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No. 62403-2-1

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

ELIJA GREENE,

Appellant.

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

APPELLANT'S REPLY BRIEF

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A. ARGUMENT.

1. THE STATE PROPERLY CONCEDES ITS FAILURE TO PROVE ONE PORTION OF THE RESTITUTION, YET INCONGRUOUSLY DEFENDS THE REMAINING RESTITUTION BASED ON A SKEWED APPLICATION OF THE LAW AND FACTS

The prosecution agrees there was no factual support connecting Elija Greene to one check: Ex. 12, check number 13587. Yet the prosecution insists that the sparse evidence connecting Greene to the remaining checks establishes enough of a record to find the checks were not for a legitimate or authorized expense, hold Greene responsible, and order he pay restitution.

Preliminarily, the prosecution overlooks the undisputed fact that Greene had authority to issue checks on behalf of David Huchthausen and his multiple businesses, and Huchthausen regularly left Greene with signed, blank checks for Greene to use to pay bills. Thus, Greene's handwriting on a check does not signal its illegitimacy.

- a. The State concocts the wrong legal criteria. The prosecution predicates it's marshalling of tenuous evidence to support the challenged restitution by creating a novel legal standard governing a restitution award. The prosecution finds

Greene responsible for checks that he did not substantiate as legitimate or falsified by someone else. See e.g., Resp. Brf. at 17. But this standard of review reverses the burden of proof and, because the prosecution's case rested on the flawed memory of an absentee employer, the proof against Greene was tenuous for many of the checks at issue. See e.g., 9/8/09RP 8 (describing regular travels out of town); 9/9/08RP 24 (explaining blank, signed checks left with Greene); 9/9/08RP 92-94 & Ex. 27 (Huchthausen did not recall Greene's assistance with a computer for a girlfriend but records supported Greene's assistance with this unofficial business).

Here, the court imposed restitution based on its conclusion of actual loss, without any intent or suggestion he vary upward. State v. Griffith, 164 Wn.2d 960, 966, 195 P.3d 506 (2008); 9/9/08RP 130-32. Thus, the order may not be defended under the "double the offender's gain" portion of the restitution statute. The prosecution must prove the amount of the loss by substantial credible evidence. Griffith, 164 Wn.2d at 965.

The prosecution rests its analysis on the notion that restitution need not be established with precision. Resp. Brf. at 8. However, restitution "must be supported by 'substantial credible

evidence.” Griffith, 164 Wn.2d at 965 (quoting State v. Fleming, 75 Wn.App. 270, 274-75, 877 P.2d 243 (1994)). The statute authorizing restitution mandates that it “shall be based on easily ascertainable damages” and “precludes restitution for speculative or intangible losses.” RCW 9.94A.753(3); State v. Kinneman, 155 Wn.2d 272, 285, 119 P.3d 250 (2005).

Part of the prosecution’s flawed analysis stems from its belief that any checks that David Huchthausen did not specifically recall constitutes a “property loss” Greene must pay as restitution. Huchthausen operated a number of businesses from afar, as he travelled to art shows or yachting trips, and he routinely paid a wide array of his bills by check. He freely admitted that he did not keep track of his expenses; rather he left employees such as Greene with blank, signed checks. His unfamiliarity with all the details of his numerous businesses was demonstrated by evidence that two checks Huchthausen claimed Greene took unlawfully were in fact money paid to tenants in his buildings. Thus, the mere fact that Huchthausen could not precisely account for a check does not mean it was not a legitimate or authorized business expense.

The prosecution asserts on appeal that no precision is required in establishing restitution. But RCW 9.94A.753 provides a

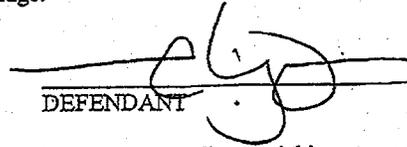
court with authority to issue restitution only for “easily ascertainable” damages from injury or property loss. The court lacks authority to predicate restitution upon speculation or upon loss not caused by the offense of conviction.

b. The prosecution baselessly clings to its restitution request despite the lack of evidentiary connection to Greene.

i. Greene’s so-called “distinctive handwriting” is entirely misrepresented by the prosecutor on appeal. On appeal, the prosecution repeatedly claims Greene has such distinctive handwriting that it shows his responsibility for the checks at issue. But it does not explain what was so distinctive about Greene’s handwriting, and the trial court’s findings similarly do not contain any specific identification of any part of Greene’s handwriting as distinctive. The prosecution stretches its claim of “distinctive handwriting” in its Response Brief to encompass everything it wishes to pin on Greene without reasoned factual support or trial court findings.

Certainly, Greene had a unique way of signing his own name. One example if this distinctive signature may be found on the Guilty Plea Statement:

12. My lawyer has explained to me, and we have fully discussed, all of the above paragraphs. I understand them all. I have been given a copy of this "Statement of Defendant on Plea of Guilty." I have no further questions to ask the judge.


DEFENDANT

I have read and discussed this statement with the defendant and believe that the defendant is competent and fully understands the statement.

CP 40 (page 10 of plea statement). Greene endorsed a number of the checks at issue with this particular signature. The court could and did rely on this unique signature to tie Greene to certain checks.

But none of the checks Greene challenges in his Opening Brief contain this signature flourish. The appellate prosecutor's repeated claims of checks showing examples of "distinctive handwriting" are entirely divorced from the findings made by the trial court and cannot be relied upon by this Court. Huchthausen, a person who might be familiar with Greene's handwriting, testified that "there are a number of documents here with different versions of Mr. Greene's handwriting, so it is impossible to say whether it is or isn't" his handwriting. 9/9/09RP 49. The trial court did not find Greene had particularly distinctive handwriting. Rather, it ambiguously ruled, "I didn't see any issues with the handwriting."

9/9/08RP 131. The prosecution inaccurately rests its argument on appeal on the notion that the court found particular parts of, or all of, Greene's handwriting distinctive but the court never found the prosecution proved such distinctive handwriting.

Further confusing the matter, the prosecution also relies on the notion that Greene could readily disguise his handwriting, and therefore it argues that the lack of his "distinctive handwriting" provides additional support for blaming him for writing an unauthorized check. This catch-22 type of argument makes it impossible for Greene to contest the evidence against him, and the court cannot both rely on a distinctive way of writing and a non-distinctive way of writing in a "disguised" fashion.

Finally, the prosecution properly concedes no evidence connects Greene to Check No. 13587, Ex 12. But the handwriting on this check is not so different from the handwriting on the other checks. The State's concession demonstrates that there must be evidence of a connection to Greene, either by an admission, his endorsement on a check that was not authorized, or other evidence reasonably showing his connection to an illegitimate check, rather than pure speculation or lack of other proffered explanation by the account's owner.

ii. Evidence casting doubt on checks in Ex. 9.

The prosecution surmises that the check to S.A. Sweeney could not have been a legitimate check to a tenant because other checks to tenants involving rental deposits were smaller amounts, citing the Adam Lorte and Charles McColm checks that the trial court refused to order as restitution because they appeared to be legitimate rental checks. Response Brief at 15. But Lorte and McColm were tenants in a different building, part of the Weiss-Huchthausen property, that was a residential unit and not tenants of a commercial building. Ex. 23; see 9/9/08RP 148. The check to S.A. Sweeney came from the Somerset property account, which was predominately commercial and corporate development. 9/8/08RP 8; Ex. 9. There was no evidence that all renters paid the same or even similar rental fees, and it would not be reasonable to surmise they did based on the different types of properties at issue. The prosecution's effort to draw this unsupported analogy must be rejected as pure speculation by the prosecution raised for the first time on appeal.

The prosecution also baselessly asserts that the record shows Greene had a friend named Stacy, and there was one check made out to Stacy Sweeny, concluding that Greene's friend Stacy

must be Stacy Sweeney, who must be the same person as “S.A. Sweeney.” Resp. Brf. at 15. But the prosecution offers no reasonable basis to conclude that there is only one person named Stacy in Seattle. The fact that Greene had a friend named Stacy does not obligate him to pay restitution for a check that may have been paid to someone also named Stacy. The prosecution cites “3RP 49-50” as evidence of Greene’s connection to Stacy Sweeney but those pages do not show Greene’s connection to anyone named Sweeney. Resp. Brf. at 15.

As further example, the two checks addressed to MBNA have no established connection to Greene. Bank records did not show Greene had any credit card or other relationship with MBNA. There is no evidence showing Greene benefited from these checks. Greene may not be ordered to pay restitution without some evidence connecting him to the specific checks.

iii. Exhibit 11 checks. The prosecution’s “distinctive handwriting” argument is not something found by the trial court or borne out by a review of the evidence. Even the prosecution agrees that some of the handwriting is not Greene’s, but claims unidentified and unexplained “distinctiveness” shows Greene’s connection to the checks. The arguments requiring

unsupported allegations of distinctive handwriting are too vague and speculative to be sustained on appeal when not even the trial court made such explicit findings.

As further example of the lack of proof, Huchthausen could not recall the checks to "B of A," although he acknowledged a relationship with Bank of America, and did not recognize Greene's handwriting. 9/9/08RP 49. The evidence does not establish Greene's responsibility or that the checks were unauthorized. Huchthausen's failure to precisely recall the check as a legitimate expense does not reasonably connect Greene or prove the check was unauthorized when Greene had the authority to issue checks on behalf of Huchthausen and Huchthausen paid little attention to the individual checks at the time they were issued.

iv. Exhibit 12 checks. The prosecution attempts to connect highly ambiguous checks with bank account entries but the connection is too speculative to demonstrate his responsibility for an illegitimate check. For example, the prosecution claims that an unidentified check made out to cash, for \$729.69, on April 25, 2002, must be the same money Greene deposited in his account in April 29, 2002, because he deposited \$809.69 in his account. But this connection is unreliable. Greene

had other sources of income and made many deposits that are not part of this case. The likelihood of a coincidence is simply too great to demand Greene pay this money to Huchthausen when the check or money order is just as likely if not more likely to be a legitimate expense Huchthausen paid to another.

In sum, the contested checks demonstrate a lack of proven or reasonable connection to Greene. The prosecution faults Greene for failing to specify what each check was legitimately for, but Greene the hearing occurred in 2008, for actions that occurred in 2002 and 2003. Greene did not refuse to answer questions about his responsibility for some unauthorized checks but rather he could not precisely explain each check at the restitution hearing because he could not recall everything about what happened years before. 9/9/08RP 103-05.

The trial court did not closely review each check and instead held Greene responsible for all checks identified by the prosecution without sufficient evidentiary support. Greene has urged the court to consider the failure of proof of specific checks as evidence that the State did not prove the illegitimacy of the checks at issue. 9/9/08RP 147. The prosecution urges this Court to repeat the same error made by the trial court, that Greene must be

responsible for all checks because he was responsible for some, but because numerous legitimate financial transactions occurred and there is little evidence supporting numerous checks, Greene cannot simply be deemed responsible for everything the account owner did not recall when he admitted his memory and financial acumen were less than reliable and Greene was undisputedly legitimately paid and responsible for issuing checks during this same time period.

2. THE TAX DEDUCTIONS CLAIMED BY HUCHTHAUSEN UNDERMINE THE CLAIM OF PROPERTY LOSS ESSENTIAL TO A RESTITUTION ORDER

As discussed at length in Appellant's Opening Brief, restitution must be based on actual lost income. Here, Huchthausen provided the court with records showing that he received reimbursement in the form of tax deductions for a substantial amount of the money he claimed Greene took without authorization. This sum of money does not represent "property loss." The money for which Huchthausen was already reimbursed by a tax deduction is not an amount of easily ascertainable damages for which the restitution may be imposed.

B. CONCLUSION.

For the foregoing reasons as well as those argued in Appellant's Opening Brief, Mr. Greene respectfully requests this Court reverse the restitution order and remand the case for entry of an order involving only the amount of restitution proven and authorized.

DATED this 12th day of August 2009.

Respectfully submitted,



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Attorneys for Appellant

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

STATE OF WASHINGTON)	
Respondent)	CoA No. 62403-2
)	
v.)	
)	
CHRISTOPHER/ELIJA GREENE,)	
Appellant.)	

DECLARATION OF SERVICE

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

1. THAT ON THE 12TH DAY OF AUGUST, 2009, A COPY OF **APPELLANT'S REPLY BRIEF** WAS SERVED ON THE PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL ADDRESSED AS FOLLOWS:

[X] Prosecuting Atty King County
King Co Pros/App Unit Supervisor
W554 King County Courthouse
516 Third Avenue
Seattle WA 98104

SIGNED IN SEATTLE, WASHINGTON, THIS 12TH DAY AUGUST, 2009

x *Ann Joyce*

2009 AUG 12 PM 4:09
STATE OF WASHINGTON
COURT OF APPEALS