69932-6

69932-6

NO. 69932-6-I

IN THE COURT OF APPEALS – STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON
Respondent,

v.

GREGORY WILLIAM WATERS,
Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON, FOR SKAGIT COUNTY

The Honorable Dave Needy, Judge

RESPONDENT'S BRIEF

SKAGIT COUNTY PROSECUTING ATTORNEY
RICHARD A. WEYRICH, PROSECUTOR

By: ROSEMARY H. KAHOLOKULA, WSBA#25026
Chief Criminal Deputy Prosecuting Attorney
Office Identification #91059

Courthouse Annex
605 South Third
Mount Vernon, WA 98273
Ph: (360) 336-9460

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Court of Appeals

Statutes

I. ISSUES

A. Did the trial court err in instructing the jury on a inferior degree offense where there was evidence to support a finding of recklessness rather than knowledge?

B. Did the trial court improperly impose a restitution amount based on the actual loss to the victim?

II. STATEMENT OF THE CASE

Zach Waters is the son of the appellant, Gregory Waters. RP 34[1]. In October, 2011, Zach, along with his fiance, Kerri Uitbenhowen and her five year old daughter, were living at 9969 Holtcamp Road in Sedro-Woolley. RP 34, 38, 53, 54. They were renting the property from Mildred Holtcamp and had access to the barn on the property for purposes of storing their property. RP 37, 54, 68. The Holtcamps also stored items, including about 300 metal hoop stalls, or cattle guards, in there. RP 37, 70, 77. Each guard had been worth about $30 in mid-90's. RP 78, 84-85.

At some point in 2011, Zach and his family went to Oregon for a few days. RP 39, 56. When Zach and Ms. Uitbenhowen returned, they noticed indications that someone may have entered the house and taken items. RP

[1] The State will refer to the verbatim report of proceedings by using "RP" and the page number.

40-41. They also noticed that the cattle guards in the barn had been taken. RP 41-42, 56. Mr. Waters, a few months previous, had asked Zach if he could scrap those metal hoop stalls and Zach testified that he told him "no". RP 43, 59. Zach had never heard anybody give permission to Mr. Waters to take those items. RP 44. Ms. Uitbenhowen testified that she had never given Mr. Waters permission to use or sell the cattle guards. RP 55, 56, 61. Ms. Holtcamp testified that she never gave Zach or Ms. Uitbenhowen permission to scrap the guards, nor did she authorize them to grant permission to anyone else. RP 71. Ms. Holtcamp's son, Tom Holtcamp, also testified that he did not ever give permission to renters to use the cattle guards. RP 80.

Ms. Uitbenhowen, who reported the theft to the police, never told them that Mr. Waters had asked Zach for permission to scrap the metal stalls. RP 65, 99. Zach never reported this to the police either. RP 52.

Mr. Waters told Detective Luvera that Ms. Uitbenhowen had wanted him to scrap the metal that was on the property and that they would split the money from scrapping the metal. RP 122. Mr. Waters said that he did then take the metal guards out of the barn, sell them, and share the money with Ms. Uitbenhowen and Zach. RP 123, 127-128.

Mr. Waters sold the guards to Brian Parberry, who owns a scrap metal business. RP 100, 102, 112, 120, 121. He sold between 50 and 100 of the guards for $279.30. RP 84, 112.

Mr. Holtcamp testified that in the mid-90's, each guard cost about $30.00 each. RP 78. He testified that most of the guards were purchased in the 80's, some in the 90's, and the value may have increased slightly between the 80's and the 90's. Finally, he testified that the $30 figure might have been a bit low because of the customization of the guards. RP 85.

Mr. Waters was charged with Trafficking in Stolen Property in the First Degree (among other things). CP 13-14. He was acquitted of that charge but was convicted of the inferior degree offense of Trafficking in Stolen Property in the Second Degree. CP 51-56.

At the restitution hearing, the State relied on trial testimony as well as Mr. Holtcamp's victim loss statement which indicated that some of the missing guards were larger and worth about $42.00 each, while the smaller ones were worth about $30.00 each. RP 164-165. The State also presented an email from Detective Luvera which indicated that according to the store manager for Coastal Farm and Ranch, the current value of 10 to 12 foot cattle guards was $399.00 up to the mid-four hundred dollars. The size of the Holtcamp cattle guards was about 6 to 8 feet. RP 165.

The trial judge determined the restitution would be based only the cattle guards actually sold to Mr. Parberry, and not all that were missing. RP 170. The trial judge determined that the restitution

would be based only on 50 sold cattle guards. Finally the trial judge determined that the amount of restitution would be $35.00 per guard; a figure mid-way between the $30.00 and $42.00 that Mr. Holtcamp had spent on purchasing the cattle guards. RP 174.

III. ARGUMENT

A. The trial court did not err in instructing the jury on an inferior degree offense where there was evidence to support a finding of recklessness rather than knowledge.

From the evidence presented, the jury could rationally find that Mr. Waters committed the offense of Trafficking in Stolen Property in the Second Degree, but not Trafficking in Stolen Property in the First Degree.

The trial court properly instructs on an inferior degree offense when:

> (1) The statutes for both the charged offense and the proposed inferior degree offense "proscribe but one offense"; (2) the information charges an offense that is divided into degrees, and the proposed offense is an inferior degree of the charged offense; and (3) there is evidence that the defendant committed the inferior offense.

State v. Fernandez-Medina, 141 Wn.2d 448, 454, 6 P.3d 1150 (2000) quoting State v. Peterson, 133 Wn.2d 885, 891, 948 P.2d 381 (1997) (quoting State v. Foster, 91 Wn.2d 466, 472, 589 P.2d 789 (1979)).

The third factor is the factual component of the test and is what is at issue in the case at bar.

The factual component has been interpreted to mean that "the evidence must raise an inference that only the lesser included/inferior degree offense was committed to the exclusion of the charged offense." Fernandez-Medina, 141 Wn.2d at 455. In other words, "[i]f the evidence would permit a jury to rationally find a defendant guilty of the lesser offense and acquit him of the greater," then the inferior degree instruction should be give upon request. Fernandez-Medina, 141 Wn.2d at 456 (citing State v. Warden, 133 Wn.2d 559, 563, 947 P.2d 708 (1997)). In making this determination, the trial court is to consider all of the evidence presented. Fernandez-Medina, 141 Wn.2d at 456 (citing State v. Bright, 129 Wn.2d 257, 269-270, 916 P.2d 922 (1996)).

A trial court's decision to give a jury instruction is reviewed for an abuse of discretion if based on a matter of fact. Kappelman v. Lutz, 167 Wash. 2d 1, 6, 217 P.3d 286, 288 (2009); State v. Walker, 136 Wn.2d 767, 771-772, 966 P.2d 883 (1998); State v. Jensen, 149 Wn. App. 393, 399, 203 P.3d 393, 395 (2009). "A trial court abuses its discretion when its decision is manifestly unreasonable or based upon untenable grounds." Jenson, 149 Wn.

App. at 399, citing State v. Perrett, 86 Wn. App. 312, 319, 936 P.2d 426, rev. denied, 133 Wn.2d 1019, 948 P.2d 387 (1997).

In order to convict Mr. Waters of Trafficking in Stolen Property in the First Degree, the jury would have had to have found that Mr. Waters knowingly trafficked in stolen property. RCW 9A.82.050. In order to convict Mr. Waters of Trafficking in Stolen Property in the Second Degree, the jury had to have found that Mr. Waters recklessly trafficked in stolen property, i.e., that he knew of and disregarded a substantial risk that the property was stolen. RCW 9A.82.055, RCW 9A.08.010(1)(c).

Based on the evidence that was received, the jury was permitted to rationally find Mr. Waters guilty of second degree trafficking and acquit him of first degree trafficking.

The jury could (and apparently did) disbelieve the State's witnesses, Zach Waters and Kerri Uitbenhowen. They could instead believe, based on the testimony of Detective Luvera, that Mr. Waters did receive permission from Ms. Uitbenhowen to take the metal. However, given that Ms. Uitbenhowen was not the actual owner of the property, the jury could find that Mr. Waters knew of and disregarded the risk that the true owner did not consent to the taking of the metal and that that disregard was a gross deviation from

conduct that a reasonable person would exercise. That is, a reasonable person would ask the true owner of the property whether he could take it. Mr. Waters knew that his son, Zach, and Ms. Uitbenhowen were merely renters on the property without authority to grant permission to take the metal.

There was evidence from which a jury could rationally find that Mr. Waters committed the crime of Trafficking in Stolen Property in the Second Degree, but not Trafficking in Stolen Property in the First Degree.

B. The trial court properly imposed a restitution amount based on actual loss to the victim.

The right of a crime victim to restitution is codified in RCW 9.94A.753 which states that restitution "shall be based on easily ascertainable damages for injury to or loss of property."

The trial court has broad authority in determining the amount of restitution and a challenge to the amount ordered is reviewed for an abuse of discretion. State v. Hughes, 154 Wn.2d 118, 153, 110 P.2d 192 (2005), overruled in part by Washington v. Recuenco, 548 U.S. 212, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006); State v. Fleming, 75 Wn. App. 270, 274, 877 P.2d 243 (1994), overruled on other grounds by Recuendo, supra. "[A] loss need not be established with

specific accuracy" but there must be a reasonable basis for estimating loss. Fleming, 75 Wn. App. at 274; Hughes, 154 Wn.2d at 154.

Here, the trial court determined that these cattle guards had value to the victims of this crime. The court reasoned:

> If I'm the Holtcamps and these gates or guards fit into my barn, even if I don't want to be a dairy farmer any time in the future, I may want to sell my land and barns you can tell the seller I'm also including gates that you could start a dairy farm if you wanted to in the future and not have to go out and spend who knows what $200 to $300 for new gates.

RP 173. The court went on to find a value of $35 each for 50 guards based on an average of $30 for small guards and $42.00 for the larger ones. RP 164, 174-175. This is a rational basis for determining loss to the victim.

Contrary to the assertion of the appellant, Fleming does not stand for the proposition that the value of the victim's loss is the fair market value of the property. Br. App. at 15. See Hughes, 154 Wn.2d at 154-155 (the definition of "value" for restitution purposes need not equate to "market value"). Nor does Fleming stand for the proposition that the value of the victim's loss must be ascertained with reference to the time of the criminal act. Br. App. at 15. Rather in Fleming the trial court in its discretion was permitted to take into account the fluctuation of the market value of gold, where the gold

increased in market value between the time of acquisition and the time of the criminal act. Fleming, 75 Wn. App. at 275. Fleming does stand for the proposition that the restitution statute is to be interpreted broadly to effect the Legislature's intent. Fleming, 75 Wn. App. at 275. In Fleming, the victim's loss was the gold necklace plus the opportunity to take advantage of the increase in its value. Fleming, 75 Wn. App. at 275. Here, however, the victim's loss is the value paid for the cattle guards because if she wanted to acquire more, she would have to go out and purchase them. There was sufficient credible evidence that the cost to go out and get more guards would be at least the same cost as what was paid for them originally, if not more.

The appellant asserts that Mr. Parberry testified that there was no resale value to the metal cattle guards. The appellant further asserts that Mr. Parberry testified that the only value was as scrap. Br. App. at 16. However, this is inaccurate. What Mr. Parberry testified to was that quite a few cattle guards had been scrapped due to the shut down of the dairy farms in the area. 1RP 108, 111. The fact that the cattle guards had no value to Mr. Parberry, a scrap dealer, as scrap, is irrelevant to the loss sustained by the victims. Indeed, it is even irrelevant to the issue of whether the cattle guards

had value to someone else who is not a scrap dealer, say, a dairy farmer.

Finally, the appellant argues that the court erred in imposing restitution that the jury did not find. This argument has been rejected by our Supreme Court in State v. Kinneman, 155 Wn.2d 272, 119 P.2d 350 (2005). So long as the restitution amount was based on easily ascertainable damages supported by a preponderance of the evidence, the trial court does not abuse its discretion in ordering the restitution amount. This is true even where the award does not fit within the monetary parameters of the charged crime. See e.g. State v. Selland, 54 Wn. App. 122, 772 P.2d 534, rev. denied, 113 Wn.2d 1011 (1989) (where defendant convicted of causing under $250 worth of damage, the restitution award of more than double that was upheld).

The court imposed a restitution amount based on the easily ascertainable amount of loss to the victim.

IV. CONCLUSION

For the foregoing reasons, this Court should affirm the conviction and the trial court's imposition of restitution.

DATED this 28th day of October, 2013.

SKAGIT COUNTY PROSECUTING ATTORNEY

By: Erik Pedersen Sr DPA for 30016

ROSEMARY H. KAHOLOKULA, WSBA#25026
Chief Criminal Deputy Prosecuting Attorney
Skagit County Prosecutor's Office #91059

DECLARATION OF DELIVERY

I, Karen R. Wallace, declare as follows:

I sent for delivery by; [X]United States Postal Service; [ ]ABC Legal Messenger Service, a true and correct copy of the document to which this declaration is attached, to: Nancy Collins, addressed as Washington Appellate Project, 1511 Third Avenue, Suite 701, Seattle, WA 98101. I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Executed at Mount Vernon, Washington this 28th day of October, 2013.

Karen R Wallace

KAREN R. WALLACE, DECLARANT