

IN THE COURT OF APPEALS OF IOWA

No. 1-202 / 10-0883
Filed May 25, 2011

STATE OF IOWA,
Plaintiff-Appellee,

vs.

CHARLES DANIEL SIMS,
Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, Nancy S. Tabor,
Judge.

The defendant appeals a restitution order, challenging the sufficiency of
the evidence supporting the pecuniary damages awarded to the victim.

REVERSED AND REMANDED.

Mark C. Smith, State Appellate Defender, and Bradley M. Bender,
Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Martha E. Trout, Assistant Attorney
General, Michael J. Walton, County Attorney, and Kimberly Shepherd, Assistant
County Attorney, for appellee.

Considered by Vaitheswaran, P.J., and Eisenhauer and Danilson, JJ.
Tabor, J., takes no part.

VAITHESWARAN, P.J.

Charles Sims was convicted of second-degree arson and third-degree burglary in connection with a fire at an abandoned building.¹ The building was owned by P.C. Homes I, L.L.C., with Valley Bank financing the purchase and subsequent improvements. At sentencing, the district court ordered Sims to “make restitution to Valley Bank and P.C. Homes I, L.L.C. in an amount to be determined at a later hearing.” The State subsequently filed a statement of pecuniary damages asserting Valley Bank was entitled to \$231,404.40 in restitution. See Iowa Code § 910.3 (2009). Following an evidentiary hearing, the district court ordered restitution in that amount. On appeal, Sims essentially attacks the sufficiency of the evidence supporting this figure.

At the outset, the State argues Sims did not preserve error by objecting to the restitution figure in the district court. “However, in a bench trial, a defendant is not required to challenge the sufficiency of the evidence in the district court to preserve error for appeal.” *State v. Bonstetter*, 637 N.W.2d 161, 167 (Iowa 2001). *But see State v. Wagner*, 484 N.W.2d 212, 217 (Iowa Ct. App. 1992) (declining to consider defendant’s entitlement to insurance offset where defendant did not object to prosecutor’s failure to offset insurance proceeds against restitution amount). Because Sims’s appeal is from a hearing before the court and is essentially a challenge to the sufficiency of the evidence supporting the restitution award, we conclude error was preserved. Accordingly, we proceed to the merits, examining the district court’s fact-findings to determine

¹ We affirmed his convictions on direct appeal. See *State v. Sims*, No. 10-0318 (Iowa Ct. App. Apr. 27, 2011).

whether they lack substantial evidentiary support. *State v. Jenkins*, 788 N.W.2d 640, 642 (Iowa 2010).

Restitution includes “payment of pecuniary damages to a victim.” Iowa Code § 910.1(4). “Pecuniary damages” are defined as

all damages to the extent not paid by an insurer, which a victim could recover against the offender in a civil action arising out of the same facts or event, except punitive damages and damages for pain, suffering, mental anguish, and loss of consortium.

Id. § 910.1(3). The district court arrived at a pecuniary damages figure of \$231,404.40² by totaling the payoff amounts on three loans P.C. Homes obtained from Valley Bank (\$154,960.12, \$56,186.54, and \$20,257.74) and deducting \$137,000 in insurance proceeds received by the bank.

Sims first contends the court’s damage award is not supported by substantial evidence because it does not account for the market value of the property before the loss. See *Hendricks v. Great Plains Supply Co.*, 609 N.W.2d 486, 494 (Iowa 2000) (examining pre-loss market value in action for damages resulting from fire’s destruction of newly constructed home). He asserts the measure of damages “is the fair and reasonable cost of replacement or repair, but not to exceed the value of the property immediately prior to the loss or damage.” *Id.* Valley Bank essentially concedes the property’s fair market value immediately prior to the loss is relevant to the calculation of damages, but responds that the “district court could infer that the value of the property did not exceed the amount the bank would loan on the property.” Based on this

² The court also ordered Sims to pay the owner of the building \$600 in restitution for items left in the building that were destroyed by the fire. Sims has not appealed from that portion of the court’s order.

inference, Valley Bank asserts the “restitution award has a reasonable basis in the existing mortgages due on the property.”

Valley Bank was a mortgage holder rather than a titleholder. See *Mathews v. Silsby Bros.*, 198 Iowa 1392, 1395–96, 201 N.W. 94, 95–96 (1924) (distinguishing between rights of title owner and rights of mortgagee). The measure of damages for a mortgage holder, at least prior to foreclosure, is the extent of the impairment of its security. See *Bates v. Humboldt Cnty.*, 224 Iowa 841, 842–43, 277 N.W. 715, 716 (1938) (stating a mortgagee’s damages must be “measured by the amount or extent to which the value of the security was impaired”); *Kulp v. Trs. of Iowa Coll.*, 217 Iowa 310, 313, 251 N.W. 703, 704 (1933) (“Prior to foreclosure, the mortgagee may only sue for injury to his security.”). The mortgagee must show the value of the property before and after the alleged waste “and that the property is now worth less than the outstanding mortgage debt.” *Ginsberg v. Lennar Florida Holdings, Inc.*, 645 So. 2d 490, 500 (Fla. Dist. Ct. App. 1994); see also *European Am. Bank v. Dupont Bldg. Assocs.*, 567 So. 2d 971, 972 (Fla. Dist. Ct. App. 1990) (“A mortgagee . . . may have an action on the case for damages resulting from wrongful injury to the mortgaged property, whereby the property is rendered of less value as security for the mortgage debt; the damages to be awarded being the amount of injury to the security resulting from the damage to the property.” (quoting *Atlantic Coast Line R. Co. v. Rutledge*, 165 So. 563, 564 (Fla. 1935)); Hon. William Houston Brown, 1 *The Law of Debtors and Creditors* § 8:7 n.7 (2010) (“[I]f an injury to the property does not reduce its value below the amount required to secure the debt, the mortgagee has suffered no injury.”).

The record contains no evidence of the value of the building and land immediately prior to the fire.³ While Valley Bank is correct that certain evidence might suggest the value was less than the debt, we believe the damage calculation must be based on more concrete evidence.

This brings us to Sims's next challenge to the restitution award. He contends the award includes accumulated interest, late charges, legal fees, and costs on the unpaid notes, all of which lack a causal connection to his criminal act of setting fire to the building. See *Bonstetter*, 637 N.W.2d at 168 ("In calculating a restitution order, the district court must find a causal connection between the established criminal act and the injuries to the victim."). We agree.

The bank's loan officer did not tie the challenged sums to Sims's criminal activity. See, e.g., *id.* at 169 (reversing inclusion of cost of audit in restitution award because although "common sense seems to dictate an audit was certainly necessary . . . we may not simply infer the necessity and reasonableness. . . . The State must offer some proof to support the inclusion of the audit in the restitution order"); *State v. Starkey*, 437 N.W.2d 573, 575 (Iowa 1989) (finding no evidence that defendant's criminal act of leaving the scene of an accident either caused or aggravated the victim's injuries, which occurred before the criminal act).

Because there is no record evidence of the value of Valley Bank's security immediately prior to the loss or evidence linking the accumulated interest, late

³ The owner testified the property was purchased for \$263,000. The purchase was in late 2006. The fire was set a little more than two years later. See *State v. Sims*, No. 10-0318 (Iowa Ct. App. Apr. 27, 2011). We do not know the value immediately prior to the fire.

charges, legal fees, and costs to Sims's criminal act, we reverse the restitution order. We remand to the district court for a new restitution hearing, as requested by Sims. At the new hearing, the court shall determine the value of the security and compare it to the mortgage debt and shall redetermine the amount of interest, fees, and costs causally connected to Sims's criminal act and delete those items that are unrelated to his acts. See *State v. Ihde*, 532 N.W.2d 827, 830 (Iowa Ct. App. 1995) (reversing restitution order and remanding to fix restitution to the time period defendant admitted to stealing goods from the victim).

REVERSED AND REMANDED.