No. 33418-0-III

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

STATE OF WASHINGTON,
Plaintiff/Respondent,

vs.

NATHAN EARL ELDRED
Defendant/Appellant.

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

BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

Statutes

A. ASSIGNMENTS OF ERROR

1. The court erred in finding "that the charges to [*sic*] which the Defendant was convicted are sufficient in factual basis and causation (as supported by the Amended [*sic*] Information and the Statement of Probable Cause) to support the imposition of restitution as requested by the State." CP 55, paragraph 2.

2. The court erred in concluding "[b]ut 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 55, paragraph 3.

2. The court erred by ordering appellant to pay $3,106.65 in restitution.

Issues Pertaining to Assignments of Error

1. Appellant pled guilty to rendering criminal assistance in the second degree. Although the court had authority to order restitution for any damages suffered as a result of that crime, did the court err in ordering appellant to pay restitution where the damage occurred *before* the act constituting appellant's offense?

2. Appellant pled guilty to second degree possession of stolen property. Did the court err in ordering full restitution for damages not proven to be causally related to the charged offense?

B. 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 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).[1] 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

[1] 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.

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 the police reports and/or a statement of probable cause[2] 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

[2] 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

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 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.

This appeal followed. CP 59.

C. ARGUMENT

THE 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

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memorandum in support of restitution. CP 44–48.

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") (emphasis added). "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.

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

"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
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> (2) Warns such person of impending discovery or apprehension; or
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> (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. *State v. Acevedo*, 159 Wn. App. 221, 229–30, 248 P.3d 526 (2010).

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, *supra*; *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, *supra*) (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. *State v. Dennis*, 101 Wn. App. 223, 228–30, 6 P.3d 1173 (2000) (where defendant objects below to restitution, State not entitled to second chance to prove causation and damages).

2. The court exceeded its authority in imposing full restitution for damages not causally related to the charged offense of possession of stolen property.

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). The 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. *Acevedo*, 159 Wn. App. at 229–30

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.

The Supreme 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)). 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.[3]" *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. 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.

[3] "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.*

D. CONCLUSION

For the reasons stated, the restitution order must be stricken and the matter remanded for determination of the loss that can be satisfactorily proved to be causally related to the possession of stolen property offense committed by Eldred.

Respectfully submitted on January 23, 2016.

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Dennis, 101 Wn. App. 223, 229–30, 6 P.3d 1173 (2000)." *Griffith*, 164 Wn.2d at 968 fn.6.

PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on January 23, 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 brief of appellant:

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