

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A22-1597**

State of Minnesota,
Respondent,

vs.

Brandon Michael Kertscher,
Appellant.

**Filed July 17, 2023
Affirmed
Jesson, Judge**

Becker County District Court
File No. 03-CR-20-1270

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

Brian W. McDonald, Becker County Attorney, Detroit Lakes, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Jennifer L. Lauermann, Assistant
Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Smith, Tracy M., Presiding Judge; Jesson, Judge; and
Bryan, Judge.

NONPRECEDENTIAL OPINION

JESSON, Judge

After pleading guilty to second-degree manslaughter when his punch to G.S.
(the victim) resulted in the victim's death from a traumatic brain injury,
appellant Brandon Michael Kertscher appeals from the district court's restitution order of

over half a million dollars. He argues that the district court abused its discretion in ordering \$556,121.39 to be paid to the victim's health-benefits company because the state did not establish that the company's economic losses were a direct result of his conduct and because the district court did not expressly consider his ability to pay restitution. Further, he contends that the restitution order was punitive, not rehabilitative, and should be vacated. Because the victim's medical bills were a direct result of Kertscher's conduct, the district court expressly addressed his ability to pay, and the amount is not punitive, we affirm.

FACTS

In July 2020, respondent State of Minnesota charged Kertscher with first-degree assault, second-degree assault with a dangerous weapon, and first-degree aggravated robbery.¹ These charges were based on the allegation that in June 2020, Kertscher punched the victim in the face with a metal object around his knuckles, which left the victim unconscious and later diagnosed with a severe brain bleed. After approximately two months in the hospital, the victim died. The state then amended its complaint and charged Kertscher with first-degree manslaughter.²

In July 2021, Kertscher pleaded guilty to an amended count of second-degree manslaughter and agreed to leave sentencing to the discretion of the district court. For the factual basis of his plea, Kertscher testified that, on the date of the incident,

¹ Kertscher was charged with these crimes in violation of Minnesota Statutes sections 609.221, subdivision 1; 609.222, subdivision 2; and 609.245, subdivision 1 (2018).

² Kertscher was charged with this crime in violation of Minnesota Statutes section 609.20(2) (2018).

he was in a friend's basement when he and the victim got into an argument. He stated that the victim "came at" him, so he hit the victim "[i]n the jaw" and the victim was "knocked out and fell over." He also testified that he left the house directly after he punched the victim. He said that he saw in the police reports that other individuals brought the victim from the basement to the front yard of the house in order for the victim to be transferred to the hospital. Kertscher acknowledged that the victim was diagnosed with a traumatic brain injury and later died. The district court accepted Kertscher's plea, convicted him of second-degree manslaughter, and sentenced him to 48 months' imprisonment. The district court left restitution open.

Three victims³ sought restitution: the Crime Victims Reparations Board, the victim's mother, and First-Class Recoveries, Inc. on behalf of Preferred One. The Crime Victims Reparations Board requested \$7,246.49 to cover the victim's funeral costs. The victim's mother requested \$2,729.38 for cash Kertscher allegedly stole from the victim during the incident, as well as expenses for fuel, lodging, food, and lost wages, which were incurred from visiting her son in the hospital. And Preferred One requested \$557,506.39 for the victim's medical benefits that paid the medical bills for his end-of-life care.

Kertscher filed a motion and affidavit challenging the restitution. A contested-restitution hearing was held, and all three parties seeking restitution testified.

³ "Victim" is defined by Minnesota Statutes section 611A.01(b) (2018) as a natural person, corporation, government entity, or other entity who has incurred loss or harm as a result of a crime. *See* Minn. Stat. § 611A.04, subd. 1(a) (2018) (stating that a "victim of a crime has the right to receive restitution as part of the disposition of a criminal charge . . . against the offender if the offender is convicted").

Kertscher neither objected to nor challenged the Crime Victims Reparations Board's request for restitution. The victim's mother testified that some of her requested losses were made on behalf of other individuals who were part of the victim's family. And Preferred One had an attorney and owner of First-Class Recoveries, Inc. testify to the medical benefits the victim received through his employer's health plan. The owner of First-Class Recoveries testified that Preferred One made payments for the victim's medical care at the end of his life and then retained First-Class Recoveries to pursue recovery on behalf of the health plan. Further, the owner stated that Preferred One only covers expenses that are deemed medically necessary. Finally, the owner testified that the amount requested in restitution was typical for end-of-life care because such care "after trauma is often very expensive."

Kertscher also testified about his ability to pay restitution. He stated that in prison he gets paid about \$0.25 an hour to attend treatment, clean, or serve food, which is about \$9.00 every two weeks. Before prison, Kertscher testified that he cut lawns for about \$100 a week and worked at K-Concrete, his brother-in-law's company, where he made \$15 an hour. He also stated that he intends to seek full-time employment once he is released from prison—around March 2023 when he is about 32 years old—specifically either in construction or back at his brother-in-law's company. After the hearing, the state conceded that five claims listed in Preferred One's exhibits (totaling \$1,042.46) should be withdrawn for lacking a corresponding bill and decreased its request to \$556,121.39.

In September 2022, the district court ordered that Kertscher pay restitution to all three victims in the following amounts:

- \$7,246.49 to the Crime Victims Reparations Board;
- \$410.32 to the victim's mother; and
- \$556,121.39 to Preferred One.

Kertscher appeals only the restitution ordered to Preferred One.

DECISION

Kertscher argues that the district court abused its discretion in ordering restitution in the amount of \$556,121.39 to be paid to Preferred One, the victim's health-benefits provider, for three reasons: (1) Preferred One's economic loss was not directly caused by Kertscher's conduct, (2) the district court failed to expressly consider his ability to pay the restitution amount, and (3) the district court's restitution order is more retributive than rehabilitative.

We “generally review a restitution order for an abuse of the district court's broad discretion.” *State v. Wigham*, 967 N.W.2d 657, 662 (Minn. 2021) (quotation omitted). That broad discretion, however, “is constrained by the statutory requirements” set forth in Minnesota Statutes section 611A.045 (2020). *Id.* This statute requires courts to consider two factors when deciding whether to order restitution and setting the amount of 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). Before the district court makes its determination, the defendant may challenge the restitution requested by the state. *Id.*, subd. 3(b). In a

contested-restitution scenario, the proper restitution amount must be supported by a preponderance of the evidence. *Id.*, subd. 3(a). And the state has the burden of demonstrating the amount of loss sustained by a victim as a result of the offense and its appropriateness. *Id.*

With the law governing restitution in mind, we address in turn each of Kertscher's three arguments pertaining to the restitution amount to Preferred One.

Preferred One's economic loss was directly caused by Kertscher's conduct and the restitution award was reasonable.

Kertscher contends that the district court abused its discretion in its restitution order for Preferred One because the state's evidence did not provide the requisite specificity, rendering the award unreasonable. He asserts that restitution should only compensate loss that was directly related to his own conduct, and all the injuries the victim sustained could not be attributable to the conduct Kertscher admitted to at his plea hearing.

To evaluate this claim, we turn to Minnesota Statutes section 611A.04, subdivision 1(a), which specifies that "[a] request for restitution may include . . . any out-of-pocket losses resulting from the crime, including *medical . . . costs.*" (Emphasis added.) And Minnesota Statutes section 611A.045, subdivision 1(a)(1), states that in determining restitution, the district court should consider the "amount of economic loss sustained by the victim *as a result of the offense.*" (Emphasis added.) In *State v. Riggs*, the Minnesota Supreme Court interpreted the phrase "as a result of the offense" to "require[] the district court to consider the economic loss sustained by the victim as a consequence of the defendant's violation of the law." 865 N.W.2d 679, 685-86

(Minn. 2015). Later, in *State v. Boettcher*, the supreme court clarified that the “general rule . . . is that a district court may order restitution only for losses that are directly caused by, or follow naturally as a consequence of, the defendant’s crime.” 931 N.W.2d 376, 381 (Minn. 2019).

Here, the record supports the district court’s determinations that the \$556,121.39 in medical bills were reasonable and were incurred as a result of Kertscher’s offense. Accordingly, the district court acted within its discretion when it ordered all the medical bills for the victim’s end-of-life care as restitution to be paid by Kertscher.

First, the record supports that Preferred One’s restitution amount followed naturally as a consequence of Kertscher’s crime. Kertscher pleaded guilty to the conduct that led to the victim being in the hospital. At his plea hearing, he admitted that he knocked out the victim with one punch and left the scene. And the victim was later diagnosed with a traumatic brain injury that ultimately led to his death two months later. The victim’s medical expenses naturally follow from the punch that left the victim unconscious from the moment it happened until the moment he died. Accordingly, the factual basis for Kertscher’s plea supports the district court’s determination that the punch was the direct cause of the victim’s medical needs.

The record also supports the reasonableness of the ordered restitution amount. For example, the restitution affidavit from Preferred One described its elements of loss, itemized the total dollar amounts of restitution claimed, and specified the medical procedures that justified the medical expenses, which was in conformance with the restitution statute. *See* Minn. Stat. § 611A.04, subd. 1(a) (stating that medical expenses

can be recovered in restitution as long as the information submitted describes the loss, itemizes the total dollar amount, and specifies the reasons that justify these amounts). And when Kertscher contested five claims without accompanying bills, the state subtracted those claims from Preferred One's restitution request. Moreover, the owner of First-Class Recoveries, Inc. testified that the affidavit submitted by Preferred One included all the expenses that were reasonable and medically necessary because the health-benefit plan only approves payments for such expenses. And he explained that such end-of-life care after trauma is "very expensive," and thus this amount is "typical" for this sort of care. His testimony supports that the amount is reasonable, and the district court found his testimony credible. *See State v. Dickerson*, 481 N.W.2d 840, 843 (Minn. 1992) (explaining that the credibility of witnesses and the weight to be given to their testimony are determinations to be made by the factfinder).⁴

To conclude, because the ordered restitution was reasonable and followed naturally from Kertscher's conduct, the district court did not abuse its discretion.

The district court expressly considered Kertscher's ability to pay restitution.

Kertscher next asserts that the district court abused its discretion because it did not expressly state that it considered Kertscher's ability to pay, which is the second restitution factor. Minn. Stat. § 611A.045, subd. 1(a)(2). Although we generally review a restitution

⁴ Still, Kertscher alludes to an argument given at sentencing that some statements provided at the time of the incident indicated that the victim may have been dropped on his head during transport from the basement to the outside, which could have been an intervening cause or made the victim's condition worse. This argument fails. Kertscher pleaded guilty and waived his right to a trial to determine this issue.

order for an abuse of discretion, in the wake of *State v. Wigham*, whether the district court fulfilled its statutory obligation to consider the defendant's ability to pay restitution is a question of law that this court reviews de novo. 967 N.W.2d at 662.

Minnesota Statutes section 611A.045, subdivision (1)(a)(2), requires a district court to consider a defendant's income, resources, and obligations when it "affirmatively take[s] into account the defendant's ability to pay when awarding and setting the amount of restitution." *Wigham*, 967 N.W.2d at 663. The district court fulfills its statutory duty regarding this second restitution factor "when it expressly states, either orally or in writing, that it considered the defendant's ability to pay" and "the record include[s] sufficient evidence about the defendant's income, resources, and obligations" to consider ability to pay. *Id.* at 664-65. But the district court *need not* make express findings about the defendant's income, resources, and obligations to support its express statement that it considered the defendant's ability to pay. *Id.* at 659. Rather, the record must include sufficient information on those topics to support the district court's express statement regarding the defendant's ability to pay. *Id.*

Here, the district court did not err because it expressly stated in writing that it considered Kertscher's ability to pay. The district court's restitution order provides an express statement in writing about Kertscher's ability to pay because it acknowledges his lack of financial means to have the ability to pay now while also noting his earning potential and opportunities for inheritance and other financial windfalls after his release from prison. Specifically, the district court satisfied *Wigham*'s requirement when it wrote "[t]herefore, [Kertscher] has the ability to pay restitution in this matter," combined with the income

information it provided. *See id.* at 664-65 (requiring the district court to expressly state that it considered the defendant’s ability to pay). And the district court’s restitution order includes evidence of Kertscher’s income, resources, and obligations within three paragraphs that outline his income in prison, his income before prison, and his potential income once he is released from prison. Thus, even though the district court is not required to make specific findings about Kertscher’s income, it did so here. The express sentence and the context surrounding Kertscher’s income in the past, present, and future, clearly shows an express consideration of Kertscher’s ability to pay.

The district court’s restitution order was not punitive.

Finally, Kertscher argues that the amount of \$556,121.39 to be paid to Preferred One is such a large amount of restitution, it is functionally punitive because “it is unlikely [he] would be able to repay the restitution . . . even throughout his entire lifetime.”

The principal purpose of restitution is to ensure crime victims are restored to the same financial position they were in before the crime. *State v. Palubicki*, 727 N.W.2d 662, 666 (Minn. 2007). Restitution, however, should not be used as a form of punitive damages. *See State v. Fader*, 358 N.W.2d 42, 48 (Minn. 1984) (explaining that “the word ‘restitution’ connotes restoring or compensating the victim for his loss”).

Here, the district court acted within its discretion in ordering \$556,121.39 in restitution because, although it is a large amount, it is not punitive in nature. This amount is the exact amount of medical bills that the victim incurred—minus five unsupported health-insurance claims that were removed from the total after the restitution hearing. It

was not inflated by the district court. The district court neither included interest nor adjusted for inflation.

Finally, the nonpunitive nature of this award is supported by caselaw. *State v. Maidi* explained that a restitution order, although large, can still fit within the confines of rehabilitation over punishment. 537 N.W.2d 280, 283, 285 (Minn. 1995) (affirming a district court’s November 1993 restitution order of \$147,251.27 because the court considered defendant’s ability to pay, and it was an appropriate amount to compensate the victims). And although *State v. Hanninen*,⁵ mentions the “futility of ordering overwhelming restitution,” *Maidi* reinforces that even if the amount is overwhelming the monthly payments scheduled by the sentencing court—or in this case reserved for determination by Kertscher’s supervised release agent—may not be. *Hanninen*, 533 N.W.2d at 662; *See Maidi*, 537 N.W.2d at 285–86 (holding that because “the sentencing court properly considered [the defendant’s] ability to pay” by setting a payment schedule that he could afford based on his earnings, it did not abuse its discretion by ordering restitution in an amount the defendant could “mathematically . . . never pay off”).⁶ Moreover, we observe that Kertscher’s age and anticipated release date—he is about 32 years old as of March 2023—support the nonpunitive nature of this award. At his relatively

⁵ And *Hanninen* can be distinguished from this case because, in *Hanninen*, the amount of restitution was unspecified and there was civil liability pending that factored into whether the restitution amount was appropriate. 533 N.W.2d 660, 662 (Minn. App. 1995), *rev. denied* (Minn. Sept. 28, 1995). In contrast, all Preferred One’s restitution request is specified in an itemized list of medical costs and no civil liability is pending.

⁶ We note that the record lacked any documentation regarding a restitution-payment plan from Kertscher’s supervised release agent.

young age, Kertscher has many years to earn a living and make payments towards this restitution amount.

In sum, the district court acted within its broad discretion in awarding restitution because its determinations that Preferred One's economic loss was directly caused by Kertscher's conduct and Kertscher had the ability to pay were not against the facts and logic in the record. *State v. Hallmark*, 927 N.W.2d 281, 291 (Minn. 2019). Moreover, the district court did not err because it expressly stated that it considered Kertscher's ability to pay, even making findings about his past, present, and future income. And the amount, although large, is not punitive, given Minnesota caselaw applied to the facts of this case, and the district court did not abuse its discretion in ordering it.

Affirmed.