STATE OF MINNESOTA
IN COURT OF APPEALS
A20-1348

State of Minnesota,
Respondent,

vs.

Dalton James Subbert,
Appellant.

Filed July 26, 2021
Affirmed
Bratvold, Judge

Blue Earth County District Court
File No. 07-CR-19-638

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

Patrick R. McDermott, Blue Earth County Attorney, Susan B. DeVos, Assistant County Attorney, Mankato, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Roy G. Spurbeck, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Connolly, Presiding Judge; Segal, Chief Judge; and Bratvold, Judge.

NONPRECEDENTIAL OPINION

BRATVOLD, Judge

In this sentencing appeal, appellant challenges the district court's restitution order on a judgment of conviction for first-degree drug possession. Appellant contends that the district court erred when it ordered him to pay restitution to his landlord for property

damage to the home where police seized the drugs, arguing that the district court relied on overruled caselaw and that the landlord's damages "were not the result of [appellant] possessing hallucinogenic mushrooms." The state's only response is that appellant forfeited any challenge to restitution during district court proceedings.

We first conclude that we need not decide the forfeiture issue because appellant's challenge fails on the merits. We next conclude that the district court's citation of overruled caselaw did not prejudice appellant because the district court also relied on binding caselaw. Finally, we conclude that the record supports the district court's key determinations: (1) appellant's "production of the controlled substances damaged the residence and required cleaning services," and (2) the landlord "sustained [some] out-of-pocket losses as a result of [appellant's] offense." Thus, we affirm.

FACTS

Respondent State of Minnesota charged appellant Dalton James Subbert by amended complaint with eight counts of drug possession and sale, including first-degree sale of a hallucinogen, Minn. Stat. § 152.021, subd. 1(5) (2018), and first-degree possession of a hallucinogen, Minn. Stat. § 152.021, subd. 2(a)(5) (2018). The charges stemmed from the execution of a search warrant at Subbert's Mankato home, where the stated alleged Subbert had a "lab" for growing hallucinogenic mushrooms.

At a plea hearing, Subbert and the state informed the district court that they had reached an agreement. Subbert agreed to plead guilty to first-degree possession of hallucinogens and a charge in a separate criminal file. In exchange, the state agreed that "all the other charges [would] be dismissed in these two files." The parties agreed to a

"joint recommendation for a guideline sentence which [they] anticipate[d] to be 95 months" in prison, to be executed concurrently with the sentence imposed in the separate criminal file. The agreement included $2,517.94 in restitution to the sheriff's department for "the handling of the materials that were found at [Subbert's] residence."

Subbert submitted a written petition to enter a guilty plea, describing the terms of the parties' agreement. Subbert then waived his trial rights and testified. He agreed "a large mixture of grown material that also contained some psilocin mushroom" was found in his home during the search, and "it was actually [his] materials." He also agreed the materials weighed 657.07 grams and tested positive for psilocin, an illegal hallucinogen. Subbert then pleaded guilty to first-degree possession of a hallucinogen.

The district court accepted Subbert's plea and, at a later hearing, sentenced Subbert to 95 months in prison, concurrent with the sentence imposed in the separate criminal file. The district court also ordered that Subbert "pay restitution in the amount of $2,517.94" to the sheriff's department.

One month later, the state filed and served a restitution affidavit from Subbert's landlord. Along with the affidavit, the state wrote to the district court, with a copy to Subbert and his attorney: "I believe the appropriate remedy would be for the Court to set a hearing date to review the request and determine if it should amend its Order." Subbert filed nothing in response.

The district court scheduled a restitution hearing and "indicated to the parties in advance of the hearing that no testimony would be taken." Both parties appeared. The state asked the district court to amend Subbert's sentence and order restitution for the landlord's

property damage, arguing that Subbert forfeited any challenge because he had not objected to the landlord's restitution request. Subbert's attorney argued that the district court should set an evidentiary hearing because the state had asked for a hearing and Subbert has "a right to rely on what the State has filed." Subbert also noted that, at the plea hearing, he had only anticipated the restitution ordered to the sheriff's department, and "[t]here [was] no discussion of additional restitution."

The district court's order and memorandum of law amended its earlier restitution order and directed Subbert to pay $15,089 as restitution to the landlord, on top of the restitution previously ordered to the sheriff's department. The district court explained its reasoning in three steps. First, it determined that Subbert "does not dispute that he did not request a hearing to present these challenges within 30 days of receiving [the landlord's] affidavit . . . and he did not submit an affidavit detailing his restitution challenges at least five business days before the restitution hearing." The district court reasoned that, even if the state's hearing request had relieved Subbert from requesting a hearing, Subbert still failed to timely challenge the landlord's restitution request. Subbert "had to submit the affidavit in order to meet his burdens of pleading and production, which he failed to do." The district court "conclude[d] that [Subbert's] claim is barred and that a hearing to consider the merits of [his] claims is not warranted."

Second, the district court determined that Subbert had grown the hallucinogenic mushrooms and this had "damaged the residence and required cleaning services." The district court then considered the landlord's affidavit and reduced the number of hours spent on "[l]abor for cleanup and restoration" from 190 hours to 150 hours. The district

court also determined that the landlord's affidavit "fails to explain how the need to remove trash and personal belongings, remove appliances, repair the closet, and clean up the exterior yard was a result of [Subbert's] production of controlled substances." And the district court reduced the hourly rate of "[l]abor for cleanup and restoration" and "[t]ime for phone calls and emails" from $50 per hour, as attested in the affidavit, to $30 per hour. The district court reasoned that the affidavit "provided no information or documentation to support the $50 per hour charge." Based on the district court's analysis of the landlord's affidavit, it determined that the landlord's out-of-pocket loss "as a result of [Subbert's] offense" was $15,089. The district court then determined that Subbert "has the ability to pay $15,089.00 from his prison earnings."

Third, the district court determined that because it "did not know the extent of [the landlord's] losses at sentencing, the statute does not bar the Court from amending its order for restitution," citing Minn. Stat. § 611A.04, subd. 1(b) (2018) (allowing amendment of restitution order after sentencing). The district court recognized, however, that the plea agreement did not contemplate restitution to the landlord. The district court, therefore, allowed Subbert to withdraw his guilty plea because the added restitution "materially alters the expectations of the parties."

Subbert did not ask to withdraw his plea. This appeal followed.

DECISION

A victim of a crime 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) (2018). We review a district court's "broad discretion to award restitution" for "abuse of

that discretion." *State v. Andersen*, 871 N.W.2d 910, 913 (Minn. 2015). "A [district] court abuses its discretion when its decision is based on an erroneous view of the law." *State v. Boettcher*, 931 N.W.2d 376, 380 (Minn. 2019) (quotation omitted). An appellate court will not disturb a district court's factual findings unless they are clearly erroneous. *Andersen*, 871 N.W.2d at 913. But "questions concerning the authority of the district court to order restitution are questions of law subject to de novo review." *Id.*

Subbert argues that the district court abused its discretion in two ways—by relying on overruled caselaw and by ordering restitution "where there was not a sufficient nexus between the offense of conviction and the purported losses." The state responds that Subbert forfeited his challenge to the restitution award because he did not follow the statutory procedure for doing so during district court proceedings. Because the state's argument raises a threshold issue, we address it first.

I. We need not decide whether Subbert forfeited his restitution challenge during district court proceedings.

We see some merit to both parties' positions on this issue. Beginning with the state's position, it correctly points out that the statutory procedure for challenging restitution places obligations on the defendant that Subbert did not satisfy. *See* Minn. Stat. § 611A.045 (2018). A defendant "may challenge restitution, but must do so by requesting a hearing within 30 days of receiving written notification of the amount of restitution requested." *Id.*, subd. 3(b). A defendant also must file an affidavit "setting forth all changes" to restitution. *Id.*, subd. 3(a). Applying these statutory provisions, caselaw describes the "burden of pleading" and "burden of production" placed on a defendant challenging restitution.

State v. Thole, 614 N.W.2d 231, 235 (Minn. App. 2000). "Under the statute, the affidavit is both the sole vehicle by which the offender can meet the burden of pleading, and an essential element of the offender's case required to meet the burden of production." *Id.* Thus, a "valid dispute" only arises after a defendant meets the "threshold burden" by making a "specific objection by affidavit." *Id.*

The state argues that "at no time did Subbert file the required affidavit detailing his challenge to the [landlord's] restitution [request]. Without this affidavit, he did not meet his threshold burden." Subbert concedes that he did not file an affidavit objecting to the landlord's restitution request. But he argues this requirement does not apply to his appeal because he challenges the district court's legal authority to order restitution.

Subbert's position is supported by *State v. Gaiovnik*, where the supreme court reversed this court's decision that the appellant "waived the right to challenge the restitution award" because he "did not submit a written request for a hearing on the restitution issue." 794 N.W.2d 643, 646 (Minn. 2011). The supreme court relied on the appellant's challenge to the district court's legal authority to award restitution without a claim by the victim, noting that the appellant first challenged restitution during the sentencing hearing. *Id.* The supreme court reasoned that the appellant's failure to file an affidavit challenging restitution "does not preclude [the appellant] from challenging in a direct appeal the district court's legal authority to award restitution when he raised this legal issue with the district court at the sentencing hearing." *Id.* at 649.

The state's brief to this court does not discuss *Gaiovnik*. Regardless of whether Subbert's challenge to the district court's restitution award is proper under *Gaiovnik*, we need not resolve the issue because we conclude that Subbert's challenge fails on the merits.

II. The district court acted within its legal authority when it amended Subbert's restitution order.

A district court's legal authority to award restitution is provided by statute. "A request for restitution may include, but is not limited to, any out-of-pocket losses resulting from the crime . . . ." Minn. Stat. § 611A.04, subd. 1(a). In deciding whether to order restitution and the amount of the restitution, a district court considers "(1) the amount of economic loss sustained by the victim as a result of the offense; and (2) the income, resources, and obligations of the defendant." Minn. Stat. § 611A.045, subd. 1(a). "While the district court has broad discretion in granting restitution, the record must provide a factual basis for the amount awarded by showing the nature and amount of the losses with reasonable specificity." *Thole*, 614 N.W.2d at 234.

A district court may amend its restitution order after sentencing if "the true extent of the victim's loss . . . was not known at the time of the sentencing." Minn. Stat. § 611A.04, subd. 1(b); *see also In re Welfare of M.R.H.*, 716 N.W.2d 349, 352 (Minn. App. 2006) (explaining "it is the *district court's* lack of knowledge that allows it to amend or issue a restitution order after sentencing, not *the victim's*"), *review denied* (Minn. Aug. 15, 2006). Here, the district court found it lacked knowledge of the landlord's losses when it sentenced Subbert.

Subbert makes two arguments in support of reversal; the state does not respond to either. We address each argument in turn.

A. The district court's reliance on overruled caselaw did not prejudice Subbert.

Subbert argues that the district court erred when it relied on *State v. Nelson*, 796 N.W.2d 343 (Minn. App. 2011), *overruled by Boettcher*, 931 N.W.2d at 381, and contends that "[a] court that employs *Nelson* abuses its discretion." Subbert is correct that the supreme court has overruled *Nelson*'s factual-relationship standard. In *Nelson*, this court stated that "a loss claimed as an item of restitution by a crime victim must have some factual relationship to the crime committed." 796 N.W.2d at 347. But later, in *Boettcher*, the supreme court overruled this portion of *Nelson*:

> To the extent that the articulation by the court of appeals of the direct-causation standard in *Nelson* allows criminal restitution for losses that merely have a 'factual relationship' to the defendant's crime, *Nelson* is in direct conflict with existing law . . . and it is overruled.

Boettcher, 931 N.W.2d at 381.[1] In *Boettcher*, the supreme court not only rejected the factual-relationship standard from *Nelson*, it also held that "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." *Id.*

[1] The appellant in *Boettcher* was found guilty and convicted of burglary, but the jury could not reach a verdict on an arson charge, and the state did not retry him. *Id.* at 378-79. The victims requested restitution for fire damage related to the arson charge. *Id.* at 379. The district court ordered restitution, including the fire damage, and Boettcher appealed. *Id.* We affirmed based on *Nelson*'s factual-relationship standard. *Id.* at 380.

Here, the district court's memorandum cited the overruled language from *Nelson*, 796 N.W.2d at 347, and stated that "[a] loss claimed as an item of restitution by a crime victim must have *some factual relationship* to the crime committed." (Emphasis added.) The district court also applied *Nelson*'s factual-relationship standard when it rejected some of the items listed in the landlord's affidavit because the items "do not have *any factual relationship* to the conduct for which [Subbert] was convicted" and reduced the landlord's number of hours spent on "[l]abor for cleanup and restoration." (Emphasis added.) Thus, the district court erred by relying on the factual-relationship standard from *Nelson*. *See Hoven v. McCarthy Bros. Co.*, 204 N.W. 29, 30 (Minn. 1925) ("It is the law that a decision of a court of supreme jurisdiction overruling a former decision is retrospective in its operation—the overruled decision is regarded in law as never having been the law.").

But the district court's error does not end our analysis because Subbert was not prejudiced. We disregard errors that do not prejudice an appellant. *See* Minn. R. Crim. P. 31.01 ("Any error that does not affect substantial rights must be disregarded."). To begin, the district court relied on *Nelson* to reject some of the landlord's restitution claims, which benefitted Subbert. But even more importantly, the district court's memorandum also cited *Boettcher*, 931 N.W.2d at 380, for its holding that restitution may be ordered only "for losses that *result* from the crime." Indeed, the district court concluded that the landlord "sustained the following out-of-pocket losses *as a result of* [Subbert's] offense." (Emphasis added.) Thus, even though the district court cited *Nelson*, the district court used the overruled factual-relationship standard to *reduce* the restitution award, and it applied

the correct standard to determine the landlord's restitution award. We conclude that Subbert was not prejudiced by this error.

B. The record supports the district court's determination that the landlord's damages followed naturally from or as a consequence of Subbert's crime of conviction.

Subbert also argues, citing *Boettcher*, 931 N.W.2d at 381, that he "could be ordered to pay restitution only for those losses which 'resulted' from [his] crime" of first-degree *possession* of a hallucinogen. He contends that the state "sought restitution for remediation from the *manufacture* of controlled substances." (Emphasis added.) For support, Subbert points out that the district court "noted that the *production* of controlled substances had damaged the residence and required cleaning services." (Emphasis added.) Thus, Subbert argues that, because he "was not convicted of manufacturing a controlled substance," he may be ordered only to pay restitution for "direct losses from Subbert's offense of conviction [which] would include the out-of-pocket costs, if any, occasioned by Subbert's *possession* of the mushrooms."[2] (Emphasis added.)

Subbert relies on our unpublished opinion in *State v. Boettcher*, No. A17-1426, (Minn. App. Nov. 12, 2019), following remand from the supreme court. There, we reversed the district court's restitution order and remanded with instructions "to vacate any portion of the restitution order that is not directly related to Boettcher's" conviction. *Id.* at *2. We

[2] We note that Minnesota generally does not criminalize the manufacture of a controlled substance. One exception is that possession of the "chemical reagents or precursors" of methamphetamine with intent to manufacture is prohibited. *See* Minn. Stat. §§ 152.0262, subd. 1, .021, subd. 2a (2018). There is no similar statute, however, prohibiting the possession of materials used to "manufacture" or grow hallucinogenic mushrooms.

reasoned that "economic losses resulting from the fire damage" for which Boettcher was not convicted "are too attenuated from the [burglary] crime of which Boettcher was actually convicted because they 'cannot be said to result from [Boettcher's] criminal act' of entering a dwelling without consent and with intent to commit theft." *Id.* (quoting *Boettcher*, 931 N.W.2d at 381).

We are not persuaded by Subbert's analogy to *Boettcher*. Subbert pleaded guilty to possession of hallucinogens and admitted to possession of over 600 grams of "a large mixture of grown material that also contained some psilocin mushroom." The district court determined that "[i]t is undisputed that [Subbert's] production of the controlled substances damaged the residence and required cleaning services." While Subbert's possession crime did not require proof of his production of hallucinogens, he admitted that he possessed the controlled substance in "grown material." In other words, Subbert came to possess the controlled substance by growing it.

We conclude that applicable law and the record evidence support the district court's determination that the landlord's losses resulted from, were "directly caused by, or follow[ed] naturally as a consequence of" Subbert's possession of hallucinogens. *See Boettcher*, 931 N.W.2d at 381. The landlord's affidavit documented costs for chemical testing, cleanup, restoration, garbage disposal, and time and mileage, all of which were needed to repair the damage caused by Subbert's possession crime. And the state clarified at the restitution hearing that the landlord's losses for unpaid rent and utilities were incurred because he was "not allowed to have any income because the house was held in abatement due to the clean-up required."

Because the district court did not err by determining that the landlord's out-of-pocket losses resulted from Subbert's conviction of first-degree drug possession, we affirm the district court's restitution order.

Affirmed.