

29908-2-III
COURT OF APPEALS
DIVISION III

FILED
Feb 29, 2012
Court of Appeals
Division III
State of Washington

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

MARGARET GRINSTEAD, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF BENTON COUNTY

APPELLANT'S BRIEF

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in ordering \$20,000 in restitution.

B. ISSUES

1. At the plea hearing, a portion of the affidavit of probable cause was read into the record, addressing books taken from David Carl Gustafson by Ms. Grinstead. The trial court agreed with defense counsel that Ms. Grinstead would be responsible for what the Court deems is proven at the restitution hearing. At the restitution hearing, except for a stipulation by Ms. Grinstead regarding restitution for books, there was no evidence that Ms. Grinstead took the missing ammunition and other missing items submitted by Mr. Gustafson. Did the State prove that Mr. Gustafson's loss was causally related to Ms. Grinstead's crime of third degree theft, as required for an order of restitution?
2. Mr. Gustafson provided an admittedly inaccurate list of missing items and values totaling \$30,000, based on his internet research. Was this evidence sufficient to support a restitution award of \$20,000?

3. The trial court ordered restitution in the amount of \$20,000. The trial court did not indicate how it arrived at this figure. Did the trial court abuse its discretion in ordering restitution in this amount?

C. STATEMENT OF THE CASE

Margaret Grinstead entered an *Alford*¹ plea to one count of third degree theft. (CP 6-14, 16-17; RP (Feb. 18, 2010) 4-9). The State alleged the theft occurred between April 7, 2009 and September 30, 2009, from David Carl Gustafson. (CP 16-17; RP (Feb. 18, 2010) 4-5). In order to establish a factual basis for the plea, Ms. Grinstead agreed that the trial court could review the affidavit of probable cause. (CP 13; RP (Feb. 18, 2010) 6; State's Exh. A 38-39). At the plea hearing, the trial court read the following portion of the affidavit of probable cause into the record:

[T]he court would incorporate by reference the Motion and Affidavit for Probable Cause indicating that between April 7, 2009 and September 30, 2009, that you took various items from your roommate - - a Dave Gustafson - - and Officer Leach spoke to an employee of the Adventures Underground Book Store in Richland. That they had apparently spoken to Mr. Gustafson about some books that you bought from the defendant [sic] that were stolen. That the store employee identified you by picture. That you used a different name when you sold the books. That you received \$560 for the books. That you were

¹ *North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

captured on store security cameras and that you had previously been ordered not to take any of the books or belongings from the house.

(RP (Feb. 18, 2010) 6-7).

The State added the following:

I notice that you didn't read the entire Affidavit of Probable Cause, which is understandable. It's quite lengthy. There was a significant amount of items that were taken from the victim in the case, and we're gonna have a restitution hearing and the amount could very well exceed the misdemeanor amount. The defendant is aware of that. . . . It's just important that we acknowledge on the record that the entire Affidavit of Probable Cause is to be incorporated so that when we do reach the restitution hearing, she's gonna be held responsible for those.

(RP (Feb. 18, 2010) 7).

Ms. Grinstead indicated that she understood. (RP (Feb. 18, 2010) 7-8). Defense counsel then stated, "the only thing I would like to add to the record would be that she'll be responsible for whatever the Court deems is proven at the restitution hearing, not necessarily what's incorporated in the probable cause statement." (RP (Feb. 18, 2010) 8). The trial court responded "[c]ertainly." (RP (Feb. 18, 2010) 8).

The trial court sentenced Ms. Grinstead and set a hearing for determining the amount of restitution owed to Mr. Gustafson. (CP 18-22; RP (Feb. 25, 2010) 16-17). The parties agreed the amount of restitution could exceed the amount required for third degree theft. (RP (Feb. 25,

2010) 12, 14); *see* RCW 9A.56.050(1) (the amount required for third degree theft is \$750 or less).

The trial court held a restitution hearing on three separate dates. (RP (May 14, 2010) 2-52; RP (Nov. 12, 2010) 4-48); RP (Apr. 13, 2011) 2-18).

Ms. Grinstead and Mr. Gustafson were married for two years and then divorced. (RP (Nov. 12, 2010) 5). Subsequently, Mr. Gustafson lived with Ms. Grinstead and her husband at the time, Gregory Grinstead, for approximately fifteen years. (RP (May 14, 2010) 6-7; RP (Nov. 12, 2010) 6). According to Mr. Gustafson, he and Ms. Grinstead got along fine during most of these years. (RP (Nov. 12, 2010) 6).

However, in May 2009, Mr. Gustafson was arrested for assaulting Ms. Grinstead, and a no-contact order was issued, prohibiting him from returning to the home. (RP (May 14, 2010) 17, 43; RP (Nov. 12, 2010) 7-9). As a result, Mr. Gustafson moved out. (RP (May 14, 2010) 17; RP (Nov. 12, 2010) 7-9).

Pursuant to the no-contact order, Mr. Gustafson was away from Ms. Grinstead's home for close to six months. (RP (Nov. 12, 2010) 9). When he returned, he discovered that the majority of his property was missing. (RP (Nov. 12, 2010) 9). He was not physically present at the house to see who took his property. (RP (Nov. 12, 2010) 20-21, 28).

Mr. Gustafson provided a list of items that he alleged were missing, and listed a total of \$30,058.62 for his missing items. (RP (Nov. 12, 2010) 10-16; State's Exh. A 1-5). He listed \$15,924.22 for missing ammunition, and \$14,134.67 for all other missing items. (State's Exh. A 1-5). The other missing items included clothing and shoes; knives; an ax; a folding spade; a survival pack; six opals; 66 DVDs; more than 800 books; a bed, mattress, pillows, and linens; a radio alarm; an LCD monitor; cables; a drill; kitchen appliances; a space heater; a paper shredder; and smoking pipes. (State's Exh. A 1-5). Mr. Gustafson obtained values for these items by going onto the internet and finding replacement value for them. (RP (Nov. 12, 2010) 11).

On September 18, 2009, Ms. Grinstead received \$561.99 from Hastings Entertainment in exchange for some books. (RP (May 14, 2010) 15, 19; State's Exh. A 56). As acknowledged during the plea hearing, the affidavit of probable cause stated that Ms. Grinstead sold books belonging to Mr. Gustafson. (State's Exh. A 38). Ms. Grinstead stipulated to restitution for the books taken from Mr. Gustafson. (RP (Nov. 12, 2010) 40-41; RP (Apr. 13, 2011) 11, 13-14). At the second restitution hearing, Ms. Grinstead stipulated to the amount of 700 dollars. (RP (Nov. 12, 2010) 40-41). At the third and final restitution hearing, Ms. Grinstead

argued restitution for the books should be \$561.99, the amount she received for the books. (RP (Apr. 13, 2011) 13-14; State's Exh. A 56).

In addition to the portion read into the record at the plea hearing regarding books, the affidavit of probable cause stated the following regarding the items Mr. Gustafson alleged Ms. Grinstead stole from him:

Detective Clark Boyer of the West Richland Police Department interviewed neighbors of the defendant and Mr. Gustafson. Some of the neighbors reported seeing Margaret Grinstead and another man, James Wodehouse, removing items from Mr. Gustafson's residence between April 7, 2009 and September 30, 2009. These neighbors report that Ms. Grinstead and Mr. Wodehouse had at least one yard sale during this period and also left a substantial amount of property listed "free" for anyone to take.

(State's Exh. A 38-39).

At the restitution hearings, Mr. Gustafson told the court a majority of the books taken from him were recovered. (RP (Nov. 12, 2010) 14). His \$30,058.62 figure included \$3,167.40 for books not returned by the police. (State's Exh. A 3). However, he said he has not determined how many of the recovered books should be subtracted from the \$30,058.62 figure. (RP (Nov. 12, 2010) 28).

Gregory Grinstead told the court he was working overseas during 2008 and 2009. (RP (May 14, 2010) 8-9, 15-16). He said he returned to the Tri-Cities in August 2009, but he did not go to the house. (RP (May 14, 2010) 17-19). He testified that from July 2008 until September when

this incident occurred, he did not know what property Mr. Gustafson had at the house. (RP (May 14, 2010) 18-19). Gregory Grinstead told the court he did not see Ms. Grinstead take any property. (RP (May 14, 2010) 19).

Spencer Oland, a friend of Mr. Gustafson, removed property belonging to Gregory Grinstead from the house, between May 2009 and September 2009. (RP (May 14, 2010) 25, 30-32, 35-36). Mr. Oland told the court he also removed guns belonging to Mr. Gustafson. (RP (May 14, 2010) 36-38). He said Mr. Gustafson's residence was still filled with property after he removed these items. (RP (May 14, 2010) 39). Mr. Oland admitted he did not see Ms. Grinstead take or sell any property. (RP (May 14, 2010) 40).

Mary Oland, Mr. Oland's wife, told the court she went to the house at the end of May 2009, to retrieve some property for Mr. Gustafson. (RP (May 14, 2010) 37, 43-44). She said she and her son took computer equipment and approximately five to eight books. (RP (May 14, 2010) 43-44). Ms. Oland testified "[t]here had to be hundreds of books" remaining. (RP (May 14, 2010) 44). She told the court a lot of property was left in the house, specifically:

[P]ans - - he liked to cook so he had cooking items, spices sodas [sic]. . . . I notice that he had - - he drinks root beer and there was large stacks of rewards from the Coke

Cola rewards. He probably had 500 of . . . those cans you turn in for magazine items, that type of stuff so obviously he was saving them for something.

(RP (May 14, 2010) 45-46).

The State asked the trial court to order \$60,000 in restitution, double the \$30,000 figure provided by Mr. Gustafson. (RP (Apr. 13, 2011) 10). Ms. Grinstead argued that except for the books, the State failed to show a causal connection between her actions and the property for which the State sought restitution. (RP (Apr. 13, 2011) 4-5, 10-14).

The trial court ordered restitution in the amount of \$20,000 to Mr. Gustafson. (CP 1306-1307). The trial court said:

I have reviewed the probable cause affidavit, which I think is germane to this issue. Ms. Grinstead pled guilty, even though by way of Alford, she pled guilty to the charge. The best that I can do given the testimony and evidence that has been presented to me is conclude first of all she probably won't be able to pay restitution back. That's probably not going to happen so I'm not sure what meaning this decision of mine has but best I can do [sic] is to indicate she owes \$20,000 restitution. I think that is a fair amount and payable at \$25 or \$50 a month isn't going to get very far. It's the best I can do.

(RP (Apr. 13, 2011) 17-18).

Ms. Grinstead appealed the restitution order. (CP 1308-1310).

D. ARGUMENT

1. THE TRIAL COURT ERRED IN ORDERING \$20,000 IN RESTITUTION.

A trial court's restitution order is reviewed for an abuse of discretion. *State v. Davison*, 116 Wn.2d 917, 919, 809 P.2d 1374 (1991). A trial court abuses its discretion when "the order of the court is manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *State v. Cunningham*, 96 Wn.2d 31, 34, 633 P.2d 886 (1981) (internal quotation marks omitted). The State must prove the amount of restitution by a preponderance of the evidence. *State v. Kinneman*, 155 Wn.2d 272, 285, 119 P.3d 350 (2005). "'Evidence supporting restitution is sufficient if it affords a reasonable basis for estimating loss and does not subject the trier of fact to mere speculation or conjecture.'" *Id.* (quoting *State v. Hughes*, 154 Wn.2d 118, 154, 110 P.3d 192 (2005)).

The power to order restitution is based on statute. *State v. Smith*, 119 Wn.2d 385, 389, 831 P.2d 1082 (1992). Third degree theft is a gross misdemeanor. RCW 9A.56.050(2). Restitution in gross misdemeanor cases is authorized under RCW 9.92.060(2), RCW 9.95.210(2), and RCW 9A.20.030. *State v. Thomas*, 138 Wn. App. 78, 81-82, 155 P.3d 998

(2007).² RCW 9.92.060(2) authorizes restitution as a condition of a suspended sentence, and RCW 9.95.210(2) authorizes restitution as a condition of probation. RCW 9.92.060(2); RCW 9.95.210(2). RCW 9A.20.030 authorizes restitution in lieu of a fine. RCW 9A.20.030(1). Here, restitution was not imposed as a condition of a suspended sentence or as a probation condition, but rather, in lieu of a fine. (CP 18-20). Therefore, the applicable restitution statute is RCW 9A.20.030. Under this statute:

If a person has gained money or property or caused a victim to lose money or property through the commission of a crime, upon conviction thereof . . . the court, in lieu of imposing the fine authorized for the offense under RCW 9A.20.020, may order the defendant to pay an amount, fixed by the court, not to exceed double the amount of the defendant's gain or victim's loss from the commission of a crime.

RCW 9A.20.030(1).

This statute also authorizes restitution “when 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 9A.20.030(1).

² The statutes addressing restitution in the Sentencing Reform Act (SRA) do not apply, because the SRA applies only to felonies. See *State v. Marks*, 95 Wn. App. 537, 539, 977 P.2d 606 (1999).

“Restitution is allowed only for losses that are ‘causally connected’ to the crimes charged.” *State v. Tobin*, 161 Wn.2d 517, 524, 166 P.3d 1167 (2007) (citing *Kinneman*, 155 Wn.2d at 286).³ “Losses are causally connected if, but for the charged crime, the victim would not have incurred the loss.” *State v. Griffith*, 164 Wn.2d 960, 966, 195 P.3d 506 (2008) (citing *Tobin*, 161 Wn.2d at 524). The State must prove causation by a preponderance of the evidence. *State v. Thomas*, 138 Wn. App. at 82.

In determining restitution, “the sentencing court may rely on no more information than is admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing.” *State v. Dedonado*, 99 Wn. App. 251, 256, 991 P.2d 1216 (2000). “A causal connection is not established simply because a victim or insurer submits proof of expenditures for replacing property stolen or damaged by the person convicted.” *Id.* at 257. “Such expenditures may be for items of substantially greater or lesser value than the actual loss.” *Id.*

In *Griffith*, the defendant pleaded guilty to possessing stolen property in the second degree. *Griffith*, 164 Wn.2d at 963-64. The trial court ordered the defendant to pay restitution in the amount of \$11,500. *Id.* at 964. The defendant appealed, arguing the evidence was insufficient

³ Although some of the cases discussed here involve restitution under the SRA, causation is also a requirement for restitution in gross misdemeanor cases. *See, e.g., State v. Thomas*, 138 Wn. App. at 82-85 (addressing causation for restitution ordered for the gross misdemeanor of driving while under the influence of intoxicating liquor).

to support the restitution order. *Id.* Our Supreme Court found that the testimony at the restitution hearing did not support the trial court's conclusion that the defendant possessed \$11,500 of the victim's unrecovered property. *Id.* at 966-67. The court stated that the defendant "is responsible only for the value of [the victim's] unrecovered property proven to be causally related to her crime." *Id.* at 967. Accordingly, the court remanded the case for a new restitution hearing, "to determine the value of [the victim's] unrecovered items from the police report that can be identified by a preponderance of the evidence to have been in [the defendant's] possession." *Id.* at 968.

Here, except for the books, the State did not prove that Mr. Gustafson's loss was causally related to Ms. Grinstead's crime of third degree theft. Ms. Grinstead is responsible only for the value of Mr. Gustafson's unrecovered property proven to be causally related to her crime of third degree theft. *See Griffith*, 164 Wn.2d at 967. The State did not prove that but for this crime, Mr. Gustafson would not have incurred the loss of property, other than books, that he claimed at the restitution hearing. *See id.* at 966 (*citing Tobin*, 161 Wn.2d at 524).

At the plea hearing, the portion of the affidavit of probable cause read into the record was limited to Ms. Grinstead taking books from Mr. Gustafson. (RP (Feb. 18, 2007) 6-7). Defense counsel stated that Ms.

Grinstead will “be responsible for whatever the Court deems proven at the restitution hearing, not necessarily what’s incorporated in the probable cause statement[,]” and the trial court agreed. (RP (Feb. 18, 2010) 8). At the restitution hearings, except for a stipulation by Ms. Grinstead regarding books⁴, there was no evidence that Ms. Grinstead took the missing ammunition and other missing items submitted by Mr. Gustafson. (RP (May 14, 2010) 2-52; RP (Nov. 12, 2010) 4-48; State’s Exh. A 1-5). No one testified to seeing Ms. Grinstead take the property from Mr. Gustafson. (RP (May 14, 2010) 2-52; RP (Nov. 12, 2010) 4-48). Mr. Gustafson was not present in the house during the time the crime occurred, and none of the other witnesses testified to seeing Ms. Grinstead take the property. (RP (May 14, 2010) 19, 40-51; RP (Nov. 12, 2010) 20-21, 28). Other than books, no one testified to seeing the specific items submitted by Mr. Gustafson inside the residence. (RP (May 14, 2010) 18-19, 39, 44-46).

The affidavit of probable cause does not prove that Ms. Grinstead took the missing ammunition and other missing items submitted by Mr.

⁴ Ms. Grinstead stipulated to restitution for the books taken from Mr. Gustafson, in the amount of \$561.99. (RP (Nov. 12, 2010) 40-41; RP (Apr. 13, 2011) 11, 13-14). Ms. Grinstead does not challenge an order of restitution in this amount. *See State v. Hunsicker*, 129 Wn.2d 554, 558-59, 919 P.2d 79 (1996) (in determining the amount of restitution, the trial court may rely on a defendant’s acknowledgment of the amount). However, Mr. Gustafson did tell the court a majority of the books taken from him were recovered. (RP (Nov. 12, 2010) 14).

Gustafson. (State's Exh. A 38-39). Although neighbors reported seeing Ms. Grinstead remove items from the residence during the time period at issue, there was no detail as to what these items were. (State's Exh. A 39). There is no indication that any of these items were the missing items submitted by Mr. Gustafson. (State's Exh. A 39).

Because the State failed to prove that Mr. Gustafson's loss was causally related to Ms. Grinstead's crime of third degree theft, the restitution order must be reversed, except for the \$561.99 stipulated to by Ms. Grinstead. (RP (Nov. 12, 2010) 40-41; RP (Apr. 13, 2011) 11, 13-14).

In addition to the lack of causation, the State failed to prove that the replacement figures submitted by Mr. Gustafson are comparable to his actual loss from the crime. *See Dedonado*, 99 Wn. App. at 257.

Also, the trial court abused its discretion in ordering restitution in the amount of \$20,000 to Mr. Gustafson. The trial court did not indicate how it arrived at this figure. (RP (Apr. 13, 2011) 17-18). The order lacks tenable grounds or reasons for this figure. *See Cunningham*, 96 Wn.2d at 34. The evidence presented at the restitution hearings was insufficient to support the trial court's restitution order, because there is no way to determine how the court arrived at the \$20,000 figure, other than by speculation and conjecture. *See Kinneman*, 155 Wn.2d at 285. It is not

possible to tell if this figure was permitted under the applicable statute, or if it “exceed[s] double the amount of the defendant’s gain or victim’s loss from the commission of a crime.” RCW 9A.20.030(1).

E. CONCLUSION

The trial court erred in ordering \$20,000 in restitution to Mr. Gustafson. The State did not prove that Mr. Gustafson’s loss was causally related to Ms. Grinstead’s crime of third degree theft. The State failed to prove that the replacement figures submitted by Mr. Gustafson are comparable to his actual loss from the crime. The trial court abused its discretion in setting restitution at \$20,000. The restitution order must be reversed, except for the \$561.99 stipulated to by Ms. Grinstead.

Dated this 29th day of February, 2012.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION III

STATE OF WASHINGTON,)	
)	
Respondent,)	No. 29908-2-III
)	
vs.)	CERTIFICATE
)	OF MAILING
MARGARET GRINSTEAD,)	
)	
Appellant.)	

I certify under penalty of perjury under the laws of the State of Washington that on February 29, 2012, I served a copy of the Appellant's Brief in this matter by email on the following party, receipt confirmed, pursuant to the parties' agreement:

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I certify under penalty of perjury under the laws of the State of Washington that on February 29, 2012, I mailed a copy of the Appellant's Brief in this matter to:

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Signed at Spokane, Washington on February 29, 2012.


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