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State v. Hill Appellant's Brief Dckt. 38808

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)
)
 Plaintiff-Respondent,) NO. 38808
)
 v.)
)
 JERRY ALLAN HILL,) APPELLANT'S BRIEF
)
 Defendant-Appellant.)
 _____)

BRIEF OF APPELLANT

**APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF KOOTENAI**

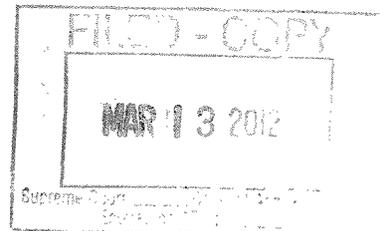
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STATEMENT OF THE CASE

Nature of the Case

Jerry Allan Hill appeals from his judgment of conviction for three counts of grand theft. He asserts that the district court erred by permitting a witness to testify to the effects of the alleged theft on one of the victims, and that the district court erred in awarding restitution.

Statement of the Facts and Course of Proceedings

Mr. Hill was a partner in the real estate firm of Jordan, Hill and Hall (*hereinafter*, the Firm). (Plaintiff's Exhibit 1). Sawnie Walker worked as the bookkeeper for the Firm from October 2005, until December 2008. (Tr., p.127, Ls.6-14.) She testified that the three partners had business credit cards and it was part of her duty to pay the bills for those credit cards. (Tr., p.130, Ls.7-20.) During her testimony, the State introduced Mr. Hill's credit card statement for the period of October 2004, through October 2006. (Tr., p.136, Ls.2-4.) The State also introduced evidence that the firm paid for the expenses on the card. (*See generally* plaintiff's exhibits 3, 4, 5, 6, 7, 8, and 9.) Ms. Walker testified that Mr. Hill instructed her to code an expense to the Spokane Chiefs as a company expense even though the firm had no business with that organization; she also testified that Mr. Hill would occasionally write the checks to American Express to pay for the credit card even though that was her responsibility. (Tr., p.159, L.11 – p.161, L.10.) The State admitted a spreadsheet of Mr. Hill's purchases on the card between December 2004, and October 2006 that the firm alleged were personal, rather than business expenses. (Plaintiff's exhibit 10.)

Ms. Walker testified that in 2006, Mr. Hill wrote himself checks in the amount of \$120,000; this was in addition to his salary and his commissions. (Tr., p.199, Ls.3-20.) She also testified that Mr. Hill kept the proceeds from the office vending machine when the products in the machine were purchased with company checks. (Tr., p.201, Ls.9-16.)

The State then sought to admit plaintiff's exhibit 15, which contained membership summaries and sales audits for Mr. Hill and his wife's Costco cards, despite the fact that the party that compiled the data testified. (Plaintiff's Exhibit 15.) Mr. Hill objected to the introduction of this exhibit on the bases of hearsay, the confrontation clause, and foundation. (Tr., p.205, Ls.19-20.) The State asserted that the record was a self-authenticating document and could be admitted as a business record. (Tr., p.205, Ls.21-25.) These documents set forth what products were purchased on Mr. Hill's account. (Plaintiff's exhibit 15.)

Curtis Clark, a certified public account, testified next. (Tr., p.256, Ls.9-19.) He was contacted by the other partners of the firm to review the firm's records because they were concerned about money being taken out by one of the partners. (Tr., p.261, Ls.11-22.) His schedule of Mr. Hill's transactions and the amount he owed the company was introduced into evidence. (See plaintiff's exhibits12.)

Robert Brad Jordan, one of the partners in the firm, testified next. (Tr., p.307, Ls.11-15.) He generally explained the organization of the company and the partners' responsibilities. (Tr., p.309, L.1 – p.322, L.13.) He testified that he became aware that Mr. Hill had been using his business card to purchase personal items; he says he confronted Mr. Hill, who told him that he was doing the office a favor because the office owed him money and it was easier to "barter it out, so to speak with that – by charging

that on the card.” (Tr., p.324, Ls.7-23.) At the end of his direct examination, Mr. Johnson was asked what happened to him financially after the collapse of the company; Mr. Hill objected and a different question was then asked. (Tr., p.342, Ls.7-14.) Mr. Johnson was asked if he knew the whereabouts of the third partner in the firm, Patrick Hall. (Tr., p.342, Ls.15-19.) When asked if Mr. Johnson knew what happened to Mr. Hall after the collapse of the company, Mr. Hill objected on the basis of relevancy. (Tr., p.243, Ls.24-25.) The prosecutor responded,

[w]ell, I think it goes to whether or not these two other partners made any money after Mr. Hill was booted out of the company. I think it goes to whether or not these two partners had some sort of financial reward as a result of that. I think it goes to the theft itself in establishing what it did to the other partners.

(Tr., p.343, Ls.1-7.) Counsel for Mr. Hill replied, “I don’t think any of those issues are relevant to the present proceedings.” (Tr., p.343, Ls.10-11.) The court held that the testimony could be of “limited relevance” and permitted a brief inquiry. Mr. Jordan then testified,

Well, uh, about a – just a year ago he moved to California. He, uh, ran out of money – he actually ran out of money that previous year and after – well, let’s see, I had been putting my money in with Patrick, and when Patrick ran out of money a little before I did and couldn’t make payments on his house anymore, he went to California probably just about a year ago, left town, and I kind of got left alone.

(Tr., p.343, Ls.18-25.)

Mr. Hill was convicted. The district court imposed unified concurrent sentences of six years, with three years fixed, and the court retained jurisdiction. (R., p.291.) Following the retained jurisdiction period, Mr. Hill was placed on probation. (R., p.685.) Mr. Hill appealed. He asserts that the district court erred by admitting Mr. Jordan’s testimony and by awarding the State’s full restitution request.

ISSUES

1. Did the district court err when it permitted Brad Johnson to testify to the effects of Mr. Hill's conduct on Patrick Hall?
2. Did the distirct court err in awarding the full restitution amount?

ARGUMENT

I.

The District Court Erred By Permitting Brad Johnson To Testify To the Effects Of Mr. Hill's Conduct On Patrick Hall

A. Introduction

Mr. Hill asserts that the district court erred by permitting Brad Johnson to testify to the effect that Mr. Hill's conduct had on Patrick Hall because this evidence was irrelevant and was merely an appeal to passion and sympathy.

B. The District Court Erred By Permitting Brad Johnson To Testify To the Effects Of Mr. Hill's Conduct On Patrick Hall

At the end of his direct examination, Mr. Johnson was asked what happened to him financially after the collapse of the company; Mr. Hill objected and a different question was then asked. (Tr., p.342, Ls.7-14.) Mr. Johnson was then asked if he knew the whereabouts of the third partner in the firm, Patrick Hall. (Tr., p.342, Ls.15-19.) When asked if Mr. Johnson knew what happened to Mr. Hill after the collapse of the company, Mr. Hill objected on the basis of relevancy. (Tr., p.243, Ls.24-25.) The prosecutor responded,

[w]ell, I think it goes to whether or not these two other partners made any money after Mr. Hill was booted out of the company. I think it goes to whether or not these two partners had some sort of financial reward as a result of that. I think it goes to the theft itself in establishing what it did to the other partners.

(Tr., p.343, Ls.1-7.) Counsel for Mr. Hill replied, "I don't think any of those issues are relevant to the present proceedings." (Tr., p.343, Ls.10-11.) The court held that the testimony could be of "limited relevance" and permitted a brief inquiry. Mr. Johnson then testified,

Well, uh, about a – just a year ago he moved to California. He, uh, ran out of money – he actually ran out of money that previous year and after – well, let's see, I had been putting my money in with Patrick, and when Patrick ran out of money a little before I did and couldn't make payments on his house anymore, he went to California probably just about a year ago, left town, and I kind of got left alone.

(Tr., p.343, Ls.18-25.) Mr. Hill asserts that the district court erred because this information was not relevant. It was an appeal to passion and sympathy.

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." I.R.E. 401; *State v. Byington*, 132 Idaho 597, 603 (Ct. App. 1998). Whether evidence is relevant is an issue of law. *State v. Atkinson*, 124 Idaho 816, 819 (Ct. App. 1993); *State v. Lamphere*, 130 Idaho 630, 632 (1997). This Court's standard of review on issues of relevance is *de novo*. *State v. Page*, 135 Idaho 214, 219 (2000).

Testimony regarding the effects of Mr. Hill's alleged theft on Mr. Hall was completely irrelevant. The relevant inquiry in this case was whether Mr. Hill committed theft, not how much the alleged theft hurt a particular victim. Further, the testimony was simply an appeal to passion. Appeals to emotion, passion or prejudice of the jury through use of inflammatory tactics are impermissible. *State v. LaMere*, 103 Idaho 839, 844 (1982). There is no purpose to the prosecutor's question other than asking the jury to feel sympathy – it is a direct appeal to emotion, which is "impermissible." The district court erred in concluding that the evidence had limited relevance and the question itself was an appeal to emotion and passion. The district court erred in permitting the questioning.

II.

The District Court Erred By Awarding The Full Restitution Amount

A. Introduction

Mr. Hill asserts that the district court erred in awarding the State's full restitution request to Mr. Johnson and Mr. Hall because Mr. Hill owned one-third of the firm. Mr. Hill also asserts that the State did not prove that the disputes regarding the Delay loan and the Mullan and Maverick properties were losses resulting from Mr. Hill's criminal conduct. Further, Mr. Hill asserts that the district court erred in not offsetting the amount owed by the amount the victims received from the sale of Mr. Hill's home.

B. The District Court Erred By Awarding The Full Restitution Amount

In this case, the court held a restitution hearing. The State presented the testimony of Curtis Clark, who submitted the same exhibit that he prepared at trial; at the restitution hearing, it was referred to as Plaintiff's Exhibit 5. Mr. Clark concluded that Mr. Hill owed \$354,062.38. (Plaintiff's Exhibit 5.) However, it was demonstrated at the hearing that the schedule included expenses not covered in the time period in which the thefts were alleged, and the State agreed that \$41,764.85 fell outside the charging document. (R., p.718.) Mr. Hill filed a restitution memorandum which challenged the restitution order and alleged that Mr. Hill owed no restitution because of set-offs and payments he had already made. (R., pp.710-713.)

Specifically, plaintiff's exhibit 5 listed payments totaling \$41,772.38, made to Allegro Escrow on the "Delay" loan. (R., p.712.) Mr. Clark included these totals because according to Plaintiff's Exhibit 14, the Delay loan was a personal loan to Mr. Hill and his wife, not a corporate loan. However, at the restitution hearing, Mr. Hill

introduced Defendant's Exhibit C, which was a promissory note signed by all members of the Firm on January 12, 2006. (Defendant's Exhibit C.) Mr. Clark acknowledged that he had never seen this document and had based his opinion that the Delay loan was a personal loan based on State's Exhibit 14. (Restitution Tr., p.119, Ls.1-25.)

Exhibit 5 also shows two additional entries for the Delay loan: a \$320,000 charge to Mr. Hill for the loan, and a \$200,000 credit to Mr. Hill, amounting to a charge of \$120,000. (Plaintiff's Exhibit 5.) However, because this was a corporate loan, Mr. Hill asserted that he was not liable for restitution on it, and in any event, Plaintiff's Exhibit 5 showed no payments that the corporation actually made on that remaining \$120,000. (R., p.712.)

Mr. Hill also asserted that he should be credited \$216,231.27, which he alleged were paid to the corporation as a result of the sale of his lake house residence. (R., p.713.) Finally, he asserted that any payment should be made to the Firm, rather than the partners individually, because doing so would avoid an unjust enrichment to Mr. Jordan and Mr. Hall because "to the extent that Jerry Hill stole from [the Firm], he was stealing from an entity in which he owned one third of the shares." (R., p.711.)

The district court awarded the State's entire restitution request. (R., p.737.) He asserts that the district court erred. Idaho's restitution statute permits a court to order restitution for "any crime which results in an economic loss to the victim." I.C. § 19-5304(2). The statute defines victim as "a person or entity, who suffers economic loss or injury as the result of the defendant's criminal conduct." I.C. § 19-5304(1)(e)(i). The term economic loss includes "the value of property taken, destroyed, broken, or otherwise harmed, lost wages, and direct out-of-pocket losses or expenses, such as

medical expenses resulting from the criminal conduct.” I.C. § 19–5304(1)(a) (emphasis added).

The decision whether to require restitution is within the discretion of the district court. *State v. Hamilton*, 129 Idaho 938, 942 (Ct. App. 1997). The determination of the amount of restitution is a question of fact for the district court. *State v. Bybee*, 115 Idaho 541, 544 (Ct. App. 1989). The exercise of discretion must encompass consideration of the amount of economic loss sustained by the victim as a result of the offense, the financial resources, needs and earning ability of the defendant, and other factors deemed appropriate by the court. *Id. see also* I.C. § 19-5304(7). Findings on the amount of restitution, if supported by substantial evidence, will not be disturbed on appeal. *Bybee*, 115 Idaho at 544.

1. The Delay Loan And The Mullan And Maverick Properties

On cross-examination, Mr. Clark was questioned about the Delay loan and the Maverick and Mullan properties. He replied with the following,

There are several properties that were – had an ambiguous ownership, if you’ll bear with me. The Mullan Property, the Maverick Property, the transactions involving Ray Delay were all involved in property transactions that were originally intended to be projects of the company. However, for a variety of reasons the title to these properties did not get vested in the name of the company.

Some of them were vested in the name of Jerry Hill, and that was- that was done with everyone’s knowledge that they were still going to be company properties, but Mr. Hill at some point decided he was no longer going to treat those as company properties. He was going to keep and treat those properties as his own. The transactions that are on here are related to those properties that he chose to keep as his own.

(Restitution. Tr., p.28, Ls.9-24.) Mr. Hill asserted that he did not owe restitution for the Delay loan because it was a corporate loan. The district court did not address Mr. Hill’s claim regarding the Delay loan in its analysis of calculating restitution. (See R., pp.728-

737.) The only reference to Mr. Hill's claim that some personal loans were actually corporate loans are to the Maverick and Mullan loans, where the court ruled that Mr. Hill had not supported his claim with any documentation. (R., p.730.)

Mr. Hill introduced Defendant's Exhibit C, a promissory note executed in January 2006. When confronted with the promissory note at the restitution hearing, Mr. Clark acknowledged that he had not seen that document previously. (Restitution Tr., p.119, Ls.20-21.) Considering the fact that Mr. Hill presented evidence that the Delay loan was a corporate loan as of January 2006, he asserts that the district court erred in awarding restitution for payments that the firm made on 2/14/06, 3/13/06, 4/5/06, 5/5/06, 6/16/06, 7/3/06, 8/4/06 and 9/8/06, totaling \$41,772.38. (See R., p.712.) He further asserts that the district court erred in awarding the firm the \$120,000 from the October 16, 2006 entries. First, as Defendant's Exhibit C demonstrated, the Delay loan was a corporate loan. However, even if the firm assumed a private loan, there is no evidence that this was done through any illegal means or that the firm was defrauded by assuming this obligation. This is a civil dispute and not money owed by Mr. Hill to the Firm due to any theft.

Second, as asserted by Mr. Hill in his restitution memorandum, there is no evidence that the Firm actually made any payments related to the October 16, 2006 accounting entries. As the restitution statute provides for recovery of actual out-of-pocket expenses, and there was no evidence that the Firm made any of these payments before it finally declared bankruptcy, the district court erred by awarding these amounts.

Regarding the Mullan and Maverick properties, Mr. Hill acknowledged that there was conflicting testimony regarding these properties. (R., p.712.) However, "there was

no evidence presented at the restitution [hearing] that the disputes over these properties were the result of criminal actions by Mr. Hill.” (R., p.712.) This is absolutely correct. Even assuming that these were personal loans subsequently assumed by the Firm, there was absolutely no evidence produced at the restitution hearing that this was due to any theft or deceit by Mr. Hill. While Plaintiff’s Exhibit 5 shows that Mr. Hill may owe the Firm for these matters, the State did not prove that the Firm owed him this because of his theft. It may very well be that Mr. Hill owes the Firm money due to the Firm taking over these loans, but not because of any theft by Mr. Hill. This dispute is a civil dispute between Mr. Hill and the other partners and the district court erred by awarding restitution relating to the Maverick or Mullan property. As Mr. Clark testified at trial, his schedule was simply “the amount that Jerry Hill owed the corporation as of the end of 2006.” (Trial Tr., p.272, Ls.13-14.)

That Mr. Hill may have owed the company is one thing; that he may have owed the company *due to his criminal behavior* is another, and at the restitution hearing, the State made no attempt to separate what was owed due to Mr. Hill’s criminal behavior and what was owed due to civil disputes between the partners. Mr. Hill acknowledged that, “the State introduced exhibits documenting credit card charges made by Mr. Hill. These amounts are not disputed as being appropriate requests for restitution.” (R., p.713.) Likewise, on appeal, Mr. Hill does not dispute those charges as appropriate requests for restitution. As to the other charges, however, Mr. Hill submits that Mr. Clark’s schedule is simply a schedule showing the amount Mr. Hill owed the Firm, not the amount owed due to Mr. Hill’s criminal activity. Even though the court concluded that Mr. Clark was credible and Mr. Hill’s witness was not, the record shows that Mr. Clark did not consider Defendant’s Exhibit C when determining whether the

Delay loan was a corporate loan or a personal loan. Due to the fact that Mr. Clark did not have Defendant's Exhibit C, Mr. Hill submits that his calculation in this regard is in error.

Mr. Hill submits that the district court erred by awarding Mr. Clark's calculated amount in full. He submits that with regard to these properties, the State did not demonstrate that the Firm suffered these, "injuries as the result of the defendant's criminal conduct." I.C. § 19-5304(1)(e)(i).

2. The Lake House

Mr. Hill also asserted that the proceeds from the sale of his lake house be applied against any restitution order. (R., p.713.) Mr. Hill presented evidence that Mr. Jordan and Mr. Hall had a lien on his house for \$216,231.27 that would be released upon Idaho Independent Bank's receipt of that amount, provided that no proceeds went to Mr. Hill or his wife. (Defendant's Exhibit A.) Further, he submitted evidence that, upon the sale of his house, a payoff was made to Idaho Independent Bank for this exact amount. (Defendant's Exhibit B.)

Regarding this claim, the court determined that it was not supported by authority, but that if it were, "this restitution hearing is not the place for Hill to make claims about other corporate matters. This restitution hearing is not the place for Hill to make claims of set-off, or to bring in collateral issues. Hill can bring a civil action if he feels [the Firm] owes him money." (R., p.735.)

The district court erred. The restitution hearing was the exact place for Mr. Hill to make claims of set-offs. The purpose of restitution is to make the victims whole. If the victims had already received \$216,231.27 from Mr. Hill, this should have been credited against the amount Mr. Hill owed. The purpose of the restitution statute is to make the

victims whole; if they had already received funds from Mr. Hill, recovering these funds in addition to the full restitution award amounts to a windfall for the Mr. Jordan and Mr. Hall. The evidence before the court was that the condition precedent to releasing the lien had been satisfied and therefore the court erred in not crediting Mr. Hill this amount.

3. Unjust Enrichment To Mr. Jordan And Mr. Hall

The Articles of Organization for the firm were introduced as Plaintiff's Exhibit 1. (See plaintiff's exhibit 1.) The Articles identify three members of the firm: R. Bradley Jordan, Jerry A. Hill, and Patrick J. Hall. (Plaintiff's exhibit 1, p.1.) In his restitution memorandum, Mr. Hill asserted that any restitution should be paid to Jordan, Hill and Hall, Inc, dba Real Estate Northwest, who was the victim. (R., p.710.) Mr. Hill asserted that, "this would protect any creditors in the Jordan, Hill and Hall, Inc. bankruptcy proceedings. In addition naming the correct victim avoids unjust enrichment to Brad Jordan and Patrick Hall." (R., p.710.) Mr. Hill further asserted, "to the extent that Jerry Hill stole from Jordan, Hill and Hall he was stealing from an entity in which he owned one third of the shares." (R., pp.710-11.)

The district court stated that "Hill's argument at first blush makes sense," but held that Mr. Hill was not entitled to one-third of the restitution because he was not a "victim" and was not entitled to any restitution due to his unclean hands. (R., p.733.) Because the court's restitution award amounts to a windfall for Mr. Jordan and Mr. Hall, Mr. Hill asserts that the district court erred by awarding the full amount.

In this case, the district court awarded more than the amount of the economic loss sustained by Mr. Jordan and Mr. Hall. As noted above, Mr. Jordan and Mr. Hall each had a one-third interest in the Firm. It stands to reason that they should each

receive one-third of the Firm's losses, as this would reflect their actual economic loss. See I.C. § 19-5304(1)(e)(i). However, the district court awarded the full amount, with fifty percent each to Mr. Jordan and Mr. Hall, because Mr. Hill was not a victim and cannot claim one-third of the amounts owed. (R., p.733.) Further, the court held that Mr. Hill would not be entitled to restitution because of the doctrine of unclean hands. (R., p.733.) The district court erred.

However, Mr. Hill was not asserting that he should pay restitution to himself. His assertion was simply that, because he had a one-third interest in the Firm and the other partners each had a one-third interest, the other partners should be compensated accordingly. Mr. Jordan and Mr. Hall were not each entitled to half of the Firm's assets; all three partners were entitled to one-third of an interest in the Firm. Further, the doctrine of unclean hands does not apply here. Mr. Hill was not seeking to unjustly enrich himself or deprive the victims of their share of the Firm's interest. Paying one-third to Mr. Jordan and Mr. Hall would recognize the interest all three partners had in the Firm and make the parties whole, which is the goal of restitution.

CONCLUSION

Mr. Hill requests that his conviction be vacated and his case remanded for further proceedings. Alternatively, he requests that the restitution order be vacated and the case remanded for further proceedings.

DATED this 13th day of March, 2012.



JUSTIN M. CURTIS
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

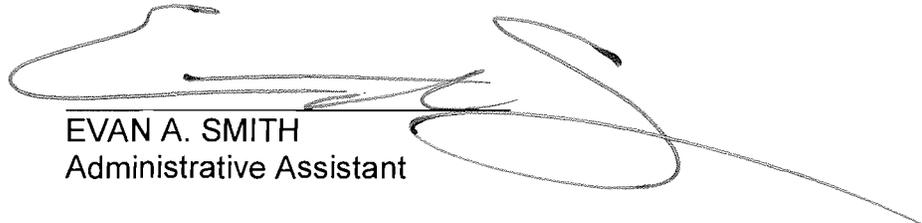
I HEREBY CERTIFY that on this 13th day of March, 2012, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

JERRY ALLAN HILL
4761 E WOODLAND DRIVE
POST FALLS ID 83854

JOHN T MITCHELL
DISTRICT COURT JUDGE
E-MAILED BRIEF

KENNETH K. JORGENSEN
DEPUTY ATTORNEY GENERAL
CRIMINAL DIVISION
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BOISE ID 83720-0010

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EVAN A. SMITH
Administrative Assistant

JMC/eas