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Court of Appeals
Division III
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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.

NATHANIEL MOWEN

DEFENDANT/APPELLANT

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

A. STATEMENT OF THE CASE 1

1. Procedural History.....1

2. Underlying Facts.....2

3. Restitution Hearing.....3

B. ARGUMENT.....8

The Court Properly Limited Cross Examination to Relevant Testimony.....8

C. CONCLUSION.....8

TABLE OF AUTHORITIES

Table of Cases

State v. Darden, 145 Wn.2d 612, 619, 41 P.3d 1189, 1192 (2002).....6

State v. Lee, 188 Wn.2d 473, 486, 396 P.3d 316, 323 (2017).....6

State v. Stenson, 132 Wn.2d 668, 701–02, 940 P.2d 1239, 1257 (1997)....6

State v. Tobin, 161 Wn.2d 517, 523, 166 P.3d 1167, 1169–70 (2007).....7

Rules

ER 401.....6

A. STATEMENT OF THE CASE

1. Procedural History

On December 15th 2015, the Defendant Nathaniel Mowen 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 47-49.

On May 3rd 2016, the Defendant pled guilty to the charges. CP 37-46. The Court-approved plea agreement involved the State dismissing Count 3 (Possession of Marijuana with Intent to Deliver), and the Defendant agreeing to pay restitution in an amount to be determined. CP 30-36. The Court followed the plea agreement, and the Defendant was sentenced to 6+ months in custody, and ordered to pay restitution in an amount to be determined. CP 22-24.

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 50- 56. The police report likewise

documented the involvement of Co-Defendant's Joseph Jones and Thomas Robertson.

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 property. The trailer was secured by a locked door. The farm had a number of surveillance cameras, one of which was positioned inside the storage trailer. CP 53.

On the evening of December 10th 2015, the Defendant along with Joseph Jones and Thomas Robertson burglarized the business of Ed Rhinehart. The two Co-Defendant's were both former employees of Ed Rhinehart. They had been fired by Rhinehart a number of months earlier. CP 54.

The three arrived at the farm using the Defendant's truck. Jones 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 off the property. All three individuals escaped, however the Defendant dropped one of the bags while fleeing. All three drove away from the scene using the Defendant's vehicle.

Immediately after the report of the burglary, the police questioned the owner, Ed Rhinehart, along with the security guard. They viewed surveillance footage, and foot and tire impressions in the snow. The Defendant was captured around a day later, and confessed to the crime. The Defendant explained that the proceeds of the theft were split so that the Defendant received one full bag of stolen marijuana. Co-Defendant Jones was then arrested, and two full bags of stolen marijuana were recovered in the attic of Jones' apartment. Jones confirmed that the Defendant and Thomas Robertson 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 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 estimated that although he was able to make use of most of the recovered marijuana, he estimated that the value was reduced by 25 percent. RP 17 The reason for this was that the Defendants handled the marijuana roughly, causing the flowers to break. RP 16, RP 22. Rhinehart explained that his business was that of a wholesale producer, and he only sells marijuana flowers. With the flower becoming trim it was "not sellable." RP 22.

Rhinehart explained on cross examination that he was actually able to sell the recovered marijuana for just two dollars a gram, rather than the three dollars a gram that he estimated earlier. Two dollars a gram was "the most [he] could get anybody to pay for it. RP 26.

Counsel for the Defendant attempted to ask Rhinehart if he sold other marijuana products. Counsel explained that the purpose of this questioning was to elicit a response that the damaged marijuana had value and was therefore not an actual loss of 25 percent. The Court sustained the State's objection to this line of questioning on relevance grounds. RP 27- 30.

Neither the Defendant nor co-Defendants presented any testimony at the restitution hearing. The Court ultimately ordered restitution in an amount of $76,670.00, to be paid joint and several between all three Defendants. RP 54; CP 14.

B. ARGUMENT

The Court Appropriately Limited the Scope of Cross Examination to Relevant Testimony

The Defendant's argument on appeal is essentially that the Court should have permitted counsel to ask the victim if the victim could conceivably make use of damaged marijuana trim. The Court properly prohibited this line of questioning because the victim had already testified that he had no use for damaged marijuana, and it was not sellable at his business.

A trial court's ruling on the admissibility of evidence is reviewed for abuse of discretion. *State v. Darden*, 145 Wn.2d 612, 619, 41 P.3d 1189, 1192 (2002). A trial court abuses its discretion when its decision is "manifestly unreasonable or based upon untenable grounds or reasons." *State v. Lee*, 188 Wn.2d 473, 486, 396 P.3d 316, 323 (2017).

ER 401 defines relevant evidence as evidence having a tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. *State v. Stenson*, 132 Wn.2d 668, 701–02, 940 P.2d 1239, 1257 (1997).

In the present case, it is apparent that the Defendant's counsel was attempting to elicit testimony that the damaged marijuana had some value. If the damaged marijuana had marketable value for the victim, then the estimation of twenty-five to thirty percent loss would be exaggerated. RP 29:2- RP 29:20. There is no indication that this line of questioning had anything to do with an argument regarding causation - as indicated in the Appellate's Brief at 8.

The Court properly limited questioning of the victim over the potential value for damaged marijuana. While this line of questioning could arguably have been relevant if the victim was in the business of

selling damaged marijuana- his testimony clearly indicated that he was not.

The victim was asked if the returned marijuana was "sellable or salvageable." His response was that it was "substantially damaged." RP 16:9. The victim then clarified on cross examination that he only deals with the production and wholesale distribution of marijuana flowers. "We were only selling the flower," and the damaged flower "becomes trim, not sellable." RP 22:1 – RP 22:10.

The mere possible existence of markets for damaged marijuana, along with the possibility of victim Rhinehart being able to change his business model, is not relevant to the ultimate question of how much money the victim lost. The totality of the victim's testimony indicates that the damaged marijuana was of no value to the victim. The Court properly restricted testimony to questions regarding the market value of the marijuana that the victim produced, processed, and sold.

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). In this case, the Court took competent evidence from the victim. The preponderance of evidence supported the Court's restitution award. This award appropriately accounted for a

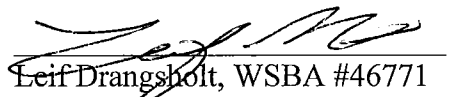
twenty-five percent reduction in the value of the recovered stolen marijuana.

C. CONCLUSION

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

Dated this 11h day of June, 2018

Respectfully Submitted:



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