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Court of Appeals
Division II
State of Washington
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NO. 51281-5-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

ORLENA DRATH,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR MASON COUNTY

The Honorable Toni A. Sheldon, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The order of restitution is not supported by substantial credible evidence.

Issues pertaining to assignments of error

1. Where the evidence fails to establish a causal connection between expenditures by an insurance company and appellant's offenses, must the restitution award to the insurer be vacated?

2. Where the amount of restitution is based on a miscalculation rather than a reasonable exercise of discretion, must the restitution order be corrected?

B. STATEMENT OF THE CASE

Appellant Orlena Drath was convicted following a jury trial in Mason County Superior Court of residential burglary, first degree burglary, first degree theft, theft of a firearm, first degree unlawful possession of a firearm, second degree unlawful possession of a firearm, first degree trafficking in stolen property, and bail jumping. CP 430. The judgment and sentence was entered on September 2, 2016, and a restitution hearing was set for November 15, 2016. CP 430-48; RP 1.

Drath waived her presence at the restitution hearing. RP 1. Defense counsel, who had been appointed after the trial, informed the

court he needed additional time to review discovery, because Drath was disputing items included in the State's restitution request. RP 2. The court set a status hearing for February 7, 2017, at which time it would determine if an agreed restitution order would be entered or a contested hearing was needed. RP 4. At the status hearing, defense counsel told the court he had received a restitution estimate from the victims and sent it to Drath. She indicated she would not agree to the requested amount, and therefore an evidentiary hearing was needed. RP 6.

The evidentiary hearing was conducted on February 28, 2017. RP 13. The State presented testimony from two witnesses at the hearing. The lead detective in the investigation testified that Drath was involved in a series of burglaries at a house owned by Fernando Maffei in March and April 2011, as well as the retention and/or possession of items stolen during the burglaries. RP 15-17. Maffei also testified about the stolen items and their value. RP 28-39.

In addition to this testimony, the State offered in evidence Exhibit 1, a restitution request prepared by Maffei prior to return of some of the stolen items. Maffei's total restitution estimate as of November 25, 2011, was \$98,788. This figure included the value of stolen collector items, guns, and knives, damage to the house, and recoverable depreciation.

Lists of the stolen items, with Maffei's estimate of their value, were included in the exhibit. RP 20.

The detective testified that some of the items had been recovered and returned to Maffei. RP 22. Instead of having Maffei describe every item on the list, the attorneys focused on identifying the items which had been recovered. RP 33-34. Maffei identified the items that had been returned to him, and he explained how he determined the value of the items that were still missing. RP 28-39.

Also included in the restitution request are two letters to Maffei from Progressive Home Advantage Insurance. These letters identify Maffei as the insured, the policy number, the claim number, and the date of loss. The letter from May 19, 2011, lists a replacement cost value of contents of \$5403.21, recoverable depreciation of \$2567, a deductible of \$1000, with a net of \$1836. The letter indicates that a check of \$1836 was sent to Maffei. Exhibit 1.

The second letter, dated October 13, 2011, references the same insured, policy number, claim number and date of loss. It states that the loss payable under the policy is \$6176.14, based on replacement cost value of \$10,293.88, recoverable depreciation of \$2241.29, less deductible of \$1876.45. It indicates that a check for the loss amount was sent to Maffei. Exhibit 1.

Neither of the State's witnesses testified about the insurance claim, and the State did not offer any evidence regarding the claim other than the letters included in Exhibit 1. Nor did the State argue that these letters had any bearing on the restitution request. It asked the court to grant restitution for the items stolen from Maffei and to strike the amounts associated with the recovered items from the restitution request. RP 40-42. Defense counsel agreed that deductions for the returned items were appropriate. RP 42. The court ruled that restitution would be ordered based on the items in Maffei's list, subtracting the value of the recovered items. It did not mention the insurance letters. RP 44-45.

On April 13, 2017, the court entered a written restitution order. It ordered restitution of \$92,218 to Maffei, reflecting that the value of the returned items was subtracted from the total requested restitution. It also included an order for restitution to Progressive Home Advantage of \$6176.14. CP 449-50. Drath filed this appeal. CP 451-52.

C. ARGUMENT

THE ORDER OF RESTITUTION IS NOT SUPPORTED BY SUBSTANTIAL CREDIBLE EVIDENCE, AND IT MUST BE REVERSED.

A sentencing court's authority to order restitution is derived entirely from statute. *State v. Smith*, 119 Wn.2d 385, 389, 831 P.2d 1082 (1992); *State v. Cawyer*, 182 Wn. App. 610, 616, 330 P.3d 219 (2014);

RCW 9.94A.753. When an offender is convicted of an offense which results in damage to or loss of property, the court is statutorily required to order restitution, unless extraordinary circumstances make restitution inappropriate. RCW 9.94A.753(5). The restitution must be based on “easily ascertainable damages.” RCW 9.94A.753(3).

It is well established that the State carries the burden of establishing the amount of restitution. *State v. Dennis*, 101 Wn. App. 223, 226, 6 P.3d 1173 (2000); *State v. Dedonado*, 99 Wn. App. 251, 256, 991 P.2d 1216 (2000); *State v. Woods*, 90 Wn. App. 904, 907, 953 P.2d 834, *review denied*, 136 Wn.2d 1021 (1998). Restitution must be based on a causal connection between the victim’s damages and the defendant’s offense, and, where the defense disputes facts relevant to determining restitution, the State must prove the restitution amount by a preponderance of the evidence. *Dedonado*, 99 Wn. App. at 256.

- a. The evidence was insufficient to establish a causal connection between payment made by the insurance company and Drath’s offenses.

Where restitution is statutorily authorized, the court has discretion to determine the amount of restitution. *Dedonado*, 99 Wn. App. at 256. Nonetheless, the restitution amount must be supported by “substantial credible evidence.” *State v. Pollard*, 66 Wn. App. 779, 785, 834 P.2d 51, *review denied*, 120 Wn.2d 1015 (1992). While mathematical precision is

not required in calculating restitution, the evidence must provide a reasonable basis for estimating loss and not subject the trier of fact to mere speculation or conjecture. *State v. Fleming*, 75 Wn. App. 270, 274-75, 877 P.2d 243 (1994).

Insurers may be victims entitled to restitution where they are required to pay claims because of crimes such as burglary. *State v. Smith*, 42 Wn. App. 399, 402, 711 P.2d 372 (1985). But restitution must be based on a causal connection between the crime and the insurer's damages. *Dedonado*, 99 Wn. App. at 256. A causal connection is not established simply because a victim or insurer submits proof of expenditures. *Dennis*, 101 Wn. App. at 227; *Dedonado*, 99 Wn. App. at 257.

In *Dennis*, the defendant was convicted of three counts of third degree assault, and the State sought restitution for medical services provided to the three officers. As to one of the officers, the only evidence presented was that he was treated for injuries on an unknown date, incurring \$180.94 in expenses. This evidence was insufficient to establish a causal connection between the injuries and the assault, and the court abused its discretion in ordering the defendant to pay restitution for the medical expenses. *Dennis*, 101 Wn. App. at 228.

And in *Dedonado*, the defendant was convicted of taking a motor vehicle without permission. During the course of her crime, the defendant burglarized an electronics shop and loaded equipment from the shop into the stolen vehicle. *Dedonado*, 99 Wn. App. at 253. At the restitution hearing, the State presented a property restitution estimate from the manager of the electronics shop which included “an irreparable Adret Signal Generator that was replaced with an HP ESG 3000A for \$10,968.60.” *Id.* In addition, the State requested reimbursement for expenses paid to repair the stolen vehicle. The Court of Appeals held that the State did not meet its burden of proving the restitution amount. The Court noted that it was impossible to determine from the State’s documentation whether the HP generator was a proper replacement for the Adret. Likewise, it was not possible to tell from the list of expenditures whether all the vehicle repairs were related to the defendant’s crime. Although the defendant clearly damaged the vehicle, restitution could not be ordered for a list of repairs made, without a showing that each of those repairs was in fact necessitated by the defendant’s actions. *Id.* at 257.

Similarly here, the evidence was insufficient to establish the necessary causal connection between expenditures by Progressive Home Advantage and Drath’s offenses. The only evidence presented about these expenditures was two letters included in Exhibit 1 summarizing the loss

payable on a claim made by Maffei. Exhibit 1. There was no testimony about the insurance claim, what was covered, or how the amount was calculated. The State made no argument regarding restitution for the insurance company, and the court did not address the insurance claim in its ruling. Because the State's documentation does not amount to substantial credible evidence that Progressive Home Advantage was entitled to restitution in the amount ordered, the court abused its discretion in ordering restitution.

- b. If the evidence established that insurance payments were made to Maffei in connection with Drath's offenses, the court miscalculated the amount of restitution to Maffei.

Maffei's restitution request in exhibit 1 combines the values of stolen property items, damage to the home, and recoverable depreciation. No items had been returned at the time he prepared the estimate, so the value of returned items was not deducted from the amount requested. Maffei also reported the amount of the insurance claim. Exhibit 1.

The court's ruling indicated its intent that the requested restitution amount be reduced by the amount Maffei recovered. It did this by subtracting the value of the returned items from the total amount of restitution Maffei requested. RP 44-45. But it failed to subtract the sum he received in his insurance claim for the lost items. So while the court

intended to compensate for Maffei's loss, it included loss for which Maffei had already been compensated. The amount of restitution to Maffei is the result of miscalculation, not reasonable exercise of discretion by the court, and it must be reversed. *See Dennis*, 101 Wn. App. at 228.

D. CONCLUSION

For the reasons addressed above the award of restitution to Progressive Home Advantage must be vacated and the award of restitution to Maffei must be corrected.

DATED March 20, 2018.

Respectfully submitted,



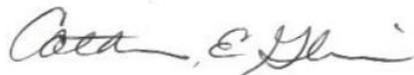
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Certification of Service by Mail

Today I caused to be mailed a copy of the Brief of Appellant in
State v. Orlena Drath, Cause No. 51281-5-II as follows:

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Washington Corrections Center for Women
9601 Bujacich Rd. NW
Gig Harbor, WA 98332

I certify under penalty of perjury of the laws of the State of Washington
that the foregoing is true and correct.



Catherine E. Glinski
Done in Manchester, WA
March 20, 2018

GLINSKI LAW FIRM PLLC

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