

The government argued that under Minnesota Statutes section 611A.045, subdiv. 3, Mr. B█ should have submitted an affidavit regarding his position on restitution. The purpose of this memorandum is to address the government's argument and to re-raise the argument that restitution to J.D.E. is inappropriate in this case.

ARGUMENT ADDRESSING STATE'S ARGUMENT

The government argues that Minnesota Statute section 611A.045 requires Mr. B█ submit an affidavit in this case. The statute states:

At the sentencing, dispositional hearing, or hearing on the restitution request, the offender shall have the burden to produce evidence if the offender intends to challenge the amount of restitution or specific items of restitution or their dollar amounts. This burden of production must include a detailed sworn affidavit of the offender setting forth all challenges to the restitution or items of restitution, and specifying all reasons justifying dollar amounts of restitution which differ from the amounts requested by the victim or victims. The affidavit must be served on the prosecuting attorney and the court at least five business days before the hearing. A dispute as to the proper amount or type of restitution must be resolved by the court by the preponderance of the evidence. 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 is on the prosecution.

MINN. STAT. § 611A.045, subdiv. 3(a) (emphasis added). The plain reading of this statute requires an affidavit only if the dollar amounts are at issue. This is not the case here. The argument here is legal—not factual. The issue is not what *amount* should be paid for restitution, what the *items* to be replaced or repaired should be, or the *amount of money* needed to replace broken items the damaged vehicle. To the contrary, Mr. B█ does not dispute that J.D.E. incurred the cost he alleges. The sole issue is whether Mr. B█, versus the third co-defendant who actually damaged the vehicle, is legally required to pay any restitution whatsoever given that the allegations against J.D.E. were never charged in Mr. B█' case.

The vast majority of Minnesota restitution cases deal with cases where the restitution amount is challenged. In contrast, the cases mentioned in the undersigned's previous letter to this Court discussing whether restitution was applicable—*State v. Latimer*, 604 N.W.2d 103 (Minn. Ct. App. 1999), *State v. Olson*, 381 N.W.2d 899 (Minn. Ct. App. 1986), and *State v. Esler*, 553 N.W.2d 61 (Minn. Ct. App. 1996)—apply to cases where the issue is whether restitution even applies.

The statute cited by the government does not apply to this case for several reasons. First, all arguments for restitution were discussed extensively at Mr. B■■■■' sentencing hearing, a hearing where Ms. S■■■■ was absent. At the sentencing hearing, due to Mr. B■■■■' argument that he is not responsible for any restitution beyond the stolen phone, Your Honor scheduled restitution hearing date and waived Mr. B■■■■' appearance. It was clear to all parties—and stated on the record—that restitution was at issue as Mr. B■■■■ was arguing that he was not responsible for any restitution given that the restitution claimer—J.D.E.—was not a victim to the crimes charged. There is no lack of notice.

Second, because this is a legal and not a factual argument (the prosecutor did not object to the video), an affidavit is irrelevant. As stated above, the amount of restitution is not at issue. Therefore, Mr. B■■■■ is not required to submit an affidavit contesting the monetary aspects of the restitution given his argument that he is responsible for nothing but the stolen phone.² The fact that the video clearly depicts Mr. B■■■■ not involved in the damage to the truck, as well as the fact that he was never charged with criminal damage to property speaks for itself. There is no dispute given all record evidence, including the plea agreement, the criminal complaint, the police reports, and the squad video, that J.A.J.H. was the victim of the robbery, not J.D.E.

² The government has never provided defense counsel an affidavit for restitution seeking restitution for the phone. In fact, defense counsel contacted the government and specifically stated that Mr. B■■■■ would pay for any expenses related to the missing phone, however the government did not respond.

Third, if Mr. B■■ was challenging the restitution amount, than an affidavit or testimony would be necessary. For example, if Mr. B■■ thought the vehicle parts were overpriced, then an affidavit would have been appropriate. But Mr. B■■ is not challenging the restitution amount in any regard and thus an affidavit is pointless. He is simply challenging that J.D.E. is not the appropriate party to receive restitution *in his case* (it is the third co-defendant who damaged the vehicle unbeknownst to Mr. B■■ who should be responsible).

The statute above states, “. . . the offender shall have the burden to produce evidence **if the offender intends to challenge the amount of restitution or specific items of restitution or their dollar amounts.**” MINN. STAT. § 611A.045, subdiv. 3(a) (emphasis added). Mr. B■■ did not challenge and is not challenging “the amount of restitution or specific items of restitution or their dollar amounts.” The statute continues, “This burden of production must include **a detailed sworn affidavit of the offender setting forth all challenges to the restitution or items of restitution, and specifying all reasons justifying dollar amounts of restitution which differ from the amounts requested by the victim or victims.**” MINN. STAT. § 611A.045, subdiv. 3(a) (emphasis added). Again, Mr. B■■ is not shouldering this “burden of production,” which requires the affidavit. His argument is simply that J.D.E. is not the person who can receive restitution in his specific case because none of the charged offenses related to the damage to the truck or named J.D.E. as the victim. This is a legal argument—it is not the argument that is contemplated by the statute cited by the government.

For these reasons, the affidavit described in the statute cited by the government simply does not apply in this case, as there are no facts by which Mr. B■■ could swear in the affidavit. The criminal complaint charged by the government and the video provided during discovery

speaks for itself—that Mr. B█ had nothing to do with the damage to the truck nor was he alleged by the government to have caused it.

ARGUMENT AGAINST IMPOSING RESTITUTION

Restitution is inappropriate in this case. The issue in this case is not about the appropriate amount of restitution; it is a legal issue as to whether the truck owner, J.D.E., is the victim of the crime. He is not.

Mr. B█ was charged with *First Degree Aggravated Robbery* and *Simple Robbery*, both against a victim, J.A.J.H., who is not claiming restitution. The only restitution the government is attempting to collect is J.D.E.'s monetary loss due to the damage to his truck. Mr. B█ was never charged with damage to property or any other such charge where the victim was J.D.E.

“A victim of a crime has the right to receive restitution as part of the disposition of a criminal charge or juvenile delinquency proceeding against the offender if the offender is convicted or found delinquent. . . . A request for restitution may include, but is not limited to, any out-of-pocket **losses resulting from the crime . . . ”** MINN. STAT. § 611A.04, subdiv. 1(a) (emphasis added). In Mr. B█’ case, he was never charged with, never pled guilty to, and was never convicted of a crime against truck owner J.D.E.

In *State v. Latimer*, the defendant was charged with and pled guilty to being an accomplice after the fact to murder by driving two of the involved individuals so they could get rid of weapons and burn evidence. 604 N.W.2d 103, 104 (Minn. Ct. App. 1999). The court imposed joint and several restitution with four other people, to be paid to the victim’s parents. *Id.* The appellate court stated that **restitution “is only proper where the victim’s losses are ‘directly caused’ by the conduct for which the defendant was convicted”** and that the court must give a factual basis supporting the imposition of restitution. *Id.* at 105 (citation omitted)

(emphasis added). The appellate court analyzed that the defendant's actions after the murder were "separate from the murder itself" and that she was only involved *after* the murder. *Id.* The appellate court remanded the case to the district court to determine "which losses were directly caused by Latimer's participation in the cover-up of the murder." *Id.* The court held, "the district court abused its discretion in ordering Latimer to pay restitution to [the victim's] parents for losses that were not directly caused by her actions as an accessory after the fact and by failing to allocate the portion of the restitution claim that related solely to Latimer's actions." *Id.* at 105–06.

In *State v. Olson*, the defendant was charged with aiding in the burglary of a building and theft of items in that building; he was convicted of aiding the burglary but acquitted of theft. 381 N.W.2d 899, 900 (Minn. Ct. App. 1986). He was ordered to pay restitution of both the damage from the break-in and the theft of the items. *Id.* The defendant appealed, arguing that since he was acquitted of the theft, he should not have to pay restitution of the items stolen. *Id.* The appellate court disagreed, saying that the victim store's "**losses are directly caused by appellant's conduct for which he was convicted**" and upheld the restitution amount. *Id.* at 901 (emphasis added).

In *State v. Esler*, the defendant was indicted for first-degree murder and convicted by jury of second degree murder. 553 N.W.2d 61, 62–63 (Minn. Ct. App. 1996). After an afternoon of drinking, the defendant shot his gun several times at a house. *Id.* at 63. Early the next morning, the defendant shot at the victim in another house, killing her. *Id.* The court ordered restitution for the house that the defendant shot—not the murder victim's house. *Id.* The appellate court reversed the order of restitution, stating that the homeowner was not the victim of the crime for which the defendant was convicted. *Id.* at 65. "Only the victim is entitled to receive restitution."

Id. (internal quotation marks and citation omitted). Quoting *Olson*, the appellate court stated, “Where the victim’s losses are directly caused by the defendant’s conduct **for which he was convicted**, there is nothing improper in ordering restitution.” *Id.* (quoting *Olson*, 381 N.W.2d at 901) (emphasis added). The court stated that the killing of the murder victim and the shooting at the other house were not of the same incident—there were different criminal objectives and the incidents were separated by several hours. *Id.* “Although the homeowner was a ‘victim’ of Esler’s earlier ‘target practice’ session, Esler was found not guilty of premeditated murder, which might have linked the two incidents into a single course of conduct. Thus, we cannot say that the homeowner was a ‘victim’ of the . . . murder.” *Id.*

Restitution over and above the cost of the cell phone is inappropriate in this case. First, in Mr. B■■■’ case, the incident involving J.D.E.’s truck and the incident involving J.A.J.H. are completely separate. One involved damaging a truck and the other involved taking a person’s phone. There is no connection between the two. Truck owner J.D.E. is not victim to the robbery of J.A.J.H. If J.D.E. had tried to intervene in the robbery and his truck had been damaged as a result, the government might have a basis for requesting restitution for J.D.E., but such is not the case. The two incidents are separate.

Second, Mr. B■■■ was never charged with or convicted of damaging the truck. There is no charged crime or conviction to which J.D.E. is a victim. Therefore, he cannot collect restitution because there was no crime charged. If the government wanted J.D.E. to collect restitution, then it should have charged the alleged offense. If J.D.E. wants to attempt to collect, he can proceed in a civil case.

Third, the government will have to convince this Court of the amount of restitution that is attributable to Mr. B■■■■' alleged actions. The video in this case shows that Mr. B■■■■ did not damage the truck. Thus, it impossible to allocate any restitution regarding the truck to Mr. B■■■■.

CONCLUSION

For the foregoing reasons, because the restitution argument is purely legal on the issue of whether restitution actually applies, Mr. B■■■■ was not required to submit an affidavit. Further, restitution is not applicable in this case because the alleged conduct against J.D.E.'s vehicle was never charged; he is not a "victim" of Mr. B■■■■' case and is ineligible for restitution.

Respectfully submitted,

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