

FILED

MAY 06 2013

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By: _____

NO. 30414-1

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON

RESPONDENT

V.

GREGORY F. EVERYBODYTALKSABOUT

APPELLANT,

BRIEF OF RESPONDENT

KARL F. SLOAN
Prosecuting Attorney
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Okanogan County, Washington

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A. ASSIGNMENTS OF ERROR

1. Whether the defendant's convictions were supported by substantial evidence.
2. Whether the defendant is precluded from raising the issue of restitution on appeal.
3. Whether the trial court properly determined the amount of restitution and entered the corresponding order.

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Were the defendant's convictions supported by substantial evidence where physical evidence and testimony of lay witnesses and co-defendant's detailed the defendant's involvement in the crimes?
2. Did the defendant waive appeal of the timeliness of the restitution order when the court acted within its statutory authority and the defendant failed to object?
3. Was restitution properly ordered when the court determined the amount as required by the statute within 180 days of sentencing and continued entry of the order for good cause?

C. STATEMENT OF THE CASE ¹

1. Substantive Facts

October 20, 2011, a jury convicted the defendant of Residential Burglary, Theft 1st, Burglary 1st, Theft 1st, Theft of a Firearm, Unlawful Possession of a Firearm 1st, Burglary 2nd, Theft 1st, Malicious Mischief 3rd, Burglary 2nd, Theft 2nd, Malicious Mischief 3rd, Residential Burglary, Burglary 2nd, and Theft 1st. CP 25-26. The crimes were connected to series of burglaries committed on or about September 1st and 2nd, 2008. CP 25-26.

Det. Debbie Behymer testified about her investigation of burglaries at the 12 Hospital Way; the Swezey residence at 422 N. Starr Road, the Lawson residence at 316 Old Highway 97, 309 ½ Highway 97, the Evans residence at 26450 Highway 97, and the Wright shop near Malott on Highway 97. RP 347-349.

At the Wright shop, the Det. Behymer documented shoeprints, tire patterns, and an abandoned stolen vehicle. RP 349-350, 356, 358-368. The vehicle was connected to co-defendant John Woodward, which led to contacts with Tim

¹ "RP" in the substantive facts refers to Report of Proceedings Vol. I – IV, page numbered consecutively. Vol. I (pg. 1-197) includes Sept. 29, 2008 to Aug. 15, 2011; Vol. 2 (pg. 198-255) includes Sept. 8 2011 to Oct. 6, 2011; Vol. III (pg. 256-431) from Oct. 18, 2011; and Vol. IV (pg. 432-592) from Oct. 19, 2011.

Florence, Lawrence Sellers, and the defendant Greg Everybodytalksabout. RP 352.

Detective Mike Worden testified about his investigation at the Lawson residence at 316 Old Highway 97. RP 375. During the investigation, Det. Worden documented shoe prints and tire tracks left at the Lawson property at the time of the burglary. RP 376-390. Shoe prints and tire treads from Lawson burglary were consistent with those found at the Wright burglary. RP 392-395.

Sgt. Gene Davis testified about his investigation of the stolen vehicle recovered near the Wright shop, and his investigation of John Woodward and Lawrence Sellers. RP 399-400. Mr. Sellers admitted to being involved in multiple burglaries with the defendant. He took officers to several of the locations where they had committed burglaries, including the Swezey residence at 422 N. Star Road. Sellers described going with the defendant and Mr. Florence, where they stole items, including a .22 rifle. RP 401, 404-405, 558-559.

Mr. Sellers also took Sgt. Davis to the Lawson residence at 316 Old Hwy 97, where he described acting as a lookout while the defendant and Mr. Florence stole items from a shop. RP 402, 404, 556-558.

Mr. Sellers then took Sgt. Davis to 12 Hospital Way, where he described going into the residence with the defendant and stealing laptop computers and other items. RP 402-403, 560-561. Officer Adam Nichols and Akifumi Moriyoshi of Gebber's Farms testified about the laptops and other items stolen from the property at 12 Hospital Way. The items belonged to two Japanese students who were trainees with Gebber's Farms. Mr. Moriyoshi also testified to the value of the items stolen. RP 461-470.

Mr. Sellers also showed Sgt. Davis the location of a burglary that they committed in Douglas County. Mr. Sellers took officers to locations in Brewster and Bridgeport where they sold stolen items from the burglaries. These locations included Bruce Street in Brewster, and Half Moon Orchard where the defendant sold the stolen .22 rifle to an orchard worker for fifty dollars. RP 406-409, 559, 561-564. Officers were able to recover some of the stolen property at a residence on Bruce Street. RP 413.

During the investigation, Sgt. Davis also located additional stolen vehicles at the defendant's residence. RP 419-421. A few days after locating the stolen vehicles, the defendant was arrested and his shoes were taken as evidence. RP 422. The defendant's shoes matched prints recovered at the Lawson burglary. RP 475.

Co-defendant John Woodward testified about taking the vehicle from Airway Heights, which was later recovered at the Wright shop. He loaned the vehicle to Tim Florence for several days. RP 479-483. Mr. Woodward ultimately recovered the vehicle from the defendant's residence, before leaving it near the Wright shop. RP 486-487. Sheriff Frank Rogers testified that Mr. Woodward admitted that he had given another person two rifles that had been stolen from the Wright shop. RP 584-585.

Co-defendant Tim Florence testified about his involvement in the burglaries with defendant. The defendant directed Mr. Florence and the others to the locations of the burglaries and locations to sell the stolen items. RP 542.

During the burglaries, the defendant and Mr. Florence used the vehicle that had been provided by Mr. Woodward. RP 504-516, 518-.519. Mr. Florence also described being shown the stolen laptops by Lawrence Sellers. He described the keyboards as having Chinese or Japanese letters. RP 516-517.

Mr. Florence also described selling the stolen property with the defendant by going door to door in Bridgeport and Brewster. RP 519-520; 539. Ms. Michelle Overa testified that she lived in

Brewster and was approached by the defendant about purchasing a laptop near the time of the burglaries. RP 545-549.

Mr. Florence also directed law enforcement to locations where they might recover some of the stolen property. RP 525-526, 540.

Deputy Tait Everett testified about his investigation of the burglary at the Evans residence at 26450 Hwy 97. RP 424-429. Marty Evans testified about the items stolen from his property and their value. RP 438-443.

Additionally, victims William Lawson, Phillip Swezey, and Wayne Lehrman testified about items stolen from their property and the value of the stolen property. RP 444-451, 454-456, 458-460.

2. Procedural Facts²

The defendant was sentenced on October 20, 2011. CP 25-.38. At the time of sentencing, a restitution hearing was set for November 21, 2011. CP 30. The hearing was not held on November 21, 2011, and was re-noted by the State for hearing on March 21, 2012. Supplemental RP 4. The state specifically

² "Supplemental RP" refers to the Supplemental Verbatim Report of Proceedings for March 12, 2012 and April 2, 2012, numbered consecutively as pages 1-13. "RP (06/11/12)" refers to the Report of Proceedings for June 11, 2012.

sought to have the restitution hearing held within the statutory time frame *Id.* On the March 21 hearing, the court was also considering a pro se motion filed by the defendant regarding bond.

Supplemental RP 2.

The court set over the restitution hearing and the pro se motion to April 2, 2012, for the defendant to appear telephonically.

Supplemental RP 4.

At the hearing on April 2, 2012, the defendant appeared telephonically. The defendant's trial attorney was present in court. Supplemental RP 7. The State advised the court, and defendant's trial attorney acknowledged that the information regarding restitution was presented at trial. Supplemental RP 8-9. The State had provided the restitution order and a transcript of the portions of the trial pertaining to restitution. Supplemental RP 9.

The court considered setting the hearing over to April 17, 2012, but the defendant's trial attorney was unavailable. RP 9-10. The court instructed the defendant to review the materials and speak with his attorney to decide if he wished to be present for the hearing. Supplemental RP 9-10. The defendant advised the court that he had just hired an attorney identified as Jeff Alice to "deal with all of this". Supplemental RP 10-11. The defendant indicated

his attorney would be contacting both the State and his trial attorney by the following Monday. Supplemental RP 10-11. At the hearing the defendant and the court agreed to wait to hear from the defendant's new attorney. Supplemental RP 11. At the April 2, 2012 hearing the court stated the amount of restitution was \$19,568. Supplemental RP 9. The court continued the matter to the next available hearing date of May 15, 2012 and advised that the time would not count toward the 180 day restitution time frame. Supplemental RP 9-10.

No contact was made by the defendant or a new attorney prior to May 15, 2012, and on May 25, 2012 the matter was again re-noted for hearing on June 11, 2012. On June 11, 2012, neither the State nor the defendant's trial attorney had been contact by the defendant, or a new attorney acting on the defendant's behalf. RP (06/11/12) 2-3.

The court noted that the defendant had been present at trial when each witness testified to their damages, and "... because of the transcript, because the witnesses have testified in the Defendant's presence, been subject to cross examination, because no restitution is being sought that wasn't testified to and documented at trial, because the jury found the Defendant guilty

beyond a reasonable doubt of the offenses involved, the Court determines that the jury trial satisfied the requirements for restitution hearing and I'm signing the order of restitution." RP (06/11/12) 4-5. The restitution order was joint and several with the defendant's three co-defendants: John Woodward, Timothy Florence, and Lawrence Sellers. RP (06/11/12) 3-4

D. ARGUMENT

1. The defendant's convictions were supported by substantial evidence

The Appellant challenges his convictions on sufficiency of the evidence, but the Appellant cannot meet his burden. The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. *E.g.*, State v. Salinas, 119 Wash. 2d 192, 201, 829 P.2d 1068 (1992).

When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. Salinas, 119 Wash. 2d at 201. A claim of insufficiency admits the truth of the State's evidence and all

inferences that reasonably can be drawn there from. Salinas, 119 Wash. 2d at 201.

The reviewing court is not required to determine whether the evidence at trial established guilt beyond a reasonable doubt.

State v. Green, 94 Wash. 2d 216, 221, 616 P.2d 628 (1980).

Whether there is evidence legally sufficient to go to the jury is a question of law for the courts; but, when there is substantial evidence, and when that evidence is conflicting or is of such a character that reasonable minds may differ, it is the function and province of the jury to weigh the evidence, to determine the credibility of the witnesses, and to decide the disputed questions of fact. State v. Hagler, 74 Wash. App. 232, 235, 872 P.2d 85 (1994), (citing State v. Theroff, 25 Wash. App. 590, 593, 608 P.2d 1254 aff'd and remanded, 95 Wash. 2d 385, 622 P.2d 1240 (1980).

Credibility determinations are for the trier of fact and cannot be reviewed on appeal. *E.g.*, State v. Romero, 113 Wash. App. 779, 798, 54 P.3d 1255 (2002).

The reviewing court considers circumstantial evidence to be as equally reliable as direct evidence. State v. Romero, 113 Wash. App. 779, 54 P.3d 1255 (2002)

The Appellant primarily seeks to challenge sufficiency of the evidence by attacking the credibility of a select few of the State's many witnesses. The evidence against the defendant was substantial *and* overwhelming. The testimony of the numerous witnesses was also corroborated by both law enforcement investigation and physical evidence.

The defendant was a principal in the selection and execution of the burglaries, and in disposing of the stolen property.

Viewing the evidence in the light most favorable to the State, the evidence was legally sufficient to go to the jury on each count.

2. The defendant failure to object to timeliness of the restitution order at the trial court level precludes appellate review.

The Appellant's brief cites to State v. Moen, 129 Wash. 2d 535, 919 P.2d 69, 74 (1996), to claim the restitution order is invalid. However, the reliance on Moen, 129 Wash. 2d 535 is misplaced.

In Moen, 129 Wash. 2d 535, the order or restitution was not determined or entered until over 60 days after sentencing. (60 days was the time frame set out in former Wash. Rev. Code Ann. § 9.94A.142(1) (West)). Moen, 129 Wash. 2d at 537. The court in Moen, 129 Wash. 2d 535 acknowledged that appellate courts will

not consider issues raised for the first time on appeal under RAP 2.5(a). The Moen court also found the claimed error in that case was neither jurisdictional nor constitutional, and therefore not directly addressed by RAP 2.5 or its exceptions. Moen, 129 Wash. 2d at 546.

Instead, the Moen court found an exception to the objection requirement by classifying the error as “sentencing order” that exceeded the trial court's statutory authority. State v. Moen, 129 Wash. 2d 535, 919 P.2d 69 (1996) To do this, *Moen* relied upon State v. Paine, 69 Wash. App. 873, 884, 850 P.2d 1369, 1376 (1993) where the court stated “...it appears to us that the cases addressing the review of sentencing errors on appeal have established a common law rule that when a sentencing court acts without statutory authority in imposing a sentence, that error can be addressed for the first time on appeal.” Paine, 69 Wash. App. 873, 69 Wash. App. at, 884. However, Paine involved an exceptional sentence, not restitution. The justification given for this common law rule was “...that it tends to bring sentences in conformity and compliance with existing sentencing statutes and avoids permitting widely varying sentences to stand for no reason other than the

failure of counsel to register a proper objection to the trial court.”

Paine, 69 Wash. App. at 884; Moen, 129 Wash. 2d at 546-47.

The purpose of requiring an objection in general is to apprise the trial court of the claimed error at a time when the court has an opportunity to correct the error. Moen, 129 Wash. 2d at 547 (citing State v. Wicke, 91 Wash. 2d 638, 591 P.2d 452 (1979)). The Moen court opined that an objection on the basis that a restitution order has been entered after the sixty-day time limit has passed arises under circumstances where the trial court would be unable to set restitution in a timely fashion; and that sort of “correction” of an error does not fall sufficiently within the purpose of the rule to justify requiring an objection as a prerequisite to appellate review. Moen, 129 Wash. 2d at 547.

However, the logic of Moen is inapplicable to the present case. In this case a restitution hearing was set on April 2, 2012, and the defendant was present. The defendant was advised on the record of the amount of restitution. The defendant then agreed to a continuance of the hearing. The court initially wanted to set the hearing for April 17, 2012 (180 days from October 20, 2012), but the defendant and his trial attorney both sought additional delay. It was clear that the defendant made no objection to the amount of

restitution, or to the continuance of the hearing. Unlike Moen, both the determination of the amount and the hearing were set within the statutory time frame. Unlike Moen, if the defendant had made a timely objection at the April 2, 2012, hearing the court could have ordered that the hearing be held on or before April 17.

More importantly, unlike Moen, the trial court in this case was within its statutory authority in setting and continuing the hearing to enter the order of restitution. In this case, there is no lack of statutory authority that would justify the defendant raising the issue for the first time on appeal.

3. The trial court properly determined the amount of restitution at a hearing in the defendant's presence and entered a corresponding order after the defendant failed to respond.

a. ***The trial court determined the amount of restitution within 180 days of sentencing as required by RCW 9.94A.753.***

Wash. Rev. Code Ann. § 9.94A.753 states in part:

- (1) When restitution is ordered, the court shall determine the amount of restitution due at the sentencing hearing or within one hundred eighty days except as provided in subsection (7) of this section. The court may continue the hearing beyond the one hundred eighty days for good cause....
- (3) Except as provided in subsection (6) of this section, restitution ordered by a court pursuant to a criminal

conviction 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. The amount of restitution shall not exceed double the amount of the offender's gain or the victim's loss from the commission of the crime.

Restitution is entirely controlled by statute. *E.g., In re Sappenfield*, 138 Wash. 2d 588, 591, 980 P.2d 1271 (1999).

Restitution statutes are interpreted broadly to carry out the statutory goals, and the court does not engage in overly technical construction that would permit the defendant to escape from just punishment. *E.g., State v. Ashenberner*, 171 Wash. App. 237, 286 P.3d 984, 990 (2012).

A sentencing court's authority to order restitution is purely statutory and, where so authorized, the sentencing court has discretion to determine the amount of restitution. The exercise of such discretion is reviewed for abuse of discretion and is reversible only where it is manifestly unreasonable or exercised on untenable grounds or for untenable reasons. *State v. Dedonado*, 99 Wash. App. 251, 256, 991 P.2d 1216 (2000),

The amount of restitution should be based on easily ascertainable damages, but the amount of harm or loss need not be established with specific accuracy; evidence supporting

restitution is sufficient if it affords a reasonable basis for estimating loss and does not subject the trier of fact to mere speculation or conjecture. State v. Hughes, 154 Wash. 2d 118, 110 P.3d 192 (2005) abrogated by Washington v. Recuenco, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006).

When restitution is ordered, a trial court determining the amount of restitution may either rely on a defendant's admission or acknowledgment of the amount of restitution or it may determine the amount by a preponderance of evidence. State v. Ryan, 78 Wash. App. 758, 761, 899 P.2d 825 (1995) (citing State v. Pockert, 53 Wash. App. 491, 498, 768 P.2d 504 (1989), review denied, State v. Ryan, 128 Wash. 2d 1006, 907 P.2d 296 (1995)). In determining restitution, the sentencing court may rely on no more information than is admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing. Dedonado, 99 Wash. App. at 256.

Wash. Rev. Code Ann. § 9.94A.753 does not require that a restitution order to be *entered* within 180 days. It provides that the court *determine* the amount of restitution within 180 days of sentencing. See, State v. Hunsicker, 129 Wash. 2d 554, 561-62,

919 P.2d 79, 82-83 (1996).³ The 180 day limitation period does not relate to the entry of the restitution order; rather, the time limitation is imposed on the determination of the amount of restitution.

Hunsicker, 129 Wash. 2d at 561-62.

In the present case, the amount of restitution was determined at the time of the jury trial, and was reiterated by the court at the April 2, 2012, hearing. The determination of the amount of restitution was not contingent on the agreement, admission, or acknowledgment of the defendant.

b. Even if the trial court had not determined the amount of restitution, the court had good cause to continue the hearing.

Even if the amount of restitution had not been determined within the 180 time period, a court may continue the restitution hearing beyond the 180-day limit for good cause. State v. Halsey, 140 Wash. App. 313, 326, 165 P.3d 409 (2007). A motion for continuance must be made before the time limit has expired. Id.

³ Hunsicker, 129 Wash. 2d, 558 referred to the same language in former Wash. Rev. Code Ann. § 9.94A.142(2) that read: "When restitution is ordered, the court shall determine the amount of restitution due at the sentencing hearing or within sixty days..."

Contrary to the assertion in the Appellant's brief, the Supplemental Report of Proceedings for March 12, and April 2, show the court continued the hearing to enter the order of restitution. In this case, the court continued the hearing to enter the order upon the request of the defendant and his trial attorney.

c. ***Even if the trial court had not granted a continuance, equitable tolling would have applied.***

Additionally, even if a continuance had not been formally granted, equitable tolling would have applied. The 180 day period in which to set restitution operates like ordinary statute of limitations, not a jurisdictional limit, and thus, the period can be tolled under appropriate circumstances. See State v. Duvall, 86 Wash. App. 871, 874, 940 P.2d 671, 674 (1997). A trial court may toll ordinary statute of limitations under appropriate circumstances; appropriate circumstances generally include bad faith, deception, or false assurances by the defendant, and the exercise of diligence by the plaintiff. Duvall, 86 Wash. App. at 875.

In the present case the defendant on April 2, 2012, assured the court that he had hired a new attorney who was to appear on the matter and was to contact the State and trial counsel within a week. That did not occur; and had not occurred by June 11, 2012,

when the court finally entered the restitution order. The defendant also failed to contact his trial attorney after the April 2, 2012 hearing as directed by the court.

The use of equitable tolling should be consistent with the purposes of the specific statute of limitation as well as the general purposes of the statute. The purpose for the mandatory 180-day limit is to avoid delay in the resolution of a criminal charge. Duvall, 86 Wash. App. at 875-76. As with the rules mandating prompt arraignment and speedy trial, the underlying policy is that it is in the best interest of all concerned that criminal matters be tried while they are fresh. Accordingly, the court should consider whether the defendant had timely notice of the claim, whether the delay hindered the gathering of evidence or otherwise prejudiced the defendant, and whether the prosecution acted with diligence and good faith. Duvall, 86 Wash. App. at 875-76.⁴

In the present case, the defendant had notice of the amount of restitution at trial, and again at the April 2nd hearing. During the

⁴ In Duvall, 86 Wash. App., 876 the court found equitable tolling of the statute for seven months did not frustrate the purposes of the limitation period. The defendant had notice at the original sentencing hearing that the court intended to enter a restitution order at a later date. He made no showing of prejudice by the delay; he did not object to the substance of the order and acknowledged that he found the amount to be adequately documented. Nothing in the record indicated that the result would have been any different if the court held a hearing at an earlier time, and there was no evidence of bad faith or lack of diligence by the State.

time between trial and June 11, 2012, the defendant never gathered evidence or contested the amount of restitution. The defendant was not prejudiced by any delay; he was the cause of the delay.

Even if the court had not already determined the amount of restitution within 180 days, equitable tolling would have operated to prevent frustration of the restitution statute by the defendant's false assurances and delay of the process.

E. CONCLUSION

There was substantial and overwhelming evidence in the case. Viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt.

The defendant's failure to object to the continuance of the restitution hearing prevents him from raising the issue for the first time on appeal.

The trial court did determine the amount of restitution within the 180 day statutory period. Restitution was established through testimony at trial and was stated on the record in the defendant's

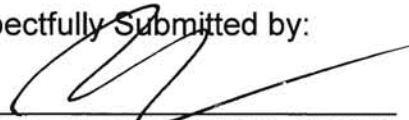
presence on April 2, 2012. Signing the order beyond the original 180 day period did not invalidate restitution.

Moreover, the court did properly continue the hearing on the order beyond the original 180 day period for good cause and at the request of the defendant and his trial attorney. Even if the court had not, equitable tolling would have operated to prevent the defendant from escaping his restitution obligation simply by delaying and ignoring the process.

The defendant's convictions and resulting restitution order should be affirmed.

Dated this 2 day of May 2017

Respectfully Submitted by:



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