

NO. 66258-9-I

IN THE COURT OF APPEALS – STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON
Respondent,

v.

SHAUN WALLEN,
Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON, FOR SKAGIT COUNTY

The Honorable Michael E. Rickert, Judge

RESPONDENT'S BRIEF

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I. SUMMARY OF ARGUMENT

On October 27, 2010, a restitution hearing was held following Mr. Shaun Wallen's plea to Theft in the First Degree. Mr. Wallen had been sentenced to 52 months in prison and waived his right to appear at the restitution hearing. Mr. Wallen was represented at the hearing by defense counsel, Jeri Coleman. The State requested restitution in the amount of \$34,984.99 be awarded to the victims in this case, Jack and Karen Moffitt. The State supplied declarations signed under penalty of perjury from the Moffitts in support of such request. The State also supplied a detailed list of all of the personal items stolen from the Moffitt residence. Many of the items were large, expensive items, such as: a washer and dryer; television; bedroom set; custom pool table; five-piece leather recliner sectional and many other items. The Moffitts did not have receipts for the items, presumably because they had not anticipated losing them to a burglary. Defense argued that there was insufficient documentation to support such an amount of restitution, but also indicated at the hearing that Mr. Wallen did not dispute all of the items. The record is unclear as to which specific items Mr. Wallen had no objection. Judge Michael Rickert awarded the Moffitts the full amount of their

request for restitution--\$34,984.99. In this appeal, Mr. Wallen objects to the amount of restitution awarded by Judge Rickert. Mr. Wallen also argues that he was not afforded due process at the restitution hearing.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court abused its discretion in ordering restitution based on a declaration from the victims that did not include actual receipts for the stolen items.
2. Whether Mr. Wallen was afforded due process for the purposes of his restitution hearing.

III. STATEMENT OF THE CASE

1. Statement of Procedural History

¹ On October 22, 2009, in Skagit County, Mr. Wallen was charged by information of Residential Burglary, Theft in the First Degree and Trafficking Stolen Property in the First Degree. CP 1-2. Mr. Wallen entered a plea of guilty as to the Theft in the First Degree charge on May 7, 2010. CP 6-12. The other accompanying charges were dismissed pursuant to the plea. CP 6-12. Sentencing for Mr. Wallen was set over to May 20, 2010. CP 13-22. Mr. Wallen was

sentenced to 52 months in prison in regard to the Theft in the First Degree charge. CP 13-22.

A restitution hearing was held on October 27, 2010. 10/27/2010 RP 3-12. Mr. Wallen waived his right to appear at the restitution hearing, but he did have counsel present on his behalf. 10/27/2010 RP 3-12. This timely appeal follows the restitution hearing. CP 26.

2. Statement of Facts

On October 27, 2010, a restitution hearing was held to determine what amount of restitution Mr. Wallen owed to the victims in his case, Jack and Karen Moffitt. 10/27/2010 RP 3-12. The Moffitts were victims of a residential burglary where most of their personal items in their private home were stolen by Mr. Wallen and his accomplice. 10/27/2010 RP 3-5. The items ranged from large appliances, to bedroom sets, to a five-piece leather recliner set. 10/27/2010 RP 3-6. Mr. Wallen waived his presence at the hearing but his attorney, Jeri Coleman was present on his behalf. 10/27/2010 RP 3-5. The state provided to the trial court and defense counsel a victim loss statement signed under penalty of perjury by Jack and Karen Moffitt. 10/27/2010 RP 3. The State also handed to the court

¹ The State will refer to the verbatim report of proceedings by using the date

and defense counsel a ten key total accounting of what the Moffitts deemed was owed to them for the loss of their personal property; this amount was \$34,984.99. 10/27/2010 RP 3-4. One of the items stolen—a custom made pool table—had been recovered, but with significant damage. 10/27/2010 RP 4. The pool table was repaired at a cost of \$1,150 and defense counsel did not object to this figure. 10/27/2010 RP 4-5. Defense counsel also stated at the hearing, “there are several of these items that I certainly don’t have any objection to,” what defense did or did not have an objection to was not clarified on the record during the hearing. 10/27/2010 RP 5. Defense counsel also handed forth a witness statement from Kim Ammonds, the Moffitts’ daughter, stating that the appellant had notice of the items listed on the statement from Ms. Ammonds. CP__ (sub no. 39, state witness sheriff, 10/27/2010, designation pending). Ms. Ammonds was watching her parents’ home at the time of the residential burglary and made a list of things she knew to be missing. 10/27/2010 RP 9. Ms. Ammonds was not the direct victim of the crime, however. 10/27/2010 RP 9. Defense counsel made an objection as to the State failing to provide further documentation to support such a restitution figure. 10/27/2010 RP 3.

followed by “RP” and the page number.

The State replied, "the fact of the matter is the Moffitts are unable to provide any receipts at this time. I'm sure they never anticipated that one day in the future they were going to have to try to prove ownership of these things. They've done the best they can to estimate what they're worth. 10/27/2010 RP 9-10.

Judge Michael Rickert stated the following in his ruling:

Some very large pieces were taken, custom made pool table; washer and dryers; John Deere riding tractor; lawn mower; entire bedroom set; entire living room set. They pretty much stripped the house. And when Mr. Wallen and Mr. Anderson stripped the house they were not thinking downstream...they might have considered the fact that if they got caught the restitution was going to be immense since they pretty much stripped the house. 10/27/2010 RP 10.

Judge Rickert also stated that while it was a large amount, he did have the estimates from the victims and the amount itself did not seem out of line. 10/27/2010 RP 11.

Judge Rickert ordered the full amount requested of \$34,984.99. 10/27/2010 RP 12.

IV. ARGUMENT

A. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN AWARDING RESTITUTION REQUESTED BY THE VICTIMS WHEN THE REQUEST WAS ACCOMPANIED BY A DECLARATION THAT PROVIDED A REASONABLE BASIS FOR THE AMOUNT SOUGHT.

The authority to order restitution is purely statutory. *State v. Smith*, 119 Wn.2d 385, 389, 831 P.2d 1082 (1992). Determining the amount of restitution lies within the sound discretion of the trial court. *State v. Davidson*, 116 Wn.2d 917, 9149, 809 P.2d 1374 (1991). Thus, a trial court's decision to award restitution will only be overturned upon a clear showing of abuse of discretion, that is, discretion manifestly unreasonable or exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). Courts of appeal review a trial court's authority to order restitution under the statute de novo. *State v. Edelman*, 97 Wn. App. 161, 165, 984 P.2d 421 (1999). RCW 9.94A.753 (5) provides that "[r]estitution 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."

"Restitution is appropriate so long as there is a causal connection between the crime and the injuries for which compensation is sought." *State v. Enstone*, 89 Wn. App. 882, 886, 951 P.2d 309 (1998). "[R]estitution ordered by a court pursuant to a criminal conviction shall 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(3). This statute must be broadly interpreted to accomplish the legislature's purpose, which is to require the defendant to face the consequences of his criminal conduct. See *State v. Tobin*, 132 Wn. App. 161, 173, 130 P.3d 426 (2006), *aff'd*, 161 Wn.2d 517, 166 P.3d 1167 (2007); *State v. King*, 113 Wn. App. 243, 299, 54 P.3d 1218 (2002). "Easily ascertainable" damages are those tangible damages that are proven by sufficient evidence to exist. The amount of loss does not need to be shown with mathematical certainty. *Tobin*, 132 Wn. App. at 173, 130 P.3d 426; *State v. Bush*, 34 Wn. App. 121, 123-124, 659 P.2d 1127 (1983). The evidence is sufficient "if it affords a reasonable basis for estimating loss and does not subject the trier of fact to mere speculation or conjecture." *State v. Pollard*, 66 Wn.App. 779, 785, 834 P.2d 51 (1992).

Information pertaining to the amount of loss can be provided in the form of letters and declarations. *Tobin*, 132 Wn. App. at 175. The owner is always qualified to provide that information. *McCurdy v. Union Pac. R.R.*, 68 Wn.2d 457, 468-69, 413 P.2d 617 (1966).

Jack and Karen Moffitt described each item of property stolen and provided their opinion of its value. The descriptions were detailed enough to permit the court, as fact finder, to reasonably

conclude that the items actually existed and to provide some basis for an objective valuation. The values asserted were not clearly excessive. That is adequate credible evidence to support the award. It should also be noted that the lost items could not be appraised because Mr. Wallen and his accomplice had disposed of most of the items, except for a custom pool table that sustained significant damage. To deny the Moffitts damages would permit Mr. Wallen to escape the consequences of his conduct.

Mr. Wallen was provided a hearing and the opportunity to rebut the State's evidence. The defense attorney for Mr. Wallen objected to the Moffitts' declaration but offered no rebuttal evidence or testimony except for a reference to items she had found on e-bay. Mr. Wallen waived his appearance at the restitution hearing, thus Mr. Wallen himself did not challenge the fact he stole the items with the help of his accomplice, rather he argued through his attorney that the amount being requested was not supported by sufficient descriptive factors and that the overall restitution being sought was too high. Furthermore, Mr. Wallen, through his counsel, stated that there were several items that he had no objection to, but counsel did not make a clear record as to which items Mr. Wallen fully accepted responsibility for the restitution. Rather, the overarching argument was simply

that the figure was too high. Given the breadth and depth of the theft in this residential burglary case, the amount of restitution sought was reasonable; the trial court did not abuse its discretion.

B. MR. WALLEN WAS AFFORDED DUE PROCESS AT HIS RESTITUTION HEARING.

The rules of evidence do not apply to restitution hearings. ER 1101(C)(3); *State v. Kisor*, 68 Wn. App. 610, 620, 844 P.2d 1038, *review denied*, 121 Wn.2d 1023, 854 P.2d 1084 (1993). While traditional evidence rules do not apply at restitution hearings, due process requires that the defendant have an opportunity to rebut the evidence presented. *Id.* at 620. Due process is satisfied if the evidence presented is reasonably reliable and the defendant has an opportunity to refute it. *Id.*

Here, the declaration from the Moffitts was reasonably reliable evidence, especially considering the bulk of the items they owned in their home had been stolen and never recovered, thus they made a list of items with accompanying values to the best of their ability. The Moffitts also signed this declaration under penalty of perjury. In addition, while Mr. Wallen was not present at the hearing, his defense counsel was at the hearing, and had the opportunity to rebut the evidence presented. Mr. Wallen was afforded due process for

purposes of the restitution hearing and the court's order for restitution in the amount of \$34,984 should not be disturbed.

V. CONCLUSION

The trial court did not abuse its discretion in ordering restitution in the amount of \$34,984.99 when the victims provided estimates of the value of their stolen items and submitted a declaration under penalty of perjury. Mr. Wallen was afforded due process for purposes of his restitution hearing. This Court should leave the restitution undisturbed.

DATED this 19th day of September, 2011.

SKAGIT COUNTY PROSECUTING ATTORNEY

By: 
MELISSA W. SULLIVAN, WSBA#38067
Deputy Prosecuting Attorney
Skagit County Prosecutor's Office #91059

DECLARATION OF DELIVERY

I, Karen R. Wallace, declare as follows:
I sent for delivery by; [] United States Postal Service; [] ABC Legal Messenger Service, a true and correct copy of the document to which this declaration is attached, to: David L. Donnan, addressed as Washington Appellate Project at 1511 Third Avenue, Suite 701, Seattle WA 98101. I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Executed at Mount Vernon, Washington this 19th day of September, 2011.


KAREN R. WALLACE, DECLARANT

Katimie

SKAGIT COUNTY SHERIFF'S OFFICE
VOLUNTARY WITNESS STATEMENT FORM 09-1-00845-0
600 South Third St, Mount Vernon, WA 98273 360 336-9450 fax 360 336-9455

Name Kim Ammons Address Po Box 770 Alhid, Id 83801 Case Number 09-12172

I am 41 years old. My date of birth is 3-15-68 My phone number is 808 683-0028 I have finished the 12th grade in school. I can read, write and understand the English language. Yes No

1. Pool Table (maroon with "Jack Morfet custom plate with leather pockets) official size

2. leather F \$1,800.00

3. Bedroom set \$1,000.00

4. china hutch full of antique china, ~~antique~~ \$1,800.00

5. John Deere lawn mower \$2,000

6. Misc. fishing gear

7. wooden hope chest \$1,000.00

8. Big screen TV: DCA (1,000.00)

9. Secretary desk (Antique) (1,000.00)

10. Washer & Dryer (500.00)

11.

12.

13.

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17.

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20.

21.

This copy was prepared by the Skagit County Sheriff on 10/27/10 for the official use of the Prosecuting Attorney for the purpose of prosecution and may not be released to any other individual and/or agency or used for any other purpose than stated without the consent of the Skagit County Sheriff's Office.

Deputy

The above information is true to the best of my knowledge and was freely given. No threats or promises have been made against or to me in order to get me to make this statement. I certify under the penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signature Kim Ammons Location Signed 33081 Pt 20 Selkoe Walk

Date and Time _____ Witness _____

DO NOT DISCLOSE

Page _____ of _____

2/2009

Appendix pg. 1 CP (sub no. 39 state witness sheriff, 10/27/10 designation pending.)

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SKAGIT COUNTY PROSECUTING ATTORNEY'S OFFICE

Courthouse Annex 605 South 3rd Street, Mount Vernon, WA 98273-3867
Telephone (360) 336-9460 Fax (360) 336-9347

VICTIM LOSS STATEMENT

Restitution is financial reimbursement made by the offender to the victim and is limited to easily determined damages for loss of property. Restitution does not include reimbursement for damages for mental anguish, pain or suffering or other intangible losses. (RCW 13.40.020) Please return this form within fifteen (15) days. If we do not hear from you we will assume there is no restitution.

Victim's Name and Address:
JACK WAYNE MOFFET
96 S. SANCTUARY LOOP
HERON, MT 59844

Defendant's Name: Cause number
JEREMY LEE ANDERSON 09-1-00844-1

Co-Defendant: SHAUN CLINTON WALLEN
09-1-00845-0

Investigating Agency, Case Number(s): Skagit County Sheriff, 09-12132

Please answer each question as completely as possible. We understand that you may have given this information to law enforcement, insurance companies, etc., but we need to confirm your loss for restitution purposes. Provide the most accurate and complete information available to you at this time. If this information changes (items are recovered and returned or estimates are higher or lower) please contact this office to make the necessary changes. It is important that we have accurate information regarding your loss to provide to the Court.

1. **TOTAL AMOUNT OF DAMAGE OR LOSS:** List all items missing or damaged and the value or repair of each (attach additional sheets if necessary). List only those items not recovered.

3

Item	Value/Repair	Item	Value/Repair

Total Amount of Loss: \$ _____

2. **INCLUDE DOCUMENTATION:** Please include copies of receipts, bill, estimates, insurance itemizations, etc. that you have concerning the value of this loss.

3. **INSURANCE COVERAGE:** Was this loss submitted to your insurance? YES NO *If yes, please complete the following:*

NAME OF INSURANCE COMPANY: None
ADDRESS: _____ PHONE: _____
AGENT: _____ CLAIM/POLICY NO. _____
DEDUCTIBLE: _____ TOTAL PAID BY INSURANCE: _____

4. **TOTALS**
TOTAL LOSS OR DAMAGE \$ 23,384.99
LESS INSURANCE PAYMENT (IF ANY) \$ _____
TOTAL OUT OF POCKET EXPENSE FOR YOU \$ _____

5. **WAIVER OF RESTITUTION:** If you are not requesting restitution, please mark the appropriate box:
 Restitution has already been made to my satisfaction No restitution is requested

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct:

Jason S. Moffet 7/16/10 Idaho MT
Signature Date City State

ATTN: KAREN Himes
 CASE # 09 1 008450

COSTCO 5 piece brown leather recliner set \$2,199.99

Big screen RCA TV 52 Inch \$2000.00

Bedroom set 5 piece walnut queen bed head board w/ lights mirror shelves, 7 foot dresser w/mirror, 2 dresser drawers and matching tables \$3000.00 memerx bed foam \$135.00

2 lamps milk glass & wood \$250.00

John deer riding tractor 25 hoarse used 3 months \$3,300.00

Maytag washer & dryer almond extra large \$1100.00

Living room 2 floral sofas \$800.00, 2 solid oak drop leaf coffee tables & 2 matching end tables \$600.00

2 table lamps \$100.00

Dining room 5 foot oak china hutch, leaded glass \$900.00

Antique glass ware in above hutch \$700.00, serving dishes in hutch \$500.00

Silverware platters bowls tea and coffee sets All antique \$4000.00

Antique rocking chair 149 years old \$300.00, oak sec. desk \$800.00 large oak leaf table \$400.00

Walnut crib table \$250.00, 2 train sets antiques Lionel 1 1925 as per e bay \$ 4000.00 to 6000.00

1 Lionel small gauge train and complete Bavarian village \$2,200.00

6 Fenniwick Fishing poles and reels sets 2 fresh water 4 salt water \$1000.00 Misc. tackle \$600.00 2 scotty down riggers \$400.00

2 sewing machines 1 Kenmore 1 brother \$200.00

Dining room chandelier \$ 400.00 2 hanging lights \$300.00

MR coffee new \$45.00, espresso machine \$75.00, harvest dehydrator \$80.00. In box new Jenn air stove tops \$250.00

Antique large black granete clock \$200.00 Crafting and sewing tools and supplies \$250.00

Custom made Pool table was returned in pieces cost to repair \$1150.00

Lane hope chest maple 53 years old my Mom bought for me when I was 15 \$850.00

Antique pump organ black made in 1920 \$1200.00 Bench \$150.00

Antique wood butter churn \$150.00

Plus many glass, wood and Iron wood nick naks \$150.00

	0
0.00	+
2,100.99	+
2,000.00	+
3,000.00	+
135.00	+
250.00	+
3,300.00	+
1,100.00	+
800.00	+
600.00	+
100.00	+
900.00	+
700.00	+
500.00	+
4,500.00	+
300.00	+
800.00	+
40.00	+
250.00	+
4,000.00	+
2,200.00	+
1,200.00	+
600.00	+
400.00	+
200.00	+
450.00	+
300.00	+
45.00	+
75.00	+
80.00	+
250.00	+
200.00	+
250.00	+
1,150.00	+
850.00	+
1,200.00	+
150.00	+
150.00	+
150.00	+
34,264.99	G+