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NO. 35536-5-III

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

STATE OF WASHINGTON
PLAINTIFF/RESPONDENT,

V.

JOSEPH JONES
DEFENDANT/APPELLANT

BRIEF OF RESPONDENT

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A. STATEMENT OF THE CASE

1. Procedural History

On December 15th 2015, the Defendant Joseph Jones was charged in Okanogan County Superior Court as principal or accomplice for the crimes of Burglary Second Degree, Theft in the First Degree, Possession of Marijuana with Intent to Deliver, Possession of Marijuana above one ounce, and Malicious Mischief in the Third Degree. CP 84-86. Later charges of Intimidating a Witness and Attempted Delivery of Marijuana were added. CP 64 - 67.

On July 26th 2017, the Defendant ultimately pled guilty by means of an *Alford* Plea to a number of the charges. (Burglary 2nd, Theft 1st, Malicious Mischief 3rd, and Tampering with a Witness). CP 37-47. The Court-approved plea agreement involved the Defendant agreeing to pay restitution for the crimes charged. CP 33. In the plea agreement, the Defendant agreed that he had the present or future ability to pay the recommended financial obligations and restitution. *Id.* The Court followed the plea agreement recommendations, and the Defendant was sentenced to 17 months in custody and ordered to pay restitution in an amount to be determined. CP 23-27.

In the Defendant's guilty plea, he stipulated that the Court could consider the police reports and/or a statement of probable cause supplied by the prosecution to establish a factual basis for the plea. CP 46. The probable cause declaration for the Defendant's case included the relevant police report for this incident. CP 78- 83. The police report likewise documented the involvement of Co-Defendants Thomas Robertson and Nathaniel Mowen.

2. Underlying Facts

In 2015, Ed Rhinehart operated a licensed marijuana farm in the Methow Valley region of Okanogan County. The farm was gated, and protected by fencing on the perimeter of the property. The harvested, processed and packaged marijuana was stored in a trailer located on the property. The trailer was secured by a locked door. The property had a number of surveillance cameras, one of which was situated inside the locked storage trailer.

On the evening of December 10th 2015, the Defendant along with Thomas Robertson and Nathaniel Mowen burglarized the business of Ed Rhinehart. Jones and Robertson were both former employees of Ed Rhinehart. They had been fired a number of months earlier.

The three arrived at the farm using Mowen's truck. The Defendant jumped over the fence and opened the gate for the other two. All three then entered the farm. This was captured on one of the farm's security cameras. The Defendants breached the door to the storage trailer by destroying the door. Once inside the storage trailer, the Defendants seized a number of black garbage bags. Each of these bags was filled with processed marijuana. In the course of this burglary, a security guard became aware of the event and chased the Defendants. All three managed to get away, but Mowen dropped one of the bags while fleeing. They all left the scene of the burglary in Mowen's car.

Immediately after the report of the burglary, the police questioned the owner Ed Rhinehart, along with the security guard. They viewed surveillance footage, and photographed foot and tire impressions in the snow. The security guard reported that although there was a security camera sited inside the storage trailer, it was oriented toward a wall, therefore it was not in a position to capture footage from the interior of the shed.

Mowen was captured and confessed to the crime and the joint involvement of the Defendant and Robertson. Mowen explained that the proceeds of the theft were split so that each Defendant received stolen marijuana. The Defendant was then arrested, and two full bags of stolen

marijuana were recovered in the attic of his apartment. The Defendant confirmed that Robertson and Mowen were involved in the burglary.

3. Restitution Hearing

Because all three individuals ultimately pled guilty for their joint involvement in the burglary, a single restitution hearing was scheduled. There were several continuances to accommodate the presence of all three Defendants and their respective counsel in Okanogan County. *See* 12.14.17 Jones RP 97- 101.

The restitution hearing was held on August 23rd 2017 with all Defendants present along with their attorneys. The victim, Ed Rhinehart testified regarding the losses he sustained from the theft and burglary.

Rhinehart testified in support of a written victim's restitution estimate form. RP 10-12 and Ex. 1. The bulk of Rhinehart's testimony (and questioning on cross examination) involved explanations of his calculation of the market values for the marijuana that was stolen versus the value of marijuana that was recovered but sold at depressed prices.

Rhinehart testified that his accounting of the quantities of marijuana that was stolen was corroborated by a detailed audit conducted by the Liquor and Cannabis Board.

Rhinehart testified as to the replacement costs for the broken door and the broken surveillance camera next to the door. He explained that the door was completely destroyed, with the entire frame being broken out. RP 83. He then purchased a replacement door from Home Depot, and then paid a carpenter to install the door. The costs of the replacement door and installation were \$800.00. RP 13.

Rhinehart testified that the security camera was also damaged. He explained that the cost of the security camera was \$200.00. He explained that although he did not save receipts for the purchase, he was aware of the value because he had purchased thirty of those cameras. RP 13, 17, 38.

Neither the Defendant nor co-Defendants presented any testimony or admitted any evidence at the restitution hearing. The Court ultimately ordered restitution in an amount of \$76,670.00, to be paid jointly and severally between all three Defendants. RP 54 Included in this award was the \$200.00 costs of the security camera that was damaged in the course of the burglary.

B. ARGUMENT

1. The Defendant was Ordered to Pay Restitution for the Crimes he Committed.

The Defendant pled guilty to the crimes of Burglary Second Degree, Theft First Degree, Malicious Mischief Third Degree, and Possession of Marijuana. He agreed that he would pay restitution in an amount to be determined in connection with these charged offenses. CP 33. On appeal he now argues that there was an insufficient causal connection between those offenses and the restitution award.

A Court's order of restitution will not be disturbed on appeal absent an abuse of discretion. *State v. Tobin*. 161 Wn.2d 517, 523, 166 P.3d 1167, 1169–70 (2007). An example of a relevant abuse of discretion was the case of *State v. Dedonado*. 99 Wn. App. 251, 256, 991 P.2d 1216, 1219 (2000). In *Dedonado* the Defendant was convicted of the crime of Taking a Motor Vehicle without Permission. The allegation was essentially that in the process of stealing and driving a stolen van, the Defendant Dedonado damaged the ignition system. *Id.* at 253. The trial court awarded restitution for the costs of improvements to the van such as replacing fluids, light bulbs, and re-alignment of the suspension system. *Id.* at 255. The reviewing Court held that this award was an abuse of discretion as the ordered restitution was for items unrelated to the Defendant's actions and the damages. *Id.*

In the present case, the Defendant pled guilty to Burglary in the Second Degree and Malicious Mischief Third Degree. The Defendant was charged as a principal or accomplice. The police report specifically mentions that there was a surveillance camera positioned near the site of the breached door. The property owner testified as to the replacement value for the door and surveillance camera. RP 13. The owner then testified at a restitution hearing as to the various values of the marijuana that was stolen and not returned, and then the value of the marijuana that was recovered from the Defendant's apartment.

The nexus between the crimes the Defendant was convicted of, and the accompanying losses in marketable marijuana, a door, and a camera is apparent. *Cf. State v. Smith*, 61 Wn. App. 277, 279, 809 P.2d 763, 764 (1991). The victim's restitution estimates did not account for expenses such as enhanced security measures or the routine costs of running a marijuana farm. Because the victim's losses are directly tied to the crimes for which the Defendant was convicted, there is no basis for the Court to vacate the restitution award.

2. The Restitution Order was Properly Supported by a Preponderance of the Evidence.

The Court's authority to impose restitution is vested in statute. RCW 9.94A.501 and RCW 9.94A.753 dictate that restitution *shall* be imposed in felony cases whenever an offender is convicted of an offense which results in damage to or loss of property. RCW 9.94A.753(5) The restitution amount must be based on "easily ascertainable damages for injury to or loss of property....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. RCW 9.94A.753(3)

RCW 9.94A.753 allows the judge *considerable discretion* in determining restitution, which ranges from none (in some extraordinary circumstances) up to double the offender's gain or the victim's loss. *State v. Kinneman*, 155 Wn.2d 272, 282, 119 P.3d 350, 355 (2005). When disputed, the facts supporting a restitution award must be proved by a preponderance of the evidence. *State v. Deskins*, 180 Wn.2d 68, 82, 322 P.3d 780, 787 (2014).

Although restitution must be proved by a preponderance of evidence, a "loss need not be established with specific accuracy." *State v.*

Kisor, 82 Wn. App. 175, 182, 916 P.2d 978, 981 (1996). The imposition of restitution is generally within the discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. State v. Davison, 116 Wn.2d 917, 919, 809 P.2d 1374, 1375 (1991)

In the present case, the figures that the victim obtained were in fact determined with considerable accuracy. The victim initially reported the losses of marijuana to the police and estimated the value of marijuana at a low amount of \$3.00 a gram. Because of the highly regulated nature of the marijuana production business, it was possible to determine the various strains of marijuana that were stolen, and those that were recovered. CP 17- CP 18. The victim testified that there was an audit that corroborated this accounting. RP 14. As for the door, the victim himself purchased the replacement door and arranged a carpenter to install it along with a new lock set. RP 13. The victim testified that he was well aware of the costs of the damaged security camera because he had purchased so many of them previously. The victim's testimony at the restitution hearing was consistent with the restitution estimate that he completed. CP 15.

There were no other witnesses presented which would call this testimony into doubt. The victim's testimony failed to reveal any

inconsistencies. Because competent testimony demonstrated that the estimate of \$51,113.00 was appropriate, the question turns to whether it was proper for the Court to impose \$76,670.00 as the restitution award.

The Court heard testimony from the victim that while he estimated the market value of some of the marijuana to be \$3.00, the victim was actually only able to sell it for \$2.00. The victim also stated that the costs to purchase the replacement door (with associated lock) and installation were “beyond reasonable” at \$800.00. RP 38. The Court took notice of this when it imposed the restitution award. Because restitution is both punitive and compensatory, Washington permits a Court to impose amounts that exceed a victim’s loss. *State v. Kinneman*, 155 Wn.2d 272, 279, 119 P.3d 350, 354 (2005).

In the present case the Court found by a preponderance of evidence that more than \$51,113.00 in damage was caused by the Defendant (as a principal or accomplice). The Court’s imposition of an amount fifty percent greater than the original estimate was permissible by statute, and not manifestly unreasonable.

3. The Court had Authority to Order Legal Financial Obligations that Included Attorney's Fees.

After finding that the Defendant had the future ability to pay legal-financial obligations, the Court imposed the standard \$400.00 Attorney Fee Reimbursement. CP 25. The Defendant's argument on appeal relies heavily on *State v. Diaz-Farias*. App Br. at 14. That case held that there was a due process violation when Defendants were made to pay for the costs of Spanish language interpreters. *State v. Diaz-Farias*, 191 Wn. App. 512, 515, 362 P.3d 322, 323 (2015). Included in that Court's opinion was the observation:

As noted earlier, for example, RCW 9.94A.030(31) defines LFOs as including "court-appointed attorneys' fees" and "costs of defense," both of which are not directly associated with *jury trial*, but are associated with other constitutional rights that serve to protect a defendant at trial. Washington decisions **have long recognized that the cost of a court-appointed lawyer for an indigent defendant is one that can be imposed under RCW 10.01.160.**

Id. 520–21. (Emphasis added)

In the present case, a jury trial was not even held. However, the Defendant was represented by an attorney over the course of multiple Court hearings. The Attorney filed a motion to suppress on his behalf. CP 49. Ultimately, the Defendant and State entered a signed plea agreement where there was a joint recommendation of \$1260.50 in Legal-Financial

Obligations. This included the standard \$400.00 attorney reimbursement fee. The signed plea agreement also included an express agreement for the Defendant to pay reimbursement of assigned counsel fees. CP 33.

Because the Defendant agreed to pay attorney's fees, and there is a statutory basis to impose those fees as legal financial obligations, there is no basis for a reviewing Court to modify the standard legal-financial obligations.

4. The Court Appropriately Ordered Legal-Financial Obligations after Making an Individualized Inquiry into the Defendant's Ability to Pay.

The Defendant argues against the record that the Court failed to conduct an adequate inquiry into the Defendant's ability to pay. *App Br. at 16*. The Court asked a battery of questions concerning the Defendant's expenses, his lifestyle, and his work skills. The Defendant's responses fully support the Court's imposition of standard legal-financial obligations.

The Court asked the Defendant if he had children, or a spouse. The Defendant said that he had neither. 12.14.17 RP at 92. The Defendant therefore would not presumably be making regular payments for the sustainment of a household.

The Court asked the Defendant what he did for work. The Defendant replied that he worked as a carpenter, and was able to complete tasks such as drywalling, framing, and fencing. The Defendant said he would be able to find work doing these activities once he was released from custody. The Defendant stated that he was not disabled. RP 92-93 These answers indicate the Defendant's ability to earn future income.

The Defendant stated that while he did not smoke cigarettes, he usually owned and used a cell phone. This response indicates that the Defendant was able to afford a communication device that likely required some amount of discretionary spending.

The totality of the record supports the Court's decision to order standard legal financial obligations. Because the Court made an individualized inquiry into the Defendant's ability to pay, there is no basis for a reviewing Court to conclude otherwise. *Cf. State v. Blazina*, 182 Wn.2d 827, 839, 344 P.3d 680, 685 (2015).

5. Requiring the Defendant to make Minimum Payments of \$50 Monthly was Appropriate

The Defense argues that it was unjustly punitive for the Court to order the Defendant to pay \$50 a month to satisfy his legal-financial obligations. *App. Br.* at 20. They argue that it was unjustly punitive

because the Defendant would already have to pay toward \$76,670 in restitution.

This argument is based on a false premise. The Defendant was sentenced on July 26th 2016. This is when the Court imposed legal-financial obligations. While restitution was ordered at this hearing, no amount was fixed until 13 months later once the restitution hearing was actually held.

It is also incorrect that the sentencing Court made a *determination* that the Defendant was only able to pay \$50 a month. *App. Br. at 20*. The Court set payments at a minimum of \$50 a month after inquiry into the Defendant's ability to pay. The Court made no comments, and nothing in the record indicates that the Court found that the Defendant only had the ability to pay a maximum of \$50 a month.

The Defendant was, and is not bound to pay at the minimum rate of \$50 per month or any rate which guarantees he will never satisfy his obligations. Any assumption that he would is inappropriate.

The Defendant himself agreed that he could pay \$50 per month once he got out [of prison] 12/19/17 RP at 92. Because the Defendant affirmed that he had no dependents, had skills to work, and the ability to make minimum payments of \$50 per month, the Court appropriately

required the Defendant to pay a minimum of \$50 a month toward his legal-financial obligations.

C. CONCLUSION

For the aforementioned reasons, the State asks that this Court not disturb the Restitution Order.

Dated this 11^h day of June, 2018

Respectfully Submitted:


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PROOF OF SERVICE

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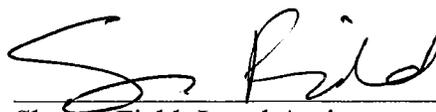
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