

NOT DESIGNATED FOR PUBLICATION

Nos. 119,479
119,480

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

JORDAN BROCK GLASSBURN-HOESLI,
Appellant.

MEMORANDUM OPINION

Appeal from Saline District Court; JARED B. JOHNSON, judge. Opinion filed June 14, 2019.
Restitution award vacated.

Kasper Schirer, of Kansas Appellate Defender Office, for appellant.

Anna M. Jumpponen, assistant county attorney, *Ellen Mitchell*, county attorney, and *Derek Schmidt*, attorney general, for appellee.

Before MALONE, P.J., SCHROEDER, J., and MCANANY, S.J.

PER CURIAM: Jordan Glassburn-Hoesli was charged with possession of Jerry Dreher's stolen outboard motor, which was taken from Dreher's pontoon boat in May 2017. The motor was recovered from Glassburn-Hoesli, but it had been damaged at some point before it was recovered. Pursuant to a plea agreement with the State, Glassburn-Hoesli pled no-contest to the possession of stolen property and to charges pending against him in another case, which involved different crimes and different victims. Under the plea agreement, Glassburn-Hoesli agreed to pay restitution for all crimes he was charged or convicted of in each case.

On May 10, 2018, the district court granted Glassburn-Hoesli probation in the case involving the stolen outboard motor and ordered him to pay restitution. At the restitution hearing that immediately followed, the district court ordered Glassburn-Hoesli to pay the cost of a new outboard motor to replace the one that had been stolen. Glassburn-Hoesli appeals that decision. Because there was an inadequate showing of a causal connection between the damage caused to the outboard motor and Glassburn-Hoesli's later possession of it, we vacate the district court's order of restitution.

At the restitution hearing, Dreher was the only witness to testify regarding the loss of his outboard motor. He testified that in May 2017 he discovered that the front and back doors and the garage door to a residence he owned had been kicked in and a 90 horsepower outboard motor and a 4x8 trailer were missing. He later found the missing motor at Glassburn-Hoesli's residence. He also recovered the trailer, which was undamaged. Dreher testified to the cost of replacing the doors that had been kicked in, but the district court, in its later ruling, noted that restitution is limited to losses "reasonably related to the offense. The plea was to possession of stolen property. It wasn't to residential burglary. He wasn't even charged with that."

Dreher testified about the damage to his outboard motor. He testified that the gas line, control lines, and electric lines of the motor were all cut, and there were scratches on the side of the motor. According to Dreher, a wiring harness for the motor is no longer available. He also learned that the motor had been started without any water to cool it, which ruined it.

Glassburn-Hoesli objected to hearsay statements of two mechanics about obtaining a replacement wiring harness for the motor. In response, the State provided a written statement dated April 26, 2018, from Shane Sankey, a marine dealer in Salina. A copy of the letter had been provided to Glassburn-Hoesli. The court ruled that the letter would be admitted upon laying a proper foundation regarding the condition of the motor

at the time of Sankey's written statement. Dreher identified the letter as Sankey's estimate of the repair or replacement costs for the damaged motor. Dreher testified to the motor's condition and contents of the letter. The letter stated that the old motor was worth \$2,140 and that it would cost about \$6,000 to install a used motor and replace the throttle and steering controls on Dreher's boat. But it is unlikely a used motor could be found because Dreher's motor was 17 years old. A new motor installed on Dreher's boat with new throttle and steering controls would cost about \$18,000.

Based on Sankey's estimate, the district court determined that the stolen motor was worth \$2,140. The cost of replacing the motor with a used motor plus the cost of replacing the severed throttle and steering controls would be around \$6,000. But because finding a used motor may not be possible, restoring Dreher with a similar functioning motor would cost a total of about \$18,000. Accordingly, the court ordered Glassburn-Hoesli to pay restitution of \$18,000.

Glassburn-Hoesli appeals the district court's order of restitution. He contends that the district court erred in ordering restitution for damages caused in the course of the theft of the motor and not related to his possession of the motor after the theft. He also claims that the district court erred in admitting hearsay evidence and in calculating the amount of restitution due.

Causation

Glassburn-Hoesli did not raise the causation issue before the district court. Issues not raised before the trial court generally cannot be raised on appeal. See *State v. Kelly*, 298 Kan. 965, 971, 318 P.3d 987 (2014). But if the "newly asserted theory involves only a question of law arising on proved or admitted facts and is finally determinative of the case," the issue may be heard for the first time on appeal. *State v. Phillips*, 299 Kan. 479,

493, 325 P.3d 1095 (2014). That exception applies here, so we will consider Glassburn-Hoesli's causation argument.

Glassburn-Hoesli argues that there is no evidence the damage to the motor occurred while the motor was in his possession as opposed to while the motor was in the process of being stolen or thereafter in the possession of the thief. The State argues that there is no requirement that the damage be caused directly by Glassburn-Hoesli's possession of the stolen motor.

Glassburn-Hoesli was sentenced to 10 months in prison on his possession of stolen property conviction but was granted probation for 12 months. K.S.A. 2018 Supp. 21-6607(c)(2) provides that as a condition of probation, a defendant can be ordered to "make reparation or restitution to the aggrieved party for the damage or loss caused by the defendant's crime."

To support an order of restitution, the State must provide substantial competent evidence that establishes a causal link between the crime committed and the victim's loss. *State v. Shank*, 304 Kan. 89, 93, 369 P.3d 322 (2016); *State v. Alcala*, 301 Kan. 832, 837, 348 P.3d 570 (2015). Substantial competent evidence is legal and relevant evidence that a reasonable person could accept as sufficient to support a conclusion. *State v. Jolly*, 301 Kan. 313, 325, 342 P.3d 935 (2015).

Our Supreme Court has determined that the requirement of a causal connection may be satisfied if the loss was either directly or indirectly caused by the crime. See *State v. Hall*, 298 Kan. 978, 990, 319 P.3d 506 (2014).

More recently, in *State v. Arnett*, 307 Kan. 648, 413 P.3d 787 (2018), our Supreme Court considered whether, under K.S.A. 2017 Supp. 21-6607(c)(2), a defendant convicted of conspiracy to commit burglary could be ordered to pay restitution for

damages caused by her codefendants during the underlying burglaries and thefts. Arnett had loaned her mother's car to her two codefendants so that they could break into two houses. They returned the car to Arnett after the burglaries and paid her \$200 for the use of her mother's car. The *Arnett* court recognized the observation in *Hall* that "[a]lthough not all tangential costs incurred as a result of a crime should be the subject of restitution, . . . there is no requirement that the damage or loss be "directly" caused by the defendant's crime.' . . . [Nevertheless,] there must be some limit to the defendant's liability." *Arnett*, 307 Kan. at 653-54. While the court had not "explicitly embraced proximate cause when considering restitution" in *Hall*, "we have implicitly done so." *Arnett*, 307 Kan. at 655. Thus, "[t]oday, we explicitly conclude that the causal link between a defendant's crime and the restitution damages for which the defendant is held liable must satisfy the traditional elements of proximate cause: cause-in-fact and legal causation." 307 Kan. at 655.

Causation-in-fact

Causation-in-fact, which is required under the holding in *Arnett*, is based on a "but for" analysis. To establish causation-in-fact there must be "sufficient evidence from which a jury could conclude that more likely than not, but for the defendant's conduct, the plaintiff's injuries would not have occurred." *Puckett v. Mt. Carmel Regional Medical Center*, 290 Kan. 406, 420, 228 P.3d 1048 (2010). Moreover, the notion of causation-in-fact as applied here is subject to K.S.A. 2018 Supp. 21-6607(c)(2), which limits reparations to "the damage or loss caused by the defendant's crime." The illegal conduct at issue here is Glassburn-Hoesli's possession of property which had been stolen. He was not charged with committing the theft. Thus, to be the basis of an order of restitution the damage to Dreher's outboard motor must have been caused by Glassburn-Hoesli during the time he possessed it after the theft.

Dreher testified that he found the motor on the back of Glassburn-Hoesli's boat in his back yard. "Basically everything was cut, gas line, control lines, electric lines through it, everything was cut." When Dreher got the motor home, he observed that "it is real obvious that the motor was taken off the boat and put in the back of his truck and then the vibration of the country roads, bringing it into his residence, it's got all kinds of scratch marks on one side of the motor." On further inspection, Dreher determined that "he actually started the motor without any water running through it to cool it, cool it down. . . . It basically would ruin it. It would be like if he came up and stole a motor out of your vehicle and ran it without any cooling to it. It's going to ruin the motor."

Dreher's testimony is predicated on Glassburn-Hoesli being the thief. But Glassburn-Hoesli was never charged with theft of the motor. Dreher made no attempt to separate damage to the motor caused during the theft or during the time the motor was in the thief's possession from any damage that may have been caused later when the motor was in Glassburn-Hoesli's possession. Nor did the district court in ordering restitution. The court simply referred to Dreher's outboard motor as "the specific motor that was stolen, or possessed by the defendant and damaged in that process."

In *State v. Srader*, No. 116,387, 2018 WL 560180, at *4 (Kan. App. 2018) (unpublished opinion), the defendant, who was convicted of leaving the scene of an accident, was not held responsible for restitution in his criminal case for injuries suffered by the victim during the course of the collision. A panel of our court determined that the defendant's criminal conduct in leaving the accident scene was not the cause of the victim's injuries and did not satisfy the causation-in-fact requirement for a restitution order.

Here, there was no evidence that established that the outboard motor was damaged after it left the possession of the thief. Further, there was no testimony to the effect that but for the availability of Glassburn-Hoesli as a prospective buyer of stolen goods, the

thief would not have taken Dreher's outboard motor and damaged it in the process. Thus, the State failed to establish causation-in-fact.

Legal Causation

The second necessary type of causation, legal causation, is based on the concept of foreseeability. It has the effect of limiting causation-in-fact liability to instances in which the resulting injury or damage is foreseeable. Thus, "the defendant is only liable when it was foreseeable that the defendant's conduct might have created a risk of harm and the result of that conduct and any contributing causes were foreseeable." *Arnett*, 307 Kan. at 655.

In arguing that there was evidence to support legal causation, the State asserts that because Glassburn-Hoesli knew the motor he purchased was stolen, "he acquiesced in whatever action was necessary to remove the motor." The State points out that, according to the probable cause affidavit presented at Glassburn-Hoesli's plea hearing on December 28, 1917, Glassburn-Hoesli told the police that his old boat motor "blew up" and so he posted on Facebook that he was looking for a replacement motor. He purchased Dreher's motor for \$200 from some guy "in his 40s [who] drove a beat up Dodge pickup." But none of that was presented to the court at the May 10, 2018 restitution hearing.

Even so, while the \$200 purchase price certainly suggests that Glassburn-Hoesli knew the motor may have been stolen, placing an ad that expresses interest in buying an item does not constitute legal causation for a later loss when a prospective seller steals the item in order to complete the transaction. It is not reasonably foreseeable that posting a notice that one is interested in buying an item will cause an interested reader to go out and steal the item in order to make the sale.

Besides, as the *Arnett* court made clear, liability for restitution rests upon a showing of both causation-in-fact and legal causation. Evidence of foreseeability alone will not suffice to support a restitution order. There must also be substantial evidence that but for Glassburn-Hoesli's conduct, the damage to Dreher's outboard motor would not have occurred. Because there is no evidence here of causation-in-fact or evidence of reasonable foreseeability to support legal causation, both of which are necessary to support the district court's restitution order, we must vacate that order. See *State v. Miller*, 51 Kan. App. 2d 869, 869, 355 P.3d 716 (2015) (finding the correct remedy for lack of causal connection between crime of conviction and restitution is to vacate the district court's restitution order).

Glassburn-Hoesli's Other Claims of Error

Glassburn-Hoesli also contends that the district court erred in admitting hearsay testimony regarding the cost of replacing the damaged motor and in setting the amount of restitution. Because of our ruling on the issue of causation, these matters are now moot and we need not address them.

Order of restitution is vacated.