

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

CARMELLO SEBASTION MOTTA,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 73011

**FILED**

MAR 14 2018

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY  DEPUTY CLERK

*ORDER AFFIRMING IN PART, REVERSING IN PART AND  
REMANDING*

Carmello Sebastian Motta appeals from a judgment of conviction entered pursuant to a guilty plea of gross misdemeanor injury to other property. Fifth Judicial District Court, Nye County; Kimberly A. Wanker, Judge.

First, Motta argues the district court erred in denying his presentence motion to withdraw his guilty plea. A defendant may move to withdraw a guilty plea before sentencing, NRS 176.165, and “a district court may grant a defendant’s motion to withdraw his guilty plea before sentencing for any reason where permitting withdrawal would be fair and just,” *Stevenson v. State*, 131 Nev. \_\_\_, \_\_\_ 354 P.3d 1277, 1281 (2015). In considering the motion, “the district court must consider the totality of the circumstances to determine whether permitting withdrawal of a guilty plea before sentencing would be fair and just.” *Id.*

In his motion, Motta asserted his counsel promised him that if he entered a guilty plea and paid \$7,000 in restitution, the charges against him would be dismissed. Motta argued counsel’s promise caused him to misunderstand the actual terms of his guilty plea agreement. The district

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court conducted a hearing regarding the motion. Motta and his counsel informed the district court they both believed Motta would only have to pay \$7,000 in restitution and were surprised when the district court set this matter for a restitution hearing with the possibility of ordering him to pay more than that amount. The district court reviewed the plea canvass, noted Motta acknowledged during the plea canvass that he understood the district court was not bound to impose any specific amount of restitution and the district court had the discretion regarding the ultimate sentence. The district court found Motta's testimony regarding the sentencing promises to be incredible. The district court concluded the totality of the circumstances did not demonstrate a fair and just reason to permit Motta to withdraw his guilty plea.

The record before this court supports the district court's conclusion and we conclude Motta has not demonstrated the district court abused its discretion by denying his motion to withdraw his guilty plea. See *Hubbard v. State*, 110 Nev. 671, 675, 877 P.2d 519, 521 (1994).

Second, Motta argues the State breached the guilty plea agreement by presenting witnesses at the restitution hearing, which he asserts implicitly urged the district court to order Motta to pay more restitution than what the parties agreed upon.

"When the State enters into a plea agreement, it is held to the most meticulous standards of both promise and performance with respect to both the terms and the spirit of the plea bargain." *Sparks v. State*, 121 Nev. 107, 110, 110 P.3d 486, 487 (2005) (internal quotation marks omitted). "A plea agreement is construed according to what the defendant reasonably understood when he or she entered the plea." *Sullivan v. State*, 115 Nev.

383, 387, 990 P.2d 1258, 1260 (1999). Our review of the record reveals the State complied with both the terms and the spirit of the plea agreement.

In the written plea agreement, the parties agreed to recommend \$7,000 in restitution. At the initial sentencing hearing, the parties explained their recommendation regarding restitution, but the district court concluded a restitution hearing was appropriate to establish the proper amount of restitution. At the later restitution hearing, the State presented witnesses and evidence regarding the appropriate amount of restitution but urged the district court to follow the parties' recommendation for \$7,000 in restitution. At no time did the State argue or imply that the district court should impose restitution greater than the parties' recommendation. Therefore, we conclude the State did not breach the plea agreement and this claim lacks merit.

Third, Motta argues the district court abused its discretion in concluding the victim's real property was destroyed and setting restitution for the property at the victim's \$30,000 purchase price. In determining the appropriate amount of restitution, a district court must rely on reliable and accurate information and its determination will not be disturbed absent an abuse of discretion. *Martinez v. State*, 115 Nev. 9, 12-13, 974 P.2d 133, 135 (1999). "An abuse of discretion occurs if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason." *Crawford v. State*, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005)

In *Romero v. State*, the Nevada Supreme Court explained how to determine the value of property damaged or destroyed in the commission of an offense of injury to other property. 116 Nev. 344, 347-49, 996 P.2d 894, 897-898 (2000). "Malicious destruction of private property, unlike theft, can result in two types of direct injury to the property, total or partial

destruction.” *Id.* at 348, 996 P.2d at 897. “The fair market value of the property is the appropriate standard for determining the level of culpability when the property is completely destroyed.” *Id.* However, when there is only partial damage to the property, “the appropriate measure of damages is the cost related to repair or restore the property.” *Id.*

The record reveals a victim testified he purchased the property for \$30,000, stated he felt the property in its current state was destroyed, but acknowledged the property could be restored. The victim also testified he believed he would have the option of building a residence upon the restored property and acknowledged Motta merely damaged a section of the property, not the entire property. The record further reveals the district court heard testimony from the State’s civil engineering expert and admitted his report discussing restoration costs for the property. The district court also admitted a report from a defense expert explaining the cost to restore the property. Both experts’ reports provided costs to repair the damaged portion and did not state the property was completely destroyed. At the conclusion of the hearing, the district court stated it found Motta’s damage to the property rendered it useless and ordered Motta to pay \$30,000 in restitution for the victim’s property damage.

The record before this court does not contain evidence supporting a finding the real property was completely destroyed. Rather, the victim, expert testimony, and both expert reports demonstrate the real property was not completely destroyed and could be restored. Because the evidence and testimony presented demonstrate the property could be restored, we utilize the *Romero* court’s decision and find that the appropriate measure of restitution is the cost to restore the victim’s real property. *Cf. id.* Therefore, we conclude the district court abused its

discretion in ordering \$30,000 in restitution for the damage to the property and we remand for the district court to conduct a hearing to determine the appropriate restitution amount based upon the cost to restore the victim's property. See NRS 176.033(1)(c).

Fourth, Motta argues the district court abused its discretion by imposing restitution for one of the victims' civil attorney fees. As stated previously, a district court's determination regarding restitution will not be disturbed absent an abuse of discretion. *Martinez*, 115 Nev. at 12-13, 974 P.2d at 135. In a crime involving the malicious destruction of property, calculating the loss resulting from the offense "must be directly tied to the damage to the property." *Romero*, 116 Nev. at 348, 996 P.2d at 897. "Ancillary consequences that may accompany a crime in general . . . cannot be included" when calculating the loss resulting from the offense. *Id.*

The record demonstrates a victim testified following Motta's restitution argument and Motta requested the opportunity to respond to the victim's testimony. The district court denied that request. The victim then testified he incurred \$6,940.98 costs related to civil attorney fees as he sought to rectify this situation and from posting no trespassing signs on the property. Following the victim's testimony and after denying Motta's request to respond to the victim's testimony, the district court ordered Motta to pay restitution for the victim's civil attorney fees.

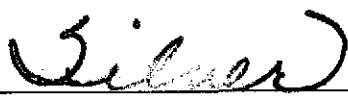
Again utilizing the *Romero* court's conclusion regarding valuation for an injury-to-other-property offense, we conclude the victim's civil attorney fees related to this matter are an ancillary consequence of Motta's offense, and therefore, the district court abused its discretion by imposing restitution for those fees. *Cf. id.*; see generally *State v. Parker*, 139


P.3d 767, 770 (Idaho App. Ct. 2006) (reversing a restitution order covering civil attorney fees as not appropriate under Idaho's restitution statute).

In addition, a defendant is entitled to challenge the restitution sought against him. *See Martinez*, 115 Nev. at 13, 974 P.2d at 135. Therefore, the district court erred by denying Motta the opportunity to challenge the victim's testimony regarding economic losses. Accordingly, we reverse the imposition of restitution for the victim's civil attorney fees and instruct the district court not to consider the victim's civil attorney fees when it reconsiders restitution in this matter.

Having concluded Motta is only entitled to the relief described herein, we

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

  
\_\_\_\_\_, C.J.  
Silver

  
\_\_\_\_\_, J.  
Tao

  
\_\_\_\_\_, J.  
Gibbons

cc: Hon. Kimberly A. Wanker, District Judge  
The Law Office of David Rickert  
Attorney General/Carson City  
Nye County District Attorney  
Nye County Clerk