

68237-7

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NO. 68237-7-I

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

STATE OF WASHINGTON

Respondent

v.

ALICEA D. MARTINI,

Appellant

BRIEF OF RESPONDENT

MARK K. ROE
Prosecuting Attorney

KATHLEEN WEBBER
Deputy Prosecuting Attorney
Attorney for Respondent

Snohomish County Prosecutor's Office
3000 Rockefeller Avenue, M/S #504
Everett, Washington 98201
Telephone: (425) 388-3333

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COURT OF APPEALS DIV 1
STATE OF WASHINGTON

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I. ISSUES

1. Was there sufficient reliable evidence presented at a restitution hearing to establish the amount of the victims' loss by a preponderance of evidence?

II. STATEMENT OF THE CASE

On May 17, 2009 Andrew Crawford, a security officer for Macy's, saw the defendant, Alicea Martini, and a co-defendant, Crystal D. Thomas, selecting clothing from the young men's department and concealing that clothing in a purse and in another article of clothing. They were then seen going past the registers and leaving the mall without making any attempt to pay for the clothing. Once outside the defendant and Ms. Thomas were contacted by another employee, Brandon Smith. Although the two women attempted to flee, they were eventually subdued and brought back to the security office. 1 CP 70-71.

The security officers found the defendant and Ms. Thomas had clothing items on their persons which had been stolen from Macy's and from Hollister. A security officer from Hollister responded and confirmed the two women had been in the store earlier, and had not bought anything. He further confirmed several

items found on them were from Hollister. The clothing had tears in it where the security tags had been forcibly removed. 1 CP 71.

The women admitted that they had stolen the clothing. The value of the items stolen from Hollister was \$394.50 and the value of the items stolen from Macy's was \$251.99. 1 CP 71

The defendant was charged with one count of Second Degree Organized Retail Theft. The Information alleged that Macy's was the victim of the offense. 1 CP 73-74.

The defendant pled guilty to the charge on March 17, 2011. 1 CP 55-69. In her statement of defendant on plea of guilty the defendant said "On May 17, 2009 in Snohomish County, Washington, I did wrongfully obtain more than \$250 in Merchandise From Macy's (a mercantile establishment) with the intent to deprive. 1 CP 61. The defendant agreed to pay restitution to Macy's and to Hollister as part of the plea agreement. 1 CP 65-66.

On August 1, 2011 the defendant was sentenced to 12 months plus one day on a Drug Offender Sentencing Alternative to be served concurrent with another charge. 1 CP 45. The court ordered the defendant pay legal financial obligations including restitution. 1 CP 47.

A restitution hearing was held on December 20, 2011. On that date the evidence was presented which consisted of a police report and an affidavit from Diana Kinnebrew, the legal assistant with the Prosecutor's Office responsible for obtaining restitution information. The Police report included an affidavit from the arresting officer, an affidavit from Andrew Crawford, and an affidavit from a security officer for Hollister named Matthew Simpson, 1 CP 10, 31-37.

The affidavit from the investigating officer stated both Mr. Crawford and Mr. Simpson identified clothing items that were found on the defendant and her co-defendant's person. The items had been damaged when security tags had been removed. The total amount of items stolen from the two stores was \$646.49. 1 CP 35. The affidavit from Mr. Simpson confirmed that the clothing that had been stolen from Hollister had rips in it where the security tags had been removed. 1 CP 37. The affidavit from Ms. Kinnebrew stated that she spoke with Mr. Simpson and confirmed that the items taken from Hollister were a total loss. 1 CP 10.

The defendant admitted that she had agreed the court could consider the affidavit of probable cause and the statement of defendant on plea of guilty when determining restitution. RP 13, 15;

1 CP 40. She argued that since she did not stipulate that the court could consider the police reports the court could not consider them at the hearing. RP 13. Further she challenged Ms. Kinnebrew's affidavit on the basis that there was no indication that Mr. Simpson made his statement to her under oath. RP 14.

The court determined the loss to Hollister was \$394.50 based on Mr. Simpson's affidavit, Ms. Kinnebrew's affidavit, the police report, and the affidavit of probable cause. RP 17-18. The court relied on the defendant's statement that she wrongfully obtained more than \$250 from Macy's to conclude that the claimed amount of loss from Macy's of \$251.99 had been established. RP 18. The court then entered an order establish a total amount of restitution in the amount of \$646.49. 1 CP 5

III. ARGUMENT

A. THE COURT'S RESTITUTION ORDER WAS SUPPORTED BY THE RELIABLE EVIDENCE.

The Court is required to order restitution when an offender is convicted of an offense which results in injury to any person or damage or loss of property. RCW 9.94A.753(5). Restitution shall also be ordered when the offender pleads guilty to fewer offenses and agrees with the prosecutor's recommendation that the offender be required to pay restitution to a victim of an offense which was

not prosecuted pursuant to a plea agreement. Id. Restitution shall be based on easily ascertainable damages for loss of property. RCW 9.94A.753(3).

The State is required to establish the amount of restitution by a preponderance of the evidence. State v. Dennis, 101 Wn. App. 223, 226, 6 P.3d 1173 (2000). The rules of evidence do not apply at a restitution hearing. ER 1101(c)(3), State v. Kisor, 68 Wn. App. 610, 620, 840 P.2d 891 (1992), review denied, 121 Wn.2d 1023, 854 P.2d 1085 (1993). Due process requires that the defendant have an opportunity to refute the evidence presented, and the evidence must be reasonably reliable. State v. Pollard, 66 Wn App. 779, 785, 834 P.2d 51, review denied, 120 Wn.2d 1015, 844 P.2d 436 (1992). The defendant has an opportunity to refute the evidence relied on by the State when the State places the documents it relies on in evidence at the hearing. State v. Bunner, 86 Wn. App. 158, 160-61, 936 P.2d 419 (1997). "When the evidence is comprised of hearsay statements, the degree of corroboration required by due process is not proof of the truth of the hearsay statements 'beyond a reasonable doubt,' but rather, proof which gives the defendant a sufficient basis for rebuttal." Kisor, 68 Wn. App. at 620.

The amount of loss incurred by a crime victim need not be established with specific accuracy. State v. Kinneman, 155 Wn.2d 272, 285, 119 P.3d 350 (2005). The evidence supporting a restitution order is sufficient if it provides a reasonable basis for estimating the loss and does not subject the fact finder to mere speculation or conjecture. Id. The restitution order must be supported by “substantial credible evidence.” State v. Griffith, 164 Wn.2d 960, 965, 195 P.3d 506 (2008). The trial court’s determination in a restitution hearing is reviewed for an abuse of discretion. State v. Enstone, 137 Wn.2d 675, 679, 974 P.2d 828 (1999). The trial court abuses its discretion when its decision is manifestly unreasonable or is exercised on untenable grounds or for untenable reasons. Id. at 679-80.

An affidavit that provides no more than a “rough estimate” of the loss incurred as a result of the defendant’s criminal act is insufficient to support an award of restitution in that amount. Kisor, 68 Wn. App. at 620-21. Similarly, hearsay evidence that is unsupported by other evidence or the defendant’s admissions will not support a restitution award. Griffith, 164 Wn.2d at 966-67.

Here there was more than a rough estimate of loss by both Macy’s and Hollister. All of the evidence presented and the

defendant's statement of defendant on plea of guilty supported the court's determination of the amount of loss incurred by each store.

Affidavits from both the police officer and the security officer for Hollister stated the clothing that had been shoplifted had been damaged when the security tags were removed. 1 CP 35, 37. The police report also listed the retail value of each item recovered from the defendant and the co-defendant. 1 CP 33-34. These facts were listed in the affidavit of probable cause, which the defendant agreed the court could rely on for sentencing purposes. Both stores clearly had some loss from the defendant's theft because the clothes were no longer in a marketable condition due to the damage caused to them during the theft. It was reasonable to believe that the loss to the stores was the retail value of the items stolen as a result of that damage. That belief was supported at least as to the Hollister store's loss by the statement from Ms. Kinnebrew regarding what Mr. Simpson told her. And as the trial court noted, the defendant had admitted to taking at least \$250.00 from Macy's. RP 18. The court did not have to resort to speculation to conclude that the stores' loss was equal to the retail value.

The defendant challenges the court's reliance on Ms. Kinnebrew's affidavit because the court could not rely on "hearsay within hearsay." BOA at 5. She relies on Pollard to support her position, stating that it is indistinguishable from her case. Id. at 6. Pollard did not say that the court could not rely on hearsay, or even double hearsay. Rather, under the facts of that case, the hearsay that was presented did not support the court's determination regarding the amount of restitution owed.

In Pollard the defendant was charged with six counts of unlawful issuance of bank check (UIBC). The defendant pled guilty to count 1 and agreed to pay restitution to all counts after the State dismissed counts 2 through 5. The State supported a request for restitution in the amounts of the checks drawn in each count by the unsworn statement of a victim's assistance unit representative that because the defendant deposited the checks into his account and then withdrew the cash, its report reflected the actual amount of loss. The trial court then ordered restitution in the amounts listed in the police report. Pollard, 66 Wn. App. at 782.

This Court found the order was unsupported by sufficient evidence. First, the Information did not state a specific amount of loss. Thus the defendant's guilty plea to the charge did not admit to

a particular amount of loss. Further since the defendant disputed the amount, even if the affidavit of probable cause had included the actual loss the court could not consider it. The only other information supplied to support the victim assistance employee's statements was a police report that recorded what bank personnel at the respective institutions stated the bank had lost. That did not establish the banks' losses because under relevant statutes regulating commercial paper and bank deposits and collections, the instrument was not necessarily paid by the drawee(s) upon presentment. Id at 786.

The case here presents significantly different facts from those in Pollard. The defendant here agreed to let the court consider the affidavit of probable cause for sentencing purposes. 1 CP 23; RP 13. That affidavit set forth the amount of loss to each store. Unlike Pollard the calculation of loss to each store is fairly straightforward. The items stolen were offered for sale for a particular price. The items were damaged during the theft. Ms. Kinnebrew's report that Mr. Simpson stated the good could not be sold is corroborated by evidence that the items had been damaged. It was reasonable for the court to conclude the stores could not get the same price for damaged goods as undamaged goods. Finally,

unlike the statement of defendant on plea of guilty in Pollard the defendant here stated she “stole more than \$250 in Merchandise from Macy’s.” The information the trial court was permitted to rely was not a “rough estimate” of loss, but a specific amount. That amount was supported by evidence which the court could reasonably believe was credible.

IV. CONCLUSION

The evidence presented at the restitution hearing was supported by substantial credible evidence. It was sufficient to afford the defendant a sufficient basis to rebut it. Her due process rights were therefore not violated when the court ordered she pay restitution to the two stores she stole from.

Respectfully submitted on July 25, 2012.

MARK K. ROE
Snohomish County Prosecuting Attorney

By: 
KATHLEEN WEBBER WSBA #16040
Deputy Prosecuting Attorney
Attorney for Respondent