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STATE OF MONTANA,

Plaintiff and Appellee,

v.

COLBY SCOTT DEVLIN,

Defendant and Appellant.

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**REDACTED BRIEF OF APPELLANT**

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On Appeal from the Montana Twentieth Judicial District Court,  
Lake County, the Honorable Molly Owen, Presiding

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## **STATEMENT OF THE ISSUE**

A district court can only order restitution when the State proves by a preponderance of the evidence that a defendant's criminal conduct caused the alleged losses. After the State charged Colby Devlin with misdemeanor stalking, the alleged victim, Paige Noyes, quit her job and submitted an affidavit of loss requesting approximately a year's worth of wages because she had anxiety and worried Colby would come to her office. Did the State fail to prove that Colby's misdemeanor offense necessitated that Noyes not work for an entire year?

## **STATEMENT OF THE CASE**

Colby pled no contest to one count of misdemeanor stalking for repeatedly attempting to contact Paige Noyes and showing up to her work on one occasion. (8/17/22 Tr. at 15–17; *see* D.C. Docs. 2, 34.)<sup>1</sup> Prior to sentencing, Noyes submitted an affidavit of loss that, among other things, asked for \$8,640 for “Lost Wages-Terminated Employment Due to PTSD.” (D.C. Doc. 37.) Noyes refused to testify at sentencing in

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<sup>1</sup> Colby pled no contest pursuant to a global plea agreement that incorporated charges from two separate cases, DC-22-18 and DC-22-29. (D.C. Doc. 34.) Those cases are not part of this appeal.

support of her restitution request and did not present any evidence explaining how she calculated the \$8,640 loss. (10/19/22 Tr. at 29.) Colby objected and argued that the State failed to prove his conduct caused Noyes to lose \$8,640 in wages. (10/19/22 Tr. at 29–30.)

The court sentenced Colby to six months at the county jail with all time suspended. (10/19/22 Tr. at 41–42, attached as App. A; D.C. Doc. 40 at 1, attached as App. B.) Over Colby’s objection, the court granted Noyes’s entire restitution request. (10/19/22 Tr. at 30–31, 42; D.C. Doc. 40 at 3.)

Colby timely appealed. (D.C. Doc. 43.)

### **STATEMENT OF THE FACTS**

[REDACTED]

[REDACTED] (D.C. Doc. 13.5 at 3.)<sup>2</sup> [REDACTED]

[REDACTED] (D.C. Doc. 8, 13.5 at 3–7, 11–12.) [REDACTED]

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<sup>2</sup> D.C. Doc. 13.5 is a forensic psychological evaluation that was designated “confidential” and filed under seal in the district court and, thus, not accessible to the public. (D.C. Docs. 13.5, 15.) Pursuant to Mont. R. App. P. 10(7), Colby has redacted from the publicly filed version of this brief information cited solely from this document.

[REDACTED]

(D.C. Doc. 13.5 at 4.)

The following year, Noyes reported to law enforcement that Colby repeatedly tried to contact her despite Noyes telling him not to. (D.C. Doc. 2 at 2–3.) Noyes alleged that Colby drove past her house several times, reached out to her on social media, contacted her family members, once followed her to a gas station, and once showed up at her work, yelled “fuck you,” ran around, and left. (D.C. Doc. 2 at 2–3.) In December 2021, the State charged Colby with two counts of stalking and one count of disorderly conduct. (D.C. Doc. 5.)

Pursuant to a plea agreement, Colby pled no contest to one count of misdemeanor stalking. (D.C. Doc. 34 at 6; 10/12/22 Tr. at 15.) The parties agreed to jointly recommend that Colby be committed to the Lake County Jail for six months with all time suspended. (D.C. Doc. 34 at 7.) The plea agreement was silent regarding restitution, and the issue was not discussed at the change of plea hearing. (D.C. Doc. 34 at 6–11; 10/12/22 Tr.)

In September 2022, roughly nine months after Colby was charged, Noyes submitted an affidavit of loss in which she claimed Colby owed her

\$9,136.26 in restitution. (D.C. Doc. 37.) Noyes grouped her losses in the following three categories: \$184.86 for “Mileage from School to Therapy (52.67 miles per trip X 6 trips, \$30.81 per trip),” \$311.40 for “Lost Wages Due to PTSD and Therapy (29.95 hrs X \$12/hr),” and \$8,640.00 for “Lost Wages-Terminated Employment Due to PTSD.” (D.C. Doc. 37.) Noyes attached to her affidavit various charts explaining how she calculated the \$184.86 and \$311.40 losses. (Miscellaneous Charts, attached to D.C. Doc. 37.) The charts showed the dates of Noyes’s therapy appointments, the mileage to and from the appointments, and the alleged lost wages from attending the appointments. (Miscellaneous Charts.) The attached documents also included an email and calendar pages from Noyes’s prior employer, Be Smart Property Management, documenting various hours Noyes missed work due to experiencing anxiety or attending therapy appointments. (Catherine Lanier Documents, attached to D.C. Doc. 37.) The documents revealed that Noyes worked two days a week—sometimes more if she was needed to cover for her boss—at either \$12 or \$15 per hour depending on whether she was cleaning or doing office work. (Catherine Lanier Documents.) The documents further provided that Noyes’s shifts were anywhere from one and a half to six hours long and

that she worked through December 2021. (Catherine Lainer Documents.)

Attached to the affidavit of loss was Noyes's victim impact statement in which she said that Colby's conduct caused her anxiety, fear, and PTSD. (Victim Impact Statement, attached to D.C. Doc. 37.) Noyes described the time Colby came to her office nearly a year prior, yelled "fuck you" several times, slammed the door, and drove off. (Victim Impact Statement.) Noyes said that the following day she experienced an anxiety attack at work. (Victim Impact Statement.) Noyes said she continues to have fear and anxiety but that therapy has helped her heal. (Victim Impact Statement.)

At some point after Colby was arrested and charged, Noyes quit her job "from fear that he would come back." (Victim Impact Statement.) Noyes did not state when she quit her job, how long she remained unemployed, or whether she tried to find a different job during this time. (Victim Impact Statement.) Noyes did not submit any further documentation supporting the \$8,640 restitution claim for "Lost Wages-Terminated Employment Due to PTSD."



Colby was incarcerated and committed for nearly the entirety of the proceedings. (*See* D.C. Docs. 10, 16, 18, 20, 29, 33, 36, 40.)

At sentencing, Colby objected to the \$8,640 restitution request. (10/19/22 Tr. at 29.) Colby pointed to the minimal support for the claim and argued that the State failed to prove that his criminal conduct caused Noyes to get PTSD, quit her job, remain unemployed, and lose \$8,640 in wages. (10/19/22 Tr. at 29–30.) Although Noyes’s attorney read her victim impact statement in court, the prosecutor informed Colby and the court that Noyes did “not want to testify concerning restitution.” (10/19/22 Tr. at 29.) No testimony or additional evidence beyond the affidavit of loss was submitted in support of the restitution claim. Nonetheless, the prosecutor maintained the restitution was warranted because the law only required an affidavit of loss and because it was not “unreasonable to believe” that Noyes could not work due to Colby’s conduct. (10/19/22 Tr. at 30.)

The court concluded there was a nexus between Colby’s conduct and the lost wages and ordered Colby to pay Noyes \$9,136.26 in restitution, which included the \$8,640 for a year’s worth of lost wages. (10/19/22 Tr. at 31; D.C. Doc. 40.)

## **SUMMARY OF THE ARGUMENT**

The State failed to prove that Colby's misdemeanor stalking offense caused Noyes to be unemployed for roughly a year. This Court has consistently held that a court cannot order a defendant to pay restitution unless the State proves by a preponderance of the evidence that the defendant's criminal conduct caused the loss. Here, the State failed to do so. The only evidence the State presented to support the \$8,640 lost wage claim was Noyes's affidavit of loss alleging she quit her job due to PTSD. While this may have been sufficient to establish that Colby's conduct caused mental health issues, it was not sufficient to prove that such issues necessitated that Noyes stop working for an entire year and lose \$8,640 in wages. This leap was based on nothing more than pure speculation. The Court should reverse.

## **STANDARD 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.

### **ARGUMENT**

**The State failed to prove that Colby’s misdemeanor stalking offense necessitated that Noyes quit her job and remain unemployed for roughly a year.**

“A district court’s power to impose a criminal sentence is constrained to specific statutory authority.” *State v. Thorpe*, 2015 MT 14, ¶ 7, 378 Mont. 62, 342 P.3d 5. Section 46, chapter 18 of the Montana Code Annotated authorizes a court to order a defendant to pay restitution for “all pecuniary loss substantiated by record evidence to have been caused by the defendant’s criminal conduct.” *Cole*, ¶ 11 (internal quotation omitted). 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. 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 the State failed to satisfy its burden of proof. In *Cole*, the district court ordered Cole to pay restitution for home renovation expenses incurred after Cole's methamphetamine use allegedly contaminated the apartment in which he lived. *Cole*, ¶ 8. On appeal, this Court reversed, concluding the State failed to prove Cole's criminal conduct caused the losses. *Cole*, ¶¶ 16, 18. Among other things, the State failed to present 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. *Cole*, ¶ 16. Because the State failed to prove the requisite causal connection, the Court ordered the district court to strike the restitution 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 in home repairs. There, the victim submitted an affidavit of loss that included an estimate of \$3,270 in damages to repair the siding and repaint the entire house. *Aragon*, ¶¶ 5–7. The victim acknowledged that Aragon’s insurance company already paid her \$1,359.14, which was its estimated repair cost. *Aragon*, ¶ 6. Relying on the affidavit of loss, the district court ordered Aragon to pay \$1,910.86—the difference between the victim’s estimate and the amount covered by insurance. *Aragon*, ¶¶ 5–7. On appeal, this Court determined that the State failed to prove the claimed loss because it did not establish it was necessary to repaint the entire house. *Aragon*, ¶¶ 16–22.

Importantly, this Court has emphasized that restitution must be based on more than speculation and assumptions. *State v. Coluccio*, 2009 MT 273, ¶¶ 42, 45, 352 Mont. 122, 214 P.3d 1282 (reversing restitution for the cost of home repairs when the victim “assumed” the amount of loss); *State v. O’Connell*, 2011 MT 242, ¶¶ 10, 14, 362 Mont. 171, 261 P.3d 1042 (reversing restitution in a theft case for a business’s lost profits

when restitution was based on speculation and “assumptions” that stolen items would have been remanufactured and sold); *State v. Pierre*, 2020 MT 160, ¶¶ 22–25, 400 Mont. 283, 466 P.3d 494 (reversing restitution for losses caused by a burglary of a main house when the State failed to cite to any non-speculative evidence proving Pierre took anything from the main house).

Here, the State failed to prove that Colby’s misdemeanor stalking offense caused Noyes to lose nearly \$9,000 in wages. While Noyes’s affidavit of loss claimed that Noyes lost \$8,640 in “Lost Wages-Terminated Employment Due to PTSD,” there was no explanation of how Noyes calculated the \$8,640 loss. (Affidavit of Loss.) The State presented no testimony or documentation showing when Noyes quit her job, how long she was unable to work due to her alleged PTSD, how many hours she would have worked had she remained employed, or the hourly rate she would have received. The documentation presented with the other restitution claims, however, revealed that Noyes worked *at least* through December 2021. (Catherine Lanier Documents.) They likewise showed that Noyes normally worked two shifts a week at either \$12 or \$15 per hour. (Catherine Lanier Documents.) Each shift varied from one and a

half to, more typically, six hours long. (Catherine Lanier Documents.) According to these figures, Noyes would have to work for close to a year—and possibly much longer—to earn \$8,640. Because Noyes worked through December 2021 and made her restitution claim the following September, Noyes was presumably asking for roughly a year’s worth of past and future lost wages.

The State presented nothing to prove that Colby’s misdemeanor stalking offense necessitated that Noyes quit her job and remain unemployed for a year. While Noyes’s impact statement—which was not made under oath—provided that Noyes had anxiety and “quit [her] job from fear that [Colby] would come back,” there was nothing explaining why she could not work elsewhere or why she had to stay jobless for a year. Notably, Colby was incarcerated and committed for most of this time period. (*See* D.C. Docs. 10, 16, 18, 20, 29, 33, 36, 40.) The court’s justification that “because [Noyes’s] mental health was affected . . . she was unable to work,” (10/19/24 Tr. at 31), assumed that Noyes’s anxiety was so severe and debilitating—and no amount of therapy or anything else could lessen it—that she could not work at any place in any capacity for at least a year. But nothing in the record established that—in fact,

Noyes admitted therapy was helping her heal, (Victim Impact Statement)—and assumptions are insufficient to support a causal connection. *Coluccio*, ¶¶ 42, 45; *O’Connell*, ¶¶ 10, 14. Moreover, Noyes had a duty to mitigate her damages. *State v. Kalal*, 2009 MT 103, ¶ 9, 350 Mont. 128, 204 P.3d 1240. She failed to do so when she did not look for or find any kind of employment—even just a few hours a week—for at least a year.

As in *Aragon*, Noyes’s affidavit of loss claiming \$8,640 in wages due to PTSD was insufficient to prove Colby caused such damages. *See Aragon*, ¶ 14 (the affidavit of loss requesting \$3,270 was insufficient to prove the defendant caused \$3,270 in damages). Even if Colby’s conduct created anxiety that necessitated Noyes take a break from work, it is “too great a leap” to conclude she could not work in any job for a year. *Cole*, ¶¶ 16–18. There was simply no evidence supporting such a finding. Because the State failed to prove the \$8,640 in lost wages, the Court should reverse that part of the restitution order. Notably, Colby does not challenge the remaining restitution of approximately \$500 for mileage to Noyes’s therapy and lost wages prior to quitting her job.



## **CONCLUSION**

The court ordered Colby to pay Noyes wages for an entire year without any evidence that his conduct necessitated such a long period of unemployment. This was unfair and resulted in Colby being on the hook for thousands of dollars based on an unsupported affidavit of loss and statements in a victim impact statement that were not made under oath. The State failed to satisfy its burden of proof, and the Court should reverse and remand with instructions to strike \$8,640 from the restitution order.

Respectfully submitted this 12<sup>th</sup> day of February, 2024.

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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 2,782, 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

Judgment.....App. 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 02-14-2024:

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