2-15-2019

State v. Habeb Appellant's Reply Brief Dckt. 45949

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2/15/2019 12:17 PM
Idaho Supreme Court
Karel Lehrman, Clerk of the Court
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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	**NO. 45949**
	)	
v.	)	**ADA COUNTY NO. CR01-16-35232**
	)	
MOHAMAD BAKIR ALI HABEB,	)	**REPLY BRIEF**
	)	
Defendant-Appellant.	)	
	)	

REPLY BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

HONORABLE RICHARD D. GREENWOOD
District Judge

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STATEMENT OF THE CASE

Nature of the Case

Mr. Habeb contends the district court improperly flipped the burden of proof when it awarded restitution in this case, and that, under the proper burdens, the State did not present sufficient evidence to carry its burden. In response, the State asserts that Mr. Habeb did not preserve this issue for appeal without citing authority or providing argument in support of that assertion. As such, this Court should refuse to consider that bare assertion. The applicable precedent makes it clear the State's bare assertion is meritless.

The State also misses the point entirely on the merits, as it contends it met its burden by presenting the repair estimate, as that estimate was accurate as to how much the repairs would cost. However, Mr. Habeb is arguing that the State cannot rely on the presumption that the repair estimate, accurate though it may be, was less than the actual value of the car, and thus, truly represents the actual loss, in this case because of the other evidence in the record. As a result, because the State had the ultimate burden of proof, the State had to prove the repair value was, in fact, less than the actual value of the car in order to prove the repair value really did represent the actual loss. The State's only response was to make the bare assertion that these legal principles should not apply because they are an "overly complicated" "burden-shifting metric," which is not applicable to restitution proceedings without citing precedent or making an argument in support. (*See* Resp. Br., p.5.) The precedent reveals the State's assertion is meritless.

Finally, the State does not address the fact that the district court still reached its decision by improperly flipping the burden of proof to Mr. Habeb. As such, even if the State were correct about the repair estimate, this case should still be remanded so the district court can determine,

under a proper understanding of the burden of proof, whether that estimate was sufficient to prove the actual loss in this case.

Statement of the Facts and Course of Proceedings

The statement of the facts and course of proceedings were previously articulated in Mr. Habeb's Appellant's Brief. They need not be repeated in this Reply Brief, but are incorporated herein by reference thereto.

ISSUE

Whether the restitution order was not supported by sufficient evidence to show the actual economic loss in this case.

ARGUMENT

The Restitution Order Was Not Supported By Sufficient Evidence To Show The Actual Economic Loss In This Case

A. The State's Assertion, Made Without Citing Authority, That Mr. Habeb's Arguments Are Not Preserved For Appeal Actually Flies In The Face Of Numerous Decisions From The Idaho Supreme Court And Court Of Appeals

The State asserts, without citation to authority or offering argument in support, that Mr. Habeb did not preserve the argument that the repair estimate was not sufficient to prove the actual loss, given all the evidence in this case for appeal. (Resp. Br., p.5.) However, "[a] *party* waives an issue cited on appeal if either authority or argument is lacking, not just if both are lacking." *Murray v. State*, 156 Idaho 159, 168 (2014) (internal quotation omitted, emphasis added). As such, this Court should not consider the State's bare, conclusory assertion regarding the issue of preservation.

That the State did not cite any authority on this issue is not surprising because, from any angle, the applicable precedent contradicts the State's bare assertion. First, the Idaho Supreme Court has explained that the "specific arguments" made in support of a position on a particular issue may "evolve[]" between the trial and appeal so long as the "*substantive issues*" do not change. *Ada County Highway Dist. v. Brooke View, Inc.*, 162 Idaho 138, 142 n.2 (2017) (emphasis from original). At the restitution hearing, defense counsel specifically argued: "I don't think the State has quite met their burden on the amount of restitution they want" based on the repair estimate and the Blue Book quote for a clean-title car because Mr. Al Rubaye did not know the actual value of his car. (Tr., p.23, L.24 - p.26, L.9.) On appeal, Mr. Habeb still argues that the State did not meet its burden to prove the actual loss in this case because there is no evidence of the actual value of Mr. Al Rubaye's car. (App. Br., pp.5-11.) Therefore, as in

Brooke View, Mr. Habeb has maintained the same position regarding the substantive issue. As such, that issue and all its attendant arguments are preserved for appeal.

Second, when the error arises in the district court's ruling on a contested issue, the aggrieved party does not need to renew his objection in order to preserve challenges to the district court's decision. *Lasselle v. Special Products Co.*, 106 Idaho 170, 173 (1983); *State v. Pickens*, 148 Idaho 554, 557 (Ct. App. 2010); *see also State v. DuValt*, 131 Idaho 550, 553 (1998) (explaining that an issue is preserved for appeal when the issue "was argued to *or decided by* the trial court") (emphasis added). Therefore, the argument that the district court abused its discretion by flipping the burden of proof in its decision to award restitution in this case is properly raised on appeal.

Third, the sufficiency of the evidence can be challenged for the first time on appeal. I.R.C.P. 50(b)(3)[1]; *accord State v. Ashley*, 126 Idaho 694, 695-96 (Ct. App. 1994); *see also State v. Yeoumans*, 144 Idaho 871, 873 (Ct. App. 2007) (explaining that, while a challenge to *the admission* of certain evidence may require a contemporaneous objection, a challenge that the admitted evidence *was not sufficient* to prove the claim being made does not).[2] As such,

[1] The rules of civil procedure are applicable in restitution proceedings. *State v. Jensen*, 149 Idaho 758, 762 (Ct. App. 2010).

[2] The Idaho Supreme Court's decision in *State v. Kelley* does not demand a different conclusion. *See State v. Kelley*, 161 Idaho 686, 689 n.1 (2017). The Supreme Court's primary reason for refusing to consider the sufficiency argument in that case was that the defendant "did not raise that issue in the briefing" on appeal. *Id*. Because the appellant in that case had not provided argument or authority on that point prior to the hearing on review to the Supreme Court, he had waived that issue for appeal. *See Murray*, 156 Idaho at 168. Thus, the subsequent part of the *Kelley* Court's statement – about the issue not being raised in the district court and there not being an adverse ruling – is *dicta* because it was not necessary to resolve the issue. That is especially true in light of the fact that, in *Kelley*, the Supreme Court did not have briefing regarding the propriety of raising a sufficiency claim for first time no appeal. *See id*; *State v. Barton*, 154 Idaho 289, 294 (2013) (Horton, J., concurring) (explaining that the Court should not address issues without first receiving "input from interested parties"). Here, unlike in *Kelley*, the preservation question is squarely presented in the appellate briefing, and there was an adverse

Mr. Habeb's argument – that the repair estimate was not sufficient to prove the actual loss given the evidence in this case – is properly raised on appeal. *Compare State v. Ibarra*, Not Reported in P.3d, 2018 WL 4608801, *4 (Ct. App. 2018) (holding the sufficiency of the State's evidence to prove its claim for restitution could be raised for the first time on appeal), *rev. denied*.[3]

For all those reasons, this Court should rejected the State's frivolous, bare assertion that this issue was not preserved for appeal.

B. The State's Attempt To Rely On The Presumption That The Repair Estimate Was Less Than The Actual Value Of The Car, Such That It Would Prove The Actual Loss, Is Improper Because The Bubble On That Presumption Burst By The Other Evidence In The Record

As the State concedes it bore the burden of proof in this case. (Resp. Br., p.5.) Specifically, it had to prove the loss actually suffered in this case by a preponderance of the evidence. I.C. § 19-5304(6). This means that the State had to show, in light of all the evidence in the record, that the amount claimed as restitution is more probably than not the amount of loss actually suffered by the victim. *See Oxley v. Medicine Rock Specialties, Inc.*, 139 Idaho 476, 481 (2003) (explaining what the preponderance standard requires the party bearing the burden must show).

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ruling – the district court's award of restitution, which it based on Mr. Habeb's failure to prove the actual value of the car in question. Therefore, even in light of *Kelley*, this Court should consider Mr. Habeb's challenge to the sufficiency of the evidence the State presented in regard to its request for restitution, especially since the civil rules expressly authorize it to do so.

[3] Mr. Habeb recognizes that unpublished decisions do not constitute precedent, and he does not cite *Ibarra* as authority requiring a particular decision in this case; rather, he merely references it as a historical example of how a learned court analyzed a similar issue. *Compare Staff of Idaho Real Estate Comm'n v. Nordling*, 135 Idaho 630, 634 (2001) (quoting *Bourgeois v. Murphy*, 119 Idaho 611, 617 (1991)) ("When this Court had cause to consider unpublished opinions from other jurisdictions because an appellant had discussed the cases in his petition, we found the presentation of the unpublished opinions as 'quite appropriat[e].' Likewise, we find the hearing officer's consideration of the unpublished opinion, not as binding precedent but as an example, was appropriate.").

The State maintains that it met that burden by presenting the repair estimate, as it argues the repair estimate was, itself, supported by substantial and competent evidence. (Resp. Br., p.4.) That misses the point entirely. Mr. Habeb is not challenging the reliability of the repair estimate. Rather, he is arguing that, in light of the other evidence presented, the repair estimate (accurate though it may be), is not sufficient to prove the actual losses suffered in this case. That is because, without evidence of the actual value of the car, a repair estimate can only prove the actual loss based on the presumption that the amount to repair is lower than the actual value of the car. *See State v. Hughes*, 130 Idaho 698, 703 (Ct. App. 1997).

The State could not rely on that presumption in this case because there was "substantial evidence contradicting the presumed fact" in the testimony Mr. Habeb elicited during cross-examination and in the State's own exhibits. D. Craig Lewis, *Should the Bubble Always Burst? The Need for a Different Treatment of Presumptions under I.R.E. 301*, 32 IDAHO L. REV. 5, 6 (1995). Specifically, the other evidence showed that the actual value of this car was less than the Blue Book value because of the salvage title and that the repair estimate was, itself, only slight less than the Blue Book value (Ex., pp.13, 17; Tr., p.13, Ls.9-14; R., p.157.) The district court found that evidence to be sparse and of questionable reliability in regard to the question of actual loss. (R., pp.155, 157-58.)

Based on that other evidence, "a reasonable person could find the nonexistence of" the presumed fact – that the repair estimate was less than the actual value of the car – which means the State cannot rely on that presumption (the bubble has burst). *Bongiovi v. Jamison*, 110 Idaho 734, 738 (1986). As a result, the State, which still had the ultimate burden of proof, still had to prove the repair estimate was, in fact, less than the actual value of the car in order to prove, by a preponderance of the evidence, that the repair estimate truly reflected the actual loss.

The State does not address any of that analysis. (*See generally* Resp. Br.) Instead, it asserts this Court should ignore these legal principles on the basis that I.R.E. 301(a), which sets out how such presumptions work in civil cases, is an "overly complicated" "burden shifting metric" that is not applicable to restitution proceedings. (Resp. Br., p.5.) However, as with its assertion about preservation, the State cites no authority and offers no argument in support of that assertion, and so, this Court should refuse to consider that bare assertion as well. *Murray*, 156 Idaho at 168.

At any rate, the State's bare assertion in that regard is directly contrary to the applicable precedent. The Court of Appeals has made it clear that, like the Rules of Civil Procedure, "[t]he Idaho Rules of Evidence apply to restitution hearings except as provided in I.C. § 19-5304(6)," *State v. McNeil*, 158 Idaho 280, 284 (Ct. App. 2014); *see Jensen*, 149 Idaho at 762 (addressing the use of the Rules of Civil Procedure in restitution proceedings). Subsection (6) of I.C. § 19-5304 specifically addresses the evidentiary rules regarding hearsay evidence: "and the court may consider such hearsay as maybe contained in the presentence report, victim impact statement or otherwise presented to the court." I.C. §19-5304(6). Because I.R.E. 301(a) addresses the procedural approach to the burdens of proof which the courts routinely apply in all civil hearings, not the hearsay rules, it is applicable to the restitution context.

Therefore, since the State failed to present any evidence about the actual value of the car, and since it could not, given all the evidence in the record, rely on the presumption that the repair estimate was less than the actual value of the car, the State failed to carry its burden to prove by a preponderance the repair estimate really reflected the loss actually suffered in this case.

And even if the State is correct, and the repair estimate might be sufficient to carry the State's burden, this Court should still remand the case because the district court's decision to that

effect was tainted by the fact that it flipped the burden of proof in order to overcome its conclusion that the State's evidence was otherwise sparse and of questionable reliability (an aspect of the case which the State does not address at all on appeal (*see generally* Resp. Br.)). Specifically, the district court determined it was Mr. Habeb's responsibility to disprove the presumption and actually demonstrate that the actual value of the car was lower than the repair estimate. (R., p.158.) However, the applicable legal standards only require the party opposing the presumption to show "a reasonable person *could* find the nonexistence of" the presumed fact; they do not need to affirmatively disprove the presumption in order for the presumption to cease to function. *Bongiovi*, 110 Idaho at 738 (emphasis added); Lewis, *supra*, at 6-7 (explaining the party opposing the presumption need only present evidence which "indicates" the presumption is faulty in that case to burst the bubble). That is because requiring the party opposing the presumption to affirmatively disprove the presumption has the effect of flipping the ultimate burden of proof. *See id*. In this case, for example, it meant Mr. Habeb had to affirmatively prove the restitution request was improper, rather than the State prove that it was proper.

As such, the district court abused its discretion by acting contrary to the applicable legal standards. *See Lunneborg v. My Fun Life*, 163 Idaho 856, 863-64 (2018). In such cases, "[w]hen the discretion exercised by a trial court is affected by an error of law, the role of the appellate court is to note the error made and remand the case for appropriate findings." *Montgomery v. Montgomery*, 147 Idaho 1, 6-7 (2009). Therefore, this Court should remand this case so the district court can make appropriate findings *under a proper understanding of the burden of proof* about whether the repair estimate was actually sufficient, in the absence of evidence about the actual value of the car in question, to prove the actual loss in this case.

CONCLUSION

Mr. Habeb respectfully requests this Court vacate the restitution order in his case.

DATED this 15th day of February, 2019.

/s/ Brian R. Dickson
BRIAN R. DICKSON
Deputy State Appellate Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15th day of February, 2019, I caused a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, to be served as follows:

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

BRD/eas