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Court of Appeals  
Division III  
State of Washington  
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COURT OF APPEALS NO. 35536-5-III

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

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STATE OF WASHINGTON,

Respondent,

v.

THOMAS ROBERTSON,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT  
OF WASHINGTON FOR OKANOGAN COUNTY

The Honorable Henry Rawson, Judge,

OPENING BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The state failed to prove a causal connection between appellant's crime and the victim's damages.

Issue Pertaining to Assignment of Error

Did the court act outside its authority in ordering appellant to pay for a camera the state failed to prove was damaged during the burglary?

B. STATEMENT OF THE CASE

On December 18, 2015, the Okanogan county prosecutor charged appellant Thomas Robertson with the following counts: (1) second degree burglary of Ed Rhinehart's building in Winthrop; (2) first degree theft of marijuana; (3) possession of marijuana with intent to deliver; (4) possession of more than 16 ounces of marijuana; and (5) third degree malicious mischief. CP 47-49.

The state alleged that intruders broke into Rhinehart's storage trailer at his marijuana farm and stole 3-4 garbage bags of processed marijuana. Supp. CP \_\_\_ (sub. No. 2, Motion and Declaration for Arrest Warrant), Investigative Report at 3. Security guard Steven Dikes chased the suspects and recovered one of the bags, which was dropped during the pursuit. Id.

Dikes told police each of the bags contained between \$15,000 and \$20,000 worth of processed and packaged marijuana. Id. He also stated that in the past 2-3 days, the camera nearest the entry door had been aimed toward the wall, rather than facing into the room. Id. at 4.

Police were able to follow footprints from the trailer that led to a car's tire tracks but the tire tracks became indiscernible from others after a short distance. Id. at 4. The business' owner, Ed Rhinehart, suggested the following persons as possible suspects: Wayne Jones, Joe Jones, Thomas Robertson, and Nathaniel Mowen. Id. Joe Jones and Thomas Robertson were former employees who were fired some months back. Id. Wayne Jones was a current employee. Id.

Police went to speak to Mowen and found a large amount of marijuana "shake" on his back bumper, and the tires on his vehicle had a similar tread pattern to the tracks police saw near Rhinehart's storage trailer. Id.

Mowen implicated Jones and Robertson and said Jones broke down the door to Rhinehart's trailer and they took 3-4 bags of marijuana.<sup>1</sup> Id. at 5. Mowen stated they returned to his place and

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<sup>1</sup> Mowen said Jones broke the door down with two shoulder hits. Id. at 5.

split up the bags; Mowen had one full bag of marijuana in his garage and two empty bags with marijuana shake residue in them. Id.

Mowen advised that Jones was at the apartment of Jessica Reece. After police took Jones into custody, Reese allowed police to look in the attic, where they found two garbage bags full of packaged marijuana. Id. The combined weight of the recovered marijuana was over 40 pounds. Id. at 6.

According to the investigative report, the third degree malicious mischief charge was based on damage to the door, the value of which was purportedly under \$250.00. Id. at 6.

Pursuant to a plea agreement, Robertson pled guilty to counts (1)-(3) and (5) and the state dropped count (4) and agreed counts (1) and (2) constituted the same criminal conduct for sentencing. CP 29-46.

At sentencing on May 27, 2016, the court imposed concurrent sentences totaling 14 months of incarceration. CP 22. The court ordered the prosecutor to set a restitution hearing. CP 25.

The restitution hearing originally scheduled for November 18, 2016 (within 180 days of sentencing) was continued several times but held on August 23, 2017. RP (8/23/17).

At the hearing, Rhinehart testified he filled out a victim's restitution estimate and gave it to police. RP 11; Ex 1. As indicated in the paperwork, Rhinehart did not recover all the marijuana that was stolen. The paperwork indicated that 31,071 grams were stolen but only 18,711 grams were returned. Thus, 12,360 grams were not returned. At a wholesale price of \$3.00 a gram, Rhinehart estimated the loss as \$37,080.00.<sup>2</sup> Ex 1. Plus, the marijuana that was returned was damaged, so Rhinehart discounted it (in the paperwork) by 25% for an additional loss of \$14,033.<sup>3</sup> Ex 1. Accordingly, Rhinehart estimated the value of his product loss at \$51,113.00.<sup>4</sup> Ex 1; RP 17.

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<sup>2</sup> Rhinehart testified that two weeks prior to the burglary he was selling marijuana at \$4.00 a gram. However, he calculated his loss using a price of \$3.00 a gram because the market was falling. RP 15.

<sup>3</sup> Rhinehart testified that he filled out the paperwork ten days after the burglary and that the 25% discount for the damaged marijuana was an estimate at the time. RP 27. Rhinehart claimed that ultimately, he was only able to recover \$2.00 a gram. RP 26.

<sup>4</sup> Rhinehart testified an audit by the Liquor and Cannabis Control Board performed after the burglary substantiated his losses. RP 14. But he did not bring the report with him. RP 20.

Rhinehart testified he also had to replace two items – the door that was kicked in and a security camera he claimed was broken in the process:

The – door to the security room was kicked in and completely destroyed. The door, when they kicked it in, flew against the wall, hit a security camera and broke the security camera.

RP 13.

Rhinehart claimed he bought a door at Home Depot and paid a carpenter to install it for \$800.00. He testified “[e]ach camera’s worth \$200, replacement cost.” RP 13. He reportedly bought 30 of them, so he knew the price. RP 13. He did not have a receipt for the door or camera. RP 38.

The state acknowledged it did not provide receipts or the audit but claimed it was not necessary. RP 44. Counsel for Robertson, Mowen and Jones objected to the state’s lack of documentation and argued the state failed to prove Rhinehart’s alleged losses by a preponderance of the evidence. RP 45-49.

The court found the evidence sufficient to substantiate Rhinehart’s losses at \$52,113.00, including the door and camera. RP 53. However, the court decided to increase Rhinehart’s restitution award by 50%, since his estimate was on the

conservative side. RP 53. The court therefore imposed restitution in the amount of \$76,670.00, with joint and several liability among Robertson, Mowen and Jones. RP 54. This appeal follows. CP 6-12.

B. ARGUMENT

THE STATE FAILED TO PROVE THE DAMAGE TO THE CAMERA WAS CAUSALLY RELATED TO THE BURGLARY.

Instead of making a statement, in his Statement of Defendant on Plea of Guilty, Robertson agreed the court could consider the police report to establish a factual basis for the plea. CP 45. The police report recounted that the security guard (Steven Dikes) told police that "in the past 2-3 days, the camera (#21?) nearest the entry door had been aimed toward the wall, rather than facing into the room." Supp. CP \_\_ (sub. No. 2, Motion and Declaration for Issuance of Order for Arrest Warrant), Investigative Report at 4. The only property damage noted in the police report was to the door, which the burglars admittedly broke down. Id. at 6.

At the restitution hearing, Rhinehart claimed that when the burglars busted open the door, it flew against the wall and broke the camera. RP 13. Rhinehart may have believed this is what happened. However, he was not there at the time of the burglary.

But more importantly, it is clear from Dikes' statement to police that the camera nearest the door was already broken at the time of the burglary. Dikes noticed something was wrong with it 2-3 days before the burglary. The state therefore failed to prove the damaged camera was causally related to the burglary and the court erred in requiring Robertson to pay for its replacement.

A sentencing court's authority to order restitution is purely statutory and, where so authorized, the sentencing court has discretion to determine the amount of restitution. State v. Davidson, 116 Wn.2d 917, 919, 809 P.2d 1374 (1991). The exercise of such discretion is reversible if it is manifestly unreasonable, or exercised on untenable grounds or for untenable reasons. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

Under RCW 9.94A.753(3), there are limits on the court's authority to impose restitution:

[R]estitution ordered by a court pursuant to a criminal conviction shall be based on easily ascertainable damages for injury to or loss of property, actual expenses incurred for treatment for injury to persons, and lost wages resulting from injury. Restitution shall not include reimbursement for damages for mental anguish, pain and suffering, or other intangible losses, but may include the costs of counseling reasonably related to the offense. The amount of restitution shall

not exceed double the amount of the offender's gain or the victim's loss from the commission of the crime.

In determining any sentence, including 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. Woods, 90 Wn. App. 904, 907, 953 P.2d 834, rev. denied, 136 Wn.2d 1021 (1998). Where a defendant disputes material facts for purposes of restitution, the sentencing court must hold an evidentiary hearing where the state must prove the restitution amount by a preponderance of the evidence. Woods, 90 Wn. App. at 907. Restitution does not need to be proven with specific accuracy. State v. Kisor, 68 Wn. App. 610, 619, 844 P.2d 1038, review denied, 121 Wn.2d 1023 (1993). Evidence is sufficient if it affords a reasonable basis for estimating loss. Kisor, 68 Wn. App. at 619.

However, restitution must be based on a causal connection between the crime and the victim's damages. State v. Dedonado, 99 Wn. App. 251, 256, 991 P.2d 1216 (2000). A causal connection exists if "but for" the offense, the loss or damages to a victim's property would not have occurred. State v. Tobin, 161 Wn.2d 517, 519, 524-25, 166 P.3d 1167 (2007). The state must prove this

causal connection between the expenses and the offense by a preponderance of the evidence. State v. Kinneman, 122 Wn. App. 850, 860, 95 P.3d 1277 (2004), aff'd, 155 Wn.2d 272, 119 P.3d 350 (2005).

The court's opinion in Dedonado is instructive. Dedonado pled guilty to taking a motor vehicle without permission. The plea agreement provided the court would consider as "real facts" the facts set forth in the certification for determination of probable cause. The certification indicated Dedonado damaged the ignition of a Dodge Caravan while stealing the van. Dedonado, 99 Wn. App. at 253. Regarding damage to the van, at the restitution hearing, the state presented a preliminary estimate from a mechanic that totaled \$1,064.67. In addition to the damage related to the ignition switch, the estimate included such items as "DOME LAMP BULBS," "FILL ALL FLUIDS," "ALIGN FRONT SUSPENSION," and "REMOVE/REPLACE LIFTGATE GRILL." Dedonado, 99 Wn. App. at 255. Despite Dedonado's objection, the court noted the insurance company paid the precise amount of the preliminary estimate and accordingly, awarded the total amount listed. Id.

On appeal, Division One held the state failed to prove a causal connection between Dedonado's crime and the damages to the van:

[I]t is not possible to determine from the documentation provided by the State whether all of the repairs to the van were related to the damaged ignition switch. The State did not meet its burden of proving the restitution amounts here by a preponderance of the evidence because the documentation it provided did not establish a causal connection between Dedonado's actions and the damages.

Dedonado, 99 Wn. App. at 257.

Similarly here, the state failed to prove a causal connection between Robertson's crime and the damage to the camera. The evidence shows the camera was damaged 2-3 days prior to the burglary. Although Rhinehart may have mistakenly believed it was damaged during the break-in, that was mere speculation on his part not evidence. As in Dedonado, this Court should vacate that portion of the restitution order the state did not prove within the 180-day period set forth under RCW 9.94A.142. Dedonado, 99 Wn. App. at 257.

D. CONCLUSION

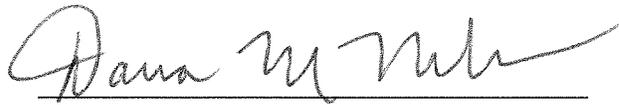
This Court should vacate that portion of the restitution order that granted \$200.00 for the damaged camera. This Court should

remand to the sentencing court to fix the proper amount of  
restitution.

Dated this 31<sup>st</sup> day of January, 2018

Respectfully submitted

NIELSEN, BROMAN & KOCH

A handwritten signature in cursive script, appearing to read "Dana M. Nelson", is written over a horizontal line.

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