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STATE OF WASHINGTON

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NO. 64009-7-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

DAU CHONG GIENG,

Appellant.

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE REGINA CAHAN

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**BRIEF OF RESPONDENT**

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**A. ISSUES PRESENTED**

1. The unchallenged evidence at the restitution hearing showed that (1) defendant Gieng's car sideswiped the victim's car while Gieng was attempting elude pursuing police officers, (2) the victim received a damage estimate after the incident that showed the need for repair of the left side of both his front and rear bumpers, and (3) the victim provided a sworn declaration that all of the damage included in a damage estimate had been caused by the defendant's crime. Is that evidence sufficient to support a restitution order requiring defendant Gieng to pay the victim for the damage to the bumpers?

**B. STATEMENT OF THE CASE**

In late July 2008, Jesse Sharp had his 1993 Dodge Spirit completely repainted. CP 44. Three weeks later, on August 24, 2008, Sharp was sitting in the driver's seat of that car, which was stopped on Rainier Avenue South. CP 19. At that time, defendant Dau Gieng was recklessly driving his car in an attempt to elude two pursuing Seattle Police Department officers. CP 3-4. Gieng then drove his car through the stop light where Sharp was stopped and, in so doing, "struck the driver's side" of Sharp's car. CP 3. Gieng was eventually apprehended and charged with, among other

things, attempting to elude pursuing police officers in violation of RCW 46.61.024.

In March 2009, Gieng pleaded guilty to attempting to elude a pursuing police vehicle in violation of RCW 46.61.024. CP 27. As part of the plea, he stipulated to the facts in the certification for the determination of probable cause, which included the fact that his car "struck the side of the vehicle that occupied the curb lane of travel," Sharp's vehicle. CP 22. Gieng also agreed to pay "restitution in full" for the damage his crime caused. CP 22. He waived his right to be present at the restitution hearing. CP 29. At the March 2009 sentencing hearing, the trial court followed an agreed recommendation for a low-end standard range sentence, ordered restitution, and set a restitution hearing. CP 27-30.

Meanwhile, in December 2008, Sharp had the costs for repairing his car estimated by Maaco Collision Repair and Auto Painting. CP 43. Maaco estimated the cost of repair at \$1,220.15, for repairs to the left front bumper, left front fender, blending of the left front door, straightening of the left rear door, straightening of the left quarter panel, and repairs to the left rear bumper. CP 43. Sharp provided this estimate as part of the restitution package. Sharp also swore a declaration describing the damage done when

Gieng sideswiped his car. CP 42. That declaration describes the damage as follows:

- 2a. Paint damage all across driver side of car (I had a new paint job !!)
- 2b. Dents and creases across driver side of car
- 2c. Broken driver side mirror

For the dollar estimate next to 2a and 2b, Sharp wrote: "1220.15."

CP 42. For the estimate next to 2c, Sharp wrote: "45.00." CP 42.

Sharp then signed his name next to the following declaration: "I declare under penalty of perjury under the laws of the State of Washington that the foregoing is a true and correct summary of the losses I incurred as a result of the crime investigated under the above cause number." CP 42.

The restitution hearing took place in July 2009. Gieng presented no evidence at the restitution hearing to dispute Sharp's declaration that the damage in question had been caused by his crime. See RP (7/16/09) at 1-7. Instead, his attorney argued "I just don't think we have enough information here." RP 2. Gieng's attorney singled out the "bumper repairs," stating: "there doesn't seem to be any indication that his bumper had fell off." RP 3. The State explained that, because Gieng had sideswiped the entire driver's side of Sharp's car, "it makes sense that ... there would be

damage to that side of the bumper both in the front and rear areas of the car.” RP 5. The trial court agreed: “it says that it was dented and creased across the side of the car[,] broken mirror”. RP 6. Thus, the court found that there were “inferences that the bumpers could have been broken” or damaged. RP 6. The court also made clear: “It doesn’t say that they’ve replaced the whole bumpers.” RP 6. The trial court thus ordered restitution in the amount of \$1,220.15. CP 34. It appears that the court inadvertently failed to order the \$45 restitution for replacing the mirror that Gieng destroyed, damages that Gieng had not challenged. Even so, Gieng timely appealed. CP 35.

C. **ARGUMENT**

Restitution statutes give the trial court broad discretion to order a defendant to pay restitution for his or her criminal acts, and an award of restitution is reviewed for an abuse of discretion. State v. Dauenhauer, 103 Wn. App. 373, 377, 12 P.3d 661 (2000); State v. Enstone, 137 Wn.2d 675, 680, 974 P.2d 828 (1999); State v. Davidson, 116 Wn.2d 917, 920, 809 P.2d 1374 (1991). A court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. State ex. rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

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". RCW 9.94A.753(5). Restitution

ordered by a court pursuant to a criminal conviction shall be based on easily ascertainable damages for injury to or loss of property. . . . The amount of restitution shall not exceed double the amount of the offender's gain or the victim's loss from the commission of the crime.

RCW 9.94A.753. Thus, a trial court may order restitution where a victim's loss is "causally connected" to a defendant's criminal conduct. Enstone, 137 Wn.2d at 682. This is consistent with one of the goals of the restitution statute: "to require the defendant to face the consequences of his criminal conduct." Id.

The reasonable inferences from the evidence in this case support the restitution order. Gieng sideswiped Sharp, causing damage "all across" the driver's side of Sharp's recently painted car. CP 42. Sharp swore as much under penalty of perjury. CP 42. As the prosecutor explained, a car's front and rear bumpers extend to the side of the car. RP 5. The trial court also found that inference reasonable. That inference was also supported by the Maaco estimate, which included repairs to the left side of the front and rear bumper. RP 6. And to remove any doubt, Sharp swore

that the bumper damage was in fact one of “the losses I incurred as a result of the crime investigated under the above cause number.”

CP 42.

There was no evidence to dispute Sharp’s assertion.

Gieng, who was not present at the hearing, chose not to present any evidence to contest Sharp’s declaration. Had Gieng chosen to testify that there was *no* damage to the front or rear bumper, or had he found some witness willing to do so, the trial court would have had to have made a credibility determination. Even that did not happen. Rather, Gieng’s *attorney* advanced the position that there could be no restitution for damage to the bumpers because “there doesn’t seem to be any indication that his bumper had fell off.” RP 3. The trial court rightly rejected that argument.

Gieng’s appellate arguments also fail. On appeal, he contends that Sharp’s “written estimate claim does not mention damage to the bumper.” Brief of Appellant at 7. But the written estimate does describe damage “all across” the driver’s side. A bumper extends from one side of a vehicle to the other side. Moreover, Sharp’s damage estimate is for the same amount as the repair estimate he submitted, which included damage to the “front left” and “rear ... left” bumper. CP 42-43. And there is no evidence

to support Gieng's claim on appeal that *he* "did not believe he damaged the car's bumpers." Brief of Appellant at 5. As noted, Gieng offered no evidence on that (or any) issue. Only his *attorney* challenged that evidence, and his attorney's opinions on bumper repair are not evidence.

Gieng is likewise incorrect in asserting that the court "thought it could infer that Sharp's bumper was damaged even if there were no actual allegations or evidence of that damage." Brief of Appellant at 7. There were both allegations, CP 42, and evidence, CP 43, of that damage. To the extent the court had to make any inference, such an inference was justified.

Gieng's arguments concerning the lack of an evidentiary hearing are also without merit. Gieng did not ask for an evidentiary hearing below. And there is no reason to believe he could have presented evidence to challenge Sharp's description of the damage he caused.

**D. CONCLUSION**

This Court should affirm the restitution order. To the extent any remand is necessary, this Court should remand to *increase* the

restitution order by the \$45 dollars that the trial court, apparently accidentally, failed to order for the destroyed driver's side mirror.<sup>1</sup>

DATED this 14th day of April, 2010.

RESPECTFULLY submitted,

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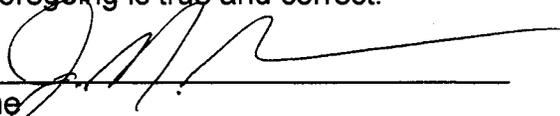
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<sup>1</sup> It appears the trial court inadvertently left the \$45 estimate for replacing the mirror out of the restitution order in error. In fact, Gieng's counsel made clear at the restitution hearing that "it's pretty clear from the police report and from the facts of the case that this is a side swipe, swiped off his mirror so I had, you know, no objection to his mirror being replaced". RP at 2. Even on appeal, Gieng does not dispute that he owed restitution for that amount.

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Nancy Collins, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Respondent's Brief, in STATE V. DAU GIENG, Cause No. 64009-7-1, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

  
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Name  
Done in Seattle, Washington

4.15.10  
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Date