

*This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2018).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0796**

State of Minnesota,
Respondent,

vs.

Jethro Togar Gboeah,
Appellant.

**Filed February 3, 2020
Affirmed
Florey, Judge**

Hennepin County District Court
File No. 27-CR-17-20534

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

Michael O. Freeman, Hennepin County Attorney, Brittany D. Lawonn, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Amy Lawler, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Johnson, Presiding Judge; Florey, Judge; and Kirk,
Judge.*

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

UNPUBLISHED OPINION

FLOREY, Judge

In this sentencing appeal challenging restitution, appellant argues that the district court abused its discretion by ordering that he pay over \$18,000 because the state did not adequately demonstrate that he was capable of paying that amount. We affirm.

FACTS

In June 2018, appellant Jethro Gboeah pleaded guilty to attempted first-degree premeditated murder and was sentenced to 15 years in prison. Thereafter, the victim sought restitution, and a restitution hearing was held. Gboeah challenged restitution, arguing that he was unable to pay the amount sought due to his incarceration. Specifically, Gboeah argued below, and now on appeal, that it would take him 360 years to pay the award of \$18,215.24 because he makes approximately \$1.90 every two weeks in prison. While the district court did consider his ability to pay, Gboeah argues, such was based only on the prosecutor's unsupported assertions—namely, that Gboeah would leave prison at a young age and have earnings capacity—in violation of recent case law. We affirm.

DECISION

Victims of criminal acts have the right to restitution if the offender is convicted. Minn. Stat. § 611A.04, subd. 1(a) (2014). Restitution serves to restore victims to the financial positions they would have occupied had the criminal conduct not occurred. *State v. Palubicki*, 727 N.W.2d 662, 666 (Minn. 2007). District courts have “wide discretion in ordering restitution and determining the appropriate amount of restitution.” *State v. Anderson*, 507 N.W.2d 245, 246 (Minn. App. 1993), *review denied* (Minn. Dec. 22, 1993).

A district court's decision to award restitution is, therefore, subject to an abuse-of-discretion standard of review. *State v. Tenerelli*, 598 N.W.2d 668, 672 (Minn. 1999). Section 611A.045 enumerates two criteria that the district court must consider prior to awarding restitution: “(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) (2018). Gboeah only challenges the district court's treatment of the second factor.

Gboeah acknowledges that prior cases have held (1) that there are no strict guidelines for a district court when considering a defendant's ability to pay; (2) that a district court is not required to make specific findings on the issue; and (3) that a defendant need not be actually able to pay the full amount. *State v. Maidi*, 573 N.W.2d 280, 285-86 (Minn. 1995); *State v. Miller*, 842 N.W.2d 474, 479 (Minn. App. 2014), *review denied* (Minn. Apr. 15, 2014). He argues, however, that the Minnesota Supreme Court's 2017 decision in *State v. Willis*—holding that the rules of evidence apply to restitution hearings—negates these prior holdings and changes the requirements for restitution awards. 898 N.W.2d 642. Because the rules of evidence now apply to restitution hearings, Gboeah argues, the prior cases do not control, and the state must provide evidence of a defendant's ability to pay the amount of restitution.

First, it must be noted Gboeah's argument confuses the effect of the *Willis* decision, as it does not support the conclusion he posits. The rule announced in *Willis*—that evidentiary rules must be followed in restitution hearings—affects only how the state meets its burden. *See id.* at 648. It does not, as Gboeah maintains, change what the state's burden

is, nor what is needed to meet it. He asserts that, after *Willis*, it is insufficient for the prosecutor to merely assert a belief that a defendant can pay restitution, as “such assertions do not comport with the Rules of Evidence.” However, he does not, and cannot, identify any evidentiary rule that would be violated by such an assertion. This is because the rules of evidence only guide the means by and circumstances under which evidence may be introduced—not the quality or quantity of evidence necessary to meet a given burden of proof. See *Black’s Law Dictionary* 673-74 (10th ed. 2014) (defining “evidence” and “rules of evidence” as “[t]he body of law regulating *the admissibility of what is offered as proof* into the record of a legal proceeding” (emphasis added)). Therefore, it is simply a non sequitur to argue that the production of evidence is required because compliance with the rules of evidence has been mandated.

Further, Gboeah’s argument has a related but more-salient shortcoming. In *Willis*, the issue concerned the means by which the prosecution proved the amount of loss sustained by the victim; that is, how the state met its burden of demonstrating the propriety of the award. *Willis*, 898 N.W.2d at 644-48 (addressing the issue of whether letters and other documents from attorneys and real-estate agents attesting to the amount of loss the victim sustained constituted inadmissible hearsay). Here, while the issue Gboeah raises—that the prosecution asserted without supporting evidence that he would be able to pay—does indeed relate to *how* the state presents its case, Gboeah does not explain how or why the ability-to-pay consideration is the state’s burden in the first place.

The burdens of proof for restitution awards are well-defined by statute. An offender challenging a restitution award bears the “burden of pleading and the burden of production.

Under the statute, the affidavit is both the sole vehicle by which the offender can meet the burden of pleading, and an essential element of the offender's case required to meet the burden of production." *State v. Thole*, 614 N.W.2d 231, 235 (Minn. App. 2000) (summarizing offender's burdens set forth in Minn. Stat. § 611A.045, subd. 3(a)). The prosecution, in contrast, has only 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." Minn. Stat. § 611A.045, subd. 3(a); *Thole*, 614 N.W.2d at 235 ("Once an offender raises a proper challenge to the restitution order, the prosecution bears the burden of proving the propriety of the restitution by a preponderance of the evidence."). As the state notes here, there is no authority for the proposition that the state must prove, or even demonstrate in any way, the defendant's ability to pay. The statute's only mention of such a consideration is where it is described as a factor for the *court* to consider. Minn. Stat. § 611A.045, subd. 1(a)(2).

While it is true that the state asserted that Gboeah would leave prison at a relatively young age and have earnings potential, and while it is true that it offered no evidence at the time to support that assertion, the state did not so assert in an attempt to meet its statutory burden. Therefore, even if Gboeah was correct in arguing that *Willis* requires the state to present evidence, the statement he challenges here would be unaffected, as the prosecution need not prove, nor even argue, that he is able to pay the restitution award. Thus, the district court did not abuse its discretion in awarding restitution.

Affirmed.