

63487-9

63487-9

No. 63487-9-I

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

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STATE OF WASHINGTON,

Respondent,

v.

TIMOTHY PHILLIPS,

Appellant.

---

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

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APPELLANT'S OPENING BRIEF

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A. SUMMARY OF APPEAL.

Timothy Phillips was convicted of Theft in the First Degree for stealing certain pieces of inventory from the Pawn X-Change where he worked. At trial, the State admitted evidence of other items missing from the store even though he was not charged with stealing these other properties. The jury instructions did not require the jury to find his theft was based on the items identified in the information. Therefore, Mr. Phillips was denied his constitutional right to be convicted only of the charged offense.

Additionally, the trial court imposed restitution. Of the total restitution owed, \$74,149 was for missing inventory items without being tied to specifically to the jewelry he was charged with stealing in the information. Mr. Phillips contends the order of restitution must be vacated because based on the overly broad "to convict" instruction, the State did not prove Mr. Phillips conviction was based on the missing inventory items. Therefore, there is no causal connection between the cost of the missing inventory and the crime with which he was convicted.

B. ASSIGNMENTS OF ERROR.

1. The trial court erred in instructing the jury on the elements to convict Mr. Phillips of theft in the first degree when it

did not require the jury to find the theft was based on the specific conduct charged in the information.

2. The trial court exceeded its authority when it imposed restitution for missing inventory from the Pawn X-Change when the erroneous “to convict” instruction made it impossible for the State to establish Mr. Phillips’ conviction was based on conduct involving these inventory items.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. An accused has a constitutional right to be informed of the charge he is to meet at trial and cannot be tried for a crime not charged. Mr. Phillips was charged with theft in the first degree involving specific inventory items. Were his constitutional rights violated where the State presented evidence of theft involving property other than that identified in the information and the “to convict” instruction did not require the State to prove the theft was based on the inventory items charged? Assignment of Error 1.

2. Restitution orders must be based on a causal relationship between the victim’s damages and the crime charged and proven. Where the damages are for the offense identified in the information, but the court’s instructions allowed the jury to convict Mr. Phillips of

a crime not identified in the information, did the damages have a causal relationship to the crime charged? Assignment of Error 2.

D. STATEMENT OF THE CASE.

The facts of this case stem from the defendant, Timothy Phillips' employment as the store manager of the Bellingham Pawn X-Change.

Steven Gray, a former employee at the Pawn Exchange, testified that one morning at work discovered a \$3,000 Pawn X-Change check in the safe. VRP 3/9/09 16, 20. He alerted Mr. Phillips to the check and was told to count it as cash. VRP 3/9/09 20. He testified that Mr. Phillips explained that if the store needed additional cash to run its daily operations, he would write a check and use it to get the needed cash from a nearby bank. VRP 3/9/09 21. He would then call a specific phone number and leave a message detailing the check number and other pertinent information. VRP 3/9/09 21. According to Mr. Gray, Mr. Phillips told him that an employee from the Seattle store asked him to bring in that check because he or she forgot to make the cash call and did not want upper management to know. VRP 3/9/09 21. He testified he saw the check in the safe for several months. VRP 3/9/09 22. On May 22, 2007, area manager, Curtis Williamson was

at the Bellingham store. Mr. Gray alerted Mr. Williamson to the check because he suspected "something was wrong." VRP 3/9/09 23; VRP 3/4/07 41. When Mr. Gray opened the safe for Mr. Williamson, he discovered the check was no longer there. VRP 3/9/09 24.

After speaking with his superiors, Mr. Williamson directed Mr. Phillips to count the cash in the store. VRP 3/4/07 43. The accounting indicated a \$2,300 cash shortage. VRP 3/4/07 43. Mr. Phillips said he remembered putting the cash in the money bag to take to the bank, but could not remember where he placed the bag. VRP 3/4/07 43; VRP 3/9/09 24, 26-27. At that time, Mr. Williamson placed Mr. Phillips on leave. VRP 3/4/07 44. A few hours later, Mr. Phillips sent his resignation letter to the company e-mail address. VRP 3/4/07 45.

Once the store received Mr. Phillips' resignation, Mr. Williamson scheduled audits for the next day. VRP 3/4/07 45. Mr. Williamson was alarmed because he noticed that one of the store reports indicated there were 400 pieces of jewelry in the store cases, but it had one of the highest inventory value in the company

at over \$80,000.<sup>1</sup> VRP 3/4/07 45-46. He testified that with an average store loan of \$90, the store should have had 1200 to 1500 pieces of jewelry. VRP 3/4/07 48.

After completing the store inventory, Mr. Williamson determined there were over 600 jewelry items missing. VRP 3/4/07 50. Additionally, he found other irregularities within the store. He determined there were approximately 118 pieces of jewelry on loan status missing from the safe and that all of those loans were for under \$500. VRP 3/4/07 55-56. The majority of the loans were made by Mr. Phillips and many of the loans had been modified. VRP 3/4/07 57-58.

Based on the audit, Mr. Williamson suspected Mr. Phillips of manufacturing phantom loans. So he viewed the store's video to obtain evidence of it. VRP 3/5/07 196. Mr. Williamson testified that a "phantom loan" is a fictitious loan entered into the store's computer system. VRP 3/4/07 73. The person entering the phantom loan generates a pawn slip and keeps the cash "loan." VRP 3/4/07 74. He testified that we saw a video of Mr. Phillips processing a loan for a woman who pawned a ring. VRP 3/5/07 196-203. However, when he generated the pawn slip, he pulled

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<sup>1</sup> Inventory value is calculated by multiplying the number of loans by the amount of each loan. VRP 3/4/09 47.

two slips instead of one. VRP 3/5/07 202. The item corresponding with the second pawn slip was missing from the store's safe and inventory. VRP 3/5/07 204. Mr. Williamson testified that he saw several instances of Mr. Phillips manufacturing these phantom loans on video, but was only able to record one of them. VRP 3/5/07 196.

The State charged Mr. Phillips with one count of theft in the first degree alleging he stole 660 inventory items.<sup>2</sup> CP 92-94; RCW 9A.56.030(1)(A); RCW 9A.60.020(1). The jury instructions did not restrict the jury to find the theft based only on those specific store items. The jury convicted him as charged. CP 27-28. At a contested restitution hearing, the trial court imposed \$87,606 in restitution. Mr. Phillips challenges his theft conviction and the restitution order.

#### E. ARGUMENT

1. MR. PHILLIPS WAS DENIED HIS CONSTITUTIONAL RIGHT TO BE INFORMED OF THE STATE'S CHARGES WHERE THE JURY WAS ALLOWED TO CONVICT HIM OF THEFT OF PROPERTY NOT SPECIFIED IN THE INFORMATION.

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<sup>2</sup> Mr. Phillips was also charged and convicted of four counts of forgery.

a. The State charged Mr. Phillips with theft of 660 inventory items from the Pawn X-Change. The State charged Mr. Phillips with theft in the first degree alleging “a series of transactions as part of a criminal episode or a common scheme or plan, did wrongfully obtain or exert unauthorized control over property of another...to-wit: 660 inventory items, of an aggregate value exceeding \$1,500...” CP 92. At trial, the State presented evidence of his alleged involvement with the missing inventory. Additionally, the State presented evidence of him taking \$2,300 cash from the store by cashing a store check and pocketing cash through fictitious loans. But, the “to convict” instruction did not specify the 660 missing inventory items identified in the information. Given the limited charging document and broad jury instructions together with the evidence presented by the State, the jury was able to convict Mr. Phillips of crimes not charged in the information.

b. An accused person has a constitutional right to be informed of the charge he is to meet at trial. An accused has a constitutional right to be informed of the charge he is to meet at trial and cannot be tried for a crime not charged. State v. Pelkey, 109 Wn.2d 484, 487, 745 P.2d 854 (1987); U.S. Const. amend VI; Washington Const. art. I § 22. The primary purpose of this

protected right is to enable the accused to prepare and mount a defense at trial. State v. McCarty, 140 Wn.2d 420, 998 P.2d 296 (2000); State v. Bergeron, 105 Wn.2d 1, 18, 711 P.2d 1000 (1985). Our courts have long recognized this principle. The Washington Supreme Court stated more than a century ago:

The accused, in criminal prosecutions, has a constitutional right to be apprised of the nature and cause of the accusation against him. Washington Const., art. I, § 22. And this can only be made known by setting forth in the indictment or information every fact constituting an element of the offense charged. This doctrine is elementary and of universal application, and is founded on the plainest principle of justice.

State v. Ackles, 8 Wash. 462, 464-65, 36 P. 597 (1894).

To meet this constitutional requirement, the charging document must include every material element of the charge along with facts supporting every element of the offense. State v. Leach, 113 Wn.2d 678, 689, 782 P.2d 552 (1989). Leach requires the defendant not only be apprised of the crime charged, but also the conduct which is alleged to have constituted the crime. State v. Kjorsvik, 117 Wn.2d 93, 98, 812 P.2d 86 (1991); CrR 2.1(a)(1)<sup>3</sup>.

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<sup>3</sup> CrR 2.1(a)(1) provides that a criminal information "shall be a plain, concise and definite written statement of the essential facts constituting the offense charged."

Here, the State charged Mr. Phillips of theft in the first degree. Specifically, it charged him with theft of 660 inventory items from the Pawn X-Change. CP 92.

c. A jury cannot be instructed on an uncharged crime. “It is fundamental that an accused must be informed of the charge he is to meet at trial *and cannot be tried for an offense not charged.*” State v. Lutman, 26 Wn.App. 766, 614 P.2d 224 (1980) (emphasis added). Similarly, a jury instruction “may not be more far-reaching than the charge in the information.” State v. Brown, 45 Wn.App. 571, 576, 726 P.2d 60 (1986).

In Brown, the State charged the defendant with conspiracy to commit theft in the first degree specifically naming the alleged co-conspirators in the information. Id. at 572-73, 576. However, the “to convict” instruction required only that the jury find that the defendant had conspired with “one or more persons.” Id. at 574-76. This Court concluded the instruction was defective “[s]ince testimony at trial indicated that there were others involved in the conspiracy besides those named in the information, the jury may have convicted the defendant after finding an agreement between him and someone not charged.” Id. at 576.

This Court more recently addressed a similar issue in State v. Jain, 151 Wn.App. 117, 210 P.3d 1061 (2009). There the State charged the defendant with two counts of money laundering alleging the disposition of two unimproved real property lots purchased with cash from the sale of marijuana. Id. at 121-23. At trial the State presented evidence of five properties not identified in the information that the defendant purchased and/or improved with alleged proceeds of illegal drug sales. The State also presented evidence that the defendant transferred seven properties to his father. Id. at 123. Only two of these properties were identified in the information. Id. at 123. The “to-convict” instruction did not require the State to prove the money laundering involved the properties identified in the information. Id. at 123-24. Moreover, the trial court did not instruct the jury to unanimously decide which dispositions of properties were the bases of the money laundering. Id. at 124. This Court accepted the State’s concession that it violated the defendant’s right to notice and the opportunity to defend himself because the jury could have convicted him by finding he committed acts related to properties not identified in the information. Id. at 124.

As in Brown and Jain, the “to convict” instruction in Mr.

Phillips' trial was overly broad and allowed the jury to convict him by finding he committed thefts unrelated to the items alleged to have been stolen in the information.

d. Mr. Phillips' conviction must be reversed because the instruction allowed the jury to convict him of an uncharged crime. An erroneous instruction given on behalf of the party in whose favor the verdict was returned is presumed prejudicial unless it affirmatively appears that the error was harmless. State v. Jain, 151 Wn.App. 117, 121, 210 P.3d 1061 (2009) citing State v. Brown, 45 Wn.App. at 576. A constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error. State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985). Here, there are no instructions or special verdict from which to conclude the jury's verdict was based only on the charged offense.

As stated above, the State charged Mr. Phillips with theft of specific property. The information provides:

**THEFT IN THE FIRST DEGREE, COUNT I**

That one or about the time intervening between November 1, 2006 and May 23, 2007, the said defendant, TIMOTHY TED PHILLIPS, then and there being in said county and state, in a series of

transactions which are part of a criminal episode or a common scheme or plan, did wrongfully obtain or exert unauthorized control over property, other than a firearm, as defined in RCW 9.41.010, or services of another, to-wit: **660 inventory items, of an aggregate value exceeding \$1,500**, with intent to deprive such other of such property or services, in violation of RCW 9A.56.030(1)(A), 9A.56.010(18)(C) and 9A.56.020(1)(A), which violation is a Class B Felony;

CP 92 (emphasis added).

At trial, the State presented evidence of theft of the 660 inventory items. However, the State also presented evidence involving items other than the inventory identified in the information. Specifically, the State presented evidence of theft involving \$2,300 of cash from the store. VRP 3/4/09 41, 43-44; VRP 3/9/09 16, 20-24, 26-27. Additionally, the State presented evidence of cash stolen through phantom loans. VRP 3/4/09 73-74; VRP 3/5/09 196-204. In closing arguments, the State again argued Mr. Phillips stole \$2,300 from the store's safe and by generating phantom loans. VRP 3/10/09 86, 88, 90, 94-97.

In contrast to the information, the "to convict" instruction did not require the State to prove that the theft involved the 660 inventory items. Rather, the instruction provided in part:

To convict the defendant of the crime of Theft in the First Degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the intervening time between November 1, 2006 and May 23, 2007, the defendant wrongfully obtained or exerted unauthorized control over property of another,

(2) That the property was not a firearm and exceeded \$1500 in value;

(3) That the defendant intended to deprive the other person of the property; and

(4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

CP 41. Also, the court did not instruct the jury that it had to unanimously agree the theft conviction was based on the 660 inventory items.

Thus, as in Brown and Jain, the “to convict” instruction was broader than the charging document because it did not require the jury to convict Mr. Phillips based only on the theft of the inventory items. Therefore the instructions were defective. Because the State presented evidence of theft involving property other than those identified in the information, the defective instructions allowed

the jury to convict Mr. Phillips of an uncharged crime. He was denied his constitutional right to be informed of the crime with which he was being charged. Therefore, his conviction must be reversed.

2. THE TRIAL COURT EXCEEDED ITS  
AUTHORITY BY IMPOSING THE ORDER  
OF RESTITUTION.

At the restitution hearing the trial court ordered Mr. Phillips to pay \$87,606 in restitution to the Pawn X-Change, \$74,149 of which was for the jewelry missing from the store's inventory.

a. The trial court's authority to impose restitution is limited to the loss causally connected to the defendant's offense.  
The trial court's authority to impose restitution is statutory. State v. Enstone, 137 Wn.2d 675, 682, 974 P.2d 828 (1999). The trial court is required to impose restitution "whenever the offender is convicted of an offense which results in injury to any person or damage to or loss of property." RCW 9.94A.753(5).

Trial courts are given broad power to order restitution. State v. Enstone, 137 Wn.2d 675, 679, 974 P.2d 828 (1999). However, restitution orders must be based on a causal relationship between the victim's damages and to the crime charged and proven. State v. Dauenhauer, 103 Wn.App. 373, 378, 12 P.3d 661(2000); State v. Woods, 90 Wn.App. 904, 907, 953 P.2d 834 (1998). A trial court

exceeds its statutory authority if it imposes restitution for a loss not causally connected to the defendant's offense. Dauenhauer, 103 Wn. App. at 379-80.

In Dauenhauer, the defendant burglarized three storage units. 103 Wn.App. at 375. When police arrived at the scene, he drove off through two fences and a stop sign before colliding with a truck driven by Ryan Jennings. Id. The defendant was convicted of three counts of burglary. Id. at 374. On appeal, the defendant challenged the trial court's imposition of restitution for the damages to the truck arguing restitution is authorized only for damages resulting from the specific crimes for which a defendant is charged and convicted. Id. at 377. Reasoning that trial court does not have the authority to impose restitution for damages "connected with" the burglaries or the defendant's "general scheme," the Court vacated the restitution. Id. at 379-80. It further ordered that the matter should be remanded to identify the damages for the burglary victims only. Id. at 380.

b. Because of the erroneous "to convict" instruction, the State did not establish a causal connection between the loss and the offense committed by Mr. Phillips. A substantial portion of the restitution the trial court ordered was based on missing

inventory items from the Pawn X-Change. However, because of the erroneous “to convict” instruction, the jury may have convicted Mr. Phillips of a crime other than the theft of the 660 inventory items. As argued above, the jury may have convicted Mr. Phillips based on the missing \$2,300 from the store’s safe or based on money received from generating phantom loans. Therefore, the restitution order lacks the required causal relationship with the specific crime charged and proven (i.e., theft of the 660 inventory items).

c. The restitution order must be reversed. A trial court’s decision regarding restitution is reviewed for abuse of discretion. State v. Enstone, 137 Wn.2d 675, 679, 974 P.2d 828 (1999). A trial court abuses its discretion when it exercises it in a manifestly unreasonable manner or on untenable grounds. Enstone, 137 Wn.2d at 679-80. Here, the erroneous “to convict” instruction allowed the jury to convict Mr. Phillips of theft or property other than the 660 inventory items identified in the information. If that is indeed what happened here, then the restitution does not have a causal relationship with the crime with which he was convicted.

F. CONCLUSION.

Based on the above reasons, Mr. Phillips respectfully requests this Court to reverse his conviction for Theft in the First Degree and the restitution order.

Respectfully submitted this 19<sup>th</sup> day of November 2009.



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

STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	
v.	)	NO. 63487-9-I
	)	
TIMOTHY PHILLIPS,	)	
	)	
APPELLANT.	)	

**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 19<sup>TH</sup> DAY OF NOVEMBER, 2009, I CAUSED THE ORIGINAL **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:

- |                                     |  |   |                                     |
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| <input checked="" type="checkbox"/> | TIMOTHY PHILLIPS<br>3071 ARNIE RD<br>CUSTER, WA 98240  | <input checked="" type="checkbox"/><br><input type="checkbox"/><br><input type="checkbox"/> | U.S. MAIL<br>HAND DELIVERY<br>_____ |

**SIGNED** IN SEATTLE, WASHINGTON THIS 19<sup>TH</sup> DAY OF NOVEMBER, 2009.

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