

IN THE SUPREME COURT OF THE STATE OF NEVADA

ERIN KELLY CLEVELAND,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 51621

FILED

SEP 05 2008

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY Alvarado
DEPUTY CLERK

ORDER AFFIRMING IN PART, VACATING IN PART AND
REMANDING

This is an appeal from a judgment of conviction, pursuant to a guilty plea, of one count of embezzlement. Second Judicial District Court, Washoe County; Connie J. Steinheimer, Judge. The district court sentenced appellant Erin Kelly Cleveland to a prison term of 12 to 32 months and ordered her to pay \$7,796 in restitution.

Cleveland contends that the district court abused its discretion by ordering restitution without establishing a sufficient basis for the restitution award. Cleveland argues that the restitution award was not supported with adequate documentation or sworn testimony and was awarded over her objection. Cleveland claims that the restitution award should be vacated and the matter remanded to the district court for a new sentencing hearing. We agree.

“[A] defendant may be ordered to pay restitution only for an offense that he has admitted, upon which he has been found guilty, or

upon which he has agreed to pay restitution.”¹ A district court retains the discretion “to consider a wide, largely unlimited variety of information to insure that the punishment fits not only the crime, but also the individual defendant.”² A district court, however, must rely on reliable and accurate information in calculating a restitution award.³ Absent an abuse of discretion, “this court generally will not disturb a district court’s sentencing determination so long as it does not rest upon impalpable or highly suspect evidence.”⁴

At the restitution hearing, the State presented an unsworn incident report prepared by the victim’s loss prevention officer identifying a total loss of \$7,796. The State also presented Cleveland’s unsworn written statement to the loss prevention officer, in which she admitted that she had caused losses to the victim and stated that loss prevention had documented the losses at \$7,796. Finally, the State presented copies of numerous receipts and other records documenting misreported work hours and unauthorized markdowns and refunds Cleveland gave customers when she was working as a cashier for the victim. Cleveland testified at the restitution hearing and acknowledged that she owed restitution for all documented losses to the victim, but objected to the

¹Erickson v. State, 107 Nev. 864, 866, 821 P.2d 1042, 1043 (1991); see also NRS 176.033(1)(c) (“If a sentence of imprisonment is required or permitted by statute, the court shall: . . . [i]f restitution is appropriate, set an amount of restitution for each victim of the offense . . .”).

²Martinez v. State, 114 Nev. 735, 738, 961 P.2d 143, 145 (1998).


³See Martinez v. State, 115 Nev. 9, 13, 974 P.2d 133, 135 (1999).

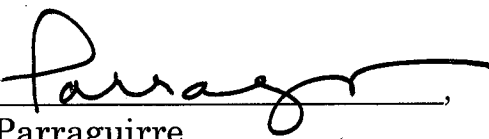
⁴Id. at 12-13, 974 P.2d at 135.

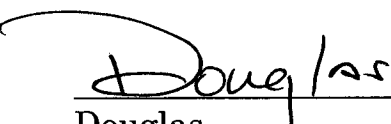
amount of restitution sought. She asserted that the total losses she referenced in her unsworn written statement were based on the loss prevention officer's verbal representations to her, not on documentation demonstrating the losses sustained by the victim.

Our review of the record on appeal indicates that the documents admitted into evidence do not substantiate the \$7,796 in losses alleged by the victim. Specifically, the loss prevention officer's incident report was not a sworn document, the losses identified in the receipts and other records do not total the amount of losses alleged, and no testimony was presented to substantiate the total amount of the alleged losses. Because the restitution awarded was not supported by competent evidence, we conclude the restitution award must be vacated and the case remanded to the district court for a new sentencing hearing to determine the proper amount of restitution. Accordingly, we

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


_____, J.
Hardesty


_____, J.
Parraguirre


_____, J.
Douglas

cc: Hon. Connie J. Steinheimer, District Judge
Washoe County Public Defender
Attorney General Catherine Cortez Masto/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk