

38646-1
NO. 39253-4

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

STATE OF WASHINGTON, RESPONDENT

v.

KIMBERLY ANN PHILLIPS, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable James Orlando, Judge

No. 07-1-05353-2

SUPPLEMENTAL RESPONSE BRIEF

MARK LINDQUIST
Prosecuting Attorney

By
Kimberley DeMarco
Deputy Prosecuting Attorney
WSB # 39218

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400



Table of Contents

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR..... 1

 1. Did the trial court properly exercise its discretion when it imposed restitution based on evidence presented at trial and the restitution hearing? 1

B. STATEMENT OF THE CASE..... 1

C. ARGUMENT.....2

 1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT IMPOSED RESTITUTION FOR AN AMOUNT PROVEN BEYOND A REASONABLE DOUBT AT TRIAL.2

D. CONCLUSION.....5

Table of Authorities

State Cases

<i>State v. Enstone</i> , 137 Wn.2d 675, 679, 974 P.2d 828 (1999).....	3
<i>State v. Kinneman</i> , 155 Wn.2d 272, 282, 199 P.3d 350 (2005)	3
<i>State v. Mark</i> , 36 Wn. App. 428, 434, 675 P.2d 1250 (1984).....	3
<i>State v. Marks</i> , 95 Wn. App. 537, 539, 977 P.2d 606 (1999).....	2
<i>State v. Pollard</i> , 66 Wn. App. 779, 785, 834 P.2d 51 (1992)	3
<i>State v. Woods</i> , 90 Wn. App. 904, 906, 953 P.2d 834 (1998).....	3

Statutes

RCW 9.94A.753	2
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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the trial court properly exercise its discretion when it imposed restitution based on evidence presented at trial and the restitution hearing?

B. STATEMENT OF THE CASE.

The State adopts the Statement of the Case as set forth in the original response brief.

On October 30, 2008, a jury found defendant guilty of eight counts of theft in the first degree involving five elderly victims. CP 261, 263, 265, 267, 269, 271, 273, 275. On May 1, 2009, the parties held a restitution¹ hearing as defendant contested \$1,500.00 to Mr. Ostrander as a result of her conviction for Count V. RH 2². Both parties supplied briefing, which was reviewed by the court prior to the hearing. CP 388-398; RH 2. Defendant argued that the restitution for Count V was entirely speculative, as there was insufficient evidence to support the conviction.

¹ The total amount of restitution sought by the State was \$32,863.20. CP 399-400. Defendant did not contest restitution for any count other than Count V. RH 3.

² For purposes of this supplemental briefing, the verbatim report of proceedings for the restitution hearing will be to "RH."

RH 3-7. The State argued that the evidence presented at trial supported \$1,700.00 in restitution for Count V, but was seeking only \$1,500.00 in the hope that defendant would agree to the lesser amount. RH 8.

The court held that the testimony presented at trial, which was relied upon by the jury in its determination of guilt, was sufficient by a preponderance of the evidence to award \$1,500.00 in restitution for Count V. RH 10-11. The court found that \$1,500.00 was a reasonable amount based on what cash was taken from Mr. Ostrander and what was left behind. RH 11.

Defendant filed a timely notice of appeal regarding the restitution issue. CP 401-403; RH 11.

C. ARGUMENT.

1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT IMPOSED RESTITUTION FOR AN AMOUNT PROVEN BEYOND A REASONABLE DOUBT AT TRIAL.

The authority to order restitution is statutory. *State v. Marks*, 95 Wn. App. 537, 539, 977 P.2d 606 (1999). RCW 9.94A.753 authorizes restitution whenever an offender is convicted of an offense that results in injury to any person, or damage to or loss of property. Damages need not be proven with specific accuracy for purposes of determining the amount of restitution a criminal defendant must pay. *State v. Mark*, 36 Wn. App.

428, 434, 675 P.2d 1250 (1984). “Evidence of damage is sufficient if it affords a reasonable basis for estimating loss and does not subject the trier of fact to mere speculation or conjecture.” *State v. Pollard*, 66 Wn. App. 779, 785, 834 P.2d 51 (1992) (quoting *State v. Mark*, 36 Wn. App. 428, 434, 675 P.2d 1250 (1984)).

While the restitution statute directs that restitution “shall” be ordered, it does not say that the restitution ordered must be equivalent to the injury, damage or loss, either as a minimum or a maximum, nor does it contain a set maximum that applies to restitution. Instead, RCW 9.94A.753 allows the judge considerable discretion in determining restitution, which ranges from none (in some extraordinary circumstances) up to double the offender’s gain or the victim’s loss.

State v. Kinneman, 155 Wn.2d 272, 282, 199 P.3d 350 (2005).

Imposition of restitution is generally within the discretion of the trial court, and absent abuse of discretion will not be disturbed on appeal. *State v. Enstone*, 137 Wn.2d 675, 679, 974 P.2d 828 (1999). A trial court’s restitution order will be reversed only if it is manifestly unreasonable or if the court applied its discretion on unreasonable or untenable grounds. *State v. Woods*, 90 Wn. App. 904, 906, 953 P.2d 834 (1998). A court does not abuse its discretion if the evidence affords a reasonable basis for estimating loss. *Kinneman*, 155 Wn.2d at 285.

Here defendant essentially reiterates his argument that the State presented insufficient evidence to prove the elements of first degree theft as charged in Count V. See Supplemental Opening Brief of Appellant at

3-5. The State addresses defendant's claim that insufficient evidence supported the conviction in its Brief of Respondent at 48-49.

During trial, Karen Anderson testified that Mr. Ostrander invariably kept between \$2,000.00 and \$4,000.00 in cash in a case in his basement. RP 520-21. Ms. Anderson would count the cash for Mr. Ostrander at least every other month and it never held less than \$2,000.00. RP 521. After defendant and her children were at his house, Mr. Ostrander's case was out of its hiding place, it was left open, the papers had been rifled through, and only \$300.00 in cash remained. RP 527.

At the restitution hearing, the court observed that the standard of proof to impose restitution was by a preponderance of the evidence. RH 10. The jury had to find beyond a reasonable doubt that defendant took over \$1,500.00 in order to convict defendant of theft in the first degree. The court found that the same evidence the jury relied on to determine guilt was sufficient to award restitution. RH 10-11.

In addition to her testimony at trial, Ms. Anderson completed a victim statement on behalf of Mr. Ostrander. CP 388-398. According to the statement:

On August 16, 2007 [Mr. Ostrander] said the same woman came again needing to use his phone. She got him to show her his hiding place for his papers and money. The next morning he looked in the case where there had been \$2,000.00-\$4,000.00 and all but \$300.00 of the money was gone. He had always kept his hiding place a well-guarded secret.

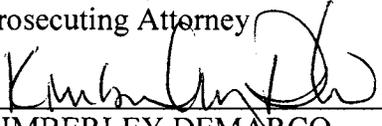
CP 393. Provided the court found the testimony and statement credible, this was substantial evidence to prove by a preponderance that defendant stole at least \$1,700.00 from Mr. Ostrander. As there is no evidence of how much more money defendant stole, any amount over \$1,700.00 would be mere speculation or conjecture. The trial court did not abuse its discretion when it imposed restitution of \$1,500.00 for Count V.

D. CONCLUSION.

As the trial court did not abuse its discretion when it imposed restitution in the amount of \$1,500.00 based on defendant's conviction for first degree theft in Count V, the State respectfully requests this court to affirm the trial court's restitution order.

DATED: January 27, 2010.

MARK LINDQUIST
Pierce County
Prosecuting Attorney


KIMBERLEY DEMARCO
Deputy Prosecuting Attorney
WSB # 39218

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.

1.27.10 
Date Signature

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