

NO. 34719-9-II

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

ROBERT CORCORAN DINGMAN,
APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Linda C J Lee

No. 04-1-02684-1

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DIVISION II
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REPLY BRIEF OF RESPONDENT ON RESPONDENT'S CROSS-APPEAL

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Dismissal of Counts 8, 13, 16, 21, 23, 24, 25, 27, 29, 31, 32, 40, 47, 50 and 56 of the third amended information by the trial court at the close of the State's case for insufficient evidence bars a retrial pursuant to double jeopardy, and, thus, cannot be appealed by the State.
2. The State, in its brief on the remaining issues on the cross-appeal, did present argument which included legal citation, as well as reference to the clerk's papers and the verbatim report of proceedings, and, thus, pursuant to State v. Olson, 126 Wn. 2d 315, 893 P.2d 629 (1995), this court can consider the State's remaining issues on its cross-appeal even though the State failed to provide a list of the assignment of errors and issues on appeal in its original brief.
3. The trial court did not properly exercise its discretion in denying restitution to four seasons.

B. ARGUMENT.

1. DISMISSAL OF COUNTS 8, 13, 16, 21, 23, 24, 25, 27, 29, 31, 32, 40, 47, 50, AND 56 OF THE THIRD INFORMATION BY THE TRIAL COURT AT THE CLOSE OF THE STATE'S CASE FOR INSUFFICIENT EVIDENCE BARS A RETRIAL PURSUANT TO DOUBLE JEOPARDY AND, THUS, CAN NOT BE APPEALED BY THE STATE

The Appellant is correct in its argument that once the trial court dismissed the above counts at the close of the State's case, the State is precluded from appealing that decision. State v. Rhinehart, 92 Wn. 2d 923, 602 P.2d 1188 (1979); State v. Matuszewski, 30 Wn. App. 714, 637 P.2d 994 (1981).

2. THE STATE, IN ITS BRIEF ON THE REMAINING ISSUES ON THE CROSS-APPEAL, DID PRESENT ARGUMENT WHICH INCLUDED LEGAL CITATION, AS WELL AS REFERENCE TO THE CLERK'S PAPERS AND THE VERBATIM REPORT OF PROCEEDINGS, AND, THUS, PURSUANT TO STATE V. OLSON, 126 WN. 2D 315, 893 P. 2D 629 (1995), THIS COURT CAN CONSIDER THE STATE'S REMAINING ISSUES ON ITS CROSS-APPEAL EVEN THOUGH THE STATE FAILED TO INCLUDE A LISTING OF THE ASSIGNMENT OF ERRORS AND ISSUES ON APPEAL IN ITS ORIGINAL BRIEF.

Rules on Appeal 10.3(a)(4) provides that “[a] separate concise statement of each error a party contends was made by the trial court, together with the issues pertaining to the assignments of error” should be contained in the brief. However, the failure to do so does not require that the court on appeal refuse to consider the issues raised in the brief. As the State Supreme Court provided in State v. Olson, 126 Wn. 2d 315, 321, 893 P.2d 629 (1995), “when an appellant fails to raise an issue in the assignments of error, in violation of RAP 10.3(a)(3), *and* fails to present any argument on the issue or provide any legal citation, an appellate court will not consider the merits of that issue.”

In this case the State not only presented argument, but also provided legal citation in support of its position. In addition, the Appellant dealt, in depth, with the issues raised by the State in its brief. As the Supreme Court noted in denying the motion to dismiss in Olson, supra, at 323, “[t]here is no compelling reason why this case should not be decided on its merits.” This same rationale applies to this case. The appellant has not provided this court with any compelling reason to not reach a decision on the restitution issues raised by the State.

3. THE TRIAL COURT DID NOT PROPERLY EXERCISE ITS DISCRETION IN DENYING RESTITUTION TO FOUR SEASONS.

- a. The trial court's initial acceptance of the stipulation made by the State and the Defense as to the restitution amount to be awarded to Four Seasons, and its subsequent rejection of the same stipulation without notice to the State, evidenced a manifest abuse of discretion when the trial court refused to award restitution to Four Seasons by claiming that the State had not established the basis for the amount of restitution to be awarded to Four Seasons.
- b. The trial court's decision to deny restitution to Four Seasons was a manifest abuse of discretion when the defense stipulated to the amount of restitution and did not raise any issue concerning the computation of the restitution amount.
- c. The trial court's decision not to award restitution to Four Seasons was a manifest abuse of discretion when the trial court ignored the evidence provided at trial which established the amount of loss suffered by the Sharpes, Murphys, Ressler, Miller/Kuhns and Gosnells for whom Four Seasons had provided sunrooms.
- d. The trial court's refusal to consider the State's Motion for Reconsideration based upon the information provided to the Defense in arriving at the stipulation was a manifest abuse of discretion.

The issues raised by the trial court's denial of restitution to Four Seasons are all interrelated and can not be argued separately. The State and the Appellant both agree that

...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 person, and lost wages resulting from injury.

RCW 9.94A.753(3). However, the Appellant ignores, in its argument, the impact of a stipulation, or an agreement, by the parties as to the amount of restitution owed to a victim. As the State argued in its original brief on the cross appeal, the Supreme Court

has provided in State v. Hughes, 154 Wn. 2d 118, 154, 110 P.3d 192 (2005), overruled on other grounds by Washington v. Recuenco, 548 U.S. 212, 126 S. Ct. 2546, 165 L.Ed. 2d 466 (2006) that the trial court, in determining the amount of restitution "...can either rely on a defendant's acknowledgment or it can determine the amount by a preponderance of the evidence." The Supreme Court, in the later case of State v. Tobin, 161 Wn. 517, 525, 166 P.3d 1167 (2007), further emphasized the acceptability of stipulations as to restitution when it stated "[a]bsent agreement from the defendant as to the amount of restitution, the State must prove the amount by a preponderance of the evidence." The existence of the stipulation was acknowledged by both parties at the January 4, 2007, hearing at pages 3-4, 12-13, 15, 17, and 20 of the Verbatim Report of Proceedings for 1/04/07 VRP. The defense discussed the stipulation in depth at 1/4/07 VRP 12 when it said

I did not anticipate that we were going to be taking evidence today in regards to the Four Seasons amount.

We did spend some time, Ms. McComb and I, going over the amounts, subtracting the amounts, giving Mr. Dingman quantum meruit credit for some work he did, subtracting those off. Ms. McComb contacted the people, the Sharpes, the Dunivans, to amend that. We did lower some figures. We reexamined some other figures. And we resolved a specific amount that we were willing to agree on for all the specific projects. And the people -- And therefore we didn't feel we needed those witnesses on that, because we had agreed.

The trial court did state at 1/04/07 VRP 9-10 that the trial court believed the January 4, 2007, hearing was to be a restitution hearing with testimony. The Appellant's characterization of this exchange as a chastisement of the State, however, ignores the rest of the exchange during which the State and the Defense both clearly informed the trial court that the sole purpose of the hearing was to decide whether Four Seasons was to be

considered as a victim. (1/4/07 VRP 9-11). The State reminded the trial court that the State had provided the trial court with its brief on whether Four Seasons can be considered as a victim on November 13, 2006, and that the trial court, contrary to its promise, had never made a decision on this issues. (1/4/07 VRP 10). Ultimately, the trial court stated that “Because there’s no issue that if Four Seasons is a victim, considered a victim under the statute and the case law, as to what the restitution will be, because the defendant is agreed to the amounts being sought by the State.” (1/4/07 VRP 17). The Defense then stated that while the case law does provide that Four Seasons is a victim, there is no proof that Four Seasons is seeking restitution. (1/4/07 VRP 17-20). The sole issue which remained at the end of the hearing on January 4, 2007, was whether Four Seasons wanted to be considered as a victim in light of the civil judgment which they had against the defendant. (1/4/07 VRP 20-22).

On January 18, 2007, the State provided the trial court with the affidavit from Four Seasons in which Four Seasons stated that they were asking for restitution from the defendant. (CP 1029-1030). At the beginning of the argument the State reminded the trial court of the stipulation made by the parties as to amount of restitution owed to Four Seasons. (1/18/07 VRP 3). The State then presented the affidavit from Four Seasons and emphasized that the civil judgment did not preclude Four Seasons from being considered as a victim in the criminal case (1/18/07 VRP 4-6). As the State argued to the trial court, “..the rules of the civil law should not be imported as a limitation to the sentencing authority granted by the legislature to criminal courts.” State v. Ewing, 102 Wn. App. 346, 353-354, 7 P.3d 835 (2000) (1/18/07 VRP 5). The Ewing Court went on to provide at page 354

The questions the sentencing court must answer are whether the claimed loss resulted from the crime, and whether it is the kind of loss for which restitution is authorized. If so, the statute plainly grants discretion to make a restitution award. The statute requires no inquiry about the viability of civil claims, nor is any such inquiry called for by public policy.

Thus, both the case law and the restitution statute (RCW 9.94A.753) do not provide that a civil judgment precludes the ordering of restitution in a companion criminal case.

The trial court in its decision on January 18, 2007, ignored the stipulation as to the restitution amount owed to Four Seasons, and ignored its acceptance of that stipulation which it had made on January 4, 2007. (1/18/07 VRP 10-12). The trial court was well aware of the amount of the loss suffered by the underlying victims, the Sharpes, Murphys, Ressler, Miller/Kuhns and Gosnells, from their testimony at trial. The trial court was also well aware of the actual cost of the sunrooms to Four Seasons based upon the testimony of Tony Russo, the representative from Four Seasons, who testified at trial. (1/18/07 VRP 11). At no point did the trial court ever provide the State with notice that it had changed its mind and would no longer accept the stipulation made by the defense as to the amount of restitution to be awarded to Four Seasons.

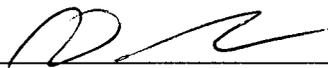
To further bolster the State's argument that the trial court's decision concerning the issue of restitution for Four Seasons shows a manifest abuse of discretion, is the trial court's decision as to restitution for the Dunivans, another victim in this matter. The amount of restitution for the Dunivans was, as with Four Seasons, also established by a stipulation on the part of the State and the Defense. The trial court, however, did not question this stipulation and signed the restitution order as to the Dunivans on January 18, 2007. (1/18/07 VRP 6, 13, Resp. CP 1-2).

D. CONCLUSION.

The State is precluded, pursuant to Double Jeopardy, from appealing the trial court's decision made after the State had rested its case in which several counts pending against the defendant were dismissed for insufficient evidence. The trial court should have ordered restitution for Four Seasons based upon the stipulation of the Defense and the State, which the trial court had accepted during the January 8, 2007, hearing. The trial court exhibited a manifest abuse of discretion when the trial court did not order the restitution since, based upon the trial court's statements, it had, apparently, decided not to honor the stipulation without providing the State with prior notice of the trial court's change of mind. It was also a manifest abuse of discretion for the trial court to consider the civil judgment as somehow applying to the determination of the restitution amount under the facts of this case.

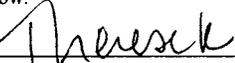
DATED: March 27, 2008.

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Certificate of Service:
The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

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