
STATE OF MONTANA,

Plaintiff and Appellee,

v.

JASSIE LAYDELL WESTERMAN,

Defendant and Appellant.

BRIEF OF APPELLANT

On Appeal from the Montana Eighth Judicial District Court,
Cascade County, the Honorable John A. Kutzman, Presiding

APPEARANCES:

CHAD WRIGHT
Appellate Defender
HALEY CONNELL JACKSON
Assistant Appellate Defender
Office of State Public Defender
Appellate Defender Division
P.O. Box 200147
Helena, MT 59620-0147
hcjackson@mt.gov
(406) 444-9505

ATTORNEYS FOR DEFENDANT
AND APPELLANT

AUSTIN KNUDSEN
Montana Attorney General
TAMMY K PLUBELL
Bureau Chief
Appellate Services Bureau
P.O. Box 201401
Helena, MT 59620-1401

JOSHUA A. RACKI
Cascade County Attorney
STEPHANIE FULLER
Deputy County Attorney
121 4th Street N
Suite 2A
Billings, MT 59401

ATTORNEYS FOR PLAINTIFF
AND APPELLEE

TABLE OF CONTENTS

TABLE OF CONTENTS	i
TABLE OF AUTHORITIES.....	ii
STATEMENT OF THE ISSUE.....	1
STATEMENT OF THE CASE	1
STATEMENT OF THE FACTS	2
SUMMARY OF THE ARGUMENT.....	10
STANDARDS OF REVIEW	11
ARGUMENT	12
I. The district court should have adjusted the \$280,000 restitution order to \$87,357 because it was unjust to require an indigent, unemployed, incarcerated man who had no assets and was in debt to pay hundreds of thousands of dollars.....	12
II. Alternatively, the district court erred when it ordered Jassie to pay \$280,000 in restitution when Linafelter admitted the loss was just as likely to have been only \$200,000, when Jassie testified the loss was \$87,357, and when the remaining evidence was speculative.....	16
CONCLUSION.....	20
CERTIFICATE OF COMPLIANCE.....	22
APPENDIX.....	23

TABLE OF AUTHORITIES

Cases

State v. Aragon,
2014 MT 89, 374 Mont. 391, 321 P.3d 84116

State v. Coluccio,
2009 MT 273, 352 Mont. 122, 214 P.3d 1282 16, 17

State v. Lodahl,
2021 MT 156, 404 Mont. 362, 491 P.3d 661 passim

State v. O’Connell,
2011 MT 242, 362 Mont. 171, 261 P.3d 1042 12, 16

State v. Passwater,
2015 MT 159, 379 Mont. 372, 350 P.3d 38217

State v. Scarborough,
2000 MT 301, 302 Mont. 350, 14 P.3d 120216

Montana Code Annotated

§ 46-18-10112

§ 46-18-20112

§ 46-18-246 passim

STATEMENT OF THE ISSUES

1. When a defendant establishes that a restitution order would be unjust due to his dire financial circumstances, a district court must adjust or waive the restitution. Following a hearing, the State requested \$280,000 in restitution for money Jassie Westerman allegedly stole from a safe. Did the district court err when it refused to adjust the \$280,000 when Jassie was indigent, unemployed, in debt, and sentenced to 10 years in prison?

2. Alternatively, did the district court err when it ordered Jassie to pay \$280,000 in restitution when the victim conceded the loss was just as likely to have been only \$200,000 and when the only person who counted the stolen money testified it was \$87,357?

STATEMENT OF THE CASE

Jassie Westerman pled guilty to three felony charges involving allegations of drug use, theft, and money laundering. (3/29/22 Tr. at 13–17.)¹ Jassie agreed to pay restitution for the money he stole but reserved the right to challenge the amount. (D.C. Doc. 30 at 5; 3/29/23

¹ Jassie pled guilty pursuant to a global plea agreement that incorporated charges from a separate case, ADC-21-090. (D.C. Doc. 30.) Those charges and subsequent convictions are not part of this appeal.

Tr. at 7.) Although the victim did not know the exact amount of money stolen from his safe, he speculated it was between \$200,000 and \$300,000. (D.C. Doc. 1 at 28; 6/21/22 Tr. at 31.) When the State requested \$280,000, Jassie objected due to his dire financial circumstances and the State's failure to prove the loss. (6/21/22 Tr. at 51–70.) The court granted the State's request and ordered Jassie to pay \$280,000 in restitution. (6/21/22 Tr. at 72, 88, attached as App. A; D.C. Doc. 41 at 4, attached as App. B.) The court sentenced Jassie to the Department of Corrections for a total of 10 years with five years suspended. (6/21/22 Tr. at 86; D.C. Doc. 41 at 3.)

Jassie timely appealed to this Court. (D.C. Doc. 43.)

STATEMENT OF THE FACTS

Jassie is unemployed and in debt. (6/21/22 Tr. at 70; D.C. Doc. 37 at 2.) The State's charging documents alleged that Jassie stole between \$200,000 and \$300,000 from a man's safe and purchased property with the stolen funds. (D.C. Docs. 1 at 28–44, 3.) The man's name was Rickey Linafelter. (6/21/22 Tr. at 29.) The State alleged Linafelter's daughter, Kristen Workman, reported to law enforcement the missing money on December 31, 2020, after she visited Linafelter's home and

discovered his empty safe. (D.C. Doc. 1 at 28.) Linafelter was in the hospital at the time and told Workman he kept between \$200,000 and \$300,000 cash in the safe. (D.C. Doc. 1 at 28.) After Workman reported the theft, police arrived at Linafelter's home and discovered \$60,000 in cash. (D.C. Doc. 1 at 29.) Workman later explained that the \$60,000 was inside her late grandmother's purse, which was in a filing cabinet in the same room as the safe. (6/21/22 Tr. at 23.)

Subsequently, Linafelter passed away, and Workman was put in charge of handling his estate. (D.C. Doc. 1 at 29; 6/21/22 Tr. at 10.)

Jassie pled guilty to the theft charge, but only admitted that the stolen property exceeded \$10,000. (3/29/22 Tr. at 15–17.) He acknowledged that he would have to pay restitution but reserved the right to challenge the amount. (3/29/22 Tr. at 7.) Jassie explicitly reserved the right to appeal restitution if there was insufficient support for the requested amount. (3/29/22 Tr. at 7.)

Among other things, Workman requested \$300,000 for the money she alleged Jassie stole from her father's safe. (Affidavit of Loss, attached to D.C. Doc. 37.) Workman acknowledged this was an "estimate" of the loss. (6/21/22 Tr. at 11.) Jassie objected. (6/21/22 Tr.

at 7–8.) Jassie admitted to taking money from the safe but maintained he only took \$87,357. (6/21/22 Tr. at 8, 47.)

At sentencing, Workman testified that her father told her that there was between \$200,000 and \$300,000 in the safe at the time of the theft.² (6/21/22 Tr. at 31.) Workman acknowledged, however, that she was “[n]ot entirely” communicating with her dad “about exactly how much was in th[e] safe” because he was sick in the hospital at the time of the theft. (6/21/22 Tr. at 35.) Workman’s priority was to be with her dad and “not necessarily [to] figure out exactly how much was in that safe.” (6/21/22 Tr. at 36.)

Workman explained that although her dad kept some of his money in bank accounts—including a personal account that had \$27,000 in it—he stored most in his safe because he did not trust banks. (6/21/22 Tr.

² The transcript of the sentencing hearing provides that when Workman was first asked if she told law enforcement that her father said there was between \$200,000 and \$300,000 in the safe, she responded that Linafelter “thought there’d be between \$250,000 and \$300,000.” (6/21/22 Tr. at 25.) Workman later testified that Linafelter told her there was “at least \$200,000 in that safe and possibly as much as \$300,000.” (6/21/22 Tr. at 31.) Whether the initial statement was an error in the transcript or a misstatement by Workman, her later testimony clarified that the amount was between \$200,000 and \$300,000 and was consistent with the charging documents that specified Linafelter told Workman the amount in the safe was between \$200,000 and \$300,000. (*See* D.C. Doc. 1 at 28.)

at 11, 13–14.) Workman believed the money in the safe included cash from her late grandmother’s estate as well as a \$120,000 life insurance payment. (6/21/22 Tr. at 11–12.) Workman clarified, however, that the only money she personally saw inside the safe was the life insurance money. (6/21/22 Tr. at 11–12, 14, 16–17, 30–32.) Workman testified that she saw her dad count the \$120,000 and put it in a bag inside the safe around Thanksgiving—over a month before the theft. (6/21/22 Tr. at 14, 16, 30, 34.) Workman believed her dad had several other bags inside the safe, some of which she thought contained cash. (6/21/22 Tr. at 12, 15, 17.) Workman speculated this cash might have included income related to two businesses and 14 rental properties Linafelter owned, but she did not know how much money this was and how much was stored in the bank accounts versus the safe. (6/21/22 Tr. at 11, 13–14, 28–29.) While Workman said she thought the \$200,000 to \$300,000 claimed loss was a conservative estimate, she conceded that she did not know how much money was inside the safe and that she never saw any cash in the safe except for the \$120,000 insurance payment in November 2020. (6/21/22 Tr. at 11, 14, 17–18, 32.)

George Simpson Jr., a friend of Linafelter's, testified that he watched Linafelter put cash from Linafelter's mother's estate inside his safe in the summer of 2020—several months prior to the theft. (6/21/22 Tr. at 38–40.) Simpson said that after Linafelter's mother died, Simpson helped Linafelter count the cash in her safe, which was \$160,000, and place it in three large bags inside Linafelter's safe. (6/21/22 Tr. at 38–40.) Regarding the \$120,000 life insurance payment, Simpson testified that while he saw Linafelter cash the check, he never saw Linafelter put the money in his safe. (6/21/22 Tr. at 39–40.)

Both Workman and Simpson testified that Linafelter regularly took money out of his safe. (6/21/22 Tr. at 28, 41–44.) Workman testified that Linafelter used money in his bank accounts and in the safe to pay expenses for his 14 rental units. (6/21/22 Tr. at 26–28.) Workman also specified that Linafelter had a \$1,282.20 monthly home mortgage payment along with various monthly utility bills. (6/21/22 Tr. at 32–33.) Simpson testified that he performed most of the maintenance work on Linafelter's properties and was paid under the table with cash from Linafelter's safe. (6/21/22 Tr. at 42–44.) Simpson typically worked about 20 hours a week at \$20 per hour. (6/21/22 Tr. at

43.) According to Simpson, anytime Linafelter or someone else needed money, “he’d reach in the safe and take some out.” (6/21/22 Tr. at 41–44.) It was a “revolving cycle” where money would go into the bank, get pulled out of the bank, get put into the safe, and get taken out of the safe. (6/21/22 Tr. at 41–42.) Workman and Simpson testified that they did not know of any large purchases Linafelter made in the months preceding the theft. (6/21/22 Tr. at 34, 42.)

When defense counsel tried to confirm the amount of money Linafelter had, both Workman and Simpson replied they did not know. (6/21/22 Tr. at 19, 25, 41–42.) Workman testified that Linafelter had an accountant who helped him manage his money, but she had not consulted with him to determine the value of her dad’s estate. (6/21/22 Tr. at 18–19.) Although Workman initially testified that her dad never pointed her toward any ledgers or receipts documenting the amount of money in his safe, she later clarified that he did have a ledger where he documented all his expenses and payments. (6/21/22 Tr. at 18, 25, 28.) Workman did not provide the ledger to the State or attach it to the Affidavit of Loss because she “didn’t know that that was something [she] would have to do.” (6/21/22 Tr. at 28.) Simpson did not know if

there was a ledger or other documentation of the amount of money Linafelter owned or kept in his safe. (6/21/22 Tr. at 41.)

Workman testified that after she reported the theft, police arrived at Linafelter's home and discovered \$60,000 in cash. (6/21/22 Tr. at 22–23.) Workman said they found the money in her late grandmother's purse, which was in Linafelter's filing cabinet on the opposite side of the room as the safe. (6/21/22 Tr. at 23.) Workman said she is not requesting the \$60,000 in restitution. (6/21/22 Tr. at 35.)

Jassie testified that he stole \$87,357.00 from Linafelter's safe. (6/21/22 Tr. at 47.) Jassie remembered the amount because “when you never had [] very much money in your life, you get that kind of money you kind of remember the number.” (6/21/22 Tr. at 47.) Jassie counted every bill that he stole from the safe. (6/21/22 Tr. at 47.) Jassie did not see \$280,000 in cash inside the safe, nor did he see any ledgers or receipts showing how much money was in the safe. (6/21/22 Tr. at 48.)

At the end of the hearing, the State requested \$280,000 in restitution for Linafelter's stolen cash. (6/21/22 Tr. at 67–68.) Jassie objected based on inability to pay and argued that he could not afford the “extremely significant amount of money” the State was requesting.

(6/21/22 Tr. at 61, 70.) Jassie pointed out he was unemployed, in debt, and going to prison for a long period of time. (6/21/22 Tr. at 70.) The PSI in the court's possession confirmed that Jassie did not have a job, had no assets, was several thousand dollars in debt, and had four children he cared for. (D.C. Doc. 37 at 2.)

Jassie also objected to the restitution on the basis that the State failed to prove he stole \$280,000 from Linafelter's safe. (6/21/22 Tr. at 51–65.) Jassie emphasized the “muddy picture” the State painted of Linafelter's finances and pointed out that Linafelter was constantly taking money out of the safe. (6/21/22 Tr. at 51–65.) Because there was no documentation of Linafelter's finances and the amount of money contained in the safe and no testimony on how much cash was in the safe around the time of the theft—only months prior—Jassie argued the State did not meet its burden of proof. (6/21/22 Tr. at 51–65.) Jassie also highlighted Workman's testimony that \$60,000 of Linafelter's money from his mother's estate was discovered in the home immediately following the theft. (6/21/22 Tr. at 55.) Jassie agreed to pay the amount he admitted that he stole—\$87,357—but argued there was insufficient support for much more. (6/21/22 Tr. at 8, 47, 51, 55.)

The court granted the State's request and ordered Jassie to pay \$280,000 for the stolen cash. (6/21/22 Tr. at 72, 88.) The court relied on Workman's and Simpson's testimony that Linafelter at one time had \$160,000 in his safe and another time had \$120,000. (6/21/22 Tr. at 71.) Because the court did not believe Linafelter would have taken some of that money out of his safe and was not convinced Jassie accurately recalled the amount of money he stole, the court concluded that Jassie must have stolen the entire \$280,000. (6/21/22 Tr. at 71.)

SUMMARY OF THE ARGUMENT

An indigent, unemployed, indebted man with no assets who is on his way to prison cannot afford to pay \$280,000 in restitution. When Jassie asked the court to refrain from imposing the entire \$280,000 based on inability to pay, the court was required to adjust or waive the restitution if ordering it was unjust due to Jassie's financial circumstances. *State v. Lodahl*, 2021 MT 156, ¶¶ 23–26, 404 Mont. 362, 491 P.3d 661 (citing Mont. Code Ann. § 46-18-246). By refusing to do so, the court ignored Jassie's dire financial situation and failed to appropriately apply Mont. Code Ann. § 46-18-246. The court should reverse and order Jassie to pay what he agreed to pay below—\$87,375.

Alternatively, the court should reverse the restitution order since it is rooted in speculation. This Court has repeatedly reversed restitution awards when they are based on assumptions and insufficient evidence. Linafelter acknowledged his loss may have been only \$200,000, both Workman and Simpson admitted they did not know how much money was in the safe at the time of the theft, and Jassie swore it was only \$87,357. Although evidence established that at one point in time there was \$160,000 in the safe and at another point there was \$120,000, there was no proof that \$280,000 remained in the safe for the several months leading up to the theft. The State failed to prove by a preponderance of the evidence that Jassie stole \$280,000, and the restitution order must be reversed.

STANDARDS OF REVIEW

The Court reviews criminal sentences for legality to determine if they are statutorily authorized. *Lodahl*, ¶ 11. Restitution awards create mixed questions of law and fact that the Court reviews de novo. *Lodahl*, ¶ 11. The Court reviews for correctness the legality of a restitution obligation. *Lodahl*, ¶ 11. The Court reviews factual findings

regarding restitution to determine if they are clearly erroneous. *State v. O'Connell*, 2011 MT 242, ¶ 7, 362 Mont. 171, 261 P.3d 1042.

ARGUMENT

I. The district court should have adjusted the \$280,000 restitution order to \$87,357 because it was unjust to require an indigent, unemployed, incarcerated man who had no assets and was in debt to pay hundreds of thousands of dollars.

A sentencing court is generally required to order a defendant to pay full restitution to a victim. Mont. Code Ann. § 46-18-201(5); *Lodahl*, ¶ 23. However, a court can adjust or waive restitution when a defendant demonstrates that the restitution would be “unjust under [a defendant’s] particular financial circumstances.” *Lodahl*, ¶¶ 23–26 (citing Mont. Code Ann. § 46-18-246). This option for an adjustment or waiver reflects Montana’s sentencing policy that restitution be ordered upon those who can pay. Montana Code Annotated § 46-18-101(3)(h), provides: “A sentence must require an offender *who is financially able to do so* to pay restitution.” *Lodahl*, ¶ 28 (quoting Mont. Code Ann. § 46-18-101(3)(h) (emphasis added)). While a district court is not required to consider a defendant’s ability to pay restitution *sua sponte*, it must do so when the defendant raises the issue. *Lodahl*, ¶ 28.

Although Mont. Code Ann. § 46-18-246 provides that a defendant must “petition” a court to waive restitution, this Court has held that a formal petition is not required. *Lodahl*, ¶¶ 26, 28 (citing Mont. Code Ann. § 46-18-246). In *Lodahl*, the Court reversed a district court’s refusal to waive restitution due to the defendant’s dire financial situation even though the defendant did not formally petition the court. *Lodahl*, ¶¶ 26–32. Among other arguments against restitution, the defendant maintained she should not be required to pay due to her financial circumstances. *Lodahl*, ¶ 4. The court held a hearing at which the defendant and the alleged victim were present and testified. *Lodahl*, ¶ 4. *Lodahl* presented evidence of her financial situation and argued that if the court imposed the restitution, she would not be able to pay and would be unduly burdened by it. *Lodahl*, ¶¶ 7–8. The district court ordered the restitution on the basis that “it would be grossly unfair to [the victims] to allow the Defendant to escape her obligation to make restitution. . . .” *Lodahl*, ¶ 9.

This Court held the district court failed to appropriately apply Mont. Code Ann. § 46-18-246 when it did not conclude it was unjust to order *Lodahl* to pay restitution. *Lodahl*, ¶ 31. Even though *Lodahl* did

not file a formal petition citing Mont. Code Ann. § 46-18-246, seeking waiver or adjustment of restitution due to it being unjust, she in essence made the same argument by asking the court to waive restitution because she could not afford to pay it. *Lodahl*, ¶¶ 24, 26. The Court noted that neither the district court nor the prosecutor asserted insufficiency with Lodahl’s request for adjustment or waiver of the restitution and pointed out that the hearing and opportunity to be heard requirements of Mont. Code Ann. § 46-18-246 were satisfied. *Lodahl*, ¶ 26. Because Lodahl established her “dire financial situation,” the court should have waived restitution. *Lodahl*, ¶¶ 27–32.

Similarly, here, the court erred when it refused to adjust the \$280,000 restitution order after Jassie established it would be unjust to order him to pay. As in *Lodahl*, Jassie challenged the restitution because he could not afford such an “extremely significant amount of money.” (6/21/22 Tr. at 61, 70.) Although Jassie did not file a formal petition on the grounds that the restitution was unjust under Mont. Code Ann. § 46-18-246, his assertion that the court should order less than the requested \$280,000 because of his dire financial circumstances was, “in essence,” the same argument. *Lodahl*, ¶¶ 24, 26. Like *Lodahl*,

the court held a hearing at which the victim had the opportunity to be heard regarding restitution, and neither the State nor the court claimed there was anything insufficient about Jassie's request for adjustment of restitution due to inability to pay. *Lodahl*, ¶ 26. Requiring Jassie do anything more “unnecessarily elevates form over substance.” *Lodahl*, ¶ 26.

The court's order is unjust because Jassie cannot afford \$280,000. Jassie is indigent, unemployed, in debt, has no assets, and is going to be in prison for many years. (6/21/22 Tr. at 70.) This information was not only argued at the restitution hearing, but it was verified in the PSI that was before the court. (D.C. Doc. 37 at 2.) As in *Lodahl*, the court failed to appropriately apply Mont. Code Ann. § 46-18-246 by imposing the \$280,000 restitution order when the record established Lodahl's dire financial circumstances. *Lodahl*, ¶ 31. The Court should reverse and remand to adjust the restitution order to Jassie's previously agreed upon amount of \$87,357—a sum that will still place a huge financial strain on Jassie. *Lodahl*, ¶ 32.

II. Alternatively, the district court erred when it ordered Jassie to pay \$280,000 in restitution when Linafelter admitted the loss was just as likely to have been only \$200,000, when Jassie testified the loss was \$87,357, and when the remaining evidence was speculative.

For purposes of restitution, the State bears the burden of proving the amount of a victim's alleged pecuniary loss by a preponderance of the evidence. *State v. Aragon*, 2014 MT 89, ¶ 16, 374 Mont. 391, 321 P.3d 841. A preponderance of the evidence is evidence showing that a claim is more probably true than not. *State v. Scarborough*, 2000 MT 301, ¶ 52, 302 Mont. 350, 14 P.3d 1202. A preponderance of the evidence is more than substantial evidence. *Scarborough*, ¶ 30.

This Court has repeatedly reversed restitution orders when they are based on speculation or insufficient evidence. *See e.g. Aragon*, ¶ 20 (reversed restitution award of \$1,910.86 upon concluding that substantial evidence did not support the award); *State v. Coluccio*, 2009 MT 273, ¶ 45, 352 Mont. 122, 214 P.3d 1282 (overruled on other grounds) (reversed restitution award of \$1.4 million upon concluding the restitution was based upon assumptions and speculation and unsupported by substantial evidence); *O'Connell*, ¶¶ 10, 14 (reversed restitution in a theft case for a business's lost profits when restitution

was based on speculation and assumptions). Although there may be “some guess work” involved when determining “uncertain” losses, and “the best evidence available under the circumstances” may sustain a restitution award, “[a]ssumptions, ballpark figures from friends, and purely speculative calculations are insufficient information upon which to make findings of fact.” *State v. Passwater*, 2015 MT 159, ¶ 20, 379 Mont. 372, 350 P.3d 382; *Coluccio*, ¶ 45.

The State failed to prove by a preponderance of the evidence that Linafelter’s loss was \$280,000. Workman testified that Linafelter admitted to her that the safe may have only contained \$200,000 at the time of the theft. (6/21/22 Tr. at 31.) He never told her the amount was more likely than not closer to \$300,000; he simply gave a massive range and implicitly acknowledged the amount was just as likely to have been \$200,000. Workman conceded she was “[n]ot entirely” communicating with her dad “about exactly how much was in th[e] safe” and that her priority was “not necessarily [to] figure out exactly how much was in that safe.” (6/21/22 Tr. at 35–36.)

The remaining evidence only established that at some point months prior to the theft there was money in the safe. Workman

testified that roughly six weeks before the theft, she saw her dad put \$120,000 inside the safe. (6/21/22 Tr. at 14, 16, 30, 34.) While Workman speculated there was additional cash in the safe at this time, she admitted she did not know how much and that she never saw any cash except for the \$120,000. (6/21/22 Tr. at 11–14, 17–18, 28–32.) Simpson only testified to seeing Linafelter put \$160,000 in the safe the summer prior to the December 31, 2020 theft. (6/21/22 Tr. at 38–40.) Importantly, both Workman and Simpson testified that they did not know the value of Linafelter’s estate or how much money he kept in his safe, and there was no documentation or testimony from Linafelter’s accountant establishing these critical facts. (6/21/22 Tr. at 17–19, 25, 28, 42.) Equally as important, both Workman and Simpson testified that Linafelter regularly removed money from his safe. (6/21/22 Tr. at 28, 41–44.)

The State’s argument that the \$280,000 placed inside the safe in different installments months prior to the theft was still in the safe on December 31, 2020, was based on speculation. Linafelter was the only person who knew whether he removed some of the \$280,000 from the safe prior to the theft, and his admission that the loss may have been

only \$200,000 acknowledged that he did. It was not for the State or court to assume otherwise when neither Workman nor Simpson knew how much money was in the safe and when the State's evidence established that cash went in and out of the safe like "a revolving cycle." (6/21/22 Tr. at 41–44 (Simpson testifying that anytime Linafelter or someone else needed money, "he'd reach in the safe and take some out.")) Moreover, Workman, the State, and the court assumed the \$60,000 in cash that was discovered in Linafelter's mother's purse was not part of the \$160,000 estate money or the \$120,000 insurance payment even though there was no evidence that Linafelter ever received any cash from his mother aside from the \$280,000. If the \$60,000 in the purse was part of the \$280,000 received from Linafelter's mother—which the evidence suggests—including that amount in the restitution order would result in double counting and an unfair windfall for the victim.

The "best evidence available" under the circumstances did not prove it was more probable than not that Jassie stole \$280,000 from Linafelter's safe. The fact that at one point in time there was \$160,000 in the safe and at another point \$120,000 did not establish that months

later there was \$280,000. This is particularly true given Linafelter's admission after the theft that the loss may have been only \$200,000 and the fact that the only person who counted the stolen money testified it was \$87,357. (*See* 6/21/22 Tr. at 47.) The State's evidence proved the loss was \$87,357 or, at most, \$200,000. Because the State failed to prove by a preponderance of the evidence a \$280,000 loss, the Court must reverse the restitution order.

CONCLUSION

The district court erred when it ignored Jassie's dire financial situation and did not appropriately apply Mont. Code Ann. § 46-18-246 to conclude it would be unjust to require Jassie to pay \$280,000 in restitution. Alternatively, the court erred when it ordered Jassie to pay \$280,000 when the State failed to prove the loss by a preponderance of the evidence. In either event, the Court should reverse and remand with instructions to amend the restitution order to \$87,357.

Respectfully submitted this 22nd day of December, 2023.

OFFICE OF STATE PUBLIC DEFENDER
APPELLATE DEFENDER DIVISION
P.O. Box 200147
Helena, MT 59620-0147

By: /s/ Haley Connell Jackson
HALEY CONNELL JACKSON
Assistant Appellate Defender

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 4,283, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ Haley Connell Jackson _____
HALEY CONNELL JACKSON

APPENDIX

Oral Pronouncement of Sentence.....App. A
Sentencing OrderApp. B

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 12-22-2023:

Austin Miles Knudsen (Govt Attorney)
215 N. Sanders
Helena MT 59620
Representing: State of Montana
Service Method: eService

Joshua A. Racki (Govt Attorney)
121 4th Street North
Suite 2A
Great Falls MT 59401
Representing: State of Montana
Service Method: eService

Electronically signed by Pamela S. Rossi on behalf of Haley Connell Jackson
Dated: 12-22-2023