

No. 45237-5-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

**TERRY L. SIMMONS; and
JOANNE M. SIMMONS,**

Appellants.

Appeal from the Superior Court of Washington for Lewis County

Consolidated Respondent's Brief

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I. ISSUE

- A. Did the trial court exceed its authority when it ordered Joanne and Terry Simmons to pay restitution for dismissed counts, if the Simmonses agreed to pay restitution for those counts as part of a plea bargain?

II. STATEMENT OF THE CASE

Joanne and Terry Simmons were charged with six counts of animal cruelty in the first degree (a felony) and two counts of animal cruelty in the second degree (a gross misdemeanor) for starving several horses in their care. Clerk's Papers (CP) at 1-6, 38-41. During plea negotiations, the State offered to dismiss some of the charges if the Simmonses agreed to "pay all costs by private or other public entities associated with investigation of all the animals in this case, counts charged or uncharged, including but not limited to the animals' care, euthanization, boarding or adoption and all veterinary costs." Verbatim Report of Proceedings (VRP) at 20. The defense rejected this offer. *Id.* The week before trial, the State amended its offer to include a plea solely to the gross misdemeanor counts. VRP at 2-3. The State and defense attorney reached an agreement on this amended offer. *Id.*

The matter came before the Hon. Nelson Hunt for a change of plea hearing. *Id.* at 1-2. The State filed an amended information charging two counts of animal cruelty in the second degree, related

to two enumerated horses. CP at 19-20, 42-43. The prosecutor explained the reason for the amendment by referring to all of the Simmonses' horses, not merely the two enumerated in the counts to which the defendants pleaded guilty. VRP at 3. The defense attorney noted that the defendants accepted the offer to avoid the possibility of a conviction on the felony counts that had formerly been charged. *Id.* at 12.

On their change of plea forms, each defendant made the following statement: "On 9-24-12 in Lewis County I neglected some of my horses which caused unnecessary physical pain." CP at 21-24, 44-47; VRP at 7, 10. Each change of plea form included a sentencing recommendation from the prosecutor that included "cost of care/boarding of animals and vet expenses TBD." CP at 22, 45. Each defendant acknowledged knowing of the prosecutor's sentencing recommendation at the time of the plea. VRP at 5, 9. The Court accepted the defendants' pleas of guilty, deferred each defendant's sentence, and reserved restitution for a later hearing. VRP at 11-15; CP at 25-27, 48-50.

Judge Hunt also presided over the restitution hearing. CP at 30; VRP at 17. At the hearing, the Simmonses' attorney moved for a ruling that the Simmonses could only be liable for restitution

related to the two horses enumerated in the counts to which they pleaded guilty. VRP at 17-18. The restitution amount for those two counts alone was \$3,211.18, whereas the amount for all of the horses was \$20,589.42. *Compare* VRP at 18 *with* CP at 32-33, 51-52. These two figures were not in dispute; the defense was contesting liability but not damages. VRP at 27-28; CP at 30.

The judge focused on the substance of the agreement between the parties, as reflected by the phrase “cost of care/boarding of animals . . . and vet expenses TBD” in the plea forms. VRP at 19-20. Judge Hunt inquired of the parties as to what this agreement entailed. *Id.* The prosecutor referred to the letter offer described in the first paragraph of this facts section, quoting the language regarding restitution for all of the horses. *Id.* at 20. The defense attorney countered that the letter offer was rejected. *Id.* The prosecutor responded that he amended the letter offer only as to the charges to which the defendants would plead, and the defendants accepted the amended offer. *Id.* The parties each gave their respective understandings of their intent regarding the amended offer, again with the State indicating that it was the letter offer with a change of charges and the defense disagreeing that the letter offer’s conditions were included. VRP at 21-22.

Having heard this background, the judge awarded restitution for all of the horses. VRP at 28-29; CP at 32-33, 51-52. He explained,

I get there from saying, look, this may be ambiguous, but there is little question in my mind that what was meant was restitution for all of them, and I just can't get by that.

VRP at 28-29. The defendants were advised of their right to appeal, which they have timely exercised. *Id.*; CP at 34, 53.

III. ARGUMENT

A. THE DEFENDANTS AGREED TO PAY RESTITUTION FOR DISMISSED COUNTS, AUTHORIZING THE COURT TO IMPOSE RESTITUTION FOR THE FULL OFFENSE.

1. Standard Of Review

Legally, a trial court's award of restitution is reviewed for an abuse of discretion. *State v. Enstone*, 137 Wn.2d 675, 679, 974 P.2d 828 (1999). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. *Id.* at 679-80.

Factually, a trial court's findings of fact are reviewed for substantial evidence. *State v. Griffith*, 164 Wn.2d 960, 965, 195 P.3d 506 (2008). Substantial evidence is evidence sufficient to persuade a fair-minded person of its truth. *State v. Nelson*, 89 Wn. App. 179, 181, 948 P.2d 1314 (Div. 3, 1997). This deferential

standard recognizes that the trier of fact is in a better position than the reviewing court to evaluate the credibility and demeanor of witnesses. *State v. Hill*, 123 Wn.2d 641, 646, 870 P.2d 313 (1994).

2. The Trial Court Found That The Defendants Agreed To Pay Restitution For All Of The Horses, Rendering Its Restitution Order Reasonable.

The trial court's authority to order a defendant to pay restitution is statutory. *State v. Osborne*, 140 Wn. App. 38, 41, 163 P.3d 799 (Div. 3, 2007). "Restitution shall be ordered whenever the offender is convicted of an offense which results in . . . damage to or loss of property." RCW 9.94A.753(5). Usually, restitution is recoverable only for crimes that are causally connected to the crime charged. *State v. Tobin*, 161 Wn.2d 517, 524, 166 P.3d 1167 (2007). But, "restitution shall [also] be ordered to pay for an injury, loss, or damage if the offender pleads guilty to a lesser offense or fewer offenses and agrees with the prosecutor's recommendation that the offender be required to pay restitution to a victim of an offense or offenses which are not prosecuted pursuant to a plea agreement." RCW 9.94A.753(5).

The issue below was the parties' intent at the time of the plea agreement, and specifically what the phrase "cost of care/boarding of animals and vet expenses TBD" in the plea forms

meant. The trial judge concluded that the parties intended this phrase to refer to restitution for all of the horses. VRP at 28-29. This was a finding of fact about what the parties were thinking about at the time of their agreement. "Finding of Fact", Black's Law Dictionary (9th ed. 2009).

The judge's finding was supported by the parties' statements to the judge at the restitution and change of plea hearings. At the restitution hearing, the prosecutor and defense attorney offered conflicting versions of how the plea agreement was made, and the judge had to decide which account was more accurate. VRP at 20-22. The change of plea proceedings, over which Judge Hunt had presided, favored the prosecutor's version: the prosecutor had discussed *all* of the horses at that hearing, not merely the two to which the defendants were pleading. VRP at 3. The statement in the change of plea form was generic, rather than being tied to specific horses. CP at 21-24, 44-47; VRP at 7, 10. This was consistent with the defense attorney's statement that the Simmonses were avoiding a felony on the foregone counts by taking the deal. VRP at 12. Finally, the notation on the plea forms, "cost of care/boarding of animals and vet expenses TBD," was reminiscent of the letter offer requiring restitution for all of the

horses as part of the plea. *Compare* CP at 22, 45 *with* VRP at 20. As a result, the judge concluded that the parties' agreement referred to all of the horses, as did the statement in the plea forms regarding restitution. VRP at 28-29. This finding was supported by substantial evidence and should not be disturbed on appeal, especially because it involved weighing the credibility of conflicting evidence. *Hill*, 123 Wn.2d at 646; *Nelson*, 89 Wn. App. at 181.

Because the judge found that the defendants agreed to pay restitution for all of the horses as part of the plea bargain, the judge had authority to impose restitution for the counts foregone as part of the plea. *See* RCW 9.94A.753(5) (requiring such an award). Following the statute was neither unreasonable nor untenable; it was within the trial court's discretion. *Enstone*, 137 Wn.2d at 679-80. The order below should be affirmed.

IV. **CONCLUSION**

Joanne and Terry Simmons were charged with several counts of animal cruelty corresponding to several horses, but pleaded guilty only to two counts corresponding to two horses. They argued that they could only be required to pay restitution for the two horses to which they pleaded guilty. The trial court found that the defendants had agreed to pay restitution for all of the

horses as part of their plea bargain, imposing restitution for the full amount. Because this finding was supported in the record, the restitution order below was within the trial court's discretion and should be affirmed.

RESPECTFULLY submitted this 5th day of February, 2014,

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**COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II**

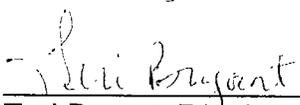
STATE OF WASHINGTON,)	NO. 45237-5-II
Respondent,)	
vs.)	DECLARATION OF
)	MAILING
TERRY L. SIMMONS,)	
And)	
JOANNE M. SIMMONS)	
Appellant.)	
)	
)	
_____)	

Ms. Teri Bryant, paralegal for Eric Eisenberg, Deputy Prosecuting Attorney, declares under penalty of perjury under the laws of the State of Washington that the following is true and correct: On February 5, 2014, the appellant was served with a copy of the **Consolidated Respondent's Brief** by e-filing same to the attorney for Appellants at the name and email address indicated below:

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Teri Bryant, Paralegal
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Declaration of
Mailing

LEWIS COUNTY PROSECUTOR

February 05, 2014 - 11:51 AM

Transmittal Letter

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Court of Appeals Case Number: 45237-5

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