

IN THE SUPREME COURT OF THE STATE OF MONTANA
Case No. DA 24-0229

STATE OF MONTANA,

Plaintiff and Appellee,

vs.

RUSTY DALE O'CONNELL,

Defendant and Appellant.

APPELLANT'S OPENING BRIEF

On Appeal from the Twenty-First Judicial District Court,
Ravalli County, Honorable Howard F. Recht, Presiding

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STATEMENT OF THE ISSUES

The Defendant and Appellant, Rusty Dale O’Connell (“O’Connell”), was ordered to pay \$120,000 in restitution for silver stolen in a burglary, jointly and severally with his codefendants.

The issues on appeal are:

1. Whether the district court erred in ordering O’Connell to pay restitution for the full \$120,000, when he did not participate in the burglary and only possessed a portion of the silver after much of it had already been disposed of by others.
2. Whether the district court erred in assigning a \$120,000 value to the stolen silver, where the valuation was not supported by substantial evidence.

STATEMENT OF THE CASE

O’Connell appeals the restitution portion of the judgment entered by the Twenty-First Judicial District Court, Ravalli County. (Doc. 122 at 4; attached as App. A.)

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O’Connell was convicted of felony Theft and Criminal Possession of Dangerous Drugs. (App. A at 1.) He entered an *Alford*¹ plea to the theft charge under Mont. Code Ann. § 45-6-301(3), for knowingly possessing silver stolen from Gene Huckstadt’s (“Huckstadt”) storage unit, which was burglarized on September 18, 2020. (Doc. 91 at 1; Doc. 92 at 1.) He pled guilty to the drug possession charge. (*Id.*)

The district court imposed a net sentence of 15 years to the Department of Corrections (“DOC”), with 10 years suspended. (App. A at 9.) As part of the theft sentence, the court ordered O’Connell to pay \$120,000 in restitution – the total estimated value of the stolen silver – jointly and severally with his codefendants. (Doc. 113 at 10.) This amount was reduced after O’Connell’s sentencing hearing, once some of the recovered silver was released from evidence. (Doc. 120; App. A at 10.)

The undisputed evidence at sentencing established that O’Connell did not participate in the burglary and only came into possession of the

¹ An *Alford* plea permits a defendant to maintain innocence while acknowledging that the prosecution’s evidence is sufficient to obtain a conviction. In entering such a plea, the defendant waives the right to trial and accepts sentencing despite not admitting guilt. *See North Carolina v. Alford*, 400 U.S. 25, 36, 91 S. Ct. 160, 167 (1970); *Lawrence v. Guyer*, 2019 MT 74, ¶ 6, 395 Mont. 222, 440 P.3d 1.

silver after his codefendants had already sold a substantial portion of it. Nevertheless, the court imposed restitution for the full amount without determining the value of the silver O'Connell actually possessed, or requiring competent evidence to support the total valuation. The court relied solely on hearsay and unverified testimony.

O'Connell timely appealed. (Doc. 125.)

STATEMENT OF THE FACTS

The Stolen Silver

Huckstadt owned a storage unit in Darby, Montana. (App. A at 1.) On September 20, 2020, he reported that a substantial quantity of silver had been stolen from safes inside his personal storage unit. (*Id.*)

The reported loss included:

- 1,260 - 1oz Silver Eagle coins
- 120 - 1oz Silver Eagle coins
- 20 - 1oz Silver Eagle coins
- 60 - 1oz Silver Eagle coins
- 135 - Silver Dollars (Eisenhowers)
- 3,997 - 1oz Silver Trade Medallions (Silver Rounds)
- 4 - 100oz Englehart Silver Bars
- 15 - Mixed Silver Bars
- 2 Bags (720 oz.) – Dimes
- 2 Bags (720 oz.) – Quarters
- 2 bags (720 oz.) – Dollars
- 2 Bags (720 oz.) – Dimes
- 2 Bags (720 oz.) – Quarters
- 1 Bag (720 oz.) – Quarters

- 3 Bags (1080 oz.) – Half Dollars
- 1 Bag (360 oz.) – Quarters and Half Dollars
- 1 2/3rd Bags (480 oz.) – Quarters
- 1 1/3rd Bags (240 oz.) – Quarters

(App. A at 1–2.)

Huckstadt passed away before O’Connell was sentenced, but he initially told law enforcement the total value of the stolen silver was approximately \$120,000, subject to market fluctuations. (App. A at 2; November 8 & 14, 2023 Sentencing Hearing Transcript “SENT. Tr.” 12:7–18.)

The Codefendants

On September 18, 2020, Kyle McCready (“McCready”) burglarized Huckstadt’s storage unit. (SENT. Tr. 19:4–11.) He pled guilty to burglary in Ravalli County Cause No. DC-2021-220 and agreed to joint and several restitution in the amount of \$120,000. (SENT. Tr. 80:1–4; Doc. 103 at 1.) Ten (10) Morgan silver dollars were recovered from McCready’s truck during the investigation. (SENT. Tr. 70:12–16.)

Jesse Edens (“Edens”) helped McCready transport a “truckload” of stolen silver and purchased paint cans to hold loose coins. (SENT. Tr. 22:8–23:9.) That same day, September 18, Edens sold approximately \$30,000 worth of silver to Grizzly Gold and Silver in Missoula. (SENT.

Tr. 24:9–25:22, 70.) Neither the silver nor the proceeds were recovered. (*Id.*) A single paint can of coins was recovered from Edens’ home at the time of his arrest. (SENT. Tr. 26:23–25.) Edens pled guilty in Cause No. DC-2021-208, agreed to testify against his codefendants, and stipulated to joint and several restitution. (SENT. Tr. 30:17–20, 122:22–24.)

Brandi Clarke (“Clarke”), McCready’s girlfriend, sold \$52,574.25 worth of silver to Missoula Gold and Silver Exchange on September 18, none of which was recovered. (SENT. Tr. 67:24–68:17; Doc. 122 at 4.) That same day, she also sold silver valued at \$24,200 to Asmus Jewelers in Hamilton, receiving two checks: one for \$9,800 and another for \$14,400. (SENT. Tr. 70:1–16; Doc. 122 at 4.) She successfully cashed the \$9,800 check, while the \$14,400 check was never negotiated. (*Id.*) Law enforcement later recovered the silver sold to Asmus. (*Id.*) Clarke was convicted in Cause No. DC-2021-196 and stipulated to joint and several restitution of \$120,000. (Doc. 103 at 1; SENT. Tr. 80:1–4.)

O’Connell’s Involvement

On September 21, 2020, McCready and Clarke were arrested in connection with an unrelated burglary. (App. A at 3.) On September 24, McCready called his mother from jail on a recorded line and spoke with

O'Connell, instructing him to retrieve and safeguard the remaining silver that had not yet been sold. (App. A at 4.) O'Connell complied, transporting a suitcase full of silver and at least 7 paint cans of coins from McCready's residence to a shed on O'Connell's property. (SENT. Tr. 121:12–21.) Witnesses at sentencing estimated the silver weighed between 50 and 200 pounds, and the coins between 15 and 35 pounds. (SENT. Tr. 69:22–25; 90:4–6; 92:6–11; 121:12–15.) O'Connell later distributed the silver and coins to others at McCready's direction. (SENT. Tr. 89:4–90:3.)

Charges and Plea Agreement

Following several amended charges (Docs. 3, 42, 92, 94), O'Connell entered an *Alford* plea to felony Theft and a guilty plea to Criminal Possession of Dangerous Drugs. (Doc. 91 at 1.) The *Alford* plea was based on the following charge:

CHARGE 1 — THEFT (Exceeding \$5,000), a Felony, in violation of § 45-6-301(3), MCA:

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On or about September 18, 2020², Defendant RUSTY DALE O'CONNELL purposely or knowingly obtained control over stolen property belonging to Gene Huckstadt, knowing the property to have been stolen by another, and with the purpose of depriving Huckstadt of the property, in violation of the above statute. The estimated value of the property is in excess of \$5,000.

(Doc. 91 at 1–2; Doc. 92 at 1.)

The plea agreement was nonbinding and included the following restitution provisions:

Restitution: Defendant shall pay restitution in accordance with Montana law, as ordered by the District Court at sentencing, in an amount to be determined at the sentencing hearing. There should be an investigation into the loss amount pursuant to MCA § 46-18-242 and any loss amounts should be included in the pre-sentence investigative report pursuant to MCA § 46-18-111.

- a. Defendant agrees to pay \$10,000.00 toward restitution at the time of sentencing and further, that this payment will come from lawfully obtained funds. The parties agree that pursuant to a restitution hearing, the Court may Order Defendant to pay restitution in an amount greater or lesser than \$10,000.
- b. Defendant agrees to return the Thompson semi-auto rifle (including the 50 round drum in cardboard box with 2 – 30 round magazines) to the State on behalf of Kenneth Grondahl.

² Although the Third Amended Information said the date of the theft by O'Connell was on or about September 18, 2020, the record from the sentencing hearing makes clear that he did not possess a portion of the stolen silver until September 24, 2020.

- c. The State agrees to return the coins pictured in State's Trial Exhibits 14-20 and Defendant's Trial Exhibit A 009 to Defendant immediately after sentencing.

(Doc. 91 at 2, ¶ 3.)

Change of Plea Hearing

O'Connell changed his plea on July 26, 2023. (07/26/2023 Change of Plea Hearing Transcript "COP Tr." at 1.) After some confusion about whether O'Connell was pleading guilty or entering an *Alford* plea to Theft (COP Tr. 9–11), he pled as follows:

The Court: Counsel, let me ask you: For the record, why is it in the best interests of your client for him to plead in that manner to Charge 1?

Defense Counsel: Mr. O'Connell maintains that he didn't have the state of mind or the knowledge to engage in theft. But, if he were to go to trial, he would be facing over 40 potential years of punishment, multiple charges. He cannot deny the property was at some point in his possession and that it was stolen, and so those facts add up to a high likelihood that he would be convicted at trial, and his risk at trial is significantly more than this Plea Agreement, so I think it's in his best interests for those reasons.

The Court: So what's the factual basis upon which the State would rely?

The State: The State is relying on the facts recited in the Affidavit in Support of the Amended Information.³

The Court: Counsel, do you acknowledge that there is a factual basis for the charges?

Defense Counsel: Yes.

The Court: So the Court finds there are sufficient facts to support the charges and there's strong evidence of guilt. The Court finds that the Defendant has made a voluntary, knowing and intelligent choice to plead in the manner that he has. The Court has been able to observe that the Defendant can communicate effectively with his attorney and with the Court and understands these proceedings. The Court finds that the plea is in the Defendant's best interests and the Court consents to a guilty plea without admission.

And concerning the Charge 2, Mr. O'Connell, you knew that you had methamphetamine and that it was illegal for you to have it, correct?

O'Connell: Correct.

(COP Tr. 11:14–12:24.)

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³ (Doc. 92 at 1.)

Presentence Investigation Report

Huckstadt was interviewed for Clarke’s presentence investigation (“PSI”) before he passed away on February 16, 2022. (Doc. 103, “Victim’s Impact” at 8.) This was the only victim impact statement provided by Huckstadt, and he did not submit an affidavit of pecuniary loss as required by Mont. Code Ann. § 46-18-242(1)(b).

In O’Connell’s case, the PSI Report noted only that “[Huckstadt] indicated he was not interested in making a statement for the reports for sentencing, noting he felt all members involved in the offense should be given full justice and ‘should pay the price’ for their actions.” (Doc. 103, “Victim’s Impact” at 8.)

The PSI Report summarized O’Connell’s restitution obligation as follows:

My understanding is the plea agreement on the current case calls for Mr. O’Connell to make a payment of \$10,000 in restitution at time of sentencing. When this was reviewed with Mr. O’Connell at his interview, he indicated he does not have that amount of money and will not have that amount at time of sentencing. He commented “they know that too.”

Co-defendants Brandi Clarke and Kyle McCready were ordered to pay \$120,000 in restitution to the Estate of Gene Huckstadt. Kyle McCready was additionally ordered to pay \$3,248 to Clifton Weinberg as part of his judgment.

I will defer to the Court as to the total amount of restitution Mr. O’Connell should be responsible for on the current offense.

(Doc. 103, “Restitution” at 10–11.)

Sentencing and Restitution Hearing

Rosie Huckstadt was the State’s first witness at O’Connell’s bifurcated sentencing and restitution hearing held on November 8 and 14, 2023. (SENT. Tr. at 11:22.) She testified that her late husband told her the stolen silver was worth \$120,000. (SENT. Tr. at 13:15–25.) She also testified that she had been receiving restitution payments of \$43 per month from Clarke over the past year. (SENT. Tr. at 14:10–23.)

On cross-examination, when defense counsel asked Rosie about the value of the silver, she stated:

Defense Counsel: And you said that not all of the silver was stolen, but that Gene estimated the amount that was stolen was 120,000; is that accurate?

Rosie: Correct.

Defense Counsel: And that was coins and bars and a variety of different forms, but mostly silver?

Rosie: Correct.

Defense Counsel: Has any silver been returned to you by the government?

Rosie: No.

Defense Counsel: Has it been explained to you that they do have silver in their possession, but that it is evidence at this time and so it can't be released?

Rosie: Correct.

Defense Counsel: Do you know the value of the silver that has been recovered?

Rosie: Today's value? I don't.

Defense Counsel: Do you know how much silver has been recovered?

Rosie: I do not. To put it honestly, I do not.

Defense Counsel: The \$120,000 number, was that a number that Gene just told you?

Rosie: No, that was according to some records that he had kept. He was very good about keeping very precise records.

Defense Counsel: He was a collector, I assume, so he was careful about what –

Rosie: When he moved to Montana in 1973, that was his goal, to retire with this.

Defense Counsel: So just to clarify, you know that some silver has been returned, but you don't know the value of that silver?

Rosie: Today's value, no, I don't.

Defense Counsel: Do you know the particulars of this crime and Rusty's role in it?

Rosie: I do.

Defense Counsel: So you understand that Rusty helped Kyle McCready when Kyle was in jail and he moved the silver to a shed, and then it was moved from Rusty's house by other people?

Rosie: I do.

(SENT. Tr. at 15:17-17:7.)

The records that Rosie relied upon in the above exchange – to opine on the value of the stolen silver – were not admitted into evidence at sentencing.

The State's second witness, codefendant Edens, testified that he assisted McCready in moving a truckload of silver from Huckstadt's storage unit and personally sold \$30,000 worth of silver on September 18, 2020. (SENT. Tr. at 19:6–9; 25:19–26:10.) However, Edens candidly admitted he had no idea of the total value of the stolen silver. (SENT. Tr. at 23:20–24:8; 37:5–11.)

The State's final witness, Detective Scott Burlingham, confirmed that O'Connell had no involvement in the September 18 burglary and only came into possession of the silver on September 24. (SENT. Tr. at

44–57.) Burlingham testified that by the time O’Connell took possession, at least \$106,774.25 worth of silver had already been sold – \$76,774.25 by Clarke and \$30,000 by Edens – with \$24,200 recovered. (SENT. Tr. at 67–68.)

Burlingham conceded that the \$120,000 figure the State sought in restitution was based solely on Huckstadt’s initial valuation and that he lacked any specialized training or education to verify its accuracy. (SENT. Tr. at 70:17–22.) He further acknowledged the possibility that Huckstadt may have overestimated the value of his collection. (SENT. Tr. at 74:12–20.)

O’Connell was the final witness to testify. He admitted he took possession of a suitcase full of silver and seven paint cans filled with quarters, which he distributed to others at McCready’s direction. (SENT. Tr. at 89:12–21; 91:20–92:2; 187:15–19.) He estimated the suitcase weighed about 50 pounds, and the cans between 15 and 20 pounds. (SENT. Tr. at 92:2–15.)

O’Connell also testified that his personal coin collection was seized during a search of his residence. (SENT. Tr. at 93:24–94:22; 109:19–25.) He described the collection as valuable, including a double-stamped

dime and a quarter bearing a double-headed eagle. (SENT. Tr. at 94:9–17.)

Summary of the Sentencing Arguments

The State argued that O’Connell had breached the plea agreement by failing to pay \$10,000 in restitution before sentencing. (SENT. Tr. 118:18–24; Doc. 91 at 2, ¶ 3.) The district court agreed. (SENT. Tr. 118:25–119:16.) The State then requested a full restitution award of \$120,000, to be imposed jointly and severally with McCready, Edens, and Clarke – even though O’Connell had no involvement in the initial burglary of the storage unit and \$106,774.25 worth of silver had already been sold or recovered before O’Connell ever came into possession of McCready’s suitcase of silver and remaining paint cans of coins. (SENT. Tr. 79:11–80:19; 121:12–122:24.) The State offered no evidence establishing a causal connection between the full \$120,000 loss and O’Connell’s limited conduct. (*Id.*)

The \$120,000 valuation itself was based solely on Huckstadt’s initial hearsay report to law enforcement and testimony from Rosie, Edens, and Detective Burlingham – none of whom were qualified to offer a reliable or expert opinion as to the value of the stolen silver.

(SENT. Tr. 121:12–122:24.) The State recommended a net sentence of 15 years DOC, with 10 years suspended. (SENT. Tr. 121:22–122:4.)

While acknowledging that some restitution was appropriate, defense counsel argued that the \$120,000 figure was speculative and unsupported by competent evidence. (SENT. Tr. 81:18–82:9.) Counsel emphasized that the vast majority of the silver had already been disposed of before O’Connell’s brief possession, and that holding him responsible for the entire loss would be legally improper. (SENT. Tr. 125:15–127:22.) Instead, the defense proposed a restitution figure closer to \$32,000, based on the estimated weight of silver, market value, and deductions for amounts already recovered. (*Id.*)

Sentencing and Restitution Order

The district court sentenced O’Connell to 10 years DOC for Theft, with 5 years suspended, and a consecutive 5-year suspended sentence for Criminal Possession. (SENT. Tr. 128:23–130:8.) The court ordered O’Connell to pay \$120,000 in restitution to the estate of Huckstadt for the theft sentence, jointly and severally with his codefendants. (*Id.*)

In support of the restitution award, the court stated:

The Court will order restitution, restitution in the amount of \$120,000 jointly and severally with the other defendants, less any

sums paid by Defendant and any sums recovered, other silver recovered. The silver that's recovered will be valued at the time of the crime; which is the date on which the \$120,000 loss was valued. The amount of restitution [is] the amount that was claimed by the victim. The victim has since passed away and his widow has reiterated the \$120,000 being the amount of the loss.

(SENT. Tr. 129:9–18.)

The court did not explain how it arrived at the \$120,000 figure as it pertained specifically to O'Connell, nor did it identify any findings establishing a causal nexus between his limited conduct and the full amount of the loss.

Additionally, the court ordered the forfeiture of O'Connell's personal coin collection referenced in the restitution provision of the plea agreement, despite assigning no value to it:

There hasn't been much discussion about the Paragraph 3(c) in which the State agrees to return the [O'Connell's] coins. I'm going to direct the State to seize those coins and use them to satisfy the restitution amount that is owed.

(SENT. Tr. 131:8–12.)

Amended Restitution Reward

Approximately two months after sentencing, the State obtained an appraisal of the recovered silver, which was valued at \$38,675.90. (Doc. 120, Ex. 1.) The appraisal cost was \$250.00. (*Id.*) The district court

granted the State's unopposed motion to reduce O'Connell's restitution obligation to \$81,574.10 (\$120,000 – \$38,675.90 – \$250). (Doc. 122.) The recovered silver was subsequently released to Huckstadt's estate. (Doc. 121.)

STANDARDS OF REVIEW

Restitution awards present a mixed question of law and fact, which are reviewed de novo. *State v. Dodge*, 2017 MT 318, ¶ 6, 390 Mont. 69, 408 P.3d 510. This Court reviews the appropriateness of imposing restitution for correctness and a district court's findings regarding the amount of restitution to determine whether they are clearly erroneous. *State v. Patterson*, 2016 MT 289, ¶ 9, 385 Mont. 334, 384 P.3d 92 (citation omitted). A finding of fact is clearly erroneous if it is not supported by substantial evidence, if the district court misapprehended the effect of the evidence, or if review of the record leaves the Court with the firm conviction that a mistake has been made. *State v. Conley*, 2018 MT 83, ¶ 9, 391 Mont. 164, 415 P.3d 473.

SUMMARY OF THE ARGUMENTS

The district court erred in ordering O'Connell to pay restitution for the full \$120,000 in stolen silver. Restitution must be based on the

defendant's own criminal conduct or conduct for which the defendant is legally accountable. O'Connell entered an *Alford* plea to possession of stolen property; he was never charged with or proven to have participated in the underlying burglary. The record reflects that O'Connell only came into possession of a portion of the silver, after the majority had already been sold by others. It was clearly erroneous for the sentencing court to impose joint and several liability for the entire loss.

In addition, the restitution award was not supported by substantial, credible evidence. The State failed to include documentation of the claimed loss in the PSI report, and presented no competent evidence or expert testimony at sentencing to establish the silver's value. The valuation relied entirely on hearsay and unsupported claims. Because the restitution amount was neither causally connected to O'Connell's offense nor supported by sufficient proof, the order must be vacated or, at a minimum, remanded for a proper evidentiary determination.

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ARGUMENTS

I. O'CONNELL WAS NOT CRIMINALLY ACCOUNTABLE FOR THE BURGLARY OR THE ENTIRE \$120,000 IN STOLEN SILVER.

A sentencing court's authority to impose restitution is strictly limited by statute. *State v. Nelson*, 1998 MT 227, ¶ 24, 291 Mont. 15, 966 P.2d 133. A restitution award that exceeds statutory limits is illegal. *State v. Ruiz*, 2005 MT 117, ¶ 12, 327 Mont. 109, 112 P.3d 1001. Restitution is permitted only when the State proves that the victim suffered a "pecuniary loss" as a result of the defendant's offense. Mont. Code Ann. §§ 46-18-201(5), -241(1); *State v. Simpson*, 2014 MT 175, ¶ 14, 375 Mont. 393, 328 P.3d 1144.

To satisfy this burden, the State must establish a direct or indirect causal connection between the defendant's criminal conduct and the claimed loss. *State v. Brownback*, 2010 MT 96, ¶¶ 20–23, 356 Mont. 190, 232 P.3d 385; *State v. Breeding*, 2008 MT 162, ¶ 18, 343 Mont. 323, 184 P.3d 313. Restitution cannot be based on uncharged, acquitted, or speculative conduct. *Simpson*, ¶ 14.

O'Connell entered an *Alford* plea to felony theft by possession of stolen property under Mont. Code Ann. § 45-6-301(3), specifically for

knowingly possessing silver stolen from Huckstadt. The charging document supporting his *Alford* plea alleged that O’Connell knowingly received stolen silver on or after September 18, 2020, but not that he participated in or facilitated the burglary. (Doc. 92 at 1; COP Tr. 11:14–12:24.)

Undisputed evidence at sentencing established that McCready and Edens committed the burglary on September 18. O’Connell did not receive any silver until after September 24, by which time Edens and Clarke had already sold over \$100,000 worth of it.

At most, O’Connell was found in possession of a suitcase containing 50 to 200 pounds of silver and several paint cans of coins – only a fraction of the total taken. No evidence showed that he ever possessed, sold, or controlled the full \$120,000 in stolen property.

Despite this, the district court imposed joint and several restitution for the entire loss, without any evidentiary basis or finding that O’Connell was criminally accountable for the full amount. That was error.

In *State v. Beavers*, 2000 MT 145, ¶¶ 10–12, 300 Mont. 49, 3 P.3d 614, overruled on other grounds by *State v. Herman*, 2008 MT 187, ¶ 12

n.1, 342 Mont. 494, 188 P.3d 978, this Court vacated a restitution award where the defendant was convicted of possessing certain stolen items but had no connection to other property taken during the theft. Likewise, in *Breeding*, the Court reversed restitution imposed for damage to a stolen car that occurred before the defendant's involvement. *Breeding*, ¶¶ 5–6, 19.

As in *Beavers* and *Breeding*, the State here failed to prove that O'Connell was criminally accountable for the initial burglary or for the total amount stolen. The record supports restitution only for the silver he actually possessed.

Montana law does not permit restitution based solely on association with others who committed a broader crime. Because the State failed to prove O'Connell's accountability for the full loss, the restitution award must be vacated. At a minimum, the matter should be remanded to determine restitution based only on the property O'Connell actually possessed, with offsets for the recovered silver, his personal coin collection, and any restitution paid by codefendants.

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II. THE RESTITUTION ORDER WAS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

Montana's restitution statutes require the State to prove the victim's pecuniary loss by substantial evidence. Mont. Code Ann. § 46-18-242(1)(b); *State v. Passwater*, 2015 MT 159, ¶ 9, 379 Mont. 372, 350 P.3d 382. Substantial evidence is the level of proof that a reasonable person could find sufficient to support a conclusion. *Passwater*, ¶ 9. It requires more than minimal or speculative evidence, but it need not rise to the level of a preponderance. *Id.*

Restitution findings may not rely on "assumptions, ballpark figures from friends, and purely speculative calculations." *State v. Coluccio*, 2009 MT 273, ¶ 45, 352 Mont. 122, 214 P.3d 1282, overruled on other grounds by *State v. Kirn*, 2012 MT 69, ¶ 8 n.1, 364 Mont. 356, 274 P.3d 7460. Section 46-18-242(1)(b) requires that the PSI include a sworn victim affidavit documenting the loss and its replacement value. Failure to include such documentation renders the restitution order unlawful. *State v. Muhammad*, 2002 MT 47, ¶ 47, 309 Mont. 1, 43 P.3d 318 (citing *State v. Pritchett*, 2000 MT 261, ¶ 13, 302 Mont. 1, 11 P.3d 539).

Although an evidentiary hearing can cure a PSI defect, the State must still present reliable evidence. *State v. Hilgers*, 1999 MT 284, ¶ 9, 297 Mont. 23, 989 P.2d 866; *State v. Benoit*, 2002 MT 166, ¶ 25, 310 Mont. 449, 51 P.3d 495.

Here, no such evidence was presented. The PSI included no victim affidavit or documentation of value. Huckstadt declined to provide a loss statement prior to his death. Rosie testified that the silver was worth \$120,000, but admitted she had never seen any records verifying that figure. Her statements were hearsay and unsupported.

Even the district court voiced concern over the valuation evidence. After the State rested, the court asked:

Well, Mr. Lakin, one thing that I'm not clear about is how much does the State contend is appropriate for restitution, or are you going to argue that or get that before me through a witness?

(Sent. Tr. at 79:11–14.)

Despite this concern, the State introduced no expert testimony, documentation, or qualified opinion on the silver's value. Detective Burlingham's reference to the \$120,000 figure was based solely on Huckstadt's initial hearsay report. Although Rosie mentioned her husband's "meticulous records," none were introduced into evidence.

This falls well short of the State's burden. Restitution must be based on substantial, credible evidence that includes both the market value of the property at the time of the loss and any residual or salvage value. *Beavers*, ¶ 12. Speculative estimates and unqualified opinion testimony do not meet this standard. *Coluccio*, ¶ 45.

Even assuming arguendo that O'Connell could be held jointly liable for the entire loss (a premise the record does not support), the State failed to establish the value of property attributable to him. The district court's award rests on speculation, hearsay, and assumption – not competent or reliable evidence.

Accordingly, the restitution order must be reversed. At the very least, it should be remanded for a new hearing at which the State must support the restitution amount with admissible evidence and account for applicable offsets.

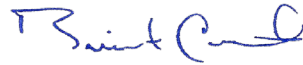
CONCLUSION

The district court's restitution order violated Montana law by holding O'Connell jointly liable for the entire \$120,000 in stolen silver, despite no evidence linking him to the burglary or the full amount taken. The State failed to meet its burden of proving a causal

connection between O'Connell's conduct and the total loss, and it failed to present substantial, credible evidence to support the valuation.

Because the restitution award lacks both legal and evidentiary support, this Court should vacate the order and remand for a new hearing consistent with Montana statutes and controlling precedent.

Respectfully submitted this 21st day of May, 2025.



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CERTIFICATE OF COMPLIANCE

Pursuant to the Montana Rules of Appellate Procedure, I hereby certify that the Appellant's Opening Brief is printed with proportionately spaced Times New Roman typeface of 14 points; is double-spaced except for lengthy quotations or footnotes; and does not exceed 10,000 words. The exact word count, as calculated by my Microsoft Word software and excluding tables and certificates is 4,776.

Respectfully submitted this 21st day of May, 2025.



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CERTIFICATE OF SERVICE

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