IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 22-0529

STATE OF MONTANA,

Plaintiff and Appellee,

v.

JASSIE LAYDELL WESTERMAN,

Defendant and Appellant.

# BRIEF OF APPELLEE

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

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## STATEMENT OF THE ISSUES

Whether the district court erred when it, in relevant part, imposed $280,000 in restitution after conducting a hearing, at which Westerman did not present evidence of his inability to pay.

## STATEMENT OF THE CASE

As part of a global plea agreement, Appellant Jassie Laydell Westerman pleaded guilty to Burglary, a felony, in violation of Mont. Code Ann. § 45-6-204(1)(a), as charged in Cascade County Cause No. ADC-21-090,[1] and Endangering the Welfare of a Child, a felony, in violation of Mont. Code Ann. § 45-5-622(3)(c), Theft, a felony, in violation of Mont. Code Ann. § 45-6-301(1)(a), and Money Laundering, a felony, in violation of Mont. Code Ann. § 45-6-341, all as charged in Cascade County Cause No. CDC-21-287. (Docs. 29, 30, 33, 34.) As part of his sentence in Cause No. CDC-21-287, the district court imposed $280,000 in restitution to the Estate of Rickey Linafelter, $7,300 to Greg Mell (Mell), and $3,691.71 to Kristin Workman (Workman). (Docs. 40, 41 at 4.) On appeal, Westerman challenges only the imposition of the $280,000 in restitution.

[1] The instant appeal stems from only Cause No. CDC-21-287.

## STATEMENT OF THE FACTS

In 2020, Rickey Dean Linafelter owned 14 rentals and 2 businesses. (6/21/22 Sent. Hr'g Tr. (Tr.) at 13, 27, 29-30; *see also* Doc. 1 at 28.) Because he did not trust banks, he would often store large amounts of cash in a safe in his house and keep only minimal amounts in bank accounts. (Tr. at 11, 13-14, 29-30, 42; Doc. 1 at 29.) Essentially, Linafelter's financial practice was to deposit money into a bank account, then withdraw cash to be placed in his safe, keeping only the minimum required in the account. (Tr. at 41-42.)

After his mother passed away, Linafelter, as the executor of his mother's estate, and his good friend, George Frederick Simpson, Jr. (Simpson), counted the money in Linafelter's mother's safe, which amounted to $160,000 cash. (*Id*. at 11, 38.) The $160,000 cash was then placed in Linafelter's safe. (*Id*. at 39.) That was in Summer 2020. (*Id*.) Workman[2] witnessed Linafelter counting $120,000 cash that was the payment from Linafelter's mother's life insurance policy and placing it in a separate bag from the $160,000. (*Id*. at 11-12, 14, 16.)

On December 28, 2020, Linafelter was admitted to the Benefis ICU with COVID-19, which had compromised 97 percent of his lung function. (Tr. at 25, 35; Doc. 1 at 28.) While Linafelter fought for his life in the ICU, Westerman stole the

[2] Workman is Linafelter's daughter and executor of his estate. (Tr. at 10; Doc. 1 at 29.)

majority of the contents of Linafelter's safe, leaving only a few random papers that were not of real importance. (Tr. at 15, 36-37; Doc. 1 at 28.) At the time of the theft, which was reported on December 31, 2020, Linafelter believed that there was "between $250,000 to $300,000 cash in the safe." (Tr. at 25; Doc. 1 at 28.)

Westerman, however, reported that he stole $87,357 cash from Linafelter's safe. (Tr. at 47.) Westerman stated that he was "certain" about that amount because he had never had "very much money," so you remember the amount. (*Id*. at 47.) He used the money he stole from Linafelter's safe to purchase property in Sun River, which he reportedly paid $99,000 in cash for. (*Id*. at 47, 50.)

Linafelter passed away from COVID-19 at the age of 70. (Tr. at 32; Doc. 1 at 29.) At the time of his death, Linafelter had relatively low monthly expenses: a mortgage payment of $1,282.20, $200 to $300 for electricity, $80 to $90 for gas, and $62.50 for water. (Tr. at 32-33.) Because of the theft, Workman, to maintain Linafelter's and her grandmother's estates, has "maxed out $20,000 in credit card debt" and "taken out $97,000 in loans to fix up all the properties and keep them going and keep the taxes and everything paid." (*Id*. at 73.)

At the sentencing hearing, Westerman agreed to pay $7,300 in restitution to Mell and $3,691.70 in restitution to Workman. (*Id*. at 6-8, 69, 86.) Westerman, however, disputed the $300,000 amount initially requested by the State. (*Id*. at 9.) Before summations, the district court stated that there was insufficient evidence to

support $300,000, but that evidence established there was $280,000 in cash in Linafelter's safe. (*Id*. at 45.) As the district court explained, the testimony supported that:

> $120,000 in one bag and another $160,000 from another source. The $120,000 was for the life insurance. The $160,000 was from the estate and Ms. Workman testified that Mr. Bauer's plan was to close everything together. And so, because it's not closed yet and not wrapped up yet, an individual like this who managed his finances the way this individual managed his finances, would resist the temptation to dip into the $160,000 and $120,000 to pay his ongoing expenses. The entire financial picture that these two witnesses depicted this afternoon leaves me thinking that he had enough money coming in, on an ongoing basis that he didn't need to raid those two funds, if you will. The $120,000 fund and the $160,000 fund. It's not the sort of thing this person would have done based on the testimony I heard this afternoon and based on Ms. Workman's testimony that these estates aren't closed yet, because Mr. Bauer wanted to close them together. A person like this would want to keep that money separated.

(*Id*. at 71.)

In reaching the $280,000 amount, the district court explained that it found both Workman and Simpson to be "quite credible," and that it did not "see any reason that either one of the witnesses who testified in support of the restitution number of the State would have to exaggerate." (*Id*. at 10.) The district court expressed concerns about Westerman's recollection of the amount, reasoning that it could not "rely on [Westerman's] count [because] he told the PSI writer that his reason for doing this was, 'because [he] was really high on drugs and was not in the right state of mind.'" (*Id*. at 72.)

Westerman's counsel stated that the district court should consider Westerman's ability to pay because he was unemployed, in debt, and would be in prison for a period of time.[3] (*Id.* at 70.) Westerman, however, presented no evidence of his financial circumstances or evidence in support of waiving or modifying the restitution amount imposed.

## SUMMARY OF THE ARGUMENT

The district court did not err when it imposed $280,000 in restitution. Workman and Simpson credibly testified that Linafelter stored large amounts of cash in several bags in his safe. In the months before the theft, Workman testified, she witnessed Linafelter count $120,000—the payment from her grandmother's life insurance policy—and place that cash in one bag that was stored in Linafelter's safe. Simpson testified that he assisted Linafelter in counting the $160,000 that was in Linafelter's mother's safe when she passed. The $160,000 was placed in its own bag and stored in Linafelter's safe. Because the evidence supported that Linafelter would likely not have used the $280,000 in cash before the theft, and that

[3] The district court sentenced Westerman to the Department of Corrections for a term of five years for Endangering the Welfare of a Child, to run concurrently to a five-year DOC commitment for Theft, both of which run concurrently to a ten-year DOC commitment, with five years suspended, for Money Laundering. (Docs. 40, 41 at 3.) The district court also ordered forfeiture of property associated with the crimes charged, which included the property purchased in Sun River. (Doc. 41 at 4.)

Westerman had nearly emptied the contents of Linafelter's safe, a preponderance of the evidence supported imposing $280,000 in restitution.

Furthermore, the district court was not required to consider Westerman's ability to pay before it imposed $280,000 in restitution. In his closing argument, Westerman's counsel stated, in passing, that the district court should consider Westerman's ability to pay the restitution because Westerman was unemployed, in debt, and would be serving a DOC sentence. Under the circumstances, the clear language of Mont. Code Ann. § 46-18-201(5) did not require the district court to consider Westerman's ability to pay before it imposed full restitution to Linafelter's estate.

Westerman's passing statement of his inability to pay is also distinguishable from this Court's decision in *State v. Lodahl*, 2021 MT 156, ¶ 11, 404 Mont. 362, 491 P.3d 661. Nor did Westerman present any evidence that would have supported the district court waiving or modifying the restitution amount. Finally, the record supports that Westerman does have the ability to pay the $280,000 restitution amount imposed.

## STANDARD OF REVIEW

Because restitution awards present a mixed question of law and fact, this Court employs *de novo* review. *State v. Arthun*, 2023 MT 214, ¶ 11, 414 Mont. 54, 538 P.3d 858.

This Court reviews for correctness the appropriateness of a district court imposing restitution. *State v. Cleveland*, 2018 MT 199, ¶ 7, 392 Mont. 338, 423 P.3d 1074. This Court reviews for clear error a district court's findings of fact regarding the amount of restitution. *Id*. A finding of fact is clearly erroneous if it is not supported by substantial evidence, if the lower court has misapprehended the effect of the evidence, or if this Court's review of the record leaves the Court with the firm conviction that a mistake has been made. *Arthun*, ¶ 11. 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." *Arthun*, ¶ 11 (internal quotations and citation omitted).

## ARGUMENT

**The district court did not err when it imposed $280,000 in restitution.**

Although restitution is an aspect of sentencing, imposed only once a defendant has been convicted, the purpose of restitution is to "make victims whole,

not to further punish offenders." *State v. Johnson*, 2018 MT 277, ¶¶ 28, 35, 393 Mont. 320, 430 P.3d 494 (citations omitted). Indeed, "[s]entencing practices *must emphasize restitution* to the victim by the offender." Mont. Code Ann. § 46-18-101(3)(h) (emphasis added). Victims are "entitled to restitution for the full replacement cost of property taken, destroyed, harmed or otherwise devalued as a result of the offender's criminal conduct." *State v. Hill*, 2016 MT 219, ¶ 10, 384 Mont. 486, 380 P.3d 768 (internal quotations and citation omitted).

Essentially, "[r]estitution engrafts a civil remedy into a criminal proceeding and creates a procedural shortcut for crime victims who are entitled to a civil recovery against the offender." *State v. Dodge*, 2017 MT 318, ¶ 9, 390 Mont. 69, 408 P.3d 510 (citing *State v. Aragon*, 2014 MT 89, ¶ 16, 374 Mont. 391, 321 P.3d 841). A defendant is, therefore, entitled to explain or rebut any information presented at the restitution hearing, and may assert any defense available to the defendant "in a civil action for the loss for which the victim seeks compensation." *Aragon*, ¶ 16 (citations omitted).

Westerman argues that the district court should have imposed $87,357, the amount he claims to have stolen, because he does not have the ability to pay $280,000 in restitution, nor did the evidence support the district court ordering that amount. (Appellant's Br. at 12, 16.)

### A. The district court was not required to consider Westerman's ability to pay before it imposed restitution.

Westerman's statement that he does not have the ability to pay, made in passing during counsel's closing argument regarding the restitution amount, without any evidence presented of Westerman's financial circumstances, did not warrant the district court conducting an inquiry into Westerman's ability to pay.

Montana Code Annotated § 46-18-101(3)(h) provides, in part, that sentences "must require an offender who is financially able to do so to pay restitution, costs as provided in 46-18-232, costs of assigned counsel, as provided in 46-8-113, and, if the offender is a sex offender, costs of any chemical treatment." However, Mont. Code Ann. § 46-18-201(5) provides that when a person has been found guilty of an offense, and the sentencing court finds that a victim has sustained a pecuniary loss, the sentencing court "*shall*, as part of the sentence, *require payment of full restitution* and interest to the victim." Principles of statutory construction require that, "[w]hen a general statute and a specific statute are inconsistent, the specific statute governs, so that a specific legislative directive will control over an inconsistent general provision." *Mosley v. Am. Express Fin. Advisors, Inc.*, 2010 MT 78, ¶ 20, 356 Mont. 27, 230 P.3d 479. Because Mont. Code Ann. § 46-18-201(5) is specific to restitution only and does not consider fees and fines as contemplated in Mont. Code Ann. § 46-18-101(3)(h), Mont. Code Ann. § 46-18-201(5) controls.

Statutory construction requires the district court to simply "ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted." *City of Missoula v. Fox*, 2019 MT 250, ¶ 18, 397 Mont. 388, 450 P.3d 898. "The starting point for interpreting a statute is the language of the statute itself." *State v. Christensen*, 2020 MT 237, ¶ 95, 401 Mont. 247, 472 P.3d 622. The plain meaning of the statute controls when the "intent of the Legislature can be determined from the plain meaning of the words used in the statute." *Id*. When several statutes apply to a situation, the statutes should be construed, if possible, in a manner that will give effect to each of them. *Fox*, ¶ 18. "Statutory construction should not lead to absurd results if a reasonable interpretation can avoid it." *Id*.

Here, the district court did not err when it did not consider Westerman's ability to pay before it imposed $280,000 in restitution because it was not statutorily obligated to. Montana Code Annotated § 46-18-201(5) expressly requires a district court to impose *full* restitution in every case where a victim, as defined by Mont. Code Ann. § 46-18-243, has sustained a pecuniary loss. Absent from Mont. Code Ann. § 46-18-201(5) is any requirement the district court must consider the offender's ability to pay before the district court fulfills its requirement to impose full restitution. Indeed, considering an offender's ability to pay would run contrary to the plain language of Mont. Code Ann. § 46-18-201(5)

because it could result in the victim not receiving full restitution. Accordingly, the district court did not err when it did not consider Westerman's ability to pay when it imposed full restitution to Linafelter's estate.

Nonetheless, Westerman relies on *Lodahl* for the proposition that the district court should have modified or waived the $280,000 restitution amount because Westerman, at the end of the hearing, stated that the district court should consider Westerman's ability to pay. (Appellant's Br. at 12-15.) In *Lodahl*, the plea agreement required Lodahl to pay restitution to the Montana State Fund (MSF) for its payments to Dawn Miller, the victim of Lodahl's assault and Miller's medical providers. *Lodahl*, ¶ 4. At her restitution hearing, Lodahl did not dispute the requested amount of restitution of $4,891.29 to the MSF and $1,261.20 to Miller. *Id*. Rather, Lodahl argued that she "should not be required to pay the restitution given her dire financial situation." *Id*.

At her sentencing hearing, Lodahl presented evidence that she was a single mother of two and was diagnosed with bipolar disorder and anxiety with agoraphobia. *Lodahl*, ¶ 7. Lodahl worked part-time at a hotel, collected social security disability, received food stamp benefits, and got money from her children's father. *Id*. Lodahl provided a budget in which, in some monthly scenarios, her monthly income ($1,542-$1,742) was less than her expenses ($1,628, which included internet, car payments, and phone payments). *Id*. The

district court concluded that Lodahl nonetheless had disposable income because she paid for her son's phone, the internet, and an auto payment. *Lodahl*, ¶ 27. The district court ordered Lodahl to pay $6,152.49 in restitution within five months. *Lodahl*, ¶ 10.

This Court reversed, reasoning that Mont. Code Ann. § 46-18-201(5) must be applied with Mont. Code Ann. §§ 46-18-241(3), -249, and -246. *Lodahl*, ¶¶ 23-24. Using that statutory interpretation, this Court found that the district court should have construed Lodahl's ability to pay objection, orally made at sentencing, as a petition to modify or waive restitution at the time the district court was evaluating the amount of restitution to order. *Lodahl*, ¶¶ 26, 28. This Court then ultimately concluded that Lodahl did not have the ability to pay the restitution, reversing the district court with instructions to waive the restitution obligation. *Lodahl*, ¶ 30.

Here, although, like Lodahl, Westerman did not formally petition for relief from the restitution amount as required by the express language of Mont. Code Ann. § 46-18-246, unlike in *Lodahl*, the parties and district court were not under the impression that one of the purposes of the hearing was for Westerman to establish he could not afford the restitution amount not yet imposed. *See Lodahl*, ¶ 26. Instead, Westerman, unlike Lodahl, used the hearing to specifically challenge the State's request that $300,000 in restitution be imposed.

Moreover, Westerman's statement in passing regarding his ability to pay at the end of the hearing did not rise to the level of Lodahl's clear objection on ability to pay grounds. Even if this Court construes Westerman's statement as a sufficient ability to pay objection, unlike Lodahl, Westerman presented no evidence of his inability to pay or why he should otherwise have his restitution modified or waived. Nor does the record support that Westerman could have presented evidence sufficient to support waiver or modification. A district court may waive or adjust restitution if the offender proves that:

> (1) the circumstances upon which the court based the imposition of restitution no longer exist; (2) the amount of the victim's pecuniary loss no longer exists; (3) the method or time of payment no longer exists; or (4) that it otherwise would be unjust to require payment as imposed.

*Lodahl*, ¶ 25 (quoting *State v. Erickson*, 2018 MT 9, ¶ 16, 390 Mont. 146, 408 P.3d 1288). Here, the circumstances that supported the $280,000 restitution award remain. The victim's pecuniary loss, likewise, still exists. The method or time of payment also still exist. And, finally, it would not be unjust to require Westerman to pay the restitution.

The statutes require that Westerman make Linafelter whole, which, here, means making his estate whole. Westerman practically cleaned out a safe, which evidence supported contained $280,000 in cash, while Linafelter was in the ICU. The aftermath of Westerman's theft has required Workman to max out her credit

cards and take out a large loan to maintain Linafelter's and her grandmother's estates.

Because the statute's express language does not require consideration of the ability to pay before imposition of restitution and *Lodahl* is not applicable to Westerman, the district court did not err when it imposed the full $280,000 in restitution.

Even so, based on Westerman's PSI, which the district court had reviewed, Westerman does have the ability to pay. At the time of sentencing, Westerman was 38 years old. (Doc. 37 at 1.) Westerman has limited debts, outside of the restitution amounts imposed by the district court, and is married. He is in good health. (Doc. 37 at 6.) Westerman has his GED. (*Id*.) Westerman has work experience as a mechanic, welder, and farm hand. (*Id*.) Westerman reportedly is a certified scale technician in Montana. (*Id*.) In other words, Westerman, although unemployed due to his DOC commitment, will be employable upon release.

Westerman, therefore, has the ability to pay the $280,000 restitution amount imposed. Furthermore, Westerman remains free to petition for relief from the restitution imposed pursuant to Mont. Code Ann. § 46-18-246 should he have evidence supporting waiver or modification of the restitution award.

### B. A preponderance of the evidence supported imposition of $280,000 in restitution.

Westerman contends that the evidence that supported the district court's imposition of $280,000 was speculative, and that the district court should have imposed $87,357, the amount he testified to stealing. (Appellant's Br. at 16-20.) When a district court is presented with two different estimates, the district court is "required to make a determination as to what amount of restitution was supported by a preponderance of the evidence." *Aragon*, ¶ 16.

In support of the differing restitution amounts, the district court heard testimony from Westerman, Workman, and Simpson. The district court, as the trier of fact, "is in the best position to judge the credibility and demeanor of witnesses and their testimony." *Aragon*, ¶ 17 (citations omitted). Accordingly, "[t]he credibility of witnesses and the weight to be given their testimony are determined by the trier of fact, whose resolution of disputed questions of fact and credibility will not be disturbed on appeal." *Id*. (citations omitted).

Here, the district court assessed the credibility of all three people who testified, ultimately weighing the testimony of Workman and Simpson over Westerman's. In part, the district court based its credibility determination on the fact that Westerman admitted that, at the time of theft, he was high and not in his right mind, which the district court reasonably concluded cast doubt on Westerman's count of the total money he stole.

Moreover, Workman and Simpson testified consistently about Linafelter's business practices, which included how he stored money. Workman testified that $120,000 was in one bag from the life estate of Linafelter's mother. Workman was there when that amount was counted. Simpson was present when the $160,000 was counted. Although counted within months of the theft, the evidence supported the district court's conclusion that Linafelter would likely not have touched those cash reserves given the way he ran his businesses and the money that came in from them.

The district court did not misapprehend the effect of the evidence when it concluded that a preponderance of the evidence supported that $280,000 cash was in the safe at the time Westerman committed the theft, which left only non-valuable papers in the safe. Nevertheless, if this Court disagrees that the $280,000 was supported by the evidence, or concludes that the evidence supports that Westerman does not have the ability to pay $280,000 in restitution, this Court should remand this matter to the district court for a redetermination of the restitution amount, which at a minimum would be the amounts Westerman has stipulated to: 7,300 to Mell, $3,691.71 to Workman, and $87,357 to Linafelter's estate.

## CONCLUSION

This Court should affirm Westerman's convictions and sentences, including the $280,000 imposition of restitution.

Respectfully submitted this 22nd day of April, 2024.

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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 3,752 words, excluding cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signatures, and any appendices.

*/s/ Cori Losing*
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## CERTIFICATE OF SERVICE

I, Cori Danielle Losing, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 04-22-2024:

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