939098

Supreme Court No. _____
Court of Appeals No. 33418-0-III

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Plaintiff/Respondent,

vs.

NATHAN EARL ELDRED,
Defendant/Appellant.

APPEAL FROM THE LIINCOLN COUNTY SUPERIOR COURT
Honorable John F. Strohmaier, Judge

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Petitioner, Nathan Earl Eldred, is the appellant below and asks this Court to review the decision referred to in Section II.

II. COURT OF APPEALS DECISION

Petitioner seeks review of the Court of Appeals, Division III, unpublished opinion filed on October 27, 2016,[1] affirming the imposition of restitution after he pleaded guilty to rendering criminal assistance and possession of stolen property. A copy of the opinion is attached as Appendix A.

III. ISSUES PRESENTED FOR REVIEW

A. Whether inferences of an uncharged general scheme to dispose of property may be used to establish the causal connection between Mr. Abbott's total loss and Eldred's possession of some of the stolen property for purposes of imposing restitution.

B. Whether restitution may be imposed for damages that occurred before the act constituting the offense of rendering criminal assistance.

IV. STATEMENT OF THE CASE

On September 12, 2013, the State charged appellant Nathan Earl Eldred with residential burglary (count I) and second degree burglary (count II). The State alleged that on February 14, 2013, Eldred "with

[1] The current online version is found at *State v. Eldred*, No. 33418-0-III, 2016 WL 6301606 (Wash. Ct. App. Oct. 27, 2016).

intent to commit a crime against a person or property therein, entered or remained unlawfully in a [residence (count I)] [building (count II]" located at "39500 SR N, Davenport, WA". CP 1–2; RCW 9A.52.025(1); RCW 9A.52.030(1). As to count II the State alleged Eldred "and/or was an accomplice to said crime." CP 1. Mike Abbott owned the house and shed at that location. CP 5.

On November 18, 2014, Eldred pleaded guilty to amended charges of second degree rendering criminal assistance (count II) and second degree possession of stolen property (count III).[2] CP 10–12, 20; RP 8. The stolen property specified in the possession charge was: "to wit: property belonging to 39500 SR 25 N., Davenport, WA, of a value in excess of $750 ... ." CP 11. The Statement of Defendant on Plea of Guilty signed by Eldred contained pre-printed language stating "If this crime resulted in injury to any person or damage to or loss of property, the judge will order me to make restitution, unless extraordinary circumstances exist which make restitution inappropriate." CP 14, 21. Eldred agreed that instead of making a statement, "the court may review

[2] As part of the plea agreement, Eldred also pleaded guilty to charges consolidated into this matter from another cause number: count I, Driving While Under the Influence, and Count IV, Possession of a Controlled Substance other than Marijuana. CP 20; RP 3–18.

the police reports and/or a statement of probable cause[3] supplied by the prosecution to establish a factual basis for the plea." CP 20. Eldred did not agree to pay restitution on any additional uncharged offenses. *See* CP 13–21.

At a restitution hearing before the Honorable John F. Strohmaier, the State sought $3,544.25 for restitution to Mr. Abbott for items taken in the burglary. RP 21; CP 49–52. The State did not call any witnesses to testify. The court considered argument of counsel and the receipts submitted in support of restitution (CP 49–53), the Defendant's Memo re Restitution Hearing (CP 34–39), the State's Memorandum of Authorities in Support of State's Request for Restitution (CP 40–43) and its attached police report of Deputy Andy Manke (CP 44–48). RP 19–46. The police report indicates the burglars used Eldred's pickup truck to transport at least some of the items stolen from Mr. Abbott's property to another location. CP 45–47.

Eldred objected to restitution for anything other than the one stolen push mower found in his possession. He argued there was no nexus between his offense of rendering criminal assistance and the theft of items

[3] The investigative report of Deputy Andy Manke was submitted as support for the finding of probable cause. CP 3–9. A copy of the report was also attached to the State's memorandum in support of restitution. CP 44–48.

during the burglary because his alleged offense was necessarily committed *after* the burglary occurred. He also argued no nexus was established between his offense of second degree possession of stolen property and items taken during the burglary other than the lawn mower found in his possession. RP 21–28, 33–37. The Court disagreed, noting that "if I'm wrong [] then the Court of Appeals can say otherwise ... I guess we'll find out about it in a year or so," and imposed restitution in the amount of $3,106.55. RP 36–39, 45.

V. ARGUMENT IN SUPPORT OF REVIEW

The trial court erred when it ordered restitution. A trial court's authority to order restitution is derived entirely from statute. *State v. Tobin,* 161 Wn.2d 517, 523, 166 P.3d 1167 (2007). 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," unless "extraordinary circumstances" make restitution inappropriate. The statutes authorize a court to order restitution up to twice the amount of the victim's loss resulting from the crime. RCW 9.94A.753(3).

Under RCW 9.94A.753(3), restitution must 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. Restitution is only allowed for losses "causally connected" to the crime charged. *State* v. *Kinneman,* 155 Wn.2d 272, 286–87, 119 P.3d 350 (2005); *State* v. *Enstone,* 89 Wn. App. 882, 886, 951 P.2d 309 (1998), *aff'd,* 137 Wn.2d 675,974 P.2d 828 (1999) (there must be a causal connection "between the crime and the injuries for which compensation is sought"). While cases commonly refer to the crime "charged," the statute actually requires "that the injury or damage be the result of the crime for which the defendant is 'convicted.'" *State v. McCarthy,* 178 Wn. App. 290, 297 n.3, 313 P.3d 1247 (2013) (noting that "[t]he initial charges are immaterial"); *see* 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"). "Losses are causally connected if, but for the charged crime, the victim would not have incurred the loss." *McCarthy,* 178 Wn. App. at 297 (internal quotation marks omitted) (quoting *Tobin,* 161 Wn.2d at 524.)

Because restitution is limited to losses incurred as a result of the precise offense charged, the general rule is that "[a] defendant may not be required to pay restitution beyond the crime charged or for other uncharged offenses." *State v. Johnson,* 69 Wn. App. 189, 191, 847 P.2d

960 (1993). In other words, restitution may not be imposed "based on the defendant's 'general scheme' or acts 'connected with' the crime charged, when those acts are not part of the charge." *State v. Woods,* 90 Wn. App. 904, 907–08, 953 P.2d 834 (1998) (quoting *State v. Miszak,* 69 Wn. App. 426, 428, 848 P.2d 1329 (1993)).

An exception to this rule applies where a defendant pleads guilty and "expressly agrees" as part of the plea bargaining process "to pay restitution for crimes for which he was not convicted." *Johnson,* 69 Wn. App. at 191; RCW 9.94A.753(5) (providing that restitution shall be ordered "if the offender pleads guilty to a lesser offense or fewer offenses and agrees with the prosecutor's recommendation that the offender be required to pay restitution to a victim of an offense or offenses which are not prosecuted pursuant to a plea agreement").

In determining restitution, a 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." *State* v. *Dedonado,* 99 Wn. App. 251, 256, 991 P.2d 1216 (2000). If the defendant disputes facts relevant to determining restitution, "the sentencing court must either not consider those facts or grant an evidentiary hearing where the State must prove the restitution amount by a preponderance of the evidence." *Id.;*

Kinneman, 155 Wn.2d at 285. The loss "must be supported by 'substantial credible evidence.'" *State* v. *Griffith,* 164 Wn.2d 960, 965, 195 P.3d 506 (2008) (quoting *State v. Fleming,* 75 Wn. App. 270, 275, 877 P.2d 243 (1994)).

Subject to these limitations, the trial court has broad discretion in deciding to impose restitution and the amount thereof. *Woods*, 90 Wn. App. at 906; *State* v. *Hughes,* 154 Wn.2d 118, 153, 110 P.3d 192 (2005*), overruled on other grounds by Washington* v. *Recuenco,* 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006). Accordingly, a trial court's order of restitution will not be disturbed on appeal unless it is '" manifestly unreasonable or the sentencing court exercised its discretion on untenable grounds or for untenable reasons.'" *Id.* (quoting *State* v. *Hunotte,* 69 Wn. App. 670, 674 , 851 P.2d 694 (1993), *abrogated on other grounds by State* v. *R.G.P.,* 175 Wn. App. 131, 302 P.3d 885 (2013), *rev. denied,* 178 Wn.2d 1020 (2013)*; Tobin,* 161 Wn.2d at 523.

A. Division Three's decision affirming full restitution based on inferences from uncharged acts for which Eldred did not agree to pay restitution when he pleaded guilty to possession of stolen property conflicts with other decisions of this Court and the Court of Appeals.

This Court should accept review pursuant to RAP 13.4(b)(1) and (2) because Division Three's decision conflicts with other decisions holding that restitution cannot be imposed based on the defendant's "general scheme" or acts "connected with" the crime charged, when those acts are not part of the charged offense and where the defendant has not otherwise agreed to repay restitution for crimes for which he was not convicted. *See, e.g., Johnson,* 69 Wn. App. at 191; *Woods,* 90 Wn. App. at 907–08; *Miszak,* 69 Wn. App. at 428.

A person is guilty of possessing stolen property in the second degree if he possesses stolen property which exceeds seven hundred fifty dollars in value but does not exceed five thousand dollars in value. RCW 9A.56.160 (1)(a). Eldred pleaded guilty to possession of stolen property. He did not expressly agree to pay restitution for crimes for which he was not convicted. The trial court concluded, "[b]ut for the Defendant's possession of stolen property, the victim would not have suffered damages." CP 55. However, the monetary loss to Mr. Abbott occurred

when the home and shed were burglarized and property taken, not after the fact when Eldred was in possession of only some of the stolen property. Whether the loss is causally connected to the crime is a question of law that is reviewed de novo. *State v. Acevedo*, 159 Wn. App. 221, 229–30, 248 P.3d 526 (2010).

In *State v. Griffith*, the defendant pleaded guilty to possessing stolen property in the second degree. *Griffith,* 164 Wn.2d at 962. Griffith agreed to pay restitution "[i]f this crime resulted in injury to any person or damage to or loss of property." *State v. Griffith*, 136 Wn. App. 885, 891, 151 P.3d 230, 232 (2007), *as corrected* (Feb. 20, 2007), *rev'd*, 164 Wn.2d 960, 195 P.3d 506 (2008). She did not agree to responsibility for the burglary loss. *Griffith*, 136 Wn. App. at 892. $5,000 worth of the items including jewelry and gold scrap stolen during the home burglary had been recovered. *State v. Griffith*, 136 Wn. App. at 889. After an evidentiary hearing, the sentencing court found that Griffith was in possession of $11,500 in unrecovered stolen property and ordered her to pay restitution in that amount. The Court of Appeals affirmed. *Griffith*, 136 Wn. App. at 888–89, 892.

This Court vacated the order and remanded for a new restitution hearing because the trial court's finding was not supported by substantial

evidence. The court noted, "The evidence is not only 'skimpy'—it is legally insufficient. John Slaughter's testimony that Griffith brought 'stuff' into the coin company does not support the trial court's finding that Griffith possessed $11,500 worth of the [victim's] unrecovered property." *Griffith,* 164 Wn.2d at 967.

The court recognized that mere possession of property stolen in a burglary does not establish the causal connection required to impose restitution. "Griffith did not plead guilty to burglary. She pleaded guilty to possessing $250—$1,500 worth of stolen property. ' "[C]ulpability for possession of stolen property does not necessarily include culpability for the stealing of the property. The actual thief is guilty of a different crime.' " *Griffith,* 136 Wn. App. at 894, 151 P.3d 230 (Schultheis, J., dissenting) (quoting *State v. Keigan C.,* 120 Wn. App. 604, 609, 86 P.3d 798 (2004), *aff'd sub nom. State v. Hiett,* 154 Wash.2d 560, 115 P.3d 274 (2005)). This Court held, "Because Griffith did not agree to pay for the [victim's] loss from the burglary, she is responsible only for the value of the [victim's] unrecovered property proven to be causally related to her crime [of possession]." *Griffith,* 164 Wn.2d at 967–68.

Because "Griffith pleaded guilty to possessing stolen property and should pay restitution for her crime," the court remanded for the trial court to "determine the value of [the victim's] unrecovered items from the police report that can be identified by a preponderance of the evidence to have been in Griffith's possession. No new evidence may be admitted.[4]" *Griffith,* 164 Wn.2d at 968 (one footnote omitted).

The facts of this case are indistinguishable from those in *Griffith*. Eldred did not plead guilty to burglary. He pleaded guilty to possessing $750 to $5,000 worth of stolen property. Because he did not agree to pay for Mr. Abbott's loss from the burglary, Eldred is responsible only for the value of Mr. Abbott's unrecovered property proven to be causally related to his crime of possession. *See* also *Johnson,* 69 Wn. App. at 191; *Woods,* 90 Wn. App. at 907–08; *Miszak,* 69 Wn. App. at 428. As in *Griffith*, the matter should be remanded for the trial court to determine the value of Mr. Abbott's unrecovered items from the police report that can be identified by a preponderance of the evidence to have been in Eldred's possession.

[4] "Introducing new evidence on remand would conflict with the statutory requirement that restitution be set within 180 days after sentencing. RCW 9.94A.753(1); see *State v. Dennis*, 101 Wn. App. 223, 229–30, 6 P.3d 1173 (2000)." *Griffith,* 164 Wn.2d at 968 fn.6.

Absent admission of participation in an uncharged crime or agreement to repay, Washington courts have consistently refused to base restitution on an offender's "general scheme," or based on acts "connected with" the crime charged that were not part of the crime charged, because such losses go beyond the crime of conviction. See, e.g., *Woods,* 90 Wn. App. at 908–09 ("Even assuming that Woods did steal the vehicle in August, she cannot be required to pay restitution for other uncharged offenses because she did not expressly agree, when she pleaded guilty to possession of stolen property in the second degree, to pay restitution for crimes for which she was not convicted, such as theft in the second degree or taking a motor vehicle without permission."); *Johnson,* 69 Wn. App. at 192 (Defendant was not required to pay restitution for replacement costs of tool and photographs where she was never specifically charged with stealing those items, even though she signed plea form in which she admitted that she wrongfully obtained unauthorized control over cash, checks, and other items from victim and in which she agreed to pay restitution in full). *Accord, State v. Miszak,* 69 Wn. App. at 429 (where defendant pleaded guilty to attempted theft he was properly ordered to pay restitution for item of jewelry he admitted taking).

Division Three disregarded *Griffith*, *Johnson, Woods,* and *Miszak,* among others. It relied instead on *State v. Rogers*, 30 Wn. App. 653, 638 P.2d 89 (1981) to support its reasoning that inferences of an uncharged general scheme to dispose of property may be used to establish the causal connection between Mr. Abbott's total loss and Eldred's possession of some of the stolen property. *Slip Opinion*, pp. 11–12. The court's reliance on *Rogers* is misplaced.

In *Rogers,* a truck leased for use in a lumber transport business was seen at defendant's business premises several times before it was discovered missing by its owner. The truck was never recovered. The defendant was convicted of second degree possession of stolen property after a bench trial and was ordered to pay restitution for the full value of the truck. The trial judge entered a finding that the defendant disposed of parts of the truck and was to be paid a commission for doing so. *Rogers*, 30 Wn. App. 654–56. On appeal, the court held that where the defendant's "proven 'possession' " of stolen truck parts was part of a scheme to dispose of the stolen vehicle and led to depriving the owner of his truck, the defendant was chargeable with such deprivation, and restitution for the value of the truck was proper. *Rogers*, 30 Wn. App. at 656.

Unlike in *Rogers*, there was no direct evidence Eldred was involved in a scheme to unlawfully take and dispose of Mr. Abbott's property. Division Three instead relied on inferences to conclude Eldred participated in at least the uncharged crime of theft of the property and should therefore be responsible to pay restitution for all of Mr. Abbott's losses. *Slip Opinion*, p. 11–12. Eldred was not charged with burglary[5] or theft as principal or accomplice or trafficking in stolen property. In his plea statement, he agreed the court "may review the police reports ... to establish a factual basis" for his plea of guilty to second degree possession of stolen property. CP 20. Under *Griffith*, *Johnson, Woods,* and *Miszak,* among others, restitution must be limited to damages resulting from his crime of conviction. Division Three's decision should be reversed.

B. The trial court erred in ordering Eldred to pay restitution for damages that occurred before the act constituting his offense of rendering criminal assistance.

The trial court concluded Eldred's criminal assistance in part caused the victim's loss of property. *Slip Opinion*, pp. 5–6. Although Division Three did not address whether a conviction for rendering criminal assistance can lead to a judgment for restitution for loss resulting from the

[5] The state originally charged Eldred with one count of residential burglary and one count of burglary in the second degree committed as principal or accomplice. CP 1–2.

original crime of others (*Slip Opinion*, pp. 9–10), the court indirectly adopted this conclusion by reasoning Eldred not only helped the burglars to forgo apprehension but illegally assisted them by using his truck to remove what he knew to be stolen goods from the property. *Slip Opinion*, p. 12. This Court should accept review pursuant to RAP 13.4(b)(1), (2) and (4) because Division Three's decision conflicts with other decisions of this Court and the Court of Appeals and because the issue is one of substantial public interest that should be determined by this Court.

"A person is guilty of rendering criminal assistance in the second degree if he or she renders criminal assistance to a person who has committed or is being sought for a class B or class C felony or an equivalent juvenile offense or to someone being sought for violation of parole, probation, or community supervision." RCW 9A.76.080(1). The offense is more specifically described in RCW 9A.76.050:

> [A] person 'renders criminal assistance' if, with intent to prevent, hinder, or delay the apprehension or prosecution of another person who he or she knows has committed a crime or juvenile offense or is being sought by law enforcement officials for the commission of a crime or juvenile offense or has escaped from a detention facility, he or she:
>
> (1) Harbors or conceals such person; or
>
> (2) Warns such person of impending discovery or apprehension; or
>
> (3) Provides such person with money, transportation, disguise, or other means of avoiding discovery or apprehension; or

(4) Prevents or obstructs, by use of force, deception, or threat, anyone from performing an act that might aid in the discovery or apprehension of such person; or

(5) Conceals, alters, or destroys any physical evidence that might aid in the discovery or apprehension of such person; or

(6) Provides such person with a weapon.

To establish a causal link between restitution and the crime of rendering criminal assistance in the second degree, the State must show how specific conduct listed in the statute caused financial harm to Mr. Abbott. The court concluded, "[b]ut for the Defendant providing transportation and assistance after the Burglary occurred ... the victim would not have suffered damages." CP 55. However, the financial harm occurred when the home and shed were burglarized and property taken, not after the fact when the perpetrators were evading detection. Whether the loss is causally connected to the crime is a question of law that is reviewed de novo. *Acevedo*, 159 Wn. App. at 229–30.

When the loss or damage forming the basis of the restitution award occurs before the act constituting the crime, there is no causal connection between the two, and the restitution award for such loss is not permitted absent the express agreement by the defendant as part of the plea agreement. *Woods*, 90 Wn. App. 904; *State v. Hartwell*, 38 Wn. App. 135, 684 P.2d 778 (1984); *see also State v. Mead,* 67 Wn. App. 846, 836 P.2d 57 (1992) (where defendant pled guilty to possession of stolen property,

court erred in imposing restitution for damage occurring during burglary in which property was taken); *State v. Raleigh,* 50 Wn. App. 248, 253–54, 748 P.2d 267 (trial court erred by imposing restitution for a string of burglaries, where defendant only pled guilty to one incident), *rev. denied*, 110 Wn.2d 1017 (1988). Here, Eldred agreed only to pay restitution for the charged offense. CP 14, 21.

In *Woods*, the defendant pled guilty to possession of a stolen truck and was ordered to pay restitution for personal property inside the truck when it was stolen. Because the car was stolen in *August*, and Woods pled guilty to possessing the truck in *September*, however, Division Two of the Court of Appeals found the link between the offense and the owner's lost property too tenuous to support the restitution order.

> The owner did not incur his loss of personal property as a result of Woods's possession of the stolen vehicle in September. Rather, the owner incurred such losses as a result of the vehicle being stolen in August. . . . The State essentially asked the trial court to impose restitution based on Woods's 'general scheme,' or based on acts 'connected with' the crime charged that were not part of the crime charged. . . .

Woods, 90 Wn. App. at 908.

The same is true here. The financial loss for items taken in the burglary arose *before* Eldred allegedly assisted the burglars in evading detection. In fact, as a matter of law, rendering criminal assistance is an

offense that can only occur *after* the fact because it otherwise constitutes accomplice liability. *State v. Anderson*, 63 Wn. App. 257, 261, 818 P.2d 40 (1991), *review denied*, 118 Wn.2d 1021 (1992); *see also State v. Robinson*, 73 Wn. App. 851, 858, 872 P.2d 43 (1994) (providing transportation only after robbery was completed is more akin to rendering criminal assistance than to being an accomplice to the robbery). As such, Mr. Abbott was not a "victim" of Eldred's offense because Eldred's offense was not a crime against Mr. Abbott, but rather an offense against the State in that Eldred allegedly interfered with the apprehension of Mr. Abbott's burglars. "In examining the causal relationship between the crime and the loss, it is clear that if the loss or damage *occurs before the act constituting the crime*, there is no causal connection between the two." *Woods*, 90 Wn. App. at 909 (quoting *Hunotte,*69 Wn. App. 670) (emphasis added). Because the house and shed were burglarized before Eldred allegedly interfered with the apprehension of the burglars—the conduct for which he was convicted—the link between the restitution order and Eldred's offense is too tenuous to support the restitution order. *Woods*, 90 Wn. App. at 908–09.

In response, the State may argue, based on the facts as stated in the investigative report, that Eldred was an accomplice to the burglars, and

therefore just as liable for the victim's financial loss as the burglars. Any such argument should be rejected.

An individual cannot be an accomplice unless "he associates himself with the undertaking, participates in it as something he desires to bring about, and seeks by action to make it succeed." *In re Wilson*, 91 Wn.2d 487, 491, 588 P.2d 1161 (1979) (quoting *State v. J-R Distribs., Inc.*, 82 Wn.2d 584, 593, 512 P.2d 1049 (1973)). Awareness and physical presence at the scene of an ongoing crime -- even when coupled with assent -- are not enough unless the purported accomplice stands "ready to assist" in the crime at issue. *Wilson*, 91 Wn.2d at 491; *State v. Luna*, 71 Wn. App. 755, 759, 862 P.2d 620 (1993). Moreover, foreseeability that another might commit the crime is also insufficient. Accomplice liability requires knowing assistance in the precise crime. *State v. Stein*, 144 Wn.2d 236, 246, 27 P.3d 184 (2001).

The investigative report indicates Eldred admitted that he agreed to meet some people for a visit and subsequently lent them his pickup truck to haul some property. There is no evidence, however, that Eldred was present or aware of any intent to burglarize Mr. Abbott's property or that he participated in the burglary. CP 5–9. The evidence is therefore insufficient to establish Eldred as an accomplice to the burglary. As

admitted by Eldred in the statement on plea of guilty, he rendered criminal assistance for conduct that occurred only after the burglary had occurred. He pleaded guilty to that charge. The State failed to establish a nexus between Eldred's offense and the financial loss associated with the burglary. The order of restitution must be stricken. *Dennis*, 101 Wn. App. at 228–30 (where defendant objects below to restitution, State not entitled to second chance to prove causation and damages).

VI. CONCLUSION

For the reasons stated, Mr. Eldred respectfully asks this Court to accept review of his petition.

Respectfully submitted on November 27, 2016.

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PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on November 27, 2016, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of appellant's petition for review and Appendix A (opinion filed 10/27/16):

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October 27, 2016

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CASE # 334180
State of Washington v. Nathan Earl Eldred
LINCOLN COUNTY SUPERIOR COURT No. 131000510

Counsel:

Enclosed please find a copy of the opinion filed by the Court today.

A party need not file a motion for reconsideration as a prerequisite to discretionary review by the Supreme Court. RAP 13.3(b); 13.4(a). If a motion for reconsideration is filed, it should state with particularity the points of law or fact which the moving party contends the court has overlooked or misapprehended, together with a brief argument on the points raised. RAP 12.4(c). Motions for reconsideration which merely reargue the case should not be filed.

Motions for reconsideration, if any, must be filed within twenty (20) days after the filing of the opinion. Please file an original and two copies of the motion (unless filed electronically). If no motion for reconsideration is filed, any petition for review to the Supreme Court must be filed in this court within thirty (30) days after the filing of this opinion (may be filed by electronic facsimile transmission). The motion for reconsideration and petition for review must be received (not mailed) on or before the dates they are due. RAP 18.5(c).

Sincerely,

Renee S. Townsley
Clerk/Administrator

RST:sh
Enclosure
c: **E-mail** Honorable John F. Strohmaier

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WA State Court of Appeals, Division III

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

STATE OF WASHINGTON, Respondent, v. NATHAN EARL ELDRED, Appellant.	)	No. 33418-0-III UNPUBLISHED OPINION

FEARING, C.J. — Nathan Eldred challenges the imposition of restitution after he pled guilty to rendering criminal assistance and possession of stolen property. He claims that his crimes did not result in the victim's loss of the stolen goods. We conclude that the trial court did not abuse its discretion when finding that at least one of Eldred's crimes led to the victim's loss. We affirm the restitution award.

FACTS

Mike Abbott owned a farm house and shed in Lincoln County, north of Davenport. During much of January and early February 2013, a period of heavy snow fall, Abbott absented the rural home. He returned home on February 14 to discover his home and shed burglarized. One or more intruders pushed in the back door to Mike Abbott's home and cut the lock from the shed's front sliding doors. The burglars took

from the shed two John Deere push lawn mowers, a Red Max weed eater, four Proxes tires with black wheels, four Kumho tires with Hoyo wheels, a Snap On tool box, and snowmobile covers.

Beginning on February 17, 2013, Lincoln County Sheriff Deputy Andy Manke investigated the burglary. Deputy Manke interviewed witnesses who claimed Stephen Murphy participated in the theft. Deputy Manke also heard that burglars used Nathan Eldred's pickup truck to transport stolen goods from Mike Abbott's farm. Spokane Tribal officers visited Eldred's Wellpinit home and observed a John Deere push mower in the open garage.

Lincoln County Sheriff Deputy Andy Manke interviewed Stephen Murphy and Nathan Eldred after each waived his respective *Miranda* rights. The confessions of each implicate both the confessor and the other suspect.

According to Stephen Murphy, Nick, aka Dough boy, and Kayla, aka K.C., burglarized Mike Abbott's home and shed at a time when Nick, Kayla and he resided at the Fort Spokane home of Rosemarie Murphy, Stephen's mother. We do not know the last names of Nick and Kayla. Nick and Kayla returned from the burglary to the Murphy home without the burglarized property. The two informed Steven Murphy that they needed a truck to move the purloined items. Murphy called Nathan Eldred, who drove his truck to Rosemarie Murphy's house. Eldred, K.C., and Nick then journeyed, in

Eldred's pickup truck, to Abbott's farmhouse and loaded tires and lawn mowers into the truck. Steven Murphy claimed he remained at his mother's house until the trio returned. Murphy then telephoned a Spokane drug dealer and arranged to exchange the tires for partial payment of Nick's debt to the dealer. Murphy removed one lawn mower from Nathan Eldred's pickup truck and left the mower at his mother's residence. Murphy then followed in his own vehicle as Eldred, Kayla, and Nick drove to Spokane and delivered the tires to the drug dealer.

Lincoln County Sheriff Deputy Andy Manke also interviewed Nathan Eldred. According to Eldred, he never went to Mike Abbott's farmhouse. Instead, Steven Murphy invited Eldred to visit at Rosemarie Murphy's home. On arrival at the Murphy abode, Eldred learned Steven wanted to use Eldred's truck to transport stolen property. Steven Murphy drove Eldred's pickup truck to Abbott's farmhouse with Nick as a passenger and Eldred following in Murphy's Jeep. Eldred parked on the side of the road while Murphy and Nick loaded the pickup truck at Abbott's farmhouse. Murphy, in the pickup truck, returned to his mother's house, and Eldred followed in the Jeep. Eldred then allowed Murphy to drive his truck, with Nick and Kayla as passengers, to take the stolen goods to Spokane. Eldred followed in Murphy's Jeep, but lost Murphy in Spokane traffic. Eldred waited at a ubiquitous Walmart, of unknown location. Murphy later arrived at the Walmart, the two exchanged vehicles, and Nathan Eldred drove his pickup truck home to Wellpinit.

Nathan Eldred admitted to Sheriff Deputy Andy Manke that he held possession of a green John Deere lawn mower. He claimed that Stephen Murphy abandoned the mower in his pickup truck.

The police recovered one of the stolen mowers at Nathan Eldred's residence and the other mower at the home of Rosemarie Murphy, Steven Murphy's mother. One of the stolen mowers was returned to Mike Abbott, but he had already purchased a replacement mower. There is no evidence that the police recovered any of the trafficked tires or wheels.

PROCEDURE

The State of Washington initially charged Nathan Eldred with residential burglary and burglary in the second degree. On November 18, 2014, the State filed an amended information as part of a global resolution of this prosecution and a second prosecution against Eldred. Under the amended information, the State charged Eldred with rendering criminal assistance in the second degree, possession of stolen property in the second degree, driving while under the influence, and possession of a controlled substance. Eldred pled guilty to all four counts. The latter two charges entail a separate incident.

In Nathan Eldred's statement on plea of guilty, he declared: "Instead of making a statement, I agree that the court may review the police reports and/or a statement of probable cause supplied by the prosecution to establish a factual basis for the plea."

Clerk's Papers (CP) at 20. He also averred:

> If this crime resulted in injury to any person or damage to or loss of property, the judge will order me to make restitution, unless extraordinary circumstances exist which make restitution inappropriate. The amount of restitution may be up to double my gain or double the victim's loss.

CP at 15. Eldred and the State entered no agreement on restitution at the plea hearing. Therefore, the trial court scheduled a later restitution hearing.

During the restitution hearing, the State of Washington requested an award of $3,544.25. The State submitted the following receipts to support the restitution request: a Les Schwab receipt for the purchase of one set of tires and wheels for $1,681.71; a 2010 receipt for a lawn mower and repairs costing $463.54; a 2012 receipt for a lawn mower costing $424.94; and a handwritten receipt for a second set of tires costing $1,000.00. Nathan Eldred contested imposition of any restitution other than the value of the lawn mower found in his possession. He argued against imposition of any other restitution on the basis that his crimes did not cause Mike Abbott's loss of other property.

The trial court imposed $3,106.65 in restitution: $424.94 for one of the lawn mowers, $1,681.71 for one set of tires and wheels, and $1,000.00 for the other set of tires and wheels. The trial court worried that the lawnmower receipts referred to the same lawnmower, so it did not include the amount from the 2010 receipt in the restitution award. In its order granting restitution, the trial court concluded:

> But for the Defendant providing transportation and assistance after the Burglary occurred and but for the Defendant's possession of stolen

> property, the victim would not have suffered damages. Therefore, the imposition of restitution for all the items and damages requested by the State is appropriate and supported by law.

CP at 55.

LAW AND ANALYSIS

Nathan Eldred appeals the order of restitution. Eldred argues restitution is not permitted when the loss or damage to the crime victim occurs before the act constituting the crime. He contends that the trial court erred in granting restitution because his convictions for rendering criminal assistance in the second degree and possession of stolen property in the second degree lack a causal connection with Mike Abbott's loss of his personal property. According to Eldred, the trial court imposed restitution based on a general scheme of criminal activity but that was not part of the crime. The State responds that an adequate causal link exists between Eldred's crimes and Abbott's property loss. We agree with the State.

The authority to impose restitution is not an inherent power of the court, but is derived from statutes. *State v. Gray*, 174 Wn.2d 920, 924, 280 P.3d 1110 (2012); *State v. Davison*, 116 Wn.2d 917, 919, 809 P.2d 1374 (1991). A number of statutes address restitution under varying circumstances. The controlling statute here is RCW 9.94A.753(5). The statute reads, in relevant part:

> (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 or as provided in subsection (6) of this section unless

> extraordinary circumstances exist which make restitution inappropriate in the court's judgment and the court sets forth such circumstances in the record. In addition, restitution shall be ordered to pay for an injury, loss, or damage if the offender pleads guilty to a lesser offense or fewer offenses and agrees with the prosecutor's recommendation that the offender be required to pay restitution to a victim of an offense or offenses which are not prosecuted pursuant to a plea agreement.

RCW 9.94A.753.

One goal of restitution is to require the defendant to face the consequences of his conduct. *State v. Enstone*, 137 Wn.2d 675, 680, 974 P.2d 828 (1999); *State v. Dauenhauer*, 103 Wn. App. 373, 378, 12 P.3d 661 (2000). The statute is designed to promote respect for the law by providing punishment that is just. *State v. Davison*, 116 Wn.2d at 922. Restitution is both punitive and compensatory in nature. *State v. Kinneman*, 155 Wn.2d 272, 279-80, 119 P.3d 350 (2005).

Nathan Eldred disputed the State's claim for restitution. When a defendant disputes facts relevant to the determination of restitution, the State must prove the amount by a preponderance of the evidence at an evidentiary hearing. *State v. Dedonado*, 99 Wn. App. 251, 256, 991 P.2d 1216 (2000). A trial court's order of restitution is reviewed for abuse of discretion. *State v. Tobin*, 161 Wn.2d 517, 523, 166 P.3d 1167 (2007). Affording discretion often entails a reviewing court accepting the reasonable inferences drawn from the facts by the trial court.

Nathan Eldred challenges the causal relationship between his crimes and the restitution award. Case law expands on the language of RCW 9.94A.753(5). A trial court exceeds its statutory authority in ordering restitution when the loss suffered is not causally related to the offense committed by the defendant. *State v. Woods*, 90 Wn. App. 904, 907, 953 P.2d 834 (1998); *State v. Vinyard*, 50 Wn. App. 888, 891, 751 P.2d 339 (1988). Imposition of restitution must be based on a causal connection between the crime charged and the victim's damages. *State v. Tobin*, 161 Wn.2d at 523; *State v. Osborne*, 140 Wn. App. 38, 42, 163 P.3d 799 (2007); *State v. Woods*, 90 Wn. App. at 907; *State v. Bunner*, 86 Wn. App. 158, 160, 936 P.2d 419 (1997). Restitution for loss beyond the scope of the crime charged is properly awardable only when the defendant enters into an express agreement, as part of the plea bargain process, to make such restitution. *State v. Woods*, 90 Wn. App. at 909. Otherwise, a trial court's discretion in awarding restitution is limited to the "precise offense" charged. *State v. Woods*, 90 Wn. App. at 907; *State v. Harrington*, 56 Wn. App. 176, 179, 782 P.2d 1101 (1989); *State v. Ashley*, 40 Wn. App. 877, 878-79, 700 P.2d 1207 (1985). Although these rules speak in terms of the crime charged, the cases limit restitution to damages resulting from the crime of conviction. *State v. Mead*, 67 Wn. App. 486, 490-91, 836 P.2d 257 (1992).

Causation is proved by a "but for" inquiry. *State v. Tobin*, 161 Wn.2d at 524. Restitution is allowed only for losses that are causally connected to a crime and may not be imposed for a general scheme or acts connected with the crime charged. *State v.*

Kinneman, 155 Wn.2d at 286 (2005). Restitution may not be based on acts connected with the crime charged, when those acts are not part of the charge. *State v. Harrington*, 56 Wn. App. at 179; *State v. Hartwell*, 38 Wn. App. 135, 141, 684 P.2d 778 (1984), *overruled on other grounds by State v. Krall*, 125 Wn.2d 146, 881 P.2d 1040 (1994). Going further, under one of our decisions, restitution can be based only on damage caused during the dates for which the State charged the defendant with a crime. *State v. Woods*, 90 Wn. App. at 908-09 (1998).

We agree in theory with Nathan Eldred's argument that loss or damage occurring before the act constituting the crime cannot be causally connected. *State v. Woods*, 90 Wn. App. at 909. We also agree in theory with Eldred's contention that restitution may not be imposed based on the defendant's "general scheme" or acts "connected with" the crime charged, when those acts are not part of the charge. *State v. Woods*, 90 Wn. App. at 907-08 (1998). We think those principles, however, inapt under the circumstances of this appeal.

Pertinent to this appeal, Nathan Eldred pled guilty to two crimes. We need only decide if one of the crimes resulted in Mike Abbott's loss. We conclude that at least one of Eldred's crimes directly led to the removing of Mike Abbott's goods from Abbott's land.

Nathan Eldred argues that his rendering of criminal assistance did not cause Mike Abbott's losses and this crime does not qualify him for restitution. The criminal

assistance statute reads:

> A person is guilty of rendering criminal assistance in the second degree if he or she renders criminal assistance to a person who has committed or is being sought for a class B or class C felony or an equivalent juvenile offense or to someone being sought for violation of parole, probation, or community supervision.

RCW 9A.76.080. Rendering criminal assistance is an offense that can only occur after the commission of the initial crime because otherwise it constitutes accomplice liability. *State v. Anderson*, 63 Wn. App. 257, 261, 818 P.2d 40 (1991); *see also State v. Robinson*, 73 Wn. App. 851, 858, 872 P.2d 43 (1994). We do not address whether a conviction for rendering criminal assistance can lead to a judgment for restitution for loss resulting from the original crime of others since we may rest our decision on other grounds.

Under the facts of this case, Nathan Eldred's unlawful possession of stolen property was one cause of Mike Abbott's losses. The possession statute reads:

> A person is guilty of possessing stolen property in the second degree if:
> (a) He or she possesses stolen property, other than a firearm as defined in RCW 9.41.010 or a motor vehicle, which exceeds seven hundred fifty dollars in value but does not exceed five thousand dollars in value . . . .

RCW 9A.56.160(1). We agree with Eldred that culpability for possession of stolen property does not necessarily include culpability for the stealing of the property. The actual thief is guilty of a different crime. *State v. Griffith*, 164 Wn.2d 960, 967, 195 P.3d 506 (2008). Once again, however, we consider these rules relevant to the issue on appeal.

Nathan Eldred relies primarily on *State v. Griffith*, 164 Wn.2d 960 (2008), wherein the Supreme Court vacated an order of restitution against a defendant convicted of possessing stolen jewelry. The trial court assessed restitution for the value of all jewelry stolen from the victim. The Supreme Court reversed on the basis that the evidence did not show that Joan Griffith possessed all of the jewelry taken from the victim. Perhaps inconsistent with other decisions, the high court implied that restitution could be imposed on the possessor of stolen property regardless of whether the possessor participated in the theft.

More on point to this appeal is *State v. Rogers*, 30 Wn. App. 653, 638 P.2d 89 (1981). The trial judge entered a finding that Richard Rogers disposed of parts of a stolen truck and was to be paid a commission for doing so. The court held that, when the defendant's proven possession is part of a scheme to dispose of property and thereby leads to permanent deprivation of an owner's property, a defendant is chargeable with such deprivation, and restitution for the value of the item is proper.

The case on appeal holds unique facts. Nathan Eldred was likely not involved in the initial burglary at Mike Abbott's home. Nevertheless, the court did not award restitution for damage to the house and shed resulting from the burglary. More importantly, the burglars could not remove the purloined articles of property the day of

the initial entry on the rural land. Instead, they solicited Eldred's assistance to remove the stolen items from Mike Abbott's land. Abbott did not lose possession of his lawn mowers, tires, weed eater, and tool box until Eldred participated in the crime and Eldred removed the items in his pickup truck.

The trial court could accept the statement of Steven Murphy as to how the crime occurred. Under Murphy's version of the story, Nathan Eldred was physically present on the farmland when burglars removed the stolen goods and placed the items in Eldred's pickup truck. Eldred drove the truck. The trial court could infer from the evidence that all goods were taken from the property at the same time and placed in the pickup of Nathan Eldred.

Nathan Eldred contends that he assisted the thieves only by helping them forgo apprehension. Eldred also contends no evidence supports that he knew others would use his pickup truck to remove stolen goods. As already outlined, substantial evidence and inferences from the evidence rebut these contentions. Under Stephen Murphy's story, Eldred knew his truck was needed to remove stolen goods from Mike Abbott's farmland.

Nathan Eldred's motion to deny appeal costs is granted. We deny the State costs on appeal.

CONCLUSION

We affirm the trial court's imposition of $3,106.65 in restitution against Nathan Eldred.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Fearing, J.
Fearing, C.J.

WE CONCUR:

Korsmo, J.

Siddoway, J.