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

**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-1314**

State of Minnesota,
Respondent,

vs.

Robert Eugene Howard,
Appellant.

**Filed March 23, 2020
Affirmed
Connolly, Judge**

Dakota County District Court
File No. 19HA-CR-17-4059

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

James C. Backstrom, Dakota County Attorney, Heather Pipenhagen, Assistant County Attorney, Hastings, Minnesota (for respondent)

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

Considered and decided by Connolly, Presiding Judge; Reilly, Judge; and
Kalitowski, Judge.*

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

UNPUBLISHED OPINION

CONNOLLY, Judge

Appellant challenges the district court's restitution award. He argues that the district court abused its discretion in awarding restitution to a private nonprofit organization and a state agency. Because the district court did not abuse its discretion, we affirm.

FACTS

In 2015, an attorney for the nonprofit organization Donations for Education (DFE) contacted the Minnesota Commerce Fraud Bureau about employee theft. A DFE internal audit revealed that appellant Robert Howard, a former board member, had stolen DFE funds. Through this audit, DFE discovered that appellant had spent over \$1,000 in unauthorized board expenses.

The resulting investigation uncovered that appellant had fraudulently applied for unemployment benefits in 2013 with the Minnesota Department of Employment and Economic Development (DEED). Following termination from an unrelated job, appellant applied for unemployment benefits. But his application and paperwork did not disclose that he worked at DFE. In total, appellant collected \$18,124 in unemployment benefits from DEED while still employed at DFE.

As a result, respondent State of Minnesota charged appellant with one count of insurance fraud under Minn. Stat. § 609.611, subd. 1 (2012), and one count of unemployment benefits theft under Minn. Stat. §§ 268.182, subd. 1, 609.52 (2012). In August 2018, appellant pleaded guilty to the unemployment benefits theft charge. The state agreed to dismiss the insurance-fraud charge and not to bring more charges against

appellant for his theft from DFE. In exchange, appellant agreed to pay restitution to DEED and DFE, but he reserved the right to challenge any awarded amounts.

At sentencing, the district court awarded \$17,149.18 in restitution to DEED and reserved restitution for DFE. The parties agreed to a contested restitution hearing to determine the amount owed to DFE. Appellant then filed an affidavit challenging the restitution amount for DEED and outlining his position on any restitution award for DFE.

The district court held a restitution hearing. Before any witness testimony, both parties agreed to a \$17,099.18 restitution award for DEED. The state then presented testimony from four former DFE board members and the attorney DFE hired after appellant's termination from the organization. After this hearing, the district court issued a written order awarding \$17,029.85 in restitution to DFE and \$17,099.18 in restitution to DEED. This appeal follows.

DECISION

As part of a felony sentence, the district court may order an offender to pay restitution to a crime victim. Minn. Stat. § 609.10, subd. 1(a)(5) (2012). Under Minnesota law, a crime victim's 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) (2012). Restitution in criminal cases aims to compensate victims for their losses. *State v. Rey*, 905 N.W.2d 490, 496 (Minn. 2018). Two primary criteria control a district court's restitution award: the victim's economic loss and the offender's ability to pay. Minn. Stat. § 611A.045, subd. 1(a)(1)-(2) (2012); *State v. Davis*, 907 N.W.2d 220, 227 (Minn. App. 2018), *review denied* (Minn. Apr. 17, 2018).

It is the state's burden to show a victim's total losses. Minn. Stat. § 611A.045, subd. 3(a) (2012). And the district court resolves disputes about the proper type or amount of restitution by a preponderance of the evidence. *Id.* A factual basis must exist for the district court to award restitution. *State v. Johnson*, 851 N.W.2d 60, 65 (Minn. 2014). The district court's restitution award is reviewed for an abuse of discretion. *State v. Boettcher*, 931 N.W.2d 376, 380 (Minn. 2019). We use the district court's factual findings unless they are clearly erroneous. *Dobbins v. State*, 788 N.W.2d 719, 725 (Minn. 2010). But a challenge to the district court's authority to order restitution represents a legal question subject to de novo review. *State v. Andersen*, 871 N.W.2d 910, 913 (Minn. 2015).

I. Restitution to DFE

Appellant first challenges the restitution award to DFE. He argues that the district court erred in awarding restitution to DFE because (1) any restitution to DFE stems from uncharged conduct and (2) his crimes did not cause DFE to incur the awarded attorney fees.

Appellant argues that the district court could not order restitution for DFE because it arose from uncharged conduct. This argument ignores the plea agreement's explicit terms. When a defendant pleads guilty, he can pay restitution for losses not identified in a complaint. *See State v. Kennedy*, 327 N.W.2d 3, 4-5 (Minn. 1982) (affirming order to pay restitution to victims not named in the complaint). In other words, a plea agreement can alter normal restitution obligations had the defendant gone to trial and been acquitted of an offense. *See id.*; *see also Boettcher*, 931 N.W.2d at 381 n.5 (observing that different

principles for restitution can apply following a guilty plea); *State v. Chapman*, 362 N.W.2d 401, 403 (Minn. App. 1985), *review denied* (Minn. May 1, 1985).

The state conditioned the plea agreement here on appellant's agreement to pay restitution to DFE. In exchange, one count was dismissed, and the state agreed not to bring additional theft charges associated with DFE. In its order, the district court observed that the parties agreed to have a hearing on restitution for DFE. For these reasons, appellant's reliance on *State v. Nelson*, 796 N.W.2d 343 (Minn. App. 2011), and *State v. Latimer*, 604 N.W.2d 103 (Minn. App. 1999), is misplaced. The plea agreement in *Nelson* stated only that the defendant agreed "to pay restitution" while allowing the court to "determine the amount of restitution." 796 N.W.2d at 346. And in *Latimer*, the plea agreement never mentioned restitution. 604 N.W.2d at 104.

Next, appellant asserts that his conduct did not directly cause DFE's losses. He claims that DFE had no financial interest in his unemployment hearings and that its choice to hire an attorney did not directly flow from his criminal actions. Our supreme court reaffirmed in *Boettcher* that restitution must be for losses "that are directly caused by, or follow naturally as a consequence of, the defendant's crime." 931 N.W.2d at 381. Put differently, a restitution award cannot be "too attenuated" from the defendant's criminal act. *State v. Palubicki*, 727 N.W.2d 662, 666-67 (Minn. 2007).

The state contends that appellant has waived his arguments on the attorney-fees restitution by not including them in his affidavit challenging restitution. But the supreme court in *Palubicki* held that an offender preserved his restitution challenge for appeal when his affidavit simply claimed that restitution for two victims' expenses was "not allowable."

Id. at 665 n.3. Here, appellant’s affidavit specifically disputed responsibility for DFE’s attorney fees. As a result, we address the merits of his challenge to the district court’s restitution award for attorney fees.

The district court’s order awarded restitution to DFE for \$13,050 in attorney fees.¹ It found a “direct nexus” between appellant’s criminal conduct and DFE’s decision to retain a lawyer. This order specifically observed that “[J.U.] was hired after DFE learned of potential theft by [appellant] and [appellant’s] termination from DFE. [Appellant] fraudulently attempted to obtain unemployment compensation as a result of his termination from DFE, which triggered [J.U.’s] involvement.”

We find record support for the district court’s decision to award attorney fees to DFE. The testimony from the restitution hearing reveals that DFE retained attorney J.U. in 2015 after DFE terminated appellant. J.U. testified that she helped DFE investigate potential employee theft. She also explained that she attended four days of appellant’s unemployment hearings before DEED on DFE’s behalf. An exhibit showed that J.U. billed DFE \$28,170 for her services. The district court’s order reveals that it scrutinized this expense, as it awarded only \$13,050 in restitution for attorney fees.

It is clear from the restitution hearing that appellant’s conduct created confusion for DFE. The organization later dissolved. After his termination, appellant sent several demand letters to DFE. We view DFE’s choice to retain an attorney to navigate issues

¹ Beyond his dismissed-charge argument, appellant challenges only the attorney-fees aspect of the DFE restitution award. We thus do not address the other \$3,979.85 awarded to DFE.

created by appellant's theft and termination from DFE as reasonable.² The same holds true for its decision to have that attorney represent the organization at appellant's 2015 unemployment hearings. These costs directly relate to appellant's theft from DFE.

II. Restitution to DEED

The second issue on appeal involves the district court's restitution award to DEED. Appellant claims that the unemployment benefit overpayments statute—Minn. Stat. § 268.18 (2018)—conflicts with the criminal restitution statute. In response, the state asserts that appellant waived his challenge to the DEED restitution award.

For two reasons, we decline to address appellant's statutory conflict argument. First, appellant waived his challenge to any restitution award for DEED. "'Waiver' is the intentional relinquishment of a known right." *State v. Vasquez*, 912 N.W.2d 642, 649 n.4 (Minn. 2018). Here, the record shows that appellant waived his challenge to the DEED restitution award and agreed to pay \$17,099.18.

Second, appellant never raised this statutory conflict argument below. An appellate court rarely decides issues first raised on appeal that the district court did not consider. *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996). Thus, we do not reach appellant's argument about any conflict between the unemployment benefit overpayment statute and the criminal restitution statute.

In urging us to address the merits of this argument, appellant cites *State v. Maurstad* and asserts that an offender cannot waive a challenge to an illegal sentence. 733 N.W.2d

² A review of our caselaw also reveals that attorney fees have often been awarded in restitution cases.

141 (Minn. 2007). But *Maurstad* is inapposite because the supreme court held there that a defendant cannot waive a challenge to an incorrect criminal-history score. *Id.* at 147. And caselaw from both the supreme court and our court reflects that appellate courts will not consider restitution arguments not raised below. *See Johnson*, 851 N.W.2d at 64 (declining to consider a restitution argument raised for the first time on appeal); *State v. Thole*, 614 N.W.2d 231, 235-36 (Minn. App. 2000) (refusing to apply plain-error review to objections not included in the offender's affidavit challenging restitution).

Affirmed.