

IN THE SUPREME COURT OF THE STATE OF NEVADA

PAUL K. RAY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.


No. 46577

PAUL K. RAY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 47078

FILED

JAN 29 2008

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY  DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART AND
REMANDING

These are consolidated appeals from a judgment of conviction, upon jury verdict of one count of theft, and from an amended judgment of conviction modifying the restitution provision in the conditions of probation. Eighth Judicial District Court, Clark County; Valorie Vega, Judge.

Following a three-day trial, appellant Paul K. Ray was convicted of felony theft by embezzlement on September 9, 2005. Ray was convicted of theft of approximately \$27,000 from Ellen Stokes for whom Ray had acted in his capacity as her financial advisor and investor. Stokes gave Ray an initial investment amount of \$75,000 for stocks and mutual funds. The two vigorously disputed whether the investment money was for Stokes' personal financial gain or for the parties' mutual benefit via investment in Excel Corporation (a multi-level telecommunications marketing company). Ray claimed that the \$27,000 was legitimately lost in stock devaluation or in expenses to promote Excel.

Arguments improperly brought for the first time on appeal

In his appeal, Ray asserts several claims that were not properly objected to at trial and are therefore improperly raised for the first time on appeal. Specifically, Ray contends that: (1) the jury instruction form resulted in a misdemeanor theft conviction rather than a felony conviction because the instruction did not specifically state an amount stolen; (2) the district court erred by not issuing a venire instruction on a potential juror's racial remark; (3) the district court erred in allowing the jury to deliberate until 1:30 in the morning; and (4) the prosecutor committed misconduct during his closing argument regarding comments directed at defense counsel. Because Ray failed to object to these errors below, they cannot now be brought for the first time on appeal. Nonetheless, "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."¹ After examination, we hold that Ray's contentions do not warrant reversal under a plain error analysis.

Judicial estoppel

Ray also improperly raises the issue of whether the district court erred by allowing the parties to stipulate to omit the indictment from the jury instructions. We conclude that Ray is judicially estopped from raising this argument. A party who participates in an error or who invites a district court action perceived as favorable to him may not then claim it is error on appeal.² Judicial estoppel is applied when the same

¹Gallego v. State, 117 Nev. 348, 365, 23 P.3d 227, 239 (2001); NRS 178.602.

²Rhyne v. State, 118 Nev. 1, 9, 38 P.3d 163, 168 (2002).

party takes two inconsistent positions in a judicial proceeding, was successful in asserting the first position, and the first position was not taken as the result of ignorance, fraud, or mistake.³

We hold that Ray's contention that the district court erred in allowing omission of the indictment meets these elements. First, Ray stipulated to the omission at trial, thus taking the first position with no clear evidence that ignorance, fraud, or mistake led to the stipulation. The district court accepted the stipulation, and on appeal Ray asserts that the stipulation was disadvantageous to him. Because these elements are met, Ray is now judicially estopped from raising this argument on appeal.

Sufficiency of the evidence

Additionally, Ray raised an argument that insufficient evidence was presented to result in a conviction. We review whether sufficient evidence existed based on whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt, after viewing the evidence in the light most favorable to the prosecution."⁴ Based on the testimonial evidence presented, a rational trier of fact could have concluded that Ray committed the crime of theft. Therefore, we conclude that substantial evidence existed to support Ray's conviction.

Victim's civil attorney fees as part of restitution

Ray also argued that the district court violated his right to due process by relying on insufficient evidence when determining restitution,

³NOLM, LLC v. County of Clark, 120 Nev. 736, 742-43, 100 P. 3d 658, 663 (2004).

⁴Domingues v. State, 112 Nev. 683, 693, 917 P.2d 1364, 1371 (1996).

and by including Stokes' civil attorney fees in the restitution amount. We hold that the district court had sufficient evidence upon which to base its restitution amount. We further hold that the district court erred when it awarded Stokes' civil attorney fees. We review a district court's decision to award restitution for abuse of discretion.⁵ However, the district courts retain wide discretion to set restitution amounts based on reliable and accurate evidence.⁶ Previously, we have allowed criminal restitution to include payment to third parties for medical bills, the cost of social services, and the cost of public defense.⁷ However, a district court may not properly award a victim's civil attorney fees as part of restitution.⁸ We conclude that a victim may not recover attorney fees as part of a

⁵Martinez v. State, 114 Nev. 735, 738, 961 P.2d 143, 145 (1998); (citing Randell v. State, 109 Nev. 5, 8, 846 P.2d 278, 280 (1993)).

⁶Martinez v. State, 115 Nev. 9, 12-13, 974 P.2d 133, 133-35 (1999).

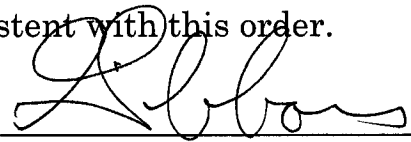
⁷See, e.g., Martinez, 115 Nev. at 11, 974 P.2d at 134; Roe v. State, 112 Nev. 733, 735, 917 P.2d 959, 960 (1996).

⁸See NRS 205.0835(5). See generally State v. Parker, 139 P.3d 767, 770 (Idaho App. Ct. 2006) (holding in a factually similar case that, "[t]he lawsuit and associated attorney fees were unnecessary to recover the victim's direct loss caused by the forgeries, for that loss was entirely compensable through the restitution order in the criminal case. Any judgment that the victim might have recovered in the civil litigation . . . would have been duplicative of the restitution ordered in the criminal case. Therefore, attorney fees related to the lawsuit are not an economic loss compensable through a restitution order.").

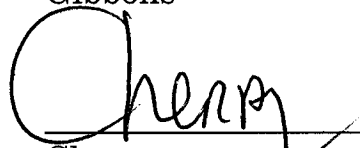
restitution award in a criminal case when the fees were incurred in a civil action, filed before the criminal trial, and seeking damages that could be recovered as restitution in the criminal trial.

In this case, Stokes filed a civil lawsuit to recover the lost portion of her \$75,000 investment before criminal charges were brought. The civil suit never proceeded because Ray received a bankruptcy judgment. Although there was no clear record detailing the civil suit, Stokes claims that she incurred \$20,000 in attorney fees. At sentencing the district court remarked that "the appropriate restitution would include what he was convicted of, that \$27,000, plus approximately one-third of the attorney's fees that were occasioned [by Stokes] as a result thereof in pursuing recouping funds lost." We conclude that the district court erred in awarding restitution for civil attorney fees. Therefore, we


ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.

 _____, C. J.

Gibbons

 _____, J.

Cherry

 _____, J.

Saitta

cc: Hon. Valorie Vega, District Judge
Clark County Public Defender Philip J. Kohn
Attorney General Catherine Cortez Masto/Carson City
Attorney General Catherine Cortez Masto/Consumer Protection
Bureau/Las Vegas
Attorney General Catherine Cortez Masto/Las Vegas
Clark County District Attorney David J. Roger
Eighth District Court Clerk

