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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1830**

State of Minnesota,
Respondent,

vs.

Jennifer Ann Shurtz,
Appellant.

**Filed August 27, 2012
Affirmed
Schellhas, Judge**

Fillmore County District Court
File No. 23-CR-10-594

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Brett A. Corson, Fillmore County Attorney, Marla J. Stanton, Assistant County Attorney, Preston, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Jennifer L. Lauermann, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Hudson, Presiding Judge; Peterson, Judge; and Schellhas, Judge.

UNPUBLISHED OPINION

SCHELLHAS, Judge

Following appellant-mother's *Alford* plea to depriving father custodial or parental rights in violation of Minn. Stat. § 609.26, subd. 1(3) (2008), the district court ordered

appellant-mother to pay \$8,120 in restitution for father's legal fees. Appellant-mother argues that the court abused its discretion because not all of father's legal fees were incurred as a result of the offense and the court failed to consider her ability to pay. We affirm.

FACTS

Appellant-mother Jennifer Shurtz and father Dustin Rueb are the parents of a child born on October 20, 2005. In 2008, a marriage-dissolution judgment granted Shurtz and Rueb joint legal and physical custody of the child. On June 2, 2010, Rueb sought legal counsel because Shurtz denied him parenting time with the child. Rueb's legal counsel initiated post-dissolution proceedings in district court. When Shurtz continued to deny Rueb his parenting time, Rueb's legal counsel advised him to contact law enforcement.

On July 2, based on Shurtz's actions from about June 6 through July 1, respondent State of Minnesota charged mother with depriving another of custodial or parental rights in violation of a court order and depriving another of custodial or parental rights before the issuance of a court order, in violation of Minn. Stat. § 609.26, subd. 1(3), (4) (2008). At the arraignment hearing, the district court ordered Shurtz to abide by the parenting-time plan in the dissolution judgment, but Shurtz continued to deny Rueb parenting time.

On July 28, at a civil hearing on Rueb's motion for compensatory parenting time or a modification of custody, the district court found that Shurtz "chronically and unreasonably failed to comply with the court ordered parenting time that was agreed upon," and granted Rueb temporary sole physical custody of the child, subject to supervised parenting time by Shurtz.

In December, after Shurtz moved the district court to dismiss both criminal counts against her, the court dismissed the second count of depriving another of custodial or parental rights before the issuance of a court order. On February 28, 2011, pursuant to a plea agreement, Shurtz entered an *Alford* plea to depriving another of custodial or parental rights in violation of a court order. In March 2011, Rueb and his attorney on his behalf submitted restitution affidavits that included an itemized attorney billing statement. The attorney stated in his affidavit that he began representing Rueb on June 2, 2010, due to Shurtz's denial of Rueb's parenting time with his child. The attorney bill itemized work and charges in June and July 2010 that totaled \$8,120. At Shurtz's sentencing in April 2011, the state requested that Shurtz be ordered to pay restitution to Rueb in the amount of attorney fees, \$8,120, incurred as a direct result of Shurtz's actions. The court stayed adjudication of guilt, placed Shurtz on supervised probation for two years with several conditions, and reserved the issue of restitution for 90 days pending the submission of an amended affidavit addressing Rueb's attorney fees. Rueb's attorney subsequently submitted a second affidavit.

On July 11, the district court held a hearing on the restitution issue. Rueb testified that he hired an attorney because Shurtz refused to allow him parenting time with his child. Rueb said he first attempted to resolve the issue directly with Shurtz, but she refused to reason with him. He said he sought legal counsel because he wanted to enforce his rights to visit and parent his child. Rueb testified that he incurred \$8,120 in legal fees related to the custody dispute caused by Shurtz's actions.

The district court granted the state's requested restitution, finding that "[Rueb] incurred reasonable attorney's fees and expenses of \$8,120 to assert his parenting rights and protect the rights of his [child]"; that Shurtz "is a 28-year-old female in generally good health who is within slightly over a year of anticipated completion of a four-year paralegal degree"; that "the bulk of [Shurtz's] needs are met through government assistance"; that Shurtz's "monthly expenses for which she is responsible total less than \$450"; and that Shurtz's "unemployment is self-limited and voluntary." Based on its findings of fact, the court concluded that Shurtz "is able to pay restitution to the victim in the sum requested," and ordered her to pay \$8,120 to Rueb in monthly installments of \$50.

This appeal follows.

DECISION

Amount of Restitution

Shurtz challenges the amount of restitution that the district court ordered her to pay Rueb, asserting that the court should not have included attorney fees incurred from June 2 through June 5, 2010. Shurtz asserts that these fees did not result from her criminal actions because the complaint alleged that her actions occurred between June 6 and July 1. She argues that "[b]ecause at least some of the charges preceded the offense dates, the attorney's fees that were incurred prior to the incidents constituting [Shurtz's] offense cannot be said to have occurred as a result of the offense." (Emphasis omitted.) Shurtz's argument is unavailing.

“A request for restitution may include, but is not limited to, any out-of-pocket losses resulting from the crime, including . . . expenses incurred to return a child who was a victim of a crime under section 609.26 to the child’s parents or lawful custodian” Minn. Stat. § 611A.04, subd. 1(a) (2008). “[T]his broad language gives the [district] court significant discretion to award restitution for a victim’s expenses.” *State v. Tenerelli*, 598 N.W.2d 668, 671 (Minn. 1999). “[T]he legislature has specifically expressed its intent that victims” of offenders convicted of violating section 609.26 “recover costs incurred in recovering” their child. *State v. Maldi*, 537 N.W.2d 280, 284 (Minn. 1995). Section 609.26 provides for restitution upon a conviction: “In addition to any sentence imposed, the court may assess any expense incurred in returning the child against any person convicted of violating this section.” Minn. Stat. § 609.26, subd. 4 (2008). “The broad language of Minn. Stat. § 609.26, subd. 4[,] strongly indicates a legislative intent to give wide discretion to the sentencing court when ordering restitution of expenses incurred in returning a child to the custodial parent.” *Maldi*, 537 N.W.2d at 284.

“The burden of demonstrating the amount of loss sustained by a victim as a result of the offense and the appropriateness of a particular type of restitution is on the prosecution.” Minn. Stat. § 611A.045, subd. 3(a) (2008). Once an offender challenges restitution, “the prosecution bears the burden of proving the propriety of the restitution by a preponderance of the evidence.” *State v. Thole*, 614 N.W.2d 231, 235 (Minn. App. 2000). We review a district court’s order for restitution under an abuse-of-discretion standard. *Tenerelli*, 598 N.W.2d at 671. But whether a claimed item of restitution meets

the statutory requirements is a question of law, which we review de novo. *Thole*, 614 N.W.2d at 234.

Here, the district court found that “[Rueb] incurred reasonable attorney’s fees and expenses of \$8,120 to assert his parenting rights and protect the rights of his [child].” The court noted that it reached this finding based on the file; the affidavits of Rueb’s attorney; the transcript of the hearing that took place on July 28, 2010; and Rueb’s testimony at the restitution hearing on July 11, 2011.

Minnesota Statutes section 609.26, subdivision 4, provides that “[i]n addition to any sentence imposed, the court may assess *any expense incurred in returning the child* against any person convicted of violating this section.” (Emphasis added.) In his affidavit, Rueb’s attorney states that the fees charged from June 2 through July were the result of Shurtz’s criminal actions denying Rueb visitation with his child. Rueb’s attorney specifies that “[a]ll of the fees that were incurred from June 2, 2010 until July 8, 2010, stemmed from [Shurtz’s] unilateral decision to terminate [Rueb’s] parenting time thereby depriving him of his custodial rights.” And Rueb testified at the restitution hearing that he sought legal counsel beginning June 2 to seek enforcement of his parental rights under the dissolution court’s judgment. Rueb explained that he sought the help of law enforcement on the advice of his counsel.

Additionally, caselaw does not support Shurtz’s contention that expenses incurred before the date of the offense were not the result of her offense. For example, in *State v. O’Brien*, 459 N.W.2d 131, 132 (Minn. App. 1990), this court affirmed a district court’s restitution order to a putative bride who learned after her marriage ceremony that the

appellant was legally married to his first wife. The restitution affirmed on appeal included costs the putative bride incurred before the wedding ceremony, such as payment for a wedding gown and shoes, a dress for her mother, a suit for her father, and other expenses incurred in planning the event such as music, cake, and flowers. *Id.* at 132–33.

We conclude that the district court did not err by including the legal fees that Rueb incurred from June 2 through June 5 in the total amount of restitution.

Shurtz's Ability to Pay

Shurtz argues that the district court abused its discretion by ordering her to pay \$8,120 in restitution because the court “did not consider [Shurtz’s] limited assets and outstanding debt when determining her ability to pay restitution.” We disagree.

“[I]n determining whether to order restitution and the amount of the restitution, [the district court] 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.” Minn. Stat. § 611A.045, subd. 1(a) (2008). While restitution serves the dual purpose of rehabilitating an offender and compensating a victim, the primary purpose is to compensate the victim. *State v. Fader*, 358 N.W.2d 42, 48 (Minn. 1984).

In *Maidi*, the Minnesota Supreme Court affirmed a restitution award of \$147,251.27, reasoning that the sentencing court properly considered the defendant’s ability to pay because, although he earned only \$6.50 an hour, the order provided that restitution was payable in monthly installments of \$200. 537 N.W.2d at 285–86. The court stated that section

611A.045 is not explicit as to how the court must consider the income, resources, and obligations of the [defendant] when imposing the restitution order. In view of Minn. Stat. § 611A.04, subd. 1(c), however, which permits the court to order partial restitution while permitting the full amount of restitution to be docketed as a civil judgment, we conclude that the legislature intended to give the courts wide flexibility to structure restitution orders that take into account a defendant's ability to pay, including, as the court did here, a reduced monthly payment that is within the defendant's means.

This interpretation is consistent with the legislative history of Minn. Stat. § 611A.045, subd. 1, which indicates the restitution statute was primarily intended to compensate victims.

Id. (footnote omitted).

Here, the district court ordered Shurtz to pay \$8,120 in restitution in monthly installments of \$50. While the court found that Shurtz is unemployed, it also found that she is “voluntarily” unemployed, that her monthly expenses for which she is responsible are \$450, and that the bulk of her needs are met through government assistance.

Concerning Shurtz's ability to pay restitution, the court stated the following:

[Shurtz] is attending school and while she is not working, she only has custody of her son for 50 percent of the time, and the court observes that she is a healthy individual with no impediments to employment. Her school obligations and part-time parenting obligations in the real world do not translate into an inability to find, at a minimum, part-time employment. Millions of single parents with full-time custody of multiple children also attend school and work. [Shurtz's] response that the victim was employed, although he is not now employed apparently, and therefore should pay for his own damages evinces a disregard for the damage she has done in causing him to expend over \$8,000 of monies to assert his right and his child's right to parenting time.

The record shows that the district court carefully considered Shurtz's circumstances, including her income, resources, and financial obligations. And, like the sentencing court in *Maidi*, the court considered Shurtz's ability to pay when it structured the payment of restitution at \$50 per month. Because the court properly considered Shurtz's ability to pay restitution, we conclude that the court did not abuse its discretion by ordering Shurtz to pay \$8,120 in restitution to Rueb.

Affirmed.