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NO. 70108-8-I

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COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

VICTOR LUIS FERNANDEZ,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE LAURA GENE MIDDAUGH

BRIEF OF RESPONDENT

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A. ISSUE PRESENTED

The State must prove the restitution amount only by a preponderance of the evidence. While restitution must be based on easily ascertainable damages, the amount of loss need not be established with specific accuracy or mathematical certainty. Evidence is sufficient if it affords a reasonable basis for estimating loss. Here, the victim provided information under penalty of perjury that accounted for his losses resulting from the defendant's crime. The defendant presented no evidence to contradict the victim's information or show that the victim's declaration was unreliable. Did the sentencing court properly exercise its discretion by ordering a restitution amount based on the victim's sworn statement and eBay comparable marketplace pricing?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

Victor Luis Fernandez was charged with two counts of theft of motor vehicle. CP 1-10. Pursuant to plea negotiations, he pled guilty as charged. CP 39-45. In the felony plea agreement signed by Fernandez and his attorney, he stipulated to real and material facts as set forth in the probable cause certification and the

prosecutor's summary. CP 92-106. These real and material facts are set forth in the "Facts of the Crime" section below. The plea agreement stated that "pursuant to RCW 9.94A.753, the defendant shall pay restitution in full to the victim(s) on charged counts and agrees to pay restitution in the specific amount of \$ TBD for all losses to stolen cars under this cause number (2000 Civic and 1998 Integra)." CP 92-106. The State agreed to recommend Fernandez serve only four months of confinement, which was the low end of his standard sentence range. CP 92-106.

Fernandez received a standard sentence range of four months of confinement and was ordered to pay restitution in an amount to be determined at a later hearing. CP 39-45. Fernandez waived his appearance at the restitution hearing. CP 39-45.

2. FACTS OF THE CRIME.

Sometime between December 18, 2011 and December 19, 2011, Fernandez and others stole Bettejane Hargrove's Acura Integra. CP 1-10. Hargrove's Integra was recovered on December 22, 2011, but was completely stripped of all parts including the wheels, engine, tail lights and interior. CP 1-10. Micah Spacek also fell victim to Fernandez and others when they stole Spacek's

Honda Civic sometime between December 26, 2011 and December 27, 2011. CP 1-10. When officers recovered Spacek's vehicle, it, too, had been stripped. CP 1-10.

On December 27, 2011, officers responded to an anonymous complaint that a stolen Honda was being stripped at a nearby house. CP 1-10. When officers arrived, they observed three vehicles, including a Honda Civic, in the driveway of a house. CP 1-10. Officers ran the Civic's license plate number and discovered it was Spacek's reported stolen vehicle. CP 1-10. Officers observed two engines, a door, transmission parts and tools on the ground next to the vehicles. CP 1-10. Upon closer examination, Spacek's Honda Civic did not have an engine or suspension, among other missing parts. CP 1-10.

Officers contacted the home owner, who gave officers permission to enter the home and search for suspects. CP 1-10. While in the home, officers observed a large number of vehicle parts, car seats, a front dash and center console, and a turbo engine charger. CP 1-10. Additionally, another resident of the home informed officers that friends of her sister's boyfriend, Justin Miramontez, a co-defendant of Fernandez, parked the Honda Civic in the driveway. CP 1-10.

Miramontez returned to the home and officers Mirandized him. CP 1-10. Miramontez said that Fernandez brought the Honda Civic to the house the previous evening "to work on it." CP 1-10. Miramontez also admitted he stole Hargrove's Acura Integra with Fernandez and another male and stripped it. CP 1-10. He further stated that he and Fernandez placed the engine from the stolen Acura Integra into his vehicle and admitted that he helped remove the engine from Spacek's Honda Civic, as well. CP 1-10.

After speaking with Miramontez, officers called Fernandez to come to the police station, which he did. CP 1-10. Post-Miranda, Fernandez admitted he prowled, stole and stripped a significant number of vehicles in an eight-month period. CP 1-10. Fernandez believed he prowled between 100 and 200 vehicles and stole between 20 and 30 vehicles during this time period. CP 1-10. Fernandez admitted he actively participated in stealing and stripping Hargrove's vehicle with Miramontez and another male. CP 1-10. Fernandez also admitted to stealing Spacek's vehicle and stripping it by removing the engine, suspension, sway bar, and two wheels and tires. CP 1-10.

Fernandez's direct role and active participation in the commission of these crimes was confirmed by others, who admitted

that Fernandez was directly involved in stealing and stripping Hargrove's Acura Integra and Spacek's Honda Civic. CP 1-10. Of note, co-defendant Victor Prieto admitted Fernandez taught him how to steal vehicles and that he was planning to steal a vehicle with Fernandez and others because Prieto needed an engine. CP 1-10. Prieto said that he wanted the Honda Civic's engine because Spacek's vehicle "was fast." CP 1-10. Prieto also indicated that the group planned to sell the parts, but the plan was interrupted when police arrived. CP 1-10.

3. FACTS REGARDING RESTITUTION AMOUNT.

At the restitution hearing, Fernandez's attorney did not dispute that Fernandez should pay restitution to Bettejane Hargrove and State Farm Insurance. RP 3. However, despite agreeing to pay restitution in full for *all* losses, Fernandez's attorney objected to paying restitution to the owner of the Honda Civic, Micah Spacek. RP 3. Fernandez's attorney believed there was insufficient documentation to support paying Spacek for the aftermarket parts that were on the car at the time of the theft. RP 3. The court reviewed Spacek's sworn statement signed under penalty of perjury and comparable marketplace pricing of vehicle parts from eBay that

were on his car. RP 9, 12, 16. Spacek indicated in his statement that his losses were submitted to his insurance company by providing a claim number and telephone number for the insurance company. CP 49-88. Spacek wrote that the insurance company paid him for "car only no aftermarket" and that his deductible was \$500. CP 49-88. The eBay paperwork was attached to Spacek's sworn statement. CP 49-88. The court ruled that Fernandez owed Spacek restitution in the amount of \$7,201.75 for the aftermarket parts because it was "reasonable to price things like that on eBay," that it was "probably more reasonable than going down to a new car store and buying them at full price" and the items are what "he [Spacek] says he added onto it." RP 16.

C. ARGUMENT

THE SENTENCING COURT DID NOT ABUSE ITS DISCRETION IN DETERMINING THE AMOUNT OF RESTITUTION BASED IN PART ON THE VICTIM'S SWORN STATEMENT SIGNED UNDER PENALTY OF PERJURY AND EBAY COMPARABLE MARKETPLACE PRICING.

Fernandez contends that the State did not produce sufficient evidence to support the value attributed to Spacek's aftermarket vehicle parts because Spacek did not submit a document from his

insurance company establishing how much and for what he had been reimbursed. RP 3, 5, 6. Yet, Washington courts allow estimated damages in restitution cases. State v. Tobin, 132 Wn. App. 161, 175, 130 P.3d 426 (2006). If a defendant disputes the restitution amount, the State must prove the damages by a preponderance of evidence. State v. Woods, 90 Wn. App. 904, 907, 953 P.2d 834 (1998). Because Spacek provided a sworn statement under penalty of perjury as to the amount of his losses, Fernandez has failed to show that the sentencing court's restitution amount was manifestly unreasonable or exercised on untenable grounds.

The authority to order restitution is statutory. State v. Tobin, 161 Wn.2d 517, 166 P.3d 1167 (2007). Under RCW 9.94A.753(5), a sentencing court shall order restitution "whenever the offender is convicted of an offense which results in injury to any person or damage to or loss of property." The legislature has expressed "a strong desire that an offender must pay restitution to the victims of their crimes." Tobin, 161 Wn.2d at 524 (quoting State v. Johnson, 69 Wn. App. 189, 193, 847 P.2d 960 (1993)). Therefore, statutes authorizing restitution should not be given an overly technical construction that would permit a defendant to escape from just

punishment. Tobin, 132 Wn. App. at 175. Rather, the restitution statutes are to be interpreted broadly to carry out the Legislature's intent. State v. Israel, 113 Wn. App. 243, 299, 54 P.3d 1218 (2002). Restitution serves several purposes, one of which is to impose upon one who breaks the law a thorough understanding of the economic effects of a particular crime upon a victim. State v. Fleming, 75 Wn. App. 270, 275, 877 P.2d 243 (1994) (overruled on other grounds by Washington v. Recuenco, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006)).

The sentencing court has considerable discretion to determine the amount of restitution. State v. Kinneman, 155 Wn.2d 272, 282, 119 P.3d 350 (2005). While restitution must be based on easily ascertainable damages, the amount of loss need not be established with specific accuracy or mathematical certainty once the fact of damage is established. State v. Tobin, 132 Wn. App. at 173. Evidence of loss is sufficient if it affords a reasonable basis for estimating loss. Kinneman, 155 Wn.2d at 272.

The restitution statutes do not require that the restitution ordered "be equivalent to the injury, damage or loss, either as a minimum or a maximum." Tobin, 132 Wn. App. at 174. (quoting Kinneman, 155 Wn.2d at 282). Rather, the amount of restitution

may range “from none (in some extraordinary circumstances) up to double the offender’s gain or the victim’s loss.” Id. (quoting Kinneman, 155 Wn.2d at 282); RCW 9.94A.753(3).

This Court reviews a trial court’s restitution award for an abuse of discretion. State v. Morse, 45 Wn. App. 197, 199, 723 P.2d 1209 (1986). This Court reverses a restitution award only when it is manifestly unreasonable or based on untenable grounds or reasons. State v. Blight, 89 Wn.2d 38, 41, 569 P.2d 1129 (1977).

Here, the evidence was adequate to support Spacek’s loss estimates and the sentencing court’s restitution award. In Tobin, the defendant argued that the State failed to prove the victim’s investigative and administrative costs because the costs were based on the victim’s estimates without any supporting documentation, such as time sheets, pay stubs, or similar corroborating information. Tobin, 132 Wn. App. at 179. The court rejected imposing this requirement when it pointed out that there was no rule requiring that evidence in restitution hearings be supported by corroborating evidence. Tobin, 132 Wn. App. at 180. The court reasoned that the victim provided a declaration executed under penalty of perjury, and the defendant presented no evidence

to contradict the victim's estimates or to show that the victim's declaration was unreliable. Id.

Similarly, in the present case, the State submitted restitution information to the sentencing court and to Fernandez. CP 49-88. Analogous to Tobin, Spacek's declaration of his losses for the aftermarket parts was executed under penalty of perjury that the information contained therein was correct. CP 49-88. He estimated the value of his Civic's aftermarket parts via eBay's comparable marketplace pricing. CP 49-88. Spacek wrote in his sworn statement that his deductible was \$500 and that his insurance company paid him for the "car only no aftermarket." CP 49-88. Therefore, the losses were easily ascertainable and the sentencing court did not speculate as to what the insurance company paid Spacek for, as Fernandez argues. Appellant's Brief, 5. Furthermore, similar to Tobin, Fernandez presented no evidence at the restitution hearing to challenge Spacek's estimates with his own figures or to show that his declaration was unreliable. He had an opportunity to do so, yet he did not. Fernandez likewise has cited no rule that states that evidence in restitution hearings must be supported by corroborating evidence.

As Tobin states, “the question is not whether [the victim] *estimated* the damages, it is whether he derived his estimates from a *reasonable basis* that does not require the trial judge to speculate or conjecture as to the appropriate restitution.” Tobin, 132 Wn. App. at 174. Here, Spacek derived his estimates from a reasonable basis – eBay. The sentencing court determined it was “reasonable to price things like that on eBay,” referring to the aftermarket parts. RP 16. Additionally, Spacek informed the detective that he had parts replaced on his vehicle 10 years earlier. CP 1-10. Therefore, eBay was a reasonable reference to use to determine the value of used aftermarket parts, rather than going to a new car store to determine the value of brand new items. Furthermore, the sentencing court did not engage in speculation or conjecture because it thoroughly reviewed Spacek’s sworn statement, the eBay comparable pricing printouts, heard from both parties, and then relied on the documentation in ordering the amount Spacek was seeking. RP 5, 12, 13, 16. The State needed to prove Spacek’s losses at an evidentiary hearing only by a preponderance of the evidence. Kinneman, 155 Wn.2d at 285. The sentencing court found that the State did so by ordering Fernandez to pay Spacek restitution.

Moreover, Fernandez agreed at the time of the plea to pay for all losses to the Honda Civic, and the damage he caused was established when he also agreed to the real and material facts as found in the certification for determination of probable cause. CP 1-10, 92-106. That document includes facts recounted above in the “Facts of the Crime” section of this brief. Pursuant to RCW 9.94A.753(5), such an agreement gives the trial court additional authority to impose restitution. The plea agreement was signed by Fernandez and his attorney. CP 92-106. Yet Fernandez is now renegeing on his agreement with the State.

Fernandez speculates that Spacek received “something” for the standard equipment found on his vehicle and suggests that Spacek should, therefore, receive nothing for the aftermarket parts. Appellant’s Brief, 5. This argument is flawed for two policy-related reasons. First, his argument runs contrary to the legislature’s intent that restitution should not be given an overly technical construction that would permit a defendant to escape from just punishment. Tobin, 132 Wn. App. at 175. Second, one purpose of restitution is to impose upon one who breaks the law a thorough understanding of the economic effects of a particular crime upon a victim. Fleming, 75 Wn. App. at 276. By his own admission, Fernandez

was a direct participant in stealing and stripping an inordinate amount of vehicles in a relatively short time period, including Spacek's Honda Civic. CP 1-10. His plan, along with his co-defendants, was to sell the parts from the stolen vehicles, but their plan was interrupted by the police. CP 1-10. One of the co-defendants even admitted he wanted Spacek's engine because Spacek's vehicle "was fast." CP 1-10. By arguing that Spacek should receive nothing for the aftermarket parts he placed in his vehicle, Fernandez gives a strong indication that he is attempting to "escape" the consequences of his direct involvement in these crimes and that he does not have a thorough appreciation for how his actions have affected the victims in general, particularly financially.

Fernandez has failed to show the State has not met its burden or that the lower court's decision was manifestly unreasonable or exercised on untenable grounds. Based on the record, the court did not abuse its discretion by ordering Fernandez to pay restitution to Spacek. Washington courts have interpreted the restitution statutes liberally in favor of ordering restitution payments. By doing so here, this Court will ensure Spacek is

compensated and Fernandez is held fully accountable for his crimes.

D. CONCLUSION

For the foregoing reasons, the State respectfully asks this Court to affirm the sentencing court's restitution order as it pertains to Spacek's losses.

DATED this 25 day of October, 2013.

Respectfully submitted,

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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 David Koch, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. VICTOR LUIS FERNANDEZ, Cause No. 70108-8-I, 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.

Betty A. Huddleston
Name

Done in Seattle, Washington

10/28/13
Date