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NO. 73051-7-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER PLETENIK,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE REGINA S. CAHAN

BRIEF OF RESPONDENT

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A. ISSUE

Restitution is based upon the statutory authority of the court to compensate crime victims for losses causally connected to criminal acts for which a defendant has been convicted. A restitution order is valid when predicated upon easily ascertainable figures proved by a preponderance of the evidence, and when based upon sound judicial discretion in determining a monetary figure. When the court finds a causal connection for property damage and/or stolen items taken during a burglary for which the defendant has entered a plea of guilty to, and where the State presented evidence of the retail value of the items, does the appellant fail to show an abuse of discretion when the court awards restitution in a prorated amount of the full retail value of such damaged and stolen goods?

B STATEMENT OF FACTS

Christopher Pletenik broke into Barney's of New York (Barney's) on April 14, 2014, damaging property within the store and stealing multiple items of clothing. CP 5. During the burglary, Pletenik shattered glass display cases, cutting his hand and leaving a trail of blood throughout the store. CP 6. In addition to stealing

clothing, electronics, and a credit card belonging to a Barney's employee, Pletenik left behind multiple high-priced articles of clothing that were blood-soaked and damaged beyond repair. CP 6.

After leaving the store wearing clothing taken from Barney's, Pletenik used the stolen credit card at several restaurants, and further used the card to pay for a taxi. CP 6-7. Seattle Police detectives estimated total loss resulting from the incidents at over \$32,000, including property damage to the store, damage to merchandise, and stolen merchandise. CP 6-7.

Pletenik was charged with burglary in the second degree and identity theft in the second degree, and entered pleas of guilty as charged on July 7, 2014. CP 10-36; 1 VRP 1-25¹. Among the conditions of sentence, Pletenik was ordered to pay restitution. CP 39.

A restitution hearing was held on January 12, 2015. Pletenik objected to the State's request that the retail value of \$4,490 for stolen and damaged merchandise be ordered among the restitution

¹ Verbatim Report of Proceedings (VRP). The Respondent references the July 7, 2014 report of proceedings from the guilty plea hearing as Volume 1, and the January 12, 2015 report of proceedings of the restitution hearing as Volume 3. The July 18, 2014 report of proceedings from the sentencing hearing is not referenced in the Brief of Respondent, but would have been titled Volume 2.

total. 3 VRP 8-24; CP 27. After fully hearing argument from the parties, the trial court determined that “replacement cost,” as opposed to “retail value,” should be awarded. 3 VRP 25. The court reasoned that this accounted for a more reasonable assessment of the store’s true loss, as opposed to retail markup. 3 VRP 26. The court ruled that twenty-five percent would be awarded. Id. Pletenik again noted his objection, arguing that the figure was “speculative.” Id. Pletenik appeals the trial court’s determination as to the restitution award for the merchandise. CP 45-47.

C. ARGUMENT

THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN ORDERING RESTITUTION IN THE AMOUNT DETERMINED.

Pletenik argues that the trial court’s determination of restitution as to the lost and damaged merchandise was predicated upon speculation despite the State providing the court with itemized documentation of such merchandise and its retail value. The trial court exercised proper discretion in determining the amount ordered, prorating the retail value at twenty-five percent.

In Washington, the authority to order restitution is purely statutory. State v. Gonzalez, 168 Wn.2d 256, 261, 226 P.3d 131,

cert. denied, 131 S. Ct. 318 (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 of restitution, and that therefore, to effect this legislative intent, the statutes authorizing restitution must be interpreted broadly. State v. Hughes, 161 Wn.2d 517, 524, 166 P.3d 1167 (2007), *overruled on other grounds* by Washington v. Recuenco, 548 U.S. 212 (2006); Hennings, 129 Wn.2d at 519; State v. Davison, 116 Wn.2d 917, 920, 809 P.2d 1374 (1991). Washington's restitution statutes "were 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). The Supreme Court has also cautioned against giving the restitution statutes "an overly technical construction that would permit the defendant to escape from just punishment." Tobin, 161 Wn.2d at 524; Davison, 116 Wn.2d at 922. A secondary purpose is to compensate victims and their survivors who have suffered the "severe and detrimental impact of crime." RCW 7.69.010; State v. Gray, 174 Wn.2d 920, 929-30, 280 P.3d 1110 (2012).

RCW 9.94A.753(3) specifies three requirements for restitution. First, restitution must be “causally connected” to the crimes charged. Tobin, 161 Wn.2d at 524; State v. Kinneman, 155 Wn.2d 272, 286, 119 P.3d 350 (2005). 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. State v. Griffith, 164 Wn.2d 960, 966, 195 P.3d 506 (2008); Tobin, 161 Wn.2d at 526-27. Second, restitution may only be awarded to a “victim” of the crime. “Victim’ means any person who has sustained emotional, psychological, physical, or financial injury to person or property as a direct result of the crime charged.” RCW 9.9A.030(53). Third, the restitution award must be based on “easily ascertainable damages.” The amount of harm or loss need not be established with specific accuracy, however. Kinneman, 155 Wn.2d at 286; Hughes, 154 Wn.2d at 154. “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 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. Griffith, 164 Wn.2d at 965; Kinneman, 155 Wn.2d at 285.

Courts have broad discretion when determining the amount of restitution. Kinneman, 155 Wn.2d at 282. The trial court abuses its discretion where the restitution order is manifestly unreasonable, exercised on untenable grounds, or for untenable reasons. State v. Enstone, 137 Wn.2d 675, 679-80, 974 P.2d 828 (1999).

In determining restitution here, the court considered the proof provided by Barney's of the \$4,490 retail value of items taken and damaged during the burglary. Pletenik argues that the State failed to meet its burden to establish with certainty the value of merchandise and items at issue. This argument fails at the outset, as the State did present such proof. Pletenik's argument suggests that the State was required to prove the production or replacement cost of the merchandise. In citing State v. Kisor, 82 Wn. App. 175, 181, 916 P.2d 978 (1996), Pletenik argues that "replacement cost is a proper measure of restitution." Brief of App. at 6. Kisor does not stand for the proposition that replacement is the *only* measure of restitution. Kisor involved calculating financial harm to the Clark

County Sheriff's Office to replace and properly train a police canine, and held that the restitution order properly included wages spent for the replacement canine's law enforcement handler, as the department "lost the services during the time he was involved with dog training." Kisor, 82 Wn. App. at 182.

The issues in Kisor are inapposite here, and Pletenik does not cite any authority supporting his claim that the State was required to provide the production or replacement cost to a retailer for lost merchandise. Argument must be supported by a citation to legal authority. RAP 10.3(a)(6). If no authority is cited, the appellate court may presume that counsel, after a diligent search, has found none. Oregon Mut. Ins. Co. v. Barton, 109 Wn. App. 405, 418, 36 P.3d 1035 (2001) (citing Roberts v. Atlantic Richfield Co., 88 Wn.2d 887, 895, 568 P.2d 774 (1997)).

At issue is whether the court properly prorated the proven retail value to reflect the cost to Barney's of the merchandise taken and damaged. Here, the court reduced the retail accounting of the lost and damaged, proven by the State in the hearing, to reflect what it believed was a more realistic "loss" resulting from the crime.

The court properly exercised its discretion in doing so, noting that the retail victim replaces the items “by their costs” as opposed to what the items could have sold for. 3 VRP 26. The court was not forced to speculate, as it had a proven retail value for the basis of its determination. It is not an abuse of discretion to *reduce* the total. The court could justifiably awarded the full retail amount, but opted not to. The court’s decision is further reasonable in light of RCW 9.94A.753(3), authorizing the court to “double the amount of the offender’s gain or the victim’s loss from the commission of the crime.” See *also* Kinneman, 155 Wn.2d at 279 (holding that “restitution is both punitive and compensatory.”). If the court has discretion to double the amount it surely has discretion to reduce it as well.

The trial court, balancing the impact of the losses to Barney’s and with full understanding of the retail value claimed and proven by the State, ordered restitution in a reasonable amount. The court’s determination of the retail value was not based on speculation or conjecture, and its reduction of that amount was not an abuse of its discretion.

D. CONCLUSION

For the foregoing reasons, Pletenik's restitution order should be affirmed.

DATED this 28th day of October, 2015.

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 Thomas M. Kummerow, the attorney for the appellant, at Washington Appellate Project, 1511 Third Avenue – Suite 701, Seattle, WA 98101, containing a copy of the BRIEF OF RESPONDENT, in STATE V. CHRISTOPHER PLETENIK, Cause No. 73051-7 -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.

Dated this 28th day of October, 2015



Name Peter D. Lewicki
Done in Kent, Washington