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MARCH 17, 2016
Court of Appeals
Division III
State of Washington

No. 33524-1-III

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

Chelan County Superior Court
Cause No. 13-1-00541-8

STATE OF WASHINGTON,
Plaintiff/Respondent,

v.

JOSEPH F. MANDOLI,
Defendant/Appellant.

BRIEF OF RESPONDENT

Douglas J. Shae
Chelan County Prosecuting Attorney

Conor C. Johnson WSBA #43119
Deputy Prosecuting Attorney

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I. RESPONSE TO ASSIGNMENT OF ERROR

The defendant asserts that he is required to pay restitution, but that the amount ordered (\$17,945.00) by the trial court was not based on substantial credible evidence. Instead, the defendant asserts the court should have ordered restitution in the amount of \$11,288.19. The State responds that the Chelan County Superior Court acted within its discretion and appropriately set the restitution at \$17,945.00.

II. STATEMENT OF THE CASE

Mr. Mandoli entered a plea of guilty to one count of Possession of Stolen Property in the Second Degree in an Amended Information entered on December 29, 2014. (CP 66). At that time a contested restitution hearing was set, which was ultimately held on May 14, 2015. (RP 1). The State, to assist with the restitution hearing, filed a restitution brief. (CP 90). The court accepted the materials submitted by the State without objection. (RP 6).

On October 14, 2013, Mr. Mandoli and co-defendant, Andrew Frederick, were caught stealing a load of copper from Alcoa Inc. which weighed 3895 lbs. (CP 90-202, Restitution Brief page 2, exhibit 2 pages 6 and 7). Mr. Frederick testified that there were two previous loads of stolen copper. (CP 8-11, Affidavit of Probable Cause; RP 1 and 9). That copper was recovered which consisted of copper tabs and copper shunts. (RP 9). Some of this copper, along with other scrap copper from Alcoa, was sold at an auction for \$3.11 a pound. (CP 52-3) At the restitution hearing the State recommended that the court use \$3.11 a pound as the price of copper even though there was evidence that some of the copper stolen was more valuable to Alcoa. (RP 22-23). Alcoa ultimately believed the amount of restitution should be \$24,258.00. (RP 46). That was based on the belief that the first two loads of copper weighed approximately 3900 pounds, the same as the third load, with the value of copper being \$3.11 per pound. (CP 49). At the restitution hearing, Andrew Frederick, a co-defendant, testified.

Mr. Frederick said he believed that the other two loads of copper were 30-40 percent less than the third load. (RP 16)

Law enforcement recovered receipts from Mr. Frederick relating to one load showing he sold 3023 pounds of copper. (CP 19). The defendant sold 810 pounds of copper on a separate occasion. (CP 49). However, the defendant argued that there was only evidence of 3833 pounds being sold and the court should use the price of \$2.945 per pound to arrive at \$11,288.19. (RP 31).

The court adopted Mr. Frederick's testimony. The court took the amount of the third load, which was 3967 pounds, and multiplied it by 2 for the two loads of copper that left the Alcoa premises. The court then reduced that amount by approximately 35 percent, arriving at the figure of approximately 5770 pounds of copper at a price of \$3.11 per pound. The court found this amount to be \$17,945.00. (RP 34-35).

III. ARGUMENT

A restitution order will be reversed only if the defendant shows an abuse of discretion by the trial court. This exists when a trial court's determination is manifestly unreasonable or based on untenable grounds. *State v. Enstone*, 137 Wn.2d 675, 679, 974 P.2d 828 (1999), citing *State v. Davison*, 116 Wn.2d 917, 919, 809 P.2d 1374 (1991), and *State v. Cunningham*, 96 Wn.2d 32, 34, 633 P.2d 886 (1981). Restitution shall be based upon "easily ascertainable damages." RCW 9.94A.753(3). However, the loss need not be established with specific accuracy. *State v. Fleming* 75 Wn. App 270, 274, 877 P.2d 243 (1994). 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.* at 274-75 (quoting *State v. Pollard*, 66 Wn. App. 779, 785, 834 P.2d 51 (1992)). To determine the amount of restitution, the trial court can either rely on a defendant's acknowledgment or it can determine the amount by a preponderance of the evidence.

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

The evidence presented at the restitution hearing clearly established a reasonable basis for estimating the loss to Alcoa. The exact amount of copper stolen by the defendants was never known, but it does not need to be. Estimations are clearly allowable under case law and the trial court had a reasonable basis to believe that three loads total were stolen. The last load stolen was recovered. The other two loads, as Mr. Frederick testified, were 30-40 percent smaller than the last load. The court explicitly gave weight to, and accepted Mr. Frederick's testimony. The direct testimony of a co-defendant is clearly a reasonable basis to establish restitution.

The defendant appears to argue that there was not any copper left over from the thefts beyond what the State showed was sold by Mr. Frederick and Mr. Mandoli. However; this theory was apparently not believed by the trial court as Judge

Small believed the most appropriate measure of loss from Alcoa was 5770 pounds of copper. Judge Small's decision was directly based upon the evidence contained in the materials submitted by the State and also the testimony given at the hearing. Judge Small found Mr. Frederick credible and adjusted the amount of restitution accordingly.

IV. CONCLUSION

Based upon the foregoing arguments, the State respectfully requests that the trial court's order of restitution be confirmed.

DATED this 17th day of March, 2016.

Respectfully submitted,

Douglas J. Shae
Chelan County Prosecuting Attorney



By: Conor C. Johnson WSBA #43119
Deputy Prosecuting Attorney

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

STATE OF WASHINGTON,)	
)	No. 33524-1-III
Plaintiff/Respondent,)	Superior Court No. 13-1-00541-8
)	
vs.)	DECLARATION OF SERVICE
)	
JOSEPH F. MANDOLI,)	
)	
Defendant/Appellant.)	

I, Cindy Dietz, under penalty of perjury under the laws of the State of Washington, declare that on the 17th day of March, 2016, I electronically transmitted to:

Renee S. Townsley
Clerk/Administrator
Court of Appeals, Div. III
500 N. Cedar Street
Spokane, WA 99201

AND electronically transmitted via email, as agreed, to:

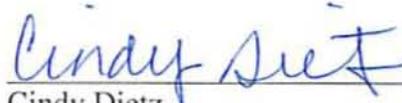
Kenneth H. Kato
Attorney for Appellant
khkato@comcast.net

AND deposited in the United States Mail a properly stamped and addressed envelope directed to:

Joseph F. Mandoli
7189 Tarpiscan Road
Malaga, WA 98828

1 said electronic transmissions and envelopes containing true and correct copies of Brief of
2 Respondent.

3 Signed at Wenatchee, Washington, this 17th day of March, 2016.

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5 _____
6 Cindy Dietz
7 Legal Administrative Supervisor
8 Chelan County Prosecuting Attorney's Office
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