STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0653

State of Minnesota,
Respondent,

vs.

Nicholas Wallace Johnson,
Appellant.

Filed December 7, 2020
Affirmed in part, reversed in part, and remanded
Bratvold, Judge

Becker County District Court
File No. 03-CR-18-1966

Cathryn Middlebrook, Chief Appellate Public Defender, Jennifer Workman Jesness, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Keith Ellison, Attorney General, Michael Everson, Assistant Attorney General, St. Paul, Minnesota; and

Brian W. McDonald, Becker County Attorney, Detroit Lakes, Minnesota (for respondent)

Considered and decided by Slieter, Presiding Judge; Bratvold, Judge; and Cochran, Judge.

U N P U B L I S H E D O P I N I O N

BRATVOLD, Judge

In this appeal from a final judgment of conviction for third-degree burglary, appellant asks us to review two issues. First, he argues that the record evidence does not establish that the barn involved in the burglary is a "building," as defined by the relevant

statute. Second, appellant argues that record evidence does not support the full amount of the district court's restitution award. Because the record evidence shows the barn was "suitable for affording human shelter," we conclude that the barn is a building under Minn. Stat. § 609.581, subd. 2 (2018), and affirm appellant's conviction. But because the record evidence fails to sufficiently establish the amount of the victim's loss for damage to her pickup truck, we reverse that part of the restitution award and remand for further proceedings, consistent with this opinion. Thus, we affirm in part, reverse in part, and remand.

FACTS

The state charged appellant Nicholas Wallace Johnson with one count of third-degree burglary under Minn. Stat. § 609.582, subd. 3 (2018). Johnson pleaded not guilty, waived his jury-trial rights, and proceeded to a bench trial. The following summarizes the evidence received during the one-day trial.

C.S. owns ten acres in rural Becker County with a farmhouse and a barn. She stores personal property in her barn. On August 24, 2018, C.S.'s groundskeeper arrived to mow the lawn and saw a stranger outside and an unfamiliar red pickup truck backed up to the barn. The groundskeeper was suspicious and blocked the barn's driveway with his car. As the groundskeeper got out of his car, the stranger got into the red pickup truck and drove away; the red pickup went around the groundskeeper by driving into a ditch alongside the driveway. The groundskeeper later described the red pickup as having a topper with the sign "Meadowland Surveying." The groundskeeper also testified that the red pickup headed in the direction of the town of Richwood.

The groundskeeper notified C.S., who asked her son to meet with the groundskeeper. The groundskeeper and C.S.'s son examined the barn and C.S.'s 1992 pickup truck parked near the barn. C.S.'s son testified that the barn door had been removed, its hinges ripped off. They found C.S.'s pickup truck on a jack with its hood open. The truck's engine parts were removed, rendering it inoperable, and the radio was missing. Other items were also missing from the barn. They called the police.

Two hours after the groundskeeper saw the red pickup, a Richwood resident saw a red pickup truck take a hard right turn to avoid another car. The pickup truck entered a ditch and hit a utility pole. Police responded to the scene, but could not find the driver. The police searched the red pickup truck, which had a topper with a "Meadowland Surveying" sign. Police found four items with Johnson's name: an identification card, a letter, a receipt, and a prescription bottle. Police called C.S.'s son to the scene, where he identified several items in the red pickup truck as belonging to C.S. and usually stored in C.S.'s barn. One of the items was a mini refrigerator, which was damaged when the red pickup truck hit the utility pole.

During the trial, the state offered testimony from the groundskeeper, C.S., C.S.'s son, the Richwood resident who witnessed the accident, two police officers, a police investigator, and a man who saw Johnson on the day of and near the burglary. The state introduced Johnson's statement to police, given after a *Miranda* warning. Johnson denied being in the area on the day of the burglary.

Johnson called two witnesses, his girlfriend and his sister, both of whom testified that Johnson was with them, or babysitting his sister's children, during the time of the burglary.

In its written findings of fact, the district court found Johnson guilty of third-degree burglary. The district court found "highly credible" the witness who identified Johnson in the courtroom and testified that he saw him on the day of the burglary and after the red pickup truck had been abandoned. The district court credited the witness's testimony that Johnson was "walking out of the woods less than a mile away from the site of the crash." The district court noted that the witness saw a distinctive scar and tattoos on Johnson. The district court rejected the credibility of Johnson's alibi witnesses and "note[d] a gap in the timeline."

The district court imposed an executed sentence of 39 months and later awarded restitution of $2,100, based on C.S's affidavit, submitted under Minn. Stat. § 611A.04, subd. 1(a) (2018). Johnson appealed and moved to stay his appeal for postconviction proceedings involving the restitution award. This court granted the stay. Following a restitution hearing, the district court modified the restitution award to $1,100. This court reinstated Johnson's appeal.

D E C I S I O N

I. The record evidence is sufficient to support Johnson's third-degree burglary conviction because C.S.'s barn is a structure suitable for affording shelter to human beings.

Appellate courts "review criminal bench trials the same as jury trials when determining whether the evidence is sufficient to sustain convictions." *State v. Hough*,

585 N.W.2d 393, 396 (Minn. 1998). "When evaluating the sufficiency of the evidence, appellate courts carefully examine the record to determine whether the facts and the legitimate inferences drawn from them would permit the jury to reasonably conclude that the defendant was guilty beyond a reasonable doubt of the offense of which he was convicted." *State v. Griffin*, 887 N.W.2d 257, 263 (Minn. 2016) (quotation omitted). Appellate courts review the evidence in the light most favorable to the verdict and assume the fact-finder disbelieved any evidence that conflicted with the verdict. *Id.*

We test the sufficiency of the evidence supporting a conviction by examining it given the elements of the offense. A third-degree burglary conviction requires the state to prove beyond a reasonable doubt that the defendant (1) entered a building, (2) without consent, and (3) with intent to steal. Minn. Stat. § 609.582, subd. 3; 10A *Minnesota Practice*, CRIMJIG 17.10, 11 (2016). A "building" is "a structure suitable for affording shelter for human beings including any appurtenant or connected structure." Minn. Stat. § 609.581, subd. 2.

Here, the parties dispute the sufficiency of the evidence in light of the meaning of "building" in the burglary statute. "Because the meaning of a criminal statute is intertwined with the issue of whether the State proved beyond a reasonable doubt that the defendant violated the statute, it is often necessary to interpret a criminal statute when evaluating an insufficiency-of-the-evidence claim . . . . We review issues of statutory interpretation de novo." *State v. Vasko*, 889 N.W.2d 551, 556 (Minn. 2017).

Statutory interpretation requires that we "ascertain and effectuate the intention of the legislature." Minn. Stat. § 645.16 (2018); *State v. Struzyk*, 869 N.W.2d 280, 284

(Minn. 2015). "When legislative intent is clear from the statute's plain and unambiguous language," we apply its plain meaning. *State ex rel. Duncan v. Roy*, 887 N.W.2d 271, 276 (Minn. 2016) (quotation omitted). Here, neither party contends that the phrase, "suitable for affording shelter" is ambiguous. We agree and therefore apply the plain meaning of the statute.

Johnson argues that C.S.'s barn is not a building because no record evidence shows it was "suitable for affording shelter." Johnson contends that "the central theme amongst [Minnesota] cases is the structure's ability to shelter humans from the elements." The state responds that the statutory definition of building sets a low bar, which the record evidence satisfies.

We are aided by considering the context of the third-degree burglary statute. *See, e.g.*, *State v. Garcia-Gutierrez*, 844 N.W.2d 519, 521-525 (Minn. 2014) ("words and phrases of the statute must be understood in light of their context" and interpreting mens rea requirement in first-degree burglary statute). For example, other statutory provisions suggest that a building "suitable for affording shelter" differs from a residence. Second-degree burglary, a more serious offense than third-degree burglary, requires the state to prove the defendant entered a "dwelling." Minn. Stat. § 609.582, subd. 2(a)(1) (2018). A "dwelling" is a "building used as permanent or temporary residence." Minn. Stat. § 609.581, subd. 3 (2018). The legislature's definition of "dwelling" suggests that a building "suitable for affording shelter" is *not* a permanent or temporary residence. With this context in mind, we turn to the record evidence and relevant caselaw.

At the trial, C.S.'s son described the barn as "old" and "beat up." C.S. and other witnesses also testified that the barn has a roof, four walls, and a "garage-sized" sliding door opening to the east, which is the main entrance. Inside the barn, C.S. stored personal property like a motorcycle, tools, a mini refrigerator, and dirt-bike equipment. A shop was attached to the outside of the barn's north-facing wall but collapsed many years ago, leaving only the north-facing concrete-block wall. The former shop was described as "just a big concrete slab."[1]

Caselaw applying the third-degree burglary statute establishes that a broad range of buildings is suitable to afford human shelter. Courts have determined various structures to be buildings under the third-degree burglary statute, including: a mini storage unit, *In re Welfare of R.O.H.*, 444 N.W.2d 294, 294-95 (Minn. App. 1989); a warehouse, *State v. Gerou*, 168 N.W.2d 15, 17 (Minn. 1969); an ice rink open on one side because of construction, *State v. Bronson*, 259 N.W.2d 465, 466 (Minn. 1977); and a farm structure without heat or electricity attached to a dairy barn, *State v. Walker*, 319 N.W.2d 414, 417 (Minn. 1982).

Johnson contends that no evidence shows that the barn was heated or cooled, had electricity or plumbing, was free of pests, had walls lacking holes or cracks, or was actually used for human shelter. While this is accurate, Johnson cites no caselaw establishing that, without these qualities, a building is not "suitable for affording shelter." The state argues

[1] Johnson's brief to this court describes the barn as "partially collapsed." The record, however, establishes that the former shop had collapsed, not the barn.

that the barn is suitable for affording shelter, even though it is missing some amenities, because it is like the mini storage unit in *R.O.H.* and the unfinished ice rink in *Bronson*.

In *R.O.H.*, this court contemplated whether a mini storage unit is a building under the third-degree burglary statute.[2] 444 N.W.2d at 294. The mini storage unit had no heat or air conditioning, no electricity, no plumbing, and served no other purpose than to store personal property. *Id.* We affirmed the appellant's juvenile delinquency adjudication, holding that it "is obvious that the purpose of the storage units, which is the storage of personal property, required that the units provide shelter from the elements." *Id.* at 295.

We agree with the state that C.S.'s barn is like the mini storage unit in *R.O.H.*, because the barn was used to store personal property and lacked amenities such as heating, electricity, and plumbing. Thus, even though there is no record evidence that people *actually* used the barn for shelter, we may infer that the barn "provid[ed] shelter from the elements," just like the mini storage unit in *R.O.H. Id.* at 294.

In *Bronson,* the Minnesota Supreme Court considered whether a basketball court undergoing construction to be converted into an ice-skating arena was a building under the third-degree burglary statute, even though one wall was open at the time of the offense.[3]

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[2] *R.O.H.* applied the same definition of building applicable to Johnson's conviction. *See* Minn. Stat. § 609.581, subd. 2 (1988).

[3] *Bronson* applied a somewhat different definition of building, but the key phrase was the same as the one applicable to Johnson's conviction. The definition considered in *Bronson* provided that "'[b]uilding' includes a dwelling or other structure *suitable for affording shelter* for human beings or appurtenant to or connected with a structure so adapted, and includes portions of such structure as are separately occupied." Minn. Stat. § 609.58, subd. 1(2) (1976) (emphasis added) (repealed 1983).

259 N.W.2d at 465. After the jury found the defendant guilty of third-degree burglary, he moved for a new trial, arguing the ice arena was not a building under the statute. The district court denied the motion. On appeal, the supreme court affirmed the conviction, reasoning that even though the structure was open to the elements at one end, it "retained its character as a 'building' because it in fact provided shelter for the people who were working inside it." *Id.* at 466.

Johnson contends that C.S.'s barn differs from the ice arena in *Bronson* because the barn "was not temporarily under construction and no evidence was elicited demonstrating its ability to shelter human beings." The statutory definition of building, however, does not provide that people must *actually* use the structure for shelter. Rather, the statute provides the building must be "*suitable* for affording shelter." Minn. Stat. § 609.581, subd. 2 (emphasis added); *see also R.O.H.*, 444 N.W.2d at 295 (holding mini storage unit is suitable for affording shelter because it was used for storing personal property).

Lastly, Johnson argues that C.S.'s barn is most like the structure in *State ex rel. Webber v. Tahash*, where the district court granted the defendant a writ of habeas corpus and the state appealed. 152 N.W.2d 497, 500 (Minn. 1967). The Minnesota Supreme Court affirmed the district court's order granting a new trial after determining that a toolshed on an unoccupied farm was not a building under the third-degree burglary statute.[4] *Id.* at 502.

[4] *Webber* applied the same definition of building as *Bronson,* so the key phrase was the same as the one applicable to Johnson's conviction. The third-degree burglary statute examined in *Webber* provided that "'[b]uilding' includes a dwelling or other structure *suitable for affording shelter* for human beings or appurtenant to or connected with a structure so adapted, and includes portions of such structure as are separately occupied." Minn. Stat. § 609.58, subd. 1(2) (emphasis added).

The supreme court stated that a new trial was appropriate because the case "went to the jury under the assumption that the shed was a 'building'" and the jury found the defendant guilty. *Id.* at 500-501.

In analyzing whether the toolshed was a building, *Webber* distinguished "suitability" from "capability" in affording shelter.

> Our statute neither includes structures which are merely 'capable' of affording shelter, nor does it require that the structure 'afford suitable shelter.' To be capable of affording shelter and to be suitable for affording shelter are two different things; and to be suitable for affording shelter and to afford suitable shelter are also two different matters. . . . The statute clearly requires that the structure be 'suitable for affording shelter,' not that it be capable of affording shelter—even though structures capable of affording shelter could be made suitable for doing so.

Id. at 501. Based on this language in *Webber*, Johnson argues that while C.S.'s barn may have been capable of affording shelter, no evidence established it was suitable for affording shelter.

While Johnson's argument has merit, we are not persuaded because there are key differences between the record evidence in *Webber* and in this appeal. The pivotal evidence in *Webber* was the property owner's testimony that none of the structures on his farm were suitable for human shelter. *Id.* The supreme court reasoned that the shed owner's testimony "specifically [took] the shed out of this definition." *Id.* The record here lacks similar testimony or evidence and, instead, includes testimony that C.S.'s barn was used to store personal property, which was sufficient in *R.O.H.*, 444 N.W.2d at 295. Also, the procedural posture of the two appeals is different. The supreme court in *Webber* affirmed the district

court's decision to order a new trial, and did not reverse the conviction, as Johnson requests here. 152 N.W.2d at 502.

To conclude, whether humans actually used the barn for shelter does not determine whether it is suitable for affording shelter under the third-degree burglary statute. *See Webber*, 152 N.W.2d at 501 ("Our statute neither includes structures which are merely 'capable' of affording shelter, *nor does it require that the structure 'afford suitable shelter*.'" (emphasis added)). Here, the record evidence established that C.S. stored her personal property in the barn, which had four walls, a roof, and a door. Thus, we affirm Johnson's conviction; the evidence is sufficient to establish that C.S.'s barn was a building under the third-degree burglary statute because it provided shelter from the elements and was suitable for affording human shelter.

II. The district court did not abuse its discretion by awarding restitution for the damages to the barn door, but the record evidence does not support the restitution award for C.S.'s pickup truck.

A crime victim "has the right to receive restitution as part of the disposition of a criminal charge . . . if the offender is convicted." Minn. Stat. § 611A.04, subd. 1(a). The purpose of restitution is restoring victims "to the same financial position they were in before the crime." *State v. Palubicki*, 727 N.W.2d 662, 666 (Minn. 2007). Evidence supporting restitution "must describe the items or elements of loss, itemize the total dollar amounts of restitution claimed, and specify the reasons justifying these amounts . . . ." Minn. Stat. § 611A.04, subd. 1(a). The state has the burden of proof at a restitution hearing. Minn. Stat. § 611A.04, subd. 3(a) (2018). But the state need not establish a victim's exact out-of-pocket loss, rather the state must show "with reasonable specificity" the items and

dollar amount of losses. *State v. Keehn*, 554 N.W.2d 405, 408 (Minn. App. 1996), *review denied* (Minn. Dec. 17, 1996). A district court "may order restitution only for losses that are directly caused by, or follow naturally as a consequence of, the defendant's crime." *State v. Boettcher*, 931 N.W.2d 379, 381 (Minn. 2019).

A district court has broad discretion to order restitution. *State v. Riggs*, 865 N.W.2d 679, 682 (Minn. 2015). "[T]he district court's order will not be reversed absent an abuse of that discretion. The district court's factual findings will not be disturbed unless they are clearly erroneous." *State v. Andersen*, 871 N.W.2d 910, 913 (Minn. 2015). As long as a sufficient factual basis supports the restitution award, we defer to the district court's discretion. *State v. Thole*, 614 N.W.2d 231, 234 (Minn. App. 2000) (citing *Keehn*, 554 N.W.2d at 407). Whether a restitution award follows the statutory requirements is a question of law that we review de novo. *Id.*

The district court at first ordered Johnson to pay restitution of $2,100 based on C.S.'s affidavit, which listed $500 for the barn door, $1,500 for the pickup truck, and $100 for the mini refrigerator. After Johnson challenged the amount of the award, the district court held a restitution hearing. The state called C.S., who testified that she had no professional estimates for the cost to repair either the barn door or her pickup truck. After the hearing, the district court modified its restitution order by reducing the restitution award for C.S.'s pickup truck to $500, for a total restitution award of $1,100.

Johnson argues the district court abused its discretion by awarding restitution of $500 for the barn door and $500 for C.S's pickup truck because the record does not establish the losses with reasonable specificity. Johnson does not challenge the district

court's award of $100 for the mini refrigerator. The state argues that the restitution award is supported by C.S.'s testimony and exhibits.

A. The district court did not abuse its discretion by awarding restitution of $500 for damage to the barn door.

C.S. testified that she estimated the cost of parts and labor to repair the solid-wood door, replace the metal tracks, and reinstall the barn door was $500. At the restitution hearing, C.S. testified about repairs to the barn door.

> Q: Now regarding the barn door, can you describe what the barn door looked like or how it was situated before the burglary?
> A: It's an old barn. It had a track with wheels on it that slid.
> Q: Now when you say a track with wheels, is that how you opened it up?
> A: Yes. You slide it open.
> Q: Okay. And after the burglary, what was the condition of the door?
> A: The door was on the ground and the track was on the ground. It had been ripped off the wall.
> . . . .
> Q: Now, [C.S.], you put in your affidavit $500 to repair. How did you come up with that amount?
> A: It was just a ballpark figure of what I thought parts and what somebody would charge to come and do it. I have no idea but I figured that was the least anybody would come and hang a new door for me.
> Q: And is that door a pretty heavy door?
> A: Yes. It's solid wood.

Johnson argues that C.S.'s testimony is not "specific enough" to support a restitution award, relying on *Keehn*. The state responds that *Keehn* involved a very different record.

In *Keehn*, this court reviewed a restitution award of $541.97 for a victim's "misc[ellaneous] [c]ash receipts from setting up new household." 554 N.W.2d at 407. There, the district court convicted the defendant of fifth-degree assault and harassing

conduct and ordered restitution for the victim's relocation expenses. *Id.* at 406. The only record evidence was the victim's affidavit, which stated she "had to buy everything from scratch from salt and pepper to bar soap," but "[t]here [was] nothing in the record that specifie[d] the miscellaneous items needed or the amounts spent as a result of [the victim's] relocation." *Id.* at 408. This court reversed and remanded, finding that the affidavit's description of miscellaneous expenses "falls short of the statutory demand for an itemized description of the losses and their value." *Id.* We reasoned that it was "impossible to determine" how the district court arrived at the award amount. *Id.* But *Keehn* also held that "we are not requiring receipts or proof of exact purchase price, but rather a list, as required by statute, with reasonable specificity describing the items or elements of loss and the dollar amount of those losses." *Id.*

We agree with the state that the record evidence for the cost to repair the barn door was sufficiently specific to support the restitution award. Unlike the generalized statements in the affidavit in *Keehn*, C.S.'s testimony estimated the cost to repair her own property—the door was solid wood, but it was ripped off the barn during the burglary, which destroyed the track and wheels; she needed to replace parts and hire someone to reinstall the door. Longstanding caselaw recognizes that an owner of personal property may testify about the market value of her own property. *Vreeman v. Davis*, 348 N.W.2d 756, 757 (Minn. 1984). Testimony of property value "by the owner is competent . . . This rule usually prevails even though the owner lays no particular foundation for his opinion." *Hous. & Redev. Auth. v. Zweigbaum*, 100 N.W.2d 719, 721 (Minn. 1960) (citation omitted). While this caselaw addresses civil claims for property loss and not restitution awards, we find it persuasive.

Despite the lack of receipts or professional estimates for the barn-door repairs, this record is reasonably specific and supports the district court's award of $500 for the barn door. Thus, we affirm the restitution award for damage to the barn door.

B. The record does not provide a sufficient factual basis for the restitution award for damage to C.S.'s pickup truck.

C.S. testified that her pickup truck had a trade-in value of $1,614, relying on internet research from Kelley Blue Book, which she offered as an exhibit.[5] C.S. also testified that, before the burglary, she used the pickup truck for property maintenance, but it was not operable after the burglary because Johnson removed engine parts during the burglary. Johnson also removed the radio from C.S.'s pickup truck. In its written order, the district court awarded $500 for the loss of C.S.'s pickup truck, with a short explanation.

> This Court shall award $500 for the cost of the radio and engine parts stolen, to account for the diminished value to the vehicle. As [C.S.] still possesses the vehicle, it holds salvage value. The $500 award can also be used to restore the vehicle back to the condition it was in prior to the theft, if [C.S.] so chooses that route.

Johnson argues that it is "impossible to determine how the postconviction court came to the $500 figure for the truck when it appears the court based that figure on nebulous reasons not in the record, such as 'salvage value.'" Johnson is correct that the district court did not explain how it arrived at $500 and only stated that the award accounts "for the diminished value to the vehicle." On appeal, the state asserts that the "cost to tow the

[5] At the restitution hearing, Johnson objected to C.S.'s reliance on Kelley Blue Book as hearsay, but the district court overruled the objection. Johnson did not raise the issue in the brief filed with this court.

now-inoperable vehicle, coupled with parts and labor to repair the vehicle to its original condition, would cost at least $500, if not more." The state, however, cites no record evidence to support its assertion and we can find none.

In *Thole*, this court considered a similar issue. The district court convicted appellant of using a motor vehicle without consent and the state pursued the victim's claim for restitution for the car, which the victim repaired and traded in. 614 N.W.2d at 233. The victim testified to a loss of $2,500, which she based on the car's trade-in value before appellant took it. *Id.* at 234. On appeal, this court determined that the record evidence proved that the car "was in sound mechanical condition before the theft; that it was barely operable after its recovery; and that its trade-in value was roughly equivalent to the amount the victim spent to return the car to a working condition." *Id.* at 236. This court affirmed the restitution award for the trade-in value of the victim's car. *Id.*

We see a critical difference between this record and the record in *Thole*. In *Thole*, evidence connected the cost of the car's repair to its trade-in value. Here, the trade-in value of C.S.'s pickup truck is $1,614, but no record evidence establishes its diminished value, the cost to repair C.S.'s pickup truck, or the value of the missing items. While the district court found that the $500 award could be "used to restore the vehicle back to the condition it was in prior to the theft," this is without record evidence and appears to depend on conjecture.

But because the state provided some evidence of the pickup's value, and established that Johnson damaged the pickup during the burglary and made it inoperable, we reverse in part the restitution award and remand for reconsideration of the award for C.S.'s pickup

truck. The district court may reopen the record for additional evidence in its discretion. *See, e.g.*, *State v. Fader,* 358 N.W.2d 42, 48 (Minn. 1984) (remanding for reconsideration of restitution award to allow parties to present evidence on the amount of loss to the victim); *Keehn*, 554 N.W.2d at 409 (reversing and remanding restitution order for further findings "on the nature and amounts of expenses"). Thus, we reverse the restitution award for the damage to C.S.'s pickup truck and remand for proceedings consistent with this opinion.

Affirmed in part, reversed in part, and remanded.