63487-9

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No. 63487-9-I

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON, Respondent,

v.

TIMOTHY TED PHILLIPS, Appellant.

BRIEF OF RESPONDENT

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A. ASSIGNMENTS OF ERROR

None.

B. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. Whether the discrepancy between the information, charging specifically theft of 667 inventory items and the broader language in the instructions that only required the jury to find theft of property in excess of $1500, requires reversal of the conviction for theft in the first degree where substantial evidence of $2300 that was missing was presented and argued as a basis for conviction.

2. Whether the restitution order must be reversed if defendant's conviction for theft in the first degree is reversed.

C. SUMMARY

Appellant Timothy Phillips appeals his conviction for Theft in the First Degree and the trial court's order of restitution for $87,606. Phillips asserts that the to-convict jury instruction on the Theft in the First Degree charge was erroneous because it was overbroad given the specific language on that charge in the information and given that other evidence of theft was presented to the jury. The State concedes the jury instructions were overbroad given the specific language in the information and the fact that evidence was presented that Phillips stole over $1500 in U.S. currency as well. The State also concedes that the error was not harmless because

the record does not demonstrate beyond a reasonable doubt that the jury's verdict was based only on the evidence of the theft of the 667 inventory items.

Phillips also claims that the restitution isn't causally connected to the offenses with which he was charged and therefore is erroneous. His restitution argument relies upon his argument regarding his theft conviction. As the State believes that the theft in the first degree conviction should be reversed, the State therefore submits that the restitution order necessarily must be reversed as well.

D. FACTS

Phillips was charged with Theft in the First Degree and four counts of forgery on August 9, 2007.[1] CP 92-97, 100-102. The first trial resulted in a mistrial. 12/5/08 RP 345. At the second trial in March of 2008, the jury found the defendant guilty of the Theft in the First Degree count as well as the four Forgery counts. CP 27-28; 3/10/09 RP 116-117. Phillips was sentenced to a standard range sentence on all counts, thirteen months on the theft conviction and eight months on the forgeries, all to run concurrent, and after a contested restitution hearing, restitution was ordered in the amount of $87,606. CP14-15, 17-20.

Phillips was the store manager for the Bellingham store of the Pawn X-Change for at least two to three years before he resigned in May 2007. 3/4/09 RP 31, 41. The Pawn X-Change had specific policies regarding its pawn business. When a customer at the store would pawn a jewelry item in order to obtain a loan, a pawn slip would be generated for the item that would include the customer's name, a unique number, a loan number and a description of the piece of jewelry. 3/4/09 RP 12. All the information would be input into the store's computer by the employee making the loan[2] and then the piece of jewelry on-loan would go into a lock box until the end of the day when it would be put into the store's safe. 3/4/09 RP 16, 29. If the employee wanted to make a loan for $500 or more on an item, the employee would have to obtain approval from the area manager; anything under $500 would be subject only to the store manager's approval. 3/4/09 RP 14.

If the loan was not repaid by the customer within the 90 day loan period, or the loan was not renewed, the item would become the property of the store and would be moved into separate bins as "scrap" or "pulled"

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[1] The information was amended a couple of times, but not substantively with respect to the Theft in the First Degree. Another count of forgery was initially alleged.
[2] Each employee has an individual password that was supposed to be secret. 3/4/09 RP 29.

items. 3/4/09 RP 33-34. "Pulled" items are prepared for sale and ultimately placed in the store's cases, and become part of the store's "inventory." 3/4/09 RP 32-33. Scrap" items are sold by weight to a scrap metal dealer by the store manager. 3/4/09 RP 34-36. When an on-loan jewelry item becomes part of the store's inventory, a jeweler would come in and do a more specific description of the item. 3/4/09 RP 25. However, modifications of a jewelry item's description are not permitted while it is in on-loan status. 3/4/09 RP 26.

Phillips was responsible for ensuring that a "loan walk" was done of all the on-loan jewelry items, either by himself or a "keyholder employee,"[3] on a daily basis. 3/4/09 RP 19. A "loan walk" verifies that all of the jewelry items that were pawned the day before are in fact in the safe, and the on-loan items in the numbered bags in the safe are compared to a report generated of all the items taken in the day before. The pieces of jewelry in the store's inventory are counted two times a day. 3/4/09 RP 39. The store manager does a monthly audit of the items in inventory with another employee and a random check on the on-loan items in the safe. 3/4/09 RP 8-9, 22-23. The area manager does a monthly spot check on the

[3] A "keyholder" was an employee who had access to the store's safe. 3/4/09 RP 17.

on-loan items. 3/4/09 RP 22. An annual audit is done on the jewelry. 3/4/09 RP 24.

On May 22nd Curtis Williamson, who had recently taken over the job of area manager for the Bellingham store, visited the Bellingham store and was approached by an employee, Steven Gray. 3/4/09 RP 41. Gray, a keyholder[4], expressed concern regarding a $2300 Pawn X-Change check[5] that had been in the safe for a number of months. 3/4/09 RP 42, 3/9/09 RP 22-23. Gray had expressed concerns about the check previously to Phillips, but Phillips had told him just to count it as cash, even though it shouldn't have been[6], and that it was a loan for another store. 3/9/09 RP 20-23. When the safe was opened for Williamson, the check wasn't there, although it had been earlier that morning. 3/9/09 RP 23-24.

Williamson told Phillips to count all the cash in the store. Phillips came up $2300 short. 3/4/09 RP 43. Phillips said he might have put the $2300 cash into a bank bag in order to take it to the bank, but Phillips never was able to find the bag. 3/4/09 RP 43. Phillips was placed on leave pending the outcome of an investigation. He told Williamson he

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[4] There was only one other keyholder employee besides Gray. 3/5/09 RP 131.
[5] There was some discrepancy in the testimony as to whether the check was for $3000 or for $2300.
[6] Phillips explained to Gray that when the store needed cash he would make out a company check and call in the check number and amount to management. 3/9/09 RP 21.

wasn't sure he wanted to work at the store anymore and later that day submitted his resignation via e-mail. 3/4/09 RP 44-45.

Williamson performed an audit of the on-loan items and the jewelry in inventory. 3/4/09 RP 45-46. He discovered that there were only approximately 400 pieces of jewelry in inventory, although the value of the Bellingham inventory, one of the highest in the company, reflected that there should have been approximately 1200 pieces in inventory.[7] 3/4/09 RP 46-47, 54. This should have been a red flag to Phillips. 3/4/09 RP 47, 69-70. The report that Williamson generated from the store's computer revealed that there should have been over 600 pieces of jewelry in inventory that weren't there. 3/4/09 RP 49, Ex.2.[8] Phillips had not reported any pieces missing in the prior monthly inventory audits. 3/4/09 RP 55. It was Williamson's belief that Phillips had "pencil–whipped" the prior monthly audits of the inventory items. 3/4/09 RP 87. Williamson testified that "pencil-whipping" was an impermissible practice in which during the monthly audit of inventory pieces, a person would mark off

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[7] The "inventory value" represents the amount of the loan that was defaulted on. 3/4/09 RP 47. The average value of a loan is $90. Id.

[8] Exhibit 2 showed that there were 666 pieces missing, representing a total value to the store of over $59,000. RP 54, Ex. 2.

more than one item as being in the store when the other employee called off the number of an inventory item. 3/4/09 RP 74.

In April and May of 2007 the Bellingham store's scrap sales were substantially lower than normal. 3/4/09 RP 36. If a number of items were reported as being placed in "scrap" but weren't actually given to the scrap dealer, that could account for the lower scrap value, because there would be a lower cost/value per item. 3/4/09 RP 37.

There were also 118 on-loan pieces that were missing from the safe. 3/4/09 RP 56. The missing on-loan pieces represented a cost to the company of over $21,000. 3/4/09 RP 59. All of the missing pieces were on loans that were under $500 and Phillips was the originator of the loans on 98% of them. RP 57-58. A good number of the on-loan jewelry pieces had had their descriptions modified, contrary to company policy. 3/4/09 RP 57, 60, 65; 3/5/09 RP 110.

In the course of reviewing the pawn slips, the managers realized that some of the items listed as loans, were in fact "phantom loans," phony loans for which pawn slips were generated but for which no pawned items existed, and for which the money had been pocketed. 3/4/09 RP 62, 73.

On these items, the modifications either lowered the value of the item and/or reflected that the item was a completely different type of jewelry.[9] 3/4/09 RP 63-67.

Mac Torres, the area manager before Williamson, testified regarding the company's policies and practices, in accord with Williamson's testimony. RP 103-62. Torres testified that he would announce his monthly visits and that he hadn't seen anything out of the ordinary in his audit checks, but that he had only checked the on-loan items that were valued at over $500. RP 112-15.

Phillips told police that he was aware of a problem with the check at Pawn X-Change, but didn't tell them he had misplaced the check. 3/5/09 RP 224, 226. He initially told them that it was normal to modify descriptions of on-loan items, but later, when confronted, admitted that it wasn't. 3/5/09 RP 228, 231.

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[9] Some of these items represented the four forgery counts. The customers who allegedly received the loans testified that they did not pawn anything at the store on those days and that the signatures on the pawn slip were not theirs. 3/5/09 RP 214-216; 3/9/09 RP 10-12; 3/9/09 PM RP 2-3.

E. ARGUMENT

1. The State concedes that the discrepancy between the information and the instructions, given the evidence presented and the State's closing argument, resulted in error that was not harmless.

Phillips asserts that the to-convict instructions were overly broad in this case where the information charged that the property taken in excess of $1500 was specifically 660 inventory items. Phillips asserts that, given the evidence presented, the overbroad instructions permitted the jury to convict him of theft of property not charged in the information. The State concedes, under State v. Brown[10] and State v. Jain,[11] that the instructions were overly broad where evidence was presented that Phillips stole $2300 and other cash and the information failed to allege the theft of the $2300 or cash. Given the substantial evidence presented on the theft of the money and the prosecutor's argument to the jury to convict on that theft alone, it is not clear that the jury convicted Phillips based only on the theft of the 660 inventory items. Therefore, it cannot be said that the error that occurred in this case was "trivial" or had no effect on the outcome of the case.

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[10] State v. Brown, 45 Wn. App. 571, 726 P.2d 60 (1986).
[11] State v. Jain, 151 Wn. App. 117, 210 P.3d 1061 (2009)

A defendant may not be convicted of an offense with which he was not charged. State v. Garcia, 65 Wn. App. 681, 686, 829 P.2d 241 (1992). "A variance between the information and the crime of which a party is convicted which is merely technical does not require reversal." Id at 686-87. On the other hand, an instructional error 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); State v. Brown, 45 Wn. App. 571, 576, 726 P.2d 60 (1986). 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." Jain, 151 Wn. App. at 122. An instructional error is harmless if it was "trivial, or formal, or merely academic, was not prejudicial to the substantial rights of the [defendant], and in no way affected the outcome of the case." State v. Brown, 45 Wn. App. at 576.

In Jain the State charged two counts of money laundering regarding two specific properties that were purchased at foreclosure sales. Id. at 122-23. The instructions did not specify that the jury had to find that the alleged money laundering occurred with respect to those two specific properties. Id. at 123. At trial, however, in addition to presenting evidence of money laundering with respect to those two properties, the State also

produced evidence of five additional properties that the defendant purchased with proceeds of his drug sales. Id. at 123. The State then presented evidence that all seven properties, those charged and those not charged, were conveyed via quitclaim deed to the defendant's father. Id. The court found that given the evidence presented, the jury instructions allowed the jury to find the defendant guilty based on acts not alleged in the information. Id. at 121, 124. While the court premised its decision on the lack of notice and opportunity to present a defense, it also acknowledged, but did not address, the issue of juror unanimity. Id. at 124.

Similarly in State v. Brown, the information charged the defendant with conspiring to commit theft with certain named individuals, but did not name those alleged conspirators in the to-convict instruction. Brown, 45 Wn. App. at 575-76. The evidence at trial included other conspirators who were not named in the information. Id. at 576. The court concluded that the instructional error in the case was not trivial, and therefore not harmless, because the jury could have found the defendant guilty of conspiring with someone not named in the information. Id.

Here, the information specifically alleged theft only of 660 inventory items, inadvertently omitting the theft of the money. CP 92-92.

The instructions only required that the jury find that Phillips took property in excess of $1500 in value. CP 41.

Phillips contends that the overbroad instructions resulted in a conviction that was not necessarily based on the theft of the inventory items. The State acknowledges that there was substantial evidence presented of $2300 that was missing from the safe, as well as money that was stolen via phantom loans, and that it was stolen by Phillips. The State also acknowledges that the prosecutor relied upon the missing $2300, and the phantom loan money, in her closing argument for the theft count and even invited the jury to find Phillips guilty based solely on that evidence. 3/10/09 RP 85-86, 90-91. The State cannot say that the error in this case was trivial or in no way had an effect on the outcome of the case. The State concedes that given the evidence presented of other acts of theft at trial and the prosecutor's argument in closing, the instructions in this case permitted the jury to find the defendant guilty based on acts not charged in the information. This problem is compounded by the lack of a jury instruction regarding unanimity. The record is not clear which acts the jury relied upon in finding the defendant guilty. The State therefore concedes that the error in this case was not harmless.

2. The restitution order must be reversed if the Theft in the First Degree conviction is reversed because there would be no causal connection for much of the restitution ordered.

If this Court reverses Phillips conviction for Theft in the First Degree, the restitution order, premised in large part on the theft of the 660 inventory items, must be reversed as well. Restitution may only be ordered for those items that are causally connected to the crime of conviction. Therefore, the State submits the restitution order should be reversed and the matter remanded.

In order to award restitution a trial court need only find that there is a causal connection between the defendant's crime and the resulting expenses. State v. Enstone, 137 Wn.2d 675, 682, 974 P.2d 828 (1999). "A causal connection exists when, 'but for' the offense committed, the loss or damages would not have occurred. State v. Enstone, 89 Wn. App. 882, 951 P.2d 309 (1998), *aff'd,* 137 Wn.2d 675, 974 P.2d 828 (1999). In determining the scope of the causal connection, courts are not limited to elements of the crime, but may also look to the defendant's actual underlying conduct. State v. Hiett, 154 Wn.2d 560, 565, 115 P.3d 274 (2005).

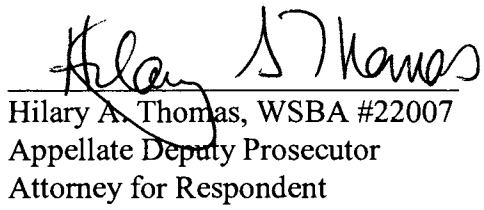
The trial court's award of restitution was primarily premised on Phillips's conviction for theft in the first degree. The court found that

$73,149 should be awarded for the missing jewelry. Without the theft conviction, there is no causal connection for over $73,000 of the restitution that was awarded. The State has conceded that the theft conviction should be reversed, and therefore submits that the restitution order should be reversed as well.

F. CONCLUSION

For the reasons set forth above, the State concedes that the theft in the first degree and the related restitution order should be reversed.

Respectfully submitted this 4th day of March, 2010.



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CERTIFICATE OF SERVICE

I certify that on this date I placed in the United States mail with proper postage thereon, or otherwise caused to be delivered, a true and correct copy of the document to which this certificate is attached, to this Court, and appellant's counsel, Carolyn Morikawa, addressed as follows:

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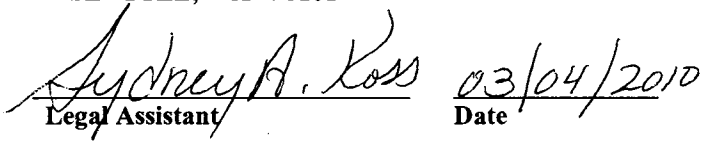

Legal Assistant **Date**