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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-2279**

State of Minnesota,
Respondent,

vs.

Ryan Charles Cass,
Appellant.

**Filed January 14, 2013
Affirmed as modified
Crippen, Judge***

Roseau County District Court
File No. 68-CR-10-776

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

Karen M. Foss, Roseau County Attorney, Michael P. Grover, Assistant County Attorney,
Roseau, 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 Johnson, Presiding Judge; Bjorkman, Judge; and
Crippen, Judge.

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

UNPUBLISHED OPINION

CRIPPEN, Judge

Appellant disputes the district court's restitution award, ordering appellant to pay \$52,871.59, both as to its factual basis and as a matter of law. Alternatively, appellant asks for a determination that he received ineffective assistance of counsel because his counsel failed to sufficiently challenge the restitution award. Because there is merit in appellant's assertion that part of the restitution award is improperly based on dismissed charges, we modify the award, but we affirm the district court's factual determinations of losses attributable to appellant's convictions.

FACTS

Appellant Ryan Cass was employed as a front-end manager at Doug's Supermarket (Doug's) in Warroad. He was employed at Doug's for approximately ten years and worked three or four shifts each week. Appellant was in charge of running the front end of the store and keeping track of the registers.

When he was working the cash register, appellant would check customers out, but not actually scan their items. He would either run the item through a price check or press a button to make the register beep. He would then enter one item in the register, a newspaper for example, and estimate a total for all of the customer's items. Appellant would charge the customer the estimated amount, even though the newspaper was the only item entered in the register. When he entered a customer's payment, either by cash or check, the register would show an overage, which was the difference between what appellant charged the customer and the cost of the newspaper. Appellant wrote down the

overage amount for each customer, kept a tally sheet of the total overages, and took that amount out of the register at the end of the day.

In November 2009, C.L., the owner of Doug's, observed appellant checking out customers in this manner and confronted appellant. Appellant admitted to C.L. that he had been "skimming the tills" for about two weeks. In December 2009, appellant was interviewed by an investigator with the Roseau County Sheriff's Department and admitted to stealing from the store.

Appellant was charged with six counts of theft-by-swindle under Minn. Stat. § 609.52, subd. 2(4) (2010), for the time period between May 1, 2007 and November 30, 2009. He pleaded guilty to three counts covering the time period between May 1, 2008 and October 31, 2009. These three counts were each for theft of amounts exceeding \$5,000. In exchange for his plea, the counts against appellant for the time periods between May 1, 2007 and April 30, 2008 and between November 1, 2009 and November 30, 2009 were dismissed. At the plea hearing, appellant agreed to leave the issue of restitution open, with the understanding that his counsel was trying to resolve the issue with the prosecutor. The parties did not reach an agreement on restitution, and the court held a restitution hearing.

At the hearing, C.L. testified about the losses he sustained as a result of appellant's conduct. C.L. acknowledged that he could not prove the cash transactions where money was stolen, but that he did track suspicious transactions on appellant's register when a customer paid with a check. C.L. identified suspicious check transactions as those that fit appellant's admitted method of stealing, e.g., where the transaction was for a small dollar

amount, like a fifty-cent newspaper, but the customer wrote a check for a large amount over the purchase price. C.L. cross-referenced all of the flagged transactions with appellant's timesheet to verify that he was working on the register on that day. C.L. also reviewed surveillance videos to verify the transactions, although he acknowledged that videos were not available for all of the transactions.

Appellant also testified at the restitution hearing and agreed that it was appropriate for him to pay restitution in some amount. He testified that he took approximately \$100 each week for about a year, and he estimated that he stole a total of \$5,000 over that year. Appellant also testified that he believed that a "big portion" of the suspicious-transaction records produced by the state were false. He claimed that he rarely stole money on check transactions and mainly employed his scheme on cash transactions. Finally, appellant claimed that many different employees and managers had access to his register.

At the close of the hearing, the court asked the parties if they wished to submit briefs on any issues raised during the hearing. The state noted that it was requesting restitution on all of the counts originally charged, which included time outside of the time period to which appellant pleaded guilty, and that the state might want to submit a brief on this issue. The court noted that the issue was relevant "except for the fact that I believe this was a plea bargain, so I think you actually dismissed certain charges in exchange for that, but I will allow briefs on that." Appellant's counsel acknowledged that there is caselaw that supports the state's position and agreed that the state could seek restitution outside of the time period of appellant's convictions.

The court ordered appellant to pay \$52,871.59 in restitution, which included \$52,667.35 for the money appellant stole and \$204.24 for C.L.'s mileage expenses to attend court hearings. The court also noted that no cash transactions were accounted for in this total and that it was “a very conservative request for restitution.”

D E C I S I O N

“[District] courts are given broad discretion in awarding restitution.” *State v. Tenerelli*, 598 N.W.2d 668, 671 (Minn. 1999). Although the district court has broad discretion in granting restitution, “the record must provide a factual basis for the amount awarded by showing the nature and amount of the losses with reasonable specificity.” *State v. Thole*, 614 N.W.2d 231, 234 (Minn. App. 2000). The prosecution bears the burden of demonstrating the amount of loss sustained by a victim as a result of the offense. Minn. Stat. § 611A.045, subd. 3(a) (2010). A dispute regarding the proper amount of restitution is resolved by the court by a preponderance of the evidence. *Id.* But the question of whether an item meets the statutory requirements for restitution is a question of law that is fully reviewable by the appellate court. *State v. Nelson*, 796 N.W.2d 343, 346–47 (Minn. App. 2011).

A restitution request “may include, but is not limited to, any out-of-pocket losses resulting from the crime.” Minn. Stat. § 611A.04, subd. 1(a) (2010). “[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.’” *Nelson*, 796 N.W.2d at 347 (quoting *State v. Latimer*, 604 N.W.2d 103, 105 (Minn. App. 1999)).

Appellant argues that there is not a sufficient factual basis to support the finding that he owes \$52,871.59 in restitution because the state's evidence did not distinguish fraudulent check transactions from unusual but legitimate transactions and because he only pleaded guilty to the counts covering the time period between May 2008 and October 2009. Appellant claims that "in providing a factual basis" for his guilty pleas, "he admitted that the amount taken during each of three pled-to time periods was \$5,000." He argues that the total, \$15,000, was the only amount of restitution that was supported by his guilty pleas.

Restitution is not limited to the specific monetary amount set out by the statute under which a defendant was convicted. *State v. Terpstra*, 546 N.W.2d 280, 280 (Minn. 1996). In *Terpstra*, the defendant was convicted of three counts of theft, one count for theft in excess of \$2,500 and two counts for theft between \$500 and \$2,500. *Id.* at 281. The district court ordered the defendant to pay \$45,341 in restitution, and the defendant challenged the amount, arguing that it was in excess of the statutory parameters of the offenses for which he was convicted. *Id.* at 281–82. The supreme court determined that, because the state had shown the amount of restitution by a preponderance of the evidence, the restitution award was not limited to the statutory parameters of the offenses. *Id.* at 283–84.

Similarly here, the state showed by a preponderance of the evidence that appellant stole amounts in excess of the statutory parameters of his convictions. And the state presented a significant amount of evidence supporting its claim that appellant owes \$52,871.59 in restitution to the victim. C.L. testified that he calculated the amount

appellant stole by identifying transactions that matched appellant's method of stealing. C.L. only counted check transactions, noting that he was unable to prove the cash transactions. He compared the suspicious transactions against appellant's timesheet to make sure that appellant was working when the transactions occurred and used surveillance videos, when they were available, to verify the transactions.

The state presented evidence showing that it calculated the restitution amount based on transactions that occurred on appellant's register, while appellant was working, and that fit the method of stealing that appellant admitted he employed. There was a factual basis for the amount of restitution ordered, and the state met its burden to demonstrate this amount by a preponderance of the evidence. Appellant presented no evidence contradicting the state's calculations.

Despite the sufficiency of the state's evidence to show losses due to appellant's conduct, the full amount is not directly related to the conduct for which appellant was convicted. *See Nelson*, 796 N.W.2d at 347. In *Nelson*, the defendant challenged the restitution order that required her to pay for losses that occurred prior to the charging period, and this court held that the district court erred by including those losses in the ordered restitution. *Id.* at 347–48. Similarly here, appellant pleaded guilty to counts covering the time period between May 2008 and October 2009. The district court erred by ordering restitution for time periods before and after the conduct for which appellant was convicted.

We affirm the restitution award except that we modify the amount to exclude \$19,119.51 attributable to the periods before and after the conduct for which appellant

was convicted, reducing the award to \$33,752.08.¹ Alternatively, appellant argues that he received ineffective assistance of counsel respecting the restitution issue that we have reviewed. Because we modify the restitution award based on his first argument, we have no occasion to review this argument.

Affirmed as modified.

¹ The amount of \$19,119.51 is calculated by adding together the amount of restitution attributable to the times before and after the conduct for which appellant was convicted. In his brief, appellant miscalculated this amount to be \$18,621.51, neglecting to include the restitution of \$498 calculated for November 1, 2009 through November 30, 2009.