

State of North Dakota,  Plaintiff/Appellee,  v.  Brenda Lee Clemens,  Defendant/Appellant.	District Court Case No.: 41-2020-CR-00046  Supreme Court Case No: 20210136  <b>CERTIFICATE OF SERVICE</b>
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[¶1] I certify that a true and correct copy of the following, specifically:

1. Appellant Appendix (Non-substantive corrections)
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by electronically serving the same through the North Dakota Supreme Court e-filing system and that e-filing will provide service to the following:

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[supclerkofcourt@ndcourts.gov](mailto:supclerkofcourt@ndcourts.gov)

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and by U.S. postal service with proper postage affixed to:

Brenda Lee Clemens  
 c/o DWCRC - ID#62082  
 440 McKenzie Street  
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 Defendant/Appellant.

Dated this 25<sup>th</sup> day of June, 2021.

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