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**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1060**

State of Minnesota,
Respondent,

vs.

Cory Daniel Bell,
Appellant.

**Filed February 19, 2013
Affirmed as modified
Klaphake, Judge***

Sherburne County District Court
File No. 71-CR-09-2113

Lori Swanson, Attorney General, Matthew Frank, Assistant Attorney General, St. Paul, Minnesota; and

Kathleen A. Heaney, Sherburne County Attorney, Tim Sime, Assistant County Attorney, Elk River, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Michael W. Kunkel, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Chutich, Presiding Judge; Hudson, Judge; and Klaphake, Judge.

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

UNPUBLISHED OPINION

KLAPHAKE, Judge

Appellant Cory Daniel Bell challenges the district court's \$36,409.30 restitution award following his conviction of first-degree criminal sexual conduct. He claims that the district court erred by awarding restitution to the victim for her home mortgage payments, costs of purchasing new furniture, and other household and moving expenses. We modify the award to \$33,696.62 because, with the exception of \$656.01 claimed for the victim's bed, the victim's \$3,368.69 claim for furniture was unrelated to appellant's criminal conduct and was therefore not compensable as restitution; we affirm the remainder of the award, because the other claimed items are compensable losses for purposes of awarding restitution.

DECISION

A crime victim may recover restitution following the offender's conviction. Minn. Stat. § 611A.04, subd. 1(a) (2010). The victim's "request for *restitution may include, but is not limited to, any out-of-pocket losses resulting from the crime*, including medical and therapy costs, replacement of wages and services, . . . and funeral expenses." *Id.* (emphasis added). "[A] loss claimed as an item of restitution by a crime victim must have some factual relationship to the crime committed—a compensable loss must be 'directly caused by the conduct for which the defendant was convicted.'" *State v. Nelson*, 796 N.W.2d 343, 347 (Minn. App. 2011) (quoting *State v. Latimer*, 604 N.W.2d 103, 105 (Minn. App. 1999)); see *State v. Thole*, 614 N.W.2d 231, 234 (Minn. App. 2000) (stating that restitution order must demonstrate "a factual basis for the amount awarded by

showing the nature and amount of the losses with reasonable specificity”). The state bears the burden of demonstrating the amount of claimed loss and “the appropriateness of a particular type of restitution.” Minn. Stat. § 611A.045, subd. 3(a) (2010). If the amount of restitution is disputed, it must be proved by a preponderance of evidence. *Id.* “A district court[] order for restitution is reviewed under an abuse of discretion standard. But determining whether an item meets the statutory requirements for restitution is a question of law that is fully reviewable by the appellate court.” *Nelson*, 796 N.W.2d at 346-47 (quotation omitted); *see also State v. Tenerelli*, 598 N.W.2d 668, 671 (Minn. 1999).

In 2006, appellant sexually assaulted L.H. in her home while her five-year-old child slept in another room. She was awakened when appellant smashed her head into a pillow, suffocating her, and held a knife to her neck. Just before she lost consciousness, appellant released her but said that if she moved he would kill her, and if she said anything he would kill her. He then committed multiple sex acts on her, brandishing the knife when she was reluctant to comply. He also bit her breast. Near the end of the assault, appellant threatened to return and kill L.H. if she told anyone, asked her to admit that she wanted him to return, and when she replied negatively, held the knife to her neck until she said, “Yes, I want you to come back.” As he went out the upper-level patio door, appellant told L.H. that if she said anything to anyone he would come back and kill her. Soon after, L.H. called the police. The next evening, an intruder who matched appellant’s description attempted to reenter L.H.’s house through the same upper-level door that had been used by appellant the night before. Police installed an alarm system

and staked out the house, and L.H.'s family and friends stayed with her in the home for two weeks. After two weeks, L.H. could no longer bear to live in her home, and she moved out, leaving the bulk of her personal property.

Two years after the crime, appellant was apprehended for another crime, was linked by DNA evidence to the attack on L.H., and was tried and convicted of first-degree criminal sexual conduct, first-degree burglary, and second-degree assault for the attack on L.H.

L.H. testified that appellant's brutal physical assault caused her such psychological trauma that she had to move from her home. At the time of the restitution hearing, L.H. had received counseling for six years. After leaving her home, L.H. resided in other places that she testified "cost much more than [her] home," although she continued to pay the mortgage and other fixed expenses associated with the home. She offered documentary evidence to support her claimed amounts for her monthly mortgage payment, utilities, telephone, and U-haul rental for moving some of her personal property. Appellant asserts that the claimed items of restitution lack a sufficient causal link to the criminal act to constitute a compensable loss under the restitution statute.

As provided by section 611A.04, subdivision 1(a), L.H. could recover losses that "resulted from" appellant's criminal conduct. The statutory language would thus permit restitution to be awarded for losses such as mortgage payments and other losses inexorably linked to psychological trauma, as long as they "resulted from" appellant's criminal conduct. *See Jackson v. Mortg. Elec. Registration Sys., Inc.*, 770 N.W.2d 487, 496 (Minn. 2009) (requiring examination of statute's plain language in application of

statute); *Owens v. Water Gremlin Co.*, 605 N.W.2d 733, 736 (Minn. 2000) (stating that “[i]f the words of the statute are clear and free from all ambiguity, further construction is neither necessary nor permitted”). The statute is broadly drafted to permit recovery for “any” loss, including “but . . . not limited to” out-of-pocket losses, if the loss “result[s] from the crime.” Minn. Stat. § 611A.04, subd. 1.

While not every crime would result in the need for the victim to move residences, the particular facts of this case establish a direct link between the crime and the victim’s need to move. Those facts include the severity and intrusiveness of the physical attack, appellant’s threats, appellant’s insistence that L.H. ask him to return, appellant’s likely return to the home on the night after the attack, L.H.’s vulnerable state living alone in the home with a five-year-old daughter, and appellant’s status of remaining at large for two years following the attack. Under the plain language of section 611A.04, subdivision 1(a), the mortgage and other household expenses were compensable as restitution because they were for out-of-pocket expenses that directly resulted from appellant’s crimes. *See, e.g., State v. O’Brien*, 459 N.W.2d 131, 132 (Minn. App. 1990) (upholding restitution award on perjury conviction for untruthful statement on groom’s marriage license application; restitution award included economic losses incurred for wedding ceremony and reception, and clothing items for bride’s parents).

Appellant claims that the language of section 611A.045, subdivision 1(a)(1) (2010), conflicts with section 611A.04, because that section requires the court, “in determining whether to order restitution” to consider “the amount of economic loss sustained by the victim as a result of the offense.” Appellant argues that this language

limits restitution to economic-based losses only. In *State v. Colsch*, 579 N.W.2d 482, 484 (Minn. App. 1998), this court read the two sections together to hold that because restitution is “limited to recovery of economic damages sustained by the victim,” the victim could not recover for pain and suffering damages that had no specific economic value.¹ But *Colsch* is not controlling here because L.H.’s claimed losses were economic; due to the psychological effects of appellant’s crimes, she incurred particular economic costs: the costs of moving to a new home and associated expenses until the original home was sold. Sections 611A.04 and 611A.045 can be read to mean that once an item of loss is compensable, it must be reduced to a sum certain—an “economic loss,” rather than some other subjective, punitive, or noneconomic type of loss, such as pain and suffering, as was the case in *Colsch*. Section 611A.04 does not limit the compensable harm to the victim to economic *harm* only; it permits the victim to recover *any* out-of-pocket expenses that “resulted from the crime.” We conclude that consistent with the plain language and purpose of the statute, which is remedial, L.H.’s claimed expenses for mortgage payments, moving expenses, and other expenses associated with maintaining the home until it was sold were compensable as items of restitution. See *State v. Terpstra*, 546 N.W.2d 280, 283 (Minn. 1996) (“Restitution is primarily intended to compensate a crime victim for his or her loss by restoring the victim to his or her original financial condition.”); *In re Welfare of J.A.D.*, 603 N.W.2d 844, 846 (Minn. App. 1999)

¹ A crime victim who is unable to obtain non-economic damages under the restitution statute may pursue a separate civil action to obtain damages. See Minn. Stat. § 611A.05 (2010) (stating that restitution penalty “shall not be construed to deprive an injured person of the right to recover from the offender damages sustained by reason of the violation of such law”).

(“Compensation of the crime victim for his or her loss is accomplished by restoring the victim to their original financial condition.”).

We cannot reach the same conclusion with regard to the inclusion of L.H.’s furniture as a proper item of restitution, however. Excluding L.H.’s bed, which was the location of the sexual assault, we conclude that the required causal link does not exist between the harm caused to L.H. by the crime and her decision to abandon her furniture and purchase new furniture. Although L.H.’s claimed basis for restitution of the furniture was that the whole home had been “violated,” such a conclusion is unsupported by the facts, except with reference to L.H.’s bed. While L.H.’s need to move “resulted” from the crime, the link between the crime and L.H.’s furniture is too attenuated to be compensable. L.H. could have moved her furniture to her new residence without exposure of any further risk of harm to herself or her family. Under these circumstances, we modify the district court’s restitution award by the following calculation: we reduce the \$3,368.69 amount that L.H. claimed as restitution for furniture by the \$656.01 that she claimed for her bed, arriving at a net impermissible furniture restitution claim of \$2,712.68. We then deduct this amount from the district court’s \$36,409.30 restitution award, for a modified restitution award of \$33,696.62.

Finally, we note that section § 611A.045, subdivision 1(a), states that the district court “shall” consider “the income, resources, and obligations of the defendant” in determining restitution. Here, appellant, who retained private counsel, did not submit any evidence at the restitution hearing to demonstrate his ability to pay restitution, although he was 19 years old at the time of the offense and was sentenced to a 244-month prison

term. The district court's restitution order states that the court was aware that appellant was incarcerated, but that appellant "provided no documentation of his ability to pay any restitution ordered in this case." Appellant had the burden to "produce evidence if [he] intend[ed] to challenge the amount of restitution." Minn. Stat. § 611A.045, subd. 3. The district court therefore did not err by declining to further consider appellant's financial ability to pay restitution.

Affirmed as modified.