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COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, APPELLANT

v.

DAVID ROMISH, RESPONDENT

APPEAL FROM THE SUPERIOR COURT
OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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I. ISSUES PRESENTED

1. Was the defendant's unlawful possession of a stolen Bobcat causally connected to the direct and remedial costs suffered by N&N Excavation?
2. During a restitution hearing, did the trial court err when it relied on the probable cause affidavit to determine the exact address of where the stolen Bobcat was clandestinely stored?
3. If it was error, was any consideration of the probable cause affidavit by the lower court harmless?

II. STATEMENT OF THE CASE

The defendant was originally charged by information in the Spokane County Superior Court with two counts of possession of a stolen motor vehicle, four counts of second degree possession of stolen property, and one count of third degree possession of stolen property. CP 11-12. Ultimately, the defendant pleaded guilty to an amended charge of first degree possession of stolen property - a Bobcat loader. RP 7; CP 71-72 (amended information), CP 104-10 (statement on plea of guilty), CP 113-24 (judgment and sentence). The amended information read as follows:

**FIRST DEGREE POSSESSION OF STOLEN PROPERTY
OTHER THAN A FIREARM OR A MOTOR VEHICLE,**
committed as follows: That the defendant,
DAVID MICHAEL ROMISH, in the State of Washington,
on or about August 23, 2016, did knowingly receive, retain,

possess, conceal, and dispose of stolen property, other than a firearm as defined in RCW 9.41.010 or a motor vehicle, to-wit: JOHN DEERE MINI EXCAVATOR, BOBCAT 763 TRACTOR[,] CABINETS, ROAD CONSTRUCTION SIGNS, MAGNUM LIGHT TOWER TRAILER, CONCRETE SAW AND TRAFFIC SIGNS, of a value in excess of five thousand dollars (\$5,000), knowing that it had been stolen, and did withhold and appropriate the property to the use of a person other than the true owner or person entitled thereto,

CP 72.

In the statement on plea of guilty, the defendant acknowledged: “On August 23, 2016, in Spokane County, WA I had stolen property in my possession that I reasonably should have known had been stolen. The aggregate total of the property exceeded \$5000.00. I did not do anything to the property once it was in [my] possession.” CP 110. It was agreed between the parties pursuant to a plea agreement that both sides could argue the appropriate sentence and restitution. RP 107.

At a restitution hearing, Frank Nekich, owner of N&N Excavation, testified he had a Bobcat (skid-steer loader), which he recently repainted and to which he had affixed new decals, stolen from a job site in Liberty Lake, Washington. RP 28-29, 37. When the loader was returned to Mr. Nekich several weeks later after being located by the Washington State Patrol,¹ it had been amateurishly repainted. RP 28-29, 31. Mr. Nekich took

¹ The Bobcat was located inside a barn in Elk, Washington. RP 35-36.

the loader to Pape Machinery in Spokane and requested a complete service as he had no knowledge whether the piece of equipment had suffered internal, mechanical damage during the time it was missing. RP 29-30. Pape had the loader for an approximate two-week period and changed all the fluids, including the chain oil case, hydraulic oil filter, engine oil and replaced a broken taillight, totaling \$1,321.01. CP 67; RP 30-31. In addition, Mr. Nekich had his own in-house shop repaint and decal the loader after it was recovered. RP 32. During the two-week interim that the Bobcat was missing, Mr. Nekich rented a skid-steer loader from Western States Equipment to replace his stolen Bobcat loader. RP 31. Mr. Nekich also had to pay a \$500 deductible on his insurance policy, with the remainder of the cost covered by his insurance company. RP 30-31; CP 63-64, 66.

In addition to the testimony, the State provided the sentencing court with invoices regarding the loss of the Bobcat from Pape Material Handling, Jensen Auto Body, and Western States Cat Rental. CP 67-69. Specifically, the cost for services to the stolen Bobcat and the rental/replacement loader, are as follows:

Pape Materials Handling:

- replace Bobcat taillight (\$175.52 for parts and \$122.00 for labor);
- service to change chain case oil, hydraulic oil and filter, fuel filter, air filters and case drain filters (\$497.52 for parts and \$384.00 for labor)
- other supplies (\$31.24)

-environmental fee ((\$5.00)

-tax (\$105.73)

Total cost = \$1321.01.

CP 67.

Jensen Auto Body

-Removal of the taillights and seat, strip existing paint, sand, seal, and paint, plus a kit (\$1950.00 for paint, \$752.50 for labor, \$237.67 for parts, \$350.00 for other supplies, and a tax of 286.24).

Total cost = \$3576.41.

CP 68.

Western States Equipment Rental

-Rental for a Cat loader (\$3300 for the rental and \$297.70 for tax, rental dates August 22, 2016 to September 18, 2016).

Total cost = \$3720.80.

-Rental for Cat loader (\$1100 for the rental and \$96.66 for tax, rental dates August 22, 2016 to October 7, 2016).

Total cost = \$1207.66.

CP 69.

The total amount of the invoices was \$9,825.87. Cincinnati Insurance Company paid \$9,325.88 on N&N Excavation's claim. CP 66. The excavation company had a \$500 deductible/loss on its insurance policy for the Bobcat. CP 66.

After argument,² the Honorable John Cooney orally ruled regarding the restitution, stating in pertinent part:

Restitution is a means by which if a person is found guilty of a crime the victim of the crime can be made whole. The rules are substantially relaxed in a restitution hearing because the person who has been convicted of the crime has been convicted. With that said though, there still has to be a causal link between the crime and the damages sustained, and that's what the State's attempting to show here.

Here, the Bobcat was stolen. Regardless of how we look at it, it was a relatively short period of time between the time it was stolen and the time it was recovered. When it was recovered, it was in worse condition than when it was stolen. While it was being possessed, at least for a period of time by the defendant -- I guess there's no argument that he was possessing it for at least a period of time because he was found guilty of it and it was also found on his property. His address is listed or was listed at 39017 North Madison, and that's where it was located.

I did rely on the probable cause affidavit for that address. I think I can rely on that to some extent. It's part of the court file and it just indicates that's where the Bobcat found. Regardless of that, Mr. Romish pled guilty to possessing stolen property. Whether it be his residence or not, it may not necessarily be all that relevant.

Mr. Romish possessed the Bobcat for a period of time, and during that time the victim had to rent equipment. The cost of the rental equipment was borne by the insurance company.

The standard is lower in a restitution hearing. It doesn't have to be an amount certain. The Court has the ability to fluctuate in ordering restitution. Here, we have a specific amount,

² The defendant objected to the trial court's use of the probable cause affidavit filed in the case at the time of hearing. RP 45.

although some of the maintenance that was done to it may not have been fully necessary but also may have been warranted since the owner didn't know what had been done to it. It seems reasonable that the Bobcat be looked over by a professional.

With all that said, the Court finds that there is a causal link between the defendant and the damage that was done to the property. He was possessing it when it was recovered. Whether or not he was the one who actually stole the Bobcat is a different story, but the Court can at least find by a preponderance of the evidence that the damage was caused when it was in his possession. In making that determination, if you're going to possess stolen property, you should be aware that if you get caught possessing the stolen property, you may be liable for the damage that had been done to it.

The Court will grant the State's motion with respect to Cincinnati Insurance and N&N Excavation only. There exists some due process issues with the excavator in that the Court isn't able to conduct an evidentiary hearing. I just have to rely on a letter that isn't even sworn. What I am going to do is grant the State's motion with respect to the \$500 and the deductible to N&N Excavation and the \$9,325.88 in restitution to Cincinnati Insurance. I'm going to deny the State's request for restitution of \$2,267 on the excavator as there was no evidence other than an unsworn letter indicating it was in worse condition when it was recovered than when it was stolen.

RP 46-48.

This appeal timely followed.

III. ARGUMENT

The defendant contends there was an insufficient casual connection between the State's evidence produced at a restitution hearing concerning

the defendant's conviction for first degree unlawful possession of stolen property and the restitution amount ordered by the trial court.

Standard of review.

An appellate court reviews a challenge to a restitution order for abuse of discretion. *State v. Tobin*, 161 Wn.2d 517, 523, 166 P.3d 1167 (2007); *State v. We*, 138 Wn. App. 716, 727, 158 P.3d 1238 (2007). An abuse of discretion occurs only when the decision or order of the court is manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. *State v. Enstone*, 137 Wn.2d 675, 679-80, 974 P.2d 828 (1999); *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). The trial court's application of an incorrect legal analysis or other error of law can constitute an abuse of discretion. *Tobin*, 161 Wn.2d at 523.

The authority to impose restitution is statutory. *State v. Griffith*, 164 Wn.2d 960, 965, 195 P.3d 506 (2008). Per the statute, the court shall order restitution "whenever the offender is convicted of an offense which results in injury to any person or *damage to or loss of property.*" RCW 9.94A.753(5) (emphasis added).

In a contested restitution hearing, the victim's loss must be supported by substantial credible evidence. *Griffith*, 164 Wn.2d at 965. Evidence is sufficient to support a restitution order if it provides a reasonable basis, other than conjecture or speculation, to estimate the loss.

Id. The lower court may, in its discretion, order up to double the amount of the victim’s loss. RCW 9.94A.753(3); *Griffith*, 164 Wn.2d at 966. When disputed, the facts supporting a restitution award must be proved by a preponderance of the evidence.³ *State v. Deskins*, 180 Wn.2d 68, 82, 322 P.3d 780 (2014), *as amended* June 5, 2014.

In interpreting the restitution statutes, an appellate court must “recognize that they were intended to require the defendant to face the consequences of his or her criminal conduct.” *Tobin*, 161 Wn.2d at 524. Accordingly, the reviewing court should not engage in an overly technical construction that would permit the defendant to escape from just punishment, *id.*, as the legislature intended “to grant broad powers of restitution” to the trial court, *State v. Davison*, 116 Wn.2d 917, 920, 809 P.2d 1374 (1991).

A. THE DEFENDANT’S UNLAWFUL POSSESSION OF A BOBCAT LOADER RESULTED IN DIRECT AND REMEDIAL LOSS TO N&N EXCAVATION AND CINCINNATI INSURANCE, AND THE CRIME WAS SUFFICIENTLY CONNECTED TO THE RESTITUTION AMOUNT ORDERED BY THE TRIAL COURT.

At a restitution hearing, “[c]ourts may rely on a broad range of evidence—including hearsay—because the rules of evidence do not apply

³ A “more likely than not” standard is equivalent to the preponderance of the evidence. *In re Pers. Restraint of Gentry*, 137 Wn.2d 378, 409, 972 P.2d 1250 (1999), *as amended* June 30, 1999, *cert. denied*, 516 U.S. 843 (1995).

to sentencing hearings.” ER 1101(c)(3); *Deskins*, 180 Wn.2d at 83; *State v. Kisor*, 68 Wn. App. 610, 620, 844 P.2d 1038, *review denied*, 121 Wn.2d 1023 (1993). Instead, due process governs this situation which requires the defendant to have an opportunity to contest the evidence and the evidence be corroborated to allow the defendant an opportunity for rebuttal. *Kisor*, 68 Wn. App. at 620.

In accordance, restitution is allowed solely for losses “causally connected” to the crimes charged. *Tobin*, 161 Wn.2d at 524. Losses are causally connected if, but for the charged crime, the victim would not have incurred the loss. *Id.* at 523; *see, e.g., State v. Hiatt*, 154 Wn.2d 560, 566, 115 P.3d 274 (2005) (affirming restitution for lost property when, “[b]ut for the taking of the vehicle, the personal property would not have gone missing”); *State v. Harris*, 181 Wn. App. 969, 976, 327 P.3d 1276 (2014), *review denied*, 181 Wn.2d 1031 (2015) (affirming restitution where, but for the defendant’s conduct in driving, the victim would not have been struck and killed); *State v. Wilson*, 100 Wn. App. 44, 50, 995 P.2d 1260 (2000) (affirming restitution for investigative costs where, “but for the embezzlement, the victim would not have incurred” the costs).

The trial court has broad discretion in making reasonable inferences regarding the causal connection between the crime and expenses. *State v. Pierson*, 105 Wn. App. 160, 168, 18 P.3d 1154 (2001). There is no

requirement that a victim's damages be foreseeable to support a restitution order. *Enstone*, 137 Wn.2d at 680-82. In addition, restitution may also include the cost of remedial steps taken by a victim to recover from the loss. *See Tobin*, 161 Wn.2d at 520-23.

For instance, *State v. Smith*, 119 Wn.2d 385, 385-87, 831 P.2d 1082 (1992), the defendant burglarized a bank and tripped three surveillance cameras which then photographed different areas of the bank. The bank incurred costs for the use of technicians who worked on the cameras and for the development and replacement of the film. The Supreme Court affirmed the restitution award to the bank for these amounts, holding that the funds spent by the bank were "property" that was lost as a direct result of the crime. *Id.* at 390.

Similarly, in *State v. Steward*, 52 Wn. App. 413, 760 P.2d 939 (1988), the court used the concept of "foreseeability" to find that losses were the direct result of the defendant's activities. The defendant took the car of a friend without permission. She abandoned the car in a nearby town, leaving the keys in the car. The car was later stripped, and personal items were stolen from inside the car. The defendant objected to the restitution order contending that she did not damage the car nor steal the missing personal property. Division One affirmed the trial court's holding that "it was foreseeable and likely to a reasonable person that the car would be

subject to stripping and theft of the contents of the car.” *Id.* at 415; *see also State v. Blair*, 56 Wn. App. 209, 783 P.2d 102 (1989), where the same court upheld a similar restitution order based on nearly identical facts.

Likewise, in *State v. Harrington*, 56 Wn. App. 176, 782 P.2d 1101 (1989), a juvenile was convicted for possession of a stolen car and ordered by the trial court to pay restitution for damage to the car. On appeal, Harrington argued that the restitution order was invalid because he pled guilty to a possessory crime which punishes conduct that could not by itself be the cause of damage to the car. Harrington contended that the damage to the car was the result of acts that constitute other uncharged crimes, such as malicious mischief.

Division One rejected this argument, concluding “[t]he fact that the damage was the immediate result of specific acts which might constitute an ‘uncharged crime’ cannot be used to legally excuse” the payment of restitution. *Id.* at 1103. The court found sufficient evidence “that but for [the juvenile’s] illegal act, the victim’s property would not have been in a position to sustain the damages it did.” *Id.* In affirming the trial court, the Harrington court concluded “[t]he trial court’s finding that Harrington’s possession of the stolen property was causally related to the victim’s loss is a legally and factually sufficient basis for the restitution order.” *Id.*

Here, the trial court allowed restitution for funds expended by N&N Excavation's direct and remedial financial loss for the Bobcat, including the cost of the rental equipment during the time in which it was in the defendant's possession and for the time it took to restore the Bobcat to its original mechanical and surface condition⁴ after its recovery, and the costs associated with Bobcat's restoration to its condition before it was stolen.

For example, in *State v. Morris*, 173 Ariz. 14, 839 P.2d 434 (1992), the defendant was convicted of endangerment for driving under the influence of cocaine and striking a jeep. The Arizona Court of Appeals held that a defendant was required to pay restitution to a victim for property damage to her automobile, *expenses for rental cars*, taxi charges, and the cost of telephone calls made as a result of damage from a collision caused by the defendant. *Id.* at 438-39. The court held that these expenses were proper subjects of a restitution order because they were "the natural consequences" of the defendant's conduct that would not have occurred but for the defendant driving while under the influence. *Id.* at 439.

In the present case, Mr. Nekich testified that he owned a Bobcat loader, which was stolen from its job site in Liberty Lake. Approximately

⁴ At first blush, repainting the Bobcat may appear superficial. However, prospective construction businesses observing a poor outward appearance of the equipment could have reflected poorly on N&N Excavation's potential for acquiring new business.

two weeks passed until the Washington State Patrol found and recovered the loader. Mr. Nekich had to take his trailer to Elk, Washington to transport the loader from the barn, in which the defendant was concealing it, back to Spokane. Mr. Nekich suffered various remedial and direct costs from the defendant's unlawful possession of the Bobcat, including steps to ensure the Bobcat was functional and the rental of a different loader to continue to earn his livelihood during the interim when his own Bobcat was missing.

Here, the defendant attempts to analogize the facts of this case to other appellate cases where restitution orders were reversed for a failure to prove the causal connection based upon a scant, summary of expenses incurred by the victim in those cases. The defendant principally relies on *State v. Hahn*, 100 Wn. App. 391, 399-400, 996 P.2d 1125 (2000) (trial court erred when it relied on a DSHS summary report that listed only the name of the service provider, the service date, the date paid, the billed amount, and the amount paid because there was nothing in the DSHS summary which linked the expenses to any specific symptoms or treatments, and there is no indication that there was any statement otherwise linking the expenses to the offense); *State v. Dedonado*, 99 Wn. App. 251, 257, 991 P.2d 1216 (2000) (“[a] causal connection is not established simply because a victim or insurer submits proof of expenditures for replacing property stolen or damaged”); *State v. Bunner*, 86 Wn. App. 158, 160,

936 P.2d 419 (1997) (error to order restitution based on Department of Social and Health Services summary report of medical expenditures); and *State v. Woods*, 90 Wn. App. 904, 953 P.2d 834 (1998) (the trial court could not order restitution for personal items taken from the truck weeks before the charged offense).

The defendant's reliance on the above authority is misplaced. In each instance, the restitution order was reversed because the only evidence considered was a summary report of expenditures. Here, unlike the above cited cases relied on by the defendant, the Bobcat owner's uncontradicted testimony corroborated and connected the detailed costs contained within the various business receipts, and the statement from Cincinnati Insurance of amount suffered by N&N Excavation and its own loss,⁵ provided the trial court with a reasonable basis for estimating the loss to Mr. Nekich and the insurance company.

Accordingly, the defendant's unlawful possession of the Bobcat loader was sufficiently rooted to the direct and remedial costs incurred by N&N Excavation in renting a replacement loader and repairing the stolen N&N loader. But for the defendant storing N&N's loader in a remote, hidden location, N&N would not have had to rent a loader to continue work

⁵ The business statements matched the loss paid out by Cincinnati Insurance.

on various job sites during the time it was stored, recovered, and out of commission, after its recovery for necessary repairs. More so, it is of no consequence whether the defendant unlawfully possessed the Bobcat for one day or a much longer period, N&N's actual consequential loss and costs remained fixed and was casually connected to the defendant's possession and storage of the stolen Bobcat. The defendant's claim has no merit.

B. THE TRIAL COURT'S LIMITED USE OF THE PROBABLE CAUSE AFFIDAVIT FILED IN THE SUPERIOR COURT WAS NOT ERROR. EVEN IF IT WAS ERROR, IT WAS HARMLESS.

The defendant also argues it was error for the trial court to rely on the filed probable cause address to determine the exact address where the Bobcat was unlawfully stored.

Akin to the present case is *State v. Blanchfield*, 126 Wn. App. 235, 239, 108 P.3d 173 (2005), where the trial court imposed restitution for the victim's medical expenses incurred because of the domestic violence incident. Blanchfield argued on appeal that the victim's testimony along with the Crime Victims Compensation (CVC) Program report were insufficient to establish a causal connection between the medical expenses and the assault. *Id.* at 241-42. Division Two disagreed, noting that the victim's testimony corroborated the CVC Program report and established that the victim's emergency room and follow-up with doctor visits were necessitated by the assault. *Id.* at 242.

Regarding the lower court's passing review of the affidavit to determine the address of where the defendant had unlawfully possessed the Bobcat loader in Elk, Washington, the defendant makes no argument as to how he was prejudiced by the trial court's limited use of the affidavit to garner this specific background information, or how it was material in the trial court's determination of a "casual connection" or the damages incurred by N&N Excavation. Furthermore, the defendant offers no authority that an affidavit of a police officer contained within a court file is not substantial credible evidence upon which the trial court can rely on in making a restitution determination. Finally, the defendant had the opportunity to offer contrary evidence and chose not to do so.

Even if the court erred in this regard, however, any consideration of that fact was harmless. Because the right to an evidentiary hearing on a disputed fact is statutory, nonconstitutional harmless error analysis applies. *Compare State v. Templeton*, 148 Wn.2d 193, 220, 59 P.3d 632 (2002) (applying nonconstitutional harmless error analysis to violation of court rule); *State v. Southerland*, 109 Wn.2d 389, 390-91, 745 P.2d 33 (1987) (applying nonconstitutional harmless error standard to violation of statute). Under that analysis, an error is not prejudicial unless, within reasonable probabilities, the outcome would have been materially affected had the error not occurred. *State v. Cunningham*, 93 Wn.2d 823, 831, 613 P.2d 1139

(1980) (admission of tape recorded statements made by defendants to police, but which did not conform strictly to statutory requirements was a statutory, rather than constitutional, violation and the nonconstitutional harmless error standard applied). Here, the restitution ordered by the court was obviously not imposed because of the defendant's address where the Bobcat was unlawfully stored. The State met its burden and the trial court did not error by its brief use of the probable cause affidavit. If the court did err, it was harmless.

IV. CONCLUSION

The decision to award \$9,825.88 in restitution was based on tenable reasons and was well within the trial court's discretionary authority. The State requests this Court affirm the restitution order entered by the trial court.

Respectfully submitted this 30 day of May, 2018.

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

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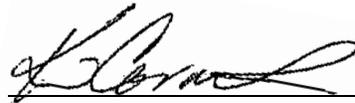
CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on May 30, 2018, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

Jennifer Stutzer
jennifer@stutzerlaw.com

5/30/2018
(Date)

Spokane, WA
(Place)



(Signature)

SPOKANE COUNTY PROSECUTOR

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