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State v. Hill Respondent's Brief Dckt. 38808

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IN THE SUPREME COURT OF THE STATE OF IDAHO

COPY

STATE OF IDAHO,)	
)	
Plaintiff-Respondent,)	NO. 38808
)	
vs.)	
)	
JERRY ALLAN HILL,)	
)	
Defendant-Appellant.)	
)	

BRIEF OF RESPONDENT

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

HONORABLE JOHN T. MITCHELL
District Judge

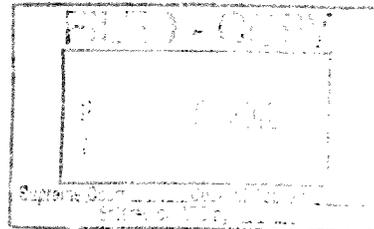
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STATEMENT OF THE CASE

Nature of the Case

Jerry Allan Hill appeals from the judgment entered upon the jury verdict finding him guilty of three counts of grand theft. Specifically, Hill asserts the district court erred in allowing irrelevant testimony of a witness at trial and by awarding the full restitution amount sought by the state.

Statement of Facts and Course of Proceedings

The state charged Hill with three counts of grand theft from the victim Jordan, Hill and Hall Inc., a real estate firm of which he was a partner along with Brad Jordan and Patrick Hall. (R., Vol.I, pp.63-65.) The thefts took place over a period of three and one-half years from January 1, 2004 to May 31, 2007. (R., Vol.I, p.64.)

Hill pled not guilty and the matter proceeded to jury trial where Hill was convicted of all three counts. (R., Vol.I, pp.248-249.) The district court sentenced Hill to a period of retained jurisdiction with underlying unified sentences of six years, with the first three years fixed, concurrent on each count. (R., Vol.II, pp.291-294.) Following his period of retained jurisdiction, Hill was placed on probation for 14 years. (R., Vol.III, pp.685-688.)

Hill timely appeals.

ISSUES

Hill states the issues on appeal as:

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

(Appellant's brief, p.4.)

The state rephrases the issues on appeal as:

1. Has Hill failed to show reversible error in the admission of testimony by Brad Jordan about the effect of Hill's crimes on Patrick Hall because any error was harmless?
2. Has Hill failed to show error in the district court's restitution determination?

ARGUMENT

I.

Hill Has Failed To Show Reversible Error In The Admission Of Testimony By Brad Jordan About The Effect Of Hill's Crimes On Patrick Hall Because Any Error Was Harmless

A. Introduction

Hill asserts on appeal "the district court erred by permitting Brad Johnson [sic] to testify to the effect that Mr. Hill's conduct had on Patrick Hall because the evidence was irrelevant and merely an appeal to passion and sympathy." (Appellant's brief, p.5.) Because any error was harmless, Hill's argument fails.

B. Standard of Review

Relevance of evidence is reviewed de novo. State v. Zichko, 129 Idaho 259, 264, 923 P.2d 966, 971 (1996); State v. Lamphere, 130 Idaho 630, 632, 945 P.2d 1, 3 (1997); State v. MacDonald, 131 Idaho 367, 956 P.2d 1314 (Ct. App. 1998).

"Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected" I.R.E. 103(a). See also I.C.R. 52 ("Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."). "The inquiry is whether, beyond a reasonable doubt, a rational jury would have convicted [the defendant] even without the admission of the challenged evidence." State v. Johnson, 148 Idaho 664, 669, 227 P.3d 918, 923 (2010) (citing Chapman v. California, 386 U.S. 18, 24 (1967); Neder v. United States, 527 U.S. 1, 18 (1999)).

C. Admission Of The Testimony By Brad Jordan About The Effect Of Hill's Crimes On Patrick Hall Personally Was Harmless Beyond A Reasonable Doubt

Hill asserts the district court erred by allowing Brad Jordan to testify as to the effects on Patrick Hall of the collapse of their company was error because it was irrelevant. (Appellant's brief, pp.5-6.) The brief objected-to exchange was as follows:

Q. What happened to you personally as a result – in terms of your finances as a result of the collapse of the company?

MR NEILS [Hill's trial counsel]: Objection. Relevancy, more prejudicial than probative.

THE COURT: Any response?

MR. VERHAREN [prosecutor]: Let me ask another question.

THE COURT: All right.

Q. (By Mr. Verharen) Are you familiar with the whereabouts of Mr. Hall, Patrick Hall?

A. I believe so, yes.

Q. Where does he live now?

A. I believe he lives in Southern California.

Q. And do you know what Mr. Hall does now?

A. I understand he works for his son down there.

Q. Do you know what happened to him in regards to the collapse of the company?

MR NEILS: Objection. Relevancy.

THE COURT: Any response?

MR. VERHAREN: Well, 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 either of these two partners had some sort of financial regard as a result of that. I think it goes to the theft itself in establishing what it did to the other two partners.

THE COURT: All right. Any response, Mr. Neils?

MR. NEILS: I don't think any of those issues are relevant to the present proceeding.

THE COURT: Well, I think it may be of limited relevance, so I will allow very brief inquiry.

Q. (By Mr. Verharen) Do you remember the question?

A. Uh –

Q. Patrick Hall, what happened to him?

A. Patrick Hall. Well, uh, about a – just about 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.342, L.7 – p.343, L.25.) Assuming the district court erred in admitting the statement of Brad Jordan, any error was harmless.

"[T]he Constitution entitles a criminal defendant to a fair trial, not a perfect one." Delaware v. Van Arsdall, 475 U.S. 673, 681 (1986). In reviewing for harmless error the court evaluates the potential prejudice from the inadmissible evidence in the context of the evidence presented at trial. See State v. Yager, 139 Idaho 680, 687, 85 P.3d 656, 663 (2004) (error in failing to suppress evidence harmless because probative value of evidence improperly admitted at trial was de minimus in light of evidence presented). Review of the record

shows the statement of Brad Jordan regarding the effect of Hill's crimes on Patrick Hall did not deny Hill a fair trial because the potential prejudice of the testimony was minimal in light of the evidence presented at trial. Beyond a reasonable doubt a rational jury would have convicted Hill even without admission of that evidence.

First, the potential prejudice from the testimony was minimal. The testimony of Mr. Jordan went to the effect of "the collapse of the company." (Tr., p.342, Ls.22-23.) There was a period of time between the discovery of the thefts, and Hill's ouster, and the company's collapse. (Tr., p.333, L.24 – p.337, L.3.) The ultimate cause of the company's collapse was the recession, which hit the real estate business very hard. (Tr., p.337, Ls.4-24.) Because the collapse of the company was not directly tied to Hill's thefts, testimony regarding how the collapse of the company affected one of the other partners had minimal potential for prejudice.

Second, the testimony at trial was extensive. Brad Jordan, former member of the firm Jordan, Hill and Hall, testified as to the nature of the business relationship as well as the company policy on company credit cards and allowable expenditures. (see generally Tr., p.309, L.1 – p.320, L.24.) Mr. Jordan also testified to his discovery of Hill using business funds for non-business purposes, the audit undertaken of the company books, and the eventual collapse of the business itself. (Tr., p.323, L.7 – p.339, L.4.) Former bookkeeper for Jordan, Hill and Hall, Sawnie Walker, testified about the accounting procedures in the office and laid the foundation for the admission of

credit card statements and internal accounting documents which outlined instances of personal charges being made by Hill on his company credit card and paid for with company funds. (Tr., p.125, L.25 – p.255, L.6.) Linda Yacono, former office manager for Jordan, Hill and Hall, testified about an agreement she had with Hill that allowed her to buy personal items for herself with money from the business as well as her assistance in issuing company checks for Hill for his personal use. (Tr., p.362, L.12 – 391, L.11.) Roberta Guttromson, former office assistant, bookkeeper and personal assistant to Brad Jordan, testified as to her role in the company and her understanding of Hill's role in the maintenance of the office vending machines and the proceeds therefrom. (Tr., p.392, L.2 – p.396, L.21.) Finally, Curtis Clark, a certified public accountant, testified at length about his review of the business books which was undertaken after he was approached by Mr. Jordan and Mr. Hall with their concerns about Hill's theft of money from the business. (Tr., p.256, L.8 – p.307, L.4.)

The testimony of Brad Jordan regarding the whereabouts and activities of former partner Patrick Hall after the collapse of the business was fleeting and insignificant in light of the extensive evidence presented at trial. Although Hill claims on appeal the testimony was "simply an appeal to passion" (Appellant's brief, p.6), there is no claim by Hill nor any evidence in the record that this brief exchange had any impact on the jury's verdict. Any error was harmless.

II.

The State Presented Substantial Competent Evidence To Support The Restitution Award

A. Introduction

On appeal, Hill asserts the district court erred in awarding the restitution as requested because he “owned one-third of the firm.” (Appellant’s brief, p.7.) Additionally, Hill argues the state failed to prove certain losses included in the restitution amount were “losses resulting from Mr. Hill’s criminal conduct,” and the district court failed to offset the amount owed “by the amount the victims received from the sale” of Hill’s home. (Appellant’s brief, p.7.) Because the award was supported by substantial competent evidence, Hill’s arguments fail.

B. Standard of Review

The decision whether to order restitution and in what amount is committed to the trial court’s discretion. State v. Higley, 151 Idaho 76, 78, 253 P.3d 750, 752 (Ct. App. 2010); State v. Card, 146 Idaho 111, 114, 190 P.3d 930, 933 (Ct. App. 2008); In Re Doe, 146 Idaho 277, 284, 192 P.3d 1101, 1108 (Ct. App. 2008); State v. Smith, 144 Idaho 687, 692, 169 P.3d 275, 280 (Ct. App. 2007). The trial court’s factual findings in relation to restitution will not be disturbed if supported by substantial evidence. Smith, 144 Idaho at 692, 169 P.3d at 280.

C. Substantial Evidence Supports The District Court’s Finding That Hill Was Responsible For Restitution In The Amount Requested By The State

Idaho’s restitution statutes require Hill to compensate victims who are injured by his criminal actions. I.C. § 19-5302 (“If a district court or magistrate’s

division orders the defendant to pay restitution, the court shall order the defendant to pay such restitution to the victim or victims injured by the defendant's actions."); I.C. § 19-5304(2) ("Restitution shall be ordered for any economic loss which the victim actually suffers.").

"One of the purposes of restitution is to obviate the need for victims to incur the cost and inconvenience of a separate civil action in order to gain compensation for their losses." State v. Schultz, 148 Idaho 884, 886, 231 P.3d 529, 531 (Ct. App. 2008) (citations omitted). The public policy underlying the statute "favor[s] full compensation to crime victims who suffer economic loss." State v. Bybee, 115 Idaho 541, 543, 768 P.2d 804, 806 (Ct. App. 1989); see also, State v. Wardle, 137 Idaho 808, 811, 53 P.3d 1227, 1230 (Ct. App. 2002) (noting that "restitution must be directed toward correcting a harm or paying a cost that results from the defendant's crime"). "Restitution orders also operate for the benefit of the state, in part because they promote the rehabilitative and deterrent purposes of the criminal law." State v. Doe, 146 Idaho 277, 283, 192 P.3d 1101, 1107 (Ct. App. 2008) (citing State v. Olpin, 140 Idaho 377, 378, 93 P.3d 708, 709 (Ct. App. 2004)).

"[D]etermination of economic loss [is] based upon the civil preponderance of evidence standard." Doe, 146 Idaho at 284, 192 P.3d at 1108 (citing I.C. § 19-5304(6)). Further, "there must be a causal connection between the conduct for which the defendant is convicted and the damages the victim suffers." Schultz, 148 Idaho at 886, 231 P.3d at 531 (citing State v. Shafer, 144 Idaho 370, 372, 161 P.3d 689, 691 (Ct. App. 2007)).

Prior to sentencing, the state filed a motion for restitution in the amount of \$354,062.38, to be divided equally between Brad Jordan and Patrick Hall. (R., Vol.II, pp.251-252.) This request was supported by Plaintiff's Exhibit No. 12, admitted at trial, which was an itemized list of the money stolen by Hill. (R., Vol.II, pp.253-255.) The issue of restitution was left open for 90 days following Hill's jurisdictional review hearing. (R., Vol.II, p.293.) The district court held a hearing on the issue of restitution wherein the same accountant from the trial testified on behalf of the state (see generally, Supp. Tr., p.7, p.24 – p.36, L.9; p.99, L.10 – p.127, L.19 (testimony of Curtis Clark) and Hill presented the testimony of a CPA on his behalf (Supp. Tr., p.37, L.9 – p.78, L.6 (testimony of Suzanne Metzger)). Additionally, there were 22 separate exhibits admitted at the restitution hearing. (Supp. Tr.). Following the presentation of evidence, the district court took the matter of restitution under advisement and ordered simultaneous briefing in lieu of closing arguments. (Supp. Tr., p.128, L.17 – p.129, L.15.) The state then filed an amended memorandum of restitution and brief in support thereof seeking \$145,384.15 to Brad Jordan and the same amount to Patrick Hall, reflecting the proper amount of restitution encompassed by the time frame of the thefts Hill was convicted of. (R., Vol.III, pp.708-709, 714-719.) The court filed a memorandum decision and order on motion for restitution consistent with the amounts outlined in the amended memorandum of restitution finding the amount appropriate. (R., Vol.III, p.737.)

Hill argues the district court erred in awarding the full amount of restitution requested by the state because not all of the amounts owing were due to his

criminal conduct but instead because of “civil disputes between the partners” in the firm. (Appellant’s brief, pp.9-12.) Specifically, Hill disputes the award of restitution as it relates to the “Delay loan” and the “Mullan and Maverick properties.” (Appellant’s brief, pp.9-12.) These concerns were raised at the restitution hearing and addressed by the district court in awarding restitution. The district court did not accept Hill’s arguments below, instead finding credible the testimony of certified public accountant Curtis Clark at trial and at the restitution hearing over the testimony of Hill himself and Ms. Metzger, his accounting witness, at the restitution hearing: “[t]he jury obviously found Clark credible and Hill not credible. The Court specifically makes the same findings on credibility.” (R., Vol.III, p.732.) Because the district court found Ms. Metzger based her opinions on what she was told by Hill, it likewise found her testimony incredible. (R., Vol.III, p.733.) Mr. Clark’s findings at the restitution hearing were supported by the admission of 14 separate exhibits. (See generally, Plaintiff’s Exhibits No. 1-14, Admitted in Evidence 6/14/11 and 6/16/11). Although Hill argues on appeal the amounts Mr. Clark attributed to Hill as owing the company are “not owed due to Mr. Hill’s criminal activity” (Appellant’s brief, p.11), this assertion is unsupported. There is sufficient competent evidence to support the district court’s restitution findings.

Hill further argues that any restitution amount should have been offset by proceeds of the sale of his home being applied to a loan held by the firm. (Appellant’s brief, pp.12-13.) Hill points to Defendant’s Exhibit’s A and B as proof that the sale of his home resulted in a payment to Idaho Independent Bank

on behalf of Jordan, Hill and Hall in an amount of \$216,231.27 and as such, his restitution amount should have been reduced. (Appellant's brief, p.12.) Although there was no dispute as to whether this amount actually went to pay a debt incurred by the firm of Jordan, Hill and Hall, there is nothing in the record to support any claim the funds went towards making whole Mr. Jordan and Mr. Hall as a result of Hill's criminal conduct. As the district court found, the issue of the sale of the house relates to other financial matters relating to the firm's corporate business and is not an appropriate set-off of restitution in the criminal case. (R., Vol.III, p.735.)

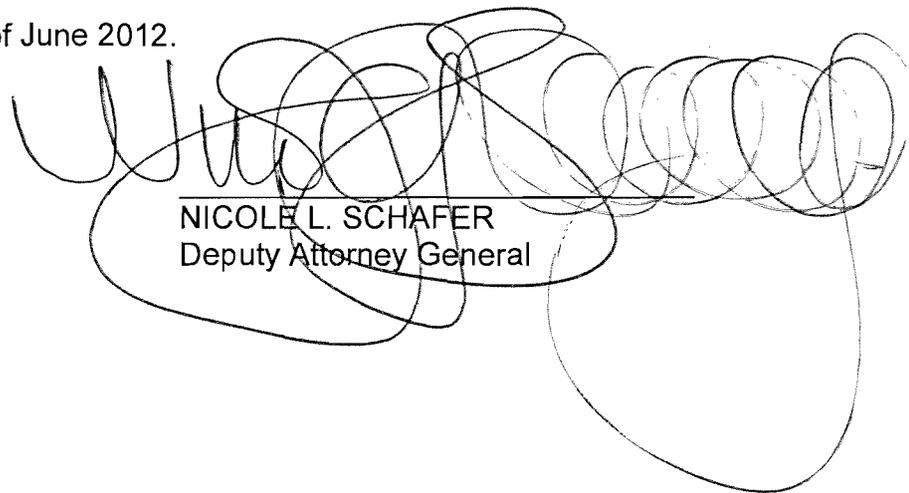
Finally, Hill argues he was entitled to a reduction of the amount of restitution under a theory of unjust enrichment to firm members Brad Jordan and Patrick Hall. (Appellant's brief, pp.13-14.) Hill argues the restitution amount should be reduced based on his status of a member of the firm who was financially harmed because of his crimes. (Appellant's brief, pp.14-15.) Because Mr. Jordan and Mr. Hall were not each entitled to one-half of Jordan, Hill and Hall's assets, Hill argues, they would be unjustly enriched by each receiving restitution totaling more than one-third of the total amount Hill stole from the business. (Appellant's brief, p.14.) The district court correctly found Hill's argument, made without the benefit of legal authority, without merit: "[t]his Court finds Hill owes restitution to Brad Jordan and Jerry [sic] Hall. It is these two individuals alone who suffered the loss at Hill's hands." (R., Vol.III, p.734.)

The district court's restitution order should be affirmed because it is supported by substantial, competent evidence and there is no support for Hill's contention that he was entitled to financial offsets to the restitution amount.

CONCLUSION

The state respectfully requests this Court affirm Hill's conviction and uphold the restitution as ordered.

DATED this 8th day of June 2012.



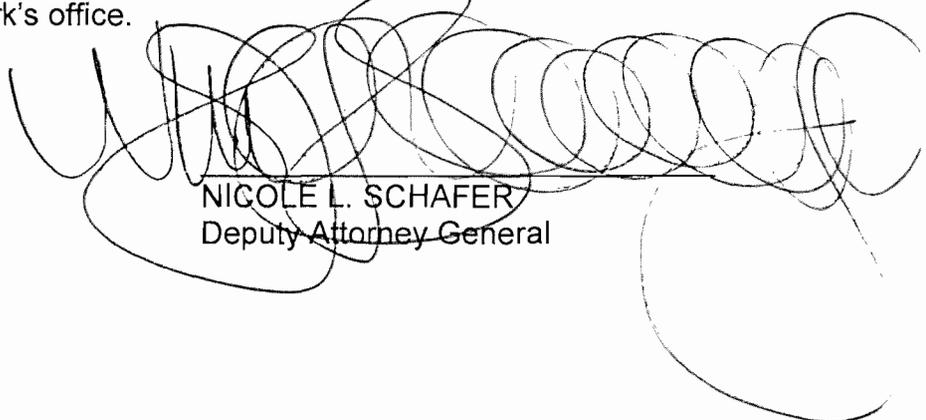
NICOLE L. SCHAFER
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 8th day of June 2012, served a true and correct copy of the attached BRIEF OF RESPONDENT by causing a copy addressed to:

JUSTIN M. CURTIS
DEPUTY STATE APPELLATE PUBLIC DEFENDER

to be placed in The State Appellate Public Defender's basket located in the Idaho Supreme Court Clerk's office.

A large, complex handwritten signature in black ink, consisting of many overlapping loops and lines, covering the name and title of the signatory.

NICOLE L. SCHAFER
Deputy Attorney General

NLS/rn