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### State v. Mallory Appellant's Brief Dckt. 48045

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	Supreme Court No. 48045-2020
	)	Kootenai County District Court
	)	No. CV28-19-8849
	)	
Plaintiff/Respondent	)	APPELLANT'S OPENING
	)	BRIEF
-vs-	)	
	)	
ANNA A. MALLORY,	)	
	)	
	)	
	)	
Defendant/Appellant	)	

THIS BRIEF IS RESPECTFULLY SUBMITTED IN SUPPORT OF MALLORY'S APPEAL IN THIS MATTER.

**I.**  
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Cases:

*State v. Corbus*, 150 Idaho 599, 602, 249 P.3d 398, 401 (2011)

*State v. Lombard*, 149 Idaho 819, 822, 242 P.3d 189, 192 (Ct.App. 2010)

*State v. Shafer*, 144 Idaho 370, 161 P.3d 689 (2007)

Statutes:

I.C. Sec 19-5304

### **III. STATEMENT OF THE CASE**

This appeal follows an award of restitution to the Hayden Lake Eagles following Mallory's plea of guilt to one count of Burglary pertaining to a push lawn mower. Mallory challenges the restitution award for the reasons hereinafter stated.

### **IV. ISSUES PRESENTED ON APPEAL**

1. Was the district court in error when it awarded restitution unrelated to the burglary charge pertaining to the theft of a push lawn mower?
2. Was the district court's restitution order supported by substantial and competent evidence?

### **V. ARGUMENT**

#### **A. Standard of Review.**

"The decision regarding whether to order restitution, and in what amount, is within the district court's discretion," guided by factors in Idaho Code section 19-5304(7). *State v. Corbus*, 150 Idaho 599, 602, 249 P.3d 398, 401 (2011). "The determination of the amount of restitution is a question of fact for the trial court whose findings will not be disturbed if supported by substantial evidence." *State v. Lombard*, 149 Idaho 819, 822, 242 P.3d 189, 192 (Ct.App. 2010).

#### **B. The district court was in error when it awarded restitution above and beyond the burglary charge pertaining to the theft of a push lawn mower.**

Before proceeding further, the court needs to be acquainted with Mr. Ron Nold, the immediate

predecessor to Mallory. The following testimony describes the relationship between the Eagles and Mr. Nold.

Are you familiar with Ron Nold?

A. Yeah, he was the terrible secretary that we had before Anna.

Q. And you said Mr. Nold was the predecessor to Ms. Mallory; is that correct?

A. That is correct, yes.

Q. And when Ms. Malory Mallory came in as the secretary, how would you describe the Eagles finances. A. Terrible.

Q. Did Mr. Nold —

A. Our financial situation was in dire straits. Q. Okay.

Q. Did you recoup any monies from Ron Nold that — well, that the Eagles believed that he stole?

A. To my knowledge, yes, there was claim that did come in for to 8,000 of losses incurred by him.

Q. But do you personally believe based on information that you may have reviewed that the monies that were missing during Mr. Nold's tenure as secretary was substantially more than you recouped?

A. Well, can't speak to that don't -- was not involved in any of the financial to know what the club was doing when he was secretary so ... know that he did leave us with substantial bill at the bank, which is still in dispute so ...

Q. Do you where he is now?

He's in prison for the rest of his life. And so unfortunately, the charges brought against him that -- the Eagles brought against him were dropped because he's already spending life in prison.

### **ARGUMENT**

A thorough analysis of the restitution statute was performed by the Idaho Court of Appeals in *State v. Shafer*, 144 Idaho 370, 161 P.3d 689 (2007). There, Shafer pleaded guilty to felony leaving the scene of an injury accident. Shafer was ordered to pay \$18,013.95 in restitution for the victim's personal injuries and property damage. Shafer appealed the restitution order, first claiming the Court was without statutory authority to enter such an order because the

damages arose from the accident itself, not his crime of leaving the scene. Shafer's secondary argument was that he did not consent to pay this restitution.

The court noted that, Idaho Code Section 19-5304(2) authorizes trial courts to order restitution to compensate crime victims. Shafer argued that this statutory authority did not extend to victims losses as they did not result from the criminal act to which he entered a plea of guilt.

The Court of Appeals agreed. The court's discussion centered on the following.

Idaho's restitution statute clearly permits restitution orders only for "any crime which results in an economic loss to the victim." I.C. Sec 19-5304(2) unless the parties consent to a broader restitution order. See I.C. Sec 19-5304(9). The statute defines "victim" as "a person or entity, who suffers economic loss or injury as a result of the defendants criminal conduct." I.C. Sec 19-2304(1)€ (emphasis added). The term "economic loss" includes such things as "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. Sec 19-5304(1)(a). (emphasis added). Thus, 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. Richmond*, 137 Idaho 35, 38, 43 P.3d 794, 797 (Ct.App. 2002)

Given these parameters, the Court ultimately conclude that Shafer's criminal act of leaving the scene and failing to provide information did not cause the injuries and property damage suffered by the other driver.

With regard to Shafer's second argument concerning consent, the court noted that although the restitution statute does not authorize imposition of restitution for economic losses not caused by the crime for which a defendant was convicted, a defendant may consent to the same, citing IC 19-1504(9). For losses not adjudicated or not before the court.

The court noted a pertinent term of Shafer's plea agreement was to pay restitution in an amount to be determined. The parties acknowledged this term at the plea change hearing and it also appeared in a preliminary settlement sheet.

The court started by noting that plea agreements are contractual in nature and are examined in accordance with contract law standards. The first thing, the Court was tasked with, was determining whether a given term was ambiguous or unambiguous. Ultimately, the court felt the term was ambiguous. It did not necessarily refer to any damages directly caused by leaving the scene but may impliedly include them, Turning them to principals of interpretation of an ambiguous term, the court recited several guiding principals, including (1) the courts to attempt to discern the intent of the contracting parties; that he ambiguous term be resolved in favor of the defendant; (3) that on appeal, the appellate court should defer to the trial courts findings unless clearly erroneous; (4) that to be clearly erroneous, the findings must be unsupported by substantial and competent evidence.

The Court then went on to applying its governing principals to Shafer's case. First, there was no direct evidence presented expressing the parties' understanding of the term.

The term suggested that both parties anticipated that restitution would be paid in some amount. Next the Court noted that Shafer received a very lenient sentencing recommendation from the State which required Shafer to start paying 100 per month, indicating both parties contemplated restitution would include the victims medical and property damages. Finally, there was little protest that the restitution was going to be a consideration for the States concessions. Without an agreement to pay a substantial amount of restitution, there was little to no protest that the restitution was going to be a very consideration for the States concessions. When the state presented the victims losses, Shafer did not object as a matter of law, but simply indicated he

wanted more time to examine the documents.

This suggested both sides contemplated the restitution would include the victims medical and property damages. Under the above circumstances, the Court of Appeals concluded Shafer did consent to pay for the victims losses.

Looking to the factors cited by the Court of Appeals, it is very apparent they do not cut in favor of any position advanced by the State that Mallory consented to the inclusion of claimed financial losses in the restitution award.

First, the mere inclusion of a restitution term in the pretrial settlement offer does not suggest payment of alleged financial losses. Mallory was pleading guilty to burglary of a lawn mower. It can just as easily be inferred that restitution would be limited to that charge only. It is important to remember that the actual language of the pretrial settlement offer was “Pay restitution/reimbursement: If applicable by statute. TBD to Hayden Lake Eagles.” There are several important qualifiers in that provision – “if applicable by statute” being the first. The Appellant contends this means the Court was required to follow the statute in its award. The second qualifier is “TBD to the Hayden Lake Eagles”. It does not even approach suggesting that the restitution was to be determined by the Eagles, in simply submitting various restitution memoranda which they felt were owing to them. Also, before leaving this point, it must be noted that an award to anyone other than the Eagles was not included in the agreement. This conclusion is strongly buttressed by the fact the prosecuting attorney related to the court that on Feb 10, 2020, that they had insufficient evidence to prove any financial improprieties, and thus had to drop the charges:

(By Mr, Poorman): Your Honor, what the -- one thing that's clear to the State is that Ms. Mallory's conduct has had an impact on the community, regardless of what can be proven in a court of law, and the State has the burden to prove things beyond a reasonable doubt...

Tr. Feb. 10,2020, p. 6, l.s 8-12.

(By Mr. Poorman): However, Ms. Mallory is only charged with what the State felt could be proven, and then there's a pretrial settlement offer and this agreement where she's pled guilty to this burglary, which she still contends she's not necessarily guilty of. Feb. 10, 2020, p.6, l.s 15-19.

Second, in *Shafer*, Shafer, as noted by the Court received a very lenient sentence, and that the State would have little incentive to offer this to Shafer without the expectation significant restitution would be paid. This is precisely the opposite of what occurred in Mallory's case. While the plea agreement recommended suspended jail time, a concession, the underlying sentence was left open, At the February 10 hearing the State recommended an 8 year sentence:

THE COURT: Mr. Poorman.

MR. POORMAN: Thank you, Your Honor.

In terms of sentence, Your Honor, the State's going to be asking the court to place Ms. Mallory on a period of supervised probation for three years pursuant to the pretrial settlement offer. In terms of an underlying sentence, the State is asking for an eight-year sentence: three year fixed and five years indeterminate.

My understanding from the pretrial settlement offer is that the restitution amount is to be determined. I don't believe it was stipulated to.

Tr. Feb, 10, 2020, p.5, l.s 17-25; p. 6, l.s 1-3.

Further, Mr. Poorman added:

(By Mr. Poorman): And the State's also asking for the extra year of supervision beyond what would normally be expect – normally be asked for in a particular circumstance.

Tr. Feb. 10, 2020, p. 7, l.ns 3-6. Allow me to correct the record here –the pretrial settlement agreement did not mention an extra year of supervised probation.

The purpose of bring this up is to point out that that the sentence asked for was not L  
lenient as in Shafer but rather quite harsh, not to engage in an “excessive sentence”

challenge.

Finally, unlike the *Shafer* case, Mallory did protest the restitution issue, multiple times, as is apparent from the hearing transcripts.

THE COURT: I want to make sure that we're going about this on the same page, if you will. My understanding is that your client agreed, as part of the pretrial settlement offer in this case, to make restitution to the Hayden Lake Eagles but did not agree to the exact amount of restitution.

MR. HORNE: Yes. The -- well, the agreement says what it says. It just says to be determined by the Eagles and if applicable per statute. So what that indicates to me is the court is the ultimate arbiter as to what is allowed by statute, and we'll live by that. So yes, we do agree to restitution if it's applicable per statute, and that's going to be up to the court, I guess.

Tr, May 7, 2020, p.6, l.s 2-15.

\* \* \*

(By the Court): And what I'm hearing from the defense is that they are not agreeing or consenting to the court awarding restitution to the Hayden Lake Eagles since they are not -- are no longer -- their case is no longer pending in front of the court and being adjudicated by the court.

Tr. May 7, 2020, p.7, l.s 11-16.

MR. HORNE: I would say, Judge, that restitution, if applicable per the court's order in interpreting the law, is going to relate to the lawn mower, because we could not consent to restitution for crimes-- or I shouldn't say that. I should say alleged crimes that were dropped crimes.

Tr. May 7, 2020, p.8, l.s 5-10.

MR. HORNE: I would say, Judge, that restitution, if applicable per the court's order in interpreting the law, is going to relate to the lawn mower, because we could not consent to restitution for crimes-- or I shouldn't say that. I should say alleged crimes that were dropped crimes.

Tr. May 7, 2020, p.8, l.s 5-10.

(By Mr. Horne): You know, we're not agreeing to restitution for something that was never proven.

Tr. May 7, 2020, p.8, l.s 16-17

(By Mr. Horne): There was no plea of guilt or finding of guilt to any financial crimes whatsoever. Those were dropped. And according to the prosecuting attorney at that hearing, there was no evidence to support those charges. That's why they got dismissed.

So no. We're agreeable to pay restitution as relates to the lawn mower. However, the lawn mower has been returned and, as I understand it, also fully paid for so . . .

Tr. May 7, 2020, p.9, l.s 4-7.

\* \*

(By the Court): And so back to my question to you and your client, Mr. Horne. Does the Defendant consent to allowing the court to determine the amount of restitution that would be payable to the Hayden Lake Eagles for any economic loss or injury even though those crimes, alleged crimes, were not adjudicated and are not before the court?

Tr. May 7, 2020, p. 13, l.s 10-16.

MR. HORNE: No.

THE COURT: Okay, that a simple answer.

Tr. May 7, 2020, p.13, l.s 17-18.

THE COURT: Well, it seems that we have a difference of opinion as to the meaning of the pretrial settlement offer.

Tr. May 7, 2020, p.11, l.s 11-13

### **CONCLUSION**

For the foregoing reasons, Mallory asks the court to reverse and vacate the district court's order of restitution.

Dated this 22<sup>nd</sup> day of February, 2021.

/s/ Greg D. Horne