

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. 21-0606

STATE OF MONTANA,

Plaintiff and Appellee,

v.

COREY MICHAEL KELLY,

Defendant and Appellant.

BRIEF OF APPELLEE

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 ISSUES

Whether the Court's order that Kelly pay \$13,495 in restitution to repair damages caused to a trailer when he shot through two walls is supported by substantial evidence.

STATEMENT OF THE CASE

Appellant Corey Michael Kelly shot and killed Mark Luther in a trailer house owned by Luther's parents. (Docs. 48, 61.) The State charged Kelly with deliberate homicide. (Doc. 4.) At trial, Kelly admitted that he shot Luther, but he claimed he was scared and was aiming at the wall. (3/31/21 Tr. at 135.) The jury found him guilty of mitigated deliberate homicide. (Doc. 48.)

The court sentenced Kelly to 40 years in prison and restricted his parole for 20 years. (Doc. 71, available at Appellant's App. B.) The court also ordered Kelly to pay \$48,015.72 in restitution. (*Id.* at 3.)

On appeal, Kelly challenges the court's order that Kelly pay \$13,495 in restitution for repairs to the trailer owned by Luther's parents.

STATEMENT OF THE FACTS

Kelly shot Luther in the living room, near the hallway. The bullet traveled through Luther, entered the living room wall, exited the other side of the wall, passed through the corner of that room, entered another wall, exited from the

hallway wall, and stopped after hitting a bookcase across the hallway. (3/29/21 Tr. at 173; State Ex.'s 9-10, 16-17.) Pictures admitted by the State demonstrate that the kitchen was in the same open space as the living room. (State's Exs. 4, 23.) An officer testified that the kitchen was approximately 15 feet from the television, which was on the back wall of the living room. (3/29/21 Tr. at 182; State's Ex. 23.)

Before the sentencing hearing, Luther's parents submitted an affidavit of loss requesting \$13,495 for repairs to their rental property, which was the trailer Luther had been living in. (Doc. 61, attached affidavit.) They attached a proposal from a contractor stating that it would cost \$13,495 to "[r]eplace wall paneling and trim." (Doc. 61, attached proposal.) The proposal stated,

We appreciate the opportunity to handle your remodel. We hereby propose to furnish all the materials and perform all the labor necessary for the completion of the work described below.

Re panel hallway, bedroom, living room and adjoining walls of kitchen. Place new paneling over existing paneling.

Place new window, door, ceiling and floor trim.

Area to be cleared of . . . belongings that may impede the installation of paneling and moldings.

(*Id.*)

Luther's parents requested additional restitution for funeral expenses, their loss of rental income, and their lost wages, and the crime victim compensation

fund requested restitution. (7/16/22 Tr. at 77-79; Doc. 57 at 4, 12, 29-47.) Those expenses are not at issue on appeal.

Kelly filed an objection to the amount of restitution requested to repair the trailer. (Doc. 62.) Kelly characterized the proposal as including a new window and door, in addition to ceiling and floor trim.¹ (*Id.* at 1.) He argued that only two panels were damaged, so the extent of the repairs was unnecessary. (*Id.*) He stated that he would agree to restitution to replace the two panels where the bullet went through and to fix the bookshelf and replace carpeting damaged by blood. (*Id.* at 2.) He asserted that “[t]here was nothing in the case indicating any windows, doors, ceiling or floor trim was impacted, nor was anything in the kitchen, bedroom impacted.” (*Id.*) Kelly argued that the repairs listed would improperly provide Luther’s family with a windfall. (*Id.*)

At the sentencing hearing, the State argued that the amount was “reasonable” to repair the rental unit. (7/16/22 Tr. at 77.) In contrast, Kelly argued that the cost of the repairs was not substantiated. (*Id.* at 88.) When imposing restitution, the court noted that the cost of repairs was “tricky” because there was not any itemization on the proposal, but there also was not anything indicating that the amount was incorrect. (*Id.* at 116.) The court stated, “I did see the photos at

¹It appears that this was a misunderstanding of the proposal, which provides the cost of installing trim around the window and door, rather than installing a new window and door. (*Compare* Doc. 62 at 1, *with* Doc. 61, attached proposal.)

trial, and I don't think it's unreasonable, there has to be some things done to get that place up to a saleable condition just because of the disorder and the mess caused by this incident." (*Id.*) The court concluded that "there's substantial evidence for it and I do think it could be established in a civil action based on the evidence I have before me." (*Id.*) As a result, the court awarded \$13,495 in restitution for the repairs. (*Id.*; Doc. 71 at 3, available at Appellant's App. B.)

SUMMARY OF THE ARGUMENT

The court's order requiring Kelly to pay \$13,495 in restitution is supported by substantial evidence because a reasonable mind could conclude from the proposal and the evidence admitted at trial that it would cost that amount to restore the trailer to the condition it was in before Kelly shot Luther. It is reasonable to assume that it would be necessary to replace the paneling throughout the rooms that were damaged to have matching paneling. The bullet passed through the living room wall, two walls of the room on the other side, which appears to be a bedroom, and exited the hallway wall. Further, the kitchen is part of the same space as the living room. As a result, the proposal to install new paneling in the hallway, bedroom, living room, and adjoining wall of the kitchen restores the property owner to the same position they were in before the offense. Further, it is reasonable to assume that it would be necessary to install trim around the edges of

the new paneling. These repairs restore the owner to the position they were in without providing the owner with a windfall. The court correctly determined that substantial evidence demonstrated that the cost to repair the damage was \$13,495. Accordingly, the award of restitution should be affirmed.

ARGUMENT

I. Standard of review

This court reviews criminal restitution orders for compliance with Mont. Code Ann. §§ 46-18-241 through 249. *State v. Cole*, 2020 MT 259, ¶ 9, 401 Mont. 502, 474 P.3d 323. This Court reviews a district court's application of the law for correctness. *Id.* This Court reviews a district court's finding of fact as to the amount of restitution under the clearly erroneous standard. *State v. Aragon*, 2014 MT 89, ¶ 9, 379 Mont. 391, 321 P.3d 841. 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 this Court's review convinces this Court that a mistake has been committed. *Id.* "Substantial evidence is evidence that a reasonable mind might accept as adequate to support a conclusion; it consists of more than a mere scintilla of evidence, but may be somewhat less than a preponderance." *Aragon*, ¶ 9 (internal quotation marks and citation omitted).

II. The court’s restitution award ordering Kelly to pay \$13,495 for damages he caused to the trailer is supported by substantial evidence.

The district court legally imposed restitution in the amount supported by the victim’s affidavit and the attached proposal from a contractor. A “sentencing court shall . . . require an offender to make full restitution to any victim who has sustained pecuniary loss, including a person suffering an economic loss.” Mont. Code Ann. § 46-18-241(1); *see also* Mont. Code Ann. § 46-18-201(5). “Pecuniary loss” includes “all special damages, but not general damages, substantiated by evidence in the record, that a person could recover against the offender in a civil action arising out of the facts or events constituting the offender’s criminal activities, including without limitation out-of-pocket losses” Mont. Code Ann. § 46-18-243(1)(a). “Pecuniary loss” also includes “the full replacement cost of property taken, destroyed, harmed, or otherwise devalued as a result of the offender’s criminal conduct[.]” Mont. Code Ann. § 46-18-243(1)(b).

Because the offender is responsible only for damages incurred “as a result of the offender’s criminal conduct,” Mont. Code Ann. § 46-18-243(1)(b), “an offender is responsible only for pecuniary victim losses he or she has agreed to pay or that are directly or indirectly caused by an offense he or she committed or is criminally accountable [for].” *State v. Pierre*, 2020 MT 160, ¶ 12, 400 Mont. 283, 466 P.3d 494. This Court has reversed restitution awards that required a defendant

to pay for damages that were caused by codefendants when the defendant was not accountable for the conduct of the codefendants. *Cole*, ¶¶ 14-17; *see also Pierre*, ¶¶ 22-24 (holding that the defendant could not be ordered to pay restitution for items other people stole from a house when Pierre was charged only with stealing items from a separate guest house and there was no evidence he caused items to be stolen from the main house); *In re B.W.*, 2014 MT 27, ¶¶ 23-24, 373 Mont. 409, 318 P.3d 682 (holding B.W. could not be required to pay restitution for damage caused by other youths on days when B.W. was not present); *State v. Breeding*, 2008 MT 162, ¶¶ 18-20, 343 Mont. 323, 184 P.3d 313 (holding that Breeding could not be ordered to pay restitution for damage caused to a vehicle by a codefendant before Breeding participated in the theft of the vehicle).

In *Cole*, the defendant pled guilty to the criminal possession of dangerous drugs and the criminal possession of drug paraphernalia based on drug residue and a glass pipe located in his bedroom in an apartment. *Cole*, ¶ 6. A separate charge of accountability to drug possession, which was related to other drugs in the apartment, was dismissed, and the State made it clear that Cole was only taking responsibility for the drugs located in his bedroom. *Id.* The district court ordered Cole to pay \$31,902.99 to remediate the entire apartment from methamphetamine contamination. *Cole*, ¶ 8. This Court reversed the restitution award because there was no evidence that Cole's conduct caused the extensive damage to the apartment. *Cole*, ¶¶ 16-17.

In these cases, restitution awards were reversed because the defendant was ordered to pay restitution for damage caused by other codefendants. That has not occurred here. Kelly was the only person liable for the damage he caused to the trailer when he fired a gun.

Further, the award of restitution was supported by substantial evidence. “The sentencing court may find the requisite causal nexus for restitution, between an offender’s admitted or adjudicated criminal conduct and the asserted victim loss, upon an admission, by implication from proof of the elements of the charged offense, upon victim affidavits included with a PSI, or upon other evidence presented at or incident to sentencing.” *Pierre*, ¶ 13. This Court has held that a victim is not required to substantiate a restitution calculation with documentation. *State v. McMaster*, 2008 MT 268, ¶ 29, 345 Mont. 172, 190 P.3d 302. But “a defendant has a due process right to explain, argue, and rebut any information presented at sentencing.” *Aragon*, ¶ 12 (internal quotation marks and citation omitted).

This Court has reversed restitution awards that were based on speculation or insufficient evidence. *State v. Passwater*, 2015 MT 159, ¶ 13, 379 Mont. 372, 350 P.3d 382. For example, in *Aragon*, this Court reversed an award of restitution because the only evidence regarding the amount of the damage consisted of two conflicting estimates. The victim’s insurance company estimated that the cost to

repair the victim's garage was \$1,359.14, and the insurance company had paid the victim that amount. *Aragon*, ¶ 6. In contrast, a contractor estimated that the repairs would cost \$3,270, and included repainting the entire house in the work.

Id. The court ordered the defendant to pay the \$1,910.86 that had not been covered by the insurance company. *Aragon*, ¶ 7. This Court reversed that award, explaining that because there were differing estimates, the court was required to make a determination as to what amount of restitution was supported by a preponderance of the evidence. *Aragon*, ¶ 16. Because there was no evidence indicating that painting the entire house was necessary and only one of the two estimates included that cost, this Court held that the restitution award was not supported by substantial evidence. *Aragon*, ¶ 20.

In contrast, this Court affirmed a restitution award in *Passwater* to compensate a victim for the cost of her care that would be required because of the defendant hitting her motorcycle, causing her leg to be amputated. The award of restitution was based on a life care plan prepared by a Certified Life Care Planner. *Passwater*, ¶¶ 5, 21-22. The plan itemized the expenses the victim would incur because of the accident. Before imposing restitution, the court went through the items and reduced amounts it saw as speculative or unsubstantiated. *Passwater*, ¶ 21. This Court concluded that this was a “reasonable method” of calculating the restitution award and that the award was supported by substantial evidence because

“a ‘reasonable mind’ could accept this evidence as adequate to support” the amount awarded. *Id.* This Court also noted that the defendant had not provided evidence contradicting the evidence provided by the victim. *Passwater*, ¶ 22; *see also State v. Santillan*, 2017 MT 314, ¶ 44, 390 Mont. 25, 408 P.3d 130 (finding it “noteworthy” that the defendant did not put on any evidence contradicting the State’s evidence about the amount of the victim’s loss and affirming the restitution award).

In this case, the amount of restitution awarded was supported by substantial evidence. Unlike *Aragon*, where there were conflicting estimates, the only estimate provided in this case was the proposal provided by the victim indicating that it would cost \$13,495 to replace the wall paneling and trim. (Doc. 61, attached proposal.) A reasonable mind could accept that evidence as adequate to support the conclusion that that was the cost to repair the trailer to the condition it was in before Kelly fired a bullet through two walls.

Significantly, Kelly did not provide any evidence indicating that the cost of the proposal was unreasonably high. Kelly’s argument that only two panels were damaged and only those panels should be replaced should be rejected. First, it is reasonable to assume that it would not be possible for a contractor to obtain the same paneling that was on the wall in the trailer. To return the trailer to the condition it was in, the owner should be able to have matching paneling.

Therefore, the proposal to provide new paneling throughout the room does not provide the victims with a windfall.

Second, the inclusion of paneling for the kitchen and hallway was supported by substantial evidence because the exhibits admitted at trial demonstrate that the kitchen was part of the living room, and the hallway contains the same paneling. (State's Exs. 4, 9-10, 23.) Indeed, the proposal indicates that the repairs will include placing new paneling in the "living room and adjoining walls of kitchen." (Doc. 61, attached proposal.) Restoration of the trailer to the condition it was in requires placing new, matching paneling on the adjoining walls of the kitchen and in the hallway.

Third, the bullet passed through the living room wall, through two walls of the room on the other side, and then exited through the hallway wall. Thus, four walls were penetrated by the bullet. It appears that the room on the other side of the living room that the bullet passed through is the bedroom listed in the proposal. (*See* 3/29/21 Tr. at 128 (referring to bedrooms being behind the living room).) Restoration of the trailer requires those walls to also be repaneled.

It is also reasonable to expect that new trim would have to be placed over the new paneling. Therefore, the restitution award properly includes the cost of installing trim on top of the new paneling.

Contrary to Kelly's assertion, installing matching paneling and trim on the damaged walls and adjoining walls will not provide the owners of the trailer with a "windfall." Instead, it will return their property to the condition it was in before Kelly fired a bullet that traveled through two walls of the trailer. Kelly failed to provide any evidence indicating that the trailer could be returned to the condition it had been in before the offense for less money. Because a reasonable mind might accept the proposal and evidence from trial as adequate to conclude that Kelly caused \$13,495 in damages, the restitution award is supported by substantial evidence.

CONCLUSION

The restitution award ordering Kelly to pay \$43,650.66 in restitution, including \$13,495 for the cost of repairs to the trailer, is supported by substantial evidence and should be affirmed.

Respectfully submitted this 25th day of August, 2023.

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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 Times New Roman 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 2,805 words, excluding cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signatures, and any appendices.

/s/ Mardell Ployhar

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CERTIFICATE OF SERVICE

I, Mardell Lynn Ployhar, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 08-25-2023:

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