

68466-3

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NO. 68466-3-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

LISA MARIE O'NEILL,

Appellant.

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STATE OF WASHINGTON
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JAY WHITE

BRIEF OF RESPONDENT

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A. ISSUE PRESENTED

1. Whether the trial court properly exercised its discretion in ordering Defendant Lisa O'Neill to pay restitution to the victim, Leonard Swenson, for his property losses associated with each of the thirteen counts of theft she was found guilty of committing without any offset for disputed expenses claimed by the defendant.

B. STATEMENT OF THE CASE

The defendant contends that the trial court ordered restitution that did not correspond to the crimes of conviction because the court did not reduce the restitution for disputed expenses she claimed were owed to her by the victim. The defendant is incorrect. The defendant having been found guilty of multiple counts of theft in the first degree by a jury and the court having heard all of the trial testimony found that restitution in the amount of \$55,427.10 was proved by a preponderance of the evidence and it imposed that amount as compensation to the victim for his losses as a result of the thefts. The trial court considered but properly denied the defendant's request for an offsetting award of damages for disputed expenses. The restitution statute provides

only for the awarding of damages to victims of crime, not to defendants, particularly when such expenses were not issues litigated at trial. Moreover, the language of the restitution statute clearly reserves the resolution of collateral issues and facts such as the validity of the defendant's claimed expenses, which were not relevant to the crime of conviction, to other civil proceedings that afford civil remedies to any party. Accordingly, the trial court's order of restitution in this case was proper.

1. PROCEDURAL FACTS.

The defendant, Lisa Marie O'Neill, was charged with fourteen counts of theft in the first degree and one count of assault in the fourth degree by the King County Prosecutor's Office. CP 101-10. The first thirteen counts of theft in the first degree charged individual discrete takings. Id. The State charged the fourteenth count of theft in the first degree as an overarching count, encompassing the incidents charged individually in counts I-XIII plus some additional incidents of theft. Id. Each theft charge also alleged that the defendant knew or should have known that the victim was particularly vulnerable or incapable of resistance. Id.

The case proceeded to a jury trial before King County Superior Court Judge Jay White in November 2011. 2RP 2.¹ On February 2, 2012, the jury found the defendant guilty of all fourteen counts of theft in the first degree and not guilty of the count of assault in the fourth degree. CP 203-18. The jury also answered “yes” as to the sentencing aggravator alleged with each count of theft in the first degree on the question of whether the defendant knew or should have known that the victim was particularly vulnerable. CP 189-202.

The sentencing hearing on this matter occurred on March 9, 2012. 18RP 2-66. At the sentencing hearing, the State moved to vacate the conviction on count XIV based on double jeopardy and the trial court granted the State’s motion. CP 369. The trial court sentenced the defendant on her remaining convictions for counts I-XIII to an exceptional sentence of 62 months in prison. CP 324-34. As part of the defendant’s sentence, the trial court ordered the defendant to pay restitution for her convictions on

¹ The verbatim report of proceedings consists of eighteen volumes: 1RP (8/26/11); 2RP (11/23/11); 3RP (11/29/11); 4RP (1/3/12); 5RP (1/4/12); 6RP (1/5/12); 7RP (1/10/12); 8RP (1/18/12); 9RP (1/17/12); 10RP (1/23/12); 11RP (1/24/12); 12RP (1/25/12); 13RP (1/26/12); 14RP (1/30/12); 15RP (1/31/12); 16RP (1/31/12 closing arguments); 17RP (2/1/12); and 18RP (3/9/12).

counts I-XIII in the amount of \$55,427.10. Id. On March 9, 2011, the defendant filed a notice of appeal. CP 336-37.

2. SUBSTANTIVE FACTS.

The defendant, Lisa Marie O'Neill, befriended 69 year-old Leonard Swenson following the death of his wife of nearly thirty-four years. 9RP 37, 46. Swenson, who suffered some sort of cognitive impairment since his youth, met the defendant while depressed after his wife's death. 8RP 35, 38, 39. Shortly after meeting the defendant, she convinced Swenson to move into her home and slowly she began asking Swenson for money and taking control of his finances. 8RP 32; 9RP 61, 64, 67, 71, 73. Swenson trusted the defendant and thought that one day they might marry. 9RP 54-56. In January 2007, while living with the defendant, Swenson suffered a stroke causing increased cognitive and physical impairments. 8RP 38, 53-55, 71, 127; 9RP 36. After this, Swenson became increasingly dependent on defendant O'Neill to assist him with his needs. 9RP 80, 83. Swenson granted defendant O'Neill access to his finances because of her assurances that she would care for him and help him with his finances. 9RP 71-77, 80. However, over the course of two years,

defendant O'Neill repeatedly betrayed the trust Swenson placed in her by using his assets and financial accounts for her own benefit often without his knowledge. 11RP 206-07. Ultimately, the defendant drained Swenson of virtually every financial resource he possessed. 11RP 204-06.

Numerous financial documents and summaries of them were admitted at trial evidencing the thefts. Exh. 84. The financial investigator for the State who reviewed the financial documents on the case, Rebecca Tyrrell, testified as to the bank transactions underlying each of the fourteen counts of theft charged.

12RP 51-89. Specifically, the investigator summarized when the financial transactions occurred, how they occurred, and the amount of each of the charged transactions. 12RP 51-89. Tyrrell testified that counts I-XIII were based on separate and discrete transactions that occurred between October 2006 through June 2008. Id. Tyrrell testified that count I was based on a cashier's check written on Swenson's account to pay off O'Neill's truck in the amount of \$23,910.04. 12RP 51-54. Tyrrell testified that count II was based on the deposit of Swenson's social security check into a joint account he held with the defendant and O'Neill's nearly immediate online transfer of \$1,700.00 from that account into her own

personal bank account. 12RP 55-57. Count III, Tyrrell testified, also involved the deposit of Swenson's social security check into the joint account and the online transfer of \$1,625.00 by O'Neill into her separate bank account. 12RP 57-59. Tyrrell summarized count IV as involving the wire deposit of money from a title company to Swenson into the joint account and O'Neill's subsequent transfer of \$4,100.00 to her own separate account. 12RP 59-62. Counts V-VII each were summarized by Tyrrell as individual deposits of Swenson's social security checks into the joint account and O'Neill's online transfer of \$1,600.00, \$1,644.00, and \$1,644.06 into her own separate personal account. 12RP 62-66. Tyrrell testified that count VIII and count IX involved the deposit by Swenson of an escrow check written to him into the joint account and O'Neill's online transfer of \$4,900.00 and \$2,620.00 into her own separate account. 12RP 67-70. Tyrrell testified that counts X-XII again involved the deposit by Swenson of social security checks into the joint account and O'Neill's online transfer of \$1,644.00, \$1,640.00, and \$1,600.00 into her separate personal account. 12RP 70-72. Count XIII was summarized by Tyrrell as involving Swenson's deposit of a check written to him from a law firm into the joint account and O'Neill's online transfer of \$6,800.00

from that check to her separate personal account. 12RP 72-74. The total amount of the losses for these thirteen counts of theft amounted to \$55,427.10. Tyrrell also testified regarding the facts underlying count XIV, which included each of the previous thefts alleged in counts I-XIII and an additional \$34,313.94 from six separate additional takings. 12RP 74-89. Finally, Tyrrell testified about a number of smaller transactions that involved the deposit of Swenson's unemployment checks into the joint bank account and the subsequent online transfer of similar amounts totaling \$6,500.00 by O'Neill into her own separate bank account. 12RP 89.

At the sentencing hearing in this case, the State requested restitution only in the amount of \$55,427.10 for the victim's losses attributable to the defendant's theft convictions on counts I-XIII. 18RP 24. While the total financial loss to Swenson for all fourteen counts of theft in the first degree was \$89,741.04 as testified to by Ms. Tyrrell, because the court dismissed count XIV, the State reduced its restitution request to \$55,427.10, which was the loss solely associated with the thefts charged in counts I-XIII. CP 406-38 and CP 439-42.

The defendant objected to the State's requested restitution of \$55,427.10, asking the trial court to reduce the victim's losses by \$21,995.66 for various household expenses the defendant claimed were owed to her by the victim. CP 284-86; 18RP 39. The State objected to any offset in favor of the defendant for disputed expenses because the validity of the expenses had not been litigated at trial, because the amount of loss to the victim for the defendant's crimes of conviction was proven by a preponderance of the evidence based on the testimony of Rebecca Tyrrell, and because the restitution statute did not contemplate such an award to a convicted defendant. CP 406-38, 439-42; 18RP 41.

After hearing the arguments of counsel, the trial court ordered restitution in the amount of \$55,427.10. 19RP 54. The court specifically stated that it "readily finds by the preponderance of the evidence that these dollar amounts set forth in counts I-XIII have been established to the court's satisfaction." 18RP 53. The court noted that the "State's financial analysis was particularly persuasive and detailed in explaining where all those numbers came from." 18RP 53. The court acknowledged that while the jury was only asked to determine whether each count involved more than fifteen hundred dollars, the court found that "in terms of the

dollar amounts set forth here, those appear to be subject to some math error, but appear to be supported, and the court could readily find by a preponderance of the evidence that is the appropriate measure of the restitution” 19RP 53-54. In fact, the court continued by saying that “if anything, it would appear that there is some restraint by the State here because – and of course, we know one count has been vacated. That would not – arguably would not – support restitution, but there certainly was evidence at trial that there was another \$34,000 or so taken, and there may have been other amounts. So it appears to be a conservative amount, so the court will order it.” 19RP 53-54.

C. ARGUMENT

- 1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ORDERING RESTITUTION IN THE AMOUNTS PROVEN AT TRIAL BY A PREPONDERANCE OF THE EVIDENCE WITHOUT ANY OFFSET FOR DISPUTED EXPENSES CLAIMED BY THE DEFENDANT.**

The defendant claims that the trial court erred in ordering O’Neill to pay restitution that did correspond to the crimes of conviction in that the restitution amount was not reduced by disputed household expenses the defendant claimed were owed to

her by the victim. Br. App. 1. However, O'Neill's claim is not supported by the plain language of the Sentencing Reform Act (SRA), the restitution statute, or the facts of this case.

The imposition of restitution will be upheld on appeal absent an abuse of discretion. *State v. Enstone*, 137 Wn.2d 675, 679-80, 974 P.2d 828 (1999). An abuse of discretion occurs only when a trial court exercises its discretion in a manifestly unreasonable manner or on untenable grounds or for untenable reasons. *Enstone*, 137 Wn.2d at 679-80, 974 P.2d 828.

In Washington, the authority to order restitution is purely statutory. *State v. Tobin*, 161 Wn.2d 517, 524, 166 P.3d 1167 (2007); *State v. Gonzalez*, 168 Wn.2d 256, 261, 226 P.3d 131 (2010), *cert. denied*, 131 S. Ct. 318, 2010 WL 2898168 (October 4, 2010); *State v. Hennings*, 129 Wn.2d 512, 519, 919 P.2d 580 (1996). The Washington Supreme Court has held that the language of the state's restitution statutes evinces a legislative intent to grant broad powers to the trial court to order restitution. *State v. Davison*, 116 Wn.2d 917, 922, 809 P.2d 1374 (1991); *State v. Smith*, 119 Wn.2d 385, 389, 831 P.2d 1082 (1992). Washington's restitution statutes are "intended to require the defendant to face the consequences of his or her criminal conduct."

State v. Tobin, 161 Wn.2d 517, 524, 166 P.3d 1167 (2007) (citing *State v. Davison*, 116 Wn.2d 917, 922, 809 P.2d 1374 (1991)).

The relevant statutes governing the imposition of restitution in criminal cases in Washington are RCW 9.94A.030, which defines the relevant terms used in the SRA and the restitution statute, and RCW 9.94A.753, which provides the guidelines for imposition of restitution. Specifically, the SRA defines restitution as “a specific sum of money ordered by the sentencing court to be paid by the offender . . . as payment of damages.” RCW 9.94A.030(42). The statute also defines an “offender” as a person who has committed a felony established by state law and the victim as “any person who has sustained emotional, psychological, physical, or financial injury to person or property as a direct result of the crime charged.” RCW 9.94A.030(34), (53).

A trial court’s imposition of restitution is guided by RCW 9.94A.753. Under RCW 9.94A.753(5), a court shall order restitution whenever the offender is convicted of an offense which results in loss of property to a victim. *State v. Res. V. Luis Cosgaya-Alvarez*, No. 66978-8-I, 2013 WL _____ (Jan. 14, 2013). Specifically, the statute reads in relevant part:

(5) 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 or as provided in subsection (6) of this section unless extraordinary circumstances exist which make restitution inappropriate in the court's judgment and the court sets forth such circumstances in the record.

RCW 9.94A.753(5). Subsection (3) of the statute reads in pertinent part:

(3) Except as provided in subsection (6) of this section, restitution 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. . . . 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(3).

Although RCW 9.94A.753(3) precludes restitution for speculative and intangible losses, and requires that restitution be based on "easily ascertainable damages," the amount of harm or loss need not be established with specific accuracy. *State v. Kinneman*, 155 Wn.2d 272, 285, 119 P.3d 350 (2005); *State v. Hughes*, 154 Wn.2d 118, 154, 110 P.3d 192 (2005). "Evidence supporting restitution is sufficient if it affords a reasonable basis for estimating loss and does not subject the trier of fact to mere speculation or conjecture." *Kinneman*, 155 Wn.2d at 285 (quoting

Hughes, 154 Wn.2d at 154, and *State v. Fleming*, 75 Wn. App. 270, 274-75, 877 P.2d 243 (1994)). If a defendant disputes the restitution amount, the State must prove the damages by a preponderance of the evidence. *State v. Griffith*, 164 Wn.2d 960, 965, 195 P.3d 506 (2008); *Kinneman*, 155 Wn.2d at 285. Restitution is allowed only for losses to the victim that are “causally connected” to the crimes charged. *State v. Tobin*, 161 Wn.2d at 524; *Kinneman*, 155 Wn.2d at 286. Losses are causally connected if “but for” the crime(s) of which the defendant has been convicted, the victim would not have incurred the loss. *Griffith*, 164 Wn.2d at 966; *Tobin*, 161 Wn.2d at 526-27. The statute, by its terms, impliedly limits restitution to victims. *State v. Ewing*, 102 Wn. App. 349, 352, 7 P.3d 835 (2000) (citing *State v. Martinez*, 78 Wn. App. 870, 882, 899 P.2d 1302 (1995)).

The SRA and restitution statutes are clear as applied to the facts of this case. The jury’s verdicts finding O’Neill guilty of thirteen counts of felony theft in the first degree for the unauthorized taking of Swenson’s property make defendant O’Neill the “offender” and the party against whom restitution shall be assessed by the court to compensate the victim for his loss of property resulting from the crimes. The plain language of the SRA

and restitution statutes limit restitution, by their terms, to victims and do not contain any provision allowing the trial court to award an offender damages or to reduce the amount of loss a victim has suffered based on an offender's disputed claims for money. The restitution statute is intended to redress a victim's loss as a result of a defendant's criminal conduct, not to be a forum for the defendant to seek redress for her own financial claims against the victim.

Under the SRA and restitution statutes, the sole questions before the trial court in determining restitution here were whether the victim's claimed loss resulted from the crime charged, if it is the kind of loss for which restitution is authorized and whether the loss was proven by a preponderance of the evidence. All of these questions were considered and resolved in the affirmative by the court. As such, the trial court's order of restitution in the amount of \$55,427.10, which was proven by a preponderance of the evidence at trial as the amount of property lost by Swenson as a direct result of the defendant's convictions in counts I-XIII for theft, was proper and not an abuse of discretion.

Further, the language of the restitution statute clearly reserves the resolution of factual disputes that are collateral to and unresolved by the criminal matter to other civil proceedings that afford all parties civil remedies for alleged wrongdoing. RCW 9.94A.753(9) specifically provides that the restitution section “does not limit civil remedies or defenses available to the victim, survivors of the victim, or offender Here, the defendant’s claims for unpaid household expenses were strongly disputed by the victim and, because they were not relevant to the facts and issues before the court and jury in the criminal case, they remained unresolved at the conclusion of the trial. Accordingly, the trial court properly denied the defendant’s request to resolve such collateral, unlitigated issues in the context of its restitution order. Rather, as provided in the restitution statute, defendant’s claims were appropriately left for resolution through initiation of a separate civil action should she wish to do so.

D. CONCLUSION

For all of the foregoing reasons, the State asks this court to affirm the trial court's order of restitution in this matter.

DATED this 15th day of January, 2013.

Respectfully submitted,

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