

2013 WL 7099166 (Alaska App.) (Appellate Brief)
Court of Appeals of Alaska.

Pamela NICHOLS, Appellant,
v.
STATE OF ALASKA, Appellee.

No. A-11128.
October 25, 2013.

Appeal from the Superior Court Judicial District At Anchorage Honorable Michael Spaan, Judge
Trial Court No. 3AN-10-6531 CR

Brief of Appellee

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***iii AUTHORITIES RELIED UPON**

Alaska Statute 12.55.045(a) and (b) provide:

Restitution and Compensation.

(a) The court shall, when presented with credible evidence, unless the victim or other person expressly declines restitution, order a defendant convicted of an offense to make restitution as provided in this section, including restitution to the victim or other person injured by the offense, to a public, private, or private nonprofit organization that has provided or is or will be providing counseling, medical, or shelter services to the victim or other person injured by the offense, or as otherwise authorized by law. The court shall, when presented with credible evidence, unless the victim expressly declines restitution, also order a defendant convicted of an offense to compensate a victim that is a nonprofit organization for the value of labor or goods provided by volunteers if the labor or goods were necessary to alleviate or mitigate the effects of the defendant's crime. In determining the amount and method of payment of restitution or compensation, the court shall take into account the

(1) public policy that favors requiring criminals to compensate for damages and injury to their victims; and

(2) financial burden placed on the victim and those who provide services to the victim and other persons injured by the offense as a result of the criminal conduct of the defendant.

(b) An order of restitution under this section does not limit any civil liability of the defendant arising from the defendant's conduct.

*1 STATEMENT OF ISSUES

Was Judge Spaan's restitution award supported by sufficient evidence?

*2 STANDARDS OF REVIEW

A trial court's award of restitution must be supported by substantial evidence. *Noffsinger v. State*, 850 P.2d 647, 650 (Alaska App. 1993). Where uncertainty regarding the restitution amount exists, the State must prove the amount "by a preponderance of the evidence." *Id.* (citing *Brakes v. State*, 796 P.2d 1368, 1372 n. 5 (Alaska App. 1990)).

As with other situations involving claims of insufficient evidence, this Court "must construe the evidence in the record in the light most favorable to the State." *Id.* This means resolving all doubts and conflicts in the evidence in favor of upholding the restitution award and leaving issues of credibility to the sentencing court. *See id.*; *Johnson v. State*, 188 P.3d 700, 702 (Alaska App. 2008). Viewing the evidence in this light, the Court must "determine whether a reasonable fact-finder could conclude that the disputed amount of restitution was established by a preponderance of the evidence." *Noffsinger*, 850 P.2d at 650.

The sentencing judge's underlying factual determinations are reviewed for clear error only. *See id.* (upholding as "not clearly erroneous" trial court's factual determination regarding amount of actual loss); *see also Salvato v. State*, 814 P.2d 741, 744 (Alaska App. 1991). Clear error exists only if, "after a thorough view of the record," this Court is left with "a definite and firm conviction that a mistake has been made." *See, e.g., Rausch v. Devine*, 80 P.3d 733, 737 (Alaska 2003).

*4 STATEMENT OF THE CASE

Statement of facts

John Pierce is an elderly gentleman who, sometime after September 2009, was diagnosed with Alzheimer's Disease. [Tr. 115] Prior to his diagnosis, Pierce conducted his personal banking at Wells Fargo Bank and maintained an investment account at Charles Schwab. [Tr. 92-98, 138-39] During 2008 and 2009, as Pierce's cognitive functioning was deteriorating, Pamela Nichols, with whom Pierce was acquainted, withdrew or facilitated the withdrawal of significant sums of money from Pierce's accounts. [Tr. 134, 138-39, 143-44, 157-58, 184, 192, 206-12]

The Wells Fargo Account

Prior to being diagnosed with Alzheimer's, Pierce visited Wells Fargo nearly every day. [Tr. 138] He visited for a variety of reasons, including sometimes just to say hello. [Tr. 138, 179] Michelle Tasker-Bell, Pierce's personal banker, assisted Pierce with his banking needs and visited with him regularly. [Tr. 179-80]

In 2009, Tasker-Bell noticed that Pierce was behaving oddly. [Tr. 139, 175] Although it was normal to see Pierce in the bank on a daily basis, he began to show up two or three times per day. [Tr. 139] When Tasker-Bell *5 questioned Pierce about visits or withdrawals made earlier in the day, Pierce did not remember the earlier events. [Tr. 139, 143-44]

Tasker-Bell soon also noticed that Pamela Nichols was frequently with Pierce. [Tr. 139] Tasker-Bell became suspicious when, after Pierce "started showing up with Nichols," Pierce's withdrawals became larger and more frequent. [Tr. 139, 143-44]

Concerned, Tasker-Bell began monitoring Pierce's account. [Tr. 139] She noted that Pierce's monthly Social Security and retirement deposits were regularly being depleted by the middle of each month. [Tr. 139] She also noted that much of the money taken from the account was either given to Nichols through personal checks or was withdrawn from the account as cash while Nichols was in the bank with Pierce. [Tr. 139, 140, 144, 145, 148, 156, 180]

Paying close attention to Nichols' bank visits, Tasker-Bell observed that, although Pierce frequented the bank for many different reasons, including assistance with his bills, general account inquiries, and social visits, Nichols was only present when Pierce made withdrawals. [Tr. 138-39, 192] When Tasker-Bell questioned Pierce about Nichols, Pierce told her that Nichols was "just a friend, nothing else" and that he "didn't really know a whole lot about her other than that she was [] needing money." [Tr. 143] He *6 also indicated that he had met Nichols through a friend with whom Nichols had spent time in jail. [Tr. 157]

When Tasker-Bell asked Pierce about a number of the withdrawals for which Nichols was present, Pierce did not remember many of the transactions. [Tr. 143] But Pierce produced a yellow legal pad on which he attempted to keep track of the loans he made to Nichols and other people. [Tr. 150] When Tasker-Bell asked Pierce whether Nichols had ever repaid the loans, Pierce said that she had not. [Tr. 182-84]

On September 2, 2009, Pierce and Nichols returned to the bank after having been there at least once already. [Tr. 140, 149; R. 216] When Nichols produced another withdrawal slip, this time for \$450, Tasker-Bell refused to process the transaction. [Tr. 140, 149] When Tasker-Bell would not give Nichols the money, Nichols became "agitated" and "angry" and "stormed out" of the bank. [Tr. 149] Immediately thereafter, she drove Pierce to another bank branch where the withdrawal was processed. [Tr. 140-43, 149]

Following these events, Tasker-Bell contacted the State to report Nichols for fraud and elder abuse. [Tr. 144] Tasker-Bell also contacted Pierce's son who shortly thereafter took over management of Pierce's finances *7 and assumed responsibility for his care.¹ [Tr. 116, 118, 144] An investigation by the Anchorage Police Department followed. [Tr. 146].

The Charles Schwab Account

After assuming responsibility for his father's finances, Pierce's son learned of Pierce's investment account with Charles Schwab. [Tr. 117] He reviewed the account statements and discovered dozens of what he thought to be fraudulent ATM withdrawals from an approximately two-week period in August 2009. [Tr. 117] Knowing that his father did not use ATM cards, he immediately reported the transactions. [Tr. 117-118, 206]

Charles Schwab investigated the ATM withdrawals, agreed they were fraudulent, and reimbursed \$9,700 back to Pierce's account to replace what was taken. [Tr. 120] During its investigation, Charles Schwab uncovered two suspicious telephone recordings. The first recording was of Pierce and an unknown person calling in to activate Pierce's ATM card. [Tr. 93, 95] In

the second recording, the unknown person called in again, pretending to be Pierce, when the card was declined at a restaurant. [Tr. 95]

The ATM withdrawals were also investigated by the Anchorage Police Department. [Tr. 205-221] Detective Anthony Pate discovered that, between *8 August 13, 2009, and August 29, 2009, more than 70 attempts had been made to withdraw cash from the account. [R. 254-60; Tr. 208] Of those attempts, more than 30 were successful, resulting in withdrawals ranging from \$60 to \$400 and totaling more than \$9,700. [R. 254-60; Tr. 208]

Many of the transactions occurred at a particular Wells Fargo ATM machine located in a gas station convenience store. [Tr. 207, 212, 215-18; R. 254-60] Wells Fargo was able to produce photographs for twelve of the transactions. [Tr. 206-07; R. 219-30] Each of the twelve photographs shows Nichols either withdrawing or attempting to withdraw cash using Pierce's ATM card. [Tr. 211; R. 219-30] Many other transactions for which there are no photos occurred within hours, minutes, and sometimes even seconds of the transactions that were caught on camera. [Tr. 211-221; R. 254-60] The first photo in which Nichols appears was taken at approximately four o'clock in the morning the same night Pierce and an unknown person called Charles Schwab to activate the ATM card. [Tr. 93, 209; R. 219] During his investigation, Detective Pate discovered nothing to suggest that anyone other than Nichols had used Pierce's ATM card. [Tr. 120]

Course of proceedings

In June 2010, the State charged Nichols with second-degree theft and scheming to defraud. [R. 21-34] See AS 11.46.139(a) (1); [AS 11.46.600\(a\)\(1\)](#).

*9 On March 24, 2011, as part of a plea agreement, Nichols pleaded guilty to one count of second-degree theft. [R. 2] Nichols was sentenced to five years' imprisonment and was ordered to make restitution in an amount to be determined at a future hearing. [R. 2-3]

The restitution hearing took place over three days, beginning July 18, 2011. [Tr. 81, 163, 203] The State proposed a restitution amount of \$19,807.70. [R. 75] Of this amount, \$10,087.70 represented the amount of money Nichols took from Pierce's Wells Fargo account and \$9,720 represented the amount she took from his Charles Schwab account. [R. 75]

At the hearing, the State called several witnesses, the first of which was Pierce. [Tr. 100-113] From the hearing transcript, it is clear that Pierce had little to no memory of Nichols or the events underlying her theft. For example, when asked about Nichols, Pierce stated that he didn't know Nichols well, and he consistently referred to her as a man. [Tr. 100, 105-108] When asked if he remembered why he wrote a particular check to Nichols, he stated that he "d [idn] 't right off because [he] d[idn] 't recognize the man himself and [didn't] know whether it was a solid thing or water or what." [Tr. 106] Pierce also did not know how old he was and, when asked what he had for dinner the night before, he said "lunch." [Tr. 102, 112, 115]

*10 Because the State could not rely on Pierce's testimony to establish the restitution amount, the State also called Pierce's son, Detective Pate, Tasker-Bell, and Charles Schwab representative Jeffrey Case to testify.

Pierce's son testified regarding his management of his father's finances and care, about his involvement in the investigation, and about various other events, including helping his father file for a protective order against Nichols. [Tr. 115-34, 166-69, 197-98] Tasker-Bell testified regarding the Wells Fargo checks written to and cashed by Nichols and about the numerous cash withdrawals made by Pierce and Nichols. [Tr. 138-58, 173-94] She also testified regarding her relationship and conversations with Pierce and about her observations of and interaction with Nichols. [Tr. 138-58, 173-94]

Jeffrey Case testified regarding Charles Schwab's investigation and the company's reimbursement of the fraudulently withdrawn funds. [Tr. 92-98] Through Case, the State also introduced the telephone recordings in which a person who was not Pierce

called Charles Schwab about Pierce's ATM card. [Tr. 92-98] Detective Pate testified regarding his investigation into the ATM withdrawals from Pierce's Charles Schwab account and the photographs he obtained of Nichols using Pierce's card. [Tr. 206-31]

Although Nichols presented no evidence at the hearing, her attorney attempted to discredit the State's evidence in several ways. First, the *11 attorney suggested that Nichols was dating Pierce and, as a result of that relationship, some of the money she took may have been gift money. [Tr. 236] As evidence of a romantic relationship, the attorney pointed to Pierce's application for a protective order on which a box was checked indicating that Pierce and Nichols had a "dating or sexual relationship." [Tr. 236; R. 261-64] Pierce's son, however, testified that he and his brother had filled out the documents because Pierce was unable to complete the forms himself, and that Pierce had not understood what he was signing. [Tr. 125-28]

Nichols' attorney also suggested that Nichols may have repaid some of the money. [Tr. 182-83] However, she presented no actual evidence to support the assertion. Tasker-Bell, on the other hand, testified that, according to earlier conversations with Pierce, Nichols had not repaid the money. [Tr. 182-84] The State also introduced the notebook page on which Pierce had attempted to keep track of money he lent to Nichols, which contained many references to money loaned to Nichols but no indication that the money had been repaid.² [Tr. 150, 181-82; R. 217]

*12 Finally, Nichols' attorney argued that Nichols should not be held responsible for all of the ATM withdrawals because the State had not proved that Nichols was the only person to withdraw cash using the card. [Tr. 235-36] Nichols pointed to several of the twelve ATM photographs, suggesting, among other things, that one of the photographs could be someone other than Nichols because the person in the image appeared to have larger breasts than Nichols; that another of the photographs could be of someone else because the person in the photograph was wearing different clothing than Nichols had been wearing earlier in the day; and that the quality of two other images was too poor to identify the person photographed. [Tr. 225-31] Although Detective Pate conceded that one of the photographs was not clear enough to make out facial features and another was "very dark," he testified that all of the photographs appeared to him to be Nichols. [Tr. 211, 230-31] He also testified that nothing he uncovered during his investigation suggested that anyone other than Nichols had used the ATM card. [Tr. 212]

Following the restitution hearing, Judge Spaan issued a written decision, ordering Nichols to pay \$9,167 in restitution for the money she took from Pierce's Wells Fargo account and \$8,920 for the money she took from his Charles Schwab account. [R. 73-74]

*13 Nichols now appeals Judge Spaan's restitution order, asserting that the restitution amount is not supported by sufficient evidence. [At. Br. 7-12]

ARGUMENT

[Alaska Statute 12.55.045](#) provides that the Court must, when presented with credible evidence, order a defendant convicted of an offense to make restitution. Generally, the restitution award is limited to the actual damages or loss caused by the crime. *See AS 12.55.100(a)(2); Demers v. State*, 42 P.3d 1, 2 (Alaska App. 2002). When actual damages are in dispute, the State must establish the amount of loss by a preponderance of the evidence. *Noffsinger*, 850 P.2d at 650.

Here, Nichols argues that the restitution award was supported by insufficient evidence because: (1) the restitution associated with Pierce's Wells Fargo account includes money that Nichols either repaid to Pierce or received as gifts from Pierce during their "dating relationship"; and (2) the restitution associated with Pierce's Charles Schwab account includes money that was stolen by "other people" who allegedly also used the ATM card. [At. Br. 7-12]

Nichols' arguments are heavily dependent upon an interpretation of the evidence in the light most favorable to herself. When viewed properly - in the *14 light most favorable to the State - the evidence presented at the restitution hearing is sufficient to support the restitution amount awarded.

I. SUFFICIENT EVIDENCE SUPPORTS THE PORTION OF THE RESTITUTION AWARD RELATED TO PIERCE'S WELLS FARGO ACCOUNT.

Nichols was ordered to pay \$9,167 in restitution for the money she took from Pierce's Wells Fargo account. [R. 73-74] Nichols does not dispute that she received all of this money. [At. Br. 8-9] Rather, she argues that insufficient evidence supports the award because it includes: (a) money she allegedly repaid to Pierce; and (b) money she allegedly received as gifts from Pierce during a "dating relationship." [At. Br. 8] Neither of Nichols' arguments provide a basis for reversing the restitution award.

Nichols presented no evidence at the restitution hearing that she repaid any of Pierce's money. Although Nichols' attorney argued that Nichols may have repaid some of the money, Nichols did not testify or present actual evidence from which it would be reasonable to conclude that any of the money was repaid. The State, on the other hand, presented substantial evidence from which one could reasonably conclude that Nichols did not repay the money.

Tasker-Bell testified that she asked Pierce, while he was much more lucid than he was at the restitution hearing, whether Nichols had repaid any *15 of the money he lent her. [Tr. 180, 182-84, 186-87] Pierce told Tasker-Bell that Nichols had not. [Tr. 182-84] Pierce also showed Tasker-Bell the yellow legal pad on which he tried to keep track of the money he loaned to various people. [Tr. 150, 181-82] On the page used to record money he loaned to Nichols there was nothing to indicate that Nichols had repaid any of the money. [R. 217] Even without this evidence, the circumstances surrounding Nichols' theft, including the amount of money and frequency with which she took money from Pierce - both in the form of cashed checks and unauthorized ATM withdrawals - makes it unlikely that she was repaying the money she took. The totality of the evidence presented by the State was more than sufficient to establish that Nichols did not repay the money.

Nichols' assertion that some of the money may have been "gifts" she received as part of a "dating relationship" is similarly flawed. As evidence that she may have been romantically involved with Pierce, Nichols points to the protective order application filed by Pierce and his sons, on which a box was checked indicating "a dating or sexual relationship." [See At. Br. 3, 8] Although this may constitute some evidence that Nichols was dating Pierce, there is conflicting direct and circumstantial evidence that she was not.

As Pierce's son explained at the restitution hearing, Pierce did not fill out the restraining order forms and did not understand what he was signing.

*16 [Tr. 125-28] Additionally, Tasker-Bell testified that, when she asked Pierce in the past about Nichols, Pierce told her that Nichols was "just a friend, nothing more" and that he only knew Nichols through a friend with whom Nichols had formerly been in jail. [Tr. 143, 157] Tasker Bell also stated that, based on her personal observations, she did not believe Nichols was dating Pierce. [Tr. 156-57] She explained that, if Pierce and Nichols were dating, she would have expected to see Nichols at the bank with Pierce in a variety of circumstances. [Tr. 156] Although Pierce often visited the bank for reasons unrelated to withdrawals, Nichols was only present when Pierce withdrew money. [Tr. 192]

At most, Nichols has pointed to conflicting evidence regarding the nature of her relationship with Pierce. Conflicts in the evidence must be resolved in the State's favor. See *Noffsinger*, 850 P.2d at 650; *Johnson*, 188 P.3d at 702. Viewed in this light, the evidence presented at the restitution hearing was sufficient to permit a reasonable fact-finder to conclude, by a preponderance of the evidence, that the \$9,167 Nichols received from Pierce's Wells Fargo account was neither "gift" money nor money she repaid.

II. SUFFICIENT EVIDENCE SUPPORTS THE PORTION OF THE RESTITUTION AWARD RELATED TO PIERCE'S CHARLES SCHWAB ACCOUNT.

*17 Nichols was ordered to pay \$8,920 in restitution for the money she withdrew from Pierce's Charles Schwab account using his ATM card. [R. 73-74] According to Nichols, the evidence was insufficient to support this amount because unidentified "other people" may also have been using the ATM card. [At. Br. 9-11] Once again, Nichols' argument is dependent upon a view of the evidence in the light most favorable to herself.

In support of her argument, Nichols attempts to equate poor quality photographs with "evidence that multiple unknown persons were using Pierce's card." [At. Br. 10] As Officer Pate acknowledged at the restitution hearing, two of the twelve photographs of Nichols were either too dark or of such poor quality that it was difficult to say for sure that the person in the photographs was Nichols. [Tr. 211, 230-31] But the inability to identify the person photographed due to poor image quality is not, as Nichols asserts, "photographic evidence" establishing that the person in the photographs was not Nichols.

Nichols also argues that doubt exists with respect to whether Nichols appears in at least two other of the twelve photographs. [At. Br. 10] She asserts that the photos show someone with a different hair style, different jewelry, different bust size, or someone who was wearing clothing different from what Nichols was wearing in another photo taken the same day. [At Br. *18 10] But the fact that Nichols styled her hair in different ways or varied her jewelry does not establish that photographs which otherwise appear to be of Nichols are of someone else.

With respect to Nichols' bust size, the only obvious difference between her bust in the photograph she challenges and the rest of the photographs is that she was wearing a low-cut top in which her breasts were prominently displayed. [See R. 103] In the other images, she was wearing full-coverage shirts or a zipped jacket.³ [See R. 219-30]

Nichols argument regarding her clothing is deceptive. Of the two photographs Nichols asserts were taken the "same day," one was taken in the middle of the night at approximately 2:00 a.m. and the other was taken nearly twelve hours later at approximately 1:15 p.m. [R. 221-22] There is nothing unusual about the fact that, at 1:15 p.m., Nichols was wearing clothing different from what she was wearing at 2:00 a.m. the night before.

At most, Nichols has shown that there is some doubt regarding the identity of the person in several of the twelve photographs. However, any *19 doubts or conflicts in the evidence must be resolved in favor of the State. See *Noffsinger*, 850 P.2d at 650; *Johnson*, 188 P.3d at 702.

Apart from her photograph-related arguments, the only other basis for Nichols' assertion that "other culpable parties" were also using the ATM card is Pierce's restitution hearing testimony. During Pierce's testimony, the following exchange took place:
State: [Do] you recall ever giving this lady who is sitting here... permission to use your debit card to pull the money out of your Charles Schwab account?

Pierce: Yes.

State:... Tell us what you remember.

Pierce: Well, there [] I do this on occasion to several other people too. They come to me and ask can they draw something out of my system and use it for theirs and then reimburse it to me with a certain amount of accountant that goes with it.

[Tr. 101]. Nichols argues that this was an admission by Pierce that he gave "several others" authorization to use his ATM card. [At. Br. 11] This may or may not be what Pierce intended to communicate. Due to his deteriorating mental health, the majority of Pierce's testimony made little sense and was largely inconsistent. Immediately before he made the statements upon

which Nichols relies, he stated that he had no recollection of the debit card and barely knew Nichols. [Tr. 101] Immediately after making the statements upon which Nichols relies, Pierce stated that he had no independent memory of giving Nichols the card and had not even a “vague recollection” of what *20 happened during the time period relevant to this case. [Tr. 101-02] For much of the rest of Pierce's testimony, he refers to Nichols as a male, stating at one point that he “d[id]n't recognize the man” and at another point that Nichols was “the guy that keeps taking the money out there.” [Tr. 106-07] When asked if he remembered writing a particular check to Nichols, Pierce said that he “d[id] n't recall because [he] wasn't getting anything from him” and he “d[id]n't know whether it was a solid thing or water or what.” [Tr. 106]

As Judge Spaan noted during the hearing, Pierce's testimony “established that [] he d[id]n't have a clear recollection” of the events about which he was being questioned. [Tr. 109-10] However, even if Pierce's mental capacity had not been an issue, the statement on which Nichols relies conflicts with Pierce's statements that he had no memory of the relevant time-period. [See Tr. 102]. Consequently, Nichols cannot rely on the statement as a basis to challenge the sufficiency of the evidence. See [Johnson, 188 P.3d at 702](#) (to view the evidence in the light most favorable to the State is to resolve all conflicts in favor of upholding the trial court's decision).

Viewed in the light most favorable to upholding the restitution award, the evidence presented at the hearing is more than sufficient to permit a

*21 reasonable inference that Nichols was the only person who used Pierce's ATM card to withdraw money from Pierce's Charles Schwab account. Nichols was photographed using the ATM card only hours after an “unidentified” person called Charles Schwab with Pierce to activate the card. [Tr. 93; R. 219] Over a two-week period, Nichols was photographed nearly every other day (and sometimes on consecutive days and more than once per day) at an ATM machine either withdrawing or attempting to withdraw money from Pierce's account. [R. 219-30] Many other withdrawals were made within hours, minutes, and sometimes even seconds of the transactions for which there is photographic evidence of Nichols using the card. [Tr. 206-21; R. 219-30, 254-60] Nichols was the only identifiable person photographed using Pierce's ATM card and the APD detective who investigated the withdrawals found no reason to believe that anyone other than Nichols had used the card. [Tr. 211-12] From this evidence, a reasonable fact-finder could conclude, by a preponderance of the evidence, that Nichols used Pierce's ATM card to withdraw from Pierce's Charles Schwab account the entire \$8,920 awarded by Judge Spaan in his restitution order.

CONCLUSION

For the reasons explained above, the evidence, viewed in the light most favorable to the State, is sufficient to permit “a reasonable fact-finder [to] *22 conclude that the disputed amount of restitution was established by a preponderance of the evidence.” [Noffsinger, 850 P.2d at 650](#). The State therefore respectfully requests that this Court affirm the restitution award in its entirety.

Footnotes

- 1 To avoid confusion, the State refers to Pierce's son, whose name is also John Pierce, simply as “Pierce's son.”
- 2 Pierce, too, testified at the restitution hearing that Nichols had not repaid the money. [Tr. 110] However, given Pierce's mental condition at the hearing and his obvious inability to recall the events underlying Nichols' criminal charges, the State relies primarily on other evidence to demonstrate that Judge Spaan's restitution award was supported by sufficient evidence.
- 3 Nichols states in her brief that Officer Pate “admitted” that Nichols had a smaller bust than the person in one of the photographs. [At. Br. 4; *see also* At. Br. 10] Although Nichols' attorney made this and other arguments while questioning Officer Pate at the restitution hearing, the only thing Officer Pate “admitted” regarding Nichols' breasts was that he “d[id]n't know what her bust looks like.” [Tr. 229-30]