IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 18-0578

STATE OF MONTANA,

Plaintiff and Appellee,

v.

AUSTIN MICHAEL WHITE,

Defendant and Appellant.

OPENING BRIEF OF APPELLANT

On Appeal from the Montana Eighth Judicial District Court,
Cascade County, the Honorable Elizabeth Best, Presiding

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STATEMENT OF THE ISSUE

1. Did the district court err in ordering the Defendant to pay $15,360.86 in restitution when the victim testified that he did not have personal knowledge of how the valuations of replacement items in his affidavit were determined?
2. Did the district court err in awarding restitution for $925 in repairs to a Ford Econoline van when the Defendant was not charged with criminal mischief to the van and the charging affidavit—in which was charged with theft—did not mention the specific damages to the van?
3. In the alternative, was the defense attorney ineffective in failing to investigate and present evidence of current retail prices for new replacement items claimed by the victim, when that evidence would have shown that the affidavit significantly overstated replacement prices?

STATEMENT OF THE CASE

On July 28, 2017, the Defendant, Austin White, was charged with Count I, felony criminal mischief; Count II, burglary; Count III, felony theft; and Count IV, felony theft. D.C. Docs. 1, 2.

Mr. White pled guilty pursuant to a plea agreement on August 22, 2018. D.C. Doc. 45, Plea Agreement, (App. B). Under the terms of the agreement, he pled guilty to Count I, Criminal Mischief, a felony, and the State dismissed counts II through IV. He agreed to pay restitution for Count I and for the dismissed cases, but reserved the right to contest at sentencing the restitution amount owed to the victim in Counts II, III and IV. He did not object to the amount of restitution owed to Gary Hackett, the victim in Count 1.

After a restitution hearing on August 22, 2018, the court ordered him to pay restitution of $15,360.86 to Gary Skolrud and $1829 to Gary Hackett. D.C. Doc 43; D.C. Doc. 46, Sentencing Order and Judgment (App. C). Mr. White was sentenced on August 22, 2018 to a five-year commitment to the Department of Corrections, all suspended. App. C.

STATEMENT OF THE FACTS

The charges in this case were based on three separate incidents: a criminal mischief incident on April 16, 2017, in which Mr. White drove his van into Gary Hackett's garage door; a theft from a van at F&S Transport on or about April 18, 2017; and a burglary and theft incident at F&S Transport on or about December 13, 2016. D.C. Docs. 1, 2.

After reviewing surveillance tapes, police determined that Mr. White had purposely driven his black van into his former landlord Gary Hackett's garage on April 16, 2017, in a possible failed attempt to burglarize the property. The damage caused by this act amounted to $1829. D.C. Doc. 1 at 5. This incident was the basis of the Count I criminal mischief charge. D.C. Doc. 2.

Because White had installed a new white back panel on his black van (at some time on April 16), officers then determined that the Hackett garage incident might be connected to a theft from a Ford Econoline van outside F& S Transport. D.C. Doc. 1 at 6-7.

On April 10, 2017, the F&S Transport owner had reported that suspects also had rammed the door of his business, damaging it, but he had not reported anything missing. They had also cut padlocks. Over $5000 damage was caused to the door, but nothing was reported as taken. D.C. Doc. 1 at 8-9. Mr. White was not charged with committing this crime. D.C. Doc. 2.

On April 18, 2017, the owner of F&S Transport reported that suspects "kept returning" to steal items off of and from a 1994 Econoline van parked at F&S Transport. These included a white back panel door,

floor mat, radio system, heat controls, air cleaner assembly system, and belt to the vehicle, with losses in the amount of $1100. D.C. Doc. 1 at 8. Count IV, felony theft, was based on the April 18 report of theft involving the Econoline van. D.C. Doc. 2. Mr. White was charged with "purposely or knowingly exerting unauthorized control over the property of another [with] the purpose of depriving the owner of the property. The value of the property exceeded $1500." Damages to the van were not mentioned in the charging affidavit, which listed only the items taken from the van. D.C. Doc. 1.

F&S Transport had also been burglarized on or about December 13, 2016 and the owner had reported $11,250.89 worth of items stolen at that time. D.C. Doc. 1 at 7. On that occasion, the suspects had entered the business by cutting a padlock. *Id.* Mr. Skolrud and the county attorney asserted that the suspects had rammed the door on that occasion, although the charging affidavit did not mention that fact. August 22, 2018 Restitution Hearing Tr. at 30, 32 (hereinafter "Tr.")

Officers conducted a search of White's van pursuant to a warrant and found items from the April 18 theft of the Econoline van, including the white back door panel, a black rubber floor mat and an engine air

cleaning assembly. D.C. Doc. 1 at 9. They also suspected that two items found in White's van—a tan ratchet strap, and a red and black high-lift jack—had been taken in the December 2016 burglary. *Id.* The victim later stated that the tan ratchet strap might not have been stolen from F& S Transport. Tr. at 33.

None of the other items from the December 13 burglary and theft were located in White's possession, however. D.C. Doc. 1 at 10. White had pawned several items and had removed them from pawn around the time of the search warrant, but none were connected to the December 13, 2016 burglary. *Id.*

Count II, burglary, and Count III, felony theft, were based on the December 13, 2016 burglary. The bulk of the restitution claimed and ordered in this case (over $11,250) was based on the December burglary.

On August 22, 2018, the Defendant pled guilty pursuant to a plea agreement. App. B. Under the terms of the agreement, he agreed to plead guilty to Count I, criminal mischief, for the April 16, 2018 incident in which he rammed Mr. Hackett's garage door with his van. The State agreed to dismiss Counts II, III and IV—the incidents

involving F&S Transport—and not to seek sentencing of Mr. White as a persistent felony offender. He also agreed to pay restitution for Count I and for the dismissed cases, with the right to contest the restitution amount for Mr. Skolrud, the owner of F&S Transport.

The plea agreement provided: "The Defendant agrees to pay restitution on all charges/cases included in the plea agreement, including any charges/cases being dismissed per this agreement. He reserves the right to a contested restitution hearing with regards to the $15,360.86 to Gary Skulrud [sic]." App. B.

A restitution hearing was also held on August 22, 2018. The Defendant did not contest the amount of restitution owed to Gary Hackett, which was $1829. Tr. 19. Mr. Hackett had submitted an invoice for the repairs. D.C. Doc. 38, Hackett Affidavit of Pecuniary Loss. Mr. White did contest the $15,360.86 claimed by Mr. Skolrud for the dismissed counts II, III and IV. D.C. Doc. 38, Skolrud Affidavit of Pecuniary Loss (App. A).

At the hearing, Mr. Skolrud, the owner of F&S Transport, testified that the business is a mail contractor business that hauls mail to the

post office. He had owned the business for 18 years and been involved with it for a total of 39 years. Tr. 24.

The county attorney questioned Mr. Skolrud about his affidavit of pecuniary loss during the hearing. She asked Mr. Skolrud to acknowledge that the affidavit's values were written into the form by his wife, rather than himself:

> Q. When she filled out and wrote in all of these values, you agreed with them --
> A. Oh, yeah.
> Q. -- at the time of that?
> A. Yeah.

Tr. 70.

On cross-examination, Mr. Skolrud stated that his wife and others looked up the affidavit's values on the computer. Tr. 69-70. While he had been in the room at the time, he conceded that he did not know how his wife had determined the replacement values listed in the affidavit. Tr. 50. He also admitted that he did not have personal knowledge as to whether or not the values were accurate. Tr. 48. He stated that he himself did not look up any of the prices for the missing items. Tr. 57, 60-61.

Mr. Skolrud also produced receipts for several missing items, with a total value of $2394.52. One of the receipts showed that his wife had paid $169 at Home Depot for an M-18 2-piece combo kit (a Milwaukee drill set). App. A, 4/7/16 Home Depot receipt. The affidavit, however, requested $277 for the same item. App. A at 4. The district court awarded restitution in the amount of $277 as part of the total restitution order. App. C.

The affidavit also requested $199 for a 230-piece Craftsman mechanic and tool set. App. A. at 5. But the Sears receipt attached to the affidavit showed a price of $99.99 for the set. It had been modified with a "1" hand-written in in front of the printed "$99.99." App. A, Sears receipt, 12/26/16. The district court awarded restitution in the amount of $199 as part of the total restitution order. App. C.

Other than these receipts, Mr. Skolrud did not produce any other documentation in support of the valuations in the affidavit. He stated that he did not have business inventory records (Tr. 40-42), could not produce accounts payable records (Tr. 42, 51-53), and could not produce other receipts for most of the stolen items. He also could not produce "computer printouts" documenting the current retail cost of

replacement items. Tr. 48, 53, 61. He did not produce an invoice for repairs to the Ford Econoline van. App. A at 6.

The district court noted that the victim was not required to produce documentation to support the affidavit. Tr. 83.

Mr. White's attorney objected that that the person who determined the values in the affidavit was not there to testify about them. Tr. 79, 81. He pointed out that "facts are weak on what the actual value is" and that "this stuff is greatly, greatly inaccurate." Tr. 82, 81.

At the end of the restitution hearing, the defense asked the court to impose either no restitution for Mr. Skolrud, or in the alternative, $2394.52, which was based on the receipts provided by Mr. Skolrud with the affidavit. Tr. 82.

The court ordered restitution be paid to Gary Hackett in the amount of $1829.00 and to Gary Skolrud in the amount of $15,380.66. Tr. 86; App. C.

STANDARD OF REVIEW

This Court reviews whether a district court had statutory authority to impose a sentence de novo. *State v. McMaste*r, 2008 MT 268, ¶ 20, 345 Mont. 172, 190 P.3d 302 (citing *State v. Breeding*, 2008

MT 162, ¶ 10, 343 Mont. 323, 184 P.3d 313). Restitution awards present mixed questions of law and fact, which this Court also reviews de novo. *State v. Patterson*, 2016 MT 289, ¶ 9, 385 Mont. 334, 384 P.3d 92 (citing *State v. Cerasani*, 2014 MT 2, ¶ 11, 373 Mont. 192, 316 P.3d 819).

A finding of fact is clearly erroneous if "it is not supported by substantial evidence, the court has misapprehended the effect of the evidence, or our review of the record convinces us that a mistake has been committed." *State v. Spina*, 1999 MT 113, ¶ 12, 294 Mont. 367, 982 P. 2d 421.

SUMMARY OF ARGUMENT

The district court erred in awarding restitution based on the affidavit and testimony of Mr. Skolrud, because he admitted that he did not have personal knowledge of how the valuations in the affidavit were determined.

The district court also erred in awarding restitution for repairs to a Ford van that were not mentioned in the charging affidavit, because the Defendant did not agree to pay for those repairs in the plea

agreement and had never been charged with causing the damages that the affidavit stated had needed to be repaired.

Finally, Mr. White's defense counsel was ineffective in failing to introduce "computer printouts" or screenshots of current prices offered by retailers for the items, for the purpose of contesting the victim's claimed valuations. There was no plausible justification for his failure. The Defendant also requests that this Court take judicial notice of current retail prices of new replacements of the same brand name items for which the victim requested restitution.

ARGUMENT

I. The District Court Erred in Ordering Restitution to Mr. Skolrud Because the Victim Did Not Have Personal Knowledge of How the Affidavit's Values Were Determined.

A. Montana Law Requires That Restitution Orders Be Based on Affidavits or Testimony Derived from Personal Knowledge of the Affiant or Witness.

The sentencing judge is required to impose restitution for pecuniary loss sustained by the victim on a defendant convicted of a criminal offense. MCA § 46-18-201(5). The victim "who suffered pecuniary loss" must "provide evidence of that loss either in the form of

an affidavit or testimony." MCA § 46-18-242; *State v. Dodge*, 2017 MT 318, ¶9, 390 Mont. 69, 408 P.3d 510.

An affidavit is a written declaration made under oath. MCA § 26-1-1001. An affidavit, if provided, is all that is required to permit the court to award restitution and a victim is not required to substantiate a restitution amount with documentation. *McMaster*, ¶ 29. If a PSI is not prepared, the victim can provide evidence of his or her loss by testifying "at the time of sentencing." MCA § 46-18-242(2).

While a court may order restitution based solely on a victim's affidavit or sworn testimony, the affidavit must be based on the victim's personal knowledge and must comply with the formal requirements for affidavits. "The requirement of § 46-18-242, MCA, that a victim submit evidence specifically describing his or her pecuniary loss under oath in an affidavit or by testifying at sentencing is designed to ensure that restitution awards comply with basic principles of due process; that is, that an award is reliable." *Dodge*, ¶13.

This Court has defined "personal knowledge" as: "knowledge gained through firsthand observation or experience, as distinguished from a belief based on what someone else has said." *Heibert v. Cascade*

County, 2002 MT 233, ¶30, 311 Mont. 471, 56 P.3d 848, citing *Black's Law Dictionary* 877 (7th ed, 1999).

In *State v. Cleveland*, this Court overturned parts of a restitution order that relied on loss amounts in an affidavit that were not based on the victim's personal knowledge. "He did not know how the amounts were arrived at or what means of calculation was used." *State v. Cleveland*, 2018 MT 199, ¶ 12, 392 Mont. 338, 423 P.3d 1074, citing *State v. Hunt*, 2009 MT 265, ¶ 20, 352 Mont. 70, 214 P.3d 1234, and *McDermott v. Carie*, LLC, 2005 MT 293, ¶ 26, 329 Mont. 295, 12 P. 3d 168.

This Court explained: "Failing to base restitution on the affidavits or testimony given under oath violated Cleveland's due process rights. Affidavit by or testimony of the victim under oath as to the victim's personal knowledge of pecuniary loss ensures reliability and provides a means of holding the victim accountable if it is later shown the victim overstated the claimed loss. *Dodge*, ¶13. A second-hand email or quote provides no indicia of reliability or means of accountability."

Similar problems with the victim's affidavit are present in this case.

B. Because Mr. Skolrud Admitted That He Did Not Have Personal Knowledge of How the Values in the Affidavit Were Determined, His Testimony and Affidavit Did Not Satisfy the Restitution Statute's Procedural Requirements.

At the restitution hearing in this case, the county attorney introduced a six-page affidavit of pecuniary loss, signed by Mr. Skolrud in the presence of a notary, which detailed numerous items stolen from the business, along with valuations of their replacement cost. App. A.

Upon questioning from the county attorney, Mr. Skolrud acknowledged that his wife had determined and written into the affidavit the values of the lost items.

> Q. And, when she filled out and wrote in all of these values, you agreed with them --
> A. Oh, yeah.
> Q. -- at the time of that?
> A. Yeah.

Tr. 70. His belief in the values was therefore based on "what another person said," rather than on his own investigation. *Cf. Heibert*, ¶ 30. The fact that he was present in the room while someone else calculated the values does not show that he understood how they were determined. Mr. Skolrud also acknowledged that earlier in the case his wife had drafted a list of the lost items and their values for law

enforcement, which the county attorney described as written in his wife's "really nice handwriting." Tr. 22.

When asked what he had done to make sure the values on the affidavit were accurate, Mr. Skolrud offered a vague explanation:

> Oh, we went through like sales things and stuff like that. And just -- computer. A lot of it was off computers and stuff like that, because I don't know where I would find all of these things around, so we just went -- most of it was on computer. Looked it up.

Tr. 37. He clarified that he himself did not look up the values on the computer but his wife did. "She's far better at computer than I am, so." Tr. 69-70. He also repeatedly referred to unnamed other individuals looking up values on the computer. Tr. 47, 49, 61.

Mr. Skolrud also explained that he was the one who signed the pecuniary loss affidavit in the presence of a notary and affirmed the truth of the affidavit. Tr. 50. His wife did not sign the affidavit or swear to the affidavits' contents, even though she had determined the values and written them down for law enforcement and in the affidavit. His wife also did not testify at the restitution hearing.

On cross-examination, however, Mr. Skolrud admitted that he himself did not have personal knowledge as to whether or not the replacement values were accurate nor how they were determined.

> Q. Okay. So, two things. One is, you don't know if this is accurate; correct?
> A. Well, that's what they could do on a computer.
> Q. Second thing is, is you did not look these up; correct?
> A. No. I didn't. No.
> Q. And so, the notary doesn't even -- when the notary made -- notarized this, were you the person that signed it?
> A. Yeah. The best of our --
> Q. But you don't know --
> A. -- abilities --
> Q. -- that it's --
> A. -- is what we were doing.
> Q. But you just told me it's not necessarily true. They're just estimates; is that correct?
> A. What we could find on a computer is what we put on the deal.
>
> Tr. 50.

Mr. Skolrud repeatedly referred to others, including his wife, finding and determining the values of the stolen items in the affidavit. With respect to a Skilsaw worm drive saw, with a claimed replacement value of $350, he stated, "That's what they figured it would cost, yeah. That's what they looked it up at…" Tr. 47. He added, "I'm sure that they picked it off of a computer that said that was what it was worth." Tr. 48.

He admitted that he did not know how accurate the estimates were. Tr. 48.

Regarding two 2000 Honda generators, with a claimed replacement value of $2000 each, he again stated, "That's what they got off the computer." Tr. 49. He admitted that he didn't know how those assisting him found the values or where they found them.

> Q. How --
> A. I don't --
> Q. -- do they find --
> A. -- know.
> Q. -- these values?
> A. I don't know where they found it.

Tr. 49. Mr. Skolrud was also vague about how the replacement value was determined for two porta powers at $358 each. He stated "It's what came out on the computers." Tr. 53. He testified that "he wouldn't know" if the large-handle ax found on the computer with a cost of $75 was the same brand as the one that was stolen. Tr. 56.

With respect to the two-ton red come-along valued at $49, Mr. Skolrud admitted that he "didn't know for sure personally" that that was the value of the item. Tr. 56. He also didn't personally look up the price for the floor jack, which his affidavit valued at $399. He again

admitted that he did not look up any of the prices personally and could not say how those assisting him had determined the prices. Tr. 60-61.

Finally, he admitted repeatedly that most of the valuations in the affidavit were "just estimates." Tr. 46, 47, 48, 50.

The county attorney tried to rehabilitate Mr. Skolrud's testimony on redirect by asking him leading questions. Mr. Skolrud responded, "I could see what she was bringing up and stuff like that. And, she says, "Well, is this pretty much what you had?" And I said, "Yeah, that's what I had. So." Tr. 70. However, this testimony only established that he affirmed the objects' identity. He still could not explain how the values were determined, including what website they were taken from, or which retailer's prices his wife was relying on. He accepted the results of her research rather than conducting it himself.

Because the affidavit and testimony were not based on Mr. Skolrud's personal knowledge, it lacked the guarantees of reliability and accuracy that affidavits are required to have. Because he did not personally look up the values, Mr. Skolrud could testify under oath without feeling personally accountable for any mistakes in the valuations of loss on the affidavit. If he had personally researched the

values, he could have explained which retailer offered the item at the claimed price, why he chose that retailer, and whether he had been careful to base the value on the cost of an individual item rather than on the cost of a set of the items.

Like the witness in *Cleveland*, Mr. Skolrud could not explain how the affidavit's amounts were determined. *Cleveland*, ¶ 9. He also resembled the victim in *State v. Coluccio*, who could not explain how the valuations in her affidavit were calculated. *State v. Coluccio*, 2009 MT 273, ¶¶ 43-45, 352 Mont. 122, 214 P.3d 1282.

The affidavit in this case is also analogous to the formally flawed affidavit in the civil case, *McDermott v. Carie*, in which the affidavit for the bill of costs was signed by a partner who had no personal knowledge of its contents, on behalf of absent partner who had drafted the affidavit. *McDermott v. Carie*, 2005 MT 293, ¶ 27, 329 Mont. 295, 124 P.3d 168. This Court explained that "The maker must have personal knowledge of the information contained in the statement and must swear to its validity." *McDermott*, ¶ 26 (citation omitted).

This Court explained in *Dodge* and in *McDermott* why an affidavit must conform to formal requirements. "An oath, contained in either an

affidavit or testimony, ensures reliability. "The person who swears to the accuracy of the enumerated costs [in an affidavit] may be held accountable if it is later shown that they have knowingly overstated their costs." *McDermott*, ¶ 27. This Court overturned the restitution order in *Dodge* because "no one provided sworn testimony regarding when either document was prepared; who prepared it; how the costs were calculated; or why, for example, a 9.13% administrative surcharge was applied. No specific person was identified who could be held accountable and address concerns of whether costs were overstated." *Dodge*, ¶ 13. In fact, an affidavit or sworn testimony that is not based on personal knowledge violates the due process rights of the defendant.

Mr. Skolrud's affidavit was legally insufficient and should not have been accepted by the district court. In accepting his affidavit, the district court did not comply with the procedures required by MCA § 46-18-242. As a result, the court lacked authority to order restitution. Moreover, White's due process right to pay an accurate amount in restitution was violated.

II. The District Court Erred in Imposing Restitution for Damage to the Ford Van, When Mr. White Was Not Charged With That Conduct and Did Not Agree To Pay For It.

The district court imposed restitution in the amount of $925 for damages and repairs to the Ford Econoline van. *See* App. A at 6, describing "vandalized 1999 Ford white van" and $925 in repairs, including $500 in labor and $425 in parts including "broken driver's window, broken backdoor window, and destroyed ignition."

While Mr. White was charged originally with theft related to items taken from the Ford van on April 18, he was never charged with criminal mischief or damage to the van. Neither the Information nor the charging affidavit mentions any of these particular damages to the van, nor the requested repairs. D.C. Docs. 1, 2.

Instead, the Information charges White in Count IV with Theft and alleges that "the above-named Defendant purposely or knowingly obtained or exerted unauthorized control over property of the owner, namely F&S Transport, and had the purpose of depriving the owner of the property….April 18, 2017." D.C. Doc. 2. The charging affidavit notes that Mr. White was found in possession of items from the Ford van— a white back panel door, a black rubber floor mat, and an engine air

cleaning assembly. Mr. Skolrud had reported stolen from the van a white back panel door, floor mat, radio system, heat controls, air cleaner assembly system, and belt to the vehicle, with losses in the amount of $1100. D.C. Doc. 1 at 8. The charging affidavit does not allege that White damaged the van and does not mention any of the specific damages to the van described in the victim's loss affidavit. D.C. Doc. 2.

In the plea agreement, Mr. White agreed only to pay restitution for cases with which he had been charged, including those that were dismissed. He did not agree to pay restitution for actions or damage with which he was never charged. App. B. at 3.

The district court erred in imposing restitution for a crime (criminal mischief to the Ford van) that Mr. White was not charged with committing.

These errors resemble the error in *State v. Simpson* in which the district court imposed restitution for conduct that had never been charged. *State v. Simpson*, 2014 MT 175, ¶¶24-25, 375 Mont. 393, 328 P.3d 1144. In that case, the district court imposed restitution for two aluminum boats, even though Simpson had never been charged with

stealing two aluminum boats. This Court reversed this part of the restitution order and explained: "Although Simpson agreed to pay restitution for charges dismissed under the plea agreement, he did not agree to pay for items that he was never charged with stealing. We have disallowed restitution for offenses that defendants have not admitted, been found guilty of or agreed to pay." *Simpson*, ¶25, citing *Breeding*, ¶ 19; *In re B.W.*, 2014 MT 27, ¶ 23, 373 Mont. 409, 318 P.3d 682.

Here, the district court should not have imposed restitution for the vandalism or criminal mischief to the van, because Mr. White was only originally charged with theft and the charging affidavit did not mention damages to the van. The Defendant did not agree to pay restitution for acts with which he had never been charged.

III. In the Alternative, Mr. White's Right to Effective Assistance of Counsel Under the Sixth Amendment and Article II, Section 24, of the Montana Constitution Was Violated When His Attorney Failed to Research and Offer Alternative Replacement Prices to Illustrate that the Victim's Valuations Were Overstated.

Mr. White's attorney was ineffective in failing to research prior to the restitution hearing the retail replacement prices cited in Mr. Skolrud's affidavit. This information is publicly available on multiple retailer's websites and easy to determine in the case of specific brand

name items with detailed specifications. Had he researched that information, he could have demonstrated that the values in the affidavit were overstated in a way that inflated the total restitution request by at least three thousand dollars. Because the victim did not provide any "computer printouts" or screenshots to substantiate his wife's valuations of the stolen items, Mr. White's attorney could have rebutted the victim's unsupported valuations with his own "computer printouts" showing significantly lower current retail prices for the same brand name items of the same specifications.

There was no plausible justification for Mr. White's attorney to fail to perform this research and to offer an investigator's testimony or printed out documentation of prices for the items from retailers such as Home Depot, Amazon, or Lowe's.

A. Mr. White Has A Constitutional Right to Effective Assistance of Counsel.

The Sixth and Fourteenth Amendments of the United States Constitution and Article II, §24 of the Montana Constitution guarantee the right to effective assistance of counsel. That right is violated when counsel provides unreasonable assistance that prejudices a defendant. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed.

2d 674 (1984). Additionally, the Montana Constitution provides a more expansive right to counsel than the federal constitution. "Despite the Sixth Amendment's extensive protections, we have held that the right to counsel afforded by Article II, Section 24 of the Montana Constitution is broader than the rights afforded by the United States Constitution." *State v. Garcia*, 2003 MT 211, ¶37, 317 Mont. 73, 75 P. 3d 313 (citations omitted.)

When evaluating a claim of ineffective assistance of counsel, this Court uses the two-part test enunciated in *Strickland*. *State v. Colburn*, 2018 MT 141, ¶21, 391 Mont. 449, 419 P.3d 1196, citing *Whitlow v. State*, 2008 MT 140, ¶ 10, 343 Mont. 90, 183 P.3d 861. Under the first prong of the *Strickland* test, the defendant must show "counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment." *Colburn*, ¶21 *quoting Golie v. State*, 2017 MT 191, ¶ 7, 388 Mont. 252, 399 P.3d 892 (citing *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064).

Under the second prong of *Strickland*, the defendant must show that counsel's performance prejudiced the defense. *Colburn*, ¶21, citing *Whitlow*, ¶ 10. Under this prong, the defendant must show there is a

reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Colburn*, ¶21, citing *Dawson v. State*, 2000 MT 219, ¶ 147, 301 Mont. 135, 10 P.3d 49; and *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068.

B. Had Defense Counsel Researched Current Prices for the Replacement Items, He Could Have Shown the District Court That the Victim's Affidavit Overstated the Prices of New Replacement Items by Thirty to One Hundred Percent.

In light of the victim's refusal to supply "computer printouts" from retailers to show how the replacement prices were determined, the defense should have researched replacement prices on publicly available retailer websites and should have presented that information to the district court.

While the victim is not required to present documentation, the defendant has a due process right to explain or rebut any information presented at the hearing. *State v. Aragon*, 2014 MT 89, ¶ 16, 374 Mont. 391, 321 P.3d 841 (citation omitted). The defendant also may assert any defense to a request for restitution "that the [defendant] could raise in a civil action for the loss for which the victim seeks compensation." MCA § 46-18-244(2). In a civil case, a defendant could offer documentation showing that the costs cited by the plaintiff were overstated.

1. The Defendant requests that this court take judicial notice of current retail prices on retailer websites for the same brand name items, for the limited purpose of demonstrating defense counsel's ineffective representation at the restitution hearing.

The Defendant requests that this Court take judicial notice of the prices currently offered by retailers for new replacement items of the same brand and description as those requested by the victims in this case. This request is made under Montana Rule of Evidence 201 (b)(2), which provides "A fact to be judicially noticed must be one not subject to reasonable dispute in that it is…(2) capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned."

The Defendant is requesting that the Court take judicial notice of the prices currently offered (at the time of the filing of this brief) by retailers on their own publicly available retail websites. These are facts that are capable of accurate and ready determination, because they can be looked up on retailer's websites by anyone. Moreover, the accuracy of the retailers' own websites cannot be reasonably questioned. Retailers have no reason to advertise prices other than those at which they wish to sell items.

The Defendant is not asking the Court to take judicial notice that these prices represent the actual "replacement value" of the items reported lost by the victims. He also is not asking the court to take judicial notice that these prices represent the amount of restitution that should have been, or should be awarded. Instead, Defendant only requests that this Court recognize that many of the brand name items described in detail by the victim are currently available at these prices available on the Internet.

The difference between these current prices and the replacement values claimed by the victim is large enough to call into question the accuracy of the values cited by the victim. The difference in the retail prices also demonstrates why it was important and harmful to the Defendant's due process rights that the victim's affidavit was not supported by personal knowledge of how the valuations in the affidavit were determined. Finally, the difference demonstrates that the defense attorney was ineffective in failing to research and introduce information on current retail prices for replacement of the stolen items.

Other courts have taken judicial notice of publicly available facts on the Internet, including prices on retail websites. *See, e.g., Johnson v.*

Lodge, 673 F. Supp. 2d 613 (D. Tenn. 2009) (court may take judicial notice of price estimates on Fidelity website), citing *State Dist. Council of Laborers v. Omnicare*, 583 F.3d 935, 942 (6th Cir. 2009); *City of Monroe Employees Ret. Sys v. Bridgestone Corp.*, 399 F.3d 651, 655n.1 (6th Cir. 2005) (explaining court's citation to the National Association of Securities dealer's web site and citing Rule 201; *Grimes v. Navigant Consulting*, 185 F. Supp. 2d 906, 913 (N.D. Ill. 2002) (taking judicial notice of stock prices listed on a web site). *See also Moss v. Infinity Ins. Co.*, 2015 U.S. Dist. LEXIS 122327, 2015 Westlaw 5360294 at *5 n.1 (N.D. Cal. 2015) (taking judicial notice of retail price of 2012 Jeep Liberty, for purposes of determining case did not meet $75,000 case-in-controversy requirement).

2. Defense counsel failed to point out discrepancies between the claimed values in the affidavit and the actual receipts provided with the affidavit, including an apparent falsification of one receipt.

Defense counsel should have pointed out to the district court that the affidavit of pecuniary loss requests an inflated reimbursement for two of the items for which a receipt was provided. He also should have referred to publicly available retailer prices to demonstrate that the other claimed replacement values were overstated.

In the affidavit, the Skolruds requested $199 for a 230-piece Craftsman standard and metric tool set. But their own Sears receipt attached to their affidavit shows that they paid $99.99 for a replacement set on December 26, 2016, after the burglary. The receipt appears to have a "1" hand-written in in front of the "$99.99" on the actual printed receipt. App. A, Sears receipt. On Sears' website, a 230-piece Craftsman standard and metric tool set is currently available for $99.99.[1] It appears that the victim deliberately modified the Sears receipt, increasing the amount by $100.

Secondly, the affidavit requests restitution of $277 for a Milwaukee drill set—an M18 Compact 2-piece combo kit—but the victims also provided a receipt for an M18 2-piece combo kit for which they paid $169. App. A, Home Depot receipt. This inflated request for reimbursement—36% higher than the Skolruds paid for the item—is typical of other over-valuations of lost items in the affidavit.

3. Defense counsel should have presented documentation of current retail prices of the same brand name items to demonstrate that the valuations in the affidavit were overstated by 30 to 100%.

[1] *See* App. D, Ex. A, screenshot of 230-piece Craftsman standard and metric tool set advertised on http://www.sears.com.

The other replacement prices cited in the affidavit (for most of the items) are thirty to one hundred percent higher than retail prices from mainstream retailers. At the same time, many of the prices cited in the affidavit do not appear to be charged by any retailer.

For example, Mr. Skolrud requested $2000 each for two stolen Honda 2000 generators, for a total request of $4000 in restitution. But Honda EU 2200i generators (the next generation model) [2] are available from several retailers at $1049.[3] Mr. Skolrud appears to have overstated his loss by approximately $1900.

Four-ton portapowers are priced at $184.99 or $114.99 at Northern Tool, or $114.13 at Home Depot.[4] Mr. Skolrud's affidavit cites a replacement price of $358 each for two four-ton porta-powers.

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[2] *See* Mark Smirniotis, "The Best Portable Generator," *Wirecutter*, August 12, 2019, available at https://thewirecutter.com/reviews/best-portable-generator/. This article cites a price of $1050 for Honda EU 2200i from Home Depot.

[3] App. D, Ex. B, screenshots of Honda EU 2200i generator prices, (overview) and screenshot of Honda EU 2200i generator from https://www.northerntool.com.

[4] App. D, Exhibit C, screenshots of 4-ton porta-power prices (overview) and from https://www.northerntool.com and https://www.homedepot.com

The Dewalt 12-inch compound miter saw, for which Mr. Skolrud requested $499, is available from Home Depot for $349.[5]

Mr. Skolrud asked for $584.99 for a new Craftsman table saw, which is available, depending on the size, for $199 (Lowe's), $349.99 (Sears); or $279.99 (Sears).[6]

The affidavit states that a replacement for a Skilsaw M77 wormdrive saw will cost $350. But several retailers, including Home Depot, offer a Skilsaw M77 worm drive saw for $199.[7]

Mr. Skolrud requests $499 for a Milwaukee electric buffer, which is available online for prices ranging from $229.99 (Amazon) to $259.99 (Home Depot).[8]

Other items' value appears to be overestimated in part because the affidavit's valuations do not take into account that items are sold in sets rather than individually. Mr. Skolrud's affidavit requests $286 for

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[5] App. D, Ex. D, screenshots of overview of prices for Dewalt 12-inch compound miter saw and from https://www.homedepot.com, describing Dewalt 12-inch 15-amp double bevel compound miter saw.

[6] App. D., Ex. E, screenshots of overview of prices for Craftsman table saw and from https://www.lowes.com and https://www.sears.com.

[7] App. D., Ex. F, screenshots of overview of prices for Skilsaw Mag 77 wormdrive saw and price from https://www.homedepot.com.

[8] App. D, Ex. G, screenshots of overview of price for Milwaukee electric buffer and screenshots of Milwaukee electric buffer at https://www.homedepot.com.

twelve Ph-16 oil filters, at $23.82 each. But Ph-16 oil-filters are sold in sets of six for $15.98 on Amazon.[9]

The affidavit requests $700 for 35 "blue ratchet straps," at $35 each. But a box of twenty 2" x 20' "heavy duty blue ratchet straps" sells for $219 on amazon.com. [10]

Mr. Skolrud's affidavit claimed a loss of $400 for a four tire chains for a 2001 Dodge, at a price of $100 per tire chain. But most tire chains are sold in sets of two, at prices such as from $64.31 a pair (Amazon) to $61.26 a pair (etrailer.com).[11]

4. There was "no plausible justification" for the defense attorney's failure to present valuation evidence to counter the victim's unsupported assertions.

Mr. White's attorney was frustrated at the hearing because he recognized that the replacement values in the affidavit seemed inflated. But this Court has explained that under Montana's statutory

[9] App. D., Ex. H, screenshot of PH-16 set of 6 engine oil filters on https://www.amazon.com.

[10] App. D., Ex. I, screenshot of sets of blue ratchet straps on https://www.amazon.com.

[11] App. D., Ex. J, screenshot of tire chains for 2001 Dodge, and screenshots of pair of tire chains from https://www.amazon.com and https://www.etrailer.com.

provisions, victims do not have to provide documentation to support their affidavits of pecuniary loss. *McMaster*, ¶ 29.

In addition, this Court has stated that "when a Defendant does not present contradictory evidence, the District Court does not err in relying on a victim's estimate of loss." *State v. Simpson*, 2014 MT 175, ¶14, 375 Mont. 393, 328 P. 3d 1144 (citation omitted).

But in cases in which the defense offers some other evidence supporting a different restitution award, this Court has held that restitution is not supported by substantial evidence where the evidence before the court is conflicting and no other testimony or evidence is available to be examined or reviewed as to the discrepancy. *State v. Aragon*, ¶ 20.

The Defendant's attorney therefore should have offered his own research and documentation of actual market prices for the replacement items. Had he offered documentation and/or investigator testimony about current market prices, he could have shown that the affidavit's values were overstated. Because the victim and the State refused to offer documentation, including computer printouts showing the basis of

the replacement prices, the outcome of the restitution hearing would likely have been different.

In *State v. Weber*, 2016 MT 138, 383 MT 506, 373 P.3d 26 this Court held that the defense attorney had been ineffective in part for failing to introduce evidence of valuation evidence of a stolen plasma cutter, leaving the State's replacement value of $2100 more or less unchallenged. *Weber*, ¶ 26. This Court concluded that there was "no plausible justification" for defense counsel's failure to establish a key element of Weber's defense, the market value of the plasma cutter, when the evidence was available to Weber. *Weber*, ¶ 27.

Here, the whole purpose of the restitution hearing was for the Defendant to challenge the amount of restitution to be awarded to Mr. Skolrud. One important way that the Defendant could have reduced the amount awarded would have been for his attorney to show "computer printouts" or screenshots demonstrating current retail prices for the items requested by the victim. Because the attorney did not present such evidence, the victim's claimed valuations went unchallenged. There was no plausible justification for failure to present this information to the district court.

Presented with the differing estimates, the district court would have been required to make a determination as to what amount of restitution was supported by a preponderance of the evidence, and would have ordered a lower amount of restitution.

CONCLUSION

For all of the above reasons, the Defendant requests that, with regard to Issue II, this Court order the district court to reduce the restitution amount by $925, because this amount was imposed despite the terms of the plea agreement. With respect to Issues I and III, he requests that this case be remanded to the district court for a new hearing on restitution amounts owed to Mr. Skolrud by the Defendant.

Respectfully submitted this 29th day of October, 2019.

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By: /s/ Laura M. Reed
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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Century text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 7220, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ Laura Reed
Laura Reed

APPENDIX

CERTIFICATE OF SERVICE

I, Laura Marie Reed, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 10-29-2019:

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