9-19-2013

State v. Davis Appellant's Brief Dckt. 40720

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff-Respondent, v. SHAWN O'SHAY DAVIS II, Defendant-Appellant.	)	NO. 40720 BANNOCK COUNTY NO. CR 2011-13283 APPELLANT'S BRIEF

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

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STATEMENT OF THE CASE

Nature of the Case

Shawn Davis appeals, challenging the district court's order that he pay restitution for certain damages done to a dirt bike. Mr. Davis asserts that the restitution award was improper since he was not the cause of most of the damage to the dirt bike. Rather, he sold the dirt bike to a third party, who Mr. Davis contends was the cause of those damages. He also contends that, since the damages caused by that third party were not a foreseeable consequence of his culpable conduct, the third party's actions constituted an intervening, superseding event between Mr. Davis's criminal actions and the majority of the damages done to the dirt bike. Therefore, he contends that the district court did not have statutory authority to order him to pay restitution for those damages to the dirt bike.

Therefore, this Court should vacate those portions of the restitution order which the State failed to prove were caused by Mr. Davis's criminal conduct. Alternatively, if the record is not sufficiently clear to determine the amount of the damages caused by Mr. Davis, this Court should remand the case for a limited hearing to determine the value of the parts Mr. Davis admitted to damaging and the cost to replace only those parts.

Statement of the Facts and Course of Proceedings

Mr. Davis was charged with possessing a dirt bike under circumstances as would reasonably as would reasonably induce him to believe that the property was stolen. (R., p.29.) He had purchased the dirt bike from another person for $600, and thought that the deal was too good to be true. (*See, e.g.,* R., p.11.) Nevertheless, he made modified the dirt bike, repainting the fenders, removing decals, and removing the hand

guards. (Tr., Vol.2, p.8, Ls.3-7; Tr., Vol.2, p.9, Ls.10-11.) However, upon test riding the dirt bike, he decided that it had too much power for him, so sold it to Travis Kearl (also spelled "Travis Curle") for $700. (Tr., Vol.2, p.8, Ls.16-23; *see also* R., pp.11-12 (police reports indicating why and to whom Mr. Davis said he had sold the dirt bike); R., p.7 (police reports indicating the dirt bike was recovered from "Travis Kearl," who said he had purchased it from Mr. Davis).)

Thereafter, he entered a binding Rule 11 plea agreement, whereby he would plead as charged and agreed "to pay restitution in the above entitled matter." (R., p.39.) There was no indication as to the amount of restitution Mr. Davis agreed to pay under the plea agreement. (*See generally* R., pp.38-40.) In exchange for his guilty plea, the State would recommend a withheld judgment and no jail, with the length of the resulting period of probation to be at the district court's discretion. (R., p.39.) The district court withheld judgment for a three-year period of probation.[1] (Tr., Vol.1, p.24, Ls19-25; R., p.53.)[2]

The State requested an order for approximately $2,400 in restitution at the sentencing hearing. (*See* Tr., Vol.1, p.20, Ls.12-14.) Mr. Davis objected to that amount. (Tr., Vol.1, p.20, L.21 - p.21, L.9; R., p.60.) An evidentiary hearing was held in regard to the claim for restitution.[3] Jeremiah Schmidtgall, the owner of the dirt bike,

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[1] Mr. Davis subsequently admitted violating probation, completed a rider program, and was released back onto probation. (R., pp.78, 82, 89-90.)

[2] The transcripts in this case are contained in two independently bound and paginated volumes. To avoid confusion, "Vol.1" will refer to the volume containing the transcripts from the change of plea hearing held on November 21, 2011, the sentencing hearing held on January 17, 2012, and the restitution hearing held on February 21, 2012. "Vol.2" will refer to the volume containing the transcript from the restitution hearing held on January 3, 2013.

[3] The restitution hearing began on February 21, 2012. However, it had become impossible for Mr. Davis to attend that hearing, though the record does not make the reason for that clear. (Tr., Vol.1, p.30, Ls.22-25.) The district court decided that the

testified that when he got the dirt bike back, it had several parts that were damaged, altered, or removed. (Tr., Vol.1, p.34, Ls.21-24.) He also testified that the engine was making disconcerting noises. (Tr., Vol.1, p.35, Ls.13-18.) As a result, he decided to take the dirt bike in to his mechanic for an evaluation and a quote for repairs. (Tr., Vol.1, p.36, L.20 - p.37, L.1.) Mr. Schmidtgall estimated, based on his own standards (after riding such dirt bikes for fourteen years), that he could sell the dirt bike as it was for $1,000 to $2,000. (Tr., Vol.1, p.41, L.16 - p.42, L.7.)

The mechanic who examined the dirt bike, Jason Weeks, testified that he had also examined this particular dirt bike approximately one month prior to it going missing, and that he recalled that it was in good shape at that time. (Tr., Vol.1, p.47, Ls.1-20.) He also valued the dirt bike, in the condition it was upon its return, to be between $1,200 and $1,500.[4] (Tr., Vol.1, p.48, Ls.15-19.) However, he concluded that the dirt bike was not safe to ride in its damaged condition. (Tr., Vol.1, p.53, Ls.15-17.)

At that hearing, the district court admitted State's Exhibit 1, which was Mr. Weeks's estimate for repairing the dirt bike. (Tr., Vol.1, p.48, L.20 - p.49, L.25.) It lists several parts which needed to be repaired or replaced. (State's Exhibit 1, p.1.) The first nine items listed were plastic parts on the exterior of the dirt bike, which had been repainted and gouged. (Tr., Vol.1, p.50, Ls.14-18.) As a result, they would need to be replaced. (Tr., Vol.1, p.50, Ls.14-18.) The tenth item listed, identified as the "Frame," had been bent, and Mr. Weeks testified that damage was likely the result of a crash. (Tr., Vol.1, p.50, L.20 - p.51, L.3; State's Exhibit 1, p.1.) The eleventh item

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State's witnesses should be allowed to testify, since they were present, and the hearing would then be continued until such time as the defendant could be present to offer his testimony in response. (Tr., Vol.1, p.30, L.9 - p.31, L.16.) The hearing did not resume until January 3, 2013. (*See* Tr., Vol.2, p.5, Ls.7-21.)

listed, identified as the muffler, was also dented. (Tr., Vol.1, p.51, Ls.11-20; State's Exhibit 1.) The next seven items were parts of the piston and rings in the engine, which had to be replaced, along with the cylinders. (Tr., Vol.1, p.51, L.22 - p.52, L.18.) The third-to-last item listed was the hand guards, which also needed to be replaced. (Tr., Vol.1, p.52, L.20 - p.53, L.1.) The final two items were "parts for the front forks the bottom two-pieces." (Tr., Vol.1, p.52, Ls.20-24.) They, too, are plastic pieces that needed to be replaced. (Tr., Vol.1, p.52, L.25 – p.53, L.1.)

Mr. Weeks also testified that his labor would cost a total of $680. (Tr., Vol.1, p.53, Ls.2-3.) State's Exhibit 1 distinguished between the labor costs relating to the engine and the body work. (State's Exhibit 1, p.2.) Diagnosing the damage to the engine would take $34.00 of labor and rebuilding it would cost an additional $340.00 in labor. (State's Exhibit 1, p.2.) The labor to perform all the body work would cost $306.00.[5] (State's Exhibit 1, p.2.) Mr. Schmidtgall was afforded a fifteen percent discount since he is a repeat customer. (State's Exhibit 1, p.2; Tr., p.49, Ls.4-10.) As a result, the total estimate to repair the dirt bike was $2,475.01.[6] (State's Exhibit 1, p.2; Tr., Vol.1, p.49, Ls.11-12.)

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[4] Mr. Weeks estimated that this particular dirt bike model, if it was in good condition, would be worth $3,500 to $4,000. (Tr., Vol.1, p.47, L.24 - p.48, L.4.)

[5] Mr. Weeks was not clear as to whether this estimated labor cost related to repairing all the damages done to the body of the dirt bike (*i.e.*, including the frame and muffler), or if it just applied to replacing the plastic parts that had been damaged. (*Compare* Tr., Vol.1, p.53, Ls.6-8 ("[The labor cost estimate is] an average price to do the top end and replace *all of the body work* on this type of a repair." (emphasis added)); *with* Tr., Vol.1, p.56, Ls.14-21 ("And so your labor estimate includes that estimate R&R on the second page that's to basically repair and replace *all of those plastic parts* essentially? Yes. And then there would be an additional labor charge to do the motor stuff? Right.") (emphasis added).)

[6] At the restitution hearing, Mr. Weeks also testified that the tires would need to be replaced. (Tr., Vol.1, p.53, L.23 - p.54, L.8.) The replacement tires were not listed in State's Exhibit 1, but Mr. Weeks estimated that, to replace both tires, Mr. Schmidtgall would be asked to pay $175. (Tr., Vol.1, p.54, Ls.9-19; *see generally* State's Exhibit 1.)

Mr. Davis admitted that he had altered the appearance of the dirt bike by removing decals and repainting the fenders. (Tr., Vol.2, p.8, Ls.3-7.) He also admitted removing the hand guards, but thought that those had been recovered by the police. (Tr., Vol.2, p.9, Ls.10-11.) He testified that he had ridden the dirt bike once for a short distance, but not exceeding forty miles per hour. (Tr., Vol.2, p.8, Ls.10-14.) He then sold the dirt bike to Mr. Kearl. (Tr., Vol.2, p.8, Ls.16-23; *see also* R., pp.7, 12.) In fact, when police recovered the dirt bike from Mr. Kearl, he and his son were riding the dirt bike. (*See* Tr., Vol.2, p.14, Ls.17-23.) Defense counsel pointed out that the State had presented no evidence that Mr. Davis had caused the damage to the frame, muffler, or engine, and so, argued that he should not be required to pay for the damage in that regard. (Tr., Vol.2, p.13, Ls.21-25.)

The district court partially agreed with defense counsel, finding "[t]he State, who has the burden, has failed to offer evidence that [Mr.] Davis caused the majority of the damages sought, while the bike was in his possession." (R., p.99.) However, the district court determined that, because Mr. Davis was in the chain of criminal conduct which ultimately led to the damages, those damages were reasonably foreseeable, and so, Mr. Davis was still liable for those damages. (R., p.99.) Accordingly, it ordered

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The prosecutor indicated that the State would be filing an amended restitution request to include the value of the tires. (Tr., Vol.1, p.58, Ls.17-20.) However, no such amended request was filed. (*See generally* R.) And, despite being aware of that additional repair cost from Mr. Weeks's testimony, the district court apparently did not include it in its award of restitution. (*See* R., pp.95-100 (awarding restitution in the amount of $2,475.01, the amount requested without the tires.) Therefore, since the district court declined to order an award for the tires, despite a request for restitution in that regard, it is not necessary to address them further. I.A.R. 15(a) (requiring a cross-appeal if the party intends to seek affirmative relief from an appealable order); *cf. State v. Steelsmith*, 153 Idaho 577, 582-83 (Ct. App. 2012) (holding that the rules do not permit a subsequent upward modification of non-mandatory sentence elements after they have been ordered by the district court).

Mr. Davis to pay $2,475.01 in restitution. (R., p.100.) Mr. Davis filed a Notice of Appeal which is timely from the district court's decision regarding restitution. (R., pp.102-04.)

ISSUE

Whether the district court erred by awarding restitution for damages when Mr. Davis was not the cause of those damages?

ARGUMENT

The District Court Erred By Awarding Restitution For Damages When Mr. Davis Was Not The Cause Of Those Damages

Idaho law permits the district court to "order a defendant found guilty of any crime which results in an economic loss to the victim to make restitution to the victim." I.C. § 19-5304(2). A "victim" is "a person or entity, who suffers economic loss or injury *as the result of the defendant's criminal conduct.*" I.C. § 19-5304(1)(e) (emphasis added).[7] "Criminal conduct" is limited only to those actions for which the defendant is found guilty. *State v. Shafer*, 144 Idaho 370, 373 (Ct. App. 2007). In some cases in this area, the term "culpable act" is substituted for "criminal conduct." *See e.g. State v. Lampien*, 148 Idaho 367, 374 (2007). The amount of the loss caused by the defendant's culpable conduct must be proved to a reasonable certainty. *State v. Straub*, 153 Idaho 882, 889 (2013). A defendant may be ordered to pay additional restitution if he agrees to pay such restitution as part of a plea deal.[8] *Shafer,* 144 Idaho at 373 (citing I.C. § 19-5304(9)). A determination of restitution by the trial court is reviewed for an abuse of discretion. *State v. Richmond*, 137 Idaho 35, 37 (Ct. App. 2002).

To order restitution without an agreement by the parties, the district court must have statutory authority permitting the order. *Id.* Idaho statutes limit the court's authority in this respect to only the damages caused by the conduct for which the

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[7] There are other definitions of "victim" under this section which are inapplicable to this case. *See* I.C. § 19-5304(1)(e).

[8] While Mr. Davis did agree to pay restitution, he did not agree to pay any particular amount of restitution. *Compare State v. Nienburg*, 153 Idaho 491, 497 (Ct. App. 2012) (finding that the language of the plea agreement did not specify how much the defendant would pay in restitution, but only established a cap to the amount of restitution the State could request). Therefore, there is no statutory authority to award restitution based on I.C. § 19-5304(9). *See id.*

defendant has been convicted. *Id.* at 38 (citing *Hughey v. United States*, 495 U.S. 411, 420 (1990)); *State v. Corbus*, 150 Idaho 599, 602 (2011); *see also Shafer*, 144 Idaho at 372; *State v. Schultz*, 148 Idaho 884, 886-87 (Ct. App. 2008). Therefore, damages caused by actions unrelated to the crime for which the defendant is found guilty cannot be claimed as restitution because the person suffering the loss is not a "victim" under the statute. *See Shafer*, 144 Idaho at 372 (citing I.C. § 19-5304(1)(e)).

To determine whether the defendant's actions were the cause of the damages, Idaho employs the tort law causation analysis. *Lampien*, 148 Idaho at 374. Causation has two parts: actual cause and proximate cause. *Corbus*, 150 Idaho at 602; *Nienburg*, 153 Idaho at 495-96. Actual cause is determined using the "but for" test. *Id.* On the other hand, proximate cause is determined by using the "reasonably foreseeable" test. *Id.* The reasonably foreseeable test requires the court to determine "whether the injury and manner of occurrence are 'so highly unusual . . . that a reasonable person, making an inventory of the possibilities of harm which his conduct might produce, would not have reasonably expect the injury to occur.'" *Lampien*, 148 Idaho at 374 (quoting *Cramer v. Slater*, 146 Idaho 868, 875 (2009)).

Additionally, even if the defendant's culpable action was initially the proximate cause of the damage, there may be an intervening, superseding cause, which is "an independent act or force that breaks the causal chain between the defendant's culpable act and the victim's injury." *Id.* The intervening, superseding cause replaces the defendant's act as the proximate cause, so long as the intervening, superseding cause is unforeseeable and extraordinary. *Corbus*, 150 Idaho at 602. If there is an intervening, superseding proximate cause, it relieves the defendant of liability for the damages. *Id.* at 602-03. Where the State fails to prove that the defendant is the actual

cause or the probable cause of the damages, awarding restitution for those damages is erroneous. *See, e.g., Nienburg*, 153 Idaho at 498; *Shafer*, 144 Idaho at 372.

A. Mr. Davis Was Not The Proximate Cause Of The Damage To The Dirt Bike's Frame And Engine Because That Damage Was Not Reasonably Foreseeable

If this Court determines that Mr. Davis was the actual cause of the damages beyond those he admitted to causing, it should still vacate the restitution award in that regard because Mr. Davis was not the proximate cause of those damages. *See, e.g., Nienburg*, 153 Idaho at 498. Proximate cause is determined by the reasonably foreseeable test, which requires the court to determine "whether the injury and manner of occurrence are 'so highly unusual . . . that a reasonable person, making an inventory of the possibilities of harm which his conduct might produce, would not have reasonably expect the injury to occur.'" *Lampien*, 148 Idaho at 374 (quoting *Cramer*, 146 Idaho at 875). As such, in the restitution context, the damages must be a reasonably foreseeable consequence of the defendant's culpable conduct. *Corbus*, 150 Idaho at 602; *Schultz*, 148 Idaho at 886-87. The damages in this case were not a reasonably foreseeable consequence of Mr. Davis's culpable conduct.

The lack of proximate cause in this case is demonstrated by examining the classic scenario of proximate cause discussed in *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99 (N.Y. 1928). That case, in which the concept of proximate cause takes its root, holds that a person is only liable for damages if the injury was within the reasonably foreseeable "orbit of danger". *See id.* at 100. However, the orbit of danger does not expand to situations where a third person was acting in the wrong:

> One who jostles his neighbor in a crowd does not invade the rights of others standing at the outer fringe when the unintended contact casts a bomb upon the ground. The wrongdoer is the man who carries the bomb, not the one who explodes it without suspicion of the danger. Life will have

> to be made over, and human nature transformed, before prevision so extravagant can be accepted as the norm of conduct, the customary standard to which behavior must conform.

Id. Arguments, such as the State's claim for restitution in this case, share the instability of such a worldview: "What the plaintiff must show is 'a wrong' to herself; [*i.e.*], a violation of her own right, and not merely a wrong to someone else, *nor conduct 'wrongful' because unsocial, but not 'a wrong' to any one.*" *Id.* (emphasis added). Critically, "[o]ne who seeks redress at law does not make out a cause of action by showing without more that there has been damage to his person. If the harm was not willful, he must show that the act as to him had possibilities of danger so many and apparent as to entitle him to be protected against the doing of it though the harm was unintended." *Id.* at 101. Basically, the concept of proximate cause is limited by the fundamental idea that one person will not be liable for the wrongdoing of another person, even if his relevant actions were not socially acceptable in and of themselves.

The Court of Appeals has examined a similar situation and reached a similar conclusion. *See Shafer*, 144 Idaho 370. In *Shafer*, the defendant was in an accident with another motorist, who was injured as a result of the collision. *Id.* at 371. The defendant left the scene of that accident without providing identification or assistance. *Id.* Ultimately, however, he was convicted of leaving the scene of an injury accident. *Id.* The district court awarded significant restitution to the other motorist. *Id.* at 371-72. The Court of Appeals concluded, however, that the defendant's culpable conduct was not the cause of the other motorist's injuries. *Id.* at 373. As in *Palsgraf*, just because the other person had been injured and the defendant had behaved in a manner that was decidedly not socially acceptable was insufficient to show that his unacceptable actions

were the cause of the damages, so as to authorize a restitution award in that case.[9] *See id.*

This rationale applies neatly to Mr. Davis's actions – buying the dirt bike under circumstances which would make him reasonably suspect it had been stolen, then reselling it. While his actions may be wrongful and not socially acceptable, that alone does not, contrary to the district court's conclusions, make him liable for every damage done to the dirt bike in the chain of possession. (*See* R., p.99 ("It should be reasonably foreseeable to a person who deprives another of his property by knowingly receiving, retaining, and selling stolen property, that the properly could be damaged in the chain of possession").) As the *Palsgraf* opinion points out, "[o]ne who seeks redress at law does not make out a cause of action by showing without more that there has been damage to his person." *Palsgraf*, 162 N.E. at 101. That is all that the State has shown in regard to the damages Mr. Davis did not admit to causing: that Mr. Schmidtgall had suffered damage to his property. That is insufficient to authorize a restitution award. *Shafer*, 144 Idaho at 373; *see also Palsgraf*, 162 N.E. at 101.

Rather, the damage done must have been a reasonably foreseeable consequence of the defendant's culpable action. *Corbus*, 150 Idaho at 602; *Schultz*, 148 Idaho at 886-87. It is not reasonably foreseeable from those actions that the third party would be so callous with the dirt bike, so as to render the dirt bike, which was in relatively good condition,[10] mechanically unusable over the course of a single

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[9] The only reason that restitution award was affirmed was that the Court of Appeals found that the defendant had agreed to pay for those losses as part of his plea agreement. *See id.* at 374-75.

[10] Mr. Schmidtgall, an avid dirt bike rider with fourteen years' experience, testified that he had purchased the dirt bike approximately five months before. (Tr., Vol.1, p.33, Ls.19-21.) It is unlikely, given his testimony, that he would have purchased a dirt bike that was in disrepair. Additionally, Mr. Weeks testified that he had seen the dirt bike

weekend.[11] Mr. Kearl's behavior to that effect is so highly unusual as to make them not reasonably foreseeable. After all, as the *Palsgraf* opinion points out, reasonable foreseeability is based, in part, on expectations about human nature. *Palsgraf*, 162 N.E. at 100. It is not reasonably foreseeable for a person selling an item to believe that the purchaser, who is intending to use the property for its intended purpose (to ride it), will immediately render that item inoperable. Therefore, since the damages to the engine and the frame were not reasonably foreseeable, Mr. Davis's actions were not the proximate cause of the damages; they were beyond the orbit of danger.

Additionally, under Idaho's restitution statute, the damages must be a specific and reasonably foreseeable consequence of Mr. Davis's criminal conduct. *Corbus*, 150 Idaho at 602; *Schultz*, 148 Idaho at 886-87. In this case, Mr. Davis's criminal conduct was possessing property under circumstances which would lead him to reasonably believe the property had been stolen. (R., pp.29, 39.)

It is not reasonably foreseeable that his possession of the dirt bike under these circumstances would lead to this type of damage. Mr. Schmidtgall and Mr. Weeks both

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before it had been stolen and it appeared that Mr. Schmidtgall had taken good care of the dirt bike. (Tr., Vol.1, p.45, Ls.16-21.)

[11] Mr. Schmidtgall reported the dirt bike stolen on July 27, 2011. (R., p.6.) The dirt bike was recovered on August 1, 2011. (R., p.7.) Mr. Davis told officers that he bought the dirt bike on Thursday and transferred it to Mr. Kearl on Saturday. (R., p.12.) This Court should take judicial notice of the fact that, in the relevant time frame, July 28, 2011, was a Thursday and July 30, 2011, was a Saturday. I.R.E. 201(b) (allowing the court to take judicial notice of facts not subject to reasonable dispute and which are capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned). Therefore, based on the district court's finding of fact – that the majority of the damage was not caused by Mr. Davis (R., p.99) – Mr. Kearl must have caused the damage between taking possession of the dirt bike at some point on Saturday, July 30, 2011, and the time the dirt bike was recovered by officers at some point on Monday, August 1, 2011. That means that Mr. Kearl rendered the dirt bike unsafe to ride in a period a little over twenty-four hours (all of July 31 and part of July 30 and August 1).

testified that the damage to the frame was the result of crashing the dirt bike. (Tr., Vol.1, p.39, Ls.11-13; Tr., Vol.1, p.51, Ls.1-3.) The damages must be of a type "'that a reasonable person, making an inventory of the possibilities of harm which his conduct might produce,'" would have expected that type of injury to occur.'"[12] *Lampien*, 148 Idaho at 374 (quoting *Cramer*, 146 Idaho at 875). Rather, in such situations, there is no sufficient causal link between the defendant's culpable conduct and the injuries, and so restitution is not authorized in those cases. *See, e.g., Shafer*, 144 Idaho at 373 (affirming the district court's decision to not award restitution because the defendant's criminal act was not the actual cause of the victim's losses).

Given this is a possession of stolen property claim, the reasonably foreseeable damage would be that additional parts would be removed or altered, so as to alter the dirt bike's appearance, or that the it would be disassembled and sold for parts. (*Cf.*, Tr., Vol.1, p.41, Ls.9-10 (Mr. Schmidtgall testifying that the bike could likely be worth $1,200 - $1,500, if it were sold for parts).) It is not reasonably foreseeable, however, that someone who would buy a dirt bike for personal use would be so reckless as to render the dirt bike unsafe to operate within a day. That is not the type of damage that a reasonable person would expect to result from Mr. Davis's criminal conduct of possessing stolen property. As a result, I.C. § 19-5304 does not authorize a restitution award against Mr. Davis for those damages. *See Lampien*, 148 Idaho at 374; *Cramer*, 146 Idaho at 875. Therefore, that portion of the restitution against Mr. Davis should be vacated. *See Corbus*, 150 Idaho at 602; *Nienburg*, 153 Idaho at 495-96.

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[12] Mr. Kearl was the wrongdoer, the bomb-carrier from Chief Judge Cardozo's illustrative example. *Compare Palsgraf*, 162 N.E. at 100. Mr. Davis was the person who jostled the bomb carrier. *Compare id.* The only difference is that Mr. Davis intended to jostle the bomb carrier. However, he could not have reasonably foreseen the type and scope of the damage that would result from his action.

To that end, Mr. Davis only admitted damaging the fenders and removing the decals and the arm guards. (Tr., Vol.2, p.8, Ls.3-7; Tr., Vol.2, p.9, Ls.10-11.) According to Mr. Weeks's explanation of State's Exhibit 1, the first nine items listed were plastic pieces that covered the dirt bike.[13] (Tr., Vol.1, p.50, Ls.8-12.) The third-to-last item listed is the hand guards.[14] (Tr., Vol.1, p.52, Ls.20-22.) The total cost for those pieces is $397.11. (*See* State's Exhibit 1, p.1.) Since those are the only pieces Mr. Davis admitted to damaging (Tr., Vol.2, p.8, Ls.3-7; Tr., Vol.2, p.9, Ls.10-11), and the district court found, as a matter of fact, that the remainder of the damages were not caused while the dirt bike was in Mr. Davis's possession (R., p.99), the record only establishes that Mr. Davis was the cause of $397.11 worth of damage to the dirt bike. (*See* State's Exhibit 1.)

The cost of the labor to replace those pieces of the dirt bike that Mr. Davis admitted to damaging is not clear from the record. State's Exhibit 1 does not differentiate between the cost of the labor to replace the plastic pieces fo the fender from the other damage to the body of the dirt bike (*i.e.*, the damage to the frame and muffler). (*See* State's Exhibit 1, p.2.) Nor does Mr. Weeks's testimony clarify the record in that regard. (*Compare* Tr., Vol.1, p.53, Ls.6-8 ("[The labor cost estimate is] an average price to do the top end and replace *all of the body work* on this type of a repair." (emphasis added); *with* Tr. Vol.1, p.56, Ls.14-21 ("And so your labor estimate includes that estimate R&R on the second page that's to basically repair and replace *all*

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[13] These pieces appear to be parts of the fender assembly. (*See* State's Exhibit 1.)

[14] Based on Mr. Weeks's description of the last two items listed in State's Exhibit 1 – they are "parts for the front forks the bottom two-piece" (Tr., vol.1, p.52, Ls.20-24) – they do not appear to be related to the fenders or the hand guards. Therefore, they are not among the parts that Mr. Davis admitted to damaging, but instead, are part of the frame damage, and thus, part of the damages that the district court determined did not occur while the dirt bike was in Mr. Davis's possession. (*See* R., p.99.)

of those plastic parts essentially? Yes. And then there would be an additional labor charge to do the motor stuff? Right.") (emphasis added).) As such, the State failed to prove by a reasonable certainty how much of the labor costs were caused by Mr. Davis's criminal conduct, and therefore, that portion of the award should be vacated. *Straub*, 153 Idaho at 889. Therefore, the restitution award should be limited to only $397.11. *See Nienburg*, 153 Idaho at 498.

B. Mr. Davis Was Not The Proximate Cause Of The Damage To The Dirt Bike's Frame And Engine Because Mr. Kearl's Actions Constituted An Intervening, Superseding Cause

Even if this Court determines that Mr. Davis's actions were originally the proximate cause of the damage to the dirt bike's frame and engine, the chain of causation, and thus, Mr. Davis's liability, was broken by an intervening, superseding cause. The Idaho Supreme Court has defined an intervening, superseding cause:

> An intervening, superseding cause generally refers to an independent act or force that breaks the causal chain between the defendant's culpable act and the victim's injury. The intervening cause becomes the proximate cause of the victim's injury and removes the defendant's act as the proximate cause. To relieve a defendant of criminal liability, an intervening cause must be an unforeseeable and extraordinary occurrence. . . . In most contexts, a crime or an intentional tort constitutes an 'independent intervening cause' that precludes a defendant's antecedent crime from being a proximate cause.

Lampien, 148 Idaho at 374 (citations omitted). Since Mr. Kearl's actions were an unforeseeable and extraordinary occurrence, they constituted an intervening superseding cause.

The Idaho Supreme Court has recently discussed the foreseeability of other persons' actions in regard to causation, considering whether the victim's action of leaping from the defendant's car in order to escape the immediate danger created by the defendant's reckless driving was reasonably foreseeable. *Corbus*, 150 Idaho at

606. In determining that the victim's actions were reasonably foreseeable, the Idaho Supreme Court made a critical distinction about the unique facts of that case. *See id.* No third-party actor was involved. *Id.* "In this case, because the alleged intervening, superseding cause involves the conduct of the victim *rather than some third-party actor or force* the analysis is essentially the same as for determining whether Corbus' criminal conduct was the proximate cause of the victim's injuries." *Id.* (emphasis added). The Court's language specifically indicates that the analysis is different if a third-party's actions were at issue. *See id.* The Court reaffirmed this distinction, noting that "the passenger's actions *were not independent of the situation created by Corbus's criminal conduct.*" *Id.* (emphasis added).

Unlike in *Corbus*, there is a third party, Mr. Kearl, whose actions are at issue in this case. Mr. Kearl's actions, which were entirely independent of Mr. Davis's, were the direct cause of the damages. (*See* R., p.99 (district court finding that Mr. Davis did not cause those damages).) Furthermore, unlike the actions of the defendant in *Corbus*, Mr. Davis's criminal conduct (possessing stolen property) did not risk immediate injury to the dirt bike, beyond the damages that he admitted to causing. In fact, the only evidence in the record suggests that, when Mr. Davis test rode the dirt bike, he did so with due caution. (Tr., Vol.2, p.8, Ls.10-14 (Mr. Davis testifying that he had ridden the dirt bike once for a short distance, but not exceeding forty miles per hour.) Therefore, the actions of the independent third party over whom Mr. Davis had no control or authority, constituted an intervening, superseding cause, replacing Mr. Davis's criminal conduct as the proximate cause. *Compare Corbus*, 150 Idaho at 606.

This case is similar to *Nienburg*, 153 Idaho 491. In *Nienburg*, the defendant was driving under the influence of alcohol. *Id.* at 494. When officers approached him, he

stopped driving and fled from the car, leaving the car door open. *Id.* His dog then exited through the open door and ran approximately one hundred yards, where it was hit and killed by another responding police vehicle. *Id.* The Court of Appeals reversed the award of restitution for the damage to the police car because, as the State conceded, that damage to the patrol vehicle was not proximately caused by the defendant's criminal actions – driving while intoxicated. *Id.* at 498. The criminal conduct of the defendant in *Nienburg* (DUI) played no role in the dog's behavior after the car was parked, nor did he have any control over the dog's behavior once it left his car. *See id.* Therefore, the dog's independent actions superseded Mr. Nienburg's criminal conduct as the proximate cause of the damage to the responding cruiser. *See id.*

Similarly, Mr. Davis's criminal conduct (possession of stolen properly) played no role in Mr. Kearl's behavior after Mr. Kearl took possession of the bike. In fact, just as parking and leaving the car ended the criminal conduct in *Nienburg*, transferring possession of the dirt bike ended Mr. Davis's criminal conduct in this case. At that point, Mr. Davis had no control over Mr. Kearl or the dirt bike, nor was his criminal conduct influencing Mr. Kearl's behavior in any way. As such, Mr. Kearl's independent actions intervened, superseding Mr. Davis's actions as the proximate cause of the damages to the dirt bike's engine and frame. Therefore, just as in *Nienburg*, Mr. Davis's culpable conduct was not the proximate cause of the damages now sought in restitution.

Furthermore, as the Idaho Supreme Court indicated, "[i]n most contexts, a crime or an intentional tort constitutes an 'independent intervening cause' that precludes a defendant's antecedent crime from being a proximate cause." *Lampien*, 148 Idaho at

374. In this case, Mr. Davis was convicted of possessing stolen property under circumstances as would reasonably induce him to believe that the property was stolen. (*See* R., p.29.) That charge was based on Mr. Davis's statements that he believed the deal he had made to purchase the dirt bike was too good to be true. (*See, e.g.*, R., p.11.) Mr. Davis bought the dirt bike for $600 and sold it to Mr. Kearl for $700.[15] (R., p.11.) That particular model of dirt bike, even when damaged to the point that it was unsafe to ride, was still worth $1,200 to $1,500. (Tr., Vol.1, p.48, Ls.15-19.) In working order, that dirt bike had been purchased five months prior for $3,500. (Tr., Vol.1, p.33, Ls.22-23.) According to Mr. Weeks, it may have been worth up to $4,000. (Tr., Vol.1, p.47, L.24 - p.48, L.4.) Since the damage to the frame and engine had not occurred when Mr. Kearl bought the dirt bike (*see* R., p.99), he, too, was getting a deal too good to be true (a $3,500-dirt bike for $700). Therefore, since the suspiciously good deal should have made Mr. Davis aware that the dirt bike was stolen, the suspiciously good deal should have also made Mr. Kearl aware that the dirt bike was stolen.

In fact, Mr. Kearl would have seen the dirt bike with spray paint on it, as well as having various parts removed or otherwise altered. As such, the circumstances when he took possession of the dirt bike were even more suggestive that something was amiss then when Mr. Davis took possession of it. Therefore, Mr. Kearl also took

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[15] The district court indicated that Mr. Davis testified that he bought the dirt bike for $150. That is an inaccurate summary of the facts. Mr. Davis testified that he made an initial payment of $150 for the bike, but also testified that he was expected to come up with the rest of the money by the next Monday. (Tr., Vol.2, p.7, Ls4-7; *see also* R., p.11 (police report indicating that Mr. Davis said he had purchased the dirt bike for $600).) As he told police, he sold the dirt bike for $700, with the intent to keep $100 and pay the remainder to the person who sold him the dirt bike to cover that debt. (R., p.11; *see also* Tr., Vol.2, p.11, Ls.2-5.)

possession of property under circumstances which as would reasonably induce him to believe that the property was stolen. That means Mr. Kearl's possession of the dirt bike would also constitute a criminal act. Consequently, under the rationale in *Lampien*, Mr. Kearl's own criminal conduct of possessing the stolen dirt bike is an intervening, superseding cause. *Lampien*, 148 Idaho at 374. Therefore, his conduct precludes Mr. Davis's antecedent crime from being the proximate cause of the damages to the dirt bike's frame and engine. *Id.* As a result, the district court erred by ordering Mr. Davis to pay restitution for the damages that Mr. Kearl caused to the dirt bike's frame and engine.

CONCLUSION

The record only established that Mr. Davis was the cause of $397.11 worth of damage to the dirt bike. (*See* Tr., Vol.2, p.8, Ls.3-7; Tr., Vol.2, p.9, Ls.10-11; State's Exhibit 1.) As such, the remaining $1,246.29 (the value of the replacement parts which were not damaged by Mr. Davis), should be vacated. *See, e.g., Nienburg*, 153 Idaho at 498. The record is also unclear as to how much of Mr. Weeks's labor costs were necessary to repair the dirt bike's frame and the engine, and how much of it was necessary to address the damages caused by Mr. Davis. (*Compare* Tr., Vol.1, p.53, Ls.6-8; *with* Tr., Vol.1, p.56, Ls.14-2.) As such, the State has failed to show how much of the labor cost was attributable to the damage caused by Mr. Davis, and, therefore, has failed to meet its burden of proof to show that the claimed loss was attributable to Mr. Davis's culpable conduct. *See Nienburg*, 153 Idaho at 495-96; *see also Corbus*,

150 Idaho at 602. Therefore, that portion of the award should be vacated from as well.[16] *See Shafer*, 144 Idaho at 372 (citing I.C. § 19-5304(1)(e)).

Therefore, Mr. Davis respectfully requests that this Court vacate the restitution order except for the award of $397.11 for damages which he concedes he caused. Alternatively, he requests that this Court remand the case for the limited purpose of calculating the restitution for only the damages he admitted causing.

DATED this 19th day of September, 2013.

BRIAN R. DICKSON
Deputy State Appellate Public Defender

[16] Even if this Court determines that Mr. Davis's culpable conduct was the cause of the labor estimate for the body work ($306.00 (State's Exhibit 1, p.2), this record would still only support a restitution award of $703.11. In that case, this Court should still vacate the remaining award for $1,771.90, since that amount was to cover losses that were not caused by Mr. Davis's culpable conduct.

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 19th day of September, 2013, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

SHAWN O'SHAY DAVIS II
1957 E 4400 NORTH
PRESTON ID 83263

STEPHEN DUNN
DISTRICT COURT JUDGE
E-MAILED BRIEF

TAWNYA R HAINES
BANNOCK COUNTY PUBLIC DEFENDER'S OFFICE
E-MAILED BRIEF

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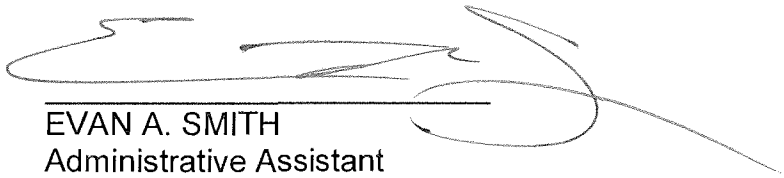

EVAN A. SMITH
Administrative Assistant

BRD/eas