

NOTICE

Memorandum decisions of this Court do not create legal precedent. See Alaska Appellate Rule 214(d) and Paragraph 7 of the Guidelines for Publication of Court of Appeals Decisions (Court of Appeals Order No. 3). Accordingly, this memorandum decision may not be cited as binding authority for any proposition of law, although it may be cited for whatever persuasive value it may have. See McCoy v. State, 80 P.3d 757, 764 (Alaska App. 2002).

IN THE COURT OF APPEALS OF THE STATE OF ALASKA

DELLAN SCOTT VANBUSKIRK,
Appellant,

v.

STATE OF ALASKA,
Appellee.

Court of Appeals No. A-13856
Trial Court No. 3HO-17-00447 CR

MEMORANDUM OPINION

No. 7091 — February 14, 2024

Appeal from the Superior Court, Third Judicial District,
Homer, Jason M. Gist, Judge.

Appearances: Barbara Dunham, Attorney at Law, Anchorage,
under contract with the Office of Public Advocacy, for the
Appellant. RuthAnne Beach, Assistant Attorney General,
Office of Criminal Appeals, Anchorage, and Treg R. Taylor,
Attorney General, Juneau, for the Appellee.

Before: Allard, Chief Judge, and Harbison and Terrell, Judges.

Judge HARBISON.

Dellan Scott Vanbuskirk pleaded guilty, pursuant to a plea agreement, to one count of first-degree burglary after entering Peggy Kane's house and her storage

trailers in order to steal tools, sporting goods, and various other items from her.¹ Following an evidentiary hearing, the superior court ordered Vanbuskirk to pay Kane \$19,279.34 in restitution.

On appeal, Vanbuskirk argues that a portion of the restitution award was not supported by substantial evidence. Specifically, Vanbuskirk contends that the evidence regarding the value of stolen “reloading bullets, reloading cases, ocean fishing reels, casting fishing reels, regular fishing poles, and custom fishing poles was too speculative . . . to meet the preponderance of the evidence standard.” For the reasons explained in this opinion, we agree with Vanbuskirk that the State did not offer sufficient evidence to establish the value of the reloading bullets and cases, but we affirm the remainder of the court’s restitution award.

Background facts and proceedings

Kane submitted a written claim for restitution, listing each of the items that were missing from her residence and storage trailers, the value of each item, and the source of the valuation. Relevant to this appeal, Kane claimed that she was missing reloading bullets, reloading cases, new ocean fishing reels, new casting fishing reels, regular fishing poles, and custom fishing poles.

At the restitution hearing, Kane provided additional details about the value of the missing items. Kane testified that she was missing “miscellaneous” reloading bullets, but she did not identify the type of bullets, and did not know how many bullets she had in stock before the burglary and theft. She explained that she had gone to Sportsman’s Warehouse and looked at the prices of reloading bullets, and then used that information to estimate the value of the missing bullets. She stated that she had originally obtained a list of prices from Sportsman’s Warehouse that reflected the sales

¹ AS 11.46.300(a)(1). As part of the agreement, Vanbuskirk also pleaded guilty to additional charges in four other cases.

price of the bullets she believed were missing, but she lost that document before the hearing.

When Kane was asked how she knew what type of bullets she was missing, she answered “because they are [for] the guns that we use most of the time.” She stated that she did not know how many bullets she had, but she knew that she “had quite a few of them because [her] husband always liked to keep a lot of bullets.” Kane similarly testified that she did not know how many reloading cases had been stolen, but she remembered that the cases were for multiple calibers, for “all the different guns [they] had.”

Regarding the fishing poles and reels, Kane testified she was missing ocean reels, casting reels, regular poles, and custom poles. Kane testified that she and her late husband had planned to operate a fishing lodge, which is why they had so many poles and reels. She also testified that her husband died nine years prior to the restitution hearing, and that their plan to operate a fishing lodge “never materialized.”

Kane testified that she and her husband had purchased about forty ocean fishing reels on eBay, and that the reels were “never used, in their boxes.” In preparing an estimate for the value of these reels, she looked at the current cost of new ocean reels on eBay.

Similarly, Kane testified that she and her husband purchased on eBay around twenty casting reels, never used and still in their boxes. In preparing an estimate for the value of these reels, she searched for new ones on eBay.

Kane testified that she estimated the value of “probably a good forty . . . regular fishing poles” by looking online, “probably [on] eBay.” She did not know the precise brand and model of the poles that were stolen.

Kane testified that “approximately six” handmade custom fishing poles were stolen, and she recalled that her husband paid about \$250 for each of them. She also “went online” and searched for custom fishing poles to determine the replacement value, finding similar prices.

After the hearing, the superior court issued a written restitution order. The superior court found that Kane's testimony was credible. It awarded the full amount she requested for the reloading bullets (\$500) and for the various fishing poles and reels. Specifically, the court awarded \$1,116.91 for forty ocean reels² (about \$28 for each reel), \$879.92 for twenty casting reels (about \$44 for each reel), \$2,000 for forty fishing poles (\$50 for each pole), and \$1,500 for six custom fishing poles (\$250 for each pole). The court awarded sixty percent of the requested amount for the reloading cases, or \$90, rather than the full \$150 Kane had requested because the court determined that the cases might have been used.

This appeal followed.

Why we reverse the superior court's award of restitution for the reloading bullets and cases but affirm its award for the fishing poles and reels

"[A] restitution order must be based on substantial evidence of monetary loss or expense, not mere speculation."³ When, on appeal, a defendant "challenges the sufficiency of the evidence as to restitution, . . . we construe the record in the light most favorable to the state and determine whether a reasonable fact-finder could conclude that the disputed amount of restitution was established by a preponderance of the evidence."⁴

This Court has explained that a court may rely on victim testimony as to the value of property if there is "no conflicting evidence of value."⁵ However, the

² On her restitution claim sheet, Kane listed \$1,116.91 as the value of the forty ocean reels. The value is entered as \$1,116.96 on the court's restitution order, but on appeal the State acknowledges that this is a scrivener's error.

³ *Peratrovich v. State*, 903 P.2d 1071, 1078 (Alaska App. 1995).

⁴ *Noffsinger v. State*, 850 P.2d 647, 650 (Alaska App. 1993) (citation omitted).

⁵ *Fee v. State*, 656 P.2d 1202, 1205-06 (Alaska App. 1982). Under Alaska law, the court is required to value property loss "as the market value of the property at the time and

victim's testimony must still be sufficient to prove by a preponderance of the evidence the amount of restitution owed — *i.e.*, the testimony must be sufficiently reliable that the trier of fact believes "the existence of a fact is more probable than its nonexistence."⁶

In the present matter, Kane testified that she had gone to Sportsman's Warehouse and obtained a quote of "some of the miscellaneous bullets that [she and her husband] had." Kane lost the quote before the restitution hearing, and at the hearing she testified that she did not know how many bullets and reloading cases she had before the burglary and theft.

The evidence supporting a restitution award need not provide absolute certainty, but it must provide more than speculation.⁷ Here, Kane's testimony did not establish even a rough estimate of the number of reloading bullets and reloading cases that were stolen, leaving us unable to determine how Kane reached her valuation for these items. Under these circumstances, the evidence was insufficient to allow a reasonable fact-finder to rely on her proposed value.

By contrast, when Kane testified about the stolen fishing gear, Kane was able to provide the court with a rough estimate of how many rods and reels were missing. She also provided a reasonable explanation for why she owned so much like-new fishing gear and how she reached her valuation of the gear that had been taken.

Kane testified that she and her husband purchased a large amount of fishing gear because they had been planning to open up a fishing lodge. She stated that they purchased "probably about twenty" new casting fishing reels from eBay. She also

place of the crime or, if the market value cannot reasonably be ascertained, the cost of replacement of the property within a reasonable time after the crime." AS 12.55.045(n).

⁶ See *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Tr. for S. Cal.*, 508 U.S. 602, 622 (1993) (quoting *In re Winship*, 397 U.S. 358, 371-72 (1970) (Harlan, J., concurring)).

⁷ *Beans v. State*, 2020 WL 567281, at *2 (Alaska App. Feb. 5, 2020) (unpublished) (citing *Peratrovich*, 903 P.2d at 1078-79).

testified that they purchased about forty fishing poles and forty ocean fishing reels that were never used and still in their boxes. Kane estimated the value of the poles and reels by looking up the cost of new poles and reels online.⁸ And, with regard to the custom fishing poles, Kane remembered that her husband had paid \$250 per pole for six poles. When she searched online for custom fishing poles, she found people that were offering to sell custom poles for \$250 each. We conclude that this testimony was sufficiently detailed to establish that Kane's estimate was more probable than not, particularly when viewed in the light most favorable to upholding the restitution award.

Finally, Vanbuskirk contends on appeal that the superior court made certain remarks that call into question its restitution findings. During the restitution hearing, the superior court judge told the parties, "I used to build custom fishing poles as a business, and I would tell you that \$250 is on the cheap end." And in his written restitution order, the judge expressed his opinion that Kane's estimate for the ocean fishing reels seemed "very low." Vanbuskirk did not object to these remarks during the restitution proceedings. However, on appeal Vanbuskirk asserts that, to the extent that the superior court relied on information it acquired outside of the record in issuing its ruling, this was error.

While we agree with Vanbuskirk that it is improper to rely on evidence outside the record, nothing in the record suggests that the court relied on its remarks in determining the value of the missing items. Furthermore, the court did not issue an

⁸ On appeal, Vanbuskirk argues that the court erred in not discounting the value of the fishing poles and fishing reels because they had been purchased at least nine years ago. However, there was no evidence that this fishing gear decreased in value over the nine years or that fishing gear typically depreciates over time. For the reels, the record reflects that they were never used and still in their boxes, suggesting that they had not been subject to wear and tear. Kane's testimony about the sale of fishing poles on eBay suggests that there is a market for person-to-person sales of fishing gear. We accordingly conclude there is nothing in the record supporting Vanbuskirk's contention that the trial court should have discounted the value of the poles and reels.

award that exceeded the amount that was requested. We accordingly conclude that the court's remarks did not constitute reversible error.

Conclusion

We REVERSE the superior court's award of restitution for the reloading bullets and cases (\$590), and we remand this case to the superior court with instructions to enter an amended restitution order. In all other respects, the judgment of the superior court is AFFIRMED.