1-26-2018

State v. Bowman Appellant's Reply Brief Dckt. 45060

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	**NO. 45060**
Plaintiff-Respondent,	)	
	)	**KOOTENAI COUNTY NO.**
v.	)	**CR 2016-2237**
	)	
KELLY A. BOWMAN,	)	**REPLY BRIEF**
	)	
Defendant-Appellant.	)	
	)	

REPLY 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

HONORABLE JOHN T. MITCHELL
District Judge

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STATEMENT OF THE CASE

Nature of the Case

Kelly Bowman appeals from the district court's order to pay $5,000 to U.S. Bank for grand theft by unauthorized control and transfers of her mother's checking account and debit card. The district court changed the "victim" of Ms. Bowman's crime to U.S. Bank after her mother, Ms. Garton, died. Ms. Bowman appealed. She argued that the district court abused its discretion by ordering her to pay $5,000 to U.S. Bank and that the evidence was insufficient to establish $5,000 in economic loss. The State responded. In this Reply, Ms. Bowman disputes the State's arguments that U.S. Bank was a "victim" under the restitution statute, that U.S. Bank suffered $5,000 in economic loss, that the evidence was sufficient, and that the district court did not abuse its discretion in reaching its restitution decision.

Statement of Facts & Course of Proceedings

The statement of facts and course of proceedings were articulated in Ms. Bowman's Appellant's Brief. (*See* App. Br., pp.1–5.) They are not repeated here, but are incorporated by reference.

ISSUES

I. Did the district court abuse its discretion by ordering Ms. Bowman to pay $5,000 in restitution to U.S. Bank because the bank did not actually suffer $5,000 in economic loss as a result of Ms. Bowman's crime?

II. If Ms. Garton's estate is entitled to her restitution award, did the district court abuse its discretion by ordering Ms. Bowman to pay $5,000 in restitution because the evidence was insufficient to prove $5,000 in economic loss?

ARGUMENT

I.

The District Court Abused Its Discretion By Ordering Ms. Bowman To Pay $5,000 In Restitution To U.S. Bank Because The Bank Did Not Actually Suffer $5,000 In Economic Loss As A Result Of Ms. Bowman's Crime

In the Appellant's Brief, Ms. Bowman argued that the district court abused its discretion by awarding Ms. Garton's restitution to U.S. Bank. (App. Br., pp.7–12.) Ms. Bowman made two related arguments. (*See* App. Br., p.7.) First, she contended that Ms. Garton was the "victim" under the restitution statute, I.C. § 19-5304(1)(e), and therefore U.S. Bank was not entitled to her restitution award. (App. Br., pp.9–10.) Second, Ms. Bowman submitted that, if U.S. Bank was entitled to any restitution, its award should be limited to $908.06. (App. Br., pp.10–12.) In response, the State asserted that U.S. Bank was a victim under I.C. § 19-5304(1)(e) and entitled to Ms. Garton's $5,000. (Respt. Br., pp.7–8.) This Reply disputes both of the State's contentions.

First, U.S. Bank does not satisfy any of the restitution statute's "victim" definitions. The State suggests that U.S. Bank meets the qualifications of I.C. § 19-5304(1)(e)(iv), but there was no evidence presented during the restitution proceedings to support this claim. This subsection of the restitution statute defines a victim as:

> A person or entity who suffers economic loss because such person or entity has made payments to or on behalf of a directly injured victim pursuant to a contract including, but not limited to, an insurance contract, or payments to or on behalf of a directly injured victim to pay or settle a claim or claims against such person or entity in tort or pursuant to statute and arising from the crime.

I.C. § 19-5304(1)(e)(iv). Relying on this definition, the State submits that U.S. Bank made payments to its account holder and the directly injured victim, Ms. Garton, to compensate her for her losses. (Respt. Br., p.7.) Although U.S. Bank may have reimbursed Ms. Garton for certain fraudulent charges, U.S. Bank's reimbursements do not satisfy the second part of this statutory

definition. There was no evidence that U.S. Bank's payments were "pursuant to a contract." I.C. § 19-5304(1)(e)(iv). And certainly U.S. Bank did not make these payments "to or on behalf of [Ms. Garton] to pay or settle a claim against [her] in tort or pursuant to statute and arising from the crime." I.C. § 19-5304(1)(e)(iv). Ms. Garton had an account with U.S. Bank, but nothing showed why U.S. Bank made these payments other than its label as "credit for fraud" adjustments in Ms. Garton's bank statements. (*See* State's Ex. 1B.) There was no evidence that U.S. Bank made these pursuant to its contract with Ms. Garton. This is pure speculation. Moreover, as Ms. Bowman noted in her Appellant's Brief, the State presented no evidence on behalf of U.S. Bank, such as testimony or an affidavit from an employee, to prove that some kind of contract mandated these credit for fraud adjustments. (*See* App. Br., p.11 n.3.) If the State sought to substitute U.S. Bank as the victim of Ms. Bowman's crime against Ms. Garton, it needed to present evidence to justify this substitution. U.S. Bank is not a victim under the restitution statute, and therefore this Court should vacate the district court's restitution order to U.S. Bank.

Second, there was not substantial and competent evidence to support an award of $5,000 to U.S. Bank. The State submits that U.S. Bank is entitled to $5,000 based on a single email that Ms. Frank (Ms. Garton's other daughter) sent to defense counsel. (Respt. Br., p.11; Conf. Exs., pp.251–52.) For one, this email was not offered as evidence to the district court. While the State correctly identifies that the evidentiary rules are more relaxed for restitution proceedings, the restitution statute still requires that "[e]conomic loss shall be based upon the preponderance of *evidence submitted to the court* by the prosecutor, defendant, victim or presentence investigator." I.C. § 19-5304(8) (emphasis added). The statute further provides that each party has the right "*to present evidence*." I.C. § 19-5304(8) (emphasis added). Here, the email was not offered as

evidence by either party. The district court did not admit the email as evidence. Ms. Bowman's trial counsel showed this email to the district court to support her motion to continue the restitution hearing. (Tr. Vol. II,[1] p.2, L.4–p.3, L.13.) After the district court reviewed the email, it inquired into the State's position on the motion to continue. (Tr. Vol. II, p.3, Ls.14–15.) The State responded that it was ready to go forward, but would leave it to the district court's discretion. (Tr. Vol. II, p.3, Ls.16–18.) Then, the district court asked if the State had any additional evidence.[2] (Tr. Vol. II, p.3, Ls.19–21.) The State answered that it did not,[3] but it believed "the defense was still in the phase of wanting to put on argument – or evidence." (Tr. Vol. II, p.3, Ls.22–25.) The district court turned to Ms. Bowman's trial counsel, and she told the district court that "in light of that e-mail," she would like a continuance to gather evidence, such as obtaining bank records and talking to Ms. Frank. (Tr. Vol. II, p.4, L.4–p.5, L.17.) The State changed its position and objected to the continuance. (Tr. Vol. II, p.5, Ls.20–21.) After further argument, the district court granted a one-day continuance. (Tr. Vol. II, p.7, Ls.19–21.) As shown by this colloquy, the email was not offered or admitted into evidence. Its sole purpose was to support Ms. Bowman's request for a continuance. In fact, the district court's handwritten note on the email appears to read: "Presented by Howe on 2/28/15[4]—*not offered*." (Conf. Exs.,

[1] There are two transcripts on appeal. The first, cited as Volume I, contains the jury trial, sentencing hearing, and three of the four restitution hearings (held on January 10, January 11, and March 1, 2017). The second, cited as Volume II, contains the other restitution hearing (held on February 28, 2017).

[2] At the prior hearings, the State had offered its only two pieces of evidence—a police report (State's Ex. 1) and Ms. Garton's bank statements (State's Ex. 1B)—in support of restitution. (Tr. Vol. I, p.266, Ls.21–22, p.273, L.24–p.273, L.3.)

[3] The transcript incorrectly designates Ms. Bowman's trial counsel as answering the district court's question. Undersigned counsel has listened to the audio recording of these proceedings and confirmed that this was a transcription error.

[4] This date appears to be an error. The hearing was held in 2017, not 2015.

pp.251–52 (emphasis added).) Therefore, the State's reliance on Ms. Frank's email to support a restitution award of $5,000 to U.S. Bank is misplaced.

Moreover, even if this email is considered to be properly admitted evidence, it is insufficient to support a restitution award of $5,000 to U.S. Bank.

> What amount of restitution to award is a question of fact for the district court, whose findings will not be disturbed if supported by substantial evidence. *State v. Corbus*, 150 Idaho 599, 602 (2011). Substantial evidence is "relevant evidence as a reasonable mind might accept to support a conclusion." *State v. Straub*, 153 Idaho 882, 885 (2013).

State v. Wisdom, 161 Idaho 916, 919 (2017). Here, this email does not satisfy the substantial evidence standard. The email stated in relevant part:

> I no longer have access to our mother's (Janice Garton) financial records since our mothers passing December 18, 2016. I was helping my mother manage her finances and this court case in 2016. In February or March of 2016 (I cannot recall the exact date or month), US Bank did reimburse my mother for all of the debits that Kelly had made from our mothers account. These debits are located on the bank statements that I had highlighted when I was a witness in this case, and they were used in court as evidence. Every highlighted item was reimbursed to our mother in full. [sic]

(Conf. Exs., p.251.) This email does not provide adequate specificity to determine the amounts reimbursed by U.S. Bank. In the bank statement exhibit (State's Exhibit 1B), Ms. Frank highlighted ATM withdrawals, debit card purchases, and electronic withdrawals. (State's Ex. 1B, pp.8, 10, 12–13, 17–18; *see also* App. Br., pp.14–15.) Ms. Frank testified that none of these transactions were authorized by Ms. Garton. (Tr. Vol. I, p.133, L.12–p.146, L.7.) In contrast, Ms. Frank's email referred to "all of the debits" highlighted in State's Exhibit 1B. This email gives no indication whether Ms. Frank was referring to the ATM withdrawals, debit card purchases, electronic withdrawals, or all three. Further, as noted in the Appellant's Brief, only fourteen of the twenty-eight credit for fraud adjustments already provided to Ms. Garton by U.S. Bank matched up with the unauthorized transactions highlighted by Ms. Frank. (*See* App.

Br., p.11 n.3; State's Ex. 1B.) This email alone—consisting solely of Ms. Frank's hearsay statement that U.S. Bank fully reimbursed Ms. Garton for all debits—is not substantial and competent evidence to support a restitution award of $5,000 to U.S. Bank.

For the reasons argued herein and in the Appellant's Brief, the district court did not act consistently with the applicable legal standards and thus abused its discretion by ordering Ms. Bowman to pay U.S. Bank $5,000 in restitution. (*See* App. Br., pp.7–12.) Ms. Bowman respectfully requests that this Court vacate the district court's restitution order to U.S. Bank in its entirety or, alternatively, vacate the order and remand this case with instructions to the district court to award U.S. Bank $908.06 in restitution.

II.

If Ms. Garton's Estate Is Entitled To Her Restitution Award, The District Court Abused Its Discretion By Ordering Ms. Bowman To Pay $5,000 In Restitution Because The Evidence Was Insufficient To Prove $5,000 In Economic Loss

In the Appellant's Brief, Ms. Bowman also argued that the evidence was insufficient to show Ms. Garton actually suffered $5,000 in economic loss as a result of Ms. Bowman's crime. (App. Br., pp.12–17.) Ms. Bowman further argued that the district court abused its discretion by adopting the State's "shortcut" sum of $5,000 rather than calculating the true economic loss. (App. Br., pp.17–19.) In response, the State asserted that the evidence was sufficient, that the district court did not abuse its discretion, and that any error was harmless. This Reply challenges the State's contentions.

First, the State's assertion that Ms. Bowman relied on a refused exhibit from the restitution proceedings to prove the appropriate restitution amount is inaccurate. Ms. Bowman does not dispute that Defendant's Exhibit A was refused by the district court. (*See* Tr. Vol. I, p.294, L.19; *see also* Conf. Exs., pp.249–50.) That is why Ms. Bowman did not rely on, or even

reference, that exhibit in her Appellant's Brief. Instead, Ms. Bowman properly relied on State's Exhibit 1B to establish the errors with the $5,000 sum. (*See* App. Br., pp.13–17.) The only deposits identified by Ms. Bowman in her Appellant's Brief were from State's Exhibit 1B. (App. Br., p.15; *see also* State's Ex. 1B, pp.10, 14.) Ms. Bowman also relied on Ms. Frank's trial testimony accompanying State's Exhibit 1B. According to Ms. Frank's testimony, Ms. Frank had highlighted in different colors certain debits, withdrawals, and deposits, and she explained each highlighted entry, including the deposits. (*See* Tr. Vol. I, p.133, L.10–p.146, L.16.) The State now contests Ms. Bowman's use of Ms. Frank's testimony to explain State's Exhibit 1B because "no transcript of the trial proceedings, or even an audio recording of those proceedings, was ever entered." (Respt. Br., p.8.) However, if the State's position is that Ms. Frank's testimony cannot be considered in conjunction with State's Exhibit 1B, then the State has rendered its own exhibit meaningless. Without Ms. Frank's testimony, State's Exhibit 1B lacks any context to designate the alleged fraudulent debits and withdrawals. The highlighted entries have no significance. In theory, the highlighted entries could be the unauthorized transactions or the authorized ones. And, without Ms. Frank's testimony, there is no evidence of a causal connection between all of the highlighted entries and Ms. Bowman's criminal conduct. *Corbus*, 150 Idaho at 602 ("[I]n order for restitution to be appropriate, there must be a causal connection between the conduct for which the defendant is convicted and the injuries suffered by the victim."). Absent Ms. Frank's testimony, State's Exhibit 1B is nothing but four of Ms. Garton's bank statements. Accordingly, if the State's position is to exclude Ms. Frank's testimony accompanying State's Exhibit 1B, Ms. Bowman asserts that there clearly was not substantial and competent evidence for the $5,000 restitution award.[5]

[5] Just prior to reaching its restitution decision, the district court stated that, in preparation for its

Although the State maintains that no evidence from the trial can be considered for restitution purposes, the State then relies on trial testimony to argue that any legitimate loans Ms. Garton gave to Ms. Bowman should be factored into the restitution award. (Respt. Br., p.9.) This is absurd. Ms. Bowman was not prosecuted for any legitimate loans from Ms. Garton. If anything, that is a civil matter and thus wholly irrelevant to criminal restitution. Moreover, "[t]here must be a causal connection between the conduct for which the defendant is convicted and the damages the victim suffers." *State v. Burggraf*, 160 Idaho 177, 179 (Ct. App. 2016) (quoting *State v. Hill*, 154 Idaho 206, 212 (Ct. App. 2012)). There is no causal connection between Ms. Bowman's conviction for grand theft by unauthorized control or transfers and the legitimate loans from Ms. Garton. In addition, "except where the parties have consented, a defendant cannot be required to pay restitution for damages stemming from separate, uncharged and unproven crimes." *State v. Shafer*, 144 Idaho 370, 372 (Ct. App. 2007). Ms. Bowman cannot be required to pay any restitution from other losses allegedly suffered by Ms. Garton that do not stem from the charged offense. This Court should reject the State's attempt to reconfigure the restitution sum with an argument made for the first time on appeal, unsupported by the evidence, and contrary to the legal principles governing restitution.

Next, the State's characterization of the district court's restitution award as a discretionary partial award is misguided. The district court, not the prosecutor, has the authority to order partial restitution. I.C. § 19-5304(2). And, if the district court orders partial restitution, "it shall enter an order articulating the reasons thereof on the record." I.C. § 19-5304(2). Here,

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ruling, it reviewed all of its detailed notes from the trial. (Tr. Vol. I, p.307, L.25–p.308, L.21, p.309, Ls.7–9.) If the State's position is that none of the evidence from trial was ever entered for restitution purposes, (Respt. Br., p.8), then the district court also abused its discretion by failing to act consistently with the legal standards because it considered facts not in evidence when it made its restitution decision.

the district court wholeheartedly adopted the State's "partial" restitution amount. The district court did not articulate any reason for its decision, other than believing that the State was "free to do that" "to take care of any ambiguity" and commending its "admirable position." (Tr. Vol. I, p.309, Ls.1–5.) The State's "admirable position," however, was due to what the State admitted was "a possibility that perhaps there was *a couple hundred dollars in mistakes* in there [State's Exhibit 1B]." (Tr. Vol. I, p.300, Ls.10–11 (emphasis added).) Mathematical difficulties and the State's purported generosity are not appropriate factors to reduce restitution. "An abuse of discretion may be shown if the order of restitution was the result of arbitrary action rather than logical application of the proper factors in Idaho Code § 19-5304(7)." *State v. Cottrell*, 152 Idaho 387, 391 (Ct. App. 2012). Ms. Bowman asserts that the district court acted arbitrarily by accepting the State's shortcut sum.

Finally, the State has not met its burden to prove beyond a reasonable doubt that the error was harmless. (*See* Respt. Br., p.10.) The State contends that any error was harmless because, according to its calculation, Ms. Bowman was ordered to pay less than the actual economic loss to Ms. Garton. Ms. Bowman respectfully disagrees. As argued in her Appellant's Brief, she should be ordered to pay, at most, $908.06 to U.S. Bank and/or $2,687.03 to Ms. Garton's estate. (App. Br., p.19.) These sums, however, depend on whether Ms. Garton's estate and U.S. Bank are entitled to any restitution at all. Moreover, the error here is more than a simple miscalculation. Ms. Bowman also argued that the district court did not act consistently with the applicable legal standards or exercise reason in its decision. (*See generally* App. Br., pp.7–19.) On appeal, the State cannot show that the district court's misapplication of legal principles and failure to exercise reason did not contribute to the outcome of its restitution decision. It is entirely possible that the district court would have ordered a lesser restitution award based on the

proper factors contained in I.C. § 19-5304(7). Despite the State's assertion to the contrary, there are remedies for Ms. Bowman—ranging from a new restitution hearing to a decision by this Court vacating the restitution order in its entirety. The State has not met its burden to prove harmless error beyond a reasonable doubt.[6]

[6] The State also claims that the $5,000 "partial" restitution order was "more in line with the district court's initial thinking on the issue of restitution." (Respt. Br., p.10.) This is an inaccurate representation of the district court's reasoning. At sentencing, the district court stated:

> I'm leaving the issue of restitution open, and I'm not looking to you Ms. Perez [(the prosecutor)] because I think that's on you [(Ms. Bowman)], and you talk about making things right by your mother, and it would seem to me – I understand why you would argue to a jury that you lacked intent, and that wasn't – that didn't work out. They didn't believe you, and they didn't believe that defense. So you – you need to make it right with your mom, and maybe you ought to not worry about nickels and dimes and an exact amount, an exact accounting, and just stipulate and make it easy and start making amends. I mean, if you were my child, that's what I'd want to see. I mean this is horrible what's gone on with you and your family for a year now, and it didn't have to be this way. Even after charges were filed I don't think it had to be this way, but this is what we're left with.

(Tr. Vol. I, p.252, Ls.2–18.) The district court's statement here is not an endorsement of partial restitution. Rather, the district court encouraged Ms. Bowman and the prosecutor to "make it easy" and make amends in the family by stipulating. The district court was not expressing support for partial restitution; it wanted the matter resolved quickly so the family could move on. The district court's opinion as to a stipulation—in which the defendant can consent to pay additional damages, *Shafer*, 144 Idaho at 372—does not carry over to its decision to order restitution after contested proceedings.

CONCLUSION

Ms. Bowman respectfully requests this Court vacate the district court's restitution order in its entirety. Alternatively, she respectfully requests this Court vacate the district court's restitution order and remand this case with instructions to the district court to order Ms. Bowman to pay $908.06 to U.S. Bank and/or $2,687.03 to Ms. Garton's estate.

DATED this 26th day of January, 2018.

_____/s/_____
JENNY C. SWINFORD
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 26th day of January, 2018, I served a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

KELLY A BOWMAN
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JOHN T MITCHELL
DISTRICT COURT JUDGE
E-MAILED BRIEF

JEANNE M HOWE
KOOTENAI COUNTY PUBLIC DEFENDER
E-MAILED BRIEF

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_____/s/_____
EVAN A. SMITH
Administrative Assistant

JCS/eas