

**STATE OF MINNESOTA
IN COURT OF APPEALS
A21-1270**

State of Minnesota,
Respondent,

vs.

Michael Phillip Cloutier,
Appellant.

**Filed February 22, 2022
Affirmed in part and remanded
Jesson, Judge**

Hennepin County District Court
File No. 27-CR-20-4377

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

Michael O. Freeman, Hennepin County Attorney, Nicole Cornale, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Sean Michael McGuire, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Bryan, Presiding Judge; Jesson, Judge; and Rodenberg, Judge.*

SYLLABUS

The state does not bear the burden of producing evidence of or proving a defendant's ability to pay restitution.

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

OPINION

JESSON, Judge

After sentencing appellant, the district court ordered him to pay \$7,500 in restitution for funeral expenses. Appellant presently has no income but may be eligible for some Social Security income when he is released from prison. Appellant challenges the district court's restitution order, arguing that (1) the state did not carry its burden to show that he had the ability to pay restitution, (2) the district court failed to consider his ability to pay and made clearly erroneous fact findings, and (3) the district court failed to specify a payment schedule. Because it is not the state's burden to produce evidence of or prove a defendant's ability to pay restitution and because the district court adequately considered appellant's ability to pay, we affirm on those two issues. But we remand on the third issue for the district court to assign responsibility to a proper person for developing a payment schedule or structure for appellant.

FACTS

Appellant Michael Phillip Cloutier stabbed his girlfriend (the victim) in the neck and chest in February 2020. When the victim later died, respondent State of Minnesota amended its original complaint to charge Cloutier with second-degree intentional murder and second-degree unintentional felony murder. Cloutier pleaded guilty to second-degree unintentional felony murder.

The district court ordered a presentence investigation. With regard to Cloutier's recent work history, the presentence-investigation report noted that he had an emergency-medical-technician certification, which he maintained for some time. He also

completed the personal-care-attendant portion of a community health and medical program at a community college so that he could serve as the victim's personal care attendant. He earned \$10 per hour as the victim's personal care attendant, acted as the victim's payee for Social Security Disability benefits, and accepted other temporary job assignments occasionally to increase his income. He was intermittently employed in various jobs from 2015 to 2018. However, at the time of the report, he had no income or savings.

Looking further back into Cloutier's employment history, the report noted that he was in the army for about two years before being honorably discharged. But he did not qualify for a military pension because he terminated service early. Cloutier then worked for the United States Postal Service for a short time until joining the Chicago Fire Department, where he worked for 15 years. He later liquidated his fire-department pension during a divorce settlement with his ex-wife.

At the sentencing hearing, the district court convicted Cloutier and sentenced him to 162 months in prison, at least two-thirds of which (or nine years) Cloutier would serve in prison. Cloutier was 66 years old at sentencing. The district court also ordered Cloutier to pay \$7,500 in restitution to the Minnesota Crime Victims Reparations Board for its payment of funeral expenses to the victim's family.

Cloutier moved the district court to eliminate or reduce the restitution order, arguing that he will be unable to pay it. In both his supporting affidavit and his testimony at a restitution hearing, Cloutier asserted that he has no job in prison, cannot collect Social Security benefits while in prison, and has no assets, including any "retirement accounts."

The district court denied appellant’s motion, upholding the restitution order and amount. It stated that there is no reason Cloutier cannot work while in prison and that “there is no deadline for the restitution to be paid in this case.” And it reasoned that Cloutier would receive Social Security income and “presumably” pension income from which he could make small payments after being released from prison. Cloutier appeals.

ISSUES

- I. Is it the state’s burden to produce evidence of or prove a defendant’s ability to pay restitution?
- II. Did the district court adequately consider Cloutier’s ability to pay?
- III. Did the district court comply with the statutory requirement that it include a provision for a payment schedule in its restitution order?

ANALYSIS

Cloutier contends that the state bears the burden to prove his ability to pay restitution and that the state did not meet that burden here. He further argues that the district court abused its discretion by failing to adequately consider his ability to pay and failing to order a payment schedule. We address each of these arguments in turn. In doing so, we review the district court’s findings of fact for clear error and its ultimate order of restitution for an abuse of discretion. *State v. Andersen*, 871 N.W.2d 910, 913 (Minn. 2015).

I. The state does not bear the burden of producing evidence of or proving a defendant’s ability to pay restitution.

The question of whether the state bears the burden of producing evidence of or proving a defendant’s ability to pay requires us to analyze Minnesota Statutes section

611A.05 (2018) (the restitution statute). We review this issue of statutory interpretation de novo. *See State v. Wigham*, 967 N.W.2d 657, 662 (Minn. 2021) (interpreting restitution statute). Our goal in interpreting statutes is to ascertain and effectuate the legislature’s intent. *Roberts v. State*, 945 N.W.2d 850, 853 (Minn. 2020). When interpreting a statute, we first determine whether it is ambiguous, meaning it is subject to “more than one reasonable interpretation.” *State v. Gibson*, 945 N.W.2d 855, 857 (Minn. 2020) (quotation omitted). We look to the plain meaning and context of the statute’s language to determine whether it is ambiguous. *Id.* at 857-58. If it is unambiguous, we apply the statute’s plain meaning without resorting to further statutory construction. Minn. Stat. § 654.16 (2020); *State v. Barrientos*, 837 N.W.2d 294, 298 (Minn. 2013).

The portion of the restitution statute at issue here provides that a defendant has the initial burdens to (1) contest restitution and (2) produce evidence, in the form of an affidavit, stating his challenges to restitution. Minn. Stat. § 611A.045, subd. 3(a) (2020). If the defendant carries these burdens, the burden shifts to the state to “demonstrat[e] the amount of loss sustained by a victim as a result of the offense and the appropriateness of a particular type of restitution.” *Id.*; *see also State v. Thole*, 614 N.W.2d 231, 235 (Minn. App. 2000) (reiterating these statutory burdens).

Applying our rules of statutory interpretation, we determine that the restitution statute unambiguously does not place the burden of producing evidence of or proving the defendant’s ability to pay on the state. The statute’s plain language places two burdens on the state after the defendant carries the initial burden. First, the state must “demonstrat[e] the amount of loss sustained by a victim,” which simply means that the state must show

the monetary value or other quantity of the victim’s damages. Minn. Stat. § 611A.045, subd. 3(a). Second, the state must demonstrate “the appropriateness of a *particular type* of restitution.” *Id.* (emphasis added); *State v. Keehn*, 554 N.W.2d 405, 407 (Minn. App. 1996) (“The burden of substantiating the . . . type of restitution is on the prosecution.”), *rev. denied* (Minn. Dec. 17, 1996). Importantly, this second burden does not require the state to produce evidence of or prove the appropriateness of restitution generally. Instead, it requires the state to demonstrate that the *type* of restitution that is requested is an appropriate *form* of restitution. *See, e.g.*, Minn. Stat. § 611A.04, subd. 1 (2020) (stating that restitution requests may include, but are not limited to, medical, therapy, lost-wage, funeral, and other expenses); *Keehn*, 554 N.W.2d at 407 (noting that various kinds of losses may be compensated through restitution). Restitution need not always be financial. It often comes in the form of reimbursing certain expenses, but in some cases, it may be, for example, repairing a damaged item or repainting a marred building. The state must demonstrate that, given the facts of the case, the type of restitution requested is appropriate. In sum, while the state bears the burden of demonstrating the amount of loss and appropriateness of the type of restitution, the state does not bear the burden of producing evidence of or proving the defendant’s ability to pay restitution.

We further note that the only time the restitution statute refers to the defendant’s ability to pay is when it lists factors that the district court must consider in determining whether to order restitution. Minn. Stat. § 611A.045, subd. 1(a) (2020) (“The court, *in determining whether to order restitution and the amount of the restitution*, shall consider the following factors: (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.” (Emphasis added.)). The language “income, resources, and obligations of the defendant”—what Minnesota appellate courts term the defendant’s ability to pay—appears nowhere else in the statute. In other words, what the district court must consider in determining whether to order restitution and what the state must prove in advocating for restitution are different. This supports our plain-language understanding that the restitution statute does not place the burden of producing evidence of or proving the defendant’s ability to pay on the state.¹

And finally, as a practical matter, it is the defendant, not the state, who will have information about the defendant’s own ability to pay. In contrast, the evidence relevant to the state’s burdens—showing the victim’s (or victim’s family’s) damages and the appropriateness of a type of restitution—is more readily accessible to the state because it is often working more closely with the victim (or victim’s family). To hold otherwise and

¹ Although the restitution statute’s plain language alone persuades us that the state does not bear this burden, we also observe that our interpretation is consistent with prior Minnesota caselaw. Albeit in a nonprecedential opinion, we concluded in *State v. Gboeah* that the state does not bear the burden of proving a defendant’s ability to pay. No. A19-0796, 2020 WL 522183, at *2 (Minn. App. Feb. 3, 2020). Because *Gboeah* addressed the precise issue we consider here, we cite it for its persuasive value. Minn. R. Civ. App. P. 136.01, subd. 1(c) (“[N]onprecedential opinions may be cited as persuasive authority.”). And, although this issue was alluded to in *Wigham*, it was not directly before the supreme court in that case. See generally *Wigham*, 967 N.W.2d 657. Nevertheless, we note that the supreme court nowhere suggested that producing evidence about or proving the defendant’s ability to pay is the state’s responsibility. *Id.* Instead, the supreme court discussed various potential sources of that information, including presentence-investigation reports and defendants’ own testimony regarding their ability to pay. *Id.* at 665.

place the burden on the state would lead to discovery requests—a process not contemplated by the restitution statute.²

Still, Cloutier argues that our prior decision in *Thole* supports his position. But in *Thole*, we merely restated and paraphrased the statutory language setting out the state’s burden: “the prosecution bears the burden of proving the propriety of the restitution.” 614 N.W.3d at 235. Although that paraphrase provides room for appellant’s interpretation, the plain language of the statute trumps that interpretation. Minn. Stat. § 611A.045, subd. 3(a). That language places on the state only the burdens to show, as a factual matter, the victim’s damages and the propriety of the type of restitution. Neither of those showings involves producing evidence of or proving the defendant’s ability to pay.

We therefore hold that the restitution statute does not place on the state the burden of producing evidence of or proving a defendant’s ability to pay restitution.

II. The district court adequately considered Cloutier’s ability to pay restitution.

To address the ability-to-pay issue, we again begin with the restitution statute, which requires the district court to “consider . . . the income, resources, and obligations,” or ability to pay, of the defendant when determining restitution. *Id.*, subd. 1(a). Although the district court need not make specific findings on the defendant’s income, resources, and obligations, it must “expressly state, either orally or in writing, that it has considered” those factors. *Wigham*, 967 N.W.2d at 659; *see also State v. Miller*, 842 N.W.2d 474, 479 (Minn. App. 2014), *rev. denied* (Minn. Apr. 15, 2014). And the record must contain sufficient

² Minnesota Rule of Criminal Procedure 9 governs discovery during criminal cases, but there is no rule governing discovery after conviction.

evidence about those factors to facilitate the district court's consideration of them. *Wigham*, 967 N.W.2d at 659.

Here, the district court explicitly found that Cloutier may be unable to pay restitution while incarcerated if he does not work. But it also noted that there was no evidence that Cloutier could not work and earn money while incarcerated. And it found that Cloutier would receive Social Security income upon release and would be able to make "small payments" from that money. The record supports these findings. Further, the amount Cloutier must pay is relatively small compared to other cases. *See, e.g., id.* at 660 (recounting that appellant was ordered to pay \$87,500); *Steinbuch v. State*, 589 N.W.2d 464, 466 (Minn. 1999) (affirming \$30,762.28 award); *State v. Maudi*, 537 N.W.2d 280, 285-86 (Minn. 1995) (requiring defendant to pay \$147,251.27 despite incarceration). Because the district court made explicit findings about Cloutier's ability to pay and the record contains sufficient evidence to support those findings, we conclude that the district court did not abuse its discretion in its consideration of Cloutier's ability to pay.

Still, Cloutier argues that the district court's findings that (1) there was no testimony about his pensions, (2) the presentence-investigation report stated that he held jobs that "traditionally pay pensions," and (3) he would "presumably" receive pension income are clearly erroneous. Because the evidence in the record contradicts these three findings, we agree with Cloutier. But error without prejudice is not grounds for reversal. *Loth v. Loth*, 35 N.W.2d 542, 546 (Minn. 1949). The district court's other findings, including that (1) there is no reason Cloutier cannot work while in prison and (2) Cloutier will receive Social Security income upon his release, are supported in the record. Those findings show

that the district court considered Cloutier's ability to pay. And, in *Wigham*, the supreme court reiterated that the restitution statute allows flexibility in how the district court considers the defendant's ability to pay. *Wigham*, 967 N.W.2d at 663. Thus, we discern no reversible error.

III. We remand to the district court for it to assign responsibility for developing a payment schedule or structure for Cloutier.

Turning finally to Cloutier's argument that the district court failed to establish a payment schedule, the restitution statute provides that the district court "shall include in every restitution order a provision requiring a payment schedule or structure." Minn. Stat. § 611A.045, subd. 2a (2020). The district court may also assign responsibility for developing a payment schedule to "the court administrator, a probation officer, or another designated person" who must consider information supplied by the defendant in setting the schedule. *Id.* In *Wigham*, the supreme court stated that a restitution order must provide either a payment schedule or structure *or* assign responsibility for developing a schedule or structure to a qualified person. 967 N.W.2d at 662, 666.

Here, the district court declined to impose a deadline for Cloutier to pay restitution. Further, it stated that Cloutier will be able to make small payments—implying an installment schedule—from his Social Security income upon release. But stating that there is no deadline for restitution to be paid and merely implying an installment schedule does not comply with the restitution statute's requirement for a payment schedule or structure. Nor did the district court utilize the alternative approach: to assign responsibility to another person to create a payment schedule or structure for Cloutier. We recognize the district

court's efforts to impose a reasonable requirement on Cloutier given his imprisonment and limited assets. And we understand the district court's reticence to set a payment schedule years in advance of Cloutier's release. We finally observe that the district court did not have the benefit of guidance from the supreme court's decision in *Wigham*. We therefore remand on this narrow issue for the district court to assign responsibility for creating a payment schedule or structure to a proper person under the restitution statute and *Wigham*.

DECISION

We hold that the state does not bear the burden of producing evidence of or proving Cloutier's ability to pay restitution. And on this record, the district court adequately considered Cloutier's ability to pay and therefore did not abuse its discretion on that issue. Finally, we remand to the district court for the limited purpose of assigning responsibility to a proper person for developing a payment schedule or structure for Cloutier.

Affirmed in part and remanded.