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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	NO. 46546-2018
Plaintiff-Respondent,)	
)	KOOTENAI COUNTY
)	NO. CR-2017-4062
v.)	
)	
PAUL CHRISTOPHER BEST,)	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**

**HONORABLE RICH CHRISTENSEN
District Judge**

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STATEMENT OF THE CASE

Nature of the Case

Paul Best appeals from the district court's restitution order requiring him to pay restitution in the amount of \$2,860. The district court erred in awarding restitution of \$1,300 for a stolen gun—a 2009 AR15—because the State did not present any evidence at the restitution hearing regarding either the market value of the gun at the time and place of the crime, or the replacement cost of the gun within a reasonable time after the crime.

Statement of the Facts and Course of Proceedings

On August 20, 2016, Paul Best's girlfriend, Sadie Hammond, broke up with him. (Presentence Investigation (PSI),¹ pp.5-6.) At the time, Mr. Best was nineteen years old and living with Ms. Hammond in a guest house at her parents' residence. (PSI, p.5.) A month after he moved out of the guest house, Mr. Best returned to a shop on the Hammond property and took several guns belonging to Ms. Hammond's father, Chad Hammond, including an AR15. (PSI, pp.3-6.) A month later, Mr. Best again took items, including ammunition from the shop. (PSI, p.6.) Mr. Best told officers that he sold the guns and ammunition. (PSI, pp.6-7.) Everything except the AR15, its ammunition, a Cabela's game camera, and a piggy bank containing change, was recovered by law enforcement. (PSI, pp.3-4.) Mr. Best was charged by Information with burglary and grand theft of a firearm. (R., pp.50-51, 57-58.)

Pursuant to a plea agreement, Mr. Best pled guilty to one count of burglary and the remaining counts were dismissed. (R., pp.61-66.) As part of the plea agreement, the parties agreed that Mr. Best would waive his right to appeal from the judgment of conviction, he would

pay restitution, and he would not be charged in federal court. (R., pp.61, 63, 70.) At sentencing, the district court sentenced Mr. Best to five years, with two years fixed, but retained jurisdiction. (R., pp.86-89.) After a period of retained jurisdiction, Mr. Best was placed on probation for three years. (R., pp.103-07.)

Six months after the original judgment of conviction was entered, the State filed a memorandum of restitution requesting \$3,990.00. (R., pp.90-93.) Mr. Best objected to the amount of restitution. (R., pp.95-96.) Following a hearing, the district court entered a memorandum decision and order concluding that Mr. Best owed restitution in the amount of \$2,860. (9/26/18 Tr., p.36, Ls.2-24; R., pp.112-13.)

Thereafter, Mr. Best filed a Notice of Appeal. (R., pp. 114-16.)

¹ Appellant's use of the designation "PSI" includes the packet of documents grouped with the electronic copy of the PSI, and the page numbers cited refer to the corresponding page of the electronic file.

ISSUE

Did the district court err in awarding restitution for the AR15 where the amount ordered was not based on substantial and competent evidence?

ARGUMENT

The District Court Erred In Ordering Restitution For The AR15

A. Introduction

Mr. Best asserts that the district court abused its discretion by awarding restitution in the amount of \$1,300 for the nine-year-old AR15. Mr. Best asserts that the district court's decision is not based on substantial, competent evidence where the State failed to establish a current market value for the gun.

B. Standard Of Review

"It is generally recognized . . . that courts of criminal jurisdiction have no power or authority to direct reparations or restitution to a crime victim in the absence of a statutory provision to such effect." *State v. Gonzales*, 144 Idaho 775, 777 (Ct. App. 2007). A district court's exercise of discretion in ordering restitution is guided by the limitations set forth in I.C. § 19-5304(7). *State v. Corbus*, 150 Idaho 599, 602 (2011). On appeal, the factual findings of the district court will not be disturbed if they are supported by substantial evidence. *State v. Straub*, 153 Idaho 882, 885 (2013). Substantial evidence is such relevant evidence as a reasonable mind might accept to support a conclusion. *Id.* The legislature has established that economic losses are to be determined by a civil preponderance of the evidence standard. I.C. § 19-5304(6); *State v. Richmond*, 137 Idaho 35, 38 (Ct. App. 2002).

C. The District Court Erred In Ordering Restitution For The Gun Where The State Failed To Establish The Market Value Of The Gun With Substantial And Competent Evidence

Idaho Code § 19-5304(6) provides:

Restitution orders shall be entered by the court at the time of sentencing or such later date as deemed necessary by the court. Economic loss shall be based upon

the preponderance of evidence submitted to the court by the prosecutor, defendant, victim or presentence investigator. Each party shall have the right to present such evidence as may be relevant to the issue of restitution, and the court may consider such hearsay as may be contained in the presentence report, victim impact statement or otherwise provided to the court.

I.C. § 19-5304(6).

When considering the general restitution statute, the Idaho Court of Appeals has explained that “the amount of the award must be supported by substantial evidence” and is to be determined “based upon the civil preponderance of the evidence standard.” *In re Doe*, 146 Idaho 277, 284 (Ct. App. 2008) (citations omitted). According to the specific language within the restitution statute, economic loss “includes, but is not limited to, the value of property taken . . . and direct out-of-pocket losses or expenses . . .” I.C. § 19–5304(1)(a). Value means “the market value of the property at the time and place of the crime, or if such cannot be satisfactorily ascertained, the cost of replacement of the property within a reasonable time after the crime.” I.C. §§ 19–5304(1)(c), 18–2402(11)(a). “When the value of property cannot be satisfactorily ascertained pursuant to the standards set forth in paragraphs (a) and (b) of this subsection, its value shall be deemed to be one thousand dollars (\$1,000) or less.” I.C. § 18–2402(c).

In *State v. Smith*, the Court of Appeals clarified the restitution definitions, holding, “the ‘market value’ of consumer goods is the reasonable price at which the owner would hold those goods out for sale to the general public, as opposed to the ‘cost of replacement’ which would be the cost for the owner to reacquire the same goods.” 144 Idaho 687, 693 (Ct. App. 2007). In determining the restitution owed by a defendant, the district court may consider the value of the property stolen, which is to be calculated according to its “market value,” so long as that value can be satisfactorily ascertained. *Id*; see also *State v. Bybee*, 115 Idaho 541, 544 (Ct. App. 1989); I.C. § 18–2402(11)(a); I.C. § 19–5304(1)(a).

At the restitution hearing, defense counsel clarified that Mr. Best was disputing only the restitution amounts for the miscellaneous ammunition and the value of the AR15.² (Tr., p.6, L.15 – p.7, L.1.) The owner who purchased the AR15, Chad Hammond, was called to testify. (Tr., p.8, Ls.4-21.) He testified that he did not recall when he purchased the gun, but guessed that it was in 2008 or 2009. (Tr., p.8, Ls.22-25; p.13, Ls.6-19.) He did not recall what kind of AR15 it was, but thought perhaps it was a Smith and Wesson brand AR15. (Tr., p.12, Ls.19-23.) He testified that he purchased it new for \$1,300, and that he did not shoot it very much. (Tr., p.9, Ls.6-22.) He did know the market value of a 2009 Smith and Wesson AR15. (Tr., p.13, Ls.23-25; p.16, L.9 – p.17, L.2.) The gun had a laser sight, but Mr. Hammond did not testify to the cost or value of the laser sight. (Tr., p.14, Ls.3-12.) The district court inquired of him regarding the fair market value—how much money the gun could be sold for at the time of the burglary, but he did not know that information. (Tr., p.16, L.3 – p.17, L.2.) He also estimated that he had 200 boxes of .223 ammunition taken from his cabinet for an approximate loss of six dollars a box, or \$1,200.³ (Tr., p.10, L.4 – p.11, L.4.)

Mrs. Stacy Hammond, Chad Hammond’s spouse, also testified. (Tr., p.20, L.6 – p.24, L.25.) Her testimony focused on the research she had done to try to value the AR15. She concluded that a brand-new AR15 would cost \$1,479. (Tr., p.22, Ls.1-3.) The prosecutor requested the full purchase price of \$1,300 for the weapon, for a total restitution amount of \$2,860. (Tr., p.9, L.24 – p.10, L.3, p.26, L.17 – p.27, L.11.)

² Prior to the restitution hearing, Mr. Best stipulated to pay restitution on: the piggy bank (\$50.00), the AR15 case (\$40.00), the magazines of AR15 ammunition (\$60.00), and the Cabela’s game cam (\$344.49). (Tr., p.5, L.25 – p.6, L.24.)

³ This number is contradicted by the “Restitution Form” submitted by the State in which \$1,000 was requested for the missing .223 ammo. (R., p.92.)

Defense counsel advised the court that she had called Cabela's to inquire as to the cost of a 2009 AR15 and found it to be \$600-\$700. (Tr., p.28, Ls.3-9; Def.'s Exhibit A, p.1.) She referred to Defendant's Exhibit A, a police report in the case which indicated that Mr. Best sold the AR15 for \$600. (Tr., p.27, Ls.20-23; Def.'s Exhibit A.) Defense counsel asserted that the value of the AR15 testified to by the victims was not the current fair market value, and they were not entitled to the amount paid for the rifle nearly ten years ago. (Tr., p.27, Ls.13-20.) Mr. Best maintained that the 200 boxes of ammunition were not mentioned in the police report or missing property report, but if the district court saw fit to award restitution on them, he requested that that award be for 172 boxes (200 minus the recovered 28 boxes). (Tr., p.29, L.25 – p.30, L.6.)

After the hearing, the district court determined that defense counsel's representation of what a like AR15 sold for was not sufficiently reliable; therefore, it based its determination solely on the testimony of the victims. (Tr., p.35, L.7 – p.36, L.6.) The court concluded that, in the absence of other reliable evidence, the \$1,300 paid for the rifle over nine years ago was the current fair market value. (Tr., p.36, Ls.2-6; R., pp.112-13.) The court ordered restitution in the total amount of \$2,860.⁴ (Tr., p.36, Ls.2-24; R., p.112.) Mr. Best asserts that the district court abused its discretion by awarding restitution in the amount of \$1,300 for the AR15.

Mr. Best contends the State did not provide any evidence regarding the market value of the AR15 at the time and place of the burglary; nor did it not submit admissible testimony or evidence which would identify the replacement cost of the rifle. The district court ultimately concluded that the purchase price for the rifle back when it was new in 2009 was the fair market

⁴ Although the district court did not set forth a detailed accounting of the values it was attributing to each item, the number the court arrived at, \$2,860, is consistent with the calculations on the Restitution Form (R., p.92), minus the TV, Wii, and the "spot scope" for the AR15 (for which there was no testimony as to value), which the State had stipulated to remove prior to the hearing. (Tr., p.5, Ls.10-21.)

value. However, the original purchase price of the AR15 is a not reasonable price at which the victim could hold those items out for sale to the general public—a rifle nearly ten years old is not worth the same as one purchased brand new off the showroom floor. The pertinent language from the statute requires that the value of the property must be the market value of the property *at the time and place of the crime*. The relevant value of the gun is the market value at the time the gun was stolen. The State did not present evidence as to this value, nor did the State present evidence as to the cost of replacement of the gun within a reasonable time after the burglary. Thus, the State failed to meet its burden of proving the restitution amount. Accordingly, the district court erred by ordering Mr. Best to pay \$1,300 for the AR15. The restitution award should be vacated and remanded to the district court to recalculate the award absent the incorrect AR15 calculation.

Neither Mr. nor Mrs. Hammond could identify the market value of the 2009 AR15, nor could they identify the cost of replacement. While the district court sought information on the market value, it was unable to acquire the information from the owner(s). Instead, the court disregarded defense counsel's representation, and acquiesced to order the purchase price of the gun bought nearly ten years ago. Mr. Best submits that this was error, as the figure determined to be the market value is not supported by substantial evidence in the record. Where the evidence supporting the \$1,300 award is simply the district court's best guess, the evidence is not substantial. Because the State did not sufficiently prove that the victims' losses for the AR15 were \$1,300, this portion of the restitution award must be vacated.

Because the State failed to present substantial, competent evidence in support of the restitution award, Mr. Best submits that the restitution award must be vacated.

CONCLUSION

Mr. Best submits that the restitution award must be vacated and the case remanded for a new restitution calculation of \$1,560, which omits the \$1,300 for the AR15.

DATED this 31st day of May, 2019.

/s/ Sally J. Cooley
SALLY J. COOLEY
Deputy State Appellate Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 31st day of May, 2019, I caused a true and correct copy of the foregoing APPELLANT’S BRIEF, to be served as follows:

KENNETH K. JORGENSEN
DEPUTY ATTORNEY GENERAL
E-Service: ecf@ag.idaho.gov

/s/ Evan A. Smith
EVAN A. SMITH
Administrative Assistant

SJC/eas