

NOTICE: Summary decisions issued by the Appeals Court pursuant to its rule 1:28, as amended by 73 Mass. App. Ct. 1001 (2009), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-261

COMMONWEALTH

vs.

MARK SVIZZERO.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

After a jury trial, the defendant was convicted of four counts of malicious destruction of property.¹ After conviction, the Commonwealth sought restitution, and an evidentiary hearing was held before the trial judge. At the conclusion of the hearing, the judge made oral and written findings, and ordered the defendant to pay restitution to both the named victim of the offenses, Mueller Corporation, and the victim's insurer, Chubb Group of Insurance Companies (Chubb). The defendant filed a motion to reconsider the restitution order, and the judge amended the order. The defendant now appeals, claiming various

¹ The defendant was initially charged with four counts of malicious destruction of property over \$250. He was convicted of two felony counts as charged, and on each of the remaining two counts, the jury convicted him only of the lesser included misdemeanor, malicious destruction of property equal to or under \$250.

errors in the restitution hearing, and in the judge's order. We affirm.

1. Failure to present a live witness from Chubb. The defendant first claims that it was error for the judge to order that restitution be paid to Chubb where no representative from Chubb appeared to testify at the restitution hearing. He argues that the absence of a representative from Chubb fatally impaired the Commonwealth's ability to meet its burden, and constituted a violation of due process. We disagree.

"Ordering restitution and determining the amount thereof rest[s] within the sound discretion of the judge," Commonwealth v. Avram A., 83 Mass. App. Ct. 208, 214 (2013), and the standard of proof for a restitution order is only that of a preponderance of the evidence. See Commonwealth v. Palmer P., 61 Mass. App. Ct. 230, 233 (2004). "The purpose of restitution . . . is to compensate the injured party for losses incurred as a result of the defendant's criminal conduct." Commonwealth v. Rotonda, 434 Mass. 211, 221 (2001). "[T]he scope of restitution is limited to 'loss or damage [that] is causally connected to the offense and bears a significant relationship to the offense.'" Commonwealth v. McIntyre, 436 Mass. 829, 835 (2002), quoting Glaubius v. State, 688 So. 2d 913, 915 (Fla. 1997). Criminal restitution is treated with an "expansive approach," and is designed to afford restitution to victims of crime "to the

greatest extent possible" (citation omitted). Commonwealth v. Cromwell, 56 Mass. App. Ct. 436, 443 (2002). When determining whether a restitution order had sufficient foundation, "[w]e accept the factual findings supported by the record, as the judge was in the best position to determine matters of credibility." Commonwealth v. Casanova, 65 Mass. App. Ct. 750, 756 (2006).

Contrary to the defendant's argument, the failure to present live testimony from a potential recipient of restitution does not itself preclude an award of restitution after a hearing. See Cromwell, 56 Mass. App. Ct. at 441-443 (upholding restitution award where no testimony was presented at restitution hearing). Here, the Commonwealth presented ample evidence of Chubb's losses through the live testimony of a representative of Mueller Corporation, and the written averments of both the Mueller Corporation and Chubb itself.

The Commonwealth also presented evidence through testimony and exhibits that the losses at issue were causally connected to the defendant's vandalism. But, importantly, we note that a judge also may rely on evidence presented at trial in assessing restitution. See, e.g., Palmer P., 61 Mass. App. Ct. at 232-233 (properly relying on trial evidence in assessing restitution award). The defendant did not include the trial transcripts in the appellate record. See Mass. R. A. P. 8 (b) (3) (ii), as

amended, 428 Mass. 1601 (1998). Without a transcript and record of the trial proceedings, we will not speculate as to what may have transpired at trial, and, accordingly, we cannot conduct an informed review of the judge's determination that the losses were causally related to the offense. Cf. Commonwealth v. Woods, 419 Mass. 366, 371 (1995) ("The burden is on the appellant to ensure that an adequate record exists for an appellate court to evaluate").

Regardless, the defendant's focus on the absence of evidence of Chubb's internal process, and "whether Chubb credited" various claims made by Mueller Corporation, is misplaced. The purpose of restitution is "not only to compensate the victim for his or her economic loss tied to the defendant's conduct, but also to make the defendant pay for the damage he or she caused as a punitive and rehabilitative sanction." Commonwealth v. Williams, 57 Mass. App. Ct. 917, 918 (2003) (victims need not submit insurance claims for losses in order to obtain restitution). The testimony of Mueller Corporation's representative, in combination with extensive documentary evidence, established the economic losses caused by the defendant's conduct.² The defendant had ample opportunity to

² We note that to the extent that the defendant suggests that items could not have been properly included as losses in the restitution sum where they represented estimates for which work was not performed, his argument fails. "The judge did not err

challenge the Commonwealth's case by means of cross-examining Glen Mueller and presenting evidence in his defense. The defendant may not challenge the apportionment of the losses found by the judge as between Mueller Corporation and Chubb, as he "lacks standing to complain against the [judge's] choice of [Chubb] as [a] beneficiary of restitution." Commonwealth v. Caparella, 70 Mass. App. Ct. 506, 517-518 (2007).

2. Hearsay. The defendant challenges the admission of various hearsay statements in evidence at the restitution hearing. These include a letter from Chubb to the East Bridgewater Police Department requesting restitution, Glen Mueller's testimony about Chubb's payment to Mueller Corporation, and a spreadsheet prepared by Mueller Corporation detailing its losses. The judge did not abuse her discretion in admitting the challenged evidence.

in relying in part on repair cost estimates prepared by various vendors and submitted by the owner, rather than the actual costs for the repairs. . . . The defendant had the opportunity to cross-examine the owner regarding those cost estimates and to submit evidence if he wished to rebut the owner's testimony." Williams, 57 Mass. App. Ct. at 917. Similarly, the defendant's argument that restitution must not exceed the amount paid by Chubb for the insurance claim relating to the defendant's offense is unavailing. The defendant points to no authority to support the claim that restitution must be capped at the level of recovery from insurance. Indeed, "there is no requirement that a victim must submit a claim under any insurance policy that might cover the loss before an order of restitution can be made." Id. at 917-918.

"A restitution hearing is not part of a criminal prosecution to which the full panoply of constitutional protections applicable at a criminal trial need be provided, but principles of due process govern." Casanova, 65 Mass. App. Ct. at 755. The "process should be flexible enough to consider evidence including letters, affidavits, and other material that would not be admissible in an adversary criminal trial." Id. at 756, quoting Morrissey v. Brewer, 408 U.S. 471, 489 (1972).

Reliable hearsay is admissible in restitution hearings, see Commonwealth v. Amaral, 78 Mass. App. Ct. 557, 561-562 (2011), and each of the challenged items of hearsay was sufficiently reliable to be admitted at such a hearing. "We conclude that the evidence and procedures here satisfied the due process standards for restitution hearings," where Glen Mueller testified regarding Mueller Corporation's losses, ample documentary support was admitted without challenge from the defendant, "and the defendant was provided an opportunity to cross-examine [Glen Mueller] and submit his own evidence. This was sufficient." Id. at 561.

3. Restitution for losses predating the offense dates.

The defendant claims that the judge improperly ordered restitution for several security- and repair-related expenses incurred by Mueller Corporation prior to the first offense date listed on the criminal complaint, because they could not

possibly be causally related to the defendant's offense. We disagree.

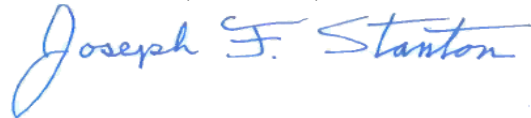
In ordering restitution, a judge is not confined to consideration of the four corners of the criminal complaint, but rather must instead make "a holistic assessment of the facts surrounding the crime, not merely those facts establishing the elements of the crime." Commonwealth v. Denehy, 466 Mass. 723, 739 (2014). "The underlying facts of the charged offense, not the name of the crime of which the defendant was convicted or to which he pleaded guilty, controls." Casanova, 65 Mass. App. Ct. at 755. See Denehy, 466 Mass. at 740 (restitution for police officer's damaged glasses where defendant convicted of disorderly conduct and assault and battery by means of dangerous weapon); McIntyre, 436 Mass. at 835-836 (restitution for vehicle damage occurring during assault and battery); Palmer P., 61 Mass. App. Ct. at 232-233 (restitution for property taken from apartment when defendant convicted of breaking and entering, but acquitted of larceny).

The Commonwealth presented evidence that the challenged costs were incurred relative to vandalism that took place in the days immediately subsequent to the defendant's termination from Mueller Corporation, close in time to the charged offenses, and which involved an air chiller, as did the charged offenses. We cannot say on these facts that the judge abused her discretion

in determining that the early incidents were sufficiently related to the charged incidents so as to establish causality sufficient to order restitution.

Restitution order entered
October 3, 2017, affirmed.

By the Court (Henry, Lemire &
Ditkoff, JJ.³),



Clerk

Entered: December 3, 2019.

³ The panelists are listed in order of seniority.