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State v. Lombard Appellant's Brief Dckt. 36454

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	
Plaintiff/Respondent,)	
)	Supreme Court Docket #36454-2009
vs.)	
)	
VERNA L. LOMBARD)	
)	
Defendant/Appellant.)	
)	
)	
)	

APPELLANT'S BRIEF

Appealed from the District Court of the Second Judicial District in the State of Idaho,
In and For the County of Clearwater

The Honorable John Bradbury, District Judge Presiding

Counsel for Plaintiff/Respondent	Counsel for Defendant/Appellant
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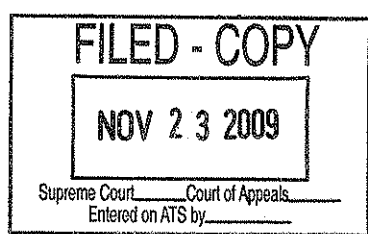


TABLE OF AUTHORITIES

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CASES

State v. Smith, 144 Idaho 687, 169 P.3d 275 (Ct. App. 2007) 8, 9

STATUTES/RULES

I.C. § 19-5304 8

1 However on December 1, 2008, the District Court rejected the Rule 11 Plea Agreement and ordered
2 the case to jury trial because Lombard would not admit to taking \$20,000. (See Tr. pp. 4-11). At
3 the change of plea hearing the District Court stated that it would not impose restitution of \$20,000
4 “unless there’s an admission that that’s what she did. And if there’s not, then we’ll go to trial.” (Tr.
5 p. 9 lns. 16-19.
6

7 A jury trial was subsequently held on January 11-13, 2009. Part of the evidence that was
8 introduced at trial was a taped conversation that Lombard had with Detective Sergeant Jared of the
9 Clearwater County Sheriff’s Office on the day of her arrest September 9th, 2007. During this
10 conversation, Lombard admitted to taking cash while at work from Mary Ann’s Grocery beginning
11 the end of June of 2007. (Tr. p. 232 lns. 7-21) Lombard admitted to taking \$50 to \$60 dollars a day
12 but she also stated that she did not take cash every day and did not always take cash when she hit
13 the no sale button on the cash register. *Id.* Subsequently on January 13th, 2009, the jury found
14 Lombard guilty of Burglary and Grand Theft.
15

16 On March 23, 2009, the District Court sentenced Lombard to concurrent terms of not less
17 than 2 ½ years nor more than 8 years with the District Court retaining jurisdiction. (R pp. 121-23).
18 The PSI recommended local incarceration followed by supervised probation. (Tr. p. 265 lns. 19-20).
19 The District Court set a restitution hearing for April 20, 2009. *Id.*
20

21 On April 20, 2009, the State filed an Affidavit for Restitution. (See R. pp. 108-15). Attached
22 to this Affidavit is a letter from Don and Cammie Ebert stating that they believed that Lombard
23

1 allegedly stole at least \$100,000. (R. p. 111). The Ebert letter offers no support for this conclusion.
2 Also attached to the Affidavit were two separate statistical calculations prepared by Don Ebert. (R.
3 pp. 112-13).

4 At the restitution hearing, over Lombard's objection, Don Ebert testified with regards to his
5 statistical calculations. (See Tr. pgs. 286-297). The District Court overruled Lombard's objection
6 that restitution is required to be established by a preponderance of the evidence and that actual loss
7 needs to be based on substantial evidence and that statistical average or assumptions are not
8 substantial evidence for purpose of determining a restitution amount. (Tr. pg. 289 lns. 14-25, pg. 290
9 lns. 1-2).

10
11 At the hearing, Don Ebert testified that he could not put a black or white number on how
12 much Lombard allegedly took. (Tr. pg. 290 lns. 5-6). At the hearing, he also testified that he could
13 not identify the exact date that allegedly Lombard began taking money from the store, how many
14 times Lombard allegedly took money from the store, and the exact amount for each transaction that
15 was allegedly taken. (Tr. pg. 293 lns. 4-16).

16
17 During the trial, Don Ebert also testified that there were legitimate reasons for no sale
18 transactions to occur on the cash register slip, that the number of legitimate no sale transactions each
19 day varied, that different employees used the same till during a shift, and that it was impossible to
20 determine from the cash register slip which employee entered a no sale transaction. (See Tr. pgs.
21 173-177).

1 In deciding the restitution amount the District Court took “the more conservative approach,
2 simply because it seems awfully hard for any reasonable person to question that amount.” (Tr. pg.
3 305 lns 3-6).

4 **ISSUES PRESENTED ON APPEAL**

- 5
- 6 A) Whether or not the District Court abused its discretion in ordering a restitution
7 amount that was not supported by a preponderance of the evidence and is thus not
8 supported by substantial evidence.
- 9 B) Whether or not the District Court abused its discretion in sentencing Verna Lombard
10 by considering facts not supported by substantial evidence in the record.

11 **ARGUMENT**

12

13 On a preliminary note, this case has always been about restitution. The Defendant in this
14 case, Verna Lombard, never denied that she engaged in inappropriate conduct while working for
15 Mary Ann’s Grocery. In fact, she admitted to Sergeant Detective Mitch Jared on the very day in
16 September of 2007 that she was arrested that she had been taking money from the store since the end
17 of June of 2007 (actually she could not remember if it started the end of June or the first part of July).
18 She admitted that she had taken \$50 to \$60 dollars a day. She also stated that she did not take every
19 single day that she worked since she had started taking in June or July. Further she stated that
20 sometimes when she hit no sale on the cash register she did not take any money. The importance,
21 or alleged importance, of a no sale on the cash register will be addressed in depth shortly.
22

1 This case has always been about restitution, or maybe more accurately, the lack of credible
2 substantiated evidence regarding a restitution amount. It must be emphasized that Verna Lombard
3 fully realizes that she should have to pay restitution, however, just as importantly, and this is equally
4 true to all people whether they are paying or receiving restitution, is that the amount of restitution
5 in a criminal case needs to be based on the **actual** loss of the victim, not some statistical analysis
6 based on assumptions. Criminal defendants are required to pay only what the actual loss was, or an
7 amount that a defendant agreed to pay. Criminal defendants are not required to pay amounts based
8 on assumptions. Victims are entitled to the amount of actual loss, or maybe even more if a defendant
9 agrees, but are not entitled to a windfall. While it should never pay to be a criminal, it should
10 likewise never pay to be a victim.
11

12
13 This case should have been resolved pursuant to the parties' written Rule 11 Plea
14 Agreement. The parties negotiated extensively in coming to the Agreement. Both sides, including
15 the victims, were satisfied with the Agreement hence the presentation of the signed Agreement to
16 the District Court. A restitution amount was agreed to and all sides benefitted. From Verna
17 Lombard's perspective, she got the opportunity to ask for a withheld judgment, got one count
18 dismissed, got the opportunity to argue for the length of local incarceration, and knew what the exact
19 amount of restitution would be. The State got a guilty plea and the victims, who were involved in
20 the plea agreement negotiations, were satisfied with the restitution amount. Plea agreements are
21 contractual and there is no legal authority that requires a defendant to plead to taking the same
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24 APPELLANT'S BRIEF

-5-

1 amount as agreed to be paid in restitution in a plea agreement. In other words, all that Defendant
2 Verna Lombard needed to do in this case was plead to the elements of grand theft, she did not have
3 to admit to taking the amount that she had agreed to pay as restitution in the Plea Agreement.
4 However the District Court would not let her just plead to the elements of grand theft and rejected
5 her plea and the Plea Agreement between the parties. This abuse of discretion forced Defendant
6 Verna Lombard to stand trial on counts of Burglary and Grand Theft in which she had no chance of
7 prevailing given her admissions to Detective Sergeant Jared. This abuse of discretion led to none
8 of the parties receiving the benefit of the bargain that Verna Lombard entered with the State and the
9 victims.
10

11 Subsequently a jury found Verna Lombard guilty of Burglary and Grand Theft. Given that
12 the admissions alone were enough to find Verna guilty beyond a reasonable doubt, this was no
13 surprise. While this case has always been about restitution, and we'll get to that in shortly, a
14 summary of the evidence presented at trial is helpful for ultimately understanding the issue of
15 restitution.
16

17 The Eberts were allegedly approached by an individual who said that he bought an item from
18 Mary Ann's Grocery that was not run up by Verna Lombard. It was the Eberts' belief that Verna was
19 selling goods to individuals and would hit no sale on the cash register which would then not register
20 as a saleable event on the till. Verna herself confirmed this to Sergeant Detective Jared and told him
21 that she would take the money, hit no sale, give the customer change, and then pocket money from
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1 the sale that registered on the till as a no sale. Verna herself admitted that she had being doing this
2 since late June or early July of 2007 and took approximately \$50 to \$60 a day when she did this.
3 Verna also stated that she did not take every day she worked from when she starting taking and that
4 some times she hit no sale and did not pocket any money from that transaction.
5

6 The State introduced video tape surveillance of Verna Lombard taken the day of her arrest
7 and for a few days prior to her arrest in September of 2007. The tapes showed Verna working the
8 cash register and at the very most by themselves only show Verna taking something from the till and
9 putting it in her pockets. They tapes do not show how much was taken each incident and only show
10 a brief period of time.

11 The State matched the cash register tapes to the videos and established that Verna had
12 actually sold product at times which the cash register tape reads no sale. The video tapes and the
13 cash register tapes themselves still fail to show how much were actually taken in even one incident
14 and again were only for a few day period. In fact, the combination of the cash register tapes and the
15 video tape only confirm what Verna admitted to Sergeant Detective Jared.
16

17 The State then introduced cash register tapes for several years The cash register tapes by
18 themselves establish nothing substantial. Don Ebert testified that there were legitimate reasons for
19 no sale entries, the amount of legitimate no sale entries varied day to day, it was impossible to tell
20 what employee run in a no sale entry from the tapes themselves, and the tapes themselves could not
21 identify an actual amount that was taken in even one incident.
22

1 So while the State failed to offer any substantial evidence at trial besides Verna Lombard's
2 admissions regarding the amount taken per incident, the total number of incidents, and the total
3 amount taken by Lombard, the admissions by Verna by themselves were enough to justify a finding
4 of guilt by the jury. Which now leads us to the issue of restitution.

5
6 A. THE DISTRICT COURT ABUSED ITS DISCRETION IN ORDERING A
7 RESTITUTION AMOUNT THAT WAS NOT SUPPORTED BY A
8 PREPONDERANCE OF THE EVIDENCE AND IS THUS NOT SUPPORTED BY
9 SUBSTANTIAL EVIDENCE.

10 The decision whether to order restitution, and in what amount, is within the discretion of the
11 trial court, guided by consideration of the factors set forth in I.C. § 19-5304(7) and by the policy
12 favoring full compensation to crime victims who suffer economic loss. *State v. Smith*, 144 Idaho
13 687, 692, 169 P.3d 275, 281 (Ct. App. 2007). “Restitution, however, may be ordered only for **actual**
14 economic loss suffered by a victim, I.C. §§ 19-5304(1)(a), (2), unless the parties consent to a broader
15 restitution order. *See* I.C. 19-5304(9).” The determination of the amount of restitution is a question
16 of fact for the trial court whose findings will not be disturbed if supported by substantial evidence.
17 *Smith* at 692, 169 P.3d at 281. An appellate court will not overturn an order of restitution unless an
18 abuse of discretion is shown. *Id.* When a trial court’s discretionary decision is reviewed on appeal,
19 the appellate court conducts a multi-tiered inquiry to determine: (1) whether the lower court correctly
20 perceived the issue as one of discretion; (2) whether the lower court acted within the boundaries of
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1 such discretion and consistently with any legal standards applicable to the specific choices before
2 it; and (3) whether the lower court reached its decision by an exercise of reason. *Id.*

3 At the restitution hearing (*See* Tr. pgs. 277-307), Don Ebert testified that he could not put
4 a black or white number on how much Lombard allegedly took. At the hearing, he also testified that
5 he could not identify the exact date that allegedly Lombard began taking money from the store, how
6 many times Lombard allegedly took money from the store, and the exact amount for each transaction
7 that was allegedly taken. In other words, Don Ebert testified that he could not identify the actual
8 loss.
9

10 Don Ebert further testified that it was impossible to determine the amount that was taken and
11 the District Court later agreed by saying that Verna Lombard caused the problem and lack of
12 evidence and thus Don Ebert's statistical model was appropriate to determine restitution. With all
13 due respect to the Don Ebert and the District Court, it was not, or is not, impossible to determine
14 how much Verna took from the store. Its a matter of simple bookkeeping and accounting to
15 determine how much "cash" should have been running through the business based on the sale of
16 inventory. Its then simply a matter of identifying the actual cash versus the amount of cash that
17 should have been running through the store. Its certainly not impossible to determine that amount.
18 The fact that the Eberts did not have adequate control of the financials does not excuse illegal
19 conduct, however it should also not open the door for restitution amounts based on speculation.
20 Restitution is limited to the actual amount of loss and it's the State's burden to make this showing.
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1 The State failed to make any showing of actual loss. The District Court is required to only award
2 restitution supported by the preponderance of the evidence. The District Court abused its discretion
3 by awarding restitution in an amount not supported by the preponderance of the evidence and there
4 is not substantial evidence in the record to affirm the District Court's award of restitution in this
5 matter. As such, the Defendant respectfully contends that the District Court's order of restitution
6 be reversed.
7

8 Restitution is limited to actual loss and thus should not be speculative at all. The statistical
9 analysis offered by Don Ebert and subsequently adopted by the District Court is nothing but
10 speculations. There is not one single factor in the models that do not require major assumptions.
11

12 Don Ebert testified that he did not know the number of unlawful events that Verna engaged
13 in, yet the models (*See R. pgs. 112-13*) use no sale entries on the cash register tapes as a measure for
14 the number of unlawful events. As already established there are many legitimate reasons for no sale
15 entries. The legitimate entrees vary day to day, its impossible to determine what employee is
16 responsible for the no sale entry, and numerous employees use the same register throughout a shift.
17 The preponderance of the evidence does not show that no sale entrees is a reliable measure for
18 unlawful transactions. The preponderance of the evidence shows that no sale entrees are not a
19 reliable event indicator and is based entirely on speculation. Restitution is limited to actual loss not
20 speculative loss.
21
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1 Don Ebert testified that he did not know how much was taken each unlawful event, yet the
2 model relies on a average take per event which is calculated purely through speculation based on the
3 amount of money Verna Lombard had on her when she was arrested. Don Ebert seeks to base the
4 daily take for 523 days in one model and for 674 days in another model based only on the amount
5 of money that Verna had on her person the date she was arrested. Not to mention that Verna told
6 Sergeant Detective Jared that she had money on her person that was hers legitimately on the date that
7 she was arrested.
8

9 The model assumes the date that Verna allegedly began engaging in unlawful conduct. Once
10 model starts with a date in 2004 and then assumes that she took every day she worked thereafter until
11 the day she was arrested! The other model assumes that Verna began taking on the very first day that
12 she worked and took every single day that she worked until the day of her arrest! There is absolutely
13 no reliable evidence that Verna Lombard took from the store 523 straight days that she worked or
14 that she took from the store 674 straight days that she worked.
15

16 Restitution is limited to actual loss. Statistical calculations assuming unlawful events,
17 amounts taken each unlawful event, daily takes, and days taken do not establish actual loss and are
18 too speculative for restitution. The problems are almost too numerous to discuss. For example, in
19 both models, Don Ebert assumes that on the date when Verna Lombard began taking, that she
20 proceeded to take every single day until the date of her arrest. There is absolutely no substantial
21 evidence that assumption is correct and its also highly unlikely someone would take every single day.
22
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1 The point being is if this assumption is wrong, say for example illegal events occurred only every
2 other day or only every third day then the amount is too high by half or too high by two thirds.

3 Another example is assuming what the daily take is and multiplying it by the number of days
4 which unlawful activity allegedly occurred. One model assumes 523 days of illegal activity and
5 wants to calculate the average daily take based on 1 day. Again there is absolutely no evidence that
6 what was taken one day was taken the next day and in this model, assuming only for illustrative
7 purposes, if the daily take is twice as high (\$160) as it should be (\$80) then the amount would be
8 inflated by \$41,840.

10 Restitution is limited to actual loss. The only reliable evidence regarding actual loss in this
11 case is the admissions that Verna Lombard make which would approximately total \$2,800. However
12 this also assumes she took every day from when she stated in fact that she did not.

14 Its important to note that the victims agreed to \$20,000 restitution in the Pleas Agreement.
15 Its important to note that amount because it shows how speculative and erroneous the statistical
16 models are. In one model the low end is almost \$72,000 and in the other the high end is over
17 \$204,000. The question has to be asked why someone who thought their actual loss was a minimum
18 of \$72,000 and a maximum of \$204,000 would ever agree to only \$20,000 in restitution.

20 Restitution is limited to actual loss. This actual loss needs to be proved by a preponderance
21 of the evidence and cannot be based on speculation. No sufficient evidence was presented at the
22 restitution hearing regarding actual loss. The preponderance of the evidence does not support the
23

1 District Court's restitution award in this matter. The District Court abused its discretion in awarding
2 restitution based purely on speculation and assumptions without any foundational support. The
3 restitution award is not based on substantial evidence in the record and Defendant Verna Lombard
4 respectfully urges that the award must be reversed.

5
6 B. THE DISTRICT COURT ABUSED ITS DISCRETION IN SENTENCING VERNA
7 LOMBARD BY CONSIDERING FACTS NOT SUPPORTED BY SUBSTANTIAL
8 EVIDENCE IN THE RECORD.

9 The District Court obviously put a lot of weight in the statistical models prepared by Don
10 Ebert when sentencing Verna Lombard in this matter. However as set forth above, these models are
11 based entirely on assumptions and speculations and there is no justification for their use in this
12 matter in setting a restitution amount. The consideration of these models as a restitution amount
13 influenced the District Court's decision on how long Verna Lombard's sentence would be with the
14 District Court's intent that Verna be on probation for up to eight years in order to pay the restitution.
15 As set forth above, the restitution order is erroneous and needs to be set aside and any change in
16 restitution should also change the length of the Verna's probation.
17

18 **CONCLUSION**

19
20 This is a case that should have been resolved by the parties' written Rule 11 Plea Agreement
21 but the District Court's abuse of discretion led to a jury trial that was a foregone conclusion based
22 on the admissions made by Verna, a sentencing that relied upon assumptions and speculative
23

1 evidence regarding restitution, and a restitution order that is purely speculative and flies in the face
2 of well established law regarding restitution.

3 Verna Lombard acknowledges that her conduct was wrong and that she should be required
4 to pay restitution. However just as importantly is the requirement that the amount of restitution be
5 based only on the actual loss of the victims and that a restitution award needs to be based on a
6 preponderance of the evidence.
7

8 It was not impossible for the victims to establish their actual loss in this matter. The State
9 failed to prove the victims' actual loss be a preponderance of the evidence. The only uncontroverted
10 evidence that is reliable and is not based improperly on assumptions and speculations are Verna's
11 admissions to Sergeant Detective Jared that she took \$50 to \$60 some days beginning the end of June
12 or the first part of July 2007 and that sometimes she hit no sale and did not take any money. The
13 video tapes do not show anything different. The cash register tapes do not show anything different.
14 The combination of the video tapes and the cash register tapes do not show anything different. At
15 the very most the restitution award should be limited to Verna's admissions.
16

17 The statistical models offered by Don Ebert are entirely speculative and rely solely on
18 assumptions and do not offer any evidence whatsoever about the actual loss in this matter. The
19 District Court in this matter abused its discretion by refusing the parties' Rule 11 Plea Agreement,
20 sentencing Verna Lombard based on its reliance of the statistical models, and abused its discretion
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1 in ordering restitution in an amount not supported by a preponderance of the evidence. This abuse
2 of discretion has caused the Defendant to suffer manifest injustice.

3 The District Court clearly abused its discretion with regards to the restitution order and
4 sentencing in this case. Neither the restitution order nor the sentence is supported by substantial
5 evidence in the record and as such, Verna Lombard respectfully requests that the restitution order
6 and the sentence be reversed.
7

8 DATED this 17th day of November, 2009.

9 CLARK AND FEENEY

10
11 By: _____
12 John Charles Mitchell, a member of the firm.
13 Attorneys for Defendant/Appellant
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 17th day of November, 2009, I caused to be served a true and correct copy of the foregoing document by the method indicated below, and addressed to the following:

Lawrence G. Wasden Attorney General 1299 N. Orchard St., Suite 110 Boise, ID 83706	<input type="checkbox"/> U.S. Mail <input type="checkbox"/> Hand Delivered <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Telecopy
---	---

By: _____
Attorneys for Defendant/Appellant