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State v. Burggraf Appellant's Reply Brief Dckt. 42491

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	
Plaintiff-Respondent,)	NO. 42491
)	
v.)	FREMONT COUNTY NO. CR 2013-
)	2182
DAVID N. BURGGRAF,)	
)	REPLY BRIEF
Defendant-Appellant.)	
_____)	

REPLY BRIEF OF APPELLANT

**APPEAL FROM THE DISTRICT COURT OF THE SEVENTH JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF FREMONT**

**HONORABLE GREGORY W MOELLER
District Judge**

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STATEMENT OF THE CASE

Nature of the Case

David N. Burggraf challenges the district court's orders denying his Rule 35 motion and awarding restitution to his former wife, Ashley Burggraf.¹ The court ordered \$500 in restitution to Ms. Burggraf to reimburse her for the insurance deductible withheld by the insurance company when it paid her for the value of the car that Mr. Burggraf crashed when committing this crime. Because that car was community property, the marital estate suffered the economic loss and the restitution award should have gone to the marital estate. In response, the State argues that the court properly awarded restitution because it was necessary to make Ms. Burggraf whole and because the Idaho Court of Appeals in *State v. Hill*, 154 Idaho 206 (Ct. App. 2012), rejected the notion that losses should be apportioned when the defendant and victim jointly owned the property that is the subject of restitution. This reply addresses the shortcomings in the State's arguments.

¹ This reply addresses only the restitution issue.

ISSUES

- I. Did the district court abuse its discretion by awarding \$500 in restitution to Ms. Burggraf because the car Mr. Burggraf crashed was community property?
- II. Did the district court abuse its discretion when it denied Mr. Burggraf's Rule 35 motion?

ARGUMENT

The District Court Abused Its Discretion By Awarding \$500 In Restitution To Ms. Burggraf Because The Car Mr. Burggraf Crashed Was Community Property

Mr. Burggraf argued in his opening brief that the district court abused its discretion by awarding \$500 in restitution to Ms. Burggraf because it was the marital community, not Ms. Burggraf individually, that suffered the economic loss and thus was the victim of the crime. (App. Br., pp.7–9.) In response, the State first claims:

The total loss to Ashley Burggraf was, as the insurance company determined, \$5,741.28. (Def. Ex. A.) However, the insurance company paid Ashley \$5,241.28—which is \$500 less than the amount needed to make her whole. (Def. Ex. B.) Although the \$500 shortfall was the result of the deductible payment being subtracted from the insurance payment, because [Mr.] Burggraf’s criminal conduct caused that loss to Ashley, he is responsible for making her whole just as if he were unrelated to her.

(Resp. Br., pp.7–8.)

The State’s argument has missed the point. The car was community property. (See generally 5/27/14 Tr.²) As a result, Ms. Burggraf did not need a total of \$5,741.28 to make her whole, and she did not suffer a \$500 loss after having received the \$5,241.28 check from the insurance company (which the State fails to note was made out to both Ms. and Mr. Burggraf). It was the marital estate that suffered the loss, as the \$500 deductible was taken directly from the value of the car belonging to the marital estate. See Def. Exs. A, B; *C. Forsman Real Estate Co. v. Hatch*, 97 Idaho 511, 517–18 (1976) (McQuade, C.J., dissenting) (explaining that “the ‘owner’ of community real property is neither the husband alone nor the wife; but rather both the husband and

² Defense counsel repeatedly stated that the car was community property, and the State never objected. Mr. Burggraf thus contends that the State has conceded that the car was community property and similarly failed to prove that Ms. Burggraf suffered an economic loss. (See App. Br., pp.8–9.)

wife”) (citing *Anderson v. Idaho Mut. Benefit Ass’n*, 77 Idaho 373, 377 (1956)); see also AMY MORRIS HESS, *THE LAW OF TRUSTS AND TRUSTEES* § 26 (2014) (“Each spouse has an undivided one-half interest in all [community] property.”). As such, the State is incorrect when it claims that Ms. Burggraf needed \$500 in restitution to make her whole. Ms. Burggraf individually suffered no economic loss, and thus was not a victim entitling her to restitution. See I.C. §§ 19–5304(1)(e)(i), (2).

To be clear, Mr. Burggraf has not argued that he should pay no restitution. Nor has he argued that Ms. Burggraf has no right to any of the \$500 deductible—he in fact acknowledges that she has a “vested, equal and undivided ownership interest” in their community property. *C. Forsman Real Estate Co.*, 97 Idaho at 517–18 (McQuade, C.J., dissenting). He only contends that Ms. Burggraf is not a victim under the plain language of I.C. § 19–5304 because she did not individually suffer an economic loss.

The State also takes issue with the divorce-related documents Mr. Burggraf provided to this Court in Appendix A to the Appellant’s Brief. (Resp. Br., p.6, n.5.) Mr. Burggraf acknowledges that those documents are not necessary for this Court to decide this appeal. He provided them to the Court, however, to give a complete picture of this issue. (App. Br., p.1 n.1.) Instead of making the initial determination of whether the car was community property—a prerequisite to deciding whether Ms. Burggraf suffered economic loss and was thus a victim—district court mistakenly deferred to the divorce court to sort out the issue. (5/27/14 Tr., p.17, L.20 – p.21, L.9; App. Br., pp.4–5.) The divorce court in turn found: “As to the insurance proceeds from the Suburban. The Court finds that those have already been dealt with in the Fremont County case by Judge Moeller to the extent necessary.” (See Appendix A, Findings of Fact and

Conclusions of Law, p.3.) But the district court in this case did not make any determination regarding the *insurance proceeds*. (5/27/14 Tr., p.20, L.24 – p.21, L.9.) It only determined that the *deductible* should be awarded to Ms. Burggraf as restitution. (Amended Order for Restitution, attached to June 12, 2015 letter from Becky Harrigfeld). The net result is that Ms. Burggraf has received the full value of the family car, even though the car was community property.

The State next cites to *State v. Hill*, 154 Idaho 206 (Ct. App. 2012), to argue that Mr. Burggraf “should not be able to apportion Ashley’s loss for the damage he inflicted on the marital community.” (Resp. Br., p.11.) The State’s reliance on *Hill* is misplaced. Although *Hill* raises an issue similar to the one here, the parties framed it in a very different way. The defendant in *Hill* was one of three members in a limited liability company. *Hill*, 154 Idaho at 208. After he was convicted of grand theft for misappropriating \$290,768.29 of the LLC’s funds, the district court awarded \$290,768.29 in restitution, to be split between the two remaining members of the LLC. *Id.* at 211. The Court of Appeals affirmed, rejecting the defendant’s claim that the court should have awarded only two-thirds of the total amount of losses in restitution to the other two members of the LLC because the three men each shared an interest in the LLC. *Id.* at 212–13.

Here, on the other hand, Mr. Burggraf has not argued that the court should have awarded only half of the \$500 deductible to Ms. Burggraf because they shared an interest in the car. Instead, he has explained that because the car belonged to the marital estate, Ms. Burggraf did not individually suffer an economic loss and thus was not a victim under I.C. § 19–5304(1)(e)(i), (2). Therefore, the restitution award should

have gone to the marital estate, the entity which actually suffered the loss. Because the *Hill* decision did not address that argument, *Hill* does not control.

Further, considering that the individual LLC members in *Hill* were similarly not victims per I.C. § 19–5304(1)(e)(i), *Hill* was incorrectly decided. See I.C. § 30–25–108(1) (“A limited liability company is an entity distinct from its member or members.”). Because the defendant there misappropriated funds from the LLC, it was the LLC (not the individual members) that suffered the economic loss. See *Hill*, 154 Idaho at 208. The Court should have awarded restitution to the LLC, not the two other members of the LLC in their individual capacities. See I.C. § 19–5304(1)(e)(i), (2).

The district abused its discretion by declining to decide whether the car was community property, and abused its discretion by awarding the \$500 insurance deductible to Ms. Burggraf because she did not individually suffer the economic loss and thus was not a victim under the restitution statutes.

CONCLUSION

Mr. Burggraf respectfully requests that this Court vacate the district court’s \$500 restitution award to Ms. Burggraf. He also requests that the Court reduce his fixed sentence to two years, with eight years indeterminate, to run concurrently to his other case.

DATED this 19th day of January, 2016.

_____/s/_____
MAYA P. WALDRON
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 19th day of January, 2016, 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:

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GREGORY W MOELLER
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MPW/eas