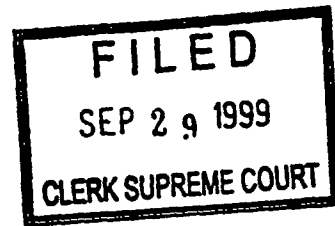


IN THE COURT OF APPEALS OF IOWA

No. 1999-137 (9-353) / 98-1689

Filed September 29, 1999



STATE OF IOWA,

Appellee,

vs.

JOSHUA LEE HENRY,

Appellant.

Appeal from the Iowa District Court for Carroll County, Joel E. Swanson,
Judge.

Joshua Henry appeals the restitution order resulting from his conviction for
first-degree theft. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and James G. Tomka, Assistant
State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Martha E. Boesen, Assistant Attorney
General, Barry T. Bruner, County Attorney, and John C. Werden, Jr., Assistant
County Attorney, for appellee.

Considered by Huitink, P.J., and Streit and Habhab*, JJ.

Senior judge assigned by order pursuant to Iowa Code § 602.9206 (1999).

HABHAB, S.J.

Joshua Henry appeals the restitution order resulting from his conviction for first-degree theft. He claims the court erred in setting the amount of restitution and he was denied his constitutional right to effective assistance of counsel. We affirm.

Ronald Muhlbauer was a coin collector. He kept his collection, which he had amassed over thirty-five years, in a safe in his home. On April 29, 1995, Joshua Henry, together with Chris Hallinan, Justin Mozena, and Todd Tryon, entered Muhlbauer's home and broke open the safe. They took jewelry and coins, along with the inventory list.

Pursuant to a plea agreement, Henry pled guilty to theft in the first degree. He was sentenced to a term of imprisonment not to exceed ten years. Defendant was also ordered to pay restitution, in an amount to be determined later.

The restitution hearing was held in August 1998. Muhlbauer testified that in 1995 his coin collection had been worth about \$200,000. The coin inventory was never found so Muhlbauer did not have an exact accounting of his coins. He testified to the best of his memory he had 5500 to 6500 silver dollars, which were each worth between \$25 to \$30. He had fifty-one gold coins, each worth between \$400 to \$700. Muhlbauer owned 100 proof sets, each worth between \$7 to \$10. He had silver fifty-cent pieces, quarters and dimes worth in the aggregate between \$3000 to \$4000. He also had silver bars worth a total of \$150. Pursuant to this testimony, the coins were worth between \$161,750 to \$235,850.

On an insurance form, Muhlbauer listed the coins as being worth \$200,000. The coins were not separately insured and he received only \$200 for the loss under his home owner's insurance police. Muhlbauer was fully compensated by insurance for jewelry taken in the crime, and his claim for restitution did not include jewelry. Coins worth \$6900 were left on the floor after the crime.

Henry testified the coins were taken to the home of Greg Perrien. He stated he did not personally dispose of any of the coins, but received between \$1500 to \$2000 from Hallinan and Mozena, who had disposed of some of the coins. Henry gave Perrien about \$500.

Hallinan cashed some of the coins at a bank for an unknown sum of money. He and Mozena took 850 silver dollars to a pawn shop and received \$4000. Hallinan also took silver dimes to several banks and received a total of \$800.

Mozena testified he sold two gold coins for \$810 in Lincoln, Nebraska. He sold three other gold coins for \$320. He took 500 silver fifty-cent pieces to a bank and received \$250. There is also evidence some gold coins were sold to a bank for about \$500. Hallinan and Mozena shared these profits with Henry and Tryon.

Tryon pawned two rings for \$5425. He used the proceeds to pay off a debt. He testified he did not receive any of the coins.

The district court determined the value of Muhlbauer's coin collection was \$200,000. The court deducted \$6900, which represents the value of the coins which were not taken. The court concluded Henry, Hallinan, Mozena, and Tryon should be

jointly and severally liable for \$193,100 and should pay restitution for this amount.

Henry appealed.

I. Our review of a restitution order is for correction of errors at law. *State v. Watts*, 587 N.W.2d 750, 751 (Iowa 1998). The trial court's findings of fact have the effect of a special verdict. *Id.*

II. Henry contends the State did not present sufficient evidence to show the value of the coins which were taken from Muhlbauer. He believes there should have been more evidence of the coins which were taken and their specific value.

Restitution is authorized by Iowa Code chapter 910. It is a mandatory part of sentencing in Iowa. *State v. Mai*, 572 N.W.2d 168, 171 (Iowa App. 1997). Restitution includes the payment of pecuniary damages to a victim. Iowa Code § 910.1(4). The pertinent portion of the definition of "pecuniary damages" provides:

"Pecuniary damages" means all damages to the extent not paid by an insurer, which a victim could recover against the offender in a civil action arising out of the same facts or event, except punitive damages and damages for pain, suffering, mental anguish, and loss of consortium.

Iowa Code § 910.1(3).

The restitution order must rest on a causal connection between the established criminal act and the injury to the victim. *State v. Wagner*, 484 N.W.2d 212, 216 (Iowa App. 1992). This causal connection is essentially the tort element of proximate cause. *State v. Ihde*, 532 N.W.2d 827, 829 (Iowa App. 1995). It is the burden of the State, not the defendant, to prove the amount of damages causally connected to the criminal act. *State v. Tutor*, 538 N.W.2d 894, 897 (Iowa App. 1995).

Restitution damages are to be determined, with some exceptions not applicable here, in the same manner as in a civil case. Iowa Code § 910.1(3). In civil cases, a damage award will be affirmed if it is within a reasonable range of the evidence. *Watts*, 587 N.W.2d at 752 (citing *Foggia v. Des Moines Bowl-O-Mat, Inc.*, 543 N.W.2d 889, 891 (Iowa 1996)). The supreme court has noted:

Although it may not be possible to value the property with absolute certainty as of a particular date, an award of damages may still stand so long as the figure has a reasonable basis and is not speculative, possible or imaginary, particularly where the conduct of the wrongdoers has rendered it difficult to ascertain the damages suffered with the precision otherwise possible.

Id. (citing 22 Am.Jur.2d *Damages* §430, at 515-516 (1988)).

There is sufficient evidence in the record to support the restitution amount set by the court in this case. The amount of restitution is within the reasonable range of the evidence. The amount set by the district court was not speculative. Muhlbauer testified to the approximate number and value of each type of coin which was taken. The court set the amount of restitution based on Muhlbauer's testimony, as well as the admissions of defendant and the other criminal offenders concerning the number and types of coins taken. The exact value of the coins taken was difficult to determine because the inventory was taken at the same time as the coins. The State adequately proved the amount of damages caused by defendant.

III. Henry asserts the amount of restitution should be reduced by the amount of insurance, \$200, which Muhlbauer received under his home owner's policy

for the coins. Under section 910.1(3), “pecuniary damages” does not include losses covered by insurance.

We question whether this issue has been preserved for appeal. Muhlbauer testified he received \$200 from insurance for the loss of his coins. The oral arguments were not recorded so we do not know if there was any argument on this issue. The district court did not mention the insurance payment in its decision. Defendant did not file any post-trial motion seeking to modify the district court decision.

We have held it is the State’s responsibility to ascertain the proper amount of pecuniary damages, including the offset for insurance. *State v. Wagner*, 484 N.W.2d 212, 217 (Iowa App. 1992). If, however, the county attorney fails to include the insurance offset, the defendant must object to that failure. *Id.* We stated:

[T]he rule is well established that a party may not sit by and permit the trial court to commit inadvertent error without protest, and then complain for the first time to the court on appeal.

Id. (quoting *State v. Lyon*, 223 N.W.2d 193, 194 (Iowa 1974)).

We conclude Henry has failed to preserve this issue for our review. It was raised for the first time on appeal.

IV. Henry contends the district court did not fully consider Perrien’s involvement. We find the district court did consider Perrien’s alleged involvement and rejected the idea of reducing the restitution amount due to the possibility Perrien received some of the proceeds from the crime. Four men--Henry, Hallinan, Mozena, and Tryon--took coins from Muhlbauer’s home on April 29, 1995. The district court

properly made these four men jointly and severally responsible for restitution to Muhlbauer.

V. Henry asserts he received ineffective assistance of counsel at the restitution hearing. He claims his counsel should have sought the recusal of the judge because he had close ties to Muhlbauer. Henry asks to have this issue preserved for postconviction relief.

Postconviction relief under chapter 822 is not available for alleged errors relating to restitution.¹ *State v. Brewer*, 547 N.W.2d 15, 16 (Iowa App. 1996). There is therefore no need to preserve this issue for postconviction relief. Any alleged errors relating to restitution must be resolved on direct appeal or in a chapter 910 proceeding. *Earnest v. State*, 508 N.W.2d 630, 633 (Iowa 1993). Henry has not provided us with sufficient information to address this issue on direct appeal.

We affirm the restitution order entered by the district court. Costs of this appeal are assessed to defendant.

AFFIRMED.

¹Section 822.2(7) provides:

The conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error formerly available under any common law, statutory or other writ, motion, petition, proceeding, or remedy, except alleged error relating to restitution, court costs, or fees under section 904.702 or chapter 815 or 910.