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State v. Harer Respondent's Brief Dckt. 43241

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TABLE OF CONTENTS

| | <u>PAGE</u> |
|---|-------------|
| TABLE OF AUTHORITIES..... | ii |
| STATEMENT OF THE CASE..... | 1 |
| Nature of the Case | 1 |
| Statement of the Facts and Course of Proceedings..... | 2 |
| ISSUE PRESENTED ON APPEAL | 6 |
| ARGUMENT..... | 7 |
| The District Court Did Not Abuse Its Discretion Err When It Denied The State’s Motion For Restitution For The Costs Of Prosecution..... | 7 |
| A. Standard Of Review | 7 |
| B. The District Court’s Decision To Deny The State’s Request For Restitution Constituted A Proper Exercise Of Its Discretion | 8 |
| 1. The District Court Recognized That This Was A Decision Submitted To Its Discretion | 9 |
| 2. The District Court Acted Within The Outer Boundaries Of Its Discretion And Consistent With Legal Standards Applicable To That Decision | 10 |
| 3. The District Court’s Decision Constituted An Exercise Of Reason | 12 |
| C. The District Court Properly Denied The State’s Motion For Restitution For The Costs Of Prosecution Because The State Claimed Restitution For Losses Not Caused By The Conduct For Which Mr. Harer Was Convicted | 17 |
| CONCLUSION | 20 |
| CERTIFICATE OF MAILING..... | 21 |

TABLE OF AUTHORITIES

Cases

| | |
|--|----------------|
| <i>In re Doe</i> , 146 Idaho 277 (Ct. App. 2008) | 12 |
| <i>State v. Card</i> , 146 Idaho 111 (Ct. App. 2008) | 7, 11, 18 |
| <i>State v. Cardoza</i> , 155 Idaho 889 (Ct. App. 2014) | 9 |
| <i>State v. Coma</i> , 133 Idaho 29 (Ct. App. 1999) | 19 |
| <i>State v. Corbus</i> , 150 Idaho 599 (2011) | 7, 8, 9 |
| <i>State v. Gomez</i> , 153 Idaho 253 (2012) | 7 |
| <i>State v. Hanson</i> , 92 Idaho 665 (1968) | 13 |
| <i>State v. Hedger</i> , 115 Idaho 598 (1989) | 7 |
| <i>State v. Mowrey</i> , 128 Idaho 804 (1996) | 7, 18, 19 |
| <i>State v. Nienburg</i> , 153 Idaho 491 (Ct. App. 2012) | 10, 11, 18, 19 |
| <i>State v. Richmond</i> , 137 Idaho 35 (Ct. App. 2002) | 13, 17 |
| <i>State v. Russo</i> , 157 Idaho 299 (2014) | 17 |
| <i>State v. Upton</i> , 127 Idaho 274 (Ct. App. 1995) | 11 |
| <i>State v. Weaver</i> , 158 Idaho 167 (Ct. App. 2014) | 9 |
| <i>State v. Windom</i> , 150 Idaho 873 (2011) | 14 |

Statutes

| | |
|-------------------------|---------------|
| I.C. § 18-8201 | 16 |
| I.C. § 19-4703 | 13 |
| I.C. § 19-5304 | <i>passim</i> |
| I.C. § 37-2732(k) | <i>passim</i> |
| I.C. §18-7804 | 16 |

STATEMENT OF THE CASE

Nature of the Case

The district court recognized that whether to grant the State's request for restitution for the costs of prosecution against Cameron Harer in this case was a discretionary determination. It considered the limits and legal standards defining that discretion and made a reasoned decision within the scope of that discretion – that the State had failed to carry its burden of proof to show that the restitution award it sought was proper in light of all the relevant, statutorily-identified factors. Therefore, it denied the State's request for restitution.

The State appealed, asserting that the district court established an additional factor for the State to prove before it merits the restitution in such cases, thereby excluding a particular subset of cases from the scope of the restitution statute. Since the district court properly exercised its discretion in this case, this Court should affirm the district court's decision to deny the restitution request.

Alternatively, this Court should affirm the district court's order denying the restitution request pursuant to the doctrine of correct result, wrong reason. Since the State's restitution request included time the prosecutor spent working on a case which was ultimately dismissed, and since the State failed to prove that there was an agreement authorizing restitution for that time, the district court had no statutory authority to award the restitution amount the State was requesting. Because the State failed to meet its *prima facie* burden to show it was entitled to the restitution it claimed under the statute, the district court order denying the State's motion was proper on this alternative ground.

For either of these reasons, this Court should affirm the district court's order denying the State's motion for restitution.

Statement of the Facts and Course of Proceedings

In this case, Mr. Harer pled guilty to one count of possession with intent to deliver a controlled substance. (R., p.79.) The only term of the plea agreement expressed in the appellate record is the statement in Mr. Harer's guilty plea questionnaire, that the "State will rec[ommend] no more than retained jurisdiction." (R., p.69.) However, the district court subsequently indicated there was a general agreement that Mr. Harer would pay restitution, though "[t]here was no agreement as to . . . the amount of restitution." (R., p.102.) Additionally, at the change of plea hearing, the prosecutor dismissed another case pending against Mr. Harer (CR-2014-13437).¹ (See R., p.74.) The district court imposed a unified term of five years, with three years fixed, on Mr. Harer, and it retained jurisdiction over the case. (R., p.80.) Mr. Harer successfully completed a rider program during that period of retained jurisdiction, and the district court subsequently suspended his sentence for a four-year period of probation. (R., p.125.)

However, at the initial sentencing hearing, the prosecutor moved for a restitution award of \$410 dollars, \$200 for the testing of substances in this case, and \$210 for the time spent prosecuting the case. (Tr., p.3, L.1-3.) Mr. Harer objected to the \$210 request for the prosecutor's time. (Tr., p.3, Ls.14-16.) He argued that the request for restitution was not appropriate since the prosecutor's office was already properly

¹ According to the online repository, CR-2014-13437 charged Mr. Harer with possession of a controlled substance with a second-offense enhancement.

funded. (Tr., p.3, Ls.16-20.) He also argued that ordering him to pay that relatively-minor amount of restitution in this case would be inappropriate given all the other costs and fees he would be required to bear going forward. (Tr., p.3, L.21 - p.4, L.9.) The presentence investigation report (*hereinafter*, PSI) had also noted that Mr. Harer was unemployed, and so, he “would require additional time in order to find a job to pay any fines, fees, court costs, or restitution that may be ordered by the Court.” (PSI, p.6.)² The district court ordered restitution for the \$200 to which Mr. Harer had not objected, along with \$2,035.50 in other costs, fines, and fees. (Tr., p.5, L.23 - p.6, L.3; *see also* R., pp.80-81.) However, it requested briefing from the State in support of its request for the remaining \$210. (Tr., p.6, Ls.6-11.)

The State’s brief argued that the district court had the discretion to award the requested restitution. (R., pp.86-92.) However, its request for restitution included an accounting of the time spent on both CR-2014-12661 (the case currently on appeal) and “CR-14-13437-FE (dismissed).” (R., p.93.) The district court ultimately denied the State’s request for restitution. (R., p.105.)

In reaching that decision, the district court recognized: “There is no question that this statute [I.C. § 37-2732(k)] gives the Court discretion to award the costs of prosecution actually incurred, including the regular salaries of employees.” (R., p.103.) However, it also noted that such an award was discretionary, not mandatory. (R., p.105.) Thus, it determined, “[t]he issue here is not whether the Court can award

² PSI page numbers correspond with the page numbers of the electronic PDF file “CONFIDENTIAL CLERK’S CERTIFICATE HARER 43421.” Included in this file are the PSI report and all the documents attached thereto (police reports, addendum from rider staff, etc.).

the costs of prosecution as restitution, but rather, whether it should award costs of prosecution as restitution.” (R., p.105.)

Recognizing that I.C. § 37-2732(k) provided no guidance in exercising its discretion in that regard, the district court looked to the general restitution statute, I.C. § 19-5304, for guidance. (R., p.105.) It determined that it needed to consider “the amount of economic loss sustained by the victim as a result of the offense, the financial resources, needs and earning ability of the defendant, and such other factors as the court deems appropriate” in deciding whether to grant the State’s request for restitution. (R., p.105 (quoting I.C. § 19-5304(7)).)

In considering those factors, the district court found that “[t]he State has made no showing of economic loss. The deputy prosecutor’s salary would have been paid whether or not work was done in this case.” (R., p.105.) While it noted that, if the facts of a particular case merited an award of restitution for the costs of prosecution, it would be willing to order such restitution, the district court concluded the facts of this case did not show such an order was merited. (R., p.105.)

Rather, the district court explained, it had already ordered Mr. Harer to pay various fines, fees, and costs. (R., p.105 (identifying costs totaling \$1950); *compare* R., pp.80-81 (ordering costs in the judgement of conviction totaling \$2,235.50).) Additionally, it explained the costs for which the State was seeking restitution were “the hourly rate and length of time incurred by the deputy prosecutor in doing her job on this case.” (R., p.105.) It pointed out that those were simply part of the general costs of maintaining the justice system and, in cases such as Mr. Harer’s, those general costs were more appropriately borne by the government. (R., pp.105-06.) Thus, it concluded,

“[i]n this case, the Court sees no reason as to why this case should be treated any differently than most criminal cases,” where the government would bear those costs, and “[t]he State made no attempt to show why this case is any different than the standard criminal case.” (R., p.106.) Thus, based on its evaluation of the facts of the case, the relevant legal standards, and the State’s failure to present sufficient evidence to justify its request, the district court denied the State’s motion for that restitution. (R., p.106.)

The State filed a timely appeal from that decision. (R., pp.108-10.) On appeal, it argued that the district court had improperly added an element of proof – that the case was different than the standard criminal case – and thereby, improperly limited its discretion by excluding a subset of the cases in which such restitution awards could, within the district court’s discretion, be awarded. (App. Br., pp.4-6.)

ISSUE

The State framed the issue on appeal as follows:

Did the district court err when it concluded that the state is entitled to recover the costs of prosecution under I.C. § 37-2732(k) only if the state suffers “economic loss,” which it does not suffer in “routine drug cases”?

(App. Br., p.2.)

The State’s articulation of this issue is unduly narrow. Therefore, Mr. Harer would rephrase the issues this way:

Did the district court abuse its discretion when it denied the State’s motion for restitution for the costs of prosecution?

ARGUMENT

The District Court Did Not Abuse Its Discretion Err When It Denied The State's Motion For Restitution For The Costs Of Prosecution

A. Standard Of Review

“The decision regarding whether to order restitution, and in what amount, is within the district court’s discretion and is guided by consideration of the factors set forth in Idaho Code section 19-5304(7).” *State v. Corbus*, 150 Idaho 599, 602 (2011). While the restitution claim in this case was made under I.C. § 37-2732(k), “[s]ince I.C. § 37-2732(k) is short on specific guidance regarding the nature of a restitution award or the procedure to obtain such an award, we find guidance in the general restitution statute, I.C. § 19-5304.” *State v. Gomez*, 153 Idaho 253, 258 (2012). The State bears the burden to prove that restitution is proper, in that “the expenses were reasonable and necessary to treat injuries caused by the defendant’s criminal conduct.” *State v. Card*, 146 Idaho 111, 114-15 (Ct. App. 2008).

When the appellate courts review such exercises of discretion, they will consider: “(1) whether the lower court rightly perceived the issue as one of discretion; (2) whether the court acted within the outer boundaries of such discretion and consistently with any legal standards applicable to specific choices; and (3) whether the court reached its decision by an exercise of reason.” *State v. Hedger*, 115 Idaho 598, 600 (1989) (internal quotation omitted). The State, as the party challenging the restitution order, bears the burden of showing a clear abuse of the district court’s discretion. *Cf. State v. Mowrey*, 128 Idaho 804, 805 (1996) (“Error will not be presumed on appeal, but must be affirmatively shown in the record. The appellant has the burden of providing an

adequate record on appeal”). In that regard, the district court’s factual determinations will not be disturbed if they are supported by substantial evidence. *Corbus*, 150 Idaho at 602.

B. The District Court’s Decision To Deny The State’s Request For Restitution Constituted A Proper Exercise Of Its Discretion

In this case, the district court properly exercised its discretion, determining that, when all the relevant factors were considered, the State had failed to carry its *prima facie* burden to show that the restitution it claimed was reasonable and necessary to address an actual loss caused by the defendant’s criminal conduct. (R., pp.103-06.) The State’s attempts to transform the district court’s analysis such that, as the State claims, the statute would “not apply[] to ‘routine’ drug cases” (App. Br., pp.4-6), demonstrate a fundamental misunderstanding of the district court’s analysis.

When the district court’s decision is analyzed through the proper standard of review, it becomes clear that the district court was not categorically excluding this sort of restitution in “routine” cases, but merely holding the State to its burden of proof. Since it determined that the State had not presented sufficient evidence to show the restitution it claimed was necessary to address an economic loss caused by the conduct for which Mr. Harer was convicted in light of all the statutory factors, the district court properly exercised its discretion to deny that claim for restitution. As such, the State’s argument should be rejected and this Court should affirm the order denying the State’s request for restitution.

1. The District Court Recognized That This Was A Decision Submitted To Its Discretion

The district court expressly recognized that this was a discretionary decision several times in its decision. For example: “There is no question that [I.C. § 37-2732(k)] gives the Court the discretion to award the costs of prosecution actually incurred, including regular salaries of employees.” (R., p.103.) Thus, it described the question it was deciding as: “whether it *should* award costs of prosecution as restitution.” (R., p.105 (emphasis added).) Furthermore, after examining the precedent upon which the State based its claim, the district court explained, “nothing in *Weaver*^[3] or *Cardoza*^[4] mandates an award for the costs of prosecution. It is a discretionary matter for the trial court.” (R., p.105.) Similarly, it noted, “[i]f the Legislature had wanted the costs of prosecution to be awarded in every drug case, the Legislature could have made the award of costs mandatory rather than discretionary,” but it had not done so. (R., p.106.) The district court’s determination that this issue is within its discretion is correct: “The decision regarding whether to order restitution, and in what amount, is within the district court’s discretion.” *Corbus*, 150 Idaho at 602.

Finally, the district court’s decision demonstrated it was exercising its discretion: “This Court is not opposed to awarding costs of prosecution as restitution in appropriate cases *and under appropriate facts and circumstances*.” (R., p.105 (emphasis added).) This also demonstrates that the district court did not, as the State contends, categorically exclude a certain subset of cases (the “routine” cases) from the scope of I.C. § 37-2732(k). (See App. Br., pp.4-6.) All the district court required is that the State

³ *State v. Weaver*, 158 Idaho 167 (Ct. App. 2014), *rev. denied*.

⁴ *State v. Cardoza*, 155 Idaho 889 (Ct. App. 2014).

meet its burden of proving that the facts and circumstances of the case justify granting the request for restitution under the appropriate statutory factors. (R., p.105).

Because the district court properly recognized this issue was committed to its discretion, its decision passes the first prong of the *Hedger* test for appropriate exercise of its discretion.

2. The District Court Acted Within The Outer Boundaries Of Its Discretion And Consistent With Legal Standards Applicable To That Decision

The district court's determination that whether or not to award restitution is within its discretion also identifies the outer boundaries of its discretion, in that it could award the entire amount requested, or it could deny the entire request. Within those boundaries, the district court identified legal standards applicable to its decision: "Because I.C. § 37-2732(k) contains no provisions concerning the nature of a restitution award or the proceedings to obtain that award, courts are guided by reference to the general restitution statute, I.C. § 19-5304." (R., p.105.) The Idaho Supreme Court has held this procedure is proper. *Gomez*, 153 Idaho at 258.

Idaho Code § 19-5304(7) identifies several factors relevant to the district court's discretionary decision to award or not award restitution in a particular case:

The court, in determining whether to order restitution and the amount of such restitution, shall consider [1] the amount of economic loss sustained by the victim as a result of the offense, [2] the financial resources, needs and earning ability of the defendant, and [3] such other factors as the court deems appropriate. The immediate inability to pay restitution by a defendant shall not be, in and of itself, a reason to not order restitution.

I.C. § 19-5304(7). Additionally, restitution awards under I.C. § 19-5304 must address an economic loss the victim has actually suffered as the result of the conduct for which the defendant was actually convicted. *State v. Nienburg*, 153 Idaho 491, 495 (Ct. App.

2012). The district court's decision in this case is consistent with these legal standards: "The State has made no showing of economic loss. The deputy prosecutor's salary would have been paid whether or not work was done on this case." (R., p.105.) As such, the district court found, as a matter of fact, that there was no causal connection between the loss the State claimed and the conduct for which Mr. Harer had been convicted. (See R., p.105.) As such, the State failed to carry its *prima facie* burden of proof, and so, denying the motion was the appropriate result according to the relevant legal standards.

Fundamentally though, what the district court's analysis recognized, and what the State's argument on appeal fails to appreciate, is that there are other factors besides the simple fact that a loss occurred which play into the discretionary decision of whether to order restitution. (*Compare* R., pp.5-6; *with* App. Br., pp.4-6.) After all, "[t]he restitution statute is not so broad, however, as to authorize compensation for every expenditure that a victim may personally deem reasonable or necessary as a response to a crime." *Card*, 146 Idaho at 114 (emphasis from original). Thus, as the district court recognized, the statutes call for it to determine, within its discretion, whether it should order the requested restitution. (R., p.105.)

In ignoring this fact, the State's asks this Court to *reverse* the district court's decision on appeal. (App. Br., p.7.) Granting the remedy the State requests would mean that the district court should have granted the motion based on the evidence in the record. That request is improper since "[w]hen a discretionary ruling has been tainted by legal or factual error, we ordinarily vacate the decision and remand the matter for a new, error-free discretionary determination by the trial court." *State v. Upton*, 127

Idaho 274, 276 (Ct. App. 1995). The reason the State's requested remedy is particularly problematic in this case is that it would effectively declare that the district court erred in considering reasonableness and necessity in its restitution decision, that it only should have determined the amount of loss sustained, then ordered the defendant to pay that amount. (See App. Br., pp.4-7.)

The Court of Appeals has already rejected such a result: "we cannot say [the statute] wholly disregards reasonableness and necessity as factors shaping a court's restitution order." *In re Doe*, 146 Idaho 277, 283-84 (Ct. App. 2008). Since the State's argument in this case promotes that already-rejected perspective, in contravention of the plain language of the relevant statutes, this Court should reject that argument and uphold the full scope of the district court's discretion, as defined by the relative statutes.

Since the district court properly recognized the outer boundaries of its discretion and acted consistent with the legal standards therein, its decision satisfies the second prong of the *Hedger* test.

3. The District Court's Decision Constituted An Exercise Of Reason

The district court's discussion of this issue reveals that it gave reasoned consideration to each of the relevant statutory factors in its decision to deny the State's request for restitution. (R., pp.103-06.) For example, the district court's discussion about the general expenses of maintaining the judicial system is directed at the first of the statutory factors – the amount of economic loss sustained by the victim (here, the State). (See R., pp.105-06.) The point the district court was making is the claimed loss was relatively minor – these are just the costs which necessarily exist from having a justice system, not some extreme expenditure of resources. As trial counsel pointed

out, “[t]he prosecutor’s office is already properly funded. They receive money through forfeiture already. The only thing that this money can go to additionally is training and for drug cases. . . . The prosecutor’s office isn’t going to miss out on another \$210” (Tr., p.3, Ls.16-20; Tr., p.4, Ls.4-5.)

In support of that determination, the district court relied on the Idaho Supreme Court’s decision in *State v. Hanson*, 92 Idaho 665 (1968). (R., p.106.) The *Hanson* Court was evaluating the application of the since-repealed I.C. § 19-4703, which provided that, in any case where the defendant was convicted in a jury trial, “the costs thereof shall be paid” by the defendant. See *Hanson*, 92 Idaho at 668 n.1 (quoting I.C. § 19-4703). The Idaho Supreme Court joined with a number of other states to hold that such costs “are a general expense of maintaining the system of courts and the administration of justice, and that such costs are more properly an ordinary burden of government.” *Id.* at 668-69.

While not a perfect analog to the situation arising under I.C. § 37-2732(k), the principle recognized in *Hanson* is still applicable to Mr. Harer’s case: when the State is seeking a relatively minor amount of restitution for an expense it would have incurred anyway in the general administration of its judicial function, the justification for forcing the defendant to pay that cost is lessened. Cf. *State v. Richmond*, 137 Idaho 35, 37 (Ct. App. 2002) (noting that I.C. § 19-5304(7) generally favors a policy of full compensation of victims, and so, necessarily recognizing that there will be cases where that policy will not be appropriately enforced). Thus, the district court’s consideration of that factor, as expressly required by I.C. § 19-5304(7), is not, as the State claims, adding an additional factor for the State to prove. (See App. Br., pp.4-6.) Rather, it is

an example of the district court engaging in a reasoned examination of one of the factors it is statutorily-obligated to consider in its exercise of its discretion. That the State disagrees with the district court's conclusion does not establish that the district court's decision is an abuse of its discretion. See, e.g., *State v. Windom*, 150 Idaho 873, 881 (2011) (explaining that, even where "reasonable minds may differ as to the 'rightness' of the district court's factual conclusions . . . it is manifest that the district court's sentence was the product of reason," and so, the defendant had failed to show that decision constituted an abuse of the district court's discretion).

The district court's ultimate decision to deny the restitution request is further supported by its consideration of the second statutorily-identified factor – the defendant's financial situation. While this factor is by no means dispositive, the statute expressly calls for it to be considered within the totality of the district court's evaluation of the issue. I.C. § 19-5304(7) ("The court . . . shall consider . . . the financial resources, needs and earning ability of the defendant"). In this regard, the district court pointed out that it had already ordered Mr. Harer to pay \$1,950 in fines, costs, and other restitution. (R., p.105.) The district court did not include its order for Mr. Harer to pay \$285.50 in statutory fees in that calculation, but with those fees added in, Mr. Harer was already obligated to pay \$2,235.50. (See R., pp.80-81.) The PSI added that, because Mr. Harer was unemployed, he "would require additional time in order to find a job to pay any fines, fees, court costs, or restitution that may be ordered by the Court." (PSI, p.6.) Trial counsel effectively explained the impact of these facts in this case, pointing out that ordering the restitution for these particular costs of prosecution is part of:

a process by which right now we're trying to force poor people to essentially pay for the criminal justice system. And while I understand the impetus for that to happen, we damage our own ability to be successful when we put people under such a financial strain and put them under increasing weighty standards that they can't get their feet back under them when they get back out of the retained jurisdiction.

The prosecutor's office isn't going to miss out on another \$210, but it may be that cutting down n the financial strain -- when they're already paying for costs and fees and costs of supervision and treatment and housing when they get back out, that this [restitution] could be the straw that breaks the camel's back.

(Tr., p.3, L.21 - p.4, L.3.) Thus, the second factor identified in I.C. § 19-5304(7) weighs heavily against awarding the claimed restitution, particularly when, as the district court determined, the amount of the loss claimed was relatively minor.

The district court's discussion of this factor echoes trial counsel's argument. For example, the district court adopted the assertion that it should consider not awarding the required restitution in light of all the other costs and fees the district court had already ordered. (R., p.105.) Thus, the district court's discussion of the fact that the State would bear this cost regardless and the fact that this is just a "routine" drug case reveals its determination that, given his financial situation, needs, and earning ability, Mr. Harer should not be required to also bear the costs of this prosecution. (See R., pp.105-06.) This constitutes a reasoned weighing of the relevant factors, and so, is appropriate within the district court's exercise of its discretion. (*Compare* App. Br., p.6 n.2 (demonstrating the State's misunderstanding of the district court's analysis in this regard).

Finally, the district court considered a third factor which, though not expressly listed in the statute, was appropriately considered under the catch-all language: "such other factors as the court deems appropriate." See I.C. § 19-5304(7). Specifically, that

is the fact that I.C. § 37-2732(k) only applies in limited circumstances (namely, to violations of Title 37, Chapter 27, I.C. §18-7804, or I.C. § 18-8201). I.C. § 37-2732(k). Considering the limited scope of I.C. § 37-2732(k), the district court concluded: “the Court sees no reason as to why this case should be treated any differently than most criminal cases,” impliedly noting that defendants in most other criminal cases do not have to pay the costs of prosecution. (R., p.106.) Therefore, the district court deemed it appropriate to consider the limited scope of I.C. § 37-2732(k) as a factor weighing against ordering the relatively-minor amount of restitution requested by the State, particularly because the State, the party bearing the burden of proof, failed to prove why such an award was merited on the facts of this particular case. (R., p.105.) Rather, the district court found, as a matter of fact, that the State “simply provided the hourly rate and length of time incurred by the deputy prosecutor in doing her job on this case.” (R., p.105.) Because the district court found that evidence insufficient to show the requested restitution should be ordered in light of its consideration of the statutory factors, it properly denied the State’s request for that restitution.

Thus, the district court’s decision demonstrates a reasoned analysis of the statutorily-identified factors. (See R., pp.105-06.) Therefore, its conclusion that the State failed to present evidence proving its claim for restitution was justified in this case, as well as its denial of that motion, constituted a valid exercise of its discretion. Since the State has failed to show an abuse of the district court’s discretion on appeal, this Court should affirm that decision.

C. The District Court Properly Denied The State's Motion For Restitution For The Costs Of Prosecution Because The State Claimed Restitution For Losses Not Caused By The Conduct For Which Mr. Harer Was Convicted

Even if this Court agrees with the State and determines that the district court unduly limited the scope of its discretion in its consideration of the State's motion, this Court should still affirm its order denying the restitution award because "[w]here the lower court reaches the correct result by an erroneous theory, this Court will affirm the order on the correct theory." *State v. Russo*, 157 Idaho 299, 307 (2014), *reh'g denied*.

The alternative analysis is premised on the fact that the State's restitution request included time spent on two cases, including "CR-14-13437 (dismissed)." (R., p.93.) Since Mr. Harer was only convicted in one of those cases (see R., pp.74, 79-84), the loss claimed is, *ipso facto*, not wholly attributable to the conduct for which Mr. Harer was convicted. That means, absent an agreement by the parties for Mr. Harer to pay restitution on the dismissed case, the district court lacked statutory authority to order the requested restitution. *Richmond*, 137 Idaho at 37 ("It is generally recognized that courts of criminal jurisdiction have no power or authority to direct reparations or restitution to a crime victim in the absence of a statutory provision to such effect."); see I.C. § 19-5304(9) ("The court may, with the consent of the parties, order restitution . . . for economic loss or injury for crimes which are not adjudicated or are not before the court.").

While the district court noted that there was a general agreement to pay restitution, it also found, as a matter of fact, "[t]here was no agreement as to . . . the amount of restitution." (R., p.102.) That sort of nonspecific agreement does not amount to an agreement under I.C. § 19-5304(9) to pay restitution for the dismissed conduct.

Nienburg, 153 Idaho at 496-97. In *Nienburg*, there was a general agreement to pay restitution. *Id.* However, the Court of Appeals found the terms of that agreement “include no expression of consent by Nienburg to pay any amount of restitution or to pay for any specified economic loss. They also do not express any consent by Nienburg to pay restitution that was not proximately caused by his DUI, the offense to which he pleaded guilty.” *Id.* (emphasis from original omitted). Thus, the Court held that the agreement did not establish a valid basis for the district court to award restitution for losses not caused by the DUI itself. *Id.* As in *Nienburg*, the district court properly denied the State’s request for restitution because the State failed to carry its *prima facie* burden to prove that the restitution it sought was necessary to address the conduct *for which Mr. Harer had been convicted*. See *id.*; *Card*, 146 Idaho at 114-15.

Furthermore, this case has a more fundamental problem in regard to the purported agreement, which further demonstrates why this Court should affirm the district court’s order denying the restitution request on this alternative ground: the terms of the purported agreement do not actually appear in the appellate record. (See generally *R., Tr.*) As the *Nienburg* Court explained, the authority to order restitution under such agreements is governed by the plain language of the agreement. *Nienburg*, 153 Idaho at 497. Thus, without the language of the agreement, this Court cannot engage in the requisite analysis.

The Idaho Supreme Court has made it clear that “[e]rror will not be presumed on appeal, but must be affirmatively shown in the record. The appellant has the burden of the providing an adequate record on appeal” *Mowrey*, 128 Idaho at 805. As such, “where pertinent portions of the record are missing on appeal, they are presumed to

support the actions of the trial court.” *State v. Coma*, 133 Idaho 29, 34 (Ct. App. 1999); *cf. Mowrey*, 128 Idaho at 805 (applying that presumption). Since the State, as the appellant in this case, did not provide a complete record of the purported agreement, the missing portions of the record (namely, the absent terms of the purported agreement to pay restitution) should be presumed to support the district court’s decision to deny the State’s restitution request. That means they should be presumed to contain no specific agreement for Mr. Harer to pay restitution for the dismissed charge. As discussed *supra*, absent such an agreement, the Court was without statutory authority to grant the State’s request for restitution, since it included a claim for restitution for time spent on charges for which Mr. Harer was not convicted. *Nienburg*, 153 Idaho at 496-97.

In fact, since the appellate record does not reveal the terms of any relevant terms of the plea agreement,⁵ the district court’s determination that there was an agreement to pay restitution at all (R., p.102) is not supported by competent and substantial evidence. Therefore, that determination should either be set aside as clearly erroneous, in which case, there definitely was not any basis upon which the district court had authority to grant the State’s restitution request, or the missing part of the record should, per *Mowrey* and *Coma*, be presumed to support the district court’s decision to deny the State’s restitution request. In either case, this Court would properly affirm the district court’s order denying the claim for restitution.


⁵ The only term of that agreement actually appearing in the appellate record is the statement in Mr. Harer’s guilty plea questionnaire – that the State will limit its sentencing recommendation to allow for a period of jurisdiction (R., p.69; *see generally* R., Tr.)

Thus, regardless of how this Court rules on the State's claim of error in this appeal, it should nevertheless affirm the district court's order on this alternative ground.

CONCLUSION

Mr. Harer respectfully requests this Court affirm the district court's order denying the State's request for restitution.

DATED this 28th day of December, 2015.

for 
BRIAN R. DICKSON
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 28th day of December, 2015, I served a true and correct copy of the foregoing RESPONDENT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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