

IN THE COURT OF APPEALS OF IOWA

No. 0-122 / 09-0952
Filed March 24, 2010

STATE OF IOWA,
Plaintiff-Appellee,

vs.

MITZI E. FENZLOFF,
Defendant-Appellant.

Appeal from the Iowa District Court for Franklin County, John S. Mackey,
Judge.

Mitzi Fenzloff appeals from a restitution order following convictions of
fraudulent practices and first-degree theft. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Stephan J. Japuntich,
Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Martha E. Trout, Chantelle Smith, and
Denise Timmins, Assistant Attorneys General, and Brent Symens, County
Attorney, for appellee.

Considered by Sackett, C.J., and Doyle and Danilson, JJ.

DANILSON, J.

Mitzi Fenzloff appeals from a restitution order following convictions of fraudulent practices and first-degree theft. We affirm.

I. Background Facts.

An investigation by the Iowa Insurance Division showed that Mitzi Fenzloff and her husband, Albert Fenzloff,¹ owners of Sunnyside Memory Gardens, sold pre-need funeral services and merchandise without the requisite permits and failed to deposit the payments for goods and services in a trust as required by Iowa Code chapter 523A.² The State charged the couple with ongoing criminal conduct, fraudulent practices, and theft.

Mitzi Fenzloff waived her right to a jury trial and agreed to a bench trial on the minutes of testimony. On August 18, 2008, the district court found Fenzloff guilty of second-degree fraudulent practices, in violation of Iowa Code sections 714.8(10), 523A.703(1), and 714.10, and first-degree theft, in violation of sections 714.1(2) and 714.2(1). The court specifically found “[t]he amount of funds misappropriated by defendant exceeds \$10,000.”

Judgment was entered upon Fenzloff’s convictions on September 29, 2008, with restitution to be determined “at a separate hearing upon application by the State and notice to the defendant and defense counsel.”

On January 2, 2009, the State filed a “Statement of Pecuniary Damages” in both Fenzloff’s cases (listing forty-four victims and amounts owed to each,

¹ This appeal involves Mitzi Fenzloff only.

² All references are to the Iowa Code (2003).

which totaled \$35,101.08) and asked that the court issue an order for restitution “for each defendant—with joint and several liability.”

On January 15, 2009, the court ordered the matter be set for hearing on January 26. On January 23, Albert Fenzloff moved to continue the hearing on pecuniary damages.

On March 16, an “Amended Statement of Pecuniary Damages” was filed, in which several victims had been removed and the total restitution decreased (the State noted it had provided merchandise to them during a receivership and was not thus seeking restitution). The statement noted, “Albert Fenzloff has agreed to the restitution amounts listed below,” which now totaled \$31,579.55, and attached Albert’s Stipulation to Restitution. The State asked the court to issue an order for restitution “for each defendant—with joint and several liability.”

In May 2009, in Mitzi Fenzloff’s case, the State’s “Request for Enforcement of Defendant’s Agreement to Restitution” was filed. The request asserted that counsel for the State and Fenzloff had contacted the court to advise it that the March hearing was no longer necessary because the parties had reached an agreement; “per the agreement, the Stipulation to Restitution included a statement indicating that [Fenzloff] was agreeing to the restitution amounts but in doing so was not admitting guilt”; Fenzloff’s attorney was not able to secure his client’s signature on the written stipulation prior to the March hearing because of her placement at a correctional facility; “the State had agreed to forego its right to seek restitution for the significant amounts owed . . . as a result of payments made by it for the benefit of victims” and to avoid a day-long restitution hearing; Fenzloff later refused to sign the written record of agreement;

and “[d]espite a negotiated agreement clearly working to the benefit of the defendant”, the State would again be required to prepare for a day-long hearing, arrange for transportation and lodging for its witnesses, and the court would have to set aside an entire day for hearing.

On June 2, 2009, following a telephonic hearing,³ the district court ruled the parties’ oral agreement should be enforced.

Fenzloff appeals, asserting the district court erred in ordering enforcement of an alleged stipulation to the amount of restitution. Fenzloff contends (1) the record does not support the monetary amount of the purported agreement, (2) there was no completed agreement, only an agreement to agree, and (3) trial counsel was ineffective in failing to advise her of the factual defects related to restitution.

II. Standard of Review.

Restitution orders are reviewed for errors at law. *State v. Bonstetter*, 637 N.W.2d 161, 165 (Iowa 2001). The court’s findings of fact have the effect of a special verdict and are binding upon us if supported by substantial evidence. *Id.* “Evidence is substantial when a reasonable mind would accept it as adequate to reach a conclusion.” *Id.* (citation omitted).

III. Discussion.

Restitution is a mandatory part of sentencing in Iowa. *State v. Mai*, 572 N.W.2d 168, 171 (Iowa Ct. App.1997). Restitution includes the payment of pecuniary damages to the victim. Iowa Code § 910.1(4). A restitution order must

³ The record contains no transcript from the telephonic hearing.

rest on a causal connection between the established criminal act and the injuries to the victim. *State v. Ihde*, 532 N.W.2d 827, 829 (Iowa Ct. App.1995).

In reviewing the amount of a restitution order fixed by a trial court, an appellate court needs to determine whether the trial court applied the correct law in fixing damages. See *State v. Petrie*, 478 N.W.2d 620, 622 (Iowa 1991). The restitution amount must be in accord with the damages caused by the crime. *State v. Wagner*, 484 N.W.2d 212, 216 (Iowa Ct. App.1992).

Fenzloff does not argue that the parties could not reach an agreement as to the amount of restitution. Rather, she argues the district court erred in concluding she did, in fact, agree to the “Stipulation to Restitution.”

We agree with the district court’s finding that Fenzloff entered into an oral agreement with respect to the Stipulation to Restitution. The district court wrote:

Following defendant’s judgment of conviction and sentence . . . [t]he matter was continued and then rescheduled . . . for March 16, 2009. Previously thereto on March 12, 2009, co-defendant Albert F. Fenzloff executed his written Stipulation to Restitution pursuant to an Amended Statement of Pecuniary Damages in the total sum of \$31,579.55.

Prior to the date set for the continued hearing on restitution, defendant orally discussed the matter with her counsel of record and agreed to the same amount of restitution as her husband provided that the stipulation set forth that she makes no admission of guilt in entering the agreement. On that basis, counsel contacted the court and advised it that hearing was no longer necessary as the State and defendant had reached an agreement with respect to the victim restitution and the State agreed to cancel the hearing with the understanding that a signed copy of the stipulation would be forthcoming.

. . . .
. . . The terms were clear and definite and the State relied upon defense counsel’s statement that an agreement had been reached to obviate the necessity for hearing on March 16, 2009. Accordingly, the Stipulation to Restitution embodying the parties’ oral agreement shall be and the same is hereby enforceable as if fully executed by defendant

The parties' agreement relieved the State of its burden to prove the restitution amounts. See *In re Property Seized*, 501 N.W.2d 482, 485 (Iowa 1993) ("We conclude that the court did not act improperly in holding French to the terms of the agreement that his counsel approved on the record in the court proceeding. We have recognized that stipulations in formal litigation may be of two kinds: those that are a mere admission of fact, relieving a party from the inconvenience of making proof, and those that constitute a concession of entire issues in the litigation."); see also *Bartels v. Hennessey Bros., Inc.*, 164 N.W.2d 87, 91 (Iowa 1969) ("[S]ubject to limitations respecting propriety, applicable statutes, or court rules, an agreement as to facts, entered into between parties to a judicial proceeding, is ordinarily binding upon those who make [it]."); cf. *State v. Petrie*, 478 N.W.2d 620, 622 (Iowa 1991) (reversing a restitution order that required payment of attorney fees and courts costs because plea agreement was silent on issue; "We stress that nothing in this opinion prevents the parties to a plea agreement from making a provision covering the payment of costs and fees.").

Because we agree with the district court that Fenzloff is bound by the "Stipulation to Restitution," we need not address her claim that the amounts are not conclusively proved by the minutes of testimony. It is sufficient that the amounts of restitution as stated in the stipulation are within the range of evidence found in the minutes of testimony. *In re Property Seized*, 501 N.W.2d at 485; see also *State v. Moore*, 500 N.W.2d 75, 76 (Iowa 1993) (concluding defendant could be required to pay restitution for costs associated with three crimes with which he

was charged, though he pleaded guilty to only one, because he did not contest the State's evidence he committed all three crimes).

Additionally, we conclude Fenzloff has failed to present sufficiently specific complaints to warrant discussion of her summary claim that “[c]ounsel was ineffective in failing to advise defendant against orally agreeing to the amount in question.” See *Dunbar v. State*, 515 N.W.2d 12, 15 (Iowa 1994).

IV. Conclusion.

The district court did not err in concluding Fenzloff was bound by her oral agreement to the “Stipulation to Restitution.” We affirm.

AFFIRMED.