STATE OF MINNESOTA
IN COURT OF APPEALS
A20-0253

State of Minnesota,
Respondent,

vs.

Shawn Michael McCollum,
Appellant.

Filed December 7, 2020
Affirmed
Frisch, Judge

Olmsted County District Court
File No. 55-CR-19-4014

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Mark A. Ostrem, Olmsted County Attorney, Jennifer D. Plante, Assistant County Attorney, Rochester, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Adam Lozeau, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Hooten, Presiding Judge; Frisch, Judge; and Kalitowski, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

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

FRISCH, Judge

Following a stalking conviction, the district court ordered appellant to pay restitution in compensation for victim's temporary inability to work. Appellant challenges the restitution amount, arguing that (1) the district court awarded victim income that he could possibly recoup later and (2) the record does not contain evidence of the amount of income lost with reasonable specificity. He also requests correction of a claimed error in the sentencing order. We affirm the restitution order and the sentencing order.

FACTS

Appellant Shawn Michael McCollum was a customer of victim, who is a self-employed vehicle-restoration and auto-body mechanic. Following a dispute about a project, McCollum threatened victim's life and family. McCollum was consequently held in custody for three days in June 2019. After McCollum was released from custody, victim was unable to engage in his ordinary business. Victim feared that he would not notice McCollum approaching if he wore the necessary helmets and earplugs when working with dangerous equipment. Victim also experienced paranoia and trouble sleeping, both interfering with his ability to work. Victim later saw a doctor, obtained medication for anxiety, and "took some time off." About a month and a half after the incident, victim was able to resume the ordinary course of his work.

The state charged McCollum with making threats of violence, Minn. Stat. § 609.713, subd. 1 (2018), and with stalking, Minn. Stat. § 609.749, subd. 2(1) (2018). McCollum pleaded guilty to stalking. The district court accepted the plea, dismissed the threats-of-violence charge, adjudicated the stalking conviction, and sentenced McCollum to a stay of imposition of sentence while reserving restitution.

Victim filed an affidavit for restitution, averring that he lost $7,918 in income from June 10 through June 21, 2019, as a result of McCollum's conduct. Victim arrived at this estimated loss by calculating his average weekly income from January 1, 2019, through May 31, 2019, then doubling that averaged weekly amount to account for two weeks of lost wages. McCollum disputed the amount, and the district court held a contested restitution hearing.

At the hearing, victim testified that he bills current customers at a rate of $65 per hour. On average, victim works between nine and ten hours on weekdays and four to six hours on Saturdays. Although victim was physically present in his shop from June 10 through June 21, the "[a]ctual work" he performed during that time was "probably slim to none," and he did not bill any hours during that time. Victim estimated that he accepted "[m]aybe one" new client during this time period. Victim testified that he thought he turned away three or four customers and thought that at least two of those projects involved "light mechanical" work, such as oil changes. On examination by the court, victim conceded that, given his ability to work on weekends, he lost a total of 110 billable hours during the relevant time period, which is slightly less than the full two weeks of compensation contemplated in the original restitution request.

The district court found that victim credibly testified that his work was interrupted from June 10 through June 21 as a result of McCollum's threats. Although the district court acknowledged that victim could make up the lost time by working longer hours in the future, it reasoned that victim "can never get back" the 110 hours lost. The district court credited victim's testimony regarding his current hourly rate of $65 per hour. The district court then multiplied that amount by 110 hours—the lost amount of billable hours—to arrive at a restitution award of $7,150. Notably, the district court's restitution award was a slight reduction from the $7,918 previously awarded, apparently based on victim's concession that he would have lost a total of 110 hours of work during the relevant time period.

McCollum appeals the restitution and sentencing orders.

D E C I S I O N

I. The record supports the restitution award.

McCollum argues that we must reverse the restitution order because (1) the order awards income that victim could recoup later and (2) the record does not establish victim's loss with reasonable specificity. "A district court has broad discretion to award restitution, and the district court's order will not be reversed absent an abuse of that discretion." *State v. Andersen*, 871 N.W.2d 910, 913 (Minn. 2015). We will not disturb the district court's factual findings unless they are clearly erroneous. *Id.* But whether the district court used the proper measure of loss is a question of law that we review de novo. *State v. Johnson*, 851 N.W.2d 60, 64 (Minn. 2014).

We first address McCollum's argument that, because victim is self-employed and primarily engages in long-term projects, victim's income was only delayed and not lost. The purpose of restitution is to restore crime victims to the same financial position they would have been in had the crime not occurred. *See State v. Palubicki*, 727 N.W.2d 662, 666 (Minn. 2007). Accordingly, "[r]estitution must aim to compensate [the victim] for [his] actual loss, and no more." *State v. Harvey*, 547 N.W.2d 706, 710 (Minn. App. 1996), *review denied* (Minn. Aug. 6, 1996).

Here, victim was unable to perform any billable work for 11 days. The record shows that victim has multiple long-term projects and that his normal workload already requires him to work close to 50 hours per week on average. Moreover, victim testified that he turned away at least two short-term projects during the relevant time period. We are unaware of any authority requiring the reduction of restitution based on the hypothetical possibility that lost income could be recovered in the future, particularly where the record shows that a victim, like the one here, already works five days per week for more than eight hours each day with additional weekend hours. We decline to deprive victim of restitution because he is self-employed or diminish his restitution because he could hypothetically work longer hours in the future above and beyond his regular, full-time work schedule.

In the alternative, McCollum argues that we should reverse the restitution order because the state failed to establish the amount of the loss with reasonable specificity. When requesting restitution, the state 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) (2018). The state bears the burden of

substantiating the amount of loss sustained by a victim as a result of an offense. Minn. Stat. § 611A.045, subd. 3(a) (2018). On review, we determine whether the record contains a factual basis for the amount of restitution. *See State v. Fader*, 358 N.W.2d 42, 48 (Minn. 1984) (remanding for further fact-finding when the record did not provide a factual basis for a restitution award).

McCollum argues that the state failed to produce reasonably specific evidence of the billable work victim would have performed during the specified time period and the amount victim would have billed for that work.[1] But victim testified as to his current hourly rate, the number of hours he works on average, and the nature of the work he performs for his current customers. He presented historical data setting forth the volume of business he experienced over a substantial period of time and requested restitution based upon that data. The district court credited this evidence and multiplied his current hourly rate by the number of hours he would have worked, on average, during the relevant time period. Given the nature of victim's work and the record below, the district court did not abuse its discretion by concluding that victim justified his claim for restitution with reasonable specificity.[2]

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[1] McCollum claims it is "conspicuous" that victim earned less in July than in June, but the record confirms that in the ordinary course of business there is a delay between *performing* work and *billing* for work.

[2] McCollum cites *State v. Keehn*, in which we concluded that a restitution request was not reasonably specific. 554 N.W.2d 405, 408 (Minn. App. 1996), *review denied* (Minn. Dec. 17, 1996). This matter is distinguishable from *Keehn* because here, it is not "impossible to determine" how the district court "reached the precise figure" it awarded on this record. *Id.* McCollum also cites *Johnson*, but in that case there was "no evidence in the record" to support the alleged monetary amount. 851 N.W.2d at 65.

As McCollum observes, the record shows that victim billed some customers at a rate of $55 per hour and not $65 per hour—the hourly rate used by the district court to calculate restitution. But victim testified that his prevailing rate in June of 2019 was $65 per hour, and the district court credited victim's testimony. McCollum further contends that the state provided no evidence of the average amount of *billable* hours per week, as opposed to hours worked but not billed to a customer. But victim confirmed that he had lost "110 billable hours" when asked by the district court. The record therefore contains reasonably specific evidence in support of the amount of restitution awarded by the district court. Accordingly, we affirm the restitution award.

II. The sentencing order correctly reflects McCollum's conviction for "stalking" under the law in effect at the time of his offense.

McCollum and the state mistakenly agree that the sentencing order incorrectly identifies the crime to which McCollum pleaded guilty. Although the current version of the statute describes the crime as "harassment," the version of the statute in effect at the time of McCollum's offense described the crime as "stalking." Minn. Stat. § 609.749, subds. 1, 2, 5 (Supp. 2019). The legislature amended the statute effective July 1, 2019—after the date of McCollum's offense. 2019 Minn. Laws 1st Spec. Sess. ch. 5, art. 2, §§ 17, 18, 20, at 967-69. *See* Minn. Stat. § 645.02 (2018) ("An . . . act having appropriation items enacted finally at any session of the legislature takes effect at the beginning of the first day

of July next following its final enactment . . . ."). Accordingly, the district court properly designated his crime as that of stalking.[3]

Affirmed.

[3] We trace the parties' mutual mistake to a change of terminology in the law and clarify that McCollum was convicted of a single "stalking" offense, even though the crime is now called "harassment." We also note that the stalking conviction is consistent with (1) McCollum's plea petition and the plea colloquy, in which McCollum indicated his intent to plead guilty to "stalking" and (2) the fact that the district court adjudicated a gross-misdemeanor conviction rather than a felony conviction. *Compare* Minn. Stat. § 609.749, subd. 2 (2018) (defining gross-misdemeanor "stalking" crimes), *with* Minn. Stat. § 609.749, subd. 5 (Supp. 2019) (defining felony "stalking" crime).