

63209-4

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NO. 63209-4-I

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

STATE OF WASHINGTON,

Respondent,

v.

DOUGLAS HUBER,

Appellant.

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

The Honorable George N. Bowden

CORRECTED BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The State failed to establish a causal nexus between the restitution claim, the facts established in Huber's guilty plea to the charged offense, and the victim's injuries.

2. The State presented insufficient evidence to support the restitution amounts claimed.

B. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

1. Where a defendant pleads guilty, absent his express agreement to pay restitution for uncharged conduct, restitution may be ordered only for injuries occurring as a result of the precise offense charged and proven. A restitution award must be based, moreover, on a causal relationship between the offense charged and proved and the victim's loss or damages. Douglas Huber admitted to being an accomplice to the crime of second-degree burglary and to assisting in the theft of an acetylene torch. Absent Huber's agreement to pay restitution for uncharged conduct or to real facts beyond the facts admitted in his guilty plea, did the trial court err in ordering restitution for items in addition to the acetylene torch? (Assignment of Error 1)

2. A restitution order claim be based on easily ascertainable damages that provide a reasonable basis for estimating loss and do not require the court to engage in speculation or conjecture. Did the restitution claim here fail to satisfy this standard where it was based on rough estimates without supporting evidence?

(Assignment of Error 2)

C. STATEMENT OF THE CASE

Douglas Huber pleaded guilty in Snohomish County to the crime of Second Degree Burglary. CP 44-61. In his statement of defendant on plea of guilty, Huber admitted,

On or about August 31, 2007, I was an accomplice to a second degree burglary. I aided another person who, with intent to commit the crime of theft of an acetelyne [sic] torch from a shed belonging to Steven Rapp, unlawfully entered that shed.

CP 50; 6/18/08 RP 4.¹

Pursuant to his plea agreement, Huber agreed to pay restitution "in full to victim(s) on charged counts [and] as set forth in attached Appendix C." CP 53. Appendix C provided in turn that Huber agreed to pay "RESTITUTION-CHARGED COUNTS

(Indicate count, police department, police number and victim's

¹ Transcripts are cited by date followed by page number, e.g.: 6/18/08 RP 4.

name) is as follows: Count I SCSO #0721042.” CP 61. As part of the plea, Huber agreed that the court could consider the Affidavit for Probable Cause in deciding whether there was a factual basis for his plea. CP 50. There was no similar agreement with respect to sentencing or restitution, however.

Steven Rapp, the victim of the burglary, provided a statement to law enforcement officers on September 1, 2008, in which he explained that after learning from a neighbor of the August 31, 2008, burglary, he inspected his shed and found a number of items missing. Ex. 1 at 1. After another burglary on September 18, 2008, Rapp's wife, Tonya Rapp, told law enforcement that more items had been stolen and provided a list of these items in a written statement. Ex. 1 at 10-11. In addition to the acetylene torch set alleged to have been taken on August 31, 2008, Tonya Rapp stated that a sand blaster, drag slicks, a Camaro hood, and an ATV winch had been stolen. Id.

Restitution hearings were held on January 28 and February 23, 2009. Rapp testified at both hearings. At these hearings, Rapp offered conflicting testimony. Rapp testified that outbuildings on his property were burglarized multiple times over the course of several

months. On January 28, Rapp stated that during a burglary on July 2, 2008, a remote control car, two carburetors, slicks for his race care, tools, a pulley winch system, and his children's toys were taken. CP 17-18.

At the February 23, 2009, hearing, Rapp admitted that the several incidents "all kind of roll together." 2/23/09 RP 20. Upon prompting from the court, he agreed he was reasonably sure that the acetylene torch system, a sandblaster, a remote control car, and an ATV winch were taken. 2/23/09 RP 24-25. He also insisted that the 1969 Camaro hood, which was on the list compiled by Tonya Rapp on September 18, 2008, was taken during the August 31, 2008, burglary. 2/23/09 RP 14-15.

While acknowledging that there were a series of break-ins and some lack of clarity as to when specific items were stolen, the court ordered restitution in the amount of \$6,200, based on Rapp's claims for the Camaro hood, the acetylene torch system, the sandblaster, the remote control car, and the ATV winch. 2/23/09 RP 41-44; CP 29-30. Huber appeals. CP 4-6.

D. ARGUMENT

1. THE TRIAL COURT ERRED IN ORDERING RESTITUTION ABSENT A CAUSAL LINK BETWEEN THE CHARGED CRIME AND THE DAMAGES SOUGHT.

a. Absent Huber's agreement to pay restitution for uncharged crimes, the trial court lacked statutory authority to order restitution where no causal link existed between the charged offense and the damages sought. The authority of a court to order restitution following a criminal conviction is governed by statute. RCW 9.94A.753(c); State v. Hennings, 129 Wn.2d 512, 519, 919 P.2d 580 (1996). The statute requires that a restitution award 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." RCW 9.94A.753(c).

Restitution must be limited to the crime charged and proved at trial. State v. Eilts, 94 Wn.2d 489, 492-93, 617 P.2d 993 (1980), superseded in part by statute as stated in State v. Barr, 99 Wn.2d 75, 78, 678 P.2d 1247 (1983). "[R]estitution for loss beyond the scope of the crime charged is properly awardable only when the defendant enters into an 'express agreement' to make such

restitution as part of the plea bargain process.” State v. Miszak, 69 Wn. App. 426, 429, 848 P.2d 1329 (1993); accord State v. Woods, 90 Wn. App. 904, 907, 953 P.2d 834 (1998) (“A restitution order must be based on the existence of a causal relationship between the crime charged and proved and the victim’s damages.”) (emphasis added); State v. Johnson, 69 Wn. App. 189, 191, 847 P.2d 960 (1993).

A sentencing court’s imposition of restitution is reviewed for an abuse of discretion. State v. Enstone, 137 Wn.2d 675, 679, 974 P.2d 828 (1999). An abuse of discretion occurs when the lower court’s decision is “manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.” State v. Wilson, 100 Wn. App. 44, 47, 995 P.2d 1260 (2000). Here, the trial court abused its discretion because Huber only admitted to participating in the theft of the acetylene torch system, the State did not obtain his agreement to pay restitution for items beyond the crime charged, and the State did not meet its burden of proving a causal link between the remaining items and the crime charged.

In Eilts, the defendant was convicted of seven counts of fraud involving seven victims. In addition to compensating these

victims, the trial court ordered restitution be paid to additional alleged victims who were not named in the information. 94 Wn.2d at 492-93. Applying principles of statutory construction, the Court concluded, “the phrase ‘crime in question’ refers only to the specific crime or crimes of which a defendant is charged and convicted.” Id. at 493. The Court accordingly vacated the portion of the restitution order that exceeded the trial court’s statutory authority. Id. at 496.

Similarly, in Miszak, the Court found a restitution order was “manifestly erroneous” where the trial court imposed restitution “for losses that were not shown to have been incurred as a result of the offense Miszak was charged with.” See also Woods, 90 Wn. App. at 907 (holding restitution must be based on causal link between charged crime and damages); State v. Hartwell, 38 Wn. App. 135, 141, 684 P.2d 778 (1984) (“Eilts limits restitution to victims of crimes charged and proven at trial.”).

These decisions supply several examples of correct application of the restitution statute. In Miszak, the defendant pleaded guilty to attempted theft in the second degree based on the theft of jewelry on February 27, 1989, the crime charged in the information. 69 Wn. App. at 427. In his statement on plea of guilty,

Miszak admitted, “On February 27, 1989 . . . I took an article of jewelry that belonged to Marjorie Dolinar with intent to deprive her of that jewelry. The jewelry was valued [at] at least \$250.” Id. Dolinar submitted a letter claiming losses for 13 items that took place “systematically” over a period of “months.” Id. at 428. On review, the Court found that because Miszak had not agreed to pay for losses incurred as a result of uncharged incidents of theft, the trial court exceeded its statutory authority in compensating Dolinar for the full amount claimed, and reversed the restitution order. Id. at 428-29.

Similarly, in Woods, the State sought restitution for items contained in a truck that was stolen in August, even though the defendant was only accused of having possessed the vehicle in September. 90 Wn. App. at 906. Division Two refused to “relate back” Woods’s conviction to August for purposes of restitution, finding it improper to impose restitution for Woods’s “general scheme” or based on acts “connected with” the crime charged. 90 Wn. App. at 907-909.

b. The court abused its discretion in ordering restitution for items in addition to the acetylene torch set. As these cases illustrate, it was “manifestly erroneous” for the trial court to order restitution for uncharged crimes absent an express agreement between Huber and the State that he should pay for uncharged conduct, or proof that the items for which the court ordered restitution were indeed stolen on August 31, 2008. Because there was no causal link between the charged offense and the damages sought, the court abused its discretion in ordering restitution.

2. ASSUMING ARGUENDO THE RESTITUTION AWARD WAS PROPER, THE STATE DID NOT PRESENT ADEQUATE PROOF OF THE VALUE OF THE ITEMS.

a. The State must present sufficient evidence of restitution to afford a reasonable basis for estimating the loss and prove a causal connection between the defendant’s act and the injury. Although easily ascertainable damages need not be proven with “specific accuracy,” State v. Fleming, 75 Wn. App. 270, 274, 877 P.2d 243 (1994), evidence of damages must be supported by “substantial credible evidence.” State v. Griffith, 164 Wn.2d 960,

965, 195 P.3d 506 (2008). A restitution claim accordingly must provide the trial court with a “reasonable basis for estimating losses” and require “no speculation or conjecture.” State v. Hahn, 100 Wn. App, 391, 399, 996 P.2d 1125 (2000) (citing, Fleming, 75 Wn.App at 274-75, State v. Pollard, 66 Wn. App. 779, 785, 834 P.2d 51 (1992)). The evidence presented here did not satisfy this standard.

In State v. Dedonado, 99 Wn. App. 251, 991 P.2d 1216 (2000), this Court reversed a restitution order compensating a crime victim for the replacement of items damaged as a result of the defendant’s taking a motor vehicle without permission. The victim had submitted a “Property Restitution Estimate” under penalty of perjury stating that the property damage included a glass window for \$753.41 and an irreparable Adret Signal Generator that was replaced with an HP ESG 3000A for \$10,968.60. 99 Wn. App. at 253. This Court found that as the causal connection between Dedonado’s acts and the damages was a material fact, the State was obligated to prove the Adret generator was properly replaced by the HP ESG 3000A and that the additional items were properly attributed to his actions. 99 Wn. App. at 256.

Similarly, in State v. Awawdeh, 72 Wn. App. 373, 378-79, 864 P.2d 965 (1994), without holding an evidentiary hearing, the trial court awarded restitution based on an estimate, ruling, "That's what I believe both the sheriff's office and Mr. Vaughan spent either in the investigation or appearance, travel time and so on.... \$1,300 represents what I believe to be probable out-of-pocket expenses for the investigation." Id. at 379. The Court held the trial court's estimate, based as it was on speculation and conjecture, did not supply a reasonable basis for estimating loss, and reversed the restitution order. Id. at 380.

b. The restitution order was improperly based on speculation and conjecture. The trial court's order in Awawdeh is substantially similar to the order entered here. Here, the restitution order was entirely based on rough estimates supplied by Rapp, without supporting documentation or other proof that these amounts were not wholly speculative. For example, with respect to the Camaro hood, Huber supplied a list of similar items from eBay that ranged in price from \$187 to \$764.95. See Ex. 1. In response, Rapp asserted that these items were reproductions, not originals, and for this reason the pricing was not accurate. 2/23/09 RP 10.

Rapp stated he shopped around for original hoods and found one listed for \$2,500. 2/23/09 RP 9. Without further inquiry the court ordered restitution in this amount. 2/23/09 RP 43.

With respect to the other items claimed, the court simply split the difference between the low and high end of Rapp's rough estimates:

I'm placing a value of [\$2,900] on the acetylene torch equipment which Mr. Rapp valued at between \$2,800 and \$3,000. Similarly he placed a value on the sandblaster of \$200 to \$300 so I'll set a midpoint range of \$250 for the sandblaster. And \$200 for the remote control car. And, again, midpoint between \$300 and \$400 for the ATV wench [sic] of \$350.

2/23/09 RP 44.

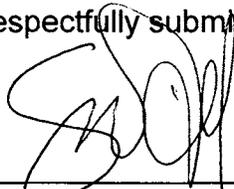
Even if the items claimed were related to the burglary on August 31, 2008 – a stretch – the factual basis for the amounts claimed was wholly absent. Compare Griffith, 164 Wn.2d 967 (finding factual basis for restitution order not just “skimpy” but “legally insufficient”). This Court should conclude that in adopting the rough estimates supplied by Rapp, the trial court impermissibly engaged in speculation and conjecture in setting the restitution amount. The restitution order must be reversed.

E. CONCLUSION

For the foregoing reasons, this Court should reverse and vacate the restitution order.

DATED this 5th day of October, 2009.

Respectfully submitted:



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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,

Respondent,

DOUGLAS HUBER,

Appellant.

NO. 63209-4-I

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 5TH DAY OF OCTOBER, 2009, I CAUSED THE ORIGINAL **CORRECTED OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X]	SETH FINE SNOHOMISH COUNTY PROSECUTING ATTORNEY 3000 ROCKEFELLER EVERETT, WA 98201	(X) U.S. MAIL () HAND DELIVERY () _____
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SIGNED IN SEATTLE, WASHINGTON, THIS 5TH DAY OF OCTOBER, 2009.

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