73759-7

NO. 73759-7-I

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

STATE OF WASHINGTON,

Respondent,

v.

VINOD RAM,

Appellant.

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

The Honorable Carol Schapira, Judge

BRIEF OF APPELLANT

JENNIFER J. SWEIGERT
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

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A. ASSIGNMENT OF ERROR

The court erred in awarding restitution to parties who did not suffer a loss and in an amount not based on the actual loss.

Issue Pertaining to Assignment of Error

Appellant was convicted of theft via fuel card fraud. Many of the cardholders did not pay the fraudulent charges to their accounts. The fuel account companies simply replaced the missing fuel. No evidence was presented of what it cost them to do so. Did the court err in awarding the retail price of the stolen fuel to the cardholders, who suffered no loss?

B. STATEMENT OF THE CASE

Appellant Vinod Ram appeals his restitution order. CP 129. He was convicted of 16 counts of first-degree identity theft and one count of conspiracy to commit identity theft. CP 51-64. The counts largely corresponded to the various companies whose fuel account cards Ram was convicted of using. CP 38-50.

The cards are issued by companies that operate so-called "cardlock" fuel stations, which are largely unstaffed and used by commercial enterprises with fleets of vehicles. 6RP[1] 53-54. The self-serve fueling kiosks are

[1] Ram also appeals the underlying convictions in case number 72654-4-I. The two appeals are linked for consideration by the same panel. This statement of the facts summarizes the trial testimony pertaining to the restitution issues and references the transcripts (1RP –14RP) in that appeal. 15RP refers to the report of proceedings from the July 31, 2015 restitution hearing.

unlocked using a card and pin number, and the fuel is charged to the cardholder's account. 7RP 47-50; 10RP 58; 11RP 117-18. Petrocard and Associated Petroleum Products (APP) are two companies that issue the fuel cards. 10RP 52-53; 11RP 116-18.

The evidence at trial showed that either Ram or an accomplice would contact local owner-operator truck drivers and offer them steeply discounted fuel. 7RP 43-61. He would then meet them at a card-lock station, activate the fuel pump using a stolen or copied fuel account card, pump the fuel, and charge the truck driver a steeply discounted price. 7RP 43-61.

At trial, representatives of 16 cardholder companies testified to the amounts of fraudulent charges made on each of their accounts. 6RP 78, 80; 7RP 30-31, 218-19, 238-39; 9RP 31-32; 10RP 149-50. At the restitution hearing, the State requested restitution for all the fraudulently charged amounts shown at trial. 15RP 3. The State presented no evidence at the restitution hearing, but rested entirely on the evidence presented at trial. The total requested was $578,590.10. 15RP 3.

Ram presented a declaration by defense investigator Ray Ward. Ward contacted the fuel card companies and learned that several of the cardholders did not actually pay the fraudulent charges to their accounts. CP 80-82. Instead, the card company simply absorbed the loss and replaced the lost inventory by purchasing additional fuel from its suppliers. CP 81-82.

Because they were able to replace their inventory, the card companies did not lose out on any sales as a result of the offenses. The card companies either could not or would not reveal to the defense investigator what their actual replacement cost was or how much financial loss they incurred. CP 81-82.

Of the 16 cardholder companies whose cards were used, the Ward declaration established that seven of them did not pay the fraudulently incurred charges: Genesee Fuel and Heating Co. (Count 3), General Teamsters Local 174 (count 7), James J. Williams Bulk Service Transport (count 9), Graham Trucking (count 11), Port-Pass (count 13), Schnitzer Steel (count 14), and Metals Express (count 15). CP 80-82. Ward did not say whether Diamond Express (count 16) paid the charges, but Diamond Express's account was with APP, who did not charge their other customer, Metals Express. CP 80. For one other Petrocard customer, Knight Transport (count 4), no restitution was awarded. CP 80, 83-85. For all but one of the other companies, there was no information provided as to whether they actually paid any of the fraudulently charged amounts. CP 82.

Ram did not challenge the $105,941.59 awarded to Bartelson Trucking because that company actually paid the charged amounts. 15RP 7. However, he argued the remainder of the restitution was not tied to actual losses suffered by any of the cardholder companies. 15RP 7-13.

The court rejected Ram's argument and awarded the full amount of the fraudulent charges to the cardholder companies. 15RP 23; CP 83-85. The order includes a notation that "Should the State learn that any of the victim companies have been reimbursed by Petrocard, Associated Petroleum Products, or an insurance company, this Order Setting Restitution shall be amended to reflect the change in payee. The State will provide a copy of this order to Petrocard and APP." CP 85.

The court cited several reasons for granting the requested restitution: first, the court observed that the card companies are not full retailers, so the amounts awarded do not reflect the same profit mark-up that an average person would pay at the pump. 15RP 23. Second, the court declared it had a high degree of confidence in the numbers presented by the State. 15RP 23. Third, the court noted that restitution can be modified in the future to prevent double recovery. 15RP 23-24. Finally, the court noted that the restitution order matches the evidence at trial. 15RP 24. Ram appeals the restitution order. CP 87.

C. ARGUMENT

THE RESTITUTION ORDER MUST BE VACATED BECAUSE IT AWARDS COMPENSATION TO THE WRONG PARTIES IN THE WRONG AMOUNTS.

"The authority to impose restitution is not an inherent power of the court, but is derived from statutes." State v. Davison, 116 Wn.2d 917,

919, 809 P.2d 1374 (1991) (citing State v. Eilts, 94 Wn.2d 489, 495, 617 P.2d 993 (1980); State v. Lewis, 57 Wn. App. 921, 923, 791 P.2d 250 (1990)). Washington's restitution statute limits the court's authority to award restitution in two primary ways. First, restitution is limited to victims who suffered losses. Second, the amount of restitution must be based on the actual loss suffered by the victim. In short, there must be a causal relationship between the offense and the victim's losses. State v. Dauenhauer, 103 Wn. App. 373, 378, 12 P.3d 661 (2000). When the court fails to adhere to these principles, its restitution order is void. Id.

The trial court's order of restitution is reviewed for an abuse of discretion. State v. Fleming, 75 Wn. App. 270, 274, 877 P.2d 243 (1994). This Court will find an abuse of discretion where the trial court's decision is "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." State v. Pollard, 66 Wn. App. 779, 785, 834 P.2d 51 (1992). When the trial court abuses its discretion in setting the restitution amount, the order must be reversed. State v. Dennis, 101 Wn. App. 223, 227-28, 6 P.3d 1173 (2000).

The trial court abused its discretion here. The restitution award is both manifestly unreasonable and in excess of the court's statutory authority because it awards restitution for the retail price of the fuel when no party sustained losses in that amount and it awards that restitution to

cardholders who suffered no loss at all. In short, the court awarded restitution a) to the wrong party and b) in the wrong amount.

a. The Court Erred in Awarding Restitution to the Cardholders Because They Did Not Suffer Any Loss.

When a court orders a defendant to pay restitution, the restitution order "shall be based on easily ascertainable damages for injury to or loss of property." RCW 9.94A.753(3).[2] The statute implicitly limits restitution recovery to victims of the offense. State v. Ewing, 102 Wn. App. 349, 352, 7 P.3d 835, 837 (2000) (citing State v. Martinez, 78 Wn. App. 870, 882, 899 P.2d 1302 (1995)). The term "victim" includes "any person who has sustained emotional, psychological, physical, or financial injury to person or property as a direct result of the crime charged." RCW 9.94A.030(53).

The State failed to present any evidence that any of the listed companies (except Bartelson) actually paid any of the fraudulent charges. Therefore, the cardholder companies are not victims, they did not suffer any loss, and the court erred in awarding them restitution. According to information from the card companies, the following cardholders paid nothing on the false charges: Genesee Fuel and Heating Co. (Count 3), General Teamsters Local 174 (count 7), James J. Williams Bulk Service Transport (count 9), Graham Trucking (count 11), Port-Pass (count 13), Schnitzer Steel

[2] The statute also covers "actual expenses incurred for treatment for injury to persons, and lost wages resulting from injury." RCW 9.94A.753. Neither of these categories of loss is at issue in this case.

(count 14), and Metals Express (count 15). CP 80-82. One further company, Diamond Express, had an account with APP, who also did not charge their other customer, Metals Express. CP 80. Therefore, it is at least reasonably probable that Metals Express also paid nothing. For the remaining companies, the defense investigator was not able to obtain any information. CP 82.

The State argued these companies were victims because their accounts were used. 15RP 14. But the State presented no evidence to counter Ward's declaration. Since most of the cardholder companies did not pay the amounts reflected on their statements, they did not suffer any tangible loss from Ram's use of their accounts, and restitution is inappropriate.

The court may not simply award restitution and sort out later who should receive it. Certainly, there are occasions when adjustments must later be made, and the statute makes provision for that to occur. RCW 9.94A.753(4) ("The portion of the sentence concerning restitution may be modified as to amount, terms, and conditions during any period of time the offender remains under the court's jurisdiction."). But in those cases, when it is not clear who, among several parties, will ultimately suffer the loss, courts award the restitution to both of them, with provision for later reimbursement or adjustment. See, e.g., State v. Tobin, 132 Wn. App. 161,

180-81, 130 P.3d 426, 436 (2006) aff'd, 161 Wn.2d 517, 166 P.3d 1167 (2007).

In Tobin, geoducks were unlawfully harvested from waters belonging in part to the State of Washington and in part to the Squaxin tribe. The court imposed restitution and awarded it to both parties. Id. at 181. When the defendant argued that the State had no right to any geoducks in Squaxin waters, the Court of Appeals pointed out that the restitution award included both the State and the tribe and provided that the amount would be distributed according to negotiations with the tribe. Tobin, 132 Wn. App. at 180-81.

But this case is nothing like Tobin. There, the value of the geoducks was the same, regardless of which entity, the State or the Tribe, was entitled to them. Also, the restitution order specifically included both parties and the fact that distribution would occur according to negotiations between them. Id. at 180-81. Here, by contrast, the cardholders to whom restitution was awarded suffered no loss. The card companies were not expressly awarded any restitution. CP 83-85. And while they apparently suffered loss, it was not in the amount awarded.

The cardholders are in a position analogous to the insurer in Martinez, 78 Wn. App. 870. Martinez was convicted of arson for burning down his own motorcycle shop. Id. at 872-73. His insurer denied his claim

because only the contents of the building were covered, not the building itself, and paid him nothing. Id. at 873. Martinez sued the insurer, but his suit was dismissed after he was convicted of arson. Id. at 873 n. 1. As part of his sentence, he was ordered to pay the insurer the costs of its arson investigation as well as its attorneys' fees in defending against the civil suit. Id. at 881.

The court held these costs were unauthorized, however, in part because the insurer was not a victim. Id. at 882. It did not suffer any loss as a direct result of the crime charged. Id. It was neither a victim of the arson nor had it paid any funds to a victim of the arson. Id. at 884. The same is true here. The cardholders detected the false charges, paid nothing and suffered no loss.

The notation regarding subsequent reimbursement does not resolve the issue. CP 85. There is nothing to reimburse the cardholders for, since it appears they neither paid nor lost any amount. The restitution award represents a windfall for the cardholders. The order provides that the card companies will be notified so they can request an adjustment if necessary. CP 85. This should have been done in preparation for the restitution hearing. It is an abuse of discretion to knowingly award restitution to a party that did not suffer an actual loss as a result of the crime.

b. The Retail Price of the Fuel Does Not Reflect the Actual Loss to the Fuel Companies.

It is the State's burden to establish the amount of restitution by a preponderance of the evidence. Dennis, 101 Wn. App. at 226. Although a loss need not be established with specific accuracy, restitution must be based on easily ascertainable damages. Fleming, 75 Wn. App. at 274. "Easily ascertainable damages are those tangible damages which are proved by sufficient evidence to exist." State v. Bush, 34 Wn. App. 121, 123, 659 P.2d 1127 (1983). The amount of restitution must be established by "substantial credible evidence." State v. Kisor, 68 Wash. App. 610, 620, 844 P.2d 1038, 1044 (1993) (quoting State v. Fambrough, 66 Wn. App. 223, 225, 831 P.2d 789 (1992)).

Evidence is insufficient for purposes of due process when it does not afford a reasonable basis for estimating loss or subjects the trier of fact to mere speculation or conjecture. Pollard, 66 Wn. App. at 785. Due process is offended when a court orders a defendant to pay restitution based merely on a rough estimate of damages without any further corroboration. Kisor, 68 Wn. App. at 620. Notwithstanding the forgiving abuse of discretion standard, the record must permit a reviewing court to determine exactly what figure the evidence establishes. Otherwise, the restitution order must be

vacated. Pollard, 66 Wn. App. at 785. The record here does not afford a reasonable basis for estimating the loss to the fuel card companies.

Other jurisdictions have rejected the retail price as a measure for restitution when the actual financial loss was the wholesale price. For example, in State v. Hall, 297 Kan. 709, 710-15, 304 P.3d 677 (2013), the Kansas Supreme Court reversed a restitution order that awarded the full retail value of supplies stolen from an animal clinic. The court noted there could be no bright line rule whether the value awarded should be retail or wholesale. Id. at 709-10. On remand the court should consider factors such as the intended use of the stolen items (i.e. for internal use or re-sale) and the amount of any actual lost sales. Id. at 714-15.

Similarly, the Indiana Court of Appeals held that the retail price "may" be awarded, but only if the evidence shows it accurately reflects the victim's loss. T.C. v. State, 839 N.E.2d 1222, 1228 (Ind. Ct. App. 2005). In T.C., the victim testified his loss exceeded the wholesale cost due to shipping and stocking costs. Id. The court concluded that such testimony could support an award of more than the wholesale value. Id. See also United States v. Lively, 20 F.3d 193, 202 (6th Cir. 1994) (upholding restitution award for retail price of stolen merchandise where restoration of lost profits was necessary to cover the companies' actual losses).

This case directly parallels People v. Chappelone, 183 Cal. App. 4th 1159, 1179, 107 Cal. Rptr. 3d 895, 910 (2010), where the California court rejected an award of the full retail price of merchandise stolen from a Target store. Even for the sellable items, the court noted that it was unlikely Target suffered any actual lost profits because "there was no evidence that there was not a comparable replacement to sell to Target's customers." Id. As the court explained, "These were not unique products, but were mass-produced consumer goods that Target sold in abundance." Id. The fact that Target is a massive, nation-wide retailer with a system for tracking goods, "suggests the items stayed in stock and no customer was ever deprived of a purchase." Id. Ultimately, the court concluded, "the victim's economic loss may include lost revenue or profit—where there is evidence of such loss. Here, there was simply no such evidence." Id.

Here, there is no evidence supporting any loss to APP or Petrocard beyond the wholesale price they paid to their suppliers to replace their lost inventory. The price those companies charged their cardholders does not reflect the card companies' actual loss. The wholesale price the card companies pay to acquire the fuel is necessarily less than what they charge their cardholders. Otherwise, they would not be in business. Like Target, the record suggests they lost no actual sales at the retail price because they were able to replace their inventory in a timely fashion. CP 81-82.

The court appears to have rested its decision in part on the fact that the price charged to cardholders was a discount from the retail price that would be charged at an average gas station to a non-cardholder. 15RP 23. But this reasonable assumption provides no basis for estimating the wholesale price. It therefore provides no basis for estimating the loss to the fuel companies. It is pure speculation, which is insufficient to justify a restitution order. Pollard, 66 Wn. App. at 785.

The State argued the amount of fuel lost was precisely demonstrated by the documented fraudulent charges. 15RP 14-15. But the statute contemplates the amount of loss or damage *to a victim*, caused by the offense, not just in the abstract. Ewing, 102 Wn. App. at 352. The price charged in the invoices presented at trial does not reflect any amount actually lost by any party. The State presented no evidence that the cardholders suffered any loss at all, as discussed above, and it presented no evidence of the amount of loss suffered by the card companies.

The State failed to present "substantial credible evidence" in support of the restitution amount ordered to the cardholder companies. State v. Griffith, 164 Wn.2d 960, 965, 195 P.3d 506 (2008). The court abused its discretion in awarding restitution to eight companies when the evidence showed they did not suffer any loss and to an additional seven companies when there was no evidence whether they suffered any loss. The court also

abused its discretion in tying the amount of restitution to the price charged in the invoices without any evidence that any party paid or otherwise suffered financial losses in that amount. The restitution order should be vacated.

c. No New Restitution Hearing Is Necessary.

When a restitution award is vacated for insufficient evidence, the State may not present new evidence on remand. Griffith, 164 Wn.2d at 968. Griffith was convicted of possessing stolen property. Id. at 967. The court vacated a restitution award that included other items taken in the same burglary, but that were never found to be in Griffith's possession. Id. at 967-68. In that case, the court remanded for a restitution hearing to determine the value of the items that the record showed were in her possession, noting that no new evidence could be submitted. Id. at 968.

In this case, there is no need to remand for a new hearing. If this Court agrees the evidence is insufficient to support awarding the charged amounts to the cardholders, the proper amount of restitution is limited to the unchallenged amount awarded to Bartelson. A remand hearing would not change the outcome for the other cardholders or the card companies, since no new evidence could be added to that already declared insufficient. Griffith, 164 Wn.2d at 968. This Court should therefore remand for vacation of the restitution order with the exception of the award to Bartelson.

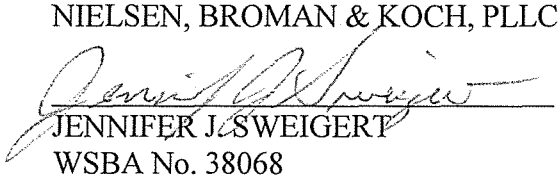
D. CONCLUSION

For the foregoing reasons, Ram requests this Court vacate the restitution order and remand so that the restitution amount can be reduced to the $105,941.59 of loss demonstrated by Bartelson.

DATED this 7th day of December, 2015.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



JENNIFER J. SWEIGERT
WSBA No. 38068
Office ID No. 91051

Attorney for Appellant

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

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 73759-7-I
	)	
VINOD RAM,	)	
	)	
Appellant.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 7TH DAY OF ECEMBER 2015, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] VINOD RAM
NO. 214025646
KING COUNTY JAIL
500 5TH AVENUE
SEATTLE, WA 98104

SIGNED IN SEATTLE WASHINGTON, THIS 7TH DAY OF ECEMBER 2015.

X Patrick Mayovsky