

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 22-0574

STATE OF MONTANA,

Plaintiff and Appellee,

v.

CHARLOTTE ANNE WOLFCHILD,

Defendant and Appellant.

OPENING BRIEF OF APPELLANT

On Appeal from the Montana Thirteenth Judicial District Court,
Yellowstone County, the Honorable Ashley Harada, Presiding

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STATEMENT OF THE ISSUE

1. Whether the district court's restitution award was erroneous?

STATEMENT OF THE CASE

On January 4, 2021, Ms. Wolfchild was charged with Felony Assault with a Weapon for repeatedly hitting Ms. Lantz in the head with a drinking glass. (D.C. Doc. 1, at 2; and 3/11/22 Tr., at 7-8; see also D.C. Doc. 4.) On July 29, 2021, Ms. Lantz signed a victim's impact affidavit requesting \$44,450.50 in restitution. (D.C. Doc. 41, at 16.) Pursuant to a plea agreement, Ms. Wolfchild pled guilty to Felony Assault with a Weapon on March 11, 2022. (3/11/22 Tr., at 5-6; see also D.C. Doc. 40.) The plea agreement contained a provision requiring Ms. Wolfchild to pay "any legally claimed restitution." (D.C. Doc. 40, at 3.) Sadly, prior to sentencing Ms. Lantz died from Covid-19. (6/22/22 Tr., at 12.)

Ms. Wolfchild's initial sentencing hearing was held on June 22, 2022. (See 6/22/22 Tr., at 1.) The State called two witnesses, Ms. Lantz's widower Scott Lantz and his sister Zina Boeyenas. (6/22/22 Tr., at 7-8 & 37.) The bulk of Mr. Lantz's testimony concerned restitution. (See 6/22/22 Tr., at 7-30.) Before Mr. Lantz completed his testimony, however, various disputes arose concerning the validity of the requested restitution. (See 6/22/22 Tr., at 23-34.) Most notably, the parties

disputed whether Mr. Lantz was a “crime victim” under the Montana Code given that he had never been appointed as the executor of his wife’s estate.¹ (6/22/22 Tr., at 23-34.) The district court ordered supplemental briefing and set a second sentencing hearing, which was held on August 12, 2022. (See 6/22/22 Tr., at 42; and D.C. Doc. 54; see also D.C. Docs. 51-52.)

Mr. Lantz testified during the second sentencing hearing as well, primarily building on his testimony from the first hearing. (See 8/12/22 Tr., at 16-38.) At the conclusion of the second hearing the district court ordered Ms. Wolfchild to pay restitution in the amount of \$44,450.50 to “Scott Lantz or the Estate of Faith Justice Lantz.” (8/12/22 Tr., at 44; see also D.C. Doc. 57, at 3 (Attached as App. A).) On October 6, 2022, Ms. Wolfchild filed a timely appeal with this Court. (D.C. Doc. 58.)

¹ The district court also searched Full Court and verified that proceedings had not been initiated to probate Ms. Lantz’s Estate. (6/22/22 Tr., at 24-25.)

STATEMENT OF THE FACTS

On October 20, 2020, Ms. Lantz was offered a job as the Property Manager of the Sage Towers apartment complex in Billings. (D.C. Doc. 1, at 1; and Ex. E to D.C. Doc. 41.) Ms. Lantz accepted the job and from the record it appears she began working on or about November 15, 2020. (Ex. E to D.C. Doc. 41.)

Approximately 6-weeks later, on the morning of December 30, 2020, Ms. Lantz was contacted by an apartment resident named Barbara Seymour. (D.C. Doc. 1, at 2.) Ms. Seymour informed Ms. Lantz that she was afraid to leave her apartment because Ms. Wolfchild was in the building. (D.C. Doc. 1, at 2.) Upon hearing this, Ms. Lantz visited the apartment of another resident named Sandra Norquay, where she located Ms. Wolfchild, who was intoxicated. (D.C. Doc. 1, at 2; and 8/12/22 Tr., at 55-56 & 60.)

Ms. Lantz informed Ms. Wolfchild that she needed to leave the apartment complex. (D.C. Doc. 1, at 2.) Ms. Lantz also called the police and began escorting Ms. Wolfchild out of the building. (D.C. Doc. 1, at 2.) While in the elevator Ms. Wolfchild assaulted Ms. Lantz by repeatedly hitting her in the head with a drinking glass. (D.C. Doc. 1,

at 2; and 3/11/22 Tr., at 7-8.) According to the police, Ms. Lantz had a laceration and large bump on the right side of her face; she was taken to the Billings Clinic for treatment. (D.C. Doc. 1, at 2.) During sentencing Mr. Lantz testified that his wife received a Traumatic Brain Injury from the incident and suffered from associated complications until her death from Covid-19. (8/12/22 Tr., at 10-14.)

Approximately six months prior to her death, on July 29, 2021, Ms. Lantz signed a victim's impact affidavit requesting \$44,450.50 in restitution.² (D.C. Doc 41, at 16-21.) The breakdown of the restitution request was as follows: \$3,038.04 for Ms. Lantz's out-of-pocket medical expenses; \$7,685.46 for Ms. Lantz's lost wages; and \$35,000 for Mr. Lantz's lost wages. (D.C. Doc 41, at 16-20; see also Exs. B-D to D.C. Doc 41.)

Somewhat confusingly, at sentencing Ms. Wolfchild argued Mr. Lantz was prohibited from "ask[ing] for restitution" given that he was never appointed as the executor of his wife's estate, but appeared to concede Ms. Lantz's Estate was entitled to \$3,038.04 for out-of-pocket

² Attached to the affidavit were five exhibits labeled A-E. (See Exs. A-E to D.C. Doc 41.)

medical expenses. (See 8/12/22, at 4-5.) In any event, Ms. Wolfchild did object to the lost wages requests, arguing they were unconnected to the underlying assault and/or overly speculative. (8/12/22, at 4-5.)

Ms. Lantz's lost wages request was divided into two time periods: the 24-weeks from January 15 – July 2 (2021), and the 4-weeks from July 2 – July 29 (2021). (Ex. D to D.C. Doc 41.)

From January 15 – July 2 (2021), Workers Comp paid Ms. Lantz \$468.78 per week, which was 66.66% of her pre-injury salary of \$698.67. (Exs. D-E to D.C. Doc. 41.) To make up for the 33.33% not covered by Workers Comp, Ms. Wolfchild sought restitution in the amount of \$232.89 per week for 24-weeks for a total of \$5,589.36. (Ex. D to D.C. Doc. 41.)

From July 2 – July 29 (2021), Ms. Lantz sought \$698.67 per week for a total of \$2,091.10. (Ex. D to D.C. Doc. 41.) The increase was based on the fact that Workers Comp had terminated Ms. Lantz's benefits on July 2 (2021) after she failed to complete her required therapy. (Ex. D to D.C. Doc. 41; and 8/12/22 Tr., at 19 & 32.)

During sentencing the parties disputed whether Workers Comp was justified in terminating Ms. Lantz's benefits. (See 8/12/22 Tr., at

10, 11, 19, 20, 32, & 54.) Mr. Lantz argued his wife's benefits were wrongfully terminated because she did not voluntarily fail to attend therapy, but rather was turned away because of Covid protocols given that she was not feeling well. (8/12/22 Tr., at 19-20.) Ms. Wolfchild's argued the reason the hospital would not allow Ms. Lantz to attend therapy is because she was unwilling to wear a mask. (8/12/22 Tr., at 10-11; see also D.C. Doc. 51, at 8.)

Concerning Mr. Lantz's request for \$35,000 in lost wages, Mr. Lantz testified he was seeking \$5,000 per month for the 7-month period from January – July (2021). (6/22/22 Tr., at 21-22; see also Ex. D to D.C. Doc 41.) Mr. Lantz explained that the \$35,000 figure was based on his previous employment as a delivery and salesperson for ALSCO, where he earned a monthly salary of \$5,000. (6/22/22 Tr., at 21-22.)

Mr. Lantz admitted he was unemployed in December of 2020 when the assault occurred, but advised he was unable to seek employment thereafter because he had to stay home and take care of his wife. (6/22/22 Tr., at 12-13; and 8/12/22 Tr., at 28.) Mr. Lantz explained that ALSCO had laid him off after a shoulder injury in May

of 2019; he had shoulder surgery approximately 7-months later.³ (6/22/22 Tr., at 12 & 21-22; see also 8/12/22 Tr., at 24.) Mr. Lantz advised the surgery had not been fully successful and that he had problems with his shoulder to this day. (6/22/22 Tr., at 12; and 8/12/22 Tr., at 24-26.)

Mr. Lantz explained that he had initially hoped to resume working for ALSCO once his shoulder healed, but the company terminated him permanently in early 2020 on account of his injury and Covid related cutbacks. (6/22/22 Tr., at 12; and 8/12/22 Tr., at 24-26.)

When asked about his work history and occupational skills, Mr. Lantz advised that prior to ALSCO his previous employment included:

- 17-years as an animal control officer with the Billings Police Department;
- A swift and ice water rescue technician;
- An investigator with the Billings Police Department;
- A euthanasia tech for the state;
- Running a crematorium for the animal shelter;
- Cremating drugs for the city, county, and state;

³ Mr. Lantz testified that he too received workers compensation for his injured shoulder. (8/12/22 Tr., at 30-31.)

- Managing an air cargo operation at the airport for UPS; and
- Serving as an equipment manager for Edwards Jet Center. (8/12/22 Tr., at 27.)

Concerning missed work opportunities, Mr. Lantz testified he could have obtained employment operating heavy machinery, which he opined he had done in the past. (8/12/22 Tr., at 26.) When asked how close he was to actually securing a job, Mr. Lantz testified he had spoken to managers at a construction company who told him to let them know when he was ready to come work. (8/12/22 Tr., at 26-27.) Mr. Lantz provided no details concerning when he communicated with the construction company, which construction company he spoke with, who the managers were, nor what heavy equipment he might be operating. (See 8/12/22 Tr., at 26-27.)

Following Mr. Lantz testimony at the second sentencing hearing the court opined “I’m not entirely sure” whether the restitution award should go to Mr. Lantz or his late wife’s estate. (8/12/22 Tr., at 39.) Given its uncertainty, the court ordered Ms. Wolfchild to pay \$44,450.50 in restitution to “Scott Lantz or the Estate of Faith Justice Lantz[.]” (8/12/22 Tr., at 44; see also D.C. Doc. 57, at 3 (Attached as App. A).)

STANDARDS OF REVIEW

The State bears the burden of proving the requisite causal connection between the defendant's criminal conduct and the requested restitution. *State v. Pierre*, 2020 MT 160, ¶ 13, 400 Mont. 283, 466 P.3d 494. Restitution awards create mixed questions of fact and law. *State v. Cleveland*, 2018 MT 199, ¶ 7, 392 Mont. 338, 423 P.3d 1074.

Conclusions of law regarding the measure of restitution are reviewed de novo, while factual findings concerning the amount of restitution are reviewed for clear error. *State v. Patterson*, 2016 MT 289, ¶ 9, 385 Mont. 334, 384 P.3d 92. Findings of findings are clearly erroneous if not supported by substantial evidence. *State v. Barrick*, 2015 MT 94, ¶ 11, 378 Mont. 441, 347 P.3d 241. Evidence is substantial if reasonable minds could accept the evidence as sufficient to support a given conclusion. *Barrick*, ¶ 11.

SUMMARY OF THE ARGUMENT

As a threshold matter, the district court failed to recognize that Ms. Lantz's Estate and Mr. Lantz the person are separate and distinct crime victims under § 46-18-243(2)(a), MCA. Accordingly, the restitution that was properly awarded for Ms. Lantz's out-of-pocket expenses and lost wages should *only* have been awarded to Ms. Lantz's Estate—not Ms. Lantz's Estate *or* Scott Lantz.

More substantively, the district court lacked the evidence necessary to award Mr. Lantz \$35,000 in lost wages. It is undisputed Mr. Lantz was unemployed when the assault occurred and had been for the previous 18-months. Nor did Mr. Lantz proffer evidence of a single *firm* job offer during the 7-month period for which he sought \$5,000 a month in purported lost wages.

ARGUMENT

I. The district court's restitution award is erroneous and must be vacated.

Prior to her death, Ms. Lantz filed a victim's affidavit seeking restitution for \$3,038.04 in out-of-pocket medical expenses, \$7,685.46 for her own lost wages, and \$35,000 in lost wages for Mr. Lantz. (D.C. Doc. 41, at 16-21; and Exs. B-E to D.C. Doc 41.) At the conclusion of the second sentencing hearing the district court ordered Ms. Wolfchild to pay \$44,450.50 in restitution to "Scott Lantz or the Estate of Faith Justice Lantz." (8/12/22 Tr., at 44; see also D.C. Doc. 57, at 3 (Attached as App. A).) As addressed below, the court's restitution award was erroneous on multiple fronts.

A. As an initial matter, the district court failed to appreciate that Ms. Lantz's Estate and Mr. Lantz the individual are separate and distinct "crime victims" under 46-18-243(2)(a).

In Montana, a convicted defendant must pay full restitution to any victim(s) sustaining a pecuniary or economic loss. §§ 46-18-201(5), MCA; and 46-18-241, MCA. As relevant to this case, § 46-18-243(2)(a), MCA defines a "crime victim" as:

- (i) a person who suffers loss of property... as a

result of... the commission of an offense; [or]

(ii) the estate of a deceased [victim]...

As the above illustrates, a crime victim under subsection (i) is “a person who suffers [a] loss of property... as a result of... the commission of an offense...”; conversely, a crime victim under subsection (ii) is the estate of a deceased victim. *Compare* § 46-18-243(2)(a)(i) *with* § 46-18-243(2)(a)(ii). In other words, for the purpose of awarding restitution there can be two distinct “crime victims”—one under subsection (i) and another under subsection (ii).

In this case, the district court expressed uncertainty concerning whether the restitution should be awarded to Ms. Lantz’s Estate or instead to Mr. Lantz personally. (8/12/22 Tr., at 39.) To placate its uncertainty, the court awarded the restitution to “Scott Lantz or the Estate of Faith Justice Lantz.” (8/12/22 Tr., at 44; see also D.C. Doc. 57, at 3 (Attached as App. A) (emphasis added).) Awarding restitution to either Ms. Lantz’s Estate or Mr. Lantz personally was improper as each is a separate and distinct crime victim under 46-18-243(2)(a).

1. **As it pertains to Ms. Lantz’s out-of-pocket expenses and lost wages, her estate is the “crime victim” under 46-18-243(2)(a)(ii).**

At sentencing Ms. Wolfchild argued Mr. Lantz was prohibited from “ask[ing] for restitution” given that he was never appointed as the executor of his wife’s estate. (8/12/22 Tr., at 4.) Ms. Wolfchild concedes on appeal this is incorrect, as Mr. Lantz was not “asking for restitution” for his wife’s lost wages and out-of-pocket expenses. Rather, it was Ms. Lantz who personally signed the victim’s affidavit requesting restitution prior to her death. (See D.C. Doc. 41, at 16; and Exs. B-E to D.C. Doc. 41.)

Additionally, it is undisputed that Ms. Lantz was deceased at the time of sentencing. (6/22/22 Tr., at 12.) Accordingly, as it pertains to her out-of-pocket medical expenses and lost wages, Ms. Lantz’s Estate is the “crime victim” under 46-18-243(2)(a)(ii). This means any restitution for Ms. Lantz’s out-of-pocket medical expenses and lost wages must be awarded to her estate—not Mr. Lantz personally.⁴

⁴ It is worth noting there could also be practical consequences for improperly awarding this restitution to Mr. Lantz personally. To illustrate but one example, consider the following: We know Ms. Lantz had two adult daughters and the record suggests Mr. Lantz was likely not their father as evidenced by his referring to them as “her...daughters.” (See 6/12/22 Tr., at 14.) Assuming for arguments sake that Mr. Lantz is not their father and Ms. Lantz died intestate with an estate worth more than \$150,000, Ms. Lantz’s daughters might be entitled to a portion of the restitution award pursuant to § 72-2-112(4), MCA. To be clear, this is not to suggest Mr. Lantz is ineligible to receive the restitution awarded to his wife’s

2. As it pertains to Mr. Lantz’s request for lost wages, he is the “crime victim” under 46-18-243(2)(a)(i).

Ms. Wolfchild argued Mr. Lantz could not be a crime victim under 46-18-243(2)(a)(ii) given that he had not been appointed by the court to serve as the personal representative of his wife’s estate. (D.C. Doc. 51, at 5-6.) Ms. Wolfchild is correct that Mr. Lantz could not be a crime victim under 46-18-243(2)(a)(ii).

But as it pertains to *his* request for \$35,000 in lost wages, Ms. Wolfchild concedes on appeal that had Mr. Lantz proffered sufficient evidence to substantiate his claim, he would be a victim under subsection (i) as “a person who suffer[ed] [a] loss of property... as a result of... the commission of an offense...” *See* § 46-18-243(2)(a)(i), MCA; *see also State v. Ness*, 2009 MT 300, ¶ 13, 352 Mont. 317, 216 P.3d 773 (“[C]lassification of an individual as a victim—for the purpose of ordering restitution—does not depend on the individual’s relationship to

estate. But to actually take possession of any restitution awarded to his wife’s estate (i.e. cash the check), Mr. Lantz will first need to be appointed as the executor or personal representative of the estate. This is a matter for another day, however, for as the State correctly observed during sentencing, whatever happens “on the back end” is not at issue here. (8/12/22 Tr., at 7-8.)

the elements of the crime for which the defendant is being sentenced.”)

B. Ms. Lantz’s Estate is entitled to an award of \$9,558.96 for her out-of-pocket expenses and lost wages.

As she appeared to do so at sentencing, Ms. Wolfchild concedes Ms. Lantz’s Estate is entitled to \$3,038.04 in restitution for her out-of-pocket medical expenses. (See D.C. Doc 41, at 16-18; and Exs. B-C to D.C. Doc 41; see also 8/12/22, at 5.)

Ms. Lantz’s request for \$7,685.46 in lost wages is a bit more complicated. Ms. Lantz divided her lost wages request into two time periods: the 24-week period from January 15 – July 2 (2021), and the 4-week period from July 2 – July 29 (2021). (Ex. D to D.C. Doc 41.)

January 15, 2021 – July 2, 2021

From January 15 – July 2 (2021), Ms. Lantz received \$468.78 per week from Workers Comp, which was 66.66% of her pre-injury salary of \$698.67.⁵ (Exs. D-E to D.C. Doc. 41.) To compensate for the 33.33% of her salary not covered by Workers Comp, Ms. Lantz sought restitution in the amount of \$232.89 per week for 24-weeks for a total of \$5,589.36. (Exs. D-E to D.C. Doc. 41.) Ms. Wolfblack concedes on appeal that Ms.

⁵ By statute Workers Comp only pays injured workers 66.66% of their weekly salary. See § 39-71-701(3), MCA.

Lantz' Estate is entitled to a restitution award of \$5,589.36 for lost wages from January 15 – July 2 (2021).

July 2, 2021 – July 29, 2021

On July 2, 2021, Workers Comp terminated Ms. Lantz's benefits owing to her failure to complete required therapy. (Ex. D to D.C. Doc. 41; and 8/12/22 Tr., at 19 & 32.) As a result, for the 4-week period from July 2 – July 29 (2021) Ms. Lantz sought restitution equivalent to her full pre-injury salary of \$698.67. (Exs. D-E to D.C. Doc. 41.)

At sentencing the parties disputed the legitimacy of the decision by Workers Comp to terminate Ms. Lantz's benefits. (See 8/12/22 Tr., at 10, 11, 19, 20, 32, & 54.) Mr. Lantz's position was that Workers Comp wrongly terminated his wife's benefits because her failure to attend therapy was involuntary. (8/12/22 Tr., at 19.) More specifically, Mr. Lantz contends his wife was not feeling well and the hospital refused to allow her to attend therapy because of Covid protocols. (8/12/22 Tr., at 19-20.) Conversely, Ms. Wolfchild argued the reason the hospital prohibited Ms. Lantz from attending therapy is because she refused to wear a mask. (8/12/22 Tr., at 10-11; see also D.C. Doc. 51, at 8.)

Whether Workers Comp rightly or wrongly terminated Ms. Lantz's benefits is an immaterial distraction. Because even if Workers Comp wrongfully terminated her benefits that is a dispute between Ms. Lantz's Estate and Workers Comp—not Ms. Wolfchild. In other words, Ms. Wolfchild is not liable for mistakes or wrongful acts committed by Workers Comp. That said, Ms. Wolfchild concedes Ms. Lantz's Estate is entitled to restitution for lost wages in the amount \$232.89 per week for the 4-week period from July 2 – July 29 (2021). This \$931.56 award represents the 33.33% of Ms. Lantz's salary she would not have received had Workers Comp not terminated her benefits.

C. Mr. Lantz is not entitled to \$35,000 in lost wages.

A causal relation between the offender's criminal conduct and the victim's pecuniary loss is the touchstone for determining an entitlement to restitution. *Pierre*, ¶ 12. A causal "but for" connection vis-à-vis the crime and the victim's financial loss is sufficient to justify a restitution award. *State v. Cerasani*, 2014 MT 2, ¶ 16, 373 Mont. 192, 316 P.3d 819.

Section 46-18-112's requirement that victims submit sworn affidavits or testimony establishing pecuniary losses ensures restitution

awards comport with due process. *State v. Dodge*, 2017 MT 318, ¶ 13, 390 Mont. 69, 408 P.3d 510; *see also Bauer v. State*, 1999 MT 185, ¶ 31, 295 Mont. 306, 983 P.2d 955 (A defendant’s sentence should only be based on “concrete and accurate information before the sentencing judge.”)

Restitution awards must be supported by a preponderance of the evidence. *State v. McClelland*, 2015 MT 281, ¶ 10, 381 Mont. 164, 357 P.3d 906; *see also* § 46-18-243(1)(a), MCA (Restitution awards must be “substantiated by evidence in the record...” “Assumptions, ballpark figures from friends, and purely speculative calculations are insufficient...” to support restitution awards. *State v. Coluccio*, 2009 MT 273, ¶ 45, 352 Mont. 122, 214 P.3d 1282 (overruled in part on other grounds). For example, in *Coluccio* this Court held that a widower’s testimony concerning her late husband’s “potential” earning capacity was too speculative to justify a restitution award. *See Coluccio*, ¶¶ 43 & 45 (overruled in part on other grounds).

In this case, Mr. Lantz testified that after the assault he was unable to seek employment as he had to stay home and take care of his wife. (8/12/22 Tr., at 21-24.) To compensate for his purported lost

wages, Mr. Lantz sought and was awarded \$35,000.00 in restitution. (6/22/22 Tr., at 21; and 8/12/22 Tr., at 8, 23, & 28; see also D.C. Doc. 57, at 3 (Attached as App. A).) Mr. Lantz calculated the \$35,000 figure by multiplying his previous \$5,000 a month salary at ALSCO by 7-months (January – July of 2021). (6/22/22 Tr., at 21-22; see also Ex. D to D.C. Doc. 41.)

In other words, Mr. Lantz's restitution request is premised on the assumption that but for his staying home to take care of his wife, he would have earned \$35,000 in the 7-month period from January 1 – July 31, 2021. This assumption is unsupported by evidence in the record.

As an initial matter, it is undisputed Mr. Lantz was not employed for 18-months prior to his wife's assault on December 30, 2020. (See 6/22/22 Tr., at 12; and Tr., at 23-24; see also D.C. Doc. 1.) Remembering that Mr. Lantz was laid off by ALSCO after a shoulder injury in May of 2019. (6/22/22 Tr., at 12; and 8/12/22 Tr., at 23-24.) And while Mr. Lantz advised he initially intended to resume his employment with ALSCO, the company terminated him permanently in early 2020 because of his injury and Covid related cutbacks. (6/22/22 Tr., at 22;

and 8/12/22 Tr., at 25.) Accordingly, Mr. Lantz's assertion that but for the need to take care of his wife he would have earned \$35,000 from January – July (2021) is pure conjecture.

Additionally, while Mr. Lantz testified that he had several employment opportunities, the only job he specifically mentioned was working as a heavy equipment operator—which he opined he had done in the past. (8/12/22 Tr., at 26.) Yet in describing his lengthy employment history, Mr. Lantz never mentioned operating heavy machinery. (See 8/12/22 Tr., at 26.) Instead, Mr. Lantz advised that prior to ALSCO his previous employment included:

- 17-years as an animal control officer with the Billings Police Department;
- A swift and ice water rescue technician;
- An investigator with the Billings Police Department;
- A euthanasia tech for the state;
- Running a crematorium for the animal shelter;
- Cremating drugs for the city, county, and state;
- Managing an air cargo operation at the airport for UPS; and
- Serving as an equipment manager for Edwards Jet

Center. (8/12/22 Tr., at 27.)

As the above illustrates, Mr. Lantz never testified to having worked even a single day operating heavy machinery. And when asked by the prosecutor how close he was to actually securing employment, Mr. Lantz advised he had spoken with managers at a construction company who purportedly told him to let them know when he was ready to come work. (See 8/12/22 Tr., at 26-27.) This may be true, but Mr. Lantz's conversation with the construction company can hardly be considered a *firm* job offer, especially in light of Mr. Lantz's lack of employment history operating heavy machinery.

Moreover, Mr. Lantz did not advise *when* he spoke with the construction company, what company it was, where the company was located, the name of the individual manager(s) he talked to, what the salary would be, nor which type of heavy equipment he would purportedly be hired to operate.⁶ (See 8/12/22 Tr., at 26-27.)

The *when* inquiry is particularly noteworthy because Mr. Lantz sought restitution for the 7-month period from January – July of 2021.

⁶ Mr. Lantz did assert that operating heavy machinery would be “more profitable” than his employment with ALSCO, but he provided no actual salary specifications.

(6/22/22 Tr., at 21-22; see also Ex. D to D.C. Doc. 41.) Accordingly, to receive the entirety of his restitution request he would have had to have turned down the job by January 1, 2021—a mere two days after his wife’s assault in the dead of winter during the Covid pandemic. It is further noteworthy that no evidence was presented suggesting Mr. Lantz had secured employment after his wife’s death in January of 2022—let alone a job operating heavy machinery. Thus, similar to the widow’s request in *Coluccio*, the evidence concerning Mr. Lantz’s purported earning potential is far too speculative to justify awarding \$35,000 in restitution. *See Coluccio*, ¶¶ 43 & 45 (overruled in part on other grounds).

CONCLUSION

Ms. Lantz’s Estate is entitled to restitution in the amount of \$9,558.96. Mr. Lantz is not entitled to restitution, however, as the record contains insufficient evidence to conclude that but for his wife’s assault he would have earned \$35,000 from January – July (2021). Accordingly, Ms. Wolfchild respectfully requests that this Court vacate the district court’s restitution order and remand for entry of an amended order awarding Ms. Lantz’s Estate \$9,568.96.

Respectfully submitted this 21st day of February, 2024.

By /s/ Pete Wood
Pete Wood, Attorney for Appellant

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this primary brief is printed with a proportionally 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 4,349 (including footnotes), but excluding Title Page, Table of Contents, Table of Authorities, Certificate of Compliance, Appendix, and Certificate of Service.

/s/ Pete Wood
Pete Wood, Attorney for Appellant

APPENDIX

Judgement App. A

CERTIFICATE OF SERVICE

I, Peter Allan Wood, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 02-22-2024:

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