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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 35536-5-III

(consolidated with Nos. 35564-1-III and 35582-9-III)

STATE OF WASHINGTON, Respondent,

v.

NATHANIEL DEAN MOWEN, Appellant.

APPELLANT'S BRIEF

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I. INTRODUCTION

Nathaniel Mowen pleaded guilty to burglarizing a marijuana farm with co-defendants Thomas Robertson and Joseph Jones. Some of the marijuana was recovered, but damaged. The trial court held a joint restitution hearing to determine the amount of the loss. During the hearing, the defendants sought to cross-examine the farm operator on potential uses for the damaged marijuana in other products, in support of an argument to mitigate the loss. The trial court refused to allow the inquiry and entered a restitution order for \$76,670 in damages based upon the wholesale price of marijuana flowers. On appeal, Mowen contends that the restitution hearing did not comport with due process requirements because he was prohibited from cross-examining the witness on a matter that pertained directly to the amount of the loss.

II. ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR NO. 1: The trial court erred in refusing to permit cross-examination into alternative uses for the damaged marijuana flowers that would have mitigated the owner's losses.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

ISSUE NO. 1: Whether the opportunity to sell the marijuana as a different product for a different price was relevant to whether the co-defendants' conduct caused the damages in question.

ISSUE NO. 2: Whether the State can demonstrate that limiting the cross-examination of a State witness on a relevant matter relating directly to the dispositive question is harmless beyond a reasonable doubt.

IV. STATEMENT OF THE CASE

Pursuant to an agreement with the State, Mowen pleaded guilty to charged of second degree burglary, first degree theft,¹ possession of a controlled substance, and third degree malicious mischief. CP 30, 37. He was one of three co-defendants charged with entering and taking a large amount of marijuana from a grow operation. RP 24. The court imposed an exceptional downward sentence of 6+ months, followed by 12 months of community custody. CP 21-23.

Subsequently, the court held a joint evidentiary hearing to determine the amount of restitution to be imposed. RP 35. Edward Rhinehart, Jr., the former operator of Methow Valley Nursery at the time

¹ As part of the agreement, the State stipulated that the second degree burglary and the first degree theft charges constituted the same criminal conduct. CP 30.

of the burglary, testified at the hearing. RP 40-41. Rhinehart testified that 68.5 pounds of marijuana, or 31,071 grams, was taken in the burglary. RP 45-46. Some of the stolen marijuana was recovered, but about one-third of the total amount was lost. RP 47. The marijuana that was returned was damaged from the handling. RP 47. Rhinehart testified that the marijuana flower will break when dropped, so when the recovered marijuana was processed to package the flower buds, the yield was reduced by 25-30 percent. RP 53.

On cross examination, the following exchange occurred:

Q Isn't it true that -- marijuana flower is only one product in a whole litany of products that you produce.

MR. PLATTER: Objection. Relevance.

THE COURT: I'll sustain--

MR. SCHIESSER: Your Honor,--

THE COURT: --the objection. You have to explain why it's relevant, when we're only talking about the product stolen here,--

MR. SCHIESSER: Your Honor, this is--

THE COURT: --and the restitution amount.

MR. SCHIESSER: This -- This question is relevant, your Honor, because -- I have reason to believe that the losses claimed here -- really aren't a loss at all; in fact, -- this marijuana could have been -- could have been sold as a separate product, say, for example, trim, marijuana trim can still be sold and recovered.

MR. PLATTER: And I would renew the same objection.

THE COURT: I'm going to sustain the objection. I guess my thought there would be, do you think that he could have recovered more than what he now says -- a greater value? If he'd--. If he somehow sold it as trim he'd get a greater price? Is that what you're telling this court?

MR. SCHIESSER: Your Honor, I'm simply saying that -- 25 -- he's claiming a 25 percent loss.

THE COURT: I'm just asking, are -- you think the value of that product that he lost -- damage -- he could have gotten a greater price for?

MR. SCHIESSER: Yes, your Honor. I'm talking about mitigation.

THE COURT: Then you'll have to at some point present that. But at this point I'm going to sustain the objection. You can present your own testimony.

Q So does each bag of marijuana, each unit, does each unit have an associated contract or purchaser connected to it?

MR. PLATTER: Objection. Relevance.

THE COURT: I'm going to sustain the objection.

Q Where were these -- where was this marijuana destined for?

MR. PLATTER: Objection. Relevance.

MR. SCHIESSER: Your Honor, I'm -- I'm attempting to establish the market value of the marijuana.

THE COURT: He's testified as to his value.

MR. SCHIESSER: And I'm trying to question the witness where that value comes from. He's--.

THE COURT: He's testified that it's his wholesale price.

MR. SCHIESSER: And I'm -- attempting to extrapolate--

THE COURT: And that was the market--

MR. SCHIESSER: --on that, your Honor.

THE COURT: It was the market price at that time. He's testified to that. I'll sustain the objection.

RP 58-60.

At the close of the testimony, the trial court entered a restitution order for \$76,670, based upon a total loss of \$52,113 increased by 50%. RP 84, 86, CP 13. These amounts were based upon Rhinehart's testimony as to the value of the marijuana as damaged buds. RP 82.

Mowen now timely appeals from the order of restitution. CP 6. He has been found indigent for that purpose. CP 1.

V. ARGUMENT

A trial court has discretion to determine the amount of restitution owed, and its determination will be reversed only if manifestly unreasonable, or based upon untenable grounds or reasons. *State v. Tobin*, 132 Wn. App. 161, 173, 130 P.3d 426 (2006), *affirmed*, 161 Wn.2d 517 (2007). The State bears the burden of proving the loss by a preponderance of the evidence, and while the loss need not be proven with mathematical accuracy, "it must be supported by substantial credible evidence." *State v. Burns*, 159 Wn. App. 74, 78, 244 P.3d 988 (2010) (*citing State v. Griffith*, 164 Wn.2d 960, 965, 195 P.3d 506 (2008)). If the facts supporting a

restitution claim are disputed, they must be resolved in an evidentiary hearing. *State v. Dedonado*, 99 Wn. App. 251, 256, 991 P.2d 1216 (2000).

A hearing to determine restitution amounts must meet minimum due process requirements, including the right to cross-examine witnesses. See *State v. Raleigh*, 50 Wn. App. 248, 254, 748 P.2d 267, review denied, 110 Wn.2d 1017 (1988); *State v. Mark*, 36 Wn. App. 428, 435, 675 P.2d 1250 (1984) (observing that because restitution hearing afforded the opportunity to present testimony, cross-examine witnesses, and other trial protections, it “afforded all procedural process that was due.”).

Both the Washington and federal constitutions protect the right to cross-examine witnesses. U.S. Const. Amend. VI; Wash. Const. art. 1, § 22; *State v. Lee*, 188 Wn.2d 473, 486-87, 396 P.3d 316 (2017). Confrontation assures the accuracy of the fact-finding process, the integrity of which is undermined when the right is denied. *Lee*, 188 Wn.2d at 487 (citing *Chambers v. Mississippi*, 410 U.S. 284, 295, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973)); *State v. Darden*, 145 Wn.2d 612, 620, 41 P.3d 1189 (2002)).

The right to cross-examine a witness is not absolute, and is limited by considerations of relevance. *Lee*, 188 Wn.2d at 487; *Darden*, 145 Wn.2d at 620-21. Reviewing courts evaluate the limitation of cross-

examination by considering three factors: (1) Whether the evidence was at least minimally relevant, (2) whether the State demonstrates the evidence is so prejudicial as to disrupt the fairness of the fact-finding process, and (3) whether the State's interest in excluding prejudicial evidence outweighs the defendant's need for the information sought. *Lee*, 188 Wn.2d at 488; *Darden*, 145 Wn.2d at 622. The threshold to admit relevant evidence is low. *Darden*, 145 Wn.2d at 621. A ruling limiting the scope of cross-examination is reviewed for abuse of discretion. *Lee*, 188 Wn.2d at 486.

In *Darden*, a police officer conducted surveillance of a drug transaction from a fixed position, the precise location of which he refused to identify. 145 Wn.2d at 616. The defense sought to establish the precise location through cross-examination in order to verify what the officer could and could not see. *Id.* at 617. On review, the *Darden* Court concluded that the officer's location was relevant because it concerned a fact of consequence to the prosecution – namely, the officer's ability to observe and recognize the defendant as the perpetrator of the offense. *Id.* at 624-25. It rejected the argument that there was no reason to doubt the accuracy of the testimony, observing that “[c]reating such doubt would have been one of the objectives of cross-examination.” *Id.* at 625 (*quoting State v. Reed*, 101 Wn. App. 704, 715, 6 P.3d 43 (2000)). Significantly,

the court emphasized that the State's case hinged entirely on the officer's testimony, concluding for that reason the limitation of cross-examination was not harmless. *Id.* at 626.

In the present case, the fact at issue was the value of the damage caused to Rhinehart's property by the handling during the burglary and subsequent flight. RCW 9.94A.750(5) ("Restitution may be ordered whenever the offender is convicted of an offense which results in injury to any person or damage to or loss of property."). This required proof that the losses claimed by Rhinehart were causally connected to the crimes. *State v. Tobin*, 161 Wn.2d 517, 524, 166 P.3d 1167 (2007). The causal connection is determined by applying a "but-for" test – but for the charged crime, the loss would not have occurred. *Griffith*, 164 Wn.2d at 966.

The defense inquiry into other uses for the damaged marijuana was relevant because it related to whether Rhinehart's losses were caused by the events of the crime. If, as the defense sought to discover, there were alternative uses available for the marijuana that would have reduced Rhinehart's losses, then the entire amount claimed as damage could not be causally attributed to the burglary – it would result, at least in part, from Rhinehart's choice to dispose of the damaged marijuana for a lower price than he could have obtained. Consequently, the defense inquiry was

relevant to the restitution question because it probed whether the amount claimed was caused by the burglary.

The present case is analogous to *Darden* in several respects. First, Rhinehart's testimony comprised the State's entire case for restitution, just as the *Darden* officer's testimony comprised its case for the charge. In *Darden*, the defense sought to elicit information from the State's witness to challenge his testimony about his observations; here, the defense sought to elicit information from Rhinehart about other uses for the marijuana to challenge his testimony about its market value. As in *Darden*, the limitation of defense questioning deprived the defense of the opportunity to investigate relevant facts of significance to the ultimate issue. But where, in *Darden*, the State had at least an arguable basis for desiring to keep the surveillance location secret, here there was no identified prejudice that would have resulted from allowing the inquiry – the trial court simply accepted the State's allegations as to market value and apparently considered defense testing of those allegations irrelevant.

Because the trial court prevented the defense from pursuing a relevant line of inquiry to test the basis of the State's claim, and because no claim of prejudice justifies the exclusion of the evidence, the burden lies with the State to prove the error harmless beyond a reasonable doubt.

Darden, 145 Wn.2d at 622 (“[T]he burden is on the State to show the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial.”); *State v. McDaniel*, 83 Wn. App. 179, 187, 920 P.2d 1218 (1996), *review denied*, 131 Wn.2d 1011 (1997) (erroneous limitation of cross-examination is constitutional error, which is presumed prejudicial). Here, the limitation on the defense cross-examination undermines the integrity of the restitution hearing and calls the trial court’s findings into question, because the trial court prevented the defense from seriously challenging the State’s evidence. Accordingly, the restitution order should be reversed, and the case remanded for a new hearing.

VI. CONCLUSION

For the foregoing reasons, Mowen respectfully requests that the court REVERSE the restitution order and REMAND the case for a new hearing.

RESPECTFULLY SUBMITTED this 12 day of February, 2018.



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DECLARATION OF SERVICE

I, the undersigned, hereby declare that on this date, I caused to be served a true and correct copy of Appellant's Brief upon the following parties in interest by depositing them in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

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

Signed this 12 day of February, 2018 in Walla Walla,

Washington.

A handwritten signature in cursive script, appearing to read "Andrea Burkhart", written over a horizontal line.

Andrea Burkhart

BURKHART & BURKHART, PLLC

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