FILED
SUPREME COURT
STATE OF WASHINGTON
6/8/2023
BY ERIN L. LENNON
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FILED
Court of Appeals
Division I
State of Washington
6/7/2023 4:35 PM

NO. 102077-5
(COA NO. 84169-6-I)

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JAZANE BROWN,

Petitioner.

FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

PETITION FOR REVIEW

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A. INTRODUCTION

After three shoplifting incidents at a Home Depot store, Mr. Brown accepted responsibility for his actions and pleaded guilty. He rededicated himself to his children, regaining custody after a years-long struggle. He also found modest employment.

The Court of Appeals stood up a barrier to Mr. Brown's efforts to reform his life. Though the facts admitted in his guilty plea supported no more than $2,250 in restitution, the Court of Appeals affirmed the trial court's award of over $18,000. This conclusion is contrary to the Court of Appeals's own published cases.

The restitution award not only exceeded the trial court's authority, but it also is an unconstitutionally excessive fine. Restitution and the interest accruing on it are punitive, and Mr. Brown is unlikely to be able to pay the full obligation in his lifetime.

B. IDENTITY OF PETITIONER AND COURT OF APPEALS DECISION

Petitioner Jazane Brown asks for review of the decision in *State v. Brown*, No. 84169-6-I (Wash. Ct. App. May 8, 2023), affirming the restitution order.

C. ISSUES PRESENTED FOR REVIEW

1. After a misdemeanor conviction, the trial court may order restitution for losses caused by the crime of conviction. Any findings inherent in the guilty verdict limit the amount the trial court may order. Here, Mr. Brown admitted to taking property worth no more than $750 on each of three occasions. The trial court imposed $18,644.52 in restitution, more than eight times the losses Mr. Brown admitted causing. The Court of Appeals affirmed, contrary to its own published precedent. In so doing, it exposed Mr. Brown and his family to an enormous debt he will never be able to pay. RAP 13.4(b)(2), (b)(4).

2. The excessive fines clause applies to monetary obligations that are at least partially punitive. A fine is excessive if it is grossly disproportionate. A factor courts consider in weighing proportionality is the ability to pay. Here, the trial court imposed $18,644.52 in restitution, 12-percent annual interest on the restitution, and a $500 victim penalty assessment. The court did not consider whether Mr. Brown is able to pay these obligations. The trial court imposed excessive fines. The Court of Appeals's decision to the contrary warrants this Court's review. RAP 13.4(b)(3).

D. STATEMENT OF THE CASE

On three occasions in 2019, Mr. Brown and Monique Duncan entered a Home Depot store, removed items from the shelf, placed them in a shopping cart, and left the store without paying. CP 101–06. The items ranged from $49.95 to $179.00. CP 102, 105, 109.

The prosecution charged Mr. Brown and Ms. Duncan with first-degree organized retail theft. CP 1. Mr. Brown pleaded guilty to three counts of third-degree theft. RP 10–11; CP 26. He admitted he took "property from Home Depot in an amount not exceeding $750" on each occasion. RP 8–9; CP 27.

As a term of misdemeanor probation, the trial court ordered Mr. Brown to pay restitution to Home Depot in an amount to be determined. CP 50. The court also imposed a $500 victim penalty assessment. CP 50.

The prosecution asked the trial court to order Mr. Brown to pay $18,644.52. CP 57. This amount is the total value of the items Home Depot determined went missing on the three relevant dates in 2019. CP 57, 102, 105, 109. Mr. Brown argued the prosecution did not prove his responsibility for all the losses. RP 46–47.

Though Mr. Brown admitted to taking no more than $750 in merchandise on each occasion, the trial court imposed the full amount of $18,644.52. RP 59; CP 97. The order said the payment was compensation for "Org. Retail Theft"—not third-degree theft, the crime of conviction. CP 97. The balance accrues interest at 12 percent per year. RCW 10.82.090(1); RCW 4.56.110(6); RCW 19.52.020(1).

After his convictions, Mr. Brown worked for a local Boys and Girls Club to help young people avoid the mistakes he made. RP 36–37. He also regained custody of his three children after years of hard work. RP 22–23, 34–35; CP 191–96. Though he had no income by the time of the restitution hearing, he still supports his spouse and children. CP 186–87.

E. ARGUMENT

1. **The Court of Appeals's decision is contrary to its precedent and imposes unfair barriers on poor offenders.**

The Court of Appeals's decision to affirm Mr. Brown's $18,000 restitution order contravenes precedent holding that the facts of the conviction limit the amount of a restitution award. The decision also sanctions a restitution debt so catastrophic that Mr. Brown is unable to be able to pay it within his lifetime, hobbling his efforts to turn his life around. This Court should grant review. RAP 13.4(b)(2), (b)(4).

a. *The Court of Appeals contravened precedent holding that the facts of the conviction limit the amount of a restitution award.*

A restitution obligation in excess of the court's statutory authority is void. *State v. Dauenhauer*, 103 Wn. App. 373, 378, 12 P.3d 661 (2000).

After a misdemeanor conviction, as "a condition of probation," the trial court may order restitution. RCW

9.95.210(2). There must be "a causal relationship between" the losses and "the offense charged and proved." *State v. Woods*, 90 Wn. App. 904, 908, 953 P.2d 834 (1998) (quoting *State v. Johnson*, 69 Wn. App. 189, 191, 847 P.2d 960 (1993)).

A court cannot order a person who "pleads guilty to a lesser offense" to "pay restitution to a victim of an offense or offenses which are not prosecuted pursuant to a plea agreement," unless the convicted person "expressly agrees to pay restitution for crimes that he was not convicted of." RCW 9.95.210(2); *State v. Osborne*, 140 Wn. App. 38, 42, 163 P.3d 799 (2007) (citing *Dauenhauer*, 103 Wn. App. at 378); RCW 9.95.210(2).[1]

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[1] The restitution provision of the misdemeanor probation statute is identical to its counterpart in the Sentencing Reform Act of 1981, discussed in *Osborne*, *Miszak*, and other cases cited in this petition. *Compare* RCW 9.94A.753(5) *with* RCW 9.95.210(2).

For theft-related crimes, restitution includes only those losses that result from the act of taking of which the accused person was convicted. *See State v. Miszak*, 69 Wn. App. 426, 428, 848 P.2d 1329 (1993) . For example, in *Miszak*, the trial court could impose restitution only for the item Mr. Miszak admitted to stealing in his plea agreement, and not for items alleged to be stolen on other occasions. *Id.* at 428–29.

Though restitution cannot exceed losses caused by the crime of conviction, a dollar-amount threshold in the definition of the crime does not impose a per se limit. *State v. Rogers*, 30 Wn. App. 653, 657–58, 638 P.2d 89 (1981). For example, the trial court could properly impose restitution for the full $9,500 value of a stolen truck even though the crime of conviction was possessing stolen property worth less than $1,500. *Id.* at 654–55, 656–57.

On the other hand, if the losses resulting from the act based on which the accused person was convicted do not exceed the threshold amount, the trial court cannot impose restitution beyond that threshold. *See State v. Taylor*, 86 Wn. App. 442, 446, 936 P.2d 1218 (1997), ***abrogated on other grounds***, *State v. Enstone*, 137 Wn.2d 675, 974 P.2d 828 (1999). In *Taylor*, the Court of Appeals held the jury's guilty verdict of second-degree welfare fraud—which requires losses less than $1,500—precluded awarding restitution in a greater amount. *Id.* at 444, 446.

Mr. Brown pleaded guilty to three counts of third-degree theft. CP 17–18, 19, 26. The law defines this crime as theft of property whose value "does not exceed" $750. RCW 9A.56.050(1). In his guilty plea statement, Mr. Brown admitted that, on three

occasions, he took "property from Home Depot in an amount not exceeding $750." CP 27.

Because none of the takings for which Mr. Brown was convicted exceeded $750, the maximum restitution the trial court could impose was $2,250. A higher amount would require Mr. Brown to compensate Home Depot for losses that did not result from the takings to which he pleaded guilty, contrary to the statute. RCW 9.95.210(2); *Miszak*, 69 Wn. App. at 428–29. Though Mr. Brown understood the prosecution would recommend restitution in some amount, he did not agree to pay for excess losses. CP 45; RCW 9.95.210(2); *Osborne*, 140 Wn. App. at 42.

The trial court nonetheless ordered Mr. Brown to pay $18,644.52, the sum value of the merchandise Home Depot reported missing. CP 97, 99.

The trial court erred in concluding that Mr. Brown's guilty plea made him liable for all of Home Depot's reported losses. As in *Miszak*, the restitution statute limits Mr. Brown's liability only to the items he was convicted of taking. 69 Wn. App. at 428–29. As in *Taylor*, Mr. Brown's admission that he took property "in an amount not exceeding $750" forecloses a higher restitution award. 86 Wn. App. at 446; CP 27. And, unlike *Rogers*, Mr. Brown's conviction cannot support a higher award because none of the items he admitted taking was worth more than $750 on its own.

By ordering Mr. Brown to compensate Home Depot for more of the missing items than he was convicted of taking, the trial court exceeded its statutory authority. RCW 9.95.210(2); *Taylor*, 86 Wn. App. at 446; *Miszak*, 69 Wn. App. at 428–29.

To the extent *Taylor* conflicts with *Rogers*, *Taylor* states the better rule. *Taylor*'s holding—that the facts necessarily established by the guilty verdict limit the restitution the trial court may order—better accounts for restitution's primary purposes of rehabilitating convicted people and deterring future crime. 86 Wn. App. at 446; *State v. Moen*, 129 Wn.2d 535, 539 n.1, 919 P.2d 69 (1996).

The Court of Appeals attempted to distinguish *Taylor*, but it drew only a trivial distinction. The Court reasoned that *Taylor* is "inapposite" because it "did not involve a plea of guilty." Slip op. at 7–8. But the manner of Mr. Brown's conviction does not matter — whether by jury verdict or by guilty plea, the trial court cannot order restitution for losses beyond "the precise offense charged." *Miszak*, 69 Wn. App. at 428.

The Court of Appeals also erroneously concluded Mr. Brown waived any argument that he did not agree to pay for losses beyond $2,250 by not raising it below. Slip op. at 6–7. The prosecution bore the burden of proving the record of Mr. Brown's conviction supported its proposed restitution award. *State v. Dedonado*, 99 Wn. App. 251, 257, 991 P.2d 1216 (2000). Its "failure to establish facts upon which relief can be granted" may be raised for the first time on appeal. RAP 2.5(a)(2).

b. Exorbitant restitution debts like Mr. Brown's frustrate poor people's efforts to reform their lives.

A rule that permits trial courts to order restitution beyond what the guilty plea supports is not only contrary to the restitution statute, but it would make rehabilitation all but impossible for many convicted people.

Most convicted people are poor, and their convictions further damage their ability to find stable employment and housing. Katherine A. Beckett, et al., Wash. State Minority & Justice Comm'n, The Assessment and Consequences of Legal Financial Obligations in Washington State 62–63 (2008).[2] And the exorbitant 12-percent interest extracted on restitution debts imposes a more formidable obstacle in the path to rehabilitation than other obligations. RCW 10.82.090(1); RCW 4.56.110(6); RCW 19.52.020(1); *State v. Ramos*, 24 Wn. App. 2d 204, 244–45, 520 P.3d 65 (2022) (Chung, J., dissenting).

If Mr. Brown pays $25 a month, he will satisfy his principal debt in 62 years, when he is 92 years old. Figure 1. The interest that accrues in that time will

[2] https://media.spokesman.com/documents/2009/05/study_LFOimpact.pdf.

require another 232 years to pay off. *Id.* If he could afford only $10 a month, he would need over a millennium. Figure 2.

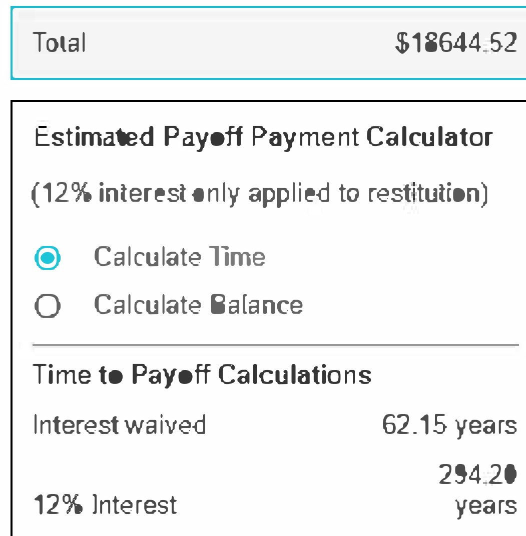

Figure 1. At 12 percent annual interest, with monthly payments of $25, Mr. Brown will pay off his restitution debt in 294 years. Calculated using the Washington Supreme Court Minority and Justice Commission's LFO Calculator, https://beta.lfocalculator.org/.

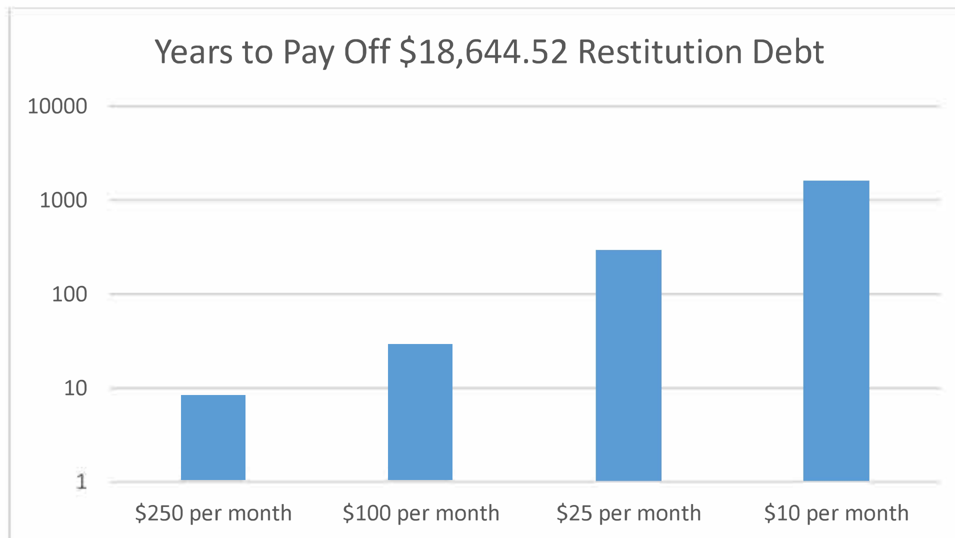

Figure 2. The amount of time needed to pay off the debt increases by orders of magnitude with decreasing ability to pay. Note the logarithmic scale—each horizontal line represents a tenfold increase from the line beneath it. Calculated using the LFO Calculator, https://beta.lfocalculator.org/.

Since his convictions, Mr. Brown has made great strides in turning his life around. He regained custody of his children, a process that took "several years." RP 22–23, 34–35; CP 191–96. He also obtained work at a local Boys and Girls Club. RP 36–37.

A restitution debt that Mr. Brown has no realistic ability to pay increases the strain on his household, and with it the difficulty of maintaining his turn away

from his former life. *State v. Blazina*, 182 Wn.2d 827, 837, 344 P.3d 680 (2015); Travis Stearns, *Legal Financial Obligations: Fulfilling the Promise of Gideon by Reducing the Burden*, 11 Seattle J. for Soc. Just. 963, 974 (2013). An excessive award frustrates rather than furthers the goal of rehabilitation and is harsher than necessary for a deterrent. *Moen*, 129 Wn.2d at 539 n.1. And a restitution award will not compensate any victims when the accused cannot pay it.

2. **By affirming a financial burden imposed on Mr. Brown without weighing his ability to pay, the Court of Appeals sanctioned excessive fines.**

The state and federal constitutions protect the people from excessive fines. Const. art. I, § 14; U.S. Const. amend. VIII. This provision's roots reach to the Magna Carta, which called for fines to "be proportioned to the wrong" and "not be so large as to deprive [a person] of his livelihood." *Timbs v. Indiana*, 139 S. Ct.

682, 687–88, 203 L. Ed. 2d 11 (2019) (quoting *Browning-Ferries Indus. of Vt. v. Kelco Disposal, Inc.*, 492 U.S. 257, 271, 109 S. Ct. 2909, 106 L. Ed. 2d 219 (1989)). The clause "limits the government's power to extract payments . . . 'as punishment for some offense.'" *Austin v. United States*, 509 U.S. 602, 609–10, 113 S. Ct. 2801, 125 L. Ed. 2d 488 (1993) (emphasis omitted) (quoting *Browning-Ferries Indus.*, 492 U.S. at 265).

Whether a court-ordered forfeiture is "excessive" turns on two questions. *City of Seattle v. Long*, 198 Wn.2d 136, 162–63, 493 P.3d 94 (2021). First, the excessive fines clause applies only to punishment—to a financial liability that is "at least 'partially punitive.'" *Id.* (quoting *Timbs*, 139 S. Ct. at 689). Second, a punitive fine is "excessive" if "grossly disproportional to the gravity" of the crime. *United States v. Bajakajian*,

524 U.S. 321, 334, 118 S. Ct. 2028, 141 L. Ed. 2d 314 (1998); *Long*, 198 Wn.2d at 163.

A key factor in determining whether a punitive forfeiture violates the excessive fines clause is whether the subject of the forfeiture can afford to pay it. *Long*, 198 Wn.2d at 173; *Timbs*, 139 S. Ct. at 687–88.

The $18,644.52 restitution order imposed on Mr. Brown, the 12-percent interest on the restitution debt, and the $500 victim penalty assessment are punitive fines subject to the excessive fines clause. To avoid imposing an excessive obligation, the trial court needed to inquire into Mr. Brown's ability to pay. The Court of Appeals, however, held the trial court had no obligation to consider ability to pay before imposing any of these obligations. This decision not only violates the excessive fines clause, but it imposes on Mr. Brown and

other poor offenders a burden they cannot bear. This Court should grant review.[3]

a. The restitution award is partially punitive, and excessive if Mr. Brown is unable to pay it.

"In Washington[,] restitution is both punitive and compensatory." *State v. Kinneman*, 155 Wn.2d 272, 279–80, 119 P.3d 350 (2005). While restitution's goals include compensation, its "primary purpose[s]" are the penological goals of deterrence and rehabilitation. *Moen*, 129 Wn.2d at 539 n.1. This includes restitution imposed "as a condition of probation" under RCW 9.95.210(2). *State v. Barr*, 99 Wn.2d 75, 78–79, 658 P.2d 1247 (1983).

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[3] An excessive fine is a manifest constitutional error that may be raised for the first time on appeal. RAP 2.5(a)(3); *see State v. WWJ Corp.*, 138 Wn.2d 595, 604, 980 P.2d 1257 (1999) (applying RAP 2.5(a)(3) to an excessive fines issue but finding the record inadequate to judge the offense's "gravity"). The Court of Appeals did not reason to the contrary—it found no error occurred. Ruling at 9.

Because restitution "is partially punitive in nature," the excessive fines clause applies. *Ramos*, 24 Wn. App. 2d at 226.

Mr. Brown's restitution order is excessive if it is "grossly disproportional." *Bajakajian*, 524 U.S. at 334. Courts consider factors including

> (1) the nature and extent of the crime, (2) whether the violation was related to other illegal activities, (3) the other penalties that may be imposed for the violation, and (4) the extent of the harm caused.

State v. Grocery Mfrs. Ass'n, 195 Wn.2d 442, 476, 461 P.3d 334 (2020) (quoting *United States v. $100,348.00 in U.S. Currency*, 354 F.3d 1110, 1122 (9th Cir 2004)).

This Court recognized a fifth factor courts must consider—the convicted person's ability to pay. *Long*, 198 Wn.2d at 173. Both English common law and early American scholars and lawmakers understood a forfeiture to be excessive if paying it would destroy a

person's livelihood. *Id.* at 168–69. And contemporary state and federal opinions hold that the excessive fines clause requires inquiry into the ability to pay. *Id.* at 170 (citing, *e.g.*, *Oregon v. Goodenow*, 251 Or. App. 139, 153, 282 P.3d 8 (2012); *United States v. Lippert*, 148 F.3d 974, 978 (8th Cir. 1998)).

The payor's ability to pay inheres in the concept of proportionality—"A fine that would bankrupt one person would be a substantially more burdensome fine than one that did not." *Long*, 198 Wn.2d at 171 (citing *Colo. Dep't of Labor & Emp't v. Dami Hosp., LLC*, 442 P.3d 94, 101 (Colo. 2019)). The homelessness crisis illustrates the profound social cost of imposing burdens on poor people that they cannot bear. *Id.* at 171–72.

Under *Long*, a trial court violates the excessive fines clause by imposing a punitive financial obligation the convicted person cannot pay. 198 Wn.2d at 173.

The record indicates Mr. Brown is not able to pay the $18,644.52 he owes in restitution. CP 97. He had no income at the time of the restitution hearing, and the expense of supporting himself and his spouse and three children totals $4,700 per month. CP 186–87. Mr. Brown was represented by appointed counsel in the trial court and permitted to appeal at public expense. CP 133, 189.

The restitution amount is disproportionate in light of the other factors as well. First and second, Mr. Brown was convicted of misdemeanor theft, and there is no evidence the takings were part of any greater criminal enterprise. Fourth, the amount of losses Home Depot claimed were a drop in the bucket of its record

$110.2 billion in sales in fiscal 2019. Home Depot, Annual Report 2019 at 4.[4]

Third, the restitution award exceeded the highest penalties the court could impose. The statutory maximum fine for a gross misdemeanor is $5,000. RCW 9A.20.020(2). Even if the trial court imposed the maximum for all three counts of third-degree theft, the total would be $15,000, well below the $18,644.52 the court imposed in restitution. CP 97. This factor also supports concluding the restitution amount is excessive. *Bajakajian*, 524 U.S. at 338.

Contrary to *Long*, the Court of Appeals held that "restitution is inherently proportional to the crime even if the defendant lacks the ability to pay." Slip op. at 9 (citing *Ramos*, 24 Wn. App. 2d at 230).

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[4] https://ir.homedepot.com/~/media/Files/H/HomeDepot-IR/2019/2019_THD_AnnualReport_vf.pdf.

By imposing a large restitution obligation on Mr. Brown without inquiring into his ability to pay, the trial court violated the excessive fines clause. RAP 13.4(b)(3). The Court of Appeals's decision to the contrary is at odds with this Court's precedent. RAP 13.4(b)(1). The crippling burden that large restitution obligations impose on the indigent is obvious. RAP 13.4(b)(4). This Court should grant review.

b. The 12-percent annual interest on the restitution award is partially punitive, and excessive if Mr. Brown is unable to pay it.

Financial obligations imposed because of a punitive fine or forfeiture are themselves punitive. *See Long*, 198 Wn.2d at 163–64. Mr. Long challenged not only the seizure of his vehicle, but the fees he was compelled to pay to the city for the costs of towing and storing it. *Id.* at 143–44. The city argued the fees were solely remedial. *Id.* at 163. This Court disagreed. "The

fees were imposed only as a result of the impoundment, which [the ordinance] characterizes as a 'penalty.'" *Id.* at 164.

Mr. Brown must pay interest on his restitution debt only because of the restitution obligation itself. Restitution is primarily punitive. *Kinneman*, 155 Wn.2d at 279–80; *Moen*, 129 Wn.2d at 539 n.1; *Barr*, 99 Wn.2d at 79. Accordingly, interest accruing on restitution is also partially punitive. *Ramos*, 24 Wn. App. 2d at 240–41 (Chung, J., dissenting).

Legislative history supports characterizing interest on restitution as partly punitive. A purpose of imposing interest on restitution is deterrence, a penological goal. *See Ramos*, 24 Wn. App. 2d at 237–38 (Chung, J., dissenting) (citing legislative history). In addition, the Legislature amended RCW 10.82.090 in 2011 to limit trial courts' ability to reduce restitution

interest, even as it acknowledged interest increases the odds "that former offenders and their families will remain in poverty." *Id.* at 238–39 & n.4; Laws of 2011, ch. 106, §§ 1(1), 2. The same amendments say that financial obligations are "an important part of taking personal responsibility for one's actions"—i.e., of punishment. Laws of 2011, ch. 106, § 1(2).

The astronomical rate at which interest accrues on a restitution debt also shows the interest is punitive. A civil judgment following a tort claim, for example, bears interest at two points above the Federal Reserve "prime rate"—currently 8.25 percent. RCW 4.56.110(3)(b); U.S. Federal Reserve, H.15 Selected Interest Rates (June 6, 2022).[5] Restitution, however, carries the "maximum rate permitted" by statute: 12 percent. RCW 10.82.090(1); RCW 4.56.110(6); RCW

[5] https://www.federalreserve.gov/releases/h15/.

19.52.020(1). Such a high rate unmoored to any objective financial metric can only be called punitive.

The interest rate is so high, in fact, it is all but certain to result in a windfall. Twelve percent is far in excess of what is needed to make up for the time value of money—it almost doubles the average stock market return. *See* Adam B. Norlander, *Privatization of Social Security: An Acceptable Risk*, 1999 L. Rev. Mich. St. U. Det. C.L. 959, 975 (1999) (average after inflation from 1802 to 1992 is 6.7 percent). If Home Depot invested $18,644.52 over ten years, it would be highly unlikely to earn a return as large as the amount of interest Mr. Brown will accrue in the same amount of time.

Because interest on restitution is partially punitive, the excessive fines clause applies.

Like restitution itself, interest on restitution is grossly disproportionate if Mr. Brown is unable to pay

it. *Ramos*, 24 Wn. App. 2d at 244–45 (Chung, J., dissenting). In fact, given the exorbitant 12-percent annual rate, interest is often more burdensome than the principal debt. As noted, if Mr. Brown paid $25 a month, he would need almost 300 years to pay off the debt entirely. *Supra*, at 14–15 & Figure 1. Because Mr. Brown has significant household expenses and no present income, the interest on the restitution order is grossly disproportionate. CP 186–87.

The other four factors also support a conclusion the interest is excessive. Mr. Brown's takings were not part of a broader scheme, and the losses were minor compared to Home Depot's revenue. *Supra*, at 23–24. And the interest Mr. Brown owes will quickly balloon far beyond the maximum statutory penalty of $15,000. *Supra*, at 14–15.

Contrary to this Court's opinion in *Long*, the legislative history cited above, and the disconnect between the sky-high interest rate and any real-world measure of the time value of money, the Court of Appeals held that interest on restitution is not punitive and therefore not subject to the excessive fines clause. Slip op. at 9 (citing *Ramos*, 24 Wn. App. 23 at 228); RAP 13.4(b)(1). This conclusion burdens Mr. Brown's constitutional rights, and those of every other poor person trying to move their life onto a new track. RAP 13.4(b)(3), (b)(4). This Court should grant review.

c. The victim penalty assessment is partially punitive, and excessive if Mr. Brown is unable to pay it.

A forfeiture is punitive if the statute imposing it labels it a "penalty." *See Long*, 198 Wn.2d at 164. In *Long*, the city's municipal code provided for impoundment "in addition to *any other penalty*

provided for by law." *Id.* This Court observed the ordinance's plain language shows that one of its purposes is punishment. *Id.*

The plain language of the victim penalty assessment statute provides that the "assessment shall be in addition to ***any other penalty or fine*** imposed by law." RCW 7.68.035(1)(a). In addition, the text of the statute labels the obligation a "penalty assessment." *Id.* The plain language of the statute makes even clearer that the assessment is a penalty than the ordinance in *Long*. The assessment is punishment.

Despite the plain language of the statute and the clear import of *Long*, the Court of Appeals relied on a series of recent opinions holding the victim penalty assessment is not excessive. Slip op. at 9 (citing *State v. Griepsma*, ___ Wn. App. 2d ___, 525 P.3d 623, 624–25 (2023); *Ramos*, 24 Wn. App. 2d at 228; *State v.*

Tatum, 23 Wn. App. 2d 123, 130–31, 514 P.3d 763 (2022)). Each of these opinions relies on this Court's decision in *State v. Curry*, 118 Wn.2d 911, 829 P.2d 166 (1992)—a case that did not concern the excessive fines clause at all. *Id.* at 917–18; Supp. Br. of Pet'rs, State v. Curry, No. 58752-3, 1992 WL 12561847, at *1 (Mar. 10, 1992).

Long, not *Curry*, controls whether the victim penalty assessment is punitive. 198 Wn.2d at 164.

Even $500 is excessive if Mr. Brown cannot pay it. *Long*, 198 Wn.2d at 173. The trial court imposed the fine without asking this question. RP 38. In holding the victim penalty assessment is nevertheless not excessive, the Court of Appeals contravened this Court's binding authority and burdened Mr. Brown's and every other poor person's right to be free from

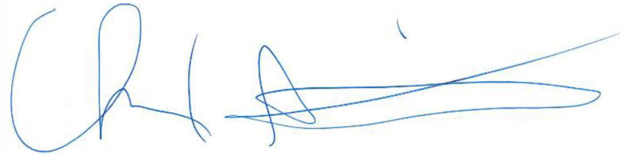
excessive fines. RAP 13.4(b)(1), (b)(3), (b)(4). This Court should grant review.

F. CONCLUSION

This Court should grant review.

Per RAP 18.17(c)(10), the undersigned certifies this brief of appellant contains 4,443 words.

DATED this 7th day of June, 2023.



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The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 84169-6-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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Appellate Court Case Title:	State of Washington, Respondent v. Jazane David Brown & Monique Desiree Duncan, Appellants

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent, v. JAZANE DAVID BROWN, and MONIQUE DESIREE DUNCAN, each of them, Appellants.	No. 84169-6-I (consolidated with 84248-0-I) DIVISION ONE UNPUBLISHED OPINION

COBURN, J. — After each pleading guilty to three counts of theft in the third degree and agreeing to pay restitution in full but disputing the amount, Monique Duncan and Jazane Brown, co-defendants, appeal their restitution orders. They claim a lack of a causal connection between the losses and the crimes, that the court could only impose a maximum amount of restitution that was referenced in their guilty plea statements, and that their restitution amount violated their federal and state constitutional rights under the excessive fines, due process, and equal protection clauses. Substantial evidence supports a causal connection between the losses and the crimes, the equal protection claim is not ripe, and appellants waived the remainder of their claims. Accordingly, we affirm.

Citations and pin cites are based on the Westlaw online version of the cited material.

FACTS

The State initially charged Brown and Duncan each with organized retail theft in the first degree and also charged Brown with assault in the fourth degree. The theft charge was based on three different incidents that occurred at a Home Depot store in July, August, and September of 2019. The same loss prevention officer (LPO) observed the thefts, unsuccessfully attempted to stop Brown and Duncan, and reported the thefts to police. The certifications of probable cause identified the value of the losses to be $4,416.20 (July), $7,363.95 (August), and $6,864.37 (September).

Following plea negotiations, Brown and Duncan, in separate plea hearings, pleaded guilty to three counts of theft in the third degree by way of second amended informations for the same July, August, and September thefts. For each of the incident dates, Duncan's statement of guilt stated, "I entered Home Depot in Redmond . . . and I did take property from Home Depot in an amount not exceeding $750 and with the intent to deprive Home Depot of said property." For each incident, Brown's statement of guilt stated, "I entered Home Depot in Redmond . . . and I did take property from Home Depot in an amount not exceeding $750 and with the intent to deprive Home Depot of that property."

Brown and Duncan each agreed that the "defendant shall pay restitution in full to the victim(s) on charged counts" and "agrees to pay restitution in the specific amount of $*TBD*" and also agreed to pay the victim penalty assessment (VPA). Both Brown and Duncan stipulated that "the facts set forth in the certification(s) for determination of probable cause and prosecutor's summary are real and material facts for purposes of this sentencing." The probable cause certifications delineated the items taken and their

value. At both plea hearings, the courts noted that the amount of restitution was yet to be determined.

As part of the plea agreement, the State agreed to recommend no additional jail time than what had already been served, unsupervised probation, and no additional legal financial obligations other than the mandatory VPA and restitution with the amount to be determined.

Brown and Duncan each had separate sentencing hearings with different judges, who followed the agreed sentencing recommendation. Parties in both hearings agreed that the amount of restitution would be determined at a future hearing. Both defendants waived their appearances at the future restitution hearing.

Restitution hearings were held at different times in front of different judges and both Duncan and Brown were not present for the hearings. The State provided the same supporting restitution documents before each court. The documentation included reports from the LPO signed under penalty of perjury, copies of receipts, photographs, incident reports, and a transcription of a defense interview with the LPO who witnessed all three theft incidents. In the interview, the LPO explained that he determined what was taken based on a combination of direct observation, viewing security video footage, and working with coworkers to check the daily inventory of the items that were taken. The State requested a total of $18,644 in restitution in each hearing consistent with the initial amounts listed in the certifications of probable cause, and the trial court imposed that amount jointly and severally. Defense counsel in both hearings challenged the State's evidence, but did not argue that the court was limited to a maximum of $750 in

restitution on each count.[1] Nor did defense counsel raise any constitutional claims.

Brown and Duncan separately appealed. A clerk of this court then consolidated their appeals. Following consolidation, Brown and Duncan each filed notices adopting each other's claims identified in their respective briefs.

DISCUSSION

The amount of a restitution award is within the court's discretion and will not be disturbed on appeal absent a showing of abuse. State v. Griffith, 164 Wn.2d 960, 965, 195 P.3d 506 (2008). A court's authority to impose restitution is statutory. Id. Under RCW 9.94A.753(5), restitution shall be ordered "whenever the offender is convicted of an offense which results in injury to any person or damage to or loss of property. . ." Restitution also "shall be based on easily ascertainable damages for injury to or loss of property, actual expenses incurred for treatment for injury to persons, and lost wages resulting from injury" and "shall not exceed double the amount of the offender's gain or the victim's loss from the commission of the crime." RCW 9.94A.753(3)(a). While the claimed loss need not be established with specific accuracy, it must be supported by substantial credible evidence. Griffith, 164 Wn.2d at 965.

The trial court is allowed considerable discretion in determining restitution. State v. Kinneman, 155 Wn.2d 272, 282, 119 P.3d 350 (2005). We review a court's factual findings for substantial evidence. Griffith, 164 Wn.2d at 965. "Substantial evidence exists if the record contains evidence sufficient to persuade a fair-minded, rational

[1] The judge in Brown's restitution hearing questioned whether there was any case law supporting that it could impose more than $750 in restitution on each count. The prosecutor explained that restitution was only limited by the facts themselves, not based on the level of crime to which the defendant pled. Defense counsel stated that she was not aware of any contrary authority. The trial court invited defense counsel to submit a motion for reconsideration if she could find legal authority holding otherwise. No motion was submitted.

person of the truth of the declared premise." State v. Lowery, 15 Wn. App. 2d 129, 138, 475 P.3d 505 (2020).

To support an order of restitution there must be a causal connection between the losses and the crimes charged. Griffith, 164 Wn.2d at 966 (citing State v. Tobin, 161 Wn.2d 517, 524, 166 P.3d 1167 (2007)). Losses are causally connected if, but for the charged crime, the victim would not have incurred the loss. Id. "In determining whether a causal connection exists, we look to the underlying facts of the charged offense, not the name of the crime to which the defendant entered a plea." Griffith, 164 Wn.2d at 966; see State v. Selland, 54 Wn. App. 122, 124, 772 P.2d 534 (1989) (holding that restitution is not limited by the definition of the crime of which defendant was convicted). When a defendant disputes a restitution amount, the State must prove the damages by a preponderance of the evidence. Kinneman, 155 Wn.2d at 285.

Appellants contend that the restitution order must be vacated because the State did not prove a causal connection between appellants' crimes and the specific amount of losses incurred by Home Depot. We disagree.

Specifically, they argue that the State failed to establish what the store inventory was prior to the theft and that the LPO only conducted an inventory audit for the September incident as reflected in his police statement. However, in the LPO's defense interview, he explained that the store evaluates the on-hand inventory daily. He further explained that "whenever I go back and do an inventory search in – in this manner, I go and I look and see what, exactly, we have on stock, of that particular SKU. Then I partner with an associate, to see what inventory states on our first phone. And I back and I double check and verify and we – we both walk through it. We both validate what's

exactly there and what's missing. That's how I was able to come up with the particular item number." He added, "I do not over estimate. I only estimated what I actually witnessed being removed from the shelf and placed into the bag." The record establishes that the LPO or coworkers were able to observe defendants working together in removing items from the shelves or retaining those items. The LPO also identified the items and compared the store's daily on-hand inventory to determine the value of the stolen merchandise. Substantial evidence supported a causal connection between the crimes and the losses incurred. The State proved Home Depot's damages by a preponderance of the evidence.

Appellants next contend that the maximum restitution the court could impose was $2,250 because each defendant pleaded guilty to taking property in an amount not exceeding $750 during each of the thefts. The State contends that appellants did not preserve this claim.

"As a general rule, appellate courts will not consider issues raised for the first time on appeal." State v. McFarland, 127 Wn.2d 322, 332-33, 899 P.2d 1251 (1995). A party may claim an error for the first time on appeal if it concerns "(1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, [or] (3) manifest error affecting a constitutional right." RAP 2.5(a).

Under the Sentencing Reform Act of 1981 (SRA), chapter 9.94A RCW, restitution is "'part of an offender's sentence.'" State v. Hughes, 154 Wn.2d 118, 155, 110 P.3d 192 (2005) (quoting State v. Edelman, 97 Wn. App. 161, 166, 984 P.2d 421 (1999)). A defendant waives the right to challenge an alleged sentencing error for the first time on appeal if the error involves agreement to facts or the exercise of discretion. State v.

Cosgaya-Alvarez, 172 Wn. App. 785, 790, 291 P.3d 939 (2013) (citing In re Pers. Restraint of Goodwin, 146 Wn.2d 861, 874, 50 P.3d 618 (2002)). However, defendants can challenge a legal error in a sentence for the first time on appeal. Id. (citations omitted).

Whether appellants agreed to pay for losses in excess of $750 per count is a question of fact that they did not raise below. Thus, appellants waived this claim and did not establish a basis for review under RAP 2.5(a).[2]

However, appellants also contend that the court did not have the authority to impose a restitution amount greater than the definition of the crime. Defendants' statement of guilt reflected the definition of theft in the third degree. RCW 9A.56.050(a) provides that a "person is guilty of theft in the third degree if he or she commits theft of property or services which . . . does not exceed seven hundred fifty dollars in value." Because this claim is an alleged legal error, they can raise it for the first time on appeal. Cosgaya-Alvarez, 172 Wn. App. at 790.

Appellants cite to State v. Taylor, 86 Wn. App. 442, 936 P.2d 1218 (1997) to support their proposition that restitution can be limited to the definition of the crime. However, Taylor did not involve a plea of guilty. A jury had to decide if the defendant committed welfare fraud in the first degree or the lesser included offense of welfare fraud in the second degree for receiving between $250 and $1,500 benefits. Id. at 444.

[2] Because this claim is waived, we need not address the State's argument that appellants are bound by their plea agreement where they agreed to pay restitution to the victim "in full" and the State's request for specific performance. RAP 2.5(a). A plea agreement is a contract between the State and the defendant. State v. Wiatt, 11 Wn. App. 2d 107, 111, 455 P.3d 1176 (2019) (citing State v. MacDonald, 183 Wn.2d 1, 8, 346 P.3d 748 (2015)). "After a party breaches the plea agreement, the nonbreaching party may either rescind or specifically enforce it." Wiatt, 11 Wn. App. 2d at 111 (citing State v. Armstrong, 109 Wn. App. 458, 462, P.3d 397 (2001)).

The jury convicted Taylor of the lesser charge, but the court ordered restitution for $9,074, based on alleged facts that supported welfare fraud in the first degree. Id. We reversed the restitution order because the jury, the fact-finder, had to have determined that Taylor only benefited between $250 and $1,500 in benefits because of the guilty finding as to the lesser charge instead of welfare fraud in the first degree. Id. at 446. The Taylor court acknowledged that "restitution is not necessarily limited by the definition of the crime," but that the issue in Taylor was that "the jury's verdict" did not establish an underlying criminal act that could serve as the basis for a restitution award greater than $1,500. Id. at 445. Taylor is inapposite. The courts in the instant cases did not exceed their authority in ordering restitution in the amount of $2,250.

Appellants next contend for the first time on appeal that the trial court violated the excessive fines clause of the Eighth Amendment to the United States Constitution and article I, § 14 of the Washington Constitution because the court did not consider their lack of ability to pay when ordering the victim penalty assessment and restitution with a 12 percent annual interest rate.[3]

While a party may raise a claimed error for the first time when error affects a constitutional right, that error must be manifest. RAP 2.5(a). A "manifest" error is one that causes "actual prejudice." State v. Ramos, 24 Wn. App. 2d 204, 214, 520 P.3d 65, 72 (2022), review denied, 101512-7, 2023 WL 2400403 (Wash. Mar. 8, 2023). Actual prejudice means "the claimed error had practical and identifiable consequences." State v. Shelton, 194 Wn. App. 660, 675, 378 P.3d 230 (2016). Appellants cannot establish a manifest error affecting a constitutional right.

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[3] Restitution allows for the "maximum rate" permitted by statute. RCW 10.82.090(1); RCW 4.56.110(6); RCW 19.52.020(1).

We recently held, once again, that the mandatory VPA is "'neither unconstitutional on its face nor as applied to indigent defendants.'" State v. Griepsma, No. 83720-6-I, slip op. at 3 (Wash. Ct. App. Mar. 13, 2023) (quoting State v. Curry, 118 Wn.2d 911, 918, 829 P.2d 166 (1992)), https://www.courts.wa.gov/opinions/pdf/837206.pdf; see State v. Tatum, 23 Wn. App. 2d 123, 130-31, 514 P.3d 763 (rejecting an excessive fines challenge to the VPA, explaining that we are bound by Curry), review denied, 200 Wn.2d 1021, 520 P.3d 977 (2022); Ramos, 24 Wn. App. 2d at 214 ("As this court explained in Tatum, we are bound by [Curry's] holding here."). We also recently held that restitution is inherently proportional to the crime even if the defendant lacks the ability to pay. Ramos, 24 Wn. App. 2d at 230. Additionally, we held that "[b]ecause the legislature did not intend for interest to be a penalty, and because interest accruing on restitution is paid to crime victims rather than to the government, interest on restitution awards is not punishment and not subject to an excessive fines clause analysis under the Eighth Amendment or article I, § 14." Id. at 228. Because appellants' claimed errors are not manifest, they are waived.

Appellants further contend for the first time on appeal that the 12 percent interest on restitution violates their constitutional rights[4] to substantive due process and equal protection because the courts did not inquire whether appellants had the ability to pay. This constitutional challenge requires further factual development, and the potential risk of hardship does not justify review before the relevant facts are fully developed. See

[4] WASH. CONST. art. I, § 3; U.S. CONST. amends. I, V, XIV; WASH. CONST. art. I, § 12; U.S. CONST. amend. XII.

Shelton, 194 Wn. App. at 672. Because nothing in the record indicates the State has attempted to enforce the imposed restitution or sanction for failure to pay, appellants' constitutional challenges are not ripe for review. RAP 2.5(a)(3).

We affirm.

Coburn, J.

WE CONCUR:

Bowman, J.

Mann, J.