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Minn. Stat. § 480A.08, subd. 3 (2018).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-2100**

State of Minnesota,
Respondent,

vs.

Daniel David Baker,
Appellant.

**Filed September 9, 2019
Affirmed
Smith, Tracy M., Judge**

Hennepin County District Court
File No. 27-CR-16-25498

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

Michael O. Freeman, Hennepin County Attorney, Jean Burdorf, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Jennifer M. Macaulay, Macaulay Law Offices, Ltd., St. Paul, Minnesota (for appellant)

Considered and decided by Reyes, Presiding Judge; Smith, Tracy M., Judge; and Florey, Judge.

U N P U B L I S H E D O P I N I O N

SMITH, TRACY M., Judge

Appellant Daniel Baker was convicted of nonpayment for improvement and two counts of theft by swindle; his sentence included restitution. Baker challenged the restitution pursuant to Minn. Stat. § 611A.045 (2018), but the district court denied him a

restitution hearing on the ground that his affidavit failed to state a challenge with sufficient specificity. Baker appeals, arguing that the district court erred by denying his challenge without holding a hearing and that the district court incorrectly calculated the victims' losses. We affirm.

FACTS

Baker owned and operated Lifestyle Basements, a company that served as a general contractor in basement-remodeling projects. Lifestyle's contracts with homeowners called for structured payments tied to different stages in the renovation. Lifestyle was supposed to use these payments to pay subcontractors for goods and services for the next stage of the project, but, in 2014, it stopped doing so. When Lifestyle's nonpayment happened before the subcontractors completed the work, work on projects went undone; when the nonpayment happened after the work was completed, subcontractors filed or attempted to file mechanic's liens on homeowners' houses.

In January 2017, the state charged Baker by amended complaint with four counts of theft by swindle and one count of nonpayment for improvement. Following a jury trial, Baker was found guilty of two of the four counts of theft by swindle and the single count of nonpayment for improvement.

In its sentencing memorandum, the state asked that Baker be ordered to pay \$711,328.08 in restitution—\$440,354.78 to homeowners and \$270,973.30 to subcontractors. In June 2018, the district court issued a sentencing order that included restitution in the amount requested by the state. The district court separately, but simultaneously, issued its findings and order specifically regarding restitution. The court

found that 21 victims—12 homeowners and 9 subcontractors—were victims of the conduct charged by counts three through five. It found that their collective losses were “\$711,328.08 less any amount for these losses already recovered by each victim in bankruptcy or the contractor recovery fund.” The district court identified the total economic loss each victim suffered but did not further itemize their losses.

Baker moved for a hearing to challenge the restitution award, and the district court scheduled the hearing for late September 2018. Baker then filed an affidavit in which he set out his challenge to “[t]he dollar amounts asked for by the state to be awarded to the homeowners.” For 11 of the 12 homeowners, Baker stated: “I am contesting this restitution amount due to the percentage of the project that was completed by Lifestyle Basements. Per the project documentation to be provided, this homeowner received a Basement that was [X]% complete.” The value of “X” varied from victim to victim, depending on how much of the basement Baker claimed that Lifestyle had completed. In an addendum labeled “Exhibit A,” Baker provided breakdowns showing how much each homeowner had paid and what percentage of the work had been done. He then calculated an amount labeled either “H/O Over paid for work completed” or “H/O Under paid for work completed” for each homeowner. Though he does not say so explicitly, it appears that the claimed over- or underpayment was calculated by multiplying the total price of the project by the percentage of the project that was completed and subtracting the resulting dollar amount from the amount that the homeowner paid Lifestyle.

The state responded with a memorandum arguing that Baker’s affidavit did not satisfy his burden of production under Minn. Stat. § 611A.045 and asking that the challenge

be summarily denied. The state also argued that Baker's suggested method of calculating out-of-pocket losses did not represent homeowners' losses because it incorrectly assumed that homeowners received value corresponding to the percentage of the project that was completed. Attached to the memorandum were summaries of the 11 challenged requests for restitution, providing a general itemization of each homeowner's claim.

Two days before the restitution hearing, Baker filed a second affidavit, accompanied by three spreadsheets, in which he argued that three subcontractors were not entitled to restitution in the amounts they claimed because they were charging Lifestyle inflated rates for their work. The state moved to dismiss Baker's challenge to restitution for the three subcontractors, arguing that the affidavit was untimely.

The restitution hearing began with arguments on the state's request that Baker's restitution challenge be summarily rejected. The district court started by summarizing its understanding of the parties' arguments regarding homeowner restitution and dismissed Baker's restitution challenge with respect to the subcontractors because the affidavit was untimely. The parties then disputed two main points: first, the proper method for calculating the amount of restitution owed, and, second, whether Baker's affidavit raised the argument that the claims for restitution were invalid because their amounts were not supported by receipts or invoices. The district court concluded, orally on the record, that Baker had not met his burden of production because his affidavit did not argue that the amounts of restitution were unsupported by documentation and because the restitution calculus that his affidavit relied on did not adequately describe the victims' out-of-pocket losses. The district court subsequently issued an order denying Baker's restitution

challenge, stating that Baker’s affidavit failed to present his challenges to the restitution in sufficient detail.

Baker appeals.

D E C I S I O N

Victims of crime have a right to receive restitution that includes, but is not limited to, compensation for “any out-of-pocket losses resulting from the crime.” Minn. Stat. § 611A.04, subd. 1(a) (2018). In service of this right, courts are instructed to “request information from the victim to determine the amount of restitution owed.” *Id.* That information is to be obtained “in affidavit form or by other competent evidence.” *Id.* The information must “describe the items or elements of loss, itemize the total dollar amounts of restitution claimed, and specify the reasons justifying these amounts.” *Id.* Restitution may be ordered at sentencing. *Id.*

An offender may challenge restitution at sentencing or in a separate hearing specific to the restitution request. Minn. Stat. § 611A.045, subd. 3(a). The offender bears the burdens of both pleading and production. *State v. Thole*, 614 N.W.2d 231, 235 (Minn. App. 2000). An offender’s production “must include a detailed sworn affidavit of the offender setting forth all challenges to the restitution . . . and specifying all reasons justifying dollar amounts of restitution which differ from the amounts requested.” Minn. Stat. § 611A.045, subd. 3(a). The affidavit, in addition to being a required element of the offender’s production, is also “the sole vehicle by which the offender can meet the burden of pleading.” *Thole*, 614 N.W.2d at 235. Once an offender satisfies the burdens of pleading and production, the prosecution bears the ultimate burden of proving the amount of each

victim's loss. Minn. Stat. § 611A.045, subd. 3. But the district court need not determine whether restitution is justified by a preponderance of the evidence if there is no "valid dispute," and the district court need not consider any challenges not raised in the affidavit. *Thole*, 614 N.W.2d at 235.

I. The district court did not err by denying Baker's challenge without a restitution hearing.

Baker argues that the district court erred by not granting him a restitution hearing. Baker does not directly argue that his affidavit was sufficiently specific under section 611A.045, subdivision 3(a). He does, however, argue that the calculation of the victims' economic losses must account for the value provided by the work that Lifestyle completed. Though Baker does not explicitly identify it as such, we will analyze this argument as a contention that his affidavit was sufficiently specific to create a "valid dispute" as to the proper amount of restitution. *See id.*

The offender's burden of pleading is not necessarily a high bar. In a case awarding restitution to the children of a murder victim, the supreme court concluded that an affidavit making a "blanket assertion that [the children's] expenses were 'not allowable'" is "sufficiently detailed for purposes of the statute." *State v. Palubicki*, 727 N.W.2d 662, 665 n.3 (Minn. 2007). While the affidavit in that case met "only the bare minimum definition of 'detailed,'" it was nonetheless sufficient to preserve the argument. *Id.* (quoting Minn. Stat. § 611A.045, subd 3(a)).

Although Baker's affidavit contains numerous details, it nonetheless fails to meet "the bare minimum definition of 'detailed'" because it does not explain *how* the details that

it provides should affect the amount of restitution awarded. Baker's affidavit begins with a general assertion that "the information provided in the attached documents shows the actual amounts that the homeowners have lost using Lifestyle Basements." Then, for 11 of the 12 homeowners, Baker's affidavit states that he is "contesting this restitution amount due to the percentage of the project that was completed by Lifestyle Basements." Attached to the affidavit are spreadsheets showing how much homeowners had paid to Lifestyle, the percentage of the project that had been completed, and the difference between the amount that homeowners paid and the percentage completed multiplied by the total value of the project.

At best, Baker's affidavit asserts that he provided value to homeowners in the form of a partially completed basement and that homeowners are entitled to restitution only in the amount that they paid above the value they received, calculated by multiplying the total value of the contract by the percent of the project that was completed. But the district court concluded that, as a matter of law, Baker's affidavit relied on the incorrect measure of direct economic losses. It concluded that the losses directly caused by Baker's crimes are properly calculated by giving homeowners the benefit of their bargain. See Minn. Stat. § 611A.04, subd. 1(a) (stating that restitution is not limited to out-of-pocket losses). Homeowners expected to pay Baker a certain amount and to receive a complete basement. Their direct economic losses are whatever they had to pay beyond their expectation in order to receive a complete basement. See *B.F. Goodrich Co. v. Mesabi Tire Co.*, 430 N.W.2d 180, 182 (Minn. 1988) (describing the "benefit-of-the-bargain" rule, and stating that

damages in Minnesota are generally limited to out-of-pocket losses except when the out-of-pocket rule does not work).

Indeed, Baker himself now admits that the argument apparently presented by his affidavit—that homeowners were only entitled to the amount that they overpaid relative to the percentage of the project that was completed—is incorrect, as it would lead, as he says in his brief to this court, to an “absurd” and “preposterous” result in that some homeowners would be deemed to have received a net benefit from his crime. Nonetheless, he claims that his affidavit indirectly argued that the district court should account for whatever value he did provide to the homeowners and that he was entitled to a hearing in order to demonstrate what that value was.

But, as the district court explained at the hearing, the percentage of a project that was completed is not determinative of how much value a homeowner received from Lifestyle’s work. That is, even if Baker had been able to prove every single detail on his spreadsheet, it would not have changed the homeowners’ losses. The homeowners’ costs fall into two categories: the amount paid to Lifestyle for its work and the amount paid to others to finish the basement (including amounts paid to Lifestyle’s unpaid subcontractors or to attorneys to clear the homeowners’ titles or to seek civil recovery from Lifestyle). The actual value of the work performed by Lifestyle is accounted for by the amount a homeowner had to pay to finish the basement—the more value Lifestyle provided, the less the homeowner presumably would have had to pay someone else to finish the job.

Baker could have attacked the homeowners’ claims: he could have asserted that the homeowners overpaid the other contractors they hired or that the basements they received

had higher values than what they had originally contracted with Lifestyle for. But he did not do so; he only said that he was “contesting [each] restitution amount due to the percentage of the project that was completed by Lifestyle Basements.” Because that statement cannot reasonably be construed to challenge the homeowners’ losses, Baker’s affidavit failed to create a valid dispute over the proper amount of restitution, and the district court was not required to hold an evidentiary hearing to determine whether restitution was justified. *See Thole*, 614 N.W.2d at 235 (“Until a dispute exists, the district court need not determine whether restitution is justified by a preponderance of the evidence . . .”).

But Baker argues that his affidavit should be considered adequate because he never received affidavits or supporting documentation from the homeowners explaining how economic losses were calculated. He contends that he was trying to challenge the sufficiency of the evidence but that he could not do so with specificity because he did not have the affidavits and documents supporting the award.

There are two problems with this argument. First, while it is true that the affidavits and documentation in support of restitution are not in the record, the record reflects that Baker was in possession of them. At the hearing on whether to go forward with an evidentiary hearing, Baker’s counsel admitted to having received from the state over 900 pages of affidavits and documentation regarding the victims’ losses. Thus, Baker’s claim that he did not know the basis of the restitution claim fails. Second, even if Baker did not know the basis of the restitution claims, that fact would not have prevented him from pleading an argument against the sufficiency of the evidence—all he had to say was that

the evidence was insufficient to support the district court's restitution award. *See Palubicki*, 727 N.W.2d at 665 n.3.

Because the only challenge Baker even arguably made in his affidavit was invalid as a matter of law, Baker did not satisfy his burden of production and pleading. *See Thole*, 614 N.W.2d at 235. The district court therefore did not err by denying a restitution hearing.

II. Baker's affidavit failed to raise any additional challenges to restitution.

In his brief to this court, Baker makes a variety of attacks on the district court's award of restitution. He argues that certain claims should be barred because of collateral bankruptcy proceedings or at least that there was insufficient evidence to show that the claims were not barred by those proceedings. He argues that there was no evidence supporting the district court's award of attorney fees to homeowners. He claims that the district court's award includes costs arising from conduct that was the basis for charges of which he was acquitted. He argues that there was no evidence at all supporting the amounts of restitution. And he argues that awards to subcontractors were not supported by evidence.

But Baker's affidavit¹ to the district court said only that he challenged restitution based on "the percentage of [each] project that was completed by Lifestyle Basements." There is no reasonable way to interpret Baker's affidavit as arguing that the state failed to introduce evidence supporting restitution, or raising the issue of his acquittal on certain

¹ The district court rejected Baker's second affidavit, which purported to challenge subcontractor awards, because the affidavit was untimely. *See* Minn. Stat. § 611A.045, subd. 3(a) (providing that affidavits must be filed at least five business days before a restitution hearing). Baker does not challenge that decision on appeal.

charges, or claiming that civil settlements should limit restitution. Failure to raise a specific objection by affidavit waives that objection. *Thole*, 614 N.W.2d at 235-36 (refusing to review objections not raised in an affidavit for plain error). Because Baker's affidavit did not plead the arguments he now raises in his brief to this court, we cannot consider them.²

In sum, Baker raised, at best, only one argument in his affidavit challenging restitution. Because that argument failed, as a matter of law, to create a valid dispute, the district court did not err in denying his restitution challenge without holding an evidentiary hearing.

Affirmed.

² Further, the trial transcript in this case may contain evidence of the homeowners' losses. Thus, even if Baker had raised his challenges to the sufficiency and meaning of the evidence, his failure to supply trial transcripts would prevent him from arguing those issues in this appeal. See *State v. Terpstra*, 546 N.W.2d 280, 283 (Minn. 1996) (holding that restitution may be based on the evidence at trial); *Duluth Herald & News Tribune v. Plymouth Optical Co.*, 176 N.W.2d 552, 555 (Minn. 1970) (holding that, when an appellant fails to provide a transcript, review is limited to the question of whether the district court's conclusions of law are supported by its findings of fact).