

FILED
JANUARY 20, 2016
Court of Appeals
Division III
State of Washington
COA No. 33524-1-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JOSEPH F. MANDOLI,

Appellant.

BRIEF OF APPELLANT

Kenneth H. Kato, WSBA # 6400
Attorney for Appellant
1020 N. Washington St.
Spokane, WA 99201
(509) 220-2237

TABLE OF CONTENTS

I. ASSIGNMENT OF ERROR..... 1

 1. The court abused its discretion by ordering restitution of \$17,945 when the evidence did not support that determination..... 1

Issue Pertaining to Assignment of Error

 A. Did the court abuse its discretion by ordering restitution of \$17,945 when the evidence did not support that determination?..... 1

II. STATEMENT OF THE CASE..... 2

III. ARGUMENT..... 3

 A. The court abused its discretion by ordering restitution of \$17,945 when the evidence did not support that determination..... 3

IV. CONCLUSION..... 7

TABLE OF AUTHORITIES

Table of Cases

State v. Fleming, 75 Wn. App. 270, 877 P.2d 243 (1994)..... 4, 6

State v. Griffith, 164 Wn.2d 960, 195 P.3d 506 (2008)..... 4, 6

State v. Hughes, 154 Wn.2d 118, 110 P.3d 192 (2005),
overruled in part on other grounds by Washington v. Recuenco, 548 U.S. 212 (2006) 4, 5, 6

State v. Kinneman, 155 Wn.2d 272, 119 P.3d 350 2005)..... 6

State v. Mead, 67 Wn. App. 486, 836 P.2d 257 (1992)..... 4

State v. Tobin, 161 Wn.2d 517, 166 P.3d 1167 (2007)..... 4

I. ASSIGNMENT OF ERROR

1. The court abused its discretion by ordering restitution of \$17,945 when the evidence did not support that determination?

Issue Pertaining to Assignment of Error

A. Did the court abuse its discretion by ordering restitution of \$17,945 when the evidence did not support that determination? (Assignment of Error 1).

II. STATEMENT OF THE CASE

Joseph F. Mandoli was charged by amended information with one count of second degree possession of stolen property. (CP 66). Under a plea agreement, he pleaded guilty and made this statement of defendant:

In 2013, in Chelan, Douglas and Grant Counties, I possessed copper that was stolen from Alcoa with intent to sell the copper as scrap when I knew it had been stolen. The value of the copper exceeded \$750. (CP 76).

A contested restitution hearing was held. (5/14/14 RP 1).

Andrew Frederick, a participant, testified two loads of copper shunts and tabs were stolen from Alcoa to sell as scrap. (*Id.* at 7-8, 11). The copper shunts had steel handles and were worn out. (*Id.* at 9). He and Mr. Mandoli were caught on the third load. (*Id.* at 9-10). Mr. Frederick assumed the two loads before weighed the

same, but he really did not know. (*Id.* at 10). He had worked nine years for Alcoa. (*Id.* at 11-12). The tabs were everywhere and the shunts were on pallets. (*Id.* at 12).

David Hulse, Alcoa's security manager, testified the copper tabs were scrapped and auctioned off at \$3.11/lb. (5/14/14 RP 18-19). The shunts were wedge-shaped pieces of copper that weighed 85 pounds when new. (*Id.* at 18). They were resurfaced as they got worn down and their weight decreased to 65-80 pounds. (*Id.* at 20). He did not see the stolen shunts. (*Id.* at 21). Shunts were not sold as scrap, but were resurfaced and reused. (*Id.* at 22-23). The price of a new shunt ranged from \$527 to \$800 and, using the lower price, Mr. Hulse came up with a value of \$6.88/lb. On the other hand, he could not find any shunt purchases at the Alcoa plant as the shunts were reused and he had no information on their useful life. (*Id.* at 22-23). No inventory of shunts was kept. (*Id.* at 24).

The victim's restitution estimate valued the copper tabs and shunts at \$24,258. (CP 46). The estimate was based on 7800 pounds of copper (two loads at 3900 pounds each) valued at \$3.11/lb. (CP 49). The police had receipts from Mr. Frederick relating to one load, showing he sold 3833 pounds of copper to a

Moses Lake recycling company. (CP 19). In another load, Mr. Mandoli sold 810 pounds of copper. (CP 49). Based on two loads of similar weight at 3900 pounds each, Alcoa's loss estimate was 7800 pounds of copper valued at \$3.11/lb. for a total loss of \$24,258. (CP 49).

Mr. Mandoli argued there was only evidence of 3833 pounds of copper that were stolen and the 3967 pounds added to the documented and verifiable loss could only be mere speculation and conjecture. (5/14/14 RP 30). Further, the defense noted the price of copper was somewhat lower at \$2.94 ½ /lb. (*Id.* at 33).

Restitution would then have been 3833 pounds at \$2.94 ½ /lb. or \$11,288.19.

The court decided to split the difference so each copper load was 2885 pounds for a total weight of 5770 pounds at a valuation of \$3.11/lb. (5/14/14 RP 33-35). Total restitution was thus \$17,945. (*Id.*; CP 1). Mr. Mandoli appealed the restitution order. (CP 203).

III. ARGUMENT

A. The court abused its discretion by ordering restitution of \$17,945 when the evidence did not support that determination.

The size of a restitution award rests in the court's discretion and will not be disturbed on appeal without a showing of abuse.

State v. Mead, 67 Wn. App. 486, 490, 836 P.2d 257 (1992). The court's authority to impose restitution is statutory. *State v. Griffith*, 164 Wn.2d 960, 965, 195 P.3d 506 (2008). Restitution must be ordered whenever a defendant is convicted of an offense resulting in loss of property and the amount must be based "on easily ascertainable damages." RCW 9.94A.753(5). The claimed loss does not have to be established with specific accuracy, but it must be supported by substantial credible evidence. *State v. Fleming*, 75 Wn. App. 270, 274-75, 877 P.2d 243 (1994), *overruled on other grounds by Washington v. Recuenco*, 538 U.S. 212 (2006). Supporting evidence 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. Hughes*, 154 Wn.2d 118, 154, 110 P.3d 192 (2005). In a contested hearing, the State must prove the damages by a preponderance of the evidence. *Griffith*, 164 Wn.2d at 965.

Restitution is allowed only for losses that are causally connected to the charged crime. *State v. Tobin*, 161 Wn.2d 517, 524, 166 P.3d 1167 (2007). That causal connection exists if, but for the crime charged, the victim would not have incurred the loss.

Id. at 524. The court looks to the underlying facts of the charge. *Griffith*, 164 Wn.2d at 966. Although a court can, in its discretion under RCW 9.94A.753(3), double the amount of restitution, that was not done here. (5/14/14 RP 35).

Mr. Mandoli does not take issue with the court's valuation of the scrap copper at \$3.11/lb. What he does challenge, however, is the total amount of restitution since the supporting evidence did not afford a reasonable basis for estimating the loss and the judge necessarily resorted to mere speculation and conjecture to arrive at a figure. *Hughes*, 154 Wn.2d at 154.

There was testimony by Mr. Frederick that two loads of copper were stolen. One of those loads was accounted for in his receipts for 3023 pounds of copper sold at \$2.28/lb for a total of \$6,892.95. (CP 19). The evidence also showed that another 810 pounds, presumably the second load as no copper was left over, were sold by Mr. Mandoli. (CP 49; 5/14/14 RP 7-8). Although the police report indicated Mr. Frederick thought the two stolen loads were about the same weight, he testified at the restitution hearing he just assumed they were the same and did not know whether they indeed were. (5/14/14 RP 10). With no copper left over from

the scrap sales, the undisputed evidence shows the two stolen loads were clearly not the same weight. (*Id.* at 8).

Considering both loads were accounted for in the 3833 pounds of copper that were shown to have been scrapped, the State did not prove by a preponderance that any more copper was stolen. *State v. Kinneman*, 155 Wn.2d 272, 285, 119 P.3d 350 (2005). The court erred by “splitting the difference” and finding the total loss was 5770 pounds when the State only proved 2000 pounds less. The undisputed evidence was that Mr. Frederick only assumed the second load was the same as the first, as did Alcoa’s representative, Mr. Hulse. (5/14/14 RP 7-10; CP 49). This is not a reasonable basis for estimating loss as assumptions are not proof. *Hughes*, 154 Wn.2d at 154. The court had to resort to speculation and conjecture to find the loss was 5770 pounds of copper. *Id.* The court abused its discretion by so finding because there was no substantial credible evidence to support it. *Fleming*, 75 Wn App. at 274-75.

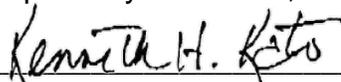
Substantial evidence does not support the restitution order. *Griffith*, 164 Wn.2d at 966. In these circumstances, it should be vacated and the case remanded for a new restitution hearing. Moreover, no new evidence should be admitted. *Id.* at 968.

IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Mandoli respectfully urges this Court to vacate the restitution order and remand for a new restitution hearing.

DATED this 20th day of January, 2016.

Respectfully submitted,



Kenneth H. Kato, WSBA #6400
Attorney for Appellant
1020 N. Washington
Spokane, WA 99201
(509) 220-2237

CERTIFICATE OF SERVICE

I certify that on January 20, 2016, I served a copy of the Brief of Appellant by USPS on Joseph Mandoli, 7189 Tarpiscan Road, Malaga, WA 98828; and by email, as agreed, on Conor Johnson at prosecuting.attorney@co.chelan.wa.us.