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**STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0701**

State of Minnesota,
Respondent,

vs.

Michael Robert Adkins,
Appellant.

**Filed November 25, 2013
Affirmed
Cleary, Chief Judge**

Hennepin County District Court
File No. 27-CR-11-36433

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

Michael O. Freeman, Hennepin County Attorney, Thomas A. Weist, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Interim Chief Appellate Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Cleary, Chief Judge; Kirk, Judge; and Smith, Judge.

UNPUBLISHED OPINION

CLEARY, Chief Judge

Appellant, Michael Robert Adkins, was ordered to pay \$5,478.07 in restitution following his conviction of third-degree assault. The district court's restitution award

included compensation for the victim's lost wages, a diamond ring, and medical expenses. Appellant now appeals arguing that the district court abused its discretion in its restitution award. We affirm.

FACTS

On November 19, 2011, police officers made contact with the victim, K.H., and discovered her bleeding from her mouth and with a bruised and swollen face. K.H. told police that she had been with appellant, Michael Robert Adkins, whom she knew from a previous occasion, and had gone out for drinks and later returned to his apartment. K.H. said that, after they watched television, appellant became violent, choking K.H. and causing her to lose consciousness. K.H. eventually fled appellant's apartment, made contact with the police, and reported that her shoes, coat, and jewelry were still in the apartment. Officers executed a search warrant and recovered some of her belongings.

Appellant was charged with third-degree assault under Minn. Stat § 609.223, subd. 1 (2010). He waived his right to a jury trial, and the case was submitted to the court for trial on stipulated facts. The district court found appellant guilty of third-degree assault and sentenced him to 27 months in prison. Respondent subsequently requested restitution for K.H., and the district court held a restitution hearing pursuant to a demand by appellant.

At the hearing, K.H. testified that at the time of the offense she was employed by Thomson-Reuters in a technical-support position. She asserted that after the incident with appellant, she was not able to go back to work because she was afraid to leave her house and because her face was visibly bruised. As a result of her inability to go to work,

K.H. received compensation through FMLA (Family Medical Leave of Absence). K.H. testified that she was fired on February 14, 2012, and that she received her base wage as severance pay during the eight weeks following termination of her employment. Lost wages were claimed as restitution for all weeks K.H. did not work, including the time period after she was fired.

To demonstrate the lost wages that K.H. sustained, the respondent presented a document K.H. created listing the direct deposits into her bank account from September 2, 2011 until November 23, 2011. At the hearing, K.H. testified that the direct deposits correspond to each paycheck she received during pay periods prior to the incident, which she then used to calculate her average pay over that time period equaling \$1,343.26 per pay period. Average pay was used because K.H. did not get paid in regular amounts. She was paid for overtime for working nights and weekends from home. To calculate her lost wages, K.H. took the difference between her average pay and the payments she received from FMLA while home from work after the assault.

K.H. testified that she did not produce any paycheck stubs because she never received any. She claimed that the only verification she has as to the amounts she received in compensation is the direct deposits listed on her bank statements and that she could not produce copies of the bank statements because she is no longer with the same bank.

K.H. testified that appellant took three of her rings on the night of the assault, and two rings were returned by the police. At the hearing, K.H. provided a 2004 appraisal valuing the unreturned diamond ring at \$6,099. She also provided documentation

indicating that she received \$2,500 for the loss of the ring from her insurance company after the assault.

K.H. asserted that she incurred a total of \$359.36 in medical expenses as a result of appellant's assault. She testified that, as a result of the assault, she needed to see a psychiatrist to get medication she was not previously taking. Although she was previously taking some medication, K.H. asserted that she was prescribed three new medications after the assault and included the costs for these new medications in her restitution claim. K.H. also claimed restitution for having seen a doctor for high blood pressure. Although she had previously seen a doctor for hypertension, she testified that, on this particular occasion, she went to the doctor because she could not breathe, stand still, or stop shaking.

The district court issued an order finding that K.H. had suffered \$5,478.07 in economic losses and ordered restitution in that amount. The awarded restitution included, among other things, \$1,211.92 for lost wages, \$3,599 for the diamond ring, and medical expenses totaling \$359.36. Appellant now appeals the restitution awarded for lost wages, the diamond ring, and medical expenses.

D E C I S I O N

The victim of a crime has a right to restitution in the disposition of a criminal charge if the offender is convicted. Minn. Stat. § 611A.04, subd. 1(a) (2010). “The primary purpose of the [restitution] statute is to restore crime victims to the same financial position they were in before the crime.” *State v. Palubicki*, 727 N.W.2d 662, 666 (Minn. 2007). This court reviews a district court's restitution order under an abuse

of discretion standard. *State v. Ramsay*, 789 N.W.2d 513, 517 (Minn. App. 2010). However, “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) (quoting *Ramsay*, 789 N.W.2d at 517).

Restitution “may include, but is not limited to, any out-of-pocket losses resulting from the crime, including medical and therapy costs, [and] replacement of wages and services.” Minn. Stat. § 611A.04, subd. 1(a). “However, 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 (quotation omitted). Additionally, despite a district court’s broad discretion, “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 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) (2010). When in dispute, the amount of restitution must be shown by a preponderance of the evidence. *Id.*; *Nelson*, 796 N.W.2d at 347.

I. The district court did not abuse its discretion by ordering appellant to pay restitution for lost wages.

The district court based the award for lost wages on the testimony of K.H. that after the assault she was afraid to leave her house, putting her out of work for weeks. Appellant argues that respondent failed to present adequate documentation to support the

district court's award of restitution for lost wages. More specifically, appellant challenges respondent's use of a summary K.H. prepared of the direct deposits to her bank account to substantiate her lost-wages claim and use of her average pay to calculate lost wages. Additionally, appellant asserts that K.H. improperly requested lost wages for time after her employment was terminated on February 14, 2012.

The district court's reliance on the testimony of K.H. and her prepared summary in awarding restitution of lost wages involves a credibility determination. "Because the weight and believability of witness testimony is an issue for the district court, we defer to that court's credibility determinations." *State v. Miller*, 659 N.W.2d 275, 279 (Minn. App. 2003), *review denied* (Minn. July 15, 2003). Appellant did not offer any evidence to the district court refuting respondent's claimed lost wages, and thus we can conclude that the district court's determination to award restitution for lost wages was based on finding the testimony given by K.H. credible. While some district courts might have required more documentation from K.H. as to her lost wages, we cannot say that the district court abused its discretion by crediting K.H.

Appellant's argument challenging the use of average pay as a basis for calculating lost wages is unpersuasive. K.H. testified that her paycheck varied each pay period based on the amount of overtime she worked. The district court did not abuse its discretion in allowing use of an average wage per pay period in calculating lost wages based on her testimony.

Appellant's assertion that K.H. was improperly awarded lost wages for time after her employment was terminated also fails. The district court reduced the original amount

K.H. claimed of \$1,622.85 in lost wages by the lost wages she claimed for the weeks after her employment was terminated.¹ Appellant's argument is therefore moot. The district court did not order restitution for wages lost after K.H.'s employment was terminated, and thus did not abuse its discretion.

II. The district court did not abuse its discretion by ordering appellant to pay restitution for a diamond ring.

The district court awarded K.H. \$3,599 for a diamond ring. The district court based its award on the documentation K.H. provided for an insurance payment and for an appraisal, as well as its determination that K.H. was consistent in her actions and words regarding her lost ring. The court also relied on its conclusion that her testimony—stating that she went into appellant's residence with three rings while only two were recovered after the assault—was believable.

Appellant argues that the district court abused its discretion in awarding restitution for the diamond ring without him having been charged with or convicted of theft. Appellant's argument is unpersuasive. Appellant fails to present applicable authority to support his argument that he must have been convicted of or charged with theft for the district court to have properly awarded restitution for the ring. Although other district courts may have required the production of more corroborating evidence to substantiate the causal connection between appellant's actions and loss of the ring, we cannot say that

¹ K.H. claimed lost wages for three pay periods after she was terminated: \$136.96 for lost pay on April 13, 2012, \$136.99 for lost pay on March 30, and \$136.98 for lost pay on March 16. The total amount claimed for the period after she was terminated, \$410.93, subtracted from the total lost wages claimed by K.H., \$1,622.85, equals \$1,211.92. This amount matches the district court's restitution award.

the district court abused its discretion. The district court determined that the testimony of K.H. was credible, and the district court did not abuse its discretion in awarding the appraised value of the ring less the insurance payout in restitution to K.H.

Additionally, appellant argues that variations in the description of the missing ring should have prevented the district court from awarding restitution. The district court addressed this argument in its order and found that the testimony of K.H. was credible.

III. The district court did not abuse its discretion by ordering appellant to pay restitution for medical expenses.

The district court awarded K.H. \$359.36 for medical expenses. Appellant argues that the district court erred in awarding restitution for medical expenses because the medications and doctor visits K.H. incurred were based on pre-existing conditions. To support this argument, appellant points to the testimony of K.H. that she had previously been treated for anxiety and depression. However, K.H. also testified that she was not required to and did not use the medications at the time of the assault. Appellant has not presented evidence demonstrating the district court abused its discretion.

Appellant also challenges the district court's restitution award for a doctor's visit regarding high blood pressure. The district court noted that K.H. testified that she had never been "that bad," and that she was having difficulty breathing and was shaking. The court did not abuse its discretion in awarding restitution for this doctor's visit.

Lastly, appellant argues that the district court improperly allowed restitution for laboratory tests and HIV shots because K.H. and appellant had sexual relations prior to the assault. The district court determined that prior sexual relations had nothing to do

with the possible consequences of appellant's assault. K.H. testified that she would not have had laboratory tests and HIV shots if it was not for the assault, and the district court found her testimony credible. The district court did not abuse its discretion in awarding K.H. restitution for medical expenses in the amount of \$359.36.

Affirmed.