9-26-2018

State v. Habeb Appellant's Brief Dckt. 45949

Electronically Filed
9/26/2018 10:56 AM
Idaho Supreme Court
Karel Lehrman, Clerk of the Court
By: Brad Thies, Deputy Clerk

IN THE SUPREME COURT OF THE STATE OF IDAHO

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

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

ERIC D. FREDERICKSEN
State Appellate Public Defender
I.S.B. #6555

BRIAN R. DICKSON
Deputy State Appellate Public Defender
I.S.B. #8701
322 E. Front Street, Suite 570
Boise, Idaho 83702
Phone: (208) 334-2712
Fax: (208) 334-2985
E-mail: documents@sapd.state.id.us

ATTORNEYS FOR DEFENDANT-APPELLANT

KENNETH K. JORGENSEN
Deputy Attorney General
Criminal Law Division
P.O. Box 83720
Boise, Idaho 83720-0010
(208) 334-4534

ATTORNEY FOR PLAINTIFF-RESPONDENT

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Additional Authorities

STATEMENT OF THE CASE

Nature of the Case

Mohammad Habeb asserts that there was not sufficient evidence to support the restitution award in this case. To that point, rather than hold the State to its burden of persuasion, the district court weighed the lack of necessary evidence against Mr. Habeb. Properly applying the burdens of production and persuasion, the State failed to carry its burden to prove the actual economic loss as required by the restitution statute. As such, this Court should vacate the restitution order.

Statement of the Facts and Course of Proceedings

Following a report that the alleged victim in this case, Mazin Al Rubaye, had sexually assaulted Mr. Habeb's girlfriend (who was a minor at the time), Mr. Habeb and his girlfriend's brother accosted Mr. Al Rubaye.[1] (*See* Prelim Tr., p.27, Ls.6-10; Presentence Investigation Report (*hereinafter*, PSI), p.3.) A jury ultimately convicted Mr. Habeb of misdemeanor assault and felony malicious injury to property for hitting Mr. Al Rubaye's car with a baseball bat.[2] (R., pp.33-34, 121-22.) The district court ultimately withheld judgment for a three-year period of probation. (R., pp.143-48.)

The State subsequently requested restitution for the damage to Mr. Al Rubaye's car. (R., pp.134-35.) Mr. Habeb objected and the matter went to a hearing. (R., p.151.) At that hearing, the prosecutor presented a repair estimate for the car and an estimate from Kelley Blue

[1] At the time of the incident, Mr. Habeb was 20 years old and Mr. Al Rubaye was 19 years old. (PSI, p.43.)
[2] The jury also found Mr. Habeb guilty on a reckless driving charge. (R., pp.34, 123.)

Book for the market value of that model of car. (*See* Ex., pp.13-19; Tr., p.8, Ls.8-16.)[3] However, on cross-examination, Mr. Al Rubaye admitted that his father, who had bought the car for him, had gotten it cheaply because he had salvaged it after it had been in an accident and rebuilt it. (Tr., p.13, L.9 - p.14, L.14; *see* R., p.157.) Mr. Al Rubaye admitted he did not know how much his father had paid for the car or how much money he had put into fixing it up. (Tr., p.14, L.15 - p.15, L.16.) He also admitted that he had not submitted a claim to his insurance company. (Tr., p.15, L.17 - p.16, L.11.) Mr. Al Rubaye's father did not testify. (R., p.155; *see generally* Tr.)

Defense counsel argued that, in light of Mr. Al Rubaye's testimony, the Blue Book estimate did not show the actual value of Mr. Al Rubaye's car, since it reported the estimated market value of a car with a clean title. (Tr., p.23, L.24 - p.24, L.2; *see* R., p.157 (the district court finding the car had a salvage title).) Defense counsel also highlighted the fact that Mr. Al Rubaye did not know the actual market value of the car, and that he had not submitted a claim to his insurance company, noting that the insurance company might have simply totaled the car out because of its reduced value as a salvaged vehicle. (Tr., p.26, Ls.1-6, p.24, Ls.4-6.) As such, defense counsel argued that the State had failed to carry its burden to prove the cost of repair represented the actual economic loss. (*See* Tr., p.26, Ls.7-9.)

The district court acknowledged that "[i]f the cost of repair exceeds the value of the car, the victim is entitled to the value, not the cost of repair." (R., p.157.) It concluded that "[i]t can safely be said that the value of a vehicle or vessel with a salvage title is less than that for a vehicle or vessel with a 'clean' title, all else being equal." (R., p.157.) It also pointed out that

[3] Citations to "Ex." refer to the page numbers from the electronic PDF document "Habeb 45949 ex."

the estimated repair costs were only slightly less than the low end of the Blue Book estimate for a clean-titled car of that same model.[4] (R., p.157.) As such, it concluded the State's evidence was sparse and of questionable reliability. (R., pp.155, 157-58.)

Nevertheless, the district court decided that, because Mr. Habeb had not presented evidence of the actual market value of the car, it would award restitution for the costs of repair: "He is as entitled to produce evidence at the hearing as is the state. He leaves it to the Court to infer, as it does, that there is a salvage vehicle involved, but does not come forth with any evidence as to the actual effect of that fact on the value of the car, let alone *this* car."[5] (R., p.158 (emphasis from original).) Mr. Habeb filed a notice of appeal timely from the order for restitution. (R., pp.160, 163.)

[4] The Blue Book estimate put the value of a clean-titled car between $6,535 and $8,032. (Ex., p.13.) The repair estimate put the total cost of repair at $5,860. (Ex., p.17.)

[5] The district court refused to award restitution for other work on the car as the State had offered no evidence showing how that work was required as a result of Mr. Habeb's criminal conduct. (R., pp.156-57.)

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. Standard Of Review

Restitution is a matter within the district court's discretion, though its exercise of that discretion is guided by the provisions of I.C. § 19-5304. *State v. Corbus*, 150 Idaho 599, 602 (2011). A district court abuses its discretion if it fails to recognize the issue is one of discretion, it acts beyond the outer boundaries of its discretion or acts inconsistent with the applicable legal standards, or it reaches its decision without exercising reason. *State v. Hedger*, 115 Idaho 598, 600 (1989). Here, the district court's decision is contrary to the applicable legal standards.

B. Properly Applying The Burdens Of Production And Persuasion, The State Failed To Meet Its Burden To Prove The Actual Economic Loss In This Case

The restitution statute is clear that restitution is only properly awarded for the economic loss the victim actually suffers as a result of the defendant's criminal conduct. I.C. § 19-5304(2). The State bears the burden to prove the actual economic loss by a preponderance of the evidence. I.C. § 19-5306(6); *State v. Nienburg*, 153 Idaho 491, 498 (Ct. App. 2012); *State v. Card*, 146 Idaho 111, 114-15 (Ct. App. 2008). Relevant to the restitution request in this case, the economic loss is "the value of the property taken, destroyed, broken, or otherwise harmed." I.C. § 19-5304(1)(a). The "value" of the property is determined by "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." I.C. § 19-5304(1)(c) (incorporating the definition provided in I.C. § 18-2402(11)).

When property is damaged, but not fully destroyed, the value of the property can be calculated by "[e]ither the diminuation of the object's fair market value or the reasonable cost of

repair." *State v. Hughes*, 130 Idaho 698, 703 (Ct. App. 1997) (specifically evaluating the calculation of value in regard to the value element of a malicious injury to property charge). However, "when the cost of repair is chosen, this measure may not exceed the market value of the item before the damage, for an offender cannot cause an economic loss that surpasses the actual value of the property damaged." *Id*. (internal quotation omitted). To that point, the restitution statute is clear that "restitution shall be ordered for any economic loss which the victim actually suffers," and that the word "actually" means "existing in fact or reality" rather than being merely "potential or possible." *State v. Straub*, 153 Idaho 882, 889 (2013) (internal quotations omitted). Accordingly, if the repair value is greater than the market value of the property prior to the defendant's actions, the repair value does not represent the economic loss *actually* suffered as a result of the defendant's actions. (*See* R., p.157 (the district court acknowledging this point).)

Thus, when the State seeks to prove the value of property through the cost of repair measure, "[t]he defendant may challenge the cost of repair measure, therefore, by presenting evidence of a lesser fair market value." *Hughes*, 130 Idaho at 703. That, however, does not change the ultimate burden of persuasion, and thus, does not change anything in regard to against whom the lack of evidence about the actual market value must weigh. *See* I.R.E. 301(a) (discussing the shifting of the burden of production, but noting that the burden of persuasion "remains on the party who had it originally")[6]; *see also* Wayne R. LaFave, 6 Search &

[6] I.R.E. 301(a) discusses the burdens of proof in regard to evidentiary presumptions in civil cases. Since restitution proceedings are civil in nature, the rules of civil procedure apply to them. *See, e.g., State v. Jensen*, 149 Idaho 758, 762 (Ct. App. 2010). Thus, I.R.E. 301(a) is applicable to restitution proceedings for the same reasons.

Seizure § 11.2(b) (5th ed.) (discussing the difference between the burden of production and the burden of persuasion in regard to motions to suppress).

Rather, what the *Hughes* Court recognized is that the burden of production shifts when the State seeks to prove value of property through the cost of repair measure because there is an evidentiary presumption that the cost of repair is equal to the actual market value. *See Hughes*, 130 Idaho at 703. The Idaho Supreme Court has provided a useful hypothetical which illustrates how the burdens shift in cases like Mr. Habeb's:

> [A]ssume plaintiff goes forward with evidence of fact P, a predicate fact from which a presumption of fact E, an element of plaintiff's case, arises. Assume further that the plaintiff moves for a directed verdict. If the district court, in its discretion, finds that a reasonable person could infer the existence of fact E from the evidence of fact P, then the court will shift the burden of producing evidence of the nonexistence of fact E to the defendant. The defendant must go forward with sufficient evidence such that the court, in its discretion, finds that a reasonable person could find the nonexistence of fact E. If the defendant goes forward with evidence insufficient for a reasonable person to find the nonexistence of fact E, then the court would have to direct a verdict for the plaintiff on fact E. . . . In those cases where the defendant introduces such compelling evidence that the court finds no reasonable person could find the existence of E, then the court should direct a verdict on that issue for the defendant.

Bongiovi v. Jamison, 110 Idaho 734, 738 (1986). In Mr. Habeb's case, the State went forward with evidence of the cost of repair (fact P), which, under the *Hughes*' rationale, gave rise to a presumption that the actual economic loss (fact E) was equal to the cost of repair. With that evidentiary presumption about the elements of its restitution claim, the State had met its initial burden of production to go forward. At that point, the burden of production shifted to Mr. Habeb to produce evidence upon which a reasonable person could find the nonexistence of the presumed fact E (*i.e.*, he had to produce evidence upon which a reasonable person could conclude that the actual market value, and thus, the actual economic loss, was less than the cost of repair). *See id*; *Hughes*, 130 Idaho at 703.

Here, it is important to remember that, regardless of which party bears the burden of production, it is only a burden to establish that the case should go forward to an ultimate weighing of the facts in light of the applicable burden of persuasion. LaFave, 6 Search & Seizure § 11.2(b). Therefore, in order to satisfy his burden of production, Mr. Habeb only needed to "introduce sufficient evidence such that a jury could reasonably find one or more of the element of the [applicable] test had not been met." *Bongivoi*, 110 Idaho at 739; *cf.* 2 McCormick on Evid., § 338 (7th ed.) (explaining that, in order to meet the burden of production, the bearing party need only present evidence "such that a reasonable person could draw from it the inference of the existence of the particular fact to be proved"). In other words, the burden of production did not require Mr. Habeb to affirmatively disprove the presumption in question, as that would effectively turn the shifting burden of production into a shifting burden of persuasion, which is improper under the applicable rule. I.R.E. 301 (providing that the burden of persuasion does not change between the parties; rather it "remains on the party who had it originally"); *Bongiovi*, 110 Idaho at 737 (explaining that affirmative proof is not required when dealing with presumptions and the burden of production because, were such affirmative proof required, the party presenting the affirmative proof would almost certainly prevail regardless of the presumption).

To meet the shifted burden of production, defense counsel elicited testimony from Mr. Al Rubaye revealing that the car had a salvage title. (*See* Tr., p.13, L.9 - p.14, L.14; R., p.157.) He also elicited testimony revealing that Mr. Al Rubaye did not try to get an evaluation of the actual market value of the car, as he had not submitted a claim to his insurance company. (*See* Tr., p.15, L.17 - p.16, L.11.) Additionally, the district court noted that the State's own exhibits showed that the market value of a clean-titled car of the same model was "very

close" to the cost of repair. (R., p.157.) Based on the testimony defense counsel elicited and the exhibits in the record, a reasonable person could infer not only that the actual market value of Mr. Al Rubaye's car was lower than the value of a clean-titled car,[7] but also that, because of the closeness of the value of a clean-titled car and the cost of repair, the actual market value of Mr. Al Rubaye's car was less than the cost of repair. Therefore, Mr. Habeb met his burden of production to go forward to a weighing of the facts under the applicable burden of persuasion.

In other words, once Mr. Habeb met his burden of production, he "burst the bubble" of the presumption, and "the character of the property will be decided based solely on the evidence admitted concerning the issue." 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).[8] When the bubble bursts, "the presumption disappears and the party with the benefit of the presumption retains the burden of persuasion on the issue." *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 736, 745 (1997); *accord Bongiovi*, 110 Idaho at 739. Simply put, once Mr. Habeb met his burden of production, the State "had to prove all of the elements [including the actual economic loss] by a preponderance of the evidence." *Matter of Estate of Smith*, ___ P.3d ___, 2018 WL 3614783, *13 (2018).

[7] The district court acknowledged the reasonableness of that inference. (R., p.157.)

[8] While the corresponding federal rule rejected the bursting bubble approach, *see* Advisory Committee Notes to F.R.E. 301, Idaho has expressly adopted it. *Bongiovi*, 110 Idaho at 738. In fact, I.R.E. 301, which was rewritten in 2018, still expressly contains the bursting bubble analysis in the language of the rule itself: "If that party [opposing the presumption] meets the burden of producing evidence, the jury must not be instructed on the presumption and the trier of fact may determine the existence or nonexistence of the presumed fact without regard to the presumption." I.R.E. 301; *cf. Matter of Estate of Smith*, ___ P.3d ___, 2018 WL 3614783, *13 (2018) (articulating the bursting bubble analysis in its application of Idaho's rule); *Hagerman Water Right Owners.*, 130 Idaho at 745 (same).

Therefore, once Mr. Habeb met his burden of production, the district court had to weigh the contradictory facts under the applicable burden of persuasion. *Compare Hagerman Water Right Owners*, 130 Idaho at 746 (noting that the facts alleged in the affidavits in that case were sufficient to dispel the presumption at issue, and so, the matter simply had to be resolved by the fact finder under the applicable burden of persuasion). That is where the district court erred in this case – it failed to properly apply the burden of persuasion, putting it on Mr. Habeb rather than the State, which had always borne that burden: "He is as entitled to produce evidence at the hearing as is the state. He . . . does not come forth with any evidence as to the actual effect of that fact on the value of the car, let alone *this* car." (R., p.158 (emphasis from original).) Essentially, what the district court did was accept the evidentiary presumption that the cost of repair was equal to the actual market value and require Mr. Habeb to affirmatively disprove that presumption. (R., pp.157-58.) That is directly contrary to the applicable legal standards set forth in the statute, rules, and precedent discussed *supra*.

Rather, since the State bore the burden of persuasion, it had the obligation to prove the actual economic loss by a preponderance of the evidence. I.C. § 19-5306(6); *Nienburg*, 153 Idaho at 498; *Card*, 146 Idaho at 114-15. Without the benefit of the evidentiary presumption that the cost of repair equaled the actual market value, the State had to show, by a preponderance of the evidence, that the cost of repair was less than the actual market value of the car, and thereby prove that the cost of repair represented the actual economic loss in this case. Therefore, any residual burden of production as to the actual market value of Mr. Al Rubaye's car lay on the State. *See State v. Davila*, 127 Idaho 888, 891 (Ct. App. 1995) (quoting McCormick on Evidence § 151 (John W. Strong ed. 4th ed. 1992) (explaining that, if, after the prosecution met its initial burden of production to show a statement was made voluntariness, "'the defendant

introduces evidence suggesting [the confession was involuntary], the prosecution may well have to respond with more detailed and persuasive evidence in order to meet its burden of persuasion'"). In other words, as a result of the applicable burden of persuasion, the lack of evidence about the actual market value should have weighed against the State. *Compare Hughes*, 130 Idaho at 704 (vacating the felony conviction in that case because the State's evidence failed to establish the actual value of the property, and so, the State had failed to present sufficient evidence to overcome its burden of proof on the value element of its case).

Properly applying the burdens of production and persuasion, this case is very similar to *Hughes*. Notably, Mr. Al Rubaye admitted he did not know what the actual market value of the car was, as he did not know what his father had paid for it (and his father did not testify to that fact either), and he admitted that he had not sought a valuation to that effect from the insurance company. (Tr., p.14, L.15 - p.15, L.16; p.15, L.17 - p.16, L.11.) The *Hughes* Court pointed to essentially the same testimony when it found that the State had failed to carry its burden of proof as to the value element at issue in that case: "In the present case, however, the owner's opinion as to market value was not offered by the State and, on cross-examination, the owner acknowledged that he did not have an opinion as to the garage door's market value." *Hughes*, 130 Idaho at 704 n.1. Additionally, since the Blue Book estimate is only for a car *similar to* Mr. Al Rubaye's, it does not represent the actual market value of *Mr. Al Rubaye's* car at the time and place of the crime as required by I.C. § 19-5304(1)(c).

Since there is no evidence showing that the cost of repair was less than the actual market value of the car in question, and with the bubble of the presumption to that effect burst, there is no evidence that the cost of repair represented the *actual* economic loss in this case. Because the

State failed to carry its burden of persuasion in that regard, as required by the restitution statute, the restitution award in this case should be vacated.

CONCLUSION

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

DATED this 26th day of September, 2018.

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 26th day of September, 2018, 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

BRD/eas