IN THE COURT OF APPEALS OF IOWA

No. 6-697 / 95-1896

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CLERK SUPREME COURT

000427

STATE OF IOWA,

Plaintiff-Appellee,

vs.

BRIAN L. HOYT,

Defendant-Appellant.

Appeal from the Iowa District Court for Cass County, James M. Richardson, Judge.

Brian L. Hoyt appeals from the district court's restitution award following his guilty pleas to fourth-degree fraudulent practice and fourth-degree theft in violation of Iowa Code sections 714.8(3), 714.12, 714.1(5), and 714.2(4) (1995). **AFFIRMED IN PART, REVERSED IN PART AND REMANDED.**

John M. Trewet of Rutherford, Trewet & Petersen, Atlantic, for appellant.

Thomas J. Miller, Attorney General, Robert P. Ewald, Assistant Attorney General, and James P. Barry, County Attorney, for appellee.

Heard by Sackett, P.J., and Streit and Vogel, JJ.

STREIT, J.

This is an appeal where a defendant urges this court to find a criminally defrauded creditor must give a notice of right to cure default before the trial court orders restitution. Brian L. Hoyt appeals from the district court's restitution order following his guilty pleas to fourth-degree fraudulent practice and fourth-degree theft in violation of Iowa Code sections 714.8(3), 714.12, 714.1(5), and 714.2(4) (1995).[1] Hoyt contends the district court erred in ordering restitution for a civil matter and in ordering an excessive amount of restitution.

In August 1994, Brian Hoyt purchased a vehicle from Exira Auto Repair for over $4000. Exira financed $3000 of the purchase price of the new vehicle. Hoyt gave a security interest to Exira. Hoyt made two payments for the vehicle, reducing the balance to $2763.43.

In September 1994, Hoyt applied for a new title to the vehicle. He listed the purchase price as $200 and did not include the notation of Exira's security interest. He then sold the vehicle to a third party.

In May 1995, Hoyt was charged with fourth-degree fraudulent practice for misrepresenting the purchase price to avoid use taxes, and with second-degree theft from Exira for selling the secured property. After a plea agreement, Hoyt plead guilty

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[1] Hoyt was convicted of theft as defined in §714.1 (5): "Takes, destroys, conceals or disposes of property in which someone else has a security interest, with intent to defraud the secured party."

to fraudulent practice charge and fourth-degree theft. The district court sentenced him to a suspended one-year jail term with one-year probation. As a condition of probation, the court ordered Hoyt to pay $155 in use tax to the State of Iowa and $2763.43 to Exira Auto. Hoyt appeals.

I. Amount in Controversy. The State asks the court to dismiss Hoyt's appeal for failure to comply with Iowa Rule of Appellate Procedure 3 (amount in controversy).[2] This case involves restitution ordered as a condition of probation in a criminal case. If Hoyt violates probation he faces criminal sanctions, i.e., incarceration for violation of the court's order or revocation of probation. There is a sufficient nexus to these criminal penalties that the requirement of the amount in controversy for civil appellate jurisdiction does not apply. Appellee's motion to dismiss is denied.

Even if Rule 3 applied, the amount in controversy as shown by the pleadings was up to $10,000. The Trial Information alleged the defendant had "disposed of property . . . valued between $1,000 and $10,000." From this pleading, the amount in controversy was in excess of the jurisdictional amount for appeal. *See Ackerman v. Int'l Business Machines Corp.*, 337 N.W.2d 486, 487 (Iowa 1983).

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[2] RULE 3. AMOUNT IN CONTROVERSY Except where the action involves an interest in real estate, no appeal shall be taken in any case, not originally tried as a small claim, where the amount in controversy, *as shown by the pleadings*, is less than five thousand dollars unless the supreme court or a justice thereof certifies that the cause is one in which appeal should be allowed. Iowa R. App. P. 3. (emphasis added).

II. Restitution. Hoyt appeals from the restitution order. Review of a sentencing court's findings is on error. *State v. Holmberg*, 449 N.W.2d 376, 377 (Iowa 1989). Hoyt claims the issue of his debt to a creditor is one of a civil debtor-creditor matter, not a criminal matter. He asserts since an installment sales agreement underlies his theft charge, this is a contract governed by the Iowa Consumer Credit Code (ICCC). Specifically, Hoyt claims Exira failed to provide him with a notice of right to cure, his debt was uncollectible, and therefore, he owed no restitution. *See* Iowa Code sections 537.5110-5111 (1995). He contends the district court erred in disallowing the evidence that Exira did not comply with the ICCC provisions concerning a notice of right to cure default. Finally, Hoyt contends the district court was without authority to order restitution in excess of $500, the maximum amount for fourth-degree theft.

A. Evidence of ICCC Violation. Hoyt argues the sentencing court erred in failing to allow evidence concerning Exira Auto's failure to comply with the ICCC upon default of his automobile loan with Exira.

Defendant failed to preserve error for this court to review by not making an offer of proof after the state's objection to the evidence was sustained. Offers of proof are so important that we require them to preserve error. *State v. Harrington*, 349 N.W.2d 758, 760 (Iowa 1984). We will not presume prejudice when the answer to the question is not obvious and the proponent made no offer of proof. *State v.*

Windsor, 316 N.W.2d 684, 688 (Iowa 1982) (citation omitted). Nor will we consider error preserved without such an offer unless the whole record makes apparent what is sought to be proven. *In re Estate of Herm*, 284 N.W.2d 191, 197 (Iowa 1979); *State v. Lange,* 531 N.W.2d 108, 114 (Iowa 1995).

However, because this discussion will help clarify the nature of this action, we will address the evidence issue raised on appeal. Even if Hoyt made a proper offer of proof, the court was correct in not allowing evidence concerning Exira Auto's compliance with ICCC. In this case Hoyt sold a vehicle that was subject to a security interest held by Exira. Compliance with the ICCC would be relevant if Exira took action such as repossessing the automobile or the filing of an action for foreclosure of the security interest. Section 537.5110(7) provides that if a creditor commences an action without giving the consumer a notice to cure, the court shall dismiss the action as premature. *Farmers Trust and Savings Bank v. Manning*, 311 N.W.2d 285, 290 (Iowa 1981). Exira took no steps to collect the debt in violation of the ICCC.[3] The State of Iowa, not the victim of the theft, was seeking restitution from the defendant. Restitution was ordered by the District Court.

Determination of relevancy of evidence rests largely in the trial court's discretion. *State v. Mathias,* 216 N.W.2d 319, 322 (Iowa 1974). The ICCC evidence

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[3] Exira's *unsuccessful* attempts to repossess the automobile without giving the proper notices did not invalidate the debt or the security interest.

had nothing to do with the Hoyt's criminal acts and restitution and was therefore irrelevant to the proceedings. The district court did not err in refusing to hear evidence of Exira's alleged non-compliance with the ICCC.

B. Restitution for a Criminal Act. Hoyt claims the district court wrongly ordered civil damages in a criminal proceeding and that such order was greater than the statutory maximum for the offense he was convicted. Iowa Code section 910.2 (1995) requires restitution be made by all offenders to the victims of the offender's criminal activities in all criminal cases in which there is a plea of guilty. Iowa Code § 910.2 (1995). Section 910.1(4) defines "restitution" as "payment of pecuniary damages to a victim in an amount and in the manner provided by the offender's plan of restitution." Iowa Code § 910.1(4) (1995). Section 910.1(2) defines "pecuniary damages" as "all damages . . . which a victim could recover against the offender in a civil action arising out of the same facts or event . . . ."Iowa Code § 910.2(2) (1995).

The rationale of restitution under criminal law is similar to the rational of tort under civil law. *State v. Ihde*, 532 N.W.2d 827, 829 (Iowa App. 1995). A wrong has been done. *Id.* The victim deserves to be fully compensated for the injury by the actor who caused it and is entitled to full compensation under section 910.2 to the extent of the damage caused by the crime. *Id.* (citing *State v. Mayberry*, 415 N.W.2d 644, 645 (Iowa 1987)).

C. Restitution Amount. The restitution order must rest on a "causal connection between the established criminal act and the injuries to the victim." *State v. Holmberg*, 449 N.W.2d 376, 377 (Iowa 1989). This causal connection is essentially the tort element of proximate cause. *Id.* This connection must be shown under "some civil theory such as fault or intentional tort." *Id.* The damage must have been caused by the offender's criminal act to justify the restitution order. *Holmberg*, 449 N.W.2d at 377-78. A restitution order is not excessive "if it bears a reasonable relationship to the damage caused." *Mayberry*, 415 N.W.2d at 647.

The district court ordered $2,763.43 restitution, the amount owed by Hoyt to Exira Auto. We find the fair measure of restitution damages as a result of a criminal act of theft by disposal of secured property would be the fair market value of the property, not to exceed the secured debt, at the time said theft occurred. *See State v Petrie*, 478 N.W.2d 620, 622 (Iowa 1991) (Only such fees and costs attributable to the conviction should be recoverable under a restitution plan). The amount of restitution should be determined based on actual loss. See *State v. Wagner*, 484 N.W.2d 212, 215-16 (Iowa App. 1992) (the restitution amount must be in accord with the damages caused by the crime). Damages in this case amount to the value of the vehicle that was sold in violation of Exira's security interest, i.e., the value of the collateral that was criminally disposed of. The destroyed security interest had no more value than the collateral that was sold. If the fair market value of the vehicle is not equal to the

amount owed to Exira, Exira may still sue and recover damages from Hoyt in a civil action. *See* Iowa Code § 910.8 (1995).

We remand to the trial court to modify its restitution order to equal the fair market value of the vehicle at the time of the theft, not to exceed the amount of the secured debt.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.