DA 17-0287

IN THE SUPREME COURT OF THE STATE OF MONTANA

2019 MT 292

STATE OF MONTANA,

Plaintiff and Appellee,

v.

LAUREN MARIE JOHNS,

Defendant and Appellant.

APPEAL FROM: District Court of the Fourth Judicial District,
In and For the County of Missoula, Cause No. DC-2013-521
Honorable John W. Larson, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Chad Wright, Appellate Defender, Haley Connell Jackson, Assistant Appellate Defender, Helena, Montana

For Appellee:

Timothy C. Fox, Montana Attorney General, Kirsten K. Madsen, Assistant Attorney General, Agency Legal Services Bureau, Helena, Montana

Kirsten H. Pabst, Missoula County Attorney, Mac W. Bloom, Deputy County Attorney, Missoula, Montana

Submitted on Briefs: August 21, 2019

Decided: December 17, 2019

Filed:

Clerk

Justice Beth Baker delivered the Opinion of the Court.

¶1 Lauren Marie Johns was convicted in Missoula County of embezzling money from her employer, Community Bank. The State sought restitution for the amount Johns stole and for expenses the Bank incurred investigating and assisting in the prosecution. At the initial sentencing hearing, Johns objected to the restitution claim. After considering briefs from both parties, the Fourth Judicial District Court ordered restitution. It imposed the State's requested amount at the final sentencing hearing. On appeal, Johns contends that the District Court violated her due process rights when it did not hold an evidentiary hearing before ordering her to pay restitution. We affirm.

PROCEDURAL AND FACTUAL BACKGROUND

¶2 The State charged Johns in 2013 with felony Theft of Property by Embezzlement, in violation of § 45-6-301(7), MCA. The State alleged that Johns stole $7,103.00 from the Bank.[1] After a two-day trial, a jury found Johns guilty on August 24, 2016.

¶3 The District Court ordered a presentence investigation ("PSI"), in part to determine the appropriate amount of restitution. The PSI report included restitution calculations supported by an Affidavit of Victim's Pecuniary Loss prepared by Bank representative Mary Strozzi. The State requested $19,406.80 in restitution, including over $12,000 for expenses the Bank incurred investigating and assisting in the prosecution.

[1] Glacier Bank acquired Community Bank in 2014. This Opinion uses "Bank" to refer to both.

¶4 At the first sentencing hearing on October 20, 2016, Johns objected to the restitution and requested a hearing on the amount and the legal authority for the restitution. The court instructed the parties to file briefs addressing the legal basis for the claimed restitution. The court advised the parties: "And then we'll have to have the hearing if there's a factual dispute about the underlying amount [after briefing]."

¶5 Johns's brief opposing restitution challenged the basis for the Bank's claimed administrative costs. She argued that "most if not all of the claimed expenses" were not compensable because they reflected time spent in furtherance of the litigation rather than in "actually trying to recover the money." She reserved for appeal any objections to the amount of actual loss resulting from the theft.

¶6 The State asserted all the costs legally were recoverable as restitution under the authority of §§ 46-18-201, -241(a), and -241(d), MCA, because they were compensable expenses incurred in pursuit of converted property and out-of-pocket expenses incurred in the investigation and prosecution of the offense. It noted that the Bank had miscalculated the restitution amount in its Affidavit but was working to provide an updated figure to the court. The State also requested a hearing "regarding the factual issues underlying the State's restitution request."

¶7 The District Court entered an order on restitution on January 11, 2017, concluding that the Bank was entitled, as a matter of law, to recover the claimed expenses it incurred investigating the theft and assisting in the prosecution. The order listed each claimed expense and noted the corresponding statutory authority. The court rejected Johns's interpretation of relevant case law, finding the expenses were compensable as expenses

incurred in the pursuit of converted property and incurred in the investigation and prosecution. The court ordered restitution for the full amount the State requested in its brief, subject to the forthcoming recalculation. At the conclusion of the order, the court set a second sentencing hearing date and stated: "Defendant may file any additional exceptions or objections to the amount of restitution ordered above by January 20, 2017." (Emphasis in original.)

¶8 Johns filed three motions to continue the sentencing hearing, but none of them raised exceptions or objections further challenging the "amount of restitution" as ordered by the District Court. The court rescheduled the final sentencing hearing and extended the date by which Johns could file any "additional exceptions or objections to the amount of restitution." Johns did not file any.

¶9 At the final sentencing hearing on March 9, 2017, the Bank provided the promised updated restitution figures. Bank representative Strozzi explained the impact of Johns's actions on the Bank's staff, who had worked to uncover the theft and to determine the amount taken. Johns's counsel confirmed receipt of the restitution order, acknowledged the Bank's revised claim, and reiterated the Defendant's restitution objection: "And for the record, we still oppose and object to the restitution even in the new amount. We still stand by our original position in our brief." The District Court asked Johns's counsel if there were any issues in the PSI report. Counsel advised that the Defendant had no issues, and they were "prepared to move forward" to sentencing. The District Court pronounced Johns's sentence and ordered restitution to the Bank in the updated amount.

STANDARDS OF REVIEW

¶10 We review a criminal sentence for legality. *State v. Simpson*, 2014 MT 175, ¶ 8, 375 Mont. 393, 328 P.3d 1144 (citing *State v. Benoit*, 2002 MT 166, ¶ 18, 310 Mont. 449, 51 P.3d 495). A claim that the sentencing court violated a defendant's right to due process presents an issue of law that we review for correctness. *State v. McClelland*, 2015 MT 281, ¶ 7, 381 Mont. 164, 357 P.3d 906 (citing *State v. Ferguson*, 2005 MT 343, ¶ 99, 330 Mont. 103, 126 P.3d 463).

DISCUSSION

¶11 "Sentencing courts are required to impose a sentence that includes payment of full restitution whenever the court finds the victim of an offense has sustained a pecuniary loss." *State v. Johnson*, 2011 MT 116, ¶ 16, 360 Mont. 443, 254 P.3d 578 (citing § 46-18-201(5), MCA). A defendant has a due process right to "explain, argue and dispute" any information presented on restitution. *State v. Hill*, 2016 MT 219, ¶ 10, 384 Mont. 486, 380 P.3d 768 (citing *McClelland*, ¶ 9).

¶12 A reviewing court generally considers "only those issues that are properly preserved for its review." *State v. Akers*, 2017 MT 311, ¶ 12, 389 Mont. 531, 408 P.3d 142 (citing *In re Transfer Territory from Poplar Elementary Sch. Dist. No. 9 to Froid Elementary Sch. Dist. No. 65*, 2015 MT 278, ¶ 13, 381 Mont. 145, 364 P.3d 1222). "In order to preserve a claim or objection for appeal, an appellant must first raise that specific claim or objection in the [trial court]." *In re T.E.*, 2002 MT 195, ¶ 20, 311 Mont. 148, 54 P.3d 38. "The basis for the general rule is that it is fundamentally unfair to fault the trial court for failing to rule correctly on an issue it was never given the opportunity to

consider." *Akers*, ¶ 12 (citing *Unified Indus., Inc. v. Easely*, 1998 MT 145, ¶ 15, 289 Mont. 255, 961 P.2d 100) (internal citations omitted). In *Johnson*, ¶ 21, we held that a defendant who failed to object to restitution imposed at sentencing forfeited his claim on appeal that the PSI did not contain adequate information to support a restitution award. In *Simpson*, ¶ 12, we held that a general objection at a restitution hearing, instead of objections to specific amounts, waived the issue for consideration on appeal.

¶13 Johns acknowledges that the District Court's restitution order concluded with an invitation to file any additional objections and that she did not do so. She argues, however, that her objection and request for a hearing during the initial sentencing hearing and in her brief preserved her claim. She further argues that at the final sentencing hearing, in response to the adjusted restitution amount, her counsel properly renewed the objection by advising the court: "We still stand by our original position in our brief." The State argues these words are "far more generic" than those required to renew a request for an evidentiary hearing and to preserve the due process claim for appeal.

¶14 We agree with the State. At the initial sentencing hearing, the District Court stated that it would hold a hearing *if* there was a factual dispute about the underlying amount of restitution after briefing on the legal basis. Johns's brief discussed this Court's case law, arguing that "the rule enunciated . . . is that time spent in pursuing converted property is compensable and time spent in pursuit of litigation is not." She maintained that, "under this case precedence, most if not all of the claimed expenses in this case are not compensable" because "[t]ime spen[t] in pursuit of litigation is not compensable." Johns

identified one expense in 2013, a claim for $3,925 "spent in the investigation of the crime." Johns complained:

> There is no detail to determine what was actually done to incur *that bill*. The witnesses testified at the trial about the investigation that was done. However, it was all done in the ordinary course of the Bank's business. A hearing should be held to determine what portion of *the bill* was incurred in actually trying to recover the money as opposed to what portion may have been in furtherance of litigation.

(Emphasis added.) Her brief did not request an evidentiary hearing on the factual basis for any other amounts claimed.

¶15 The District Court rejected Johns's interpretation of the case law and explained why each category of expenses the Bank claimed was authorized by § 46-18-243(1)(a) and (d), MCA. It addressed Johns's argument about the 2013 expenses, ruling that the entire $4,237.50 claimed was compensable under subsection (1)(a) because it accounted for time Bank employees spent "analyzing the myriad teller transactions conducted by [Johns] over several months in attempt to figure out exactly what she stole, when she stole it, and where the money went." It reasoned further that the expenses could be considered "as 'reasonable out-of-pocket expenses incurred . . . in [the] . . . investigation of the offense' under subsection (1)(d)." The court thus disposed of Johns's argument that the $3,925 would be compensable only if it was incurred in pursuit of "recover[ing] the money." The court's restitution order concluded that it would "rule upon the pleadings without hearing," but allowed Johns to "file any additional exceptions or objections to the *amount* of restitution ordered." (Emphasis added.) When Johns chose not to file specific objections on the factual basis for the Bank's claim, she implicitly

acknowledged that the District Court's statutory analysis covered her objection, and the court justifiably believed it had addressed the Defendant's concerns in its order.

¶16 Additionally, Johns further declined to contest restitution during the final sentencing hearing. She did not ask to question Ms. Strozzi or call any witnesses to challenge the Bank's claim. Her counsel's statement—"And for the record, we still oppose and object to the restitution even in the new amount. We still stand by our original position in our brief[]"—is insufficient. Johns's brief contested the legal authority for restitution and requested an evidentiary hearing on only one item listed in the Bank's claim. Johns's request for an evidentiary hearing at the initial sentencing hearing did not satisfy the necessary standard for specific objections when the court had considered intervening briefs and directed her to advise it of any further objections or exceptions.

¶17 If, as Johns now asserts, a hearing was crucial to address all amounts the Bank claimed, she should have made that request in her initial brief and explained her position to the District Court when it invited additional exceptions or during the final sentencing hearing. Instead, in response to the court's inquiry regarding the PSI restitution amount, Johns's counsel stated: "We have no issues in the presentence report, Your Honor. We're prepared to move forward." Johns expressed no further concerns about the lack of an evidentiary hearing on the restitution amount.

¶18 This Court considers "an objection sufficient if it specifies the reason for disagreement with the procedure employed by the court." *Pumphrey v. Empire Lath & Plaster*, 2006 MT 99, ¶ 30, 332 Mont. 116, 135 P.3d 797. But "mere objection without

assignment of the specific reason for the objection is not a proper objection." *Adams & Gregoire, Inc. v. Nat'l Indemnity Co.*, 141 Mont. 103, 110, 375 P.2d 112, 116 (1962). Johns offered no indication of what issues remained after the District Court's order on the statutory authority for the claimed restitution. The District Court addressed her arguments regarding the legitimacy of the claim, and she did not thereafter articulate anything that required a hearing or identify factual issues with the amount of restitution. She does not articulate any on appeal, either. To the contrary, Johns expressly disavows a challenge to the factual or legal basis for the restitution and does not contest the District Court's application of § 46-18-243(1)(a) and (d), MCA. A defendant must demonstrate prejudice from the record for this Court to decide whether an error affects her substantive rights. *State v. Huerta*, 285 Mont. 245, 252, 947 P.2d 483, 487 (1997); *see State v. Bubnash*, 142 Mont. 377, 393-94, 382 P.2d 830, 838 (1963).

¶19 After reviewing the record, we conclude that Johns objected to the claimed restitution on the basis that the statute does not authorize recovery of the Bank's "time spent in pursuit of litigation." To the extent she requested a hearing, it was limited to one claimed expense, tied to her argument that the expense could be included in restitution only if it was related to "actually trying to recover the money." The District Court addressed that argument, and Johns did not thereafter put the court on notice of any issues she believed required an evidentiary hearing.

¶20 We hold that Johns failed to preserve a due process challenge to the lack of an evidentiary hearing on the amount of restitution. The lone item she had identified for

hearing was resolved by the District Court's construction of the restitution statute, which she has not challenged on appeal.

¶21 Johns alternatively requests this Court to invoke plain error review or to review her due process claim under *State v. Lenihan*, 184 Mont. 338, 602 P.2d 997 (1979). Under the common law plain error doctrine, we review an unpreserved claim at our discretion. *State v. Favel*, 2015 MT 336, ¶ 23, 381 Mont. 472, 362 P.3d 1126 (citing *State v. Crider*, 2014 MT 139, ¶ 30, 375 Mont. 187, 328 P.3d 612). We invoke the plain error doctrine sparingly, on a case-by-case basis. *State v. Daniels*, 2011 MT 278, ¶ 32, 362 Mont. 426, 265 P.3d 623. Before this Court will find plain error, the appealing party must: "'(1) show that the claimed error implicates a fundamental right and (2) 'firmly convince' this Court that failure to review the claimed error would result in a manifest miscarriage of justice, leave unsettled the question of the fundamental fairness of the trial or proceedings, or compromise the integrity of the judicial process.'" *Favel*, ¶ 23 (citing *Daniels*, ¶ 32) (internal quotations omitted). In *Lenihan*, we held that an appellate court may review a criminal sentence if it is illegal, even if there was no objection at the time of sentencing. *Lenihan*, 184 Mont. at 343, 602 P.2d at 1000. A sentence alleged to violate constitutional guarantees of due process is a reviewable allegation of illegality. *State v. Winter*, 2014 MT 235, ¶ 27, 376 Mont. 284, 333 P.3d 222.

¶22 Johns has not met her high burden on appeal for either of these standards. The sole issue on appeal is that there was not an evidentiary hearing on restitution, in violation of Johns's constitutional right to due process. Due process guarantees that every person be given an opportunity to "explain, argue, and rebut" any information that

may lead to a deprivation of life, liberty, or property. *Bauer v. State*, 1999 MT 185, ¶ 22, 295 Mont. 306, 983 P.2d 955; *see State v. McLeod*, 2002 MT 348, ¶ 26, 313 Mont. 358, 61 P.3d 126 (holding that although the PSI was predicated on incorrect information, the defendant received proper due process because he had the full opportunity to object and failed to do so; he instead affirmed the accuracy of the PSI at hearings). The key to due process is notice and an opportunity to be heard. Here, the District Court provided both.

¶23 The District Court gave Johns specific instructions to file additional exceptions or objections to the amount of restitution ordered, and she failed to request an evidentiary hearing on any outstanding factual issues or to pursue any questioning regarding the amount of restitution at the sentencing hearing. Johns has not demonstrated constitutional error or manifest injustice. She had multiple opportunities to present her arguments and to request further development of the factual basis for restitution. The District Court did not plainly deny her an opportunity to be heard; we thus decline to exercise plain error review or to consider an unpreserved due process claim under *Lenihan*.

CONCLUSION

¶24 We hold that Johns has not demonstrated a due process violation in the District Court's imposition of restitution. The judgment is affirmed.

/S/ BETH BAKER

We Concur:

/S/ MIKE McGRATH
/S/ JAMES JEREMIAH SHEA
/S/ DIRK M. SANDEFUR
/S/ JIM RICE

Justice Laurie McKinnon, dissenting.

¶25 In ruling Johns's "brief did not request an evidentiary hearing on the factual basis for any other amounts claimed," the Court engages in a highly selective and altogether incomplete reading of Johns's brief in order to arrive at the conclusion that Johns failed to preserve a due process challenge to the lack of an evidentiary hearing. Opinion, ¶ 14. The Court fails to comprehend the underlying connection between the legal basis of Johns's argument that litigation costs were not an appropriate basis for restitution and the factual argument that the amounts claimed included these inappropriate expenses. Further, the Court ignores that the District Court's order on restitution was dispositive (in other words, final) on both objections and, therefore, the District Court's invitation for Johns to file "additional" objections does not require Johns to, again, make the same arguments and request for a hearing. Opinion, ¶ 23. I would remand for a hearing to allow Johns to establish what costs were attributable to actual recovery of the money and what costs were in furtherance of litigation. This can only be done in an evidentiary hearing. Further, although Johns's only request is for an evidentiary hearing to establish there were inappropriate costs ordered in furtherance of litigation, I find it unfathomable that a criminal defendant, as here, could be made to pay the costs of prosecuting the case against her simply because the Missoula County Attorney's Office did not have adequate resources to investigate and litigate its case, therefore requiring it to rely on the staff of Opportunity Bank to develop its case. This question, however, is not currently before the Court as Johns appropriately only asks for an evidentiary hearing to establish that there were, *in fact*, costs awarded which would support the legal basis for such a claim.

¶26 Johns first brought the need for a hearing to the attention of the Court on law and motion day held October 20, 2016, when her attorney stated: "Your honor this matter is set for sentencing. However, upon reviewing the presentence investigation report, we do have some issues with the amount of restitution. So we would ask the court to set a hearing on restitution." The Court inquired as to Johns's issue with restitution and Johns's attorney replied as follows:

> Your Honor what the issue is is that, at the trial, the evidence that – that the state put on indicated that it was seventy-two hundred dollars that was supposedly taken from the bank. Then the bank has filed a lengthy affidavit in which it states the costs of its investigation to the tune of $22,000.00. And so for that reason, we would like to have a hearing on this issue of the investigation, both for in terms of the amount of time that it took, the results that were achieved, and the rate of – of pay that they're saying it cost them to conduct this investigation.

¶27 The State indicated that it had brought a representative from the bank to the hearing to testify as to the bank's investigation, but the State did not know "if this is something the court wanted to have a hearing [on] during law and motion or if you'd like to set a separate date." The Court inquired of Johns's counsel the basis for raising the restitution issue, asking "you're not disputing the legal basis to recover those costs, just the amount of the costs . . . ?" Johns's attorney replied: "We are -- we also are going to challenge the legal authority for it." The Court ruled that the parties should file briefs on the amount of restitution sought, "how that's related to the loss," and to provide the legal basis supporting their positions based on Montana law and law from other jurisdictions. The District Court further held, "And then we'll have to have the hearing if there's a factual dispute about the underlying amount."

¶28 In response to the District Court's order, Johns filed a brief wherein she "objected to the recovery by the Bank of the so-called 'administrative costs'" contained in an affidavit attached to the PSI filed in Johns's case. Johns's brief identified and itemized 28 separate amounts from the affidavit, claimed as "administrative costs." The brief then set forth case law under which she argued none of the 28 separate amounts were recoverable as restitution. Johns further explained the connection between her legal argument that restitution in furtherance of litigation was inappropriate, *and* that a hearing was necessary to determine the amounts associated with these inappropriate litigation costs. Johns explained:

> Clearly, under this case precedence, most if not all of the claimed expenses in this case are not compensable. Time spend [sic] in pursuit of litigation is not compensable. The meeting with Shaun Donovan, the meetings with the lawyer, Geiszler, the witness interviews, the trial preparations, preparing slide shows and videos are not compensable. Under the cases cited above, mileage is compensable but that leaves only the original amounts in 2013 in which the Bank claims $3,925 was spent in the investigation of the crime. There is no detail to determine what was actually done to incur that bill. The witnesses testified at the trial about the investigation that was done. However, it was all done in the ordinary course of the Bank's business. A hearing should be held to determine what portion of the bill was incurred in actually trying to recover the money as opposed to what portion may have been in furtherance of the litigation. Other than the travel costs and potentially some of the original investigative costs, all items requested in the affidavit were done in furtherance of the litigation and should be denied.

¶29 This Court states, "Johns's brief identified one expense in 2013, a claim for $3,925 'spent in the investigation of the crime.'" as the sole basis for her request for a restitution hearing. Opinion, ¶ 14. In all, a fair and plain reading of Johns's brief indicates she objected to 28 specific amounts, loosely categorized in the affidavit attached to the PSI as "administrative costs" and totaling $12,303.80. Therefore, the District Court engaged in

an exhaustive analysis in its order, endeavoring to apply this Court's precedent to each amount identified in Johns's brief, not just the "one expense" of $3,925, but ultimately failing in its refusal to grant a restitution hearing. Opinion, ¶ 14.

¶30 Accordingly, at the time of the court's ruling, both parties repeatedly indicated, orally and in writing, the existence of a factual dispute. [1] Despite this, the District Court issued an "Order on Restitution and Setting Sentencing Hearing" in which it concluded, (1) there was a legal basis to award Opportunity Bank the costs of litigating the case which supported the full amount of restitution requested, and (2) the specific dollar amount for each category of expense were *actual* expenses which should be awarded to the bank. After setting forth the amount owed for each expense, determined without a hearing, the District Court ordered a total restitution amount of $17,891.80. The Court nonetheless finds Johns's request was not preserved because of a saving phrase in the District Court's order that the "Defendant may file any additional exceptions or objections to the amount of restitution ordered above by January 20, 2017." (Emphasis in original.) It is plain that the District Court denied the "legal basis" for Johns's arguments against specific restitution amounts and her asserted *factual* circumstances surrounding the Bank's investigation and the allegedly inflated expenses arising therefrom. Here, there was clearly a factual dispute intertwined with Johns's legal arguments for which

[1] The State echoed Johns's request for a hearing on restitution. See DKT 81 State's Response to Defendant's Opening Brief in Opposition to the State's Claims for Restitution and Request for Hearing. ("The State also REQUESTS A HEARING regarding the factual issues underlying the State's restitution request."). (Emphasis in original.)

Johns was entitled to an evidentiary hearing.[2] Johns requested a hearing and the District Court ruled without a hearing. Johns had no *additional* arguments to make other than what she had already made and preserved on several occasions. Indeed, the State anticipated Johns's argument that much of the expenses claimed by the Bank were not "related to the loss" as it was prepared to put on testimony from a Bank representative addressing that very issue at the law and motion hearing.

¶31 The Court cites to previous cases where we held a defendant failed to preserve a specific objection to a restitution issue. However, in none of those cases were the parties unified in their request for a restitution hearing, as here, and nonetheless deprived of one, as here. The Court cites to *Simpson*, ¶ 12, in which a defendant objected at his sentencing to the amount of restitution but was deemed to have forfeited his more specific claim on appeal that the PSI did not contain adequate information to support a restitution award. *Simpson* is immediately distinguishable as Simpson never requested a restitution hearing and made no objection to the adequacy of the information contained in the PSI. *Simpson*, ¶ 7. So too is *Johnson* distinguishable as Johnson was afforded an evidentiary hearing on restitution. *Johnson*, ¶ 4.

¶32 Finally, this Court faults Johns, after the District Court issued its ruling without a hearing, for choosing "not to file specific objections" or again request a hearing when the District Court invited such objections in its ruling. Opinion, ¶ 15. Such duplicitous objections have never been required to properly preserve issues for this Court's review. "The initial inquiry is whether an issue has been properly preserved for review. An issue

[2] *See generally*, Defendant's Opening Brief in Opposition to the State's Claims for Restitution.

can be preserved in different ways, reflecting different kinds of proceedings." *In re Transfer Terr.*, ¶ 13 (citation omitted). An objection must be sufficiently specific in order to preserve it for purposes of appeal. *Johnson*, ¶ 21 (citing *In re Mental Health of T.J.F.*, 2011 MT 28, ¶ 21, 359 Mont. 213, 248 P.3d 804). None of our precedent indicates a requirement that counsel must object, with specificity or otherwise, at every given opportunity. All that is required is an objection "sufficiently specific" to afford the district court adequate opportunity to address it. *Johnson*, ¶ 21 (citation omitted). Here, such an objection was made, in open court and in Johns's brief, as set forth above.

¶33 The Court also faults Johns for not having questioned a State's witness that the State *sua sponte* had present at the sentencing hearing. The Court concludes that Johns missed the opportunity, gratuitously created by the State, to question the witness regarding restitution amounts. The Court uses this additional lost opportunity for Johns to object to restitution to buttress its conclusion that Johns failed to make a *specific* objection. Opinion, ¶ 16. However, the Court misconstrues the record and the underlying legal and factual basis of Johns's objection and arguments. Undisputedly, the hearing was for sentencing *only*. The restitution hearing had earlier been dispensed with by the District Court's order. While restitution hearings are sometimes held at the same time as sentencing hearings, here the District Court chose to consider restitution separately. In fact, the parties had jointly suggested that the restitution hearing be held at a different time from sentencing because of the hearing's anticipated length and complexity. Accordingly, when Johns was asked by the District Court at sentencing regarding the PSI restitution amount, Johns preserved her earlier objections and argument

on restitution by stating, "[a]nd for the record, we still oppose and object to the restitution even in the new amount." This record demonstrates an understanding between the parties and the court that the District Court had previously disposed of Johns's arguments and Johns was, at the time of the final sentencing hearing, preserving those objections. Knowing that even had the District Court entertained an evidentiary hearing on restitution at sentencing it would be revisiting the same arguments Johns previously had made, Johns relied on her prior objections. The Court focuses on the proverbial tree, requiring a "specific objection," and fails to comprehend the entire record. Opinion, ¶ 15. Moreover, I disagree with the Court's conclusion that the State's gratuitous presentation of a witness can be used, under the circumstances here, to find an objection was not preserved. Johns's counsel would have been unprepared to conduct a lengthy and complicated restitution hearing under these circumstances, and the Court's suggestion that she should have done so to preserve her objection is, at best, ill-conceived.

¶34 The "forest," here, is that a criminal defendant may not be made, in contravention of § 46-18-243, MCA, and our case law, financially responsible for the State's prosecution costs. The "forest," here, is also that Johns's objection was rooted in both law and facts, the latter requiring an evidentiary hearing. However, when the District Court disposed of Johns's legal arguments it also disposed of the factual issues, without an evidentiary hearing, because it found the costs incurred by the bank were appropriate items of restitution under § 46-18-243, MCA. Johns's argument was rooted in her objection that she not be held accountable for the costs of her prosecution. Johns was entitled to an evidentiary hearing to establish amounts incurred in furtherance of

litigation, which are not reimbursable pursuant to § 46-18-243(1)(a) and (d), MCA. However, the District Court found that the total costs which were requested by the bank were proper amounts of restitution. The Court fails to recognize these distinctions and instead chooses to find the request for hearing was not preserved. However, to deny Johns's request because, in the end, she was not the one holding the ball or because she was last to be tagged, distorts the record and Johns's arguments. The Court's steadfast refusal, on this record, to remand for an evidentiary hearing is troublesome, particularly when the amount of restitution is nearly three times the amount Johns was convicted of stealing.

¶35 To the extent the Court refuses Johns an evidentiary hearing to determine what costs are associated with her prosecution, I dissent.

/S/ LAURIE McKINNON

Justice Ingrid Gustafson joins in the dissenting Opinion of Justice McKinnon.

/S/ INGRID GUSTAFSON