

2017 IL App (2d) 150570-U
No. 2-15-0570
Order filed June 15, 2017

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of Kane County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 13-CF-169
)	
JOHN D. HOLSKER,)	Honorable
)	T. Clint Hull,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Presiding Justice Hudson and Justice Schostok concurred in the judgment.

ORDER

¶ 1 *Held:* Defense counsel was not ineffective for failing to challenge an insurance company's valuation of certain items for purposes of a restitution award: the insurance company had a proper basis for valuing those items even if it did not independently price them, and in any event the victim's own evidence of valuation was sufficient to support the award.

¶ 2 Defendant, John D. Holsker, appeals from the judgment of the circuit court of Kane County sentencing him to pay restitution to the victim of his burglary. He contends that his trial counsel was ineffective for failing to object to the valuation of certain of the stolen items.

Because the evidence established the value of those items, counsel was not ineffective, and thus we affirm.

¶ 3

I. BACKGROUND

¶ 4 Defendant was charged by information with one count of burglary (720 ILCS 5/19-1(a) (West 2012)) and one count of theft (720 ILCS 5/16-1(a)(1) (West 2012)), arising out of the theft of cash and personal property from the victim's automobile.

¶ 5 Defendant pled guilty to the burglary charge with no agreement as to restitution. Thus, the restitution issue was resolved at the sentencing hearing.

¶ 6 The following evidence was established at sentencing. According to the victim, Mary Ann Leone, shortly after midnight on January 15, 2013, she parked her Lexus sedan in the parking lot at a Meijer store and went in the store with her daughter. Because Leone was moving from Florida to the Elgin area, her Lexus was full of her personal possessions, including \$7,000 in cash. When she returned to her car, she discovered that her property had been taken.

¶ 7 Leone had an insurance policy with Allstate Insurance Company (Allstate) covering theft of the property. In filing a claim, Leone submitted an itemized list, which included a value for each item stolen. To support the claimed values for the items she had purchased, Leone submitted her credit card statements. As for the value of the items that were gifts, Leone and her daughter researched online and "got the closest amount that [they] could come to." The \$7,000 consisted of various bank withdrawals that Leone had saved. According to Leone, her claim totaled around \$60,000.

¶ 8 Danielle Zimmerman, a claims adjuster for Allstate, testified that, although she was not personally involved with Leone's claim, she was familiar with such claims. Zimmerman

identified a document created by Allstate regarding Leone's claim. According to Zimmerman, the items identified in the claim document mirrored the list submitted by Leone.

¶ 9 Zimmerman identified the total replacement cost of the items as \$61,937.17. Of that amount, \$12,632.59 was attributable to depreciation. The depreciation would have been compensable had Leone replaced the stolen items. However, Leone did not replace any items.

¶ 10 Zimmerman identified \$49,304.58 as the actual cash value of the stolen items. That amount was the difference between the replacement cost and the depreciation. The \$49,304.58 was reduced to \$48,304.58 because of the \$1,000 deductible.

¶ 11 According to Zimmerman, Allstate then deducted \$29,694.60, which represented the loss amount that exceeded the policy limits for various items, from the \$48,304.58. Thus, Allstate paid Leone \$18,609.98.

¶ 12 Zimmerman testified that the loss for which Leone was not paid was \$43,327.19. That amount was the difference between the replacement cost of \$61,937.17 and the \$18,609.98 paid to Leone.

¶ 13 On cross-examination, Zimmerman testified that, although it is helpful when determining value if an insured supplies receipts, Allstate does not require receipts, especially if an item is old. In such a case, Allstate looks to "like, kind, and quality." Allstate uses a system that has many prices from different sources for various items. In the situation of a unique item, Allstate would look to Ebay for the price of similar items.

¶ 14 If there was a difference between the value submitted by the insured and that ascertained by Allstate, Allstate would ask the insured to identify the website relied upon or to provide other verification of the value. Also, Allstate would typically accept the value from the insured where, as here, the insured filed a police report. Allstate usually "[trusted] that [insureds were] not

lying.” Otherwise, because it required some verification of value, Allstate paid based on what it determined the value to be. Defendant offered no evidence.

¶ 15 The court found Leone credible and that the State had met its burden of proof. Accordingly, the court ordered defendant to pay Allstate restitution of \$18,609.98. The court further ordered defendant to pay Leone restitution of \$31,694.60 (the difference between the \$44,327.19 that Leone was not paid for her loss (including the \$1,000 deductible) and the \$12,632.59 attributable to unclaimed depreciation). The court sentenced defendant to 48 months’ probation.

¶ 16 Defendant filed a motion to reconsider, contending that restitution was improper for any items not specified in the factual basis for the guilty plea. The trial court denied the motion to reconsider, and defendant filed a timely notice of appeal.

¶ 17 II. ANALYSIS

¶ 18 On appeal, defendant contends that his trial counsel was ineffective for failing to argue that the claim document did not represent the fair-market value of some of the stolen items, as Allstate did not price those items.

¶ 19 A claim asserting the ineffective assistance of counsel is governed by the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Domagala*, 2013 IL 113688,

¶ 36. To prevail under that standard, a defendant must show that counsel’s performance was deficient and prejudicial. *Domagala*, 2013 IL 113688, ¶ 36. Specifically, a defendant must show that counsel’s performance was objectively unreasonable under prevailing professional norms and that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. *Domagala*, 2013 IL 113688, ¶ 36. A reasonable probability is one that is sufficient to undermine confidence in the outcome. *People*

v. Simpson, 2015 IL 116512, ¶ 35. The failure to satisfy either the performance or the prejudice prong precludes a finding of ineffectiveness. *Simpson*, 2015 IL 116512, ¶ 35.

¶ 20 Section 5-5-6(b) of the Uniform Code of Corrections authorizes restitution for the actual out-of-pocket expenses, losses, damages, and injuries suffered by a victim. 730 ILCS 5/5-5-6(b) (West 2012). Alleged losses that are unsupported by the evidence must not be used as a basis for awarding restitution. *People v. Jones*, 206 Ill. App. 3d 477, 482 (1990). In determining the victim's actual loss, the court must not speculate or guess. *People v. Dickey*, 2011 IL App (3d) 100397, ¶ 25. The court's determination of the proper amount of restitution will not be reversed absent an abuse of discretion. *People v. Clausell*, 385 Ill. App. 3d 1079, 1080 (2008). We will reverse a restitution order only when no reasonable person would take the trial court's view. *In re Shatavia S.*, 403 Ill. App. 3d 414, 418 (2010). Accordingly, unless the record shows no evidentiary or factual basis for the court's finding as to the restitution amount, we will uphold the restitution order. *In re Shatavia S.*, 403 Ill. App. 3d at 418.

¶ 21 In this case, defendant contends that his trial counsel was ineffective for failing to object to the Allstate valuation of certain items, because Allstate did not price those items. We disagree.

¶ 22 Although Allstate did not price certain items, because the policy limits for those items had been met, Leone submitted values for all of her stolen items, including those that Allstate did not price. According to Zimmerman, Allstate would typically accept the value of an item as asserted by the victim when the victim had filed a police report. Additionally, Allstate generally trusted its insureds. Because Leone filed a police report, and because Zimmerman did not suggest that there was any reason to distrust her, it could reasonably be inferred that Allstate accepted Leone's proposed values for those items that Allstate did not price. Therefore, Allstate

placed a value on those items, even though it did not independently price them. Thus, trial counsel was not deficient for not objecting to Allstate's failure to price those items.

¶ 23 Even if counsel was deficient for failing to object, defendant suffered no prejudice. Leone submitted credit card receipts for all of the items that she had purchased. As for the items that were gifts, she performed Internet research to ascertain the value of those items. Given that the trial court found Leone credible, her testimony provided sufficient evidence of the value of the stolen items, including those that Allstate did not price. See *People v. Morgan*, 259 Ill. App. 3d 770, 786 (1994) (notwithstanding an absence of documentary evidence, the amount of loss can be supported properly by the victim's testimony). Because there was sufficient independent evidence to establish the value of the unpriced items, counsel's failure to object to Allstate's valuation caused defendant no prejudice.

¶ 24 Defendant's reliance on *People v. Heinz*, 407 Ill. App. 3d 1016 (2011), is misplaced.¹ In that case, we held that, because the testimony supporting the restitution was vague as to some

¹ Although the State contends that defendant cannot rely on *Heinz*, because it was vacated by the supreme court (see *People v. Heinz*, 238 Ill. 2d 662 (2010) (table)), we disagree. This court originally held, among other things, that trial counsel was ineffective for failing to object to the State's request for restitution. *People v. Heinz*, 391 Ill. App. 3d 854, 863-64 (2009). The supreme court directed us to vacate our judgment and reconsider it as to whether the theft was a lesser included offense of the burglary. See *Heinz*, 407 Ill. App. 3d at 1023. In doing so, the supreme court did not speak to the restitution issue. Upon reconsideration, we simply adopted our prior analysis and conclusion regarding restitution, as set forth in our original *Heinz* opinion. See *Heinz*, 407 Ill. App. 3d at 1024. Thus, defendant may properly rely on our analysis and conclusion as originally set forth and subsequently adopted.

items and nonexistent as to others, defense counsel was ineffective for failing to object at sentencing or to challenge the restitution order in a motion to reconsider. *Heinz*, 391 Ill. App. 3d at 863. Here, by contrast, there was extensive testimony from both Leone and Zimmerman as to the value of the stolen items. Thus, *Heinz* is distinguishable from this case.

¶ 25

III. CONCLUSION

¶ 26 For the reasons stated, we affirm the judgment of the circuit court of Kane County. As part of our judgment, we grant the State's request that defendant be assessed \$50 as costs for this appeal. 55 ILCS 5/4-2002(a) (West 2016); see also *People v. Nicholls*, 71 Ill. 2d 166, 178 (1978).

¶ 27 Affirmed.