IN THE COURT OF APPEALS OF IOWA

No. 9-716 / 09-0243
Filed October 21, 2009

STATE OF IOWA,
Plaintiff-Appellee,

vs.

BRANDON DANIS ZIEMELIS,
Defendant-Appellant.

Appeal from the Iowa District Court for Story County, Steven P. VanMarel, District Associate Judge.

Brandon Ziemelis appeals the restitution portion of the sentence imposed following his plea of guilty to operating a vehicle without the owner's consent. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Robert Ranschau, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Martha Trout, Assistant Attorney General, Stephen Holmes, County Attorney, and Timothy Meals, Assistant County Attorney, for appellee.

Considered by Vogel, P.J., and Potterfield, J., and Miller, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2009).

MILLER, J.

Jessica Sanders purchased a 2000 Ford Focus car on August 1, 2007. Contemplating a move to California, she acquired money, packed her personal belongings in her car, and spent the night of April 22, 2008, at the home of a friend's mother in Ames, Iowa. The friend, Tyanne Deal, and Deal's boyfriend, the defendant Brandon Ziemelis, were present in the home. When Sanders awoke the next morning her car and the belongings in it were missing, as was $900 from her purse.

A few days later Deal left Ames. On May 13, 2008, police in Wheatland, Wyoming, recovered Sanders's car, which was in the possession of Ziemelis and Deal. The car had sustained damage to its struts, a ball joint, and springs; it had been driven some 6000 miles since April 23; and Sanders's cash and belongings were missing and never recovered.

Ziemelis pled guilty to operating a vehicle without the owner's consent. By agreement of the parties the issue of victim restitution was submitted to the court on the transcript of a restitution hearing that had been held in the case of Ziemelis's co-defendant, Deal, and oral arguments of counsel. The district court ordered Ziemelis to pay victim restitution of $5640.24, the same amount it had previously ordered co-defendant Deal to pay, with Ziemelis jointly and severally liable with Deal. Ziemelis appeals, challenging the amounts of three items of pecuniary damages assessed by the district court.[1]

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[1] The State argues that Ziemelis has waived any issue as to the second and third of the three items discussed below, by failing to cite any authority in support of the second issue and failing to make any argument as to the third issue. *See* Iowa R. App. P.

Our review of a restitution order is for correction of errors at law. *State v. Watts*, 587 N.W.2d 750, 751 (Iowa 2001); *State v. Knudsen*, 746 N.W.2d 608, 609 (Iowa Ct. App. 2008). "[W]e determine whether the court's findings lack substantial evidentiary support, or whether the court has not properly applied the law." *State v. Bonstetter*, 637 N.W.2d 161, 165 (Iowa 2001). "A restitution order is not excessive if it bears a reasonable relationship to the damage caused by the offender's criminal act. The relationship must be shown by a preponderance of the evidence." *Id.* at 168 (citation omitted).

Sanders received an estimate of $895.24 from Magic Mufflers & Brakes in Ames for repairs of the damage to her car. Sanders's father is a mechanic and worked for Bell Salvage in Ames. He testified that he and his coworkers did the required repairs for "a little less than what the actual estimate was," but that Sanders's cost was "well over $600 to actually repair it." Sanders's father and his coworkers performed the repairs and Sanders was charged less than the estimate in order to make the job "[a] little cheaper" than if others had made the repairs. The district court assessed $895.24.

The $895.24 estimated cost of repairs was introduced in evidence. Ziemelis made no claim or showing that the amount was unreasonable. Pecuniary damages are those damages not paid by an insurer which a victim could recover from the defendant in a civil action. Iowa Code § 910.1(3) (2007). Under Iowa's collateral source rule a plaintiff's recovery of damages is not

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6.903(2)(*g*)(3) (requiring an argument in support of an issue, and providing that failure to cite authority in support of an issue may be deemed waiver of that issue). We choose to pass the questions of waiver and address the merits.

reduced by sums received or to be received from another source. *Midland Mut. Life Ins. Co. v. Mercy Clinics, Inc.*, 579 N.W.2d 823, 829 (Iowa 1998). Generally, benefits received by a plaintiff from a collateral source will not diminish otherwise recoverable damages. *Heine v. Allen Mem'l Hosp. Corp.*, 549 N.W.2d 821, 823 (Iowa 1996). The types of benefits subject to the collateral source rule include "the rendering of services." *Farmers State Bank v. United Cent. Bank*, 463 N.W.2d 69, 71 (Iowa 1990) (citing Restatement (Second) of Torts § 920A(2) cmt. c (1979)). We conclude that the fact Sanders's father, his coworkers, and/or their employer were willing to provide their services to minimize Sanders's expenses should not diminish her recovery for the damages to her car. We affirm the district court on this issue.

The district court assessed damages of $1800 for depreciation of Sanders's car based on an estimate of thirty cents per mile for 6000 miles. Ziemelis asserts only that thirty cents per mile for depreciation is excessive.

We believe it appropriate to consider the reasonableness of the figure of $1800 for depreciation, rather than to focus entirely on the rate of thirty cents per mile used by the district court to arrive at an estimate of a reasonable assessment for depreciation. The 6000 miles used by the court apparently did not include the miles Sanders drove the car in returning it from Wyoming to Iowa, a considerable distance, as the testimony indicates the 6000 miles "had been put on [the] car while it was gone." Further, the value of the car had in all likelihood been diminished somewhat by the damage it sustained, even though repairs had been made. We conclude the court did not err in assessing $1800 for

depreciation. *See Bonstetter*, 637 N.W.2d at 165 ("A restitution order is not excessive if it bears a reasonable relationship to the damage caused by the offender's criminal act.").

The district court assessed $400 for Sanders's loss of use of the vehicle for the five weeks she was without it. Ziemelis merely notes this assessment, but makes no argument as to how it is excessive or otherwise constitutes error. There is a distinction between proof that damages have been sustained and proof of the amount of damages. *State v. Watts*, 587 N.W.2d 750, 752 (Iowa 1998). If damages have been sustained and uncertainty lies only in the amount, recovery may be had if there is a reasonable basis upon which to infer an amount. *Id.*

Common experience indicates there is substantial value to the use of a car such as the one owned by Sanders, and that damages are thus sustained when one is wrongfully deprived of its use. We find the district court's assessment of eighty dollars per week for the loss of use to be reasonable and without error, believing it to be common knowledge and beyond reasonable dispute that the rental of such a vehicle costs that much or considerably more.

AFFIRMED.