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STATE OF MONTANA,

Plaintiff and Appellee,

v.

JASSIE LAYDELL WESTERMAN,

Defendant and Appellant.

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**REPLY BRIEF OF APPELLANT**

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

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**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  
CORI LOSING  
Assistant Attorney General  
P.O. Box 201401  
Helena, MT 59620-1401

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

**ATTORNEYS FOR PLAINTIFF  
AND APPELLEE**

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## ARGUMENT

- I. **Contrary to the State’s argument, the district court was required to consider Jassie’s inability to pay \$280,000 in restitution and adjust the amount after Jassie raised the issue to the court.**

First, the State undermines the holding in *State v. Lodahl*, 2021 MT 156, 404 Mont. 362, 491 P.3d 661, when it claims that a court’s consideration of a defendant’s ability to pay restitution “would run contrary to the plain language of Mont. Code Ann. § 46-18-201(5).” (*See* Appellee’s Br. at 10.) Not so. In *Lodahl*, this Court recognized that the requirement to impose restitution found in Mont. Code Ann. § 46-18-201(5) is subject to the “limiting, waiving, and adjusting statutes” that include § 46-18-246. *Lodahl*, ¶¶ 23–24. These statutes “must be applied together,” and although Mont. Code Ann. § 46-18-201(5) contains no duty for the court to consider ability to pay sua sponte, § 46-18-246 requires the court to do so if the defendant raises the issue. *Lodahl*, ¶¶ 24–26. Accordingly, there is nothing unlawful about modifying a restitution order on the basis that requiring payment would be unjust because the defendant cannot pay. To the contrary, the law requires it. *Lodahl*, ¶¶ 24–32.

Moreover, the State’s argument that Jassie did not preserve a waiver claim under Mont. Code Ann. § 46-18-246 because no one was “under the impression” that he challenged restitution as unjust due to inability to pay ignores the record. (*See* Appellee’s Br. at 12–14.) Certainly, defense counsel’s explicit request for the court to modify the restitution amount due to “[Jassie’s] ability to pay” followed by an argument on Jassie’s poor financial situation informed the prosecutor and court that the “extremely significant amount of money” requested would be unjust. (*See* 6/21/22 Tr. at 61, 70.) The State ignores that, like *Lodahl*, “[n]either the court nor the prosecutor asserted insufficiency” with Jassie’s request for modification of the amount. *See Lodahl*, ¶ 26. The State also ignores that, like *Lodahl*, the victim “w[as] present and given the opportunity to be heard.” *See Lodahl*, ¶ 26. While filing a petition “may have been preferable,” not doing so was not fatal to Jassie’s request for modification due to inability to pay. *See Lodahl*, ¶ 26.

Finally, the State’s claim that the record established Jassie could pay \$280,000 in restitution is unpersuasive. (*See* Appellee’s Br. at 14.) The fact that Jassie is married, has his GED, is in good health, and previously worked various jobs as a mechanic and welder does not prove

he can afford a nearly \$300,000 restitution obligation during his ten-year sentence. *See* Mont. Code Ann. § 46-18-244(6)(c) (requiring a probation officer to determine monthly restitution payments by dividing the total amount of unpaid restitution by the number of months of probation). Ignored by the State are the facts presented to the court that Jassie is responsible for four children, has debts, has no assets, and will be incarcerated for five of the ten years of his sentence. (D.C. Docs. 37 at 2, 41 at 3.) Under these circumstances, Jassie simply cannot afford such a huge monetary obligation, and the district court erred when it refused to adjust the amount on this basis.

**II. The State ignores victim testimony admitting the loss might have only been \$200,000.**

The State acknowledges it was months prior to the theft that Workman and Simpson saw the \$120,000 and \$160,000 in Linafelter's safe but claims the evidence established that Linafelter would not have touched the money during those months due to the way he ran his businesses. (Appellee's Br. at 16.) What the State misses is that Linafelter acknowledged there may have only been \$200,000 in the safe at the time of the theft, thereby admitting he may have taken money out of his safe in the weeks and months leading up to the theft. (6/21/22 Tr.

at 31.) This undermines the district court's speculative finding that Linafelter would not have removed any of the \$280,000, and thereby erodes the basis for the court's restitution order.

Notably, the State cites Workman's initial statement that Linafelter told her the amount was between \$250,000 and \$300,000 (Appellee's Br. at 3), but ignores Workman's later testimony clarifying the amount was actually between *\$200,000* and \$300,000. (6/21/22 Tr. at 31; *see also* D.C. Doc. 1 at 28 (charging documents providing that Linafelter said he had between \$200,000 and \$300,000 in his safe).) Even if the district court did not err when it rejected Jassie's testimony that there was only \$87,357 in the safe at the time of the theft, it did err when it determined the State proved by a preponderance of the evidence the loss was \$280,000 when the victim conceded it may have only been \$200,000. The difference between these two amounts is significant, especially to someone like Jassie. If the Court does not reverse and remand with instructions to amend the restitution order to \$87,357 due to Jassie's inability to pay or to the State's failure to prove the loss was more than that amount, it should reverse with instructions to amend the amount to \$200,000.

## **CONCLUSION**

For the foregoing reasons, Jassie continues to respectfully request the Court reverse the \$280,000 restitution order and remand with instructions to amend the amount to \$87,357.

Respectfully submitted this 30<sup>th</sup> day of May, 2024.

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 reply 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 909, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ Haley Connell Jackson  
HALEY CONNELL JACKSON

## **CERTIFICATE OF SERVICE**

I, Haley Connell Jackson, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Reply to the following on 05-30-2024:

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

Cori Danielle Losing (Govt Attorney)  
215 North Sanders  
Helena MT 59620  
Representing: State of Montana  
Service Method: eService

Electronically signed by Pamela S. Rossi on behalf of Haley Connell Jackson  
Dated: 05-30-2024