

IN THE SUPREME COURT, STATE OF WYOMING

2019 WY 86

APRIL TERM, A.D. 2019

August 23, 2019

LINDA MARLENE FREEMAN,

Appellant  
(Defendant),

v.

S-18-0261

THE STATE OF WYOMING,

Appellee  
(Plaintiff).

*Appeal from the District Court of Laramie County  
The Honorable Catherine R. Rogers*

***Representing Appellant:***

Office of the State Public Defender: Diane M. Lozano, State Public Defender; Kirk A. Morgan, Chief Appellate Counsel; David E. Westling, Senior Assistant Public Defender.

***Representing Appellee:***

Bridget Hill, Wyoming Attorney General; Jay Jerde, Special Assistant Attorney General; Katherine A. Adams\*, Senior Assistant Attorney General; and Ewa C. Dawson, Senior Assistant Attorney General. Argument by Ms. Adams.

\* *Order Allowing Withdrawal of Counsel entered April 9, 2019.*

***Before FOX, KAUTZ, BOOMGAARDEN, GRAY, JJ, and SNYDER, DJ.***

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**SNYDER**, District Judge.

[¶1] Linda M. Freeman appeals entry of a restitution order following an unconditional “no contest” plea to one count of exploitation of a vulnerable adult. She contends that the district court acted contrary to law in awarding restitution. We affirm.

### **ISSUES**

[¶2] Ms. Freeman challenges the district court’s award of restitution. She raises four separate issues:

- I. Whether the district court erred in ordering Ms. Freeman to pay restitution for amounts transferred after L.L. Freeman’s death.
- II. Whether the district court’s order of restitution to the Estate of L.L. Freeman is valid.
- III. Whether the failure to submit a plan of restitution invalidates the restitution order.
- IV. Whether there was sufficient evidence to support the district court’s order of restitution of \$532,890.80.

### **FACTS**

[¶3] Ms. Freeman pled no contest to one count of exploitation of a vulnerable adult resulting from the misappropriation of her father-in-law’s property. In 2001, L.L. Freeman moved from Kansas City, Missouri, to Cheyenne, Wyoming, to be closer to his son. Mr. Freeman suffered from poor health, including dementia and other mental and physical health infirmities. Mr. Freeman passed away on August 7, 2007.

[¶4] While in Cheyenne, Mr. Freeman resided at the V.A. Medical Center (V.A.). Ms. Freeman often visited Mr. Freeman at the V.A. and obtained access to his bank accounts. Due to her relationship with Mr. Freeman and access to his accounts, Ms. Freeman transferred hundreds of thousands of dollars for her benefit. Ms. Freeman used these funds to purchase and build property. In February 2003, Mr. Freeman opened two financial accounts listing Ms. Freeman as a use co-signature and pay-on-death beneficiary and one joint account with survivorship rights. Between 2004 and 2007, Ms. Freeman made multiple withdrawals and transfers of money from Mr. Freeman’s accounts. After Mr. Freeman’s death, she transferred an additional \$91,330.97 from his accounts.

[¶5] Mr. Freeman’s children and his Estate filed a civil action against Ms. Freeman in 2007. In 2010, a district court entered judgment against Ms. Freeman in the amount of

\$722,870.56, plus punitive damages. Ms. Freeman made one payment of \$526.10 toward the judgment.

[¶6] Due to Ms. Freeman’s lack of payment, Mr. Freeman’s family contacted law enforcement to pursue criminal charges. In 2015, the State charged Ms. Freeman with one count of exploitation of a vulnerable adult under Wyo. Stat. Ann. § 6-2-507 (LexisNexis 2019). The State later dismissed the case without prejudice.

[¶7] In July 2016, the State re-filed the same charge, starting the current litigation. The State alleged Ms. Freeman withdrew, transferred and converted the amount of \$684,738.22, between January 7, 2004, and December 5, 2007. Of that amount, \$91,330.97 was transferred after Mr. Freeman’s death. In 2018, the parties entered into a *Plea Agreement for Recommended Disposition* in which Ms. Freeman would plead “no contest” and pay restitution in exchange for a recommended sentence.

[¶8] In July 2018, the district court sentenced Ms. Freeman to not less than eight nor more than ten years of incarceration, suspended in favor of ten years of probation. The district court took judicial notice of the civil judgment entered against Ms. Freeman. The court ordered restitution of \$532,890.80. The court reached this figure based upon the civil award amount of \$722,870.56 minus \$189,979.76, the amount recovered from the sale of real estate and Ms. Freeman’s one-time payment. The Judgment and Sentence states restitution is payable to the Estate of L.L. Freeman, in accordance with a restitution plan to be prepared by the Department of Corrections, Division of Probation and Parole, and submitted to the court for approval. Ms. Freeman filed a timely notice of appeal.

### **STANDARD OF REVIEW**

[¶9] Challenges to the court’s authority to order restitution are reviewed “under a *de novo* statutory interpretation standard, because a court has only that authority to act which is conferred by the subject statute.” *O’Halloran v. State*, 2014 WY 95, ¶ 11, 331 P.3d 121, 125 (Wyo. 2014) (quoting *Frederick v. State*, 2007 WY 27, ¶¶ 14-15, 151 P.3d 1136, 1141 (Wyo. 2007) (internal citations omitted)). Challenges to the factual basis for a restitution order are reviewed for procedural error or clear abuse of discretion. *Id.* However, “challenges to the factual basis of an award of restitution can be waived in certain circumstances by the defendant’s voluntary actions, such as entering into a plea agreement, and then failing to make any objection at sentencing.” *Merkison v. State*, 996 P.2d 1138, 1142 (Wyo. 2000). Further, this Court has determined that “(b)y agreeing in their plea agreements to pay restitution for the property damage and by failing to object to the restitution amount, the appellants waived their rights to contest the restitution awards on appeal.” *Meerscheidt v. State*, 931 P.2d 220, 226 (Wyo. 1997).

### **DISCUSSION**

**I. Whether the district court erred in ordering Ms. Freeman to pay restitution for amounts transferred after L.L. Freeman’s death.**

[¶10] Ms. Freeman argues the district court’s restitution order is invalid because it includes \$91,330.97 for funds transferred after Mr. Freeman’s death. As Ms. Freeman transferred a portion of the money after Mr. Freeman’s death, she contends the amount was not a pecuniary damage resulting from the criminal activity of exploiting a vulnerable adult.

[¶11] The Wyoming statute regarding restitution states:

In every case in which a claim for restitution is submitted, the court shall fix a reasonable amount as restitution owed to each victim for *actual pecuniary damage resulting from the defendant’s criminal activity*, and shall include its determination of the pecuniary damage as a special finding in the judgment of conviction or in the order placing the defendant on probation under W.S. 7-13-301.

Wyo. Stat. Ann. § 7-9-103(b) (LexisNexis 2019) (emphasis added).

[¶12] “Pecuniary damage” is defined as “all damages which a victim could recover against the defendant in a civil action arising out of the same facts or event, including damages for wrongful death. It does not include punitive damages and damages for pain, suffering, mental anguish and loss of consortium.” Wyo. Stat. Ann. § 7-9-101(a)(iii) (LexisNexis 2019). “Criminal activity” is defined as “any crime for which there is a plea of guilty, nolo contendere or verdict of guilty upon which a judgment of conviction may be rendered and includes any other crime which is admitted by the defendant, whether or not prosecuted.” Section 7-9-101(a)(i).

[¶13] This clear statutory language provided authority for the district court to include the amount Ms. Freeman transferred after Mr. Freeman’s death in the restitution order because it was pecuniary damage resulting from her criminal activity. *See Mathewson v. State*, 2018 WY 81, ¶ 9, 431 P.3d 1121, 1123 (Wyo. 2018) (interpreting statutory language in accordance with the plain, ordinary and usual meaning of words). Regardless of whether the State could have included the amount Ms. Freeman transferred after Mr. Freeman’s death in the exploitation of a vulnerable adult charge, it was part of her criminal activity. She admitted to taking the money and it was clearly unlawful. Further, the amount obviously could be recovered in a civil action against Ms. Freeman as it already was included in the Estate’s civil judgment against her.

[¶14] This Court has held that to justify restitution, the defendant’s criminal activity must have been a proximate cause of damages or loss to the victim. *Alcaraz v. State*, 2002 WY

57, ¶ 9, 44 P.3d 68, 72 (Wyo. 2002). Further, this Court held that legal causation is “conduct which is a substantial factor in bringing about the injuries.” *Id.* (citing *Buckley v. Bell*, 703 P.2d 1089, 1091 (Wyo. 1985)). However, if “the conduct created only a condition or occasion for the harm to occur, it would be regarded as a remote, not a proximate, cause and would not be a substantial factor in bringing about the harm.” *Id.* (citing *Buckley*, 703 P.2d at 1092).

[¶15] We discuss Ms. Freeman’s evidentiary challenge to the restitution order in more detail, *supra*. However, at this juncture, we note that, to the extent Ms. Freeman claims there is an insufficient factual basis to include the \$91,330.97 in the restitution award, she waived her factual challenge. Any argument that the \$91,330.97 factually is not appropriately included in the restitution total ignores that Ms. Freeman knowingly and voluntarily entered into a plea agreement with the provision that she pay restitution to all victims for her criminal acts. Ms. Freeman did not object at the sentencing hearing to the court’s authority to enter restitution on behalf of the Estate, nor did she challenge the amount of restitution. Accordingly, she waived her right to contest the restitution award on appeal. *Merkison*, 996 P.2d at 1142; *Meerscheidt*, 931 P.2d at 226.

## **II. Whether the district court’s order of restitution to the Estate of L.L. Freeman is valid.**

[¶16] Ms. Freeman challenges the district court’s authority to order restitution to the Estate of L.L. Freeman as opposed to individual victims.

[¶17] Wyoming law states, “the court shall fix a reasonable amount as restitution owed to each victim.” Section 7-9-103(b). The restitution statutes define “victim” to mean “a person who has suffered pecuniary damage as a result of a defendant’s criminal activities.” Section 7-9-101(a)(v). The restitution statutes do not include a definition of a “person”; however, Wyoming statute holds that unless a statute clearly specifies a different meaning or interpretation, a “person” “includes an individual, partnership, corporation, joint stock company or any other association or entity, public or private.” Wyo. Stat. Ann. § 8-1-102(vi) (LexisNexis 2019). This Court has established an estate is a legal entity. *See In re Estate of Novakovich*, 2004 WY 158, ¶ 17, 101 P.3d 931, 935 (Wyo. 2004) (“[T]he estate itself ceases to exist as a legal entity once it has been fully probated and the personal representative has been discharged.”). Additionally, this Court has found that various government agencies or offices qualify as “victims” under the Wyoming restitution statutes. *See Shafer v. State*, 2015 WY 38, ¶ 13, 344 P.3d 284, 287 (Wyo. 2015) (affirming order to pay restitution to Wyoming Department of Family Services); *Pinker v. State*, 2008 WY 86, ¶ 18, 188 P.3d 571, 578 (Wyo. 2008) (affirming order of restitution to the Office of Healthcare Financing); *Nixon v. State*, 994 P.2d 324, 300 (Wyo. 1999) (affirming order of restitution to Wyoming Workers’ Compensation Division).

[¶18] Here, Ms. Freeman took money belonging to Mr. Freeman, both before and after his death. Due to Ms. Freeman's actions, that money was no longer available as an asset of the Estate, diminishing the estate. Based on this evidence, the district court found and ordered Ms. Freeman to pay an amount certain to the Estate in restitution for her actions.

[¶19] We conclude the Estate is a victim as defined by Section 7-9-101(a)(v). Therefore, the district court did not commit error when it found and ordered Ms. Freeman to pay restitution to the Estate.

### III. Whether the failure to submit a plan of restitution invalidates the restitution order.

[¶20] Ms. Freeman asserts she is not required to pay restitution as the district court has not approved a restitution plan.

[¶21] Ms. Freeman, as part of her plea agreement, agreed to pay restitution to all victims of her actions. At sentencing, as a condition of probation, Ms. Freeman was ordered to pay restitution as contained in the Judgment and Sentence. Additionally, she was required to prepare a restitution plan and submit it to the court for its approval. In this matter, the restitution plan was not submitted to, or approved by, the district court prior to appeal. Wyoming statutes provide that the defendant, along with the probation and parole officer assigned to the defendant, shall "promptly prepare a plan of restitution including the name and address of each victim, the amount of restitution determined to be owed to each victim pursuant to W.S. 7-9-103 or 7-9-114 and a schedule of restitution payments." Wyo. Stat. Ann. § 7-9-104(a) (LexisNexis 2019). Further, "[t]he **defendant's plan of restitution** and the comments of the probation and parole officer or any other person directed by the court to assist in the preparation of the restitution plan **shall be submitted promptly to the court.**" Wyo. Stat. Ann. § 7-9-105 (LexisNexis 2019) (emphasis added). After a defendant has submitted a plan of restitution to the court, "[t]he court shall promptly enter an order approving the plan or modifying it and providing for restitution payments to the extent that the defendant is or may become reasonably able to make restitution, taking into account the factors enumerated in W.S. 7-9-106." *Id.*

[¶22] Ms. Freeman argues that no restitution plan exists, and as such, the failure to create a plan of restitution means she is not required to pay restitution. The failure to create a restitution plan is at least partially attributable to Ms. Freeman. Ms. Freeman has an affirmative obligation to create a restitution plan in conjunction with the probation agent. According to Section 7-9-104(a), Ms. Freeman is required to participate in the preparation of the restitution plan to be submitted to the district court. At the sentencing hearing, Ms. Freeman was ordered to pay restitution and corrected the Pre-Sentence Investigation Report to confirm her willingness to cooperate and pay the restitution. The court specifically told Ms. Freeman she must work with the Department of Corrections to create and submit the restitution plan to the court. Ms. Freeman's failure to comply with the

requirements of creating a restitution plan does not invalidate the restitution order or make it unenforceable.<sup>1</sup>

#### **IV. Whether there was sufficient evidence to support the district court's order of restitution of \$532,890.80.**

[¶23] Ms. Freeman contends the State failed to meet its burden of presenting credible evidence and proving by a preponderance of the evidence the amount that is appropriate for restitution.

[¶24] As stated above, this Court evaluates such factual challenges to the amount of ordered restitution for a clear abuse of discretion. “Consistent with that standard, we view the evidence as sufficient to support the sentencing court’s decision if it affords a reasonable basis for estimating a victim’s loss.” *Smiley v. State*, 2018 WY 50, ¶ 13, 417 P.3d 174, 177 (Wyo. 2018) (citing *Guinard v. State*, 2014 WY 140, ¶ 6, 337 P.3d 426, 428 (Wyo. 2014)); *Frederick*, ¶¶ 14-15, 151 P.3d at 1141. We view the evidence in the light most favorable to the State, affording it the benefit of every reasonable inference that can be fairly drawn and disregarding any conflicting evidence or interpretations presented by the defendant. *Merkison*, 996 P.2d at 1142. We accord equal dignity to circumstantial and direct evidence. *Hurley v. State*, 2017 WY 95, ¶ 17, 401 P.3d 827, 832 (Wyo. 2017). *Voelker v. State*, 2018 WY 72, ¶ 16, 420 P.3d 1098, 1100 (Wyo. 2018).

[¶25] A defendant may waive the right to contest the factual basis for a restitution order. This Court has held on multiple occasions that “when a defendant knowingly and voluntarily agrees in a plea agreement to pay restitution, and then fails to object at sentencing to the restitution amount, he waives his right to challenge on appeal the factual basis of the restitution award.” *Hite v. State*, 2007 WY 199, ¶ 9, 172 P.3d 737, 739 (Wyo. 2007) (quoting *Chippewa v. State*, 2006 WY 11, ¶ 7, 126 P.3d 129, 131 (Wyo. 2006)); *see also Meerscheidt*, 931 P.2d at 225-26; *Penner v. State*, 2003 WY 143, ¶ 7, 78 P.3d 1045, 1047-48 (Wyo. 2003); *Merkison*, 996 P.2d at 1141. To properly object to the factual basis for restitution, the “objection must be both cogent and specific.” *Smiley*, ¶ 15, 417 P.3d at 177. Brief expressions of uncertainty without further argument are insufficient to constitute a proper objection. *See id.*; *Chippewa*, ¶ 7, 126 P.3d at 131.

[¶26] In the present case, Ms. Freeman entered a no-contest plea pursuant to the *Plea Agreement for Recommended Disposition*. At the sentencing hearing, Ms. Freeman only requested one correction to the Pre-Sentence Investigation Report. That correction was to confirm her willingness to gain or remain employed and to make restitution payments on

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<sup>1</sup> Both parties briefly address whether failure to create a restitution plan is grounds for revoking Ms. Freeman’s probation. However, neither party asserts, nor does the record reflect, Ms. Freeman has had her probation revoked. As such, the Court will not address this. Further, Ms. Freeman offers no authority to support her argument that failure to submit a restitution plan after sentencing eliminates the requirement that she pay restitution.

this matter. The district court entered the Judgment and Sentence on August 17, 2018, which requires Ms. Freeman to make complete restitution to the Estate of L.L. Freeman of \$532,890.80. The district court relied upon the amount provided in the Pre-Sentence Investigation Report, which was the civil judgment of \$722,870.56, reduced by a payment made by Ms. Freeman of \$526.10. Additionally, the court reduced the restitution amount by \$189,453.66 from the sale of real estate.

[¶27] During the sentencing hearing, Mr. Freeman's daughter, Barbara Meyers, testified. She testified to the existence of a civil judgment over the same subject matter, the amount of the judgment, and the amount the Estate was entitled to recover under the judgment. Ms. Freeman did not object to the figures provided, nor did she present any conflicting evidence.

[¶28] Due to Ms. Freeman's voluntary entry of plea, including an agreement to pay restitution, and failure to object to the amount of restitution sought by the court, this Court finds Ms. Freeman has waived the right to challenge the factual basis for the award of restitution and the district court reasonably awarded restitution in this matter.

### **CONCLUSION**

[¶29] Based on the preceding analysis, this Court finds the district court shall be affirmed on all issues regarding the order of restitution in this matter.