FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D18-1312

JENNIFER M. AMISON,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

No. 1D18-1313

JOSEPH AMISON,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

On appeal from the Circuit Court for Leon County.
Robert R. Wheeler, Judge.

August 18, 2021

KELSEY, J.

Spouses Jennifer ("Jennie") and Joseph ("Mike") Amison appeal their respective judgments and sentences for multiple financial crimes, for which they were tried together. Because of the significant overlap in facts and legal issues, we consolidate their appeals for disposition. We have carefully considered all of both Appellants' arguments, reverse and remand in part, and affirm as to all other issues.

I. Facts.

From 2015 to 2017, the Amisons were struggling financially. Jennie was a Tallahassee police officer, and Mike was a Tallahassee firefighter. They have three children. They also owned a local business, Artistic Awards & Engraving, but it was losing money. They were behind in their household rent.

From 2016 to 2017, two Tallahassee firefighters died, and a third firefighter's daughter was killed in a car accident. Jennie and Mike decided to raise money to benefit these three families. Jennie admitted that she was the moving force behind the idea and the acts that followed. She started spreading the word and raising money in December of 2016.

The Amisons planned to host a barbecue dinner in February of 2017 as their main fundraiser, selling meal tickets and raffle tickets. Using their Artistic business, the Amisons also obtained themed merchandise such as t-shirts, challenge coins, drink tumblers, and decals, which they sold to raise funds. Pre-event sales and donations were brisk. The Amisons received cash and check donations independent of dinner and merchandise sales. Checks were sometimes made out to Jennie personally, sometimes to Artistic, and sometimes to Just Cause, the name the Amisons put on the bank account later opened for their fundraising. Some cash and check donations for the fundraiser were deposited to the Artistic account. Recordkeeping for donations and expenses was imprecise at best.

Jennie told one friend they had sold about 400 meal tickets, and told another friend they had sold about 650 tickets. Testimony indicated the dinner was a great success—hundreds of people

attended. The credit-card machine was not working. Attendees without pre-purchased meal tickets bought tickets on-site, some by check and some with cash, and there were cash tips and donations. Large amounts of cash were donated—"piles" of it according to at least one witness—which the Amisons would not allow anyone to count. Jennie told a friend via text message that the dinner event alone raised about $18,000 before expenses, and about $20,000 including presales. That did not include other donations, or funds raised from merchandise sales. The available forensic evidence indicated that $28,033.90 was raised altogether.

About a week after the dinner (about two months after fundraising started), the Amisons opened the "Just Cause" bank account for the funds raised. Their initial deposit was $335. A week later, they made four separate deposits totaling $6,598. Both the Artistic account and Just Cause account appear to have been used for personal expenses at times.

Several months passed after the barbecue dinner, during which the Amisons did not distribute proceeds to the three firefighter families and evaded inquiries about the money—until contacted by law enforcement. Deposits to the Just Cause account did not match donations believed to have been received. Before the Amisons distributed any money, nearly $7,000 from an unknown source was deposited to the Just Cause account. One deposit was in an amount nearly identical to the amount Mike's parents withdrew from their own account only two days earlier, but which Mike's father testified was withdrawn for a vacation.

Only after that late deposit, in May 2017, did the Amisons distribute funds to the three firefighter families: a total of $12,396.33. From the $28,033.90 believed to have been raised, $8,877.82 was attributed to expenses incurred, leaving a shortfall of over $6,700. In July of 2017, the Amisons deposited $10,400 in non-paycheck funds to their personal bank account, which rapidly decreased to a balance of about $1,500.

While all of that fundraising was going on, the Amisons were still having trouble paying their household rent. They made partial rent payments from the Artistic account in November and December of 2016—about the time they started planning the firefighter fundraising drive. In 2017, they told their landlord—

falsely—that Jennie had terminal cancer, and used this ploy for sympathy to persuade the landlord not to evict them. They made partial payments in 2017, but by the time they moved out later in 2017, they were over $12,000 in arrears.

II. Charges and Verdicts.

The case went to trial on a seven-count amended information against "Jennifer Amison, and/or Joseph Amison." The information identified the relevant time frame as between approximately January 1, 2015, and September 27, 2017. Jennie testified at trial, but Mike did not.

Count I alleged a violation of Florida's RICO (Racketeer Influenced and Corrupt Organization) Act, chapter 895 of the Florida Statutes, and alleged that the underlying acts violated chapters 812, 817, and 496 of the Florida Statutes. The information alleged ten predicate acts, including in relevant part the following: A, grand theft from the landlord; B, grand theft from the three families; C, organized scheme to defraud the landlord and the three firefighter families; and D, failure to apply charitable contributions, a violation of section 496.415(16), Florida Statutes. The jury found both Jennie and Mike guilty of the RICO count and of predicates A, B, C, and D.

Count II alleged grand theft from the Amisons' landlord in violation of chapter 812, the same as predicate act A under Count I. The jury found both Jennie and Mike guilty of Count II.

Count III alleged grand theft from the three families in violation of chapter 812, which was also charged as predicate act B for the RICO charges of Count I. Both Jennie and Mike were found guilty of Count III.

Count IV charged organized scheme to defraud as a violation of Florida's Communications Fraud Act, section 817.034 of the Florida Statutes. This was also predicate act C supporting the RICO charges of Count I. The jury found both Jennie and Mike guilty.

Count V alleged failure to apply charitable contributions in violation of chapter 496 of the Florida Statutes, also alleged as

predicate act D for the RICO charges. Both Jennie and Mike were found guilty of this.

Count VI alleged grand theft of a donor, Ms. Bodenhamer, as to which the jury found Jennie guilty and Mike not guilty.

Finally, Count VII alleged petit theft of another donor, Ms. Brown. On this charge, the jury acquitted both of the Amisons.

III. Jennie's Judgments and Appellate Arguments.

At trial, Jennie and her counsel agreed to the strategy of admitting her guilt of theft, organized scheme, and attendant RICO incidents as to the landlord-related charges. Counsel told the jury to "check guilty" each time it saw the landlord's name. The trial court conducted a colloquy in which Jennie confirmed that she agreed with this strategy.

The jury acquitted Jennie of the single petit theft count, but convicted her of the grand theft, organized scheme to defraud, and failure to apply contributions crimes alleged as Counts II, III, IV, and V. The jury also convicted her of the parallel predicate acts A through D for the RICO charge.

Jennie moved for a new trial and judgment of acquittal, asserting among other things a double-jeopardy violation—i.e., that under the Fifth Amendment to the United States Constitution and Article 1, section 9, of the Florida Constitution, she cannot be convicted for both grand theft and organized scheme to defraud because they were based on the same conduct. The trial court denied Jennie's post-trial motions, and sentenced her to five years in prison plus five years of probation to follow. In arriving at this sentence, the trial court emphasized Jennie's greater culpability, her lying and deceit, and her betrayal of her position of trust. The court ordered the Amisons jointly and severally to make restitution of $14,370 to the landlord and $11,942.77 to the families. Jennie agreed with these amounts, but argued she was entitled to additional credit for amounts already paid to the families even though part of the money ultimately disbursed may have been part of what was wrongfully withheld or may have come from other sources.

Jennie raises multiple arguments on appeal. She argues the RICO and grand theft judgments violated her double-jeopardy rights because they involved the same victims and the same currency; i.e., the same conduct. As to grand theft of the landlord, she argues that her mere failure to pay rent, under the circumstances, was not a chargeable crime. She argues the evidence only supported a verdict of grand theft as to the three firefighter families, and no other predicate acts, and therefore the RICO judgment was error. As part of her argument that there were insufficient predicate acts to support a RICO violation, she argues that the charge under section 496.415(16) for failure to apply charitable contributions is not among the valid predicate RICO acts listed in section 895.02, Florida Statutes. She challenges the inclusion of scoresheet points for grand theft separately from RICO, since the grand theft was the predicate offense. Finally, she argues the amount of restitution ordered was erroneous.

The issues raised are questions of law, which we review de novo. *See Pizzo v. State*, 945 So. 2d 1203, 1206 (Fla. 2006). We reject most of Jennie's appellate arguments without further comment, and write only to address double jeopardy, amount of restitution, and the landlord-related charges.

A. Double Jeopardy.

On appeal, Jennie argues that her judgments for both grand theft and organized scheme to defraud violate double jeopardy because they were based on the same conduct. She is correct. Grand theft is a lesser-included offense of organized scheme to defraud. *See id.* at 1207 (finding grand theft a lesser-included offense of organized fraud based on the statutory elements of each crime); *see also Saddler v. State*, 921 So. 2d 777, 778–79 (Fla. 1st DCA 2006) (finding the same). To convict of both crimes, the State must prove that different conduct gave rise to each charge. Significantly, however, the double-jeopardy analysis looks solely to the charging document, and cannot be based on evidence adduced at trial. *See Lee v. State*, 258 So. 3d 1297, 1303–04 (Fla. 2018) (resolving conflict among districts on how to determine whether multiple convictions are based on the same conduct, and approving examination of the charging document alone); *see also Morejon-Medina v. State*, 277 So. 3d 1118, 1121–22 (Fla. 2d DCA 2019)

(discussing *Lee*). If it is impossible to tell from the charging document whether the jury could have convicted the defendant of two crimes based on the same conduct, the judgments violate double jeopardy. *See Lee*, 258 So. 3d at 1304.

Here, the amended information charged Jennie with grand theft of the families beginning February 17, 2017, and continuing through September 27, 2017 (count III). It then charged an organized scheme to defraud the families (and the landlord) beginning February 17, 2017, and continuing through September 27, 2017 (count IV). The dates are identical, and the victims are identical, except for the addition of the landlord. Theft is necessarily included in organized scheme to defraud. Referring only to the conduct as charged in the amended information, it is impossible to exclude the possibility that the jury found the same act constituted theft and organized scheme to defraud.

Although the State argues that the trial evidence separated the crimes and proved distinct acts, *Lee* forecloses this argument. *See id.* at 1303–04 (limiting review to the charging document and precluding review of the trial evidence). Given the way the State worded the charging document, we are compelled to reverse Jennie's judgment for grand theft of the families (count III). *See id.* at 1300, 1303–04.

Despite reversing this judgment, which will now be stricken from Jennie's criminal record along with its associated scoresheet points, we decline to remand for resentencing. This issue is subject to harmless error analysis. If the "record conclusively shows that the trial court *would have imposed* the same sentence using a correct scoresheet," reversal is not required. *Brooks v. State*, 969 So. 2d 238, 241 (Fla. 2007); *see also Tundidor v. State*, 221 So. 3d 587, 605–07 (Fla. 2017) (holding reduction of 92 sentencing points did not require resentencing because trial court had imposed maximum sentences based on heinous nature of the crimes).

Jennie argues that the record demonstrates harmful error occurred because Mike received a shorter sentence after being convicted of fewer crimes, which could mean fewer points on her scoresheet could have produced a shorter sentence. We reject this argument because the record establishes that the trial court did not sentence Jennie based on the scoresheet. The State asked for

one year of imprisonment for each of the five victims (the three families, the landlord, and the citizens of Tallahassee). Explaining the sentence imposed, the trial court emphasized Jennie's lying and deceit "like I've never seen before" and Jennie's abuse of her position of trust as a charity organizer. The court then sentenced her to five years' imprisonment, followed by five years' probation. The court's comments demonstrate that the scoresheet points were not determinative. Rather, the sentence resulted from the number of victims plus Jennie's greater culpability, her deceit, and her abuse of trust. Vacating a single theft count does not change any of the court's sentencing considerations. We find that the record conclusively shows the trial court would have imposed the same sentence with a corrected scoresheet, and therefore we decline to remand for resentencing.

B. Restitution.

As the State pointed out at trial, the Amisons' own non-existent or sloppy record-keeping made it difficult for the State to prove exactly how much money the Amisons should have donated to the firefighter families. It is also true, however, that the State has the burden to prove the amount due, by a preponderance of the evidence. § 775.089(7), Fla. Stat. (2017). The trial court has discretion to determine adequate victim compensation, but competent evidence must support the amount. *Glaubius v. State*, 688 So. 2d 913, 915–16 (Fla. 1997); *see D.E.M. v. State*, 109 So. 3d 1229, 1232 (Fla. 1st DCA 2013) (reversing restitution award not supported by legally sufficient proof, and remanding for a new evidentiary hearing).

The trial court ordered restitution of $11,942.77. The State's examiner had testified there was a shortfall of $6,747.75, but also testified that the Amisons deposited $5,195.02 to the Just Cause account before disbursing money to the families. The examiner did not credit this amount toward the amount owed in restitution, and neither did the court's restitution judgment, apparently reasoning that the deposited funds were themselves tainted as ill-gotten gains. The examiner and the court added the $5,195.02 to the $6,747.75 shortfall. This was error.

Regardless of where the new deposit came from, that much money went back into the Just Cause account and became part of

what was distributed to the families. Even if the Amisons had wrongfully withheld this amount of money to begin with, it remains true that they gave that amount back to the families. These facts parallel those in *Glaubius*. In that case, a store employee stole $360 in cash and $300 in merchandise, and pocketed $3,000 in fake refunds. 688 So. 2d at 914. In facts relevant to the Amisons' restitution, the employee then repaid $360 to the store, but did so using money gleaned from the fake refunds. *Id.* The trial court granted restitution for the full $3,660, and the store argued this was correct because the employee repaid with already-stolen money. *Id.* at 916. The Florida Supreme Court rejected the store's argument as "illogical." *Id.* The store had been damaged $3,660, and $360 had been returned to the store. Thus, the store was damaged $360 less. Regardless of where the $360 came from, it was paid back to the store and reduced the store's damage. *See id.*

So too here, the Amisons may have withheld from the charitable donations an amount equal to (or greater than) the amount later deposited to Just Cause and disbursed to the families. But the families ultimately got the benefit of the amount disbursed, and their damages were reduced to that extent. Ideally, the punitive aspect of restitution would also fall fully on the defendant, but the primary goal of restitution is to make the victim whole. *See id.* at 915–16. Giving back money previously stolen or withheld unlawfully is still giving back. To the extent the State's calculation of restitution failed to give full credit for the late-deposited funds that were disbursed to the victims, this was error. We reverse and remand for a new restitution hearing on this issue. *See D.E.M.*, 109 So. 3d at 1232 (ordering this remedy).

C. Landlord Issues.

Jennie also argues we should reverse her judgment for grand theft of her landlord. We decline, because she intentionally and expressly admitted guilt of this charge as trial strategy. She cannot now claim error in something she agreed to and told the jury to do. *See Johnson v. State*, 133 So. 3d 602, 604 (Fla. 1st DCA 2014) (discussing invited error in double jeopardy context), *disapproved on other grounds by State v. Tuttle*, 177 So. 3d 1246, 1253 (Fla. 2015) (disapproving resolution of which crime was lesser crime to

be vacated on double jeopardy violation); *see also Flowers v. State*, 149 So. 3d 1206, 1207–08 (Fla. 1st DCA 2014) (explaining invited error doctrine and rejecting "heads I win, tails you lose" games).

IV. Mike's Double-Jeopardy Argument.

The jury also convicted Mike of the grand thefts and organized scheme to defraud, as counts II, III, and IV as well as predicate acts constituting a RICO violation under Count I. Mike moved for a new trial and judgment of acquittal. On appeal, Mike argues error in the use of the "and/or" phrase in the jury instructions. He asserts the prosecutor improperly commented during closing argument on his invocation of his right to remain silent, when she pointed out that the Amisons provided no accounting for funds collected. Like Jennie, he argues that failure to pay one's landlord cannot be a crime. He argues that grand theft is a lesser-included offense of organized scheme to defraud and therefore a judgment for both is a double-jeopardy violation. He also echoes Jennie's arguments for invalidating at least two of the predicate crimes, including the charge for failure to apply contributions under chapter 496, thus eliminating the predicate grounds for his RICO judgment. Finally, he challenges the trial court's refusal to instruct the jury on a good-faith defense.

A double-jeopardy violation is fundamental error. *Henry v. State*, 64 So. 3d 181, 183 (Fla. 2d DCA 2011) (finding fundamental error and reversing conviction for grand theft as lesser-included offense of organized scheme to defraud). Mike's grand theft judgments for Counts II (landlord) (as to which he did *not* concede guilt), and III (the three families), are lesser-included offenses of organized scheme to defraud all four victims as charged in Count IV. The theft judgments for predicate acts A and B are likewise lesser-included offenses covered in predicate act C for organized scheme to defraud all four victims. We therefore reverse Mike's judgments for grand theft in Counts II and III, and predicate acts A and B under Count I. The judgment under Count IV for organized scheme to defraud all four victims stands, as does the judgment under Count V for failure to apply charitable contributions.

As to Mike's Count-I RICO judgment, the remaining question is whether he was convicted of at least two "incidents" as required

by the statutory definition of a "pattern of racketeering activity" in section 895.02(7). The statute specifies that the incidents must be among specified violations of chapters 812 and 817 of the Florida Statutes. The judgment under Count IV (and predicate act C under Count I) for organized scheme to defraud under chapter 817 is among those listed in section 895.02 and counts as one incident. The only remaining judgment is Count V (and predicate act D) for failure to apply charitable contributions under section 496.415(16). We affirm Mike's judgment for Count V, but the parallel judgment for predicate act D cannot count as the requisite second incident under Count I because it is not included in the definition of racketeering activity in section 895.02(8). The State's inclusion of chapter 496 in the RICO count of the amended information cannot override the statutory definition of RICO crimes. Mike raised this issue before the trial court and again on appeal, and the State did not respond to it either time. He is correct on the merits of this argument. Because this judgment cannot count as a second RICO incident, we also reverse Mike's RICO judgment in Count I.

V. Conclusion.

In Case No. 1D18-1312, Jennie's appeal, we reverse her judgment on count III but affirm her sentence. We reverse and remand for a new hearing on the amount of restitution as to both Appellants, who share joint and several liability for this obligation.

In Case No. 1D18-1313, Mike's appeal, we reverse Mike's judgments for Counts I, II, and III and remand for the trial court to vacate them. We affirm his judgments as to Counts IV (organized scheme to defraud all four victims) and V (failure to apply charitable contributions). We remand for entry of a corrected scoresheet and, because we are unable to determine (as we did for Jennie) that this would not change the trial court's choice of sentence, we remand for a new sentencing hearing for Mike.

AFFIRMED in part, REVERSED in part, and REMANDED for further proceedings consistent with this opinion.

RAY and MAKAR, JJ., concur.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

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