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**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-1234**

State of Minnesota,
Respondent,

vs.

Casimir Robert Krithers,
Appellant.

**Filed December 28, 2020
Affirmed
Connolly, Judge**

St. Louis County District Court
File No. 69DU-CR-18-2947

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

Mark S. Rubin, St. Louis County Attorney, Duluth, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Gina Schulz, Michael J. McLaughlin, Assistant Public Defenders, St. Paul, Minnesota (for appellant)

Considered and decided by Connolly, Presiding Judge; Reyes, Judge; and Gaïtas,
Judge.

UNPUBLISHED OPINION

CONNOLLY, Judge

Appellant was convicted of receiving stolen property after stealing his employer's vehicles. The district court ordered him to pay \$4,000 in restitution. Appellant now challenges that order, arguing that (1) the state failed to establish the restitution value by a preponderance of the evidence and (2) the district court abused its discretion because it based its restitution order on an affidavit submitted by the victim and "supporting hearsay documents," among other errors. Because we see no error and no abuse of discretion, we affirm.

FACTS

On September 3, 2018, Duluth police officers were notified of the theft of a 2007 Dodge Caliber. The owner of the vehicle identified his employee, appellant Casimir Robert Krithers, as a suspect. Police found the Dodge Caliber smashed into a tree. Two days later, officers observed appellant driving a Nissan Titan, which had been stolen from the same address as the Dodge Caliber. The officers conducted a traffic stop and arrested appellant for theft of a motor vehicle. After waiving his *Miranda* rights, appellant admitted to stealing both vehicles and crashing the Dodge Caliber.

Appellant pleaded guilty to receiving stolen property. He admitted that he caused damage to the Dodge Caliber by crashing it into a tree. In exchange for his guilty plea, the state agreed to dismiss a felony-theft-of-a-motor-vehicle charge. The parties agreed to "reasonably required restitution." The state indicated that the amount requested would likely be "around six thousand dollars," and said it would have a definite restitution amount

before sentencing. Appellant stated that he left “some pretty valuable property in the vehicle” and that he would “like to be able to figure out what some of that property was in there and then have that go from there.”

Before sentencing, the state submitted a restitution affidavit of the victim requesting \$6,000 for the damage done to the vehicle. Attached to the affidavit was a Kelley Blue Book Pricing Report for the 2007 Dodge Caliber. The report estimated the value of the vehicle to be between \$2,812 (rough trade-in value) and \$5,912 (clean retail value). The restitution affidavit did not specify what condition the car was in, but the state conceded it was in “average condition.” At the sentencing hearing, the state requested that the district court impose a sentence that included the restitution amount requested by the victim. Appellant indicated his intention to challenge the restitution amount. The district court ordered restitution in the amount of \$6,000 on May 9, 2019.

Appellant challenged the restitution by filing an affidavit that contained specific objections to the restitution claim, pursuant to Minn. Stat. § 611A.045, subd. 3 (2018). Appellant’s affidavit also contained an attached price report estimate. Appellant alleged that the owner had bought the car for only \$2,500 and claimed that the vehicle had significant damage and a bad title; he estimated the vehicle’s value at \$1,500. Appellant also asserted that he had left valuable property, including Lake Superior agates, worth thousands of dollars in the vehicle and that the victim kept this property after the crime. He further alleged that the victim may have received money from scrapping the vehicle. Appellant’s affidavit did not include any documentation to support his claims. The district court scheduled a contested restitution hearing.

At the contested restitution hearing, the state relied on the previously filed affidavit of the victim and the valuation documents to establish the victim's loss. Appellant did not object to the admission of the Kelley Blue Book information and focused primarily on the personal property that he left in the victim's vehicle. He did not provide any receipts or other records regarding the value of this property; the evidence consisted solely of the allegations made in appellant's affidavit. Appellant believed the return of this personal property was part of the plea agreement, but the district court concluded that "no such agreement was made on the record, or incorporated into either the plea agreement, his plea, or his sentence." Appellant's attorney admitted that the resolution of this issue was a matter for civil court. After considering the Kelley Blue Book valuations of the vehicle and the competing price report submitted by appellant, the district court entered an amended restitution order in the amount of \$4,000. This appeal follows.

D E C I S I O N

A district court may impose an obligation of restitution as a part of a criminal sentence. Minn. Stat. § 609.10, subd. 1(a)(5) (2018). If restitution is requested, the court must collect information from the victim to determine the amount of restitution owed. This information must be submitted "in affidavit form or by other competent evidence." Minn. Stat. § 611A.04, subd. 1(a) (2018). "A district court has broad discretion to award restitution, and the district court's order will not be reversed absent an abuse of that discretion. The district court's factual findings will not be disturbed unless they are clearly erroneous." *State v. Andersen*, 871 N.W.2d 910, 913 (Minn. 2015) (citation omitted).

Basis for the Restitution Award

At a restitution hearing “[a] dispute as to the proper amount of restitution or type of restitution must be resolved by the court by the preponderance of the evidence.” Minn. Stat. § 611A.045, subd. 3(a) (2018). The state bears the burden of proving by a preponderance of the evidence the amount of loss and that the claimed loss resulted from the criminal act. *Id.* Although the rules of evidence apply to restitution hearings, the standards for the admissibility of hearsay are relaxed. Minn. R. Evid. 1101 2019 comm. cmt. With respect to evidentiary hearings, “the foundation for admission of documentary evidence offered under Rule 803(6) may be provided by affidavit . . . in lieu of testimony.” Minn. R. Evid. 1101(c). Exceptions to the hearsay rule include:

(6) Records of regularly conducted business activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term “business” as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit. A memorandum, report, record, or data compilation prepared for litigation is not admissible under this exception.

Minn. R. Evid. 803(6) (emphasis added).

Appellant argues that the state failed to prove the restitution amount by a preponderance of the evidence because it introduced no evidence and called no witnesses.

Appellant admitted that the loss sustained by the victim was a direct result of the offense; he stole the vehicle and crashed it into a tree. Accordingly, the only issue is whether the state established the amount of the loss by a preponderance of the evidence.

Here, the state introduced an affidavit of restitution signed by the victim on September 18, 2019. The affidavit identified the 2007 Dodge Caliber as the damaged property and listed the estimated value to be \$6,000. Attached to the affidavit was a pricing report that contained a Kelley Blue Book valuation of the vehicle. Appellant argues that the district court erred by admitting the Kelley Blue Book valuation.

Appellant never objected to the Kelley Blue Book information as inadmissible hearsay. Accordingly, we review the admission of the evidence for plain error. “An error is plain if it is clear or obvious, which is typically established if the error contravenes case law, a rule, or a standard of conduct.” *State v. Webster*, 894 N.W.2d 782, 787 (Minn. 2017) (quotations omitted). The rules of evidence allow documentary evidence to be proved by affidavit in lieu of testimony. Minn. R. Evid. 1101(c). But here, the affidavit from the victim did not provide adequate foundation under Rule 803(6) for the admission of the Kelley Blue Book estimate because the victim was not the “custodian” of the information or an otherwise “qualified witness.” Thus, the district court erred by admitting the Kelley Blue Book documents. The error was plain because it violated the rule. *See State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). However, “before an appellate court reviews an unobjected-to-error,” that error must “affect substantial rights.” *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). “With respect to the substantial rights requirement, [the appellant] bears the burden of establishing that there is a reasonable likelihood that the

absence of the error would have had a significant effect” on the verdict. *State v. Horst*, 880 N.W.2d 24, 38 (Minn. 2016) (quotation omitted). “In evaluating the reasonable likelihood that the erroneously admitted evidence significantly affected the verdict, this court must consider the persuasiveness of that evidence . . . [and] the manner in which the evidence was presented.” *State v. Jackson*, 764 N.W.2d 612, 620 (Minn. App. 2009), *review denied* (Minn. July 22, 2009). Here, appellant used the same Kelley Blue Book valuation reports that the victim submitted to argue that the amount of restitution should be at the lower end of the car’s value. The evidence was presented in a manner that indicated both parties agreed to the reliability of the Kelley Blue Book estimates and asked the judge to make a determination as to the amount to be paid. Furthermore, there is no evidence to suggest that the Kelley Blue Book documents are anything other than what they purported to be. Accordingly, the error did not affect appellant’s substantial rights.

It is true that the valuation reports contained a wide range of prices for the Dodge Caliber depending on the condition it was in prior to the crash. Appellant argues that the valuation depended on the mileage of the vehicle, and no reference to the vehicle’s mileage was made in the victim’s affidavit. But it appears that the district court considered these factors when it ultimately reduced the original restitution order amount from \$6,000 to \$4,000. This reduction is supported by the affidavit and the valuation reports presented by both parties.

Abuse of discretion

A district court abuses its discretion when its decision regarding restitution is based on an erroneous view of the law. *State v. Boettcher*, 931 N.W.2d 376, 380 (Minn. 2019).

Appellant bears the burden of establishing an abuse of discretion and that he was prejudiced by the abuse. *Dolo v. State*, 942 N.W.2d 357, 362 (Minn. 2020), citing *State v. Bustos*, 861 N.W.2d 655, 666 (Minn. 2015). Appellant argues that the district court abused its discretion by (1) failing to apply the correct burden of proof; (2) basing its restitution order on evidence that was inadmissible hearsay and that violated the confrontation clause; and (3) failing to consider the value of the property appellant transferred to the victim. These arguments are considered separately.

First, appellant argues that the district court failed to apply the correct burden of proof because it did not mention the state's burden in its restitution order. See Minn. Stat. § 611A.04, subd. 1 (“[T]he court shall grant or deny restitution and shall state on the record the reasons for the decision.”). By ordering restitution in the amount of \$4,000, a number that fell within the range of values presented by both parties, the district court clearly found that the victim's right to restitution had been established by the preponderance of the evidence and that the state had met its burden of proof. It is not necessary that the court specifically refer to the burden of proof in its order. See *White v. Minnesota Dep't of Nat'l Res.*, 567 N.W.2d 724, 734 (Minn. App. 1997) (stating that error is never presumed on appeal), *review denied* (Minn. Oct. 31, 1997). The restitution order specifically states the reasons for the court's decision, including the reasons for reducing the amount from \$6,000 to \$4,000. The court's decision was not based on an erroneous interpretation or application of the law.

Second, appellant claims that the evidence on which the court relied was inadmissible hearsay and that it violated the Confrontation Clause. While we agree that

the admission of the Kelley Blue Book information was plain error because it was inadmissible hearsay, we reiterate that it did not affect appellant's substantial rights.

Appellant's argument that his right of confrontation was violated also fails. A defendant in a criminal prosecution "shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const., Amend. VI, Minn. Const. art. 1, § 6. In *Crawford v. Washington*, the Supreme Court held that the Confrontation Clause only bars the admission of testimonial hearsay. 541 U.S. 36, 68 (2004). Whether a statement is testimonial turns in part on the primary purpose or reason for the statement. *Davis v. Washington*, 547 U.S. 813, 822 (2006). The Supreme Court in *Crawford* described the "core class of testimonial statements" as those statements that "declarant's would reasonably expect to be used prosecutorially," and "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." 541 U.S. at 51-52 (citations and quotations omitted). For example, a prior confession would be considered testimonial. *Id.* But an affidavit that attempts to establish the reliability of another document, like the affidavit in the present case, is not testimonial. Here, no testimonial evidence was presented. Accordingly, there is no confrontation problem. *Id.*

Third, appellant takes issue with the fact that the district court did not consider the value of the property "transferred from [appellant] to the victim"; i.e., appellant's personal property that he left in the Dodge Caliber after the accident. No evidence to support appellant's claim was presented at the restitution hearing. This issue need not be addressed because appellant's attorney conceded at the hearing that this issue is a matter for civil

court. Moreover, the district court specifically noted that its restitution order did not preclude appellant from pursuing other legal remedies.

Affirmed.