

FILED
Court of Appeals
Division II
State of Washington
7/9/2018 1:36 PM

NO. 51679-9-II

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

STATE OF WASHINGTON,

Respondent,

v.

C.T.,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR THURSTON COUNTY, JUVENILE
DIVISION

The Honorable Jonathan Lack, Commissioner

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The Superior Court erred when it ordered appellant to pay \$649.99 to replace a broken cell phone.

Issue Pertaining to Assignment of Error

The amount of restitution must not be based on speculation or conjecture. Appellant broke the victim's cell phone. At a restitution hearing, the court seemed to acknowledge the value of the used phone would not be the same as its original value when purchased. Yet, the court still based restitution on the original purchase price. Should the matter be remanded for an accurate assessment of loss?

B. STATEMENT OF THE CASE

The Thurston County Prosecutor's Office charged C.T. with assault in the fourth degree and malicious mischief in the third degree for events occurring May 21, 2017. CP 1. A negotiated plea agreement resulted in C.T. pleading guilty to malicious mischief in exchange for dismissal of the assault charge. CP 15, 19, 24. The court imposed three months community supervision and 24 hours community service. CP 25. The issue of restitution was reserved. CP 19.

At a subsequent restitution hearing, victim M.H. testified that C.T. assaulted her and broke her iPhone 6s. RP 5-6. A receipt and statement from T-Mobile established that the phone had been purchased at Costco on August 3, 2016 for \$649.99 and was being paid off in 24 installments of about \$27.00. RP 6-10, 15-16, 29; exhibits 1-2. By the time of the restitution hearing, the remaining balance was \$162.37. RP 9, 29; exhibit 2.

The Olympia Police Department estimated the value of the iPhone 6s to be \$300.00. RP 13, 18-19; exhibits 4-5. The phone was beyond repair. RP 12-13, 27-28. No attempt was made to buy a used replacement. RP 15, 28. Instead, M.H.'s mother replaced it with a new and larger iPhone 6s Plus. RP 7, 15-16; exhibit 2.

The State sought restitution of \$649.99, the price paid for the iPhone 6s in 2016 when purchased new. RP 30-31. The defense objected, noting that the phone had certainly depreciated over time while M.H. used it. RP 31. The court properly concluded that some restitution was appropriate. RP 33. It then continued:

The question is, how much should that restitution be. The only evidence that I have is that the phone was purchased for \$649. No evidence has been brought to the court's attention as to what a phone that's been used for a year-and-a-half is worth. There was an additional piece of evidence that was brought to the court's attention, which was that there

was an effort to try to replace (sic) the phone, and that cost \$16.¹ But there's not a request to get reimbursed for that \$16.

I am going to impose the \$649.99. I do believe that that is the only evidence before the court at this time.

RP 33.

The court entered a corresponding order, and C.T. timely filed a Notice of Appeal. CP 33-34, 41-43.

C. ARGUMENT

THE SENTENCING COURT ERRED WHEN IT ORDERED \$649.99 FOR THE iPHONE.

A trial court's authority to impose restitution in juvenile cases is controlled by statute. State v. Hiatt, 154 Wn.2d 560, 563, 115 P.3d 274 (2005). "[T]he court shall require the respondent to make restitution to any persons who have suffered loss or damage as a result of the offense committed by the respondent. . . ." RCW 13.40.190(1). Restitution includes "easily ascertainable damages for injury to or loss of property." RCW 13.40.020(26).

¹ M.H.'s mother testified the Apple Store charged her \$16 to examine the phone and determine it could not be fixed. RP 28.

While the precise value of an item of property need not be shown with mathematical certainty, the court must not engage in mere speculation or conjecture. State v. Kinneman, 155 Wn.2d 272, 285, 119 P.3d 350 (2005); State v. Pollard, 66 Wn. App. 779, 785, 834 P.2d 51, review denied, 120 Wn.2d 1015, 844 P.2d 436 (1992). “If the defendant disputes facts relevant to determining restitution, the State must prove the damages at an evidentiary hearing by a preponderance of the evidence.” Kinneman, 155 Wn.2d at 285 (citing State v. Hughes, 154 Wn.2d 118, 154, 110 P.3d 192 (2005)).

Restitution orders are reviewed for an abuse of discretion. State v. Dauenhauer, 103 Wn. App. 373, 377, 12 P.3d 661 (2000), review denied, 143 Wn.2d 1011, 21 P.3d 291 (2001). The juvenile court abuses its discretion if it bases its decision on unreasonable or untenable grounds. State v. C.A.E., 148 Wn. App. 720, 724, 201 P.3d 361, review denied, 166 Wn.2d 1013, 210 P.3d 1018 (2009). The court abused its discretion here.

“[I]t is within the sound discretion of the trial court to take fluctuations in market value into consideration for purposes of setting restitution.” State v. Fleming, 75 Wn. App. 270, 275, 877 P.2d 243 (1994). In Fleming, the court properly considered the victim’s losses from her stolen necklace to include the lost opportunity to enjoy

recent increases in market value based the rising price of gold. Id. If the appreciated value of a lost item is a proper consideration, so should be its depreciated value. When assessing market value, “a proper deduction must be made for depreciation. Depreciation is not limited to physical wear and tear but it includes economic and functional obsolescence.” State v. Wilson, 6 Wn. App. 443, 450, 493 P.2d 1252 (1972).

In C.T.’s case, the court seemed to recognize (properly) that a used iPhone is not worth the same as a brand new one. See RP 33 (noting the absence of evidence “brought to the court’s attention” concerning the value of the used phone). But the proper course was not to simply base its value on the price when new. M.H. had use of the phone for many months before it was broken. Moreover, as noted above (and to which any owner of electronics can attest), depreciation also is based on functional obsolescence.

Because the defense objected to the State’s requested amount of restitution, it was the *State’s* burden to then prove damages by a preponderance of the evidence. Kinneman, 155 Wn.2d at 285. Where, as here, the State offered no evidence of the reduced value of M.H.’s used iPhone, there was a failure of proof in this regard. This failure was the State’s, not C.T.’s.

Where the defendant has pleaded guilty and agreed to pay restitution, but the lower court has failed to properly determine the amount of the victim's losses after a contested factual hearing, the proper remedy is to remand for a proper valuation based on the evidence presented. State v. Griffith, 164 Wn.2d 960, 967-968, 195 P.3d 506 (2008). This is the proper remedy here.

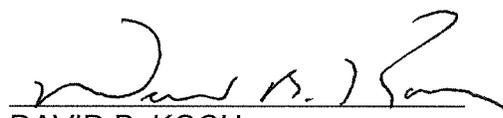
D. CONCLUSION

This Court should vacate the restitution order for failure to properly establish the victim's loss and remand for a new and accurate determination.

DATED this 9th day of July, 2018.

Respectfully submitted,

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July 09, 2018 - 1:36 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
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Appellate Court Case Title: State of Washington, Respondent v Cindy Nguyen Truong, Appellant
Superior Court Case Number: 17-8-00299-1

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