

IN THE SUPREME COURT
OF THE STATE OF NORTH DAKOTA

State of North Dakota,)	
)	Supreme Court No. 20220038
Plaintiff/Appellee,)	
)	
vs.)	
)	District Case No. 51-2020-CR-02033
)	
Shon Daniel Taylor,)	
)	
Defendant/Appellant.)	

APPELLEE'S BRIEF

APPEAL FROM THE DISTRICT COURT CRIMINAL JUDGMENT
IN AND FOR THE COUNTY OF WARD, STATE OF NORTH DAKOTA
NORTH CENTRAL JUDICIAL DISTRICT
HONORABLE RICHARD L. HAGAR
JUDGE OF THE DISTRICT COURT, PRESIDING

ORAL ARGUMENT REQUESTED

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STATEMENT OF THE ISSUE

- [¶ 1] I. The district court did not abuse its discretion in ordering restitution
- II. Appellant has not established obvious error
- III. Appellee agrees a clerical error has occurred

STANDARD OF REVIEW

[¶ 2] Appellant is seeking the Court review a restitution order. The standard of review regarding a restitution order is well established.

This 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. 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. The State has the burden in a restitution hearing to prove the amount of restitution by a preponderance of the evidence.

We review questions of law de novo in determining whether or not the district court abused its discretion through misapplication or misinterpretation of the law.

State v. Kostelecky, 2018 ND 12, ¶ 6, 906 N.W.2d 77 (internal citations omitted).

[¶ 3] However, Appellant is arguing obvious error took place during the restitution hearing. The proper standard of review for obvious error is also well established.

To establish obvious error, the defendant has the burden to demonstrate plain error which affected his substantial rights. To constitute obvious error, the error must be a clear deviation from an applicable legal rule under current law. There is no obvious error when an applicable rule of law is not clearly established.

When asserting a claim of obvious error, a defendant must show: (1) error; (2) that is plain; and (3) the error affects the defendant's substantial rights. We exercise our power to consider obvious error cautiously and only in exceptional situations where the defendant has suffered serious injustice. When analyzing obvious error, we examine the entire record for the probable effect of the alleged error in the light of all the evidence. This Court has also noted the following regarding obvious error:

Even if the defendant meets his burden of establishing obvious error affecting substantial rights, the determination whether to correct the error lies within the discretion of the appellate court, and the court should exercise that discretion only if the error seriously affects the fairness, integrity or public reputation of judicial proceedings. An alleged error does not constitute obvious error unless there is a clear deviation from an applicable legal rule under the current law.

State v. Pemberton, 2019 ND 157, ¶¶ 8, 9, 930 N.W.2d 125 (internal citations omitted).

LAW AND ARGUMENT

I. The district court did not abuse its discretion in ordering restitution [¶ 4] In a restitution hearing, the district court is bound by the limits of the statute dealing with restitution, N.D.C.C. § 12.1-32-08. Kostelecky, ¶ 6. The pertinent part of the statute states:

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.

N.D.C.C. § 12.1-32-08(1). The court's role at a restitution hearing is therefore twofold, (1) determine the damages and (2) determine which of those damages are attributable to the defendant before the court. At the restitution hearing held on January 5, 2022, the district court heard testimony and received evidence from the victim in the matter and Tai Dang, an insurance adjuster with State Farm Insurance Company. R118:5:6 to R118:44:13. The victim testified to the value of the property stolen by Appellant in the burglary, how he arrived at his valuation of that property, and a detailing of other losses as a result of Appellant's burglary. R118:5:6 to R118:41:18. The State introduced into evidence a five page document detailing specific items stolen along with the victim's valuation of the stolen property. R109. The district court then heard testimony from Tai Dang as to the costs State Farm Insurance Company incurred as a result of the burglary. R118:43:5 to

R118:44:13. The district court received extensive evidence and testimony regarding the damages incurred as a result of Appellant's burglary and that those damages were attributable to Appellant. The district court then took that information and properly determined the State proved the restitution amount through a preponderance of the evidence and ordered the full amount sought.

[¶ 5] Prior to August 1, 2019, the restitution statute also required the court determine a defendant's ability to pay and if ordering restitution would serve a valid rehabilitational purpose. N.D.C.C. § 12.1-32-08(1)(b), (c). State v. Strom, 2019 ND 9, 921 N.W.2d 660, cited by Appellant in paragraph 20 of his brief, was a case dealing with the statute prior to August 1, 2019 and is therefore inapplicable to the present matter. Since a district court is now limited to determining (1) damages and (2) the attribution of those damages, determining a defendant's ability to pay goes beyond the limits of the statute.

II. Appellant has not established obvious error

[¶ 6] Appellant has the burden to establish that an obvious error took place at the restitution hearing. Pemberton, ¶ 9. "To establish obvious error, a defendant must show: (1) error; (2) that is plain; and (3) affects substantial rights." Id. In the present matter, Appellant argues the value State Farm Insurance Company placed on the stolen items may have been different than what was testified to by the victim. Appellant Br. ¶¶ 21-27. Appellant fails to establish that an error took place as there is no reference in his brief to an applicable legal rule supporting the assertion of an error, instead providing a mere conclusory assertion. See State v. Meador, 2010 ND 139, ¶ 15, 785 N.W.2d 886 ("[A]n argument is without merit when a party does not provide supportive reasoning or citations to relevant authorities."); State v. Cone, 2014 ND 130, ¶ 19, 847 N.W.2d 761 (finding

conclusory assertions are not sufficient; courts do not need to consider arguments that are not adequately supported and briefed); McMorrow v. State, 2003 ND 134, ¶ 12, 667 N.W.2d 577 (conclusory arguments are without merit unless supported by reasoning to relevant authorities).

[¶ 7] Appellant cannot show an error was plain without first showing there was an error. Appellant's argument fails on this point as well.

[¶ 8] The Court is to determine if an Appellant's substantial rights were affected. Pemberton, ¶ 9. Here the Appellant fails to show he "suffered serious injustice." Id. Appellant's counsel at the restitution hearing extensively questioned the victim regarding the entirety of the damages caused by Appellant's burglary. R118:31:25 to R118:41:4. Furthermore, the damages incurred by State Farm Insurance Company were limited to their insurance payout as a direct result of the burglary. R118:44:3 to R118:44:10. The amount paid by State Farm Insurance Company was not in dispute at the hearing, prompting Appellant's counsel to waive cross examination of Tai Dang. R118:44:12 to R118:44:13.

[¶ 9] Finally, as evidenced by Appellant's counsel's closing arguments at the hearing, Appellant's counsel determined attacking the values provided through the victim's testimony was a tactical decision. R118:46:4 to R118:49:9. "Error wittingly created by defense counsel's tactics cannot be obvious error." State v. Stoppeworth, 442 N.W.2d 415, 417 (N.D. 1989).

IV. Appellee agrees a clerical error has occurred

[¶10] Reviewing the exhibit introduced into evidence at the restitution hearing, it is clear all parties at the hearing missed the basic math of multiplying 170 by 200. R109. The total value of the 200 fishing lures stolen in the burglary should have been \$34,000, not \$35,000.

Appellee is in agreement with Appellant this constitutes a clerical error. Since “only the sentencing court may correct clerical error,” Appellee requests the matter be remanded with instructions to correct the clerical error by reducing the total amount of restitution by \$1,000. N.D.R.Crim.P. 36, Explanatory Note. The proper total amount of restitution would be \$56,013.00, with \$13,355.38 payable to State Farm Fire and Casualty Company and \$42,657.62 payable to the victim.

CONCLUSION

[¶11] For the foregoing reasons Appellee requests the Court find Appellant has not shown obvious error and remand for the purpose of lowering the amount of restitution as detailed above.

Dated this 3rd day of May, 2022.

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CERTIFICATE OF COMPLIANCE

[1] The undersigned hereby certifies that the Brief of Plaintiff/Appellee, is in compliance with Rule 32 of North Dakota Rules of Appellate Procedure and the brief contains 8 pages.

Dated this 3rd day of May, 2022

/s/Christopher W. Nelson
Christopher W. Nelson #08708

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REQUEST FOR ORAL ARGUMENT

[1] The State requests oral argument to clarify arguments and address questions regarding facts that may not be apparent from the record.

Dated this 3rd day of May, 2022

/s/Christopher W. Nelson
Christopher W. Nelson #08708

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AFFIDAVIT OF SERVICE

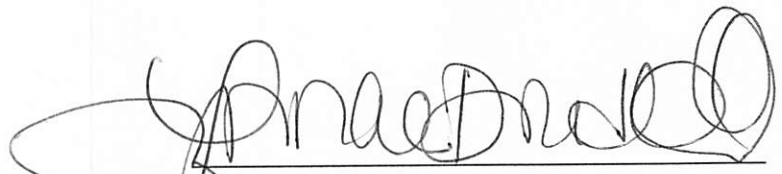
Lynnae Rudland, being first duly sworn, deposes and says:

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 3 day of May, 2022, this Affiant provided a true and correct copy of the following documents in the above entitled action:

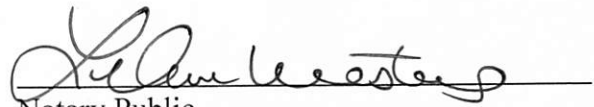
APPELLEE’S BRIEF

By ELECTRONIC SERVICE to the following:

BENJAMIN PULKRABEK
ATTORNEY AT LAW
pulkrabek@lawyer.com


Lynnae Rudland

Subscribed and sworn to before me this 3 day of May, 2022, by
Lynnae Rudland


Notary Public

LEANN WESTERENG
Notary Public
State of North Dakota
My Commission Expires April 21, 2026