

STATE OF MONTANA,

Plaintiff and Appellee,

v.

COREY MICHAEL KELLY,

Defendant and Appellant.

BRIEF OF APPELLANT

On Appeal from the Montana First Judicial District Court,
Lewis and Clark County, the Honorable Christopher D. Abbott,
Presiding

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STATEMENT OF THE ISSUE

A court can only impose restitution for losses caused by a defendant's criminal conduct. Corey Kelly's criminal conduct of shooting one bullet inside the living room of a trailer damaged two wood panels and a bookcase. Did the district court err when it ordered Corey to pay for a \$13,495.00 trailer remodel that included repaneling nearly the entire interior and replacing window, door, ceiling, and floor trim?

STATEMENT OF THE CASE

The State charged Corey with deliberate homicide for shooting Mark Luther during a fight at Mark's trailer home in Helena, Montana. (D.C. Doc. 4.) Following a four-day trial, the jury found Corey guilty of mitigated deliberate homicide. (4/1/21 Tr. at 371; D.C. Doc. 48.)

The State requested \$54,550.66 in restitution. (D.C. Doc. 57 at 4, 12; D.C. Doc. 61.) Among other things, the request included \$13,495.00 for a remodel of the trailer, which was owned by Mark's parents. (D.C. Doc. 61; *see* 7/16/21 at 18.) The remodel included repaneling the walls of the trailer's hallway, bedroom, living room, and kitchen and installing new window, door, ceiling, and floor trim. (D.C. Doc. 61.) Corey objected and argued the only parts of the trailer damaged during the incident were

the two wall panels through which the bullet traveled—one in the living room and one in the hallway—and a bookcase. (D.C. Doc. 62.) Corey agreed to pay to fix that damage but maintained he should not have to pay for the remainder of the remodel and that doing so would result in a windfall to the Luthers. (D.C. Doc. 62.)

Although the court found the issue of restitution “tricky” and “difficult,” it ordered Corey to pay \$48,015.72, which included the entire \$13,495.00 trailer remodel. (7/16/21 Tr. at 114–16, attached as App. A; D.C. Doc. 71 at 3, attached as App. B.) The court sentenced Corey to Montana State Prison for 40 years and imposed a 20-year parole restriction. (7/16/21 Tr. at 104–10; D.C. Doc. 71 at 2.)

Corey timely appealed to this Court.

STATEMENT OF THE FACTS

Mark was killed by a single bullet. (3/31/21 Tr. at 12–22.) After a night of heavy drinking, Mark began acting violently and got into an argument with Corey in the living room of the trailer home he rented from his parents. (3/30/21 Tr. at 298–301, 312; 3/31/21 Tr. at 19, 50–51, 55–64, 73, 77–85, 127–35.) The two were yelling at one another, and things escalated quickly. (3/30/21 Tr. at 313; 3/31/21 Tr. at 60, 64,

134–35.) Mark, who often acted “outrageous[ly],” began grabbing loaded guns from his bedroom and throwing them down the hallway at Corey, who was standing in the living room unarmed. (3/30/21 Tr. at 234–36, 248–49, 298–304; 3/31/21 Tr. at 56–64, 84–85, 130–32.) Other people in the room were afraid. (3/30/21 Tr. at 302–03, 314; 3/31/21 Tr. at 62.) Corey, believing somebody was going to get hurt, picked up a rifle and shot Mark once. (3/30/21 Tr. at 236–39, 304–08; 3/31/21 Tr. at 64–65, 132–35.)

At trial, the evidence confirmed Mark was shot once in his living room. (3/29/21 Tr. at 128, 164; 3/31/21 Tr. at 12–22.) After the bullet exited Mark’s body, it entered a wood-paneled wall in the living room, exited a wood-paneled wall in the hallway, hit a bookcase, and tumbled to the floor. (3/29/21 Tr. at 167, 173; *see* State’s Exs. 8–9, 16–17, admitted 3/29/21 Tr. at 157, attached as App. C.) The State admitted several photographs of the small defects in the two wood panels and bookcase caused by the bullet. (State’s Exs. 8–10, 16–17.)

Prior to sentencing, Mark’s parents, the Luthers, obtained a proposal from “Team Builders, Inc.” to remodel the trailer. (D.C. Doc. 61.) For \$13,495.00, Team Builders, Inc. would “[r]e panel [the] hallway,

bedroom, living room and adjoining walls of kitchen,” and “[p]lace new window, door, ceiling and floor trim.” (D.C. Doc. 61.) In total, Team Builders, Inc. proposed replacing 1,312 square feet of paneling. (D.C. Doc. 61.) The estimate was not itemized. (D.C. Doc. 61.) The Luthers requested Corey pay them \$13,495.00 in restitution to cover the remodel. (D.C. Doc. 61.)

Corey filed a notice of objection to the restitution request. (D.C. Doc. 62.) Corey reminded the court that the trial evidence revealed that only two wall panels and a bookcase were damaged by the bullet. (D.C. Doc. 62.) Corey agreed to pay to replace the two panels, to fix the bookcase, and to replace any carpet with blood stains. (D.C. Doc. 62.) However, because the incident did not cause any other damage to the trailer, Corey maintained the court could not order him to pay for the remainder of the remodel. (D.C. Doc. 62.)

At sentencing, the State did not present any evidence supporting the restitution request other than the general remarks of the probation officer who wrote the PSI. The PSI author believed the record revealed “residual damage” and “a lot of blood,” and the Luthers’ remodel proposal was “related to the consequences of the homicide.” (7/16/21 Tr. at 18–19.)

He agreed with the State's speculation that if a person replaced trim with blood on it, they might need to replace the entire piece of trim, but he said he was "not a carpenter." (7/16/21 Tr. at 26.) Neither the Luthers nor a representative of Team Builders, Inc. testified regarding the proposal, and the State did not admit any documentation of blood or other damage to the trailer.

The State referred to the photographs admitted at trial and argued that Corey should have to pay for the entire \$13,495.00 remodel because there was a "bullet hole that went through siding and so forth." (7/16/21 Tr. at 77.) The State argued the requested amount was reasonable. (7/16/21 Tr. at 77.) Corey again objected to the restitution, relying on his previous briefing on the issue and arguing the request was not substantiated. (7/16/21 Tr. at 87–88.)

The court struggled with whether to grant the \$13,495.00 restitution request. The court found the proposal "tricky" and "difficult" to assess since there was no itemization. (7/16/21 Tr. at 116.) Relying on the trial photos, the court ultimately determined the request was reasonable, supported by substantial evidence, and recoverable in a civil action. (7/16/21 Tr. at 116.) The court concluded, "there has to be some

things done to get that place up to a sealable condition just because of the disorder and the mess caused by this incident.” (7/16/21 Tr. at 116.) The court ordered Corey to pay \$13,495.00 for the remodel. (7/16/21 Tr. at 116.)

STANDARDS OF REVIEW

Restitution cases create mixed questions of law and fact. *State v. Cole*, 2020 MT 259, ¶ 9, 401 Mont. 502, 474 P.3d 323. The Court reviews conclusions and applications of law de novo for correctness and related findings of fact for clear error. *Cole*, ¶ 9. Findings of fact are clearly erroneous if not supported by substantial evidence, the lower court clearly misapprehended the effect of the evidence, or the Court is firmly convinced that a mistake was made. *Cole*, ¶ 9.

SUMMARY OF THE ARGUMENT

Corey did not cause \$13,495.00 in damages to the Luthers’ trailer. This Court has consistently held that a court cannot order a defendant to pay restitution in excess of the damages caused by his criminal conduct. This Court has also emphasized that it is the State’s burden to prove the requisite causal connection. Here, the State failed to do so. The only evidence of damage to the trailer were two small bullet holes in two wood

panels and one small bullet hole in a bookcase shelf. Nothing more. Because the State did not present a shred of evidence establishing that damage to a confined part of the trailer necessitated thousands of dollars of upgrades to the rest of the home, it did not prove Corey's criminal conduct caused \$13,495.00 in losses. This Court must reverse the restitution award.

ARGUMENT

The State failed to prove Corey's criminal conduct of shooting one bullet that went through two wood panels and a bookcase caused \$13,495.00 in damages to the trailer.

A defendant must pay restitution "in an amount sufficient to fully compensate victims for all pecuniary loss substantiated by record evidence to have been caused by the defendant's criminal conduct." *Cole*, ¶ 11 (internal quotation omitted). Restitution must be limited to loss suffered "as a result of the commission of an offense" and constitutes substantiated damages recoverable against the offender in a civil action "arising out of the facts or events constituting the offender's criminal activities" or the replacement cost of property destroyed or devalued "as a result of the offender's criminal conduct." *Cole*, ¶ 11 (internal quotation omitted). Replacement cost is "the cost of a substitute asset that is

equivalent to an asset currently held.” *Black’s Law Dictionary* (Bryan A. Garner ed., 11th ed., 2019). The causal relationship between the offender’s criminal conduct and the pecuniary loss is “the touchstone” for determining whether a victim is entitled to restitution. *State v. Jent*, 2013 MT 93, ¶ 13, 369 Mont. 468, 299 P.3d 332. The State has the burden of proving by a preponderance of the evidence the causal connection. *Cole*, ¶ 11 (internal quotation omitted); *State v. Aragon*, 2014 MT 89, ¶ 16, 374 Mont. 391, 321 P.3d 841.

In *Cole*, this Court held that the State failed to prove Cole’s criminal drug possession caused thousands of dollars in renovation expenses at his apartment. Cole admitted to possessing methamphetamine and a glass pipe, both of which were found inside his apartment bedroom. *Cole*, ¶¶ 5–6. At sentencing, the State asked that Cole pay restitution to the property management company for the money it spent decontaminating the apartment, replacing various fixtures and appliances, and painting. *Cole*, ¶ 8 n. 2. Cole objected, arguing there was no evidence the apartment was contamination-free prior to Cole staying at the apartment, no evidence as to when the contamination occurred, and no expert testimony to explain the need for the renovation. *Cole*, ¶ 8 n. 4

(“There’s no explanation for why you’d replace a stove and a fridge and rip out carpeting and rip out floors.”). The district court rejected Cole’s arguments and ordered him to pay the restitution. *Cole*, ¶ 8.

This Court reversed, concluding there was insufficient evidence of a causal connection between Cole’s criminal conduct and the apartment renovation expenses. *Cole*, ¶¶ 16, 18. Among other things, there was no evidence as to what level of methamphetamine would lead to the contamination found—the basis for concluding renovation was required to remediate the contamination—and no expert testimony as to the necessity to replace fixtures, appliances, and carpeting rather than clean them. *Cole*, ¶ 16. Because the State failed to prove Cole’s criminal conduct caused the damage to the apartment, the Court ordered the district court to strike the restitution award from Cole’s judgment. *Cole*, ¶¶ 16–18 (“[I]t is too great a leap to conclude that since Cole possessed methamphetamine and a glass pipe, that he caused over \$30,000 of damage to the apartment.”).

Similarly, in *Aragon*, this Court reversed a restitution order when the State failed to prove Aragon’s criminal conduct of driving under the influence into a person’s garage caused \$3,270.00 in home repairs. There,

the State provided the lower court with a \$3,270.00 estimate from a construction company to fix the siding of the house and repaint the entire exterior. *Aragon*, ¶ 6. The State also presented evidence that Aragon’s insurance company paid the homeowner \$1,359.14 to repair the siding, paint, and reseed the landscaping. *Aragon*, ¶ 6. Over Aragon’s objection, the court ordered Aragon to pay \$3,270.00 to repaint the entire house even though he only damaged the garage. *Aragon*, ¶ 7.

This Court reversed, concluding the State failed to prove the restitution by a preponderance of the evidence. *Aragon*, ¶¶ 16–22. Because there was no evidence establishing it was necessary to repaint the entire house, the Court determined there was not substantial evidence supporting the \$3,270.00 estimate. *Aragon*, ¶¶ 18–20. The Court remanded to the lower court to determine the proper amount. *Aragon*, ¶ 21.

Here, the State failed to prove that Corey’s criminal offense necessitated a \$13,495.00 trailer remodel that included repaneling the hallway, bedroom, living room, and kitchen and installing new window, door, ceiling, and floor trim. Notably, the court only imposed the “tricky” and “difficult” restitution request after determining there was

substantial evidence to support it. (7/16/21 Tr. at 116 (“The tricky one for me is the rental property repairs. It’s difficult for me . . . I do think there’s substantial evidence for it.”).) Whether substantial evidence supported the restitution request was not the question for the court to decide. Rather, the court could only impose the restitution if it determined the State proved Corey caused the damages by a preponderance of the evidence, which is more than substantial evidence. *Aragon*, ¶ 9.

The court never made this finding, and the State never satisfied its burden. Corey was found guilty of shooting Mark in the living room with one bullet. The trial evidence revealed that Mark lived in a trailer with a wood-paneled interior. It also revealed that the single bullet damaged three small places in the trailer: one wood panel in the living room where the bullet entered, one wood panel in the hallway where the bullet exited, and the front part of one bookcase shelf in the hallway where the bullet stopped and tumbled to the ground. (State’s Exs. 8–10, 16–17.) There was no evidence at trial or sentencing that the bullet damaged any other wood panels—it did not even enter the kitchen or bedroom, which were on opposite ends of the trailer from where the shooting occurred—or any

trim. There was also no evidence of blood on any of the wood panels or trim. Simply put, the only damage Corey's criminal conduct caused was two small bullet holes in two wood panels and a small bullet hole in a bookcase shelf.

As in *Cole* and *Aragon*, the State failed to establish that damage to a small, confined part of the home necessitated thousands of dollars of upgrades to other parts of the home. There was no testimony or other evidence that the only way to fix the two small bullet holes in the two wood panels was to replace the wood paneling throughout the entire trailer. See *Cole*, ¶ 8 n. 4, 16 (finding no evidence as to the necessity to replace appliances, carpeting, and fixtures; “There’s no explanation for why you’d replace a stove and a fridge and rip out carpeting and rip out floors.”); *Aragon*, ¶¶ 18–20 (finding no evidence as to the necessity to repaint the entire house when only the garage was damaged). Even if there was evidence that the two wood panels in the living room and hallway could not be fixed or replaced without repaneling the remainder of the living room and hallway—which there was not—there would still be nothing establishing that the kitchen and bedroom had to be repaneled.

Likewise, there was no testimony or other evidence explaining why all the trim had to be replaced. Nothing suggested, let alone proved, that the only way to fix the two small bullet holes in the two wood panels was to replace trim throughout the entire trailer. No one explained why the current, undamaged trim could not remain, even if some of it had to be temporarily removed to fix the two damaged panels.

Montana's policy on restitution is that restitution is "remedial in nature." *State v. Johnson*, 2018 MT 277, ¶ 28, 393 Mont. 320, 430 P.3d 494. It is for this reason that courts cannot order a defendant to pay restitution in excess of the damages caused by his criminal conduct. *Cole*, ¶ 11 (citation omitted); *Johnson*, ¶ 28; *State v. Breeding*, 2008 MT 162, ¶ 19, 343 Mont. 323, 184 P.3d 313. Doing so will improperly result in a profit or windfall. *See Bos v. Dolajak*, 167 Mont. 1, 6, 534 P.2d 1258, 1260 (1975) (cited in *McEwen v. MCR, LLC*, 2012 MT 319, ¶ 72, 368 Mont. 38, 291 P.3d 1253) (holding that in the context of available damages in a civil action, a plaintiff is entitled to only those damages that will make him as nearly whole as possible, not to damages that will result in a profit or windfall).

The court here did just that when it ordered Corey to pay \$13,495.00 for the trailer remodel. It is “too great a leap” to conclude that since Corey caused two small holes in two wood panels, his conduct necessitated new paneling and trim throughout the entire trailer. *See Cole*, ¶¶ 16–18. There was simply no evidence supporting such a finding. Because the State failed to prove that \$13,495.00 was the replacement cost of the minimal damage to the trailer, this Court should reverse the restitution order. Since Corey agreed to pay to fix the two damaged panels and the bookcase, this Court should remand for the limited purpose of determining the correct cost for such repairs. *Aragon*, ¶ 21 (holding that remand to determine the proper amount of restitution is necessary when the restitution is unsupported by substantial evidence).

CONCLUSION

The district court erred when it ordered Corey to pay \$13,495.00 in restitution for the trailer remodel. This Court should reverse and remand.

Respectfully submitted this 8th day of May, 2023.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this primary brief is printed with a proportionately spaced Century Schoolbook 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 2,957, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ Haley Connell Jackson
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APPENDIX

Oral Pronouncement of Sentence.....	App. A
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CERTIFICATE OF SERVICE

I, Haley Connell Jackson, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 05-08-2023:

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