COURT OF APPEALS OF VIRGINIA

Record No. 2064-24-2

ROBERT DARRELL KELLEY
v.
COMMONWEALTH OF VIRGINIA

Present: Judges Causey, Chaney and White
Argued at Richmond, Virginia

Opinion Issued November 4, 2026

FROM THE CIRCUIT COURT OF HANOVER COUNTY
Patricia Kelly, Judge

Catherine L. Scott (Dennis J. McLoughlin Jr.; McLoughlin Law PLC, on brief), for appellant.

Allison Mentch, Assistant Attorney General (Jason S. Miyares,[1] on brief), for appellee.

PUBLISHED OPINION BY
JUDGE DORIS HENDERSON CAUSEY

Robert Darrell Kelley was convicted by a jury of the malicious wounding of a horse and shooting from a vehicle.[2] Kelley argues that the evidence was insufficient to support those convictions. He also challenges the trial court's calculation of the restitution award and its conduct of jury polling. We hold that (1) the evidence was insufficient as to shooting from a vehicle but sufficient as to the malicious wounding of a horse, (2) restitution erroneously included costs waived by a third-party veterinary practitioner, and (3) Kelley waived his jury polling challenge. We therefore reverse in part, affirm in part, and remand.

[1] Jay C. Jones succeeded Jason S. Miyares as Attorney General on January 17, 2026.

[2] Kelley also challenged a conviction for animal cruelty, but that argument was not properly preserved, as discussed below. Kelley also sustained two other convictions not at issue on appeal.

BACKGROUND

On October 17, 2023, Leonard Short heard a gunshot while he and his wife were inside their residence in Hanover County. Short called 911. Short subsequently discovered a hole in his mailbox.[3]

Short's neighbor, David Hill, owned a barn where he kept several horses, including the horse owned by his granddaughter. On October 17, 2023, while in his home, Hill heard three gunshots.[4] The next morning, Hill's granddaughter visited the barn and found her horse with visible head wounds. She called an emergency veterinarian operating out of Blue Ridge Equine Clinic. The emergency veterinarian discovered bullet fragments in the horse's skull, resulting in an injury to its skull and sinus cavity. The horse underwent three surgeries in the six weeks that followed the shooting and ultimately recovered.

After executing four warrants to search the vehicles and homes of Kelley and his co-defendant, Jacob Brady, police recovered: (1) Kelley's phone; (2) geolocation data of Kelley's phone placing him in the area of Short's home and Hill's barn; (3) cell phone photos of Kelley holding the rifle allegedly used in the shooting; (4) shell casings matching the casings found in the field surrounding Hill's barn; and (5) the rifle and the scope flashlight.

Police later discovered that Kelley and Brady went into Green Top Sporting Goods earlier in the day, on October 17, to purchase ammunition. Kelley paid for a box of bullets, and the two left the store. Security video of the store's parking lot shows Kelley getting into the driver's seat of a vehicle and driving off.

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[3] Short's mailbox had also been shot four days prior.

[4] Hill testified that he went outside to investigate after hearing the gunshots but did not see anyone or notice any suspicious vehicles. However, a surveillance camera at the barn captured a bright light shining, the sound of three gunshots, and then a horse running into the barn from the adjacent field.

At trial, the Commonwealth introduced this evidence, and Kelley moved to strike. The trial court denied Kelley's motion.[5] The jury convicted Kelley of attempted malicious wounding of a horse, malicious wounding of a horse, conspiracy to commit malicious wounding of a horse, animal cruelty, and shooting from a vehicle.

After announcing the verdict, the trial court polled the jurors. In explaining to the jurors how the polling process would work, the trial judge stated:

> The clerk is going to call your number, and the question that we're going to ask you ["]is this your verdict[?"] and it's just basically to verify that all of you agree on the verdict.
>
> So, she's going to say juror number one or two is this your verdict and she'll go down the list and you need to respond affirmatively to the question.

After this statement, all jurors confirmed the verdict. The trial court then sentenced Kelley to 35 years and 12 months of incarceration, with 32 years and 12 months suspended.

In calculating restitution, the trial court established that the veterinary bills for the horse's emergency care and surgeries totaled $40,956. The court found that the equine clinic, on its own accord, discounted the balance of the veterinary bill to $18,160 because the family "had no control over this unfortunate event." The horse's owners paid the equine clinic the discounted total of $18,160.[6] The court then ordered Kelley to pay a total of $40,956[7] in restitution—of

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[5] The trial court granted Kelley's motion to strike on two counts that are not at issue on appeal: reckless handling of a firearm and destruction of property.

[6] At sentencing, a Blue Ridge Equine Clinic representative testified that the clinic charged the horse owner's family $18,160, which the family paid, and declined to charge them an additional $22,796. The clinic's summary states that, eight days into the horse's stay, it "decreased the client's charges." The owner's stepfather, Bruce Wiegan, also paid a $445 bill from Virginia Equine, a veterinarian who provided emergency services. The trial court ordered Kelley to pay $18,605 to Wiegan and, after a later hearing, $22,796 to Blue Ridge Equine Clinic, each jointly and severally with his co-defendant.

[7] Blue Ridge charged $18,160 and discounted $22,796, so its bill totaled $40,956. Virginia Equine billed a separate $445. The award to Wiegan of $18,605 is $18,160 plus $445, and the total ordered is $41,401.

which $22,796 was awarded to the Blue Ridge Equine Clinic and $18,605 was awarded to the family of the horse's owner.

ANALYSIS

Kelley appeals two of his convictions for insufficiency of the evidence. Kelley also challenges on appeal the order mandating he pay $22,796 in restitution to the equine clinic, as well as the trial judge's explanation to the jury that they had to "respond affirmatively" to the clerk's question regarding the verdict.

Kelley argues that the evidence was insufficient to support his conviction for shooting from a motor vehicle. He asserts that the record contains no evidence that any person was at risk of being shot or injured and that no shots were fired from a vehicle. He also challenges the sufficiency of the evidence supporting his malicious wounding conviction, arguing that the evidence did not disprove that he accidentally shot the horse. Kelley next claims that the restitution award of $22,796 to the Blue Ridge Equine Clinic was excessive, as the equine clinic was a third-party who discounted the horse owner's medical bills on its own accord. Kelley argues that the victim did not incur those expenses, as defined under Code § 19.2-305.1(B). Lastly, Kelley contends that the trial judge erred when he commanded that the jurors "respond affirmatively" to the clerk's questions regarding the verdict during jury polling. We address each issue in turn.

I. Sufficiency of Evidence

When reviewing a motion to strike, we look at the evidence in the light most favorable to the Commonwealth, asking "whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Pijor v. Commonwealth*, 294 Va. 502, 512 (2017). It is not sufficient to create a suspicion of guilt; the evidence must establish guilt beyond a reasonable doubt. *Cameron v. Commonwealth*, 211 Va. 108, 110-11 (1970). Therefore, the

facts "must exclude every reasonable hypothesis except that of guilt." *Id.* "The issue upon appellate review is . . . whether a reasonable jury, upon consideration of all the evidence, could have rejected [those] theories in [the defendant's] defense and found him guilty of [the crime] beyond a reasonable doubt." *Commonwealth v. Hudson*, 265 Va. 505, 513 (2003). It is the jury's province to "reject as unreasonable the hypotheses offered by" the accused. *Id.* at 514.

"The judgment of the trial court is presumed correct and will not be disturbed unless it is 'plainly wrong or without evidence to support it.'" *Pijor*, 294 Va. at 512 (quoting Code § 8.01-680). Statutory interpretation, on the other hand, presents a pure question of law reviewed de novo, looking to the plain language used in the statute. *Jones v. Commonwealth*, 296 Va. 412, 414-15 (2018).

A. *Evidence Supporting a Conviction Under Code § 18.2-286.1*

"Any person who, while in or on a motor vehicle, intentionally discharges a firearm so as to create the risk of injury or death to another person or thereby cause another person to have a reasonable apprehension of injury or death shall be guilty of a Class 5 felony." Code § 18.2-286.1. Looking at the plain language of the statute, the Commonwealth must prove beyond a reasonable doubt that (1) the shooter was *in* a vehicle and (2) a *person* was at risk of being shot or injured.

As to the first element, Kelley argues that the Commonwealth failed to establish beyond a reasonable doubt that Kelley or Brady was *inside* of a vehicle when the shots were fired at the Hill or Short properties. To support this element, the Commonwealth put forward two exhibits, both surveillance footage from the Hill's barn.[8] In the first video, a car can be seen driving up,

[8] Both videos provide little visual evidence. A viewer can see the illumination of both the vehicle's headlights and the flashlight attached to the alleged rifle. The footage is dark because the events occurred at nighttime. Therefore, we also rely on the sounds that can be heard in deciding whether the evidence is sufficient.

then stopping for about eleven seconds. There is a gunshot, then a two-second pause, and then the car drives away. In the second video, a car can be seen pulling up. There is no visual proof of either defendant inside of the vehicle. Voices can be heard, as well as the sound of a car door closing, suggesting that the two were outside of the vehicle when the shooting occurred. Thus, these two videos are not enough, on their own, to show that either Kelley or Brady were, in fact, inside of a vehicle during the shooting.

As to the second element, Kelley argues the Commonwealth failed to establish beyond a reasonable doubt that a *person* was at risk. Neither the Shorts' mailbox, nor the horse, were the subjects that the statute was designed to protect. Code § 18.2-286.1 does not criminalize shooting from a vehicle in a manner that creates the risk of injury or death to an *animal*, or other personal property—only to a person. Code § 18.2-286.1 provides that a person can be convicted when they cause the "risk of injury or death to another person" or a "reasonable apprehension of injury or death." The plain language of the statute requires that only a natural person be at such risk or feel such apprehension. *See* Code § 1-230 (defining "person" as "any individual, corporation, partnership, association, cooperative, limited liability company, trust, joint venture, government, political subdivision, or any other legal or commercial entity and any successor, representative, agent, agency, or instrumentality thereof"). The code reflects common sense definitions. *See Person*, *Black's Law Dictionary* (12th ed. 2024) (defining person as "a human being").

The record is devoid of evidence pointing to any person who was at risk of being shot or injured at either property. Neither Hill, nor any other person, was near the barn when the shots were fired into an open field. Additionally, Kelley fired at the Shorts' mailbox, not their home. As a factual matter, personal property was the only thing at risk of being shot.

Looking at this evidence in the light most favorable to the Commonwealth, the record does not show Kelley was inside of a vehicle when shooting Short's mailbox or Hill's barn, and no person was involved nor at risk of being shot. For these reasons, we reverse his conviction for shooting from a motor vehicle under Code § 18.2-286.1.

B. *Evidence Supporting a Conviction Under Code § 18.2-144*

Code § 18.2-144 makes it a Class 5 felony for any person to "maliciously shoot, stab, wound or otherwise cause bodily injury to . . . any horse . . . with intent to maim, disfigure, disable or kill." Kelley argues that the evidence was insufficient to support his conviction for malicious wounding of a horse because there was no proof that he shot the horse on purpose, as opposed to on accident while shooting inanimate objects for target practice.[9]

We disagree, deferring to the jury as the trier of fact, and affirm this conviction. *See Person v. Commonwealth*, 60 Va. App. 549, 555 (2012) (noting that jurors may use their common sense); *Parish v. Commonwealth*, 56 Va. App. 324, 331 (2010) (noting that the fact finder may infer that appellant intends the natural and probable consequences of his actions).

In the security footage from Hill's barn on the night of the shooting, while dark, one can see the scope flashlight move, as though the shooter was aiming for the horse by following the horse's movements. The shooter also fired a second shot while the horse was illuminated in the

[9] Kelley also challenged his animal cruelty charge on the basis of the shooting being an accident, but Kelley failed to preserve this argument under Rule 5A:18. At trial, Kelley argued that animal cruelty was a lesser-included offense of maliciously maiming a horse, not that there was insufficient evidence of intent to support the animal cruelty charge. Even if the argument had been preserved, this argument is barred by the approbate-reprobate doctrine. At trial, Kelley acknowledged that "animal cruelty [w]as a strict liability crime." On appeal, Kelley argues that animal cruelty is a specific intent crime. *See Jennings v. Commonwealth*, 82 Va. App. 692, 704 (2024) (en banc) ("The approbate and reprobate doctrine applies when a litigant 'has affirmatively staked out a position or asked the court to act,' before changing positions, and when the error the defendant complains of on appeal is 'obviously the result of his own strategy and actions at trial.'" (first quoting *Commonwealth v. Holman*, 303 Va. 62, 72 (2024); and then quoting *Rowe v. Commonwealth*, 277 Va. 495, 502 (2009))).

scope's light. From that, the jury could infer an intent to maim, disable, or kill, and could reject the target-practice hypothesis. *Parish*, 56 Va. App. at 331 (natural and probable consequences). Therefore, we hold that there is sufficient evidence to support Kelley's conviction under Code § 18.2-144. Kelley's challenges to the attempt and conspiracy convictions rest on the same claimed absence of intent to harm the horse, and they fail for the same reason.

II. Restitution

Kelley argues that the trial court erred in ordering him to pay $22,796 to Blue Ridge Equine Clinic because the horse's owner neither paid that amount nor was obligated to pay it. He also argues that restitution should have been limited to the horse's market value. We agree with the first argument and reject the second.

"A trial court has 'wide latitude' to make sentencing decisions, such as the ordering of restitution, because '[t]he determination of sentencing lies within the sound discretion of the trial court.'" *Burriesci v. Commonwealth*, 59 Va. App. 50, 55 (2011) (first quoting *Deal v. Commonwealth*, 15 Va. App. 157, 160 (1992); and then quoting *Martin v. Commonwealth*, 274 Va. 733, 735 (2007)). Therefore, where the amount of restitution is "supported by a preponderance of the evidence and is 'reasonable in relation to the nature of the offense,'" that determination will not be reversed on appeal. *McCullough v. Commonwealth*, 38 Va. App. 811, 817 (2002) (quoting *Deal*, 15 Va. App. at 161). A loss claimed as restitution must be proved by a preponderance of the evidence. *Id.*

Here, our determination of reasonableness is based on our interpretation of the statutes governing restitution. As always, we review statutes de novo. *Heart v. Commonwealth*, 75 Va. App. 453, 460 (2022).

The main purpose of restitution is to make the victim whole by compensating them for losses stemming from the offense. *See Fleisher v. Commonwealth*, 69 Va. App. 685, 691 (2019)

("Payment of restitution restores a victim to his status before the crime occurred."); *see also Landes v. Commonwealth*, 37 Va. App. 710, 714 (2002) (calculating restitution based on the purchase price, as opposed to the true value of the property in its damaged state, accounting only for the damages needed to restore the value of the property before the crime). Criminal restitution can also serve the purpose of encouraging deterrence, rehabilitation, and retribution. *See Slusser v. Commonwealth*, 74 Va. App. 761, 770 (2022).

Code § 19.2-305.1(B) allows restitution to include property damages caused by the crime *or* medical expenses "incurred by the victim." However, under Code § 19.2-11.01(B), "'victim' means (i) a *person*[10] who has suffered physical, psychological, or economic harm as a direct result of the commission of" certain enumerated crimes. (Emphasis added).

First, the plain language of Codes §§ 19.2-11.01 and -305.1(B)—when read together—allow restitution for only (1) property damage and (2) medical expenses of persons. The General Assembly has clearly chosen to distinguish personal property damage from personal injury. The plain language of Code § 19.2-11.01 dictates that a "victim" can only be a person; a victim cannot be a horse. *See, e.g.*, *Marsh v. Commonwealth*, 57 Va. App. 645, 654-55 (2011) (acknowledging cases treating horses as property for the purpose of a larceny conviction). Thus, veterinary bills do not fall within the statutory definition of the medical expenses provision under Code § 19.2-305.1(B). Instead, they fall squarely within the property damages provision of Code § 19.2-305.1(B). As a result, the veterinary bills of a horse constitute only evidence of property damage. As a result, the restitution that Kelley owes must be calculated as personal property damage.

A plain reading of the statute under which Kelley was convicted—maiming a horse—supports our reading of Code § 19.2-305.1(B). Maiming a horse is a property damage crime

[10] Defined in *Black's Law Dictionary* as "a human being." *See supra*.

found in the penal code under Section 18, Chapter 5 (titled "Chapter 5. Crimes Against *Property*"), Article 7 (titled "Damage to and Tampering With *Property*"). *See* Code § 18.2-144 (emphases added). As such, the expenses related to the horse were not a "medical expense incurred by the victim," but expenses incurred to restore the victim's property.

The case law also supports this outcome. Importantly, our Supreme Court has held, and we have built upon the reasoning, that pets are considered personal property. *See Blue Pearl Veterinary Partners, LLC v. Anderson*, 78 Va. App. 40, 46 (2023) ("[T]he law in Virginia, as in most states that have decided the question, regards animals, however beloved, as personal property." (quoting *Kondaurov v. Kerdasha*, 271 Va. 646, 657 (2006))). *Blue Pearl* and *Kondaurov* necessitate the use of the property crimes provision of Code § 19.2-305.1(B). As a result, restitution calculations must be recalculated on remand.

To calculate the restitution that Kelley owes, the trial court should have evaluated the amount of damages equal to the economic harm that the horse's owner suffered because of the damage to the owner's personal property. Resisting this conclusion, the Commonwealth relies on *Commonwealth v. Puckett*, 302 Va. 455 (2023), to argue that the equine clinic should be paid $22,796 in restitution because its medical expenses were incurred by the victim under Code § 19.2-305.1(B). In *Puckett*, a stabbing victim could not pay for his medical care, and the Department of Medical Assistance Services (DMAS), the agency in charge of administering Virginia's Medicaid program, paid "a small portion of the billed charges" on the victim's behalf. *Id.* at 457-58. The Supreme Court upheld an order requiring the defendant to pay restitution to DMAS. *Id.* at 466. It reasoned that "[t]he statute does not say that the restitution must be paid to the victim. It only requires that the expense be 'incurred by the victim.'" *Id.* at 462. And "a medical expense is 'incurred' by a victim when he either pays it or incurs an express or implied *obligation* to pay it." *Id.* at 466 (emphasis added).

Puckett thus turns on whether the victim paid the expense or became obligated to pay it. But contrary to the Commonwealth's reading, *Puckett* does not address a situation where a provider itself has chosen to bear the costs of those medical bills. The *Puckett* victim was billed by the hospital. *Id.* at 458. DMAS then stepped in, as a third-party solvent entity, and paid $22,691.01 of the total $119,188.93 bill.[11] The *Puckett* Court found that the providers "were not working for free." *Id.* at 465-66. The Court also recognized that the necessary conditions are not met where a provider openly offers its services to the public without charge. *Id.* at 466.

Applying *Puckett* to Kelley, there, the result of the crime was injury to a person; here, there were damages to property, i.e., a horse. Additionally, neither Kelley nor Brady committed any crimes against Blue Ridge Equine Center; therefore, they are not a victim. The equine clinic is analogous to the hospital, not DMAS. The evidence shows that the equine clinic was not an insurer paying what was due but the medical provider that *altered* what was due.[12] The trial court found that the clinic "actually submitted a bill and then agreed not to seek collection of it." The equine clinic, on its own volition, declined to charge the horse's owner.[13] The clinic's summary states that eight days into the horse's stay, it "decreased the client's charges," and that from then on, it "no longer charged for services" other than radiographs and one surgery. In total, the owners were charged, i.e., obligated to pay, $18,160. In fact, the Commonwealth

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[11] In *Puckett*, the record contained a breakdown of what DMAS charged and what Medicaid paid. 302 Va. at 465. Here, the Commonwealth failed to present into evidence the veterinary bills for the horse's surgeries. The record only contains the initial bill of $445 charged for emergency services the day after the shooting. Other evidence of the costs of the horse's surgeries show a summary submitted by the veterinary clinic that described *contemporaneous* charges the clinic declined to charge, not retroactive debt repayment to occur in the form of monthly billing, as in *Puckett*.

[12] The equine clinic is a private, for-profit entity, unlike DMAS, a state agency assigned by law to assist Medicaid or Medicare recipients.

[13] The equine clinic's representative testified that the family paid $18,160 and described the remaining $22,796 as "the discount that we gave them."

concedes that the clinic "only charged the family $18,160." The cost of the uncharged services fell on the clinic by its own choice, not on the owner and not on any payor standing in the owner's shoes. The evidence did not show that the owner paid or lost an additional $22,796 or was ever obligated to pay this amount. *Puckett* itself recognizes that no expense is incurred for services provided without charge. *Puckett* also approved restitution only for what DMAS actually paid. It did not award the providers the balance they, by their own choice, declined to charge the family in an act of charity. Put simply, the Commonwealth failed to prove by a preponderance of the evidence that the horse owner and her family suffered a $22,796 loss. *See McCullough*, 38 Va. App. at 817. The only invoice in the record is a $445 bill to an emergency veterinarian, Virginia Equine, which the horse owner's stepfather paid. The absence of any invoice showing the full amount that the equine clinic charged and then later declined to charge leaves us with nothing to rely on except the clinic's own account of the contemporaneous decision not to charge the family.

The Commonwealth responds that the owner was obligated to pay the full value of the clinic's services, but the clinic declined to collect it. The statement in *Puckett* that a provider's waiver does not make an expense "unincurred" presupposes an expense the victim incurred. By the clinic's own account, it reduced its charges as the treatment went on; it did not bill that full amount and later forgive it.[14] *Puckett* did not address, and nothing in it authorizes, an award to a provider of a balance it chose not to collect.

[14] The expenses of a medical provider—here, the equine clinic, offering services for free—are not incurred by the victim. Medical providers declining to charge for services cannot be constituted or considered as payments incurred. For example, under the rule established in *Puckett*, if the victim of a crime went to a not-for-profit hospital and received free medical care as part of the hospital's mission of charity, no restitution would be incurred by the hospital. But the defendant could be made to pay a victim's insurer, if the victim was charged for the surgery at a for-profit hospital. Conceivably, the equine clinic is not an insurance company; it performed an act of charity.

Nor is this a case, like *Puckett*, in which a provider looked past an indigent patient to a solvent payor. *Cf.* 302 Va. at 466 ("[Such an expense] does not become unincurred simply because a medical provider waives its right to seek full payment from an *indigent individual* in hopes of recovering partial payment from *a solvent entity.*" (emphases added)). The record shows no payment by any insurer or agency, and nothing in it suggests the owner was unable to pay. The clinic's note that it was "not sure that any arrests or convictions would be made" explains why it lowered its charges. The note does not show, and nothing else in the record suggests, that the owner remained liable for the difference.

In sum, the Commonwealth failed to show by a preponderance of the evidence that the victim was ever billed, or *obligated* to pay, $22,796. *See McCullough*, 38 Va. App. at 817. In *Puckett*, the court did not order the defendant to pay the full $119,188.93 incurred by the medical provider (i.e., the hospital) in restitution. The same is true here, as no one, especially the owner, incurred the full $40,956. Because the evidence did not show that the owner incurred the additional $22,796, the medical-expense clause of Code § 19.2-305.1(B) does not authorize the award to the clinic.

Both Kelley and the Commonwealth highlight *Blue Pearl*, a civil case, concerning civil restitution for property damage. *See* 78 Va. App. at 44. However, *Blue Pearl* does not apply to the facts at hand. There, the damages requested by the plaintiff are akin to those in a civil medical malpractice claim, as a veterinary clinic was found negligent for its own actions after the plaintiff's dog sustained fractures to two of its legs while receiving veterinary care. *Id.* Kelley's case does not involve any veterinary malpractice. Instead, a veterinarian charged the horse's owner a certain amount for veterinary services, decreased the charges that it billed the horse's owner as the medical services went on, then sought restitution from a criminal defendant. The equine clinic's records stated that the family's charges were decreased because they "had no

control over this unfortunate event." And there is no evidence that the clinic's reduction of the bill was contingent upon restitution being ordered. Therefore, neither *Puckett* nor *Blue Pearl* can guide our analysis.

Lastly, the Commonwealth argues that, even if the veterinary bills are better classified under the personal property provision of Code § 19.2-305.1(B), the $40,956 restitution amount was not excessive and, therefore, the error was harmless. The dissent echoes this theory, arguing that because veterinary bills can be personal property, the trial court did not abuse its discretion in awarding the equine clinic $22,796. We disagree for two reasons.

First, the trial court classified the $22,796 in veterinary bills under the medical expenses provision under Code § 19.2-305.1(B). There was no mention of personal property damages to the owner's family in the restitution order. As discussed at length above, medical expenses of a pet are personal property, not medical expenses of the human victim. The dissent's attempt to re-classify the trial court's sentencing order into personal property is, at best, advisory.[15] And Blue Ridge Equine Clinic is not a victim in this case; no crime was committed against it. On any theory of the case, the award must correspond to an amount the owner in fact paid, owed, or lost, and the record does not show that the horse's owner paid, owed, or lost the $22,796. Therefore, we respectfully disagree with the dissent's understanding of the assignment of error presented to us.

The $40,956 restitution amount is excessive when calculating the harm that the horse's owner suffered. The horse's owner and her family can be made whole for significantly less. When determining the evidence of loss, the trial court considered that the horse's owner

[15] This Court takes appeals as they come to us. *See Ferguson v. Commonwealth*, 71 Va. App. 546, 557 n.6 (2020) ("'Because the very "nature of judicial review constrains us to consider the case that is actually before us,"' we decline to decide this case by offering an advisory opinion." (quoting *Tucek v. Commonwealth*, 44 Va. App. 613, 616 (2004))).

paid $2,500 for the horse thirteen years ago, and the horse is now twenty years old. This purchase price, coupled with the $18,605 award that Kelley is already ordered to pay the horse's owners, is the maximum value needed to make the victim whole. *See Landes*, 37 Va. App. at 715-16 (recognizing that restitution is intended to compensate the victim, and the amount is determined by evidence of loss); *Fleisher*, 69 Va. App. at 691 ("Payment of restitution restores a victim to his status before the crime occurred.").

Significantly, though the dissent relies on it, *Blue Pearl supports* remand in this instance to calculate how much the victim incurred in out-of-pocket, property damages—an amount calculated to determine how much is needed to make the owner whole—looking at only the actual losses *to the owner* in the damage to the property. In *Blue Pearl*, we noted that, "when market value would be a manifestly inadequate measure, then some other measure must be applied." *Id.* at 47-48 (emphasis omitted) (quoting *Younger v. Appalachian Power Co.*, 214 Va. 662, 664 (1974)). We further pointed to Shearman & Redfield, *Negligence* § 603, at 680-81 (2d ed. 1870), which stated: "[I]n cases of injury to animals . . . the plaintiff ought to recover for expenses reasonably incurred in efforts to cure them, in addition to the depreciation in their value, or to their whole value where they are finally lost." *Id.* at 48. The horse's owners paid $2,500 for the horse and incurred $18,605 in their efforts to cure it. Thus, according to the analysis in *Blue Pearl*, awarding the owners an additional $22,796 in restitution for damages to their personal property would be excessive.

Though the Commonwealth argues that the equine clinic can be paid restitution to further punish Kelley for his actions, the remediation purpose of restitution has already been achieved, as Kelley has been ordered to pay $18,605 to the horse's owners—an order that remains untouched on appeal. *See Slusser*, 74 Va. App. at 770. Although Kelley argues that restitution must be capped at the horse's market value, and that the $18,605 award to the horse's owner

would exceed it, *Blue Pearl* squarely holds that reasonable and necessary veterinary expenses—for which the victim is actually obligated to pay—are recoverable even above an animal's market value. *See Blue Pearl*, 78 Va. App. at 47.

Therefore, we reverse and vacate the order, for the reasons stated herein, to calculate a reasonable estimate of the value of the horse before the shooting. *See Fleisher*, 69 Va. App. at 691.

III. Jury Polling

Kelley lastly challenges the trial court's polling of the jurors after his trial. He argues that the judge telling the jurors that they "*need to respond affirmatively* to the [clerk's polling] question" was a violation of his constitutional rights to due process and to confirm that each juror joined in the verdict.[16] Kelley argues that the trial judge gave a "command" to the jurors to say "yes," instead of asking them to verbally or loudly answer "yes" or "no." Trial counsel did not object to the judge's comments, so Kelley argues we must apply Rule 5A:18's ends of justice exception.[17]

A. *Rule 5A:18 Exception*

"No ruling of the trial court . . . will be considered as a basis for reversal unless an objection was stated with reasonable certainty at the time of the ruling, except for good cause shown or to enable this Court to attain the ends of justice." Rule 5A:18. Whether an appellant is

[16] Kelley also takes issue with the fact that, following the announcement of the jury's verdicts, the trial court asked *sua sponte*, "Request to poll the jury?" to which Kelley's counsel responded, "Yes." However, Rule 3A:17(d) states: "When a verdict is returned, the jury must be polled individually at the request of any party or upon the court's own motion." Therefore, we find no error in the trial court's sua sponte question to counsel whether they requested polling. Clearly, asking counsel if they are making a request is not in error, as the rule allows the court to have polled the jury on the court's own motion.

[17] Kelley concedes that "Rule 5A:18 applies to bar even constitutional claims." (Citing *Ohree v. Com*m*onwealth*, 26 Va. App. 299 (1998)).

entitled to invoke an exception to Rule 5A:18 is a question of law that this Court reviews de novo. *Commonwealth v. Bass*, 292 Va. 19, 27 (2016). The exception "is 'narrow and is to be used sparingly.'" *Melick v. Commonwealth*, 69 Va. App. 122, 146 (2018) (quoting *Pearce v. Commonwealth*, 53 Va. App. 113, 123 (2008)).

When delving into an inquiry of the ends of justice exception to Rule 5A:18, we must ask two questions: (1) whether the error occurred as contended by the appellant; and (2) whether the failure to apply the ends of justice provision would result in a "grave injustice or the denial of essential rights." *Rowe v. Commonwealth*, 277 Va. 495, 503 (2009) (authorizing application of the exception "to avoid a grave injustice or the denial of essential rights" (quoting *Charles v. Commonwealth*, 270 Va. 14, 17 (2005)); *Bell v. Commonwealth*, 81 Va. App. 616, 628 (2024). Because the appearance of partiality is *itself* a violation of law, the ends of justice exception may apply to situations where trial counsel fails to object to a judge's comments from the bench that deprive the defendant of due process. *See also, e.g.*, *Webb v. Commonwealth*, 64 Va. App. 371, 379 (2015) (applying ends of justice exception to non-unanimous jury verdict); *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 824-25 (1986) (noting that, under due process, "justice must satisfy the appearance of justice"); *Withrow v. Larkin*, 421 U.S. 35, 46-47 (1975) ("[A] 'fair trial in a fair tribunal is a basic requirement of due process' . . . Not only is a biased decisionmaker constitutionally unacceptable but 'our system of law has always endeavored to prevent even the probability of unfairness.'" (quoting *In re Murchison*, 349 U.S. 133, 136 (1955))); *Bethea v. Commonwealth*, 68 Va. App. 487, 506 (2018) (interpreting Va. Const. art. I, § 8, and noting "[o]nce the jury has returned its verdict 'in open court,' a defendant has a right to have the jury 'polled individually,' to confirm that each juror joins in the verdict and that it is, in fact, unanimous" (quoting *Humbert v. Commonwealth*, 29 Va. App. 783, 792 (1999))).

This Court held in *Jackson v. Commonwealth*, 86 Va. App. 722, 731-33 (2026), that the mere appearance of partiality from a trial judge is enough to constitute a grave injustice under the ends of justice exception. In *Jackson*, the trial judge, when announcing his sentencing decision, made unnecessary comments about the defendant's race and extrajudicial facts about other cases on his docket. *Id.* at 737. In response, we noted that "the ends-of-justice exception is concerned not only with whether an error altered the outcome, but also whether the error itself amounted to a denial of a fundamental constitutional protection." *Id.* at 742 (relying on *Duck v. Commonwealth*, 8 Va. App. 567 (1989), *Allen v. Commonwealth*, 36 Va. App. 334 (2001), and *Cooper v. Commonwealth*, 205 Va. 883 (1965)); *see also Herring v. Herring*, 33 Va. App. 281, 287 (2000) (explaining that some "procedures are so crucial that a court's failure to adhere to them constitutes error that is clear, substantial and material even in the absence of affirmative proof of error in the result").

However, before applying a 5A:18 exception to any given case, we must analyze the record and decide whether the facts "affirmatively show that a miscarriage of justice has occurred, not that a miscarriage *might* have occurred." *Redman v. Commonwealth*, 25 Va. App. 215, 221 (1997). While it is certainly possible that a trial judge's commentary during jury polling could result in a deprivation of due process, Kelley has failed to meet his burden of showing that a manifest injustice in fact occurred.

The trial judge stated that the jurors "need to respond affirmatively to the [clerk's polling] question." It is true that a juror *could* have understood that the judge required a "yes" answer to the clerk's questions. Perhaps the trial judge should have been more careful. Words matter, especially those spoken by an arbiter of the law in the presence of the jury. But Kelley simply has not provided evidence of any such juror. No juror showed signs of wavering before the judge's commentary; there is no sign the jury had been deadlocked or otherwise non-unanimous.

CONCLUSION

For the foregoing reasons, we affirm Kelley's convictions for attempted malicious wounding of a horse, conspiracy, malicious wounding of a horse, and animal cruelty. We reverse and dismiss his conviction for shooting from a vehicle. We vacate the order awarding $22,796 in restitution to Blue Ridge Equine Clinic and remand to the trial court for entry of an amended restitution order consistent with this opinion.

Affirmed in part, reversed in part, and remanded.

White, J., dissenting in part and concurring in part.

I concur with the finding of Section I that the evidence is insufficient to support the conviction for shooting from a vehicle, but sufficient to support the conviction for malicious wounding. I also concur in the finding of Section III that the ends of justice exception does not apply to the jury polling issue, but for additional reasons. However, because I disagree with the findings of Section II, I respectfully dissent.

Analysis

I. There Was No Abuse of Discretion in the Restitution Award

Kelley bases his argument that the trial court abused its discretion on the facts that $18,604 was already awarded to Hill, that Hill's granddaughter bought the horse for only $2,500, that the horse was twenty years old, and that Hill never "incurred" the debt that was forgiven.

"The determination of sentencing lies within the sound discretion of the trial court." *Martin v. Commonwealth*, 274 Va 733, 735 (2007). "A trial court has 'wide latitude' to make sentencing decisions such as the ordering of restitution." *Sigler v. Commonwealth*, 61 Va. App. 674, 678 (2013) (quoting *Deal v. Commonwealth*, 15 Va. App. 157, 160 (1992)). "[T]he statutory provisions [on restitution] are to be liberally construed." *McCullough v. Commonwealth*, 38 Va. App. 811, 814-15 (2002). Thus, "[a] sentencing decision will not be reversed unless the trial court abused its discretion." *Martin*, 274 Va. at 735. "On appeal, where the restitutionary amount is supported by a preponderance of the evidence and is 'reasonable in relation to the nature of the offense,' the determination of the trial court will not be reversed." *McCullough*, 38 Va. App. at 817 (quoting *Deal*, 15 Va. App. at 160-61).

Kelley argues that proper restitution according to statute dictates he should only pay the fair market value of the property damaged. Statutory language and caselaw indicate otherwise. True, the court "*may*," "if return of the property is impractical or impossible," require the

defendant to "pay an amount equal to the greater of the value of the property at the time of the offense or . . . at the time of sentencing." Code § 19.2-305.2 (emphasis added). Here, it was possible to return the property and restore it to full health. Additionally, caselaw indicates that "'if an animal is injured in such a way that proper care and attention reasonably may be expected to effect a cure,' the 'expense properly incurred for this purpose is a part of the damage to the owner, for which he is entitled to compensation' even if that expense exceeds the diminution in the animal's market value." *Blue Pearl Veterinary Partners, LLC v. Anderson*, 78 Va. App. 40, 48 (2023) (quoting *Atwood v. Boston Forwarding & Transfer Co.*, 71 N.E. 72 (Mass. 1904)).

The majority interprets the statutory language of §§ 19.2-11.01, -305.1(B), and -305.2(A)(ii) to "allow restitution for only (1) property damage and (2) medical expenses of persons," which is taken to imply that veterinary bills are an inappropriate basis for a restitution calculation. This is an overly restrictive reading of the statutes not supported by any of the statutory language. I can agree that § 19.2-11.01 restricts "victims" to human persons and that § 19.2-305.1(B) allows for restitution for property damage or medical expenses incurred by the victim. Yet, there is no language in these statutes restricting restitution to medical expenses *for injury to human persons* as opposed to injury to animals owned by human persons or restricting property damage to market value and excluding veterinary expenses incurred.

Restitution in criminal cases and compensation in tort cases have a nearly identical purpose. "[T]he purpose of compensatory damages . . . is to make a tort victim whole." *Acuar v. Letourneau*, 260 Va. 180, 192 (2000). Likewise, in criminal cases, "[o]ne purpose of restitution is to make the victim whole by compensating him for losses caused by the offense for which the defendant was convicted." *Fleisher v. Commonwealth*, 69 Va. App. 685, 691 (2019). Accordingly, "the broader liability for intentional torts should likewise be coextensive with criminal-restitution awards for crimes involving intentional wrongdoing." *Tyler v.*

Commonwealth, 75 Va. App. 218, 249 (2022). Criminal restitution damages "align with the purpose of compensatory damages [in tort cases]: 'to put an injured person in a position as nearly as possible equivalent to his position prior to the tort.'" *Id.* at 250 (quoting Restatement (Second) of Torts § 901 cmt. a (1979)).

The value of a beloved horse is impossible to calculate and the statute governing restitution calculation does not restrict courts from considering factors outside of fair market value.[18] "[T]he general rule for determining the amount of damages for injury to personal property is to subtract the fair market value of the property immediately after the loss from the fair market value thereof immediately before the injury, the remainder, plus necessary reasonable expenses incurred, being the damages." *White Consol. Indus., Inc. v. Swiney*, 237 Va. 23, 30 (1989) (quoting *Averett* v. *Shircliff*, 218 Va. 202, 237 (1977)). However, "the general damages rules are 'a standard, not a shackle.'" *Blue Pearl*, 78 Va. App. at 47 (quoting Charles T. McCormick, *Handbook on the Law of Damages* § 45 (1935)). "[T]he sundry rules for measuring damages are subordinate to the ultimate aim of making good the injury done or loss suffered and hence[,] 'The answer rests in good sense rather than in a mechanical application of a single formula.'" *Younger v. Appalachian Power Co.*, 214 Va. 662, 664 (1974) (quoting *New Jersey Power & Light Co. v. Mabee*, 197 A.2d 194, 195 (N.J. 1964)). "[W]hen the damaged property has no ascertainable market value or when market value would be a manifestly inadequate measure, then *some other measure must be applied*." *Blue Pearl*, 78 Va. App. at 47-48 (emphasis in original) (quoting *Younger*, 214 Va. at 664).

[18] *See* Code § 19.2-305.2; *Baugh v. Commonwealth*, No. 0347-18-2, slip op. at 4-5 (Va. Ct. App. Dec. 10, 2019) ("We first note that nothing in the relevant provisions of Chapter 18 of Title 19.2 of the Code establishes fair market value as the measure of value which a trial court must use in determining the amount of restitution . . . . Had the General Assembly intended to limit trial courts to determining the amount of restitution using only the 'fair market value' of property damaged or lost through a defendant's criminal acts, it could have done so by including specific language to that effect in the relevant statutes.")

As our precedent indicates, then, fair market value calculation and calculation of the cost of care are separate and independent ways of calculating restitution. Here, the question is not whether the trial court should have confined the restitution award calculation to fair market value for the horse, but rather how much in damages beyond fair market value are reasonable to recover based on the cost of care incurred for the horse.

There is no indication from the record that Blue Ridge Equine Clinic or Hill's granddaughter did anything unreasonable to restore the horse to full health. There is also no argument from Kelley to that effect. Since Kelley rests his argument on the idea that fair market value ought to determine the restitution amount, he fails to explain what he believes to be an unreasonable amount beyond market value to restore the horse to full health. It is within the trial court's discretion to use the cost of care in the calculation of restitution owed by Kelley.

Thus, I turn now to whether Kelley should be liable for the balance that was forgiven by Blue Ridge Equine Clinic, and that requires application of Code § 19.2-305.1. "Statutory interpretation is a question of law we review *de novo*." *Jacobs v. Wilcoxson*, 71 Va. App. 521, 524 (2020) (citing *Robinson v. Commonwealth*, 68 Va. App. 602, 606 (2018)). "Additionally, 'the plain, obvious, and rational meaning of a statute is always to be preferred to any curious, narrow, or strained construction.'" *Id.* at 524 (quoting *Smith v. Commonwealth*, 66 Va. App. 382, 388 (2016)).

Virginia law establishes that anyone who is convicted of a crime "shall make at least partial restitution for any property damage or loss caused by the crime or for any medical expenses . . . incurred by the victim or his estate as a result of the crime." Code § 19.2-305.1. The Commonwealth relies on *Puckett*, where the Supreme Court says, "a medical expense is 'incurred' by a victim when he either pays it or incurs an express or implied obligation to pay it." *Commonwealth v. Puckett*, 302 Va. 455, 466 (2023). Further, "an incurred medical expense does

not become unincurred simply because a medical provider waives its right to seek full payment from an indigent individual in hopes of recovering partial payment from a solvent entity, such as a private or public insurer." *Id.*

Puckett involves a case where medical expenses are incurred but an insurance provider covers some of the cost. *Id.* In that case, the third-party beneficiary of the award is a medical provider who, as in this case, makes an agreement to waive its right to some of the debt owed. *Id.* As the Supreme Court says in that case, "[t]he Court of Appeals started its analysis by correctly defining 'incurred' as the past tense of 'incur,' which means '[t]o suffer or bring on oneself (a liability or expense).'" *Id.* at 462 (quoting *Puckett v. Commonwealth*, No. 1002-21-3, slip op. at 18 n.10, 2022 Va. App. LEXIS 356, at *9 n.10 (Aug. 9, 2022)). "A host of legal and nonlegal dictionaries establish this definition as the near-unanimous understanding of this term." *Id.*

Is there a substantial difference between a third party paying off the debt and a third party forgiving the debt? The discussion in *Puckett* does differentiate between a third-party that pays *from the outset* and one that pays off a debt—the latter involving an "incurred" debt, but not the former. "If someone other than the patient has *already assumed* the legal liability to pay the patient's medical bills . . . then it makes sense . . . not [to] consider that payment to be an 'incurred expense' for the safety-net purpose of funding the medical needs of the low-income patient." *Id.* at 463 (emphasis added). However, such a difference does not protect Kelley in this case. Hill incurred the debt, and the debt was "paid" when the provider, Blue Ridge Equine Clinic, forgave it.[19] That they were not working for free is indicated by the fact that they

[19] The trial court stated that the expenses "hav[e] been incurred by a victim when he either pays it or incurs an expressed or implied obligation to pay" and "[t]here's no evidence that the equine clinic agreed to work for free in the beginning. They actually submitted a bill and then agreed not [to] seek collection of it."

imposed a very specific balance upon him. Whether their forgiving the debt is analogous to "paying" the debt off is not as important as whether their imposing the debt upon Hill burdens someone—either Hill, a third-party payer, or the provider itself—so that at least someone bears the burden of that debt through Hill's initial "incursion" of it.

"[I]f money is prudently expended in the hope of mitigating the injury, . . . there is no good reason why this expense, as well as the value of the animal, should not be included as a part of the damages." *Blue Pearl*, 78 Va. App. at 49 (quoting *Atwood*, 71 N.E. at 72). Given that our standard of review for awards of restitution is abuse of discretion, I find no error in the trial court's basis for the restitution amount imposed.

II. The Ends of Justice Exception Does Not Apply to the Jury Poll

The appellant attempting to invoke the ends of justice exception to Rule 5A:18 waiver has the burden to show "(1) that the trial court erred, and (2) that a grave or manifest injustice will occur or the appellant will be denied essential rights." *Brittle v. Commonwealth*, 54 Va. App. 505, 513 (2009). Jury polling and the appearance of impartiality is the right of any defendant, but Kelley has not shown that either was denied or that injustice occurred.

Kelley's argument is based on a single statement in the pre-polling explanation given by the trial court that the clerk would "go down the list and you need to respond affirmatively to the question." Kelley and the majority fail to appreciate the context of the statement. Immediately prior, the judge was explaining the purpose of the jury poll, saying the clerk will call each number and "the question we're going to ask you is this your verdict and it's just basically to verify that all of you agree on the verdict." It is not unreasonable for a judge to phrase the jury poll explanation as if they will all affirm, since the jury had just stipulated through its representative that it reached a unanimous decision.

Additionally, when the jury retired for deliberations the day before, the trial court instructed the jurors, "Each of you must decide the case for yourself," and "none of you should surrender your honest convictions as to the weight or effect of the evidence solely because of the opinion of your fellow jurors for the mere purpose of reaching a verdict." Further, "No ruling or remark that [the trial court] ha[s] made during this trial is intended to indicate to you what [the trial court] think[s] your verdict should be. That is entirely within your discretion." There was no appearance of partiality as the majority claims.

For the foregoing reasons, I respectfully dissent on the issue of restitution and concur on the ends of justice exception relating to the jury poll by the trial court.