

FILED
July 30, 2014
Court of Appeals
Division III
State of Washington

31972-5-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

KEENAN W. ROSS, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF YAKIMA COUNTY

APPELLANT'S BRIEF

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A. ASSIGNMENTS OF ERROR

1. The court exceeded its authority in awarding restitution for damage that preceded the crimes with which Mr. Ross was charged.

B. ISSUES

1. The defendant was charged with, and agreed to pay restitution for, loss caused by his burglary and attempted theft of two pieces of equipment. The property had been damaged by the cutting and removal of substantial quantities of copper wire and tubing. The copper material had been removed from the premises prior to Mr. Ross's attempt to steal the damaged equipment. Did the court exceed its authority in awarding restitution for damage resulting from the cutting and removal of copper wire and tubing prior to the burglary and attempted theft with which the defendant was charged?

C. STATEMENT OF THE CASE

Keenan Ross pled guilty to one count of trafficking in stolen property. (CP 22; RP 26) As part of the underlying plea agreement, Mr. Ross agreed to pay restitution in an unrelated case, cause 12-1-00295-4,

and the state agreed to dismiss the charge against him in that case. (RP 19-20, 27-29) The court imposed a sentence of 65 months' confinement and restitution in an amount to be determined. (RP 40, 42)

The Information in cause number 12-1-00295-4 charged Mr. Ross with second degree burglary, alleging he unlawfully entered a building owned by Danny Joe Garner. (CP 61) The Information also charged him with attempted first degree theft of "an air conditioner unit and/or a pump compressor" belonging to Mr. Garner. (CP 61) The officer's declaration of probable cause states:

On 02/24/12 at about 0037 hours in the state of Washington, the county of Yakima suspects Keenan Ross and Kelly Balles did commit burglary in the second degree. There was also located burglary tools on their person and in their vehicle.

Selah PD located suspect Ross and Balles parked at 1580 Crusher Canyon Rd. The red Chevy pickup lic# a76066z which the suspects were in was backed up to a large air conditioning unit in an attempt to load it into the pickup. The air conditioning unit was pulled from the back side of the warehouse and moved to the front where the truck could be backed up to it.

A small locked storage room of the warehouse was also accessed. In this area bolts were removed so a large pump/compressor could be taken. The compressor was not removed from the storage room.

Two pad locks which had been cut from the storage room were located on the ground. Two large bolt cutters were located in the suspects pickup. Also located in the bed of

the pickup were brackets used to hold the pump/compressor in place.

On one of the suspects was located bolts to remove the fly wheel on the pump/compressor which had a white tag identifying it as such.

(CP at 60)

Dan Garner testified that he was the owner of the warehouse where the burglary and theft occurred. (RP 5) He described the damage he observed on the evening of the burglary. (RP 9-10) According to Mr. Garner, copper wires and tubing had been cut and removed from two compressors and from the electrical system and control panels for the refrigerant. (RP 9-10) The condensing unit from the roof had also been removed. (RP 10) Another condensing unit remained on the premises and appeared to be in the process of being moved into the truck. (RP 11) He told the court that he had seen none of this damage when he and his wife were in the warehouse two days earlier. (RP 11)

The estimated cost of replacement or repair of the compressor was provided by Robert and Tina Brightwell. (CP 72-73) The estimate refers to multiple compressors. (CP 73) The report explains that replacement of the compressors is necessitated by “the close cutting and stripping of copper tubing and electrical wiring that has compromised the controls as well as the sensors of the compressor motors and control panels.” (CP 73)

Exhibits attached to the Brightwell estimate bore handwritten notations indicating copper mains and wiring, and copper compressor lines had been cut and removed (CP 74), an electrical panel had been cut and stripped of wiring (CP 76), and copper Freon lines had been cut and removed (CP 77-78).

An estimate for the cost of electrical work necessary to “bring the facility back into an updated working condition” was provided by Arrow Electric owner Tyler Scott. (CP 82)

The prosecuting attorney explained to the court:

Now, there's really only two ways that this could happen. One is sort of the common sense approach that the defendant and/or is accomplice came by here damaged all of this stuff, took some of it off probably in a different load, were coming back to load number two, load number three we don't know and got caught that time around. You've got the total loss of the property. We've got some, some ideas about it, it, how it needs to break down if your Honor needs to break down but I don't think we need to get there.

(8/20 RP 44)

The trial court made no finding as to the causal relationship between the crimes with which Mr. Ross was charged and the various damages for which restitution was awarded. Finding the repair estimates provided at the hearing credible, the court awarded restitution of \$16,500 for rewiring the building, \$19,000 for parts for the repair of the

compressors, and \$18,000 to \$20,000 for labor for the repair of the compressors. (CP 48-49)

D. ARGUMENT

1. NO CAUSAL CONNECTION BETWEEN THE CHARGED OFFENSES AND THE ALLEGED DAMAGE SUPPORT THE RESTITUTION AWARD.

The trial court's authority to order restitution is derived entirely from statute. *State v. Smith*, 119 Wn.2d 385, 389, 831 P.2d 1082 (1992). Courts have broad discretion when determining the amount of restitution. *State v. Kinneman*, 155 Wn.2d 272, 282, 119 P.3d 350 (2005) (citing *State v. Hughes*, 154 Wn.2d 118, 153, 110 P.3d 192 (2005)). The trial court abuses its discretion where the restitution order is manifestly unreasonable, exercised on untenable grounds, or for untenable reasons. *State v. Enstone*, 137 Wn.2d 675, 679–80, 974 P.2d 828 (1999). The court's application of an incorrect legal analysis or other error of law can constitute an abuse of discretion. *State v. Tobin*, 161 Wn.2d 517, 523, 166 P.3d 1167 (2007). The award must be "based on easily ascertainable damages for injury to or loss of property" RCW 9.94A.753(3).

Restitution is allowed only for losses that are causally connected to the crimes charged unless the defendant expressly agrees to pay restitution for crimes for which he was not convicted. *State v. Griffith*, 164 Wn.2d

960, 965–66, 195 P.3d 506 (2008). “In determining whether a causal connection exists, we look to the underlying facts of the charged offense.” *State v. Landrum*, 66 Wn. App. 791, 799, 832 P.2d 1359 (1992). 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).

The State bears the burden of establishing a causal connection between the restitution requested and the crime with which the defendant is charged. *State v. Bunner*, 86 Wn. App. 158, 160, 936 P.2d 419 (1997). “[T]he power to impose restitution derives entirely from the statute.” *State v. Woods*, 90 Wn. App. 904, 905-07, 953 P.2d 834 (1998); see *State v. Davison*, 116 Wn.2d 917, 919, 809 P.2d 1374 (1991). “[A] trial court exceeds its statutory authority in ordering restitution where the loss suffered is not causally related to the offense committed by the defendant, or where the statutory provisions are not followed.” *State v. Vinyard*, 50 Wn. App. 888, 891, 751 P.2d 339 (1988).

“Losses are causally connected if, but for the charged crime, the victim would not have incurred the loss.” *Griffith*, 164 Wn.2d at 966, 195 P.3d 506 (citing *Tobin*, 161 Wn.2d at 524, 166 P.3d 1167). The trial court cannot impose restitution based on a 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 (quoting *State v. Miszak*, 69 Wn. App. 426, 428, 848 P.2d 1329 (1993)): *accord Kinneman*, 155 Wn.2d at 286, 119 P.3d 350. There is no causal connection if the loss or damage occurred before the act constituting the crime. *State v. Woods*, 90 Wn. App. 904, 909, 953 P.2d 834 (1998).

In *Woods*, the defendant pled guilty to possession of a stolen truck. The State sought restitution for property that was in the truck at the time it was stolen, and presented evidence at the restitution hearing showing that the defendant had stolen the truck. Because the defendant did not plead guilty to the theft, and because the alleged loss was caused by the theft rather than the possession of the truck, the court reversed the restitution order:

[S]he 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.

State v. Woods, 90 Wn. App. at 908-09.

In *Acevedo*, the defendant was found guilty of possession of a stolen motor vehicle. The vehicle had been stripped and partially scrapped before it was recovered in the defendant's possession; the trial court ordered the defendant to pay for the full value of the car before it was

stolen. *Id.* at 229, 248 P.3d 526. This court reversed the restitution order, holding:

The Acura, then, was stripped before Mr. Acevedo bought it. No evidence shows or suggests that Mr. Acevedo stole the car or possessed the car since it was stolen or when it was damaged. Accordingly, no evidence shows that the Acura would not be stripped “but for” Mr. Acevedo’s possession of it. The State, then, failed to show a causal connection between Mr. Acevedo’s crime and the damage to Mr. Wold’s Acura.

Id. at 230–31, 248 P.3d 526.

The damage described by Mr. Garner at the hearing, and in the replacement estimates presented to the court, was caused by the cutting and removal of the copper wires and tubes from the compressors and refrigeration units and associated control panels. The information provided in the estimates shows that the cost of totally replacing the electrical system and the equipment repair and replacement is the result of the damage to the electrical system and the equipment caused by the cutting and removal of the copper wire and tubing.

No evidence was presented showing that any copper wire or tubing was found at the scene when Mr. Ross was apprehended. Since the copper material had already been removed, the damage for which restitution was awarded was caused by acts that were, at most, merely connected with, but not part of, the crime charged. Such acts were committed prior to the

attempted theft of the two items found at the scene when Mr. Ross was arrested. In agreeing to pay restitution for the crimes with which he had been charged, Mr. Ross did not expressly agree to pay restitution for other crimes with which he had not been charged. See *State v. Woods*, 90 Wn. App. at 908-09.

Losses that preceded the attempted theft of an air conditioner and/or pump compressor were not causally connected to the charged crime. See *Woods*, 90 Wn. App. at 909. The victim would have incurred the loss regardless of whether Mr. Ross had returned to the warehouse and attempted to steal the two items of equipment. See *Griffith*, 164 Wn.2d at 966. Mr. Ross was not charged with the theft of copper wire and tubing. Moreover, Mr. Ross was charged with the attempted theft of only one compressor and/or one air conditioner.

The damage for which restitution was sought resulted from crimes with which Mr. Ross was not charged and which necessarily would have been committed prior to the commission of the attempted theft with which he was charged. The restitution award includes the cost of repairs for damage that preceded the offenses with which Mr. Ross was charged and the replacement of equipment that Mr. Ross was not charged with attempting to steal. The record contains no evidence that any of the loss

sustained by Mr. Garner was caused by Mr. Ross's attempt to steal the two items of equipment that were recovered at the scene.


The police report indicates that two padlocks had been cut from the storage room and were found at the scene. The court could have inferred that the damage to the locks was caused by the unlawful entry. Accordingly the award of \$80 for replacement of the locks is supported by the evidence. (CP 49) The court abused its discretion and exceeded its statutory authority in awarding restitution of \$54,580.

E. CONCLUSION

The restitution order should be reversed and the matter remanded for determination of the amount of any loss actually caused by the burglary and attempted theft of an air conditioner unit and/or a pump compressor.

Dated this 30th day of July, 2014.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION III

STATE OF WASHINGTON,)	
)	
Respondent,)	No. 32053-7-III
)	
vs.)	CERTIFICATE
)	OF MAILING
KEENAN W. ROSS,)	
)	
Appellant.)	

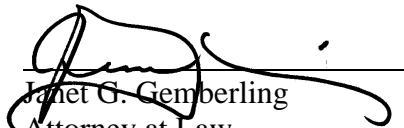
I certify under penalty of perjury under the laws of the State of Washington that on July 30, 2014, I served a copy of the Appellant's Brief in this matter by email on the following party, receipt confirmed, pursuant to the parties' agreement:

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I certify under penalty of perjury under the laws of the State of Washington that on July 30, 2014, I mailed a copy of the Appellant's Brief in this matter to:

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Signed at Spokane, Washington on July 30, 2014.


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