

DA 13-0230

IN THE SUPREME COURT OF THE STATE OF MONTANA

2014 MT 204N

IN THE MATTER OF

B.B.,

A Youth.

APPEAL FROM: District Court of the Eleventh Judicial District,
In and For the County of Flathead, Cause No. DJ-12-134B
Honorable David M. Ortley, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Wade Zolynski, Chief Appellate Defender, Jacob Johnson, Assistant
Appellate Defender, Helena, Montana

For Appellee:

Timothy C. Fox, Montana Attorney General, Tammy A. Hinderman,
Assistant Attorney General, Helena, Montana

Submitted on Briefs: July 16, 2014
Decided: July 30, 2014

Filed:

Clerk

Chief Justice Mike McGrath delivered the Opinion of the Court.

¶1 Pursuant to Section I, Paragraph 3(d), Montana Supreme Court Internal Operating Rules, this case is decided by memorandum opinion and shall not be cited and does not serve as precedent. Its case title, cause number, and disposition shall be included in this Court's quarterly list of noncitable cases published in the Pacific Reporter and Montana Reports.

¶2 B.B. appeals from an order of the Youth Court of the Eleventh Judicial District, Flathead County, requiring him to pay restitution to the Kalispell Army-Navy store in the amount of \$7,490.00. B.B. argues there was insufficient evidence to support the restitution amount. We affirm.

¶3 On November 21, 2012, the State filed a petition alleging B.B., who was then age 15, had participated in a series of burglaries in the Evergreen area. On December 14, 2012, B.B. admitted to four counts of burglary, including the November 11, 2012 burglary of Kalispell Army-Navy, and three counts of criminal mischief. The remaining allegations were dismissed. B.B. was declared a delinquent youth and serious juvenile offender.

¶4 Probation officer Nick Nyman prepared a Social History and Recommendations, in which he recommended restitution to Kalispell Army-Navy in the amount of \$9,850.00. The recommendation was based on owner Briar Purdy's statement that he had lost the following items: eleven Kershaw knives; eight Microtech knives; three Surefire flashlights; and two Marmot jackets. Purdy also claimed expenses associated with

repairing broken glass in the front door; securing the premises prior to repair of the glass; increased heating costs due to the broken glass; a damaged gun safe; and time spent cleaning the broken glass, filing police reports, and taking inventory.

¶5 On January 11, 2013, a dispositional hearing was held. B.B. contested the amount of restitution claimed by Kalispell Army-Navy. He testified that he and his companions had taken five Microtech knives, four Marmot coats, and four flashlights. Purdy was not present for this hearing. The hearing was continued to allow Purdy to appear and testify about his losses.

¶6 The dispositional hearing resumed on January 18, 2013. B.B.'s friend D.L. testified the boys had taken four coats, five knives, and two or three flashlights. Purdy testified his determination of lost items was based on visually examining his store for empty boxes and disturbed display items. The store does not keep a real-time inventory. The store generally displayed its knives outside of their boxes. Lower-priced knives such as the Kershaw models had extra inventory stored in boxes below the display models. The Microtech knives were all displayed outside their boxes, because the store had only one of each model. With respect to the Kershaw knives, Purdy testified that some boxes appeared to be missing, although "it could be more[,] it could be less" than the number given in his statement. Purdy testified it was easier to determine the number of Microtech knives missing, because the empty boxes had been left in the display case. He testified that the tags for two Marmot jackets had been found, but he had no way of knowing if other jackets were missing. He testified that he asked his staff to review the inventory they had recently received and estimate the number of items that had been sold

from that inventory. He described his estimate of lost items as “conservative.” Purdy estimated his increased heating costs based on his average monthly heating bill and the necessity of running the heater for two days in cold weather while the front door was unsecured. He testified that the temperature inside the store was 45 degrees when he arrived on Sunday morning and 60 degrees when the store opened for business on Monday.

¶7 The State ultimately requested restitution in the amount of \$10,410.00. The increase from the original recommendation of \$9,850.00 was based on testimony from B.B. and D.L. that two additional Marmot jackets were stolen. The defense calculated restitution at \$5,380.00. The Youth Court ordered restitution to Kalispell Army-Navy in the amount of \$7,490.00, noting that although Purdy had done the best he could to determine the value of the loss, “obviously there are problems in the numbers that are attributed to the Army-Navy Store.”

¶8 A district court’s findings of fact regarding the amount of restitution are reviewed for clear error. *City of Billings v. Edward*, 2012 MT 186, ¶ 18, 366 Mont. 107, 285 P.3d 523. A finding of fact is clearly erroneous if it is not supported by substantial evidence, if the court misapprehended the effect of the evidence, or if our review of the record leaves us with a definite and firm conviction that a mistake has been made. *State v. McMaster*, 2008 MT 268, ¶ 21, 345 Mont. 172, 190 P.3d 302.

¶9 A victim may recover restitution, even if the actual losses are uncertain, “if the losses were calculated by use of reasonable methods based on the best evidence available under the circumstances.” *State v. Benoit*, 2002 MT 166, ¶ 29, 310 Mont. 449, 51 P.3d

495. The amount of restitution need not be based upon formal records or documented with “absolute certainty.” *McMaster*, ¶ 36.

¶10 As the Youth Court recognized, given the nature of Purdy’s business, it was not practical to maintain a precise daily inventory. Under the circumstances, the estimates of Purdy and his staff based on visual examination of the inventory, records of goods recently received with allowances made for average sales, and packaging or items recovered after the burglary provided the best evidence of the losses incurred by Kalispell Army-Navy. The Youth Court found that Purdy’s calculations were not perfect, and accordingly lowered the amount of restitution from the requested \$10,410.00 to \$7,490.00. This amount is substantiated by evidence in the record. The Youth Court did not misapprehend the effect of the evidence, and we are not convinced a mistake was made.

¶11 We have determined to decide this case pursuant to Section I, Paragraph 3(d) of our Internal Operating Rules, which provides for memorandum opinions. The issues in this case are factual and the Youth Court’s findings of fact are supported by substantial evidence.

¶12 Affirmed.

/S/ MIKE McGRATH

We Concur:

/S/ PATRICIA COTTER

/S/ BETH BAKER

/S/ MICHAEL E WHEAT

/S/ JAMES JEREMIAH SHEA