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Court of Appeals
Division III
State of Washington
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NO. 36730-4-III

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

STATE OF WASHINGTON,

Respondent,

v.

DAVID ROMISH,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SPOKANE COUNTY

The Honorable Rachelle Anderson

APPELLANT'S OPENING BRIEF

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RCW 9.94A.753(3)5-8

A. ASSIGNMENT OF ERROR

On remand after this Court vacated the restitution order and remanded for recalculation of the restitution amount, the trial court recalculated restitution and erred when it doubled the amount of the recalculated restitution. Therefore, the trial court erred by ordering David Romish to pay restitution of \$1,000.00 to N&N Excavation and \$2,408.34 to Cincinnati Insurance Co.

B. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

This Court vacated the original restitution order issued in Mr. Romish's case. On remand, the trial court sought to recalculate the restitution order as required by the mandate based on expenses causally connected to Romish's crime of possessing stolen property. On remand, the State requested for the first time that the court double the amount of restitution ordered. The trial court granted the State's request by recalculating restitution and then doubling the full amount of the recalculated restitution. Did the court err in doubling the recalculated restitution?

C. STATEMENT OF THE CASE

David Romish previously appealed the restitution order in his case. This Court vacated his original restitution order.¹ In State v. Romish, this Court found that the restitution order exceeded what could be casually connected to Romish's crime. Romish, 7 Wn. App. at 512-13. The first restitution order was entered after Romish had pleaded guilty to first degree possession of stolen property. Id. In the Statement of Defendant on Plea of Guilty, Romish stated that he had possessed stolen property that he reasonably should have known had been stolen and that he did not do anything to the property once it was in his possession, there was no specific evidence of when Romish came into possession of the property or when damage to the property occurred. Romish, 7 Wn. App. at 512-13. In vacating the original restitution order, this Court found that the restitution ordered must be casually connected to the time where Romish had possession of the property in question. Romish, 7 Wn. App. at 516.

On remand, the judge found that because there was no evidence of when Romish came into possession of the property,

¹ State v. Romish, 7 Wn. App. 510, 434 P.3d 546 (2019).

and there was no clear evidence of how many days were needed for the servicing and repair work that the court found was casually connected, it could only order Romish to pay for two days of rental costs (at \$104.86/day for a total of \$209.72). RP 9-10. In addition, the court ordered Romish to pay \$994.45 for repairs (not including taillight fix and painting). RP 10. The court also ordered Romish pay N&N Excavation's insurance deductible of \$500. *Id.* Thus, the amount of recalculated restitution ordered was \$1,704.17. RP 10.

On remand, and for the first time in this case, the State requested the court double the amount of restitution ordered. RP 2-3, 6-8. In response to the request to double the restitution, the defense argued that the State was seeking double restitution here as a punitive measure because the defendant was successful in appealing the first restitution order, as shown by the fact that the request to double restitution was not a part of the original case. RP 5-6, 10-11. The State responded that it was requesting the restitution be doubled at that time in order to make the victim (N&N Excavation) whole. RP 10. The defense argued that this was not about making the victim whole, since N&N only paid a \$500 insurance deductible. RP 11. Further, in arguing against the court doubling the recalculated restitution, the defense pointed out

Romish's indigency (his only source of income being social security) as well as his documented history of mental health issues. RP 4-5, 11.

The court granted the State's request to double the recalculated amount of restitution. RP 10-11. The court set repayment at \$5/month. *Id.* Mr. Romish appeals the new restitution order.

D. ARGUMENT

THE TRIAL COURT ERRED BY DOUBLING THE RECALCULATED AMOUNT OF RESTITUTION.

On remand, the court entered a recalculated order of restitution. In entering this order, the court found that no clear evidence existed to show how many days were necessary for the service and repair work that it found to be casually connected. RP 9. Thus, the court refused to impose rental costs for all 46 days of repair reflected on the invoices, as requested by the State. RP 10. Instead, the court found that restitution was appropriate for only two days of servicing/repair work (at \$104.86/day using the State's estimates). RP 8-10. The court also ordered Romish to repay N&N Excavation's \$500 insurance deductible and to pay \$994.45 for repairs (not including taillight and painting costs). RP 10. The

total amount of recalculated restitution was \$1,704.17, which became \$3,408.34 after the court granted the State's request to double the amount. RP 10-11.

The burden is on the State to prove the victim's losses and the causal connection to the defendant's crime by a preponderance of the evidence. State v. Griffith, 164 Wn.2d 960, 965-66, 195 P.3d 506 (2008) (quoting State v. Tobin, 161 Wn.2d 517, 524, 166 P.3d 1167 (2007)). Restitution must be based upon "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." RCW 9.94A.753(3); State v. Enstone, 137 Wn.2d 675, 679, 974 P.2d 828 (1999).

The court based its \$1,704.17 recalculated amount of restitution on a preponderance of the evidence submitted the State. RP 8-11. The court's oral ruling provided its analysis of where a preponderance of the evidence supported a causal connection, in order to show the necessary tie between the victim's expenses and the crime committed. RP 8-11.

A trial court's authority to order restitution is purely statutory. State v. Griffith, 164 Wn.2d at 965-66. Whether a trial court exceeded its statutory authority is an issue of law reviewed de

novo. State v. Burns, 159 Wn. App. 74, 78, 244 P.3d 988 (2010), corrected (Jan. 11, 2011); State v. Peterson, 174 Wn. App. 828, 856, 301 P.3d 1060, rev. denied, 178 Wn.2d 1021 (2013). If a restitution amount is issued outside the trial court's statutory authority, it can be challenged for the first time on appeal. State v. Moen, 129 Wn.2d 535, 545–46, 919 P.2d 69 (1996).

At the hearing on remand, the State cited RCW 9.94A.750(3) as its statutory basis for requesting the court double the restitution amount. RP 6. Specifically reading the last sentence of 9.94A.750(3) into the record, “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 offense.” Id. This same language is also found in RCW 9.94A.753(3). However, the State’s position that this language supports doubling the recalculated restitution amount is not supported by the plain language of either statute.²

When asked about why it was now asking to double restitution, the only reason the State provided was that it was

² The State also argues that authority to double restitution is found in State v. Fleming. RP 3. No case cite was offered, however, a review of State v. Fleming, 155 Wn. App. 489, 228 P.3d 804 (2010) shows that this case provides no such authority, nor does it even discuss restitution.

seeking double restitution in order to make N&N Excavation whole. RP 6, 10. In context of the statute, the State was then referring to doubling the victim's loss (as opposed to the offender's gain). However, as the defense argued, N&N Excavation's actual monetary loss here consisted of the \$500 deductible payment, not the other amounts provided for in the recalculated order (repair and two days of rental), which had been paid by insurance. RP 3-5, 11.

The State was required to establish the amount of restitution by a preponderance of the evidence. And the court found that a preponderance of the evidence supported the recalculated amount of \$1,704.17. RP 8-11. However, the next step the court took, the doubling of the recalculated restitution amount was not supported by anything other than the State's bare assertions that it would make N&N Excavation whole.

The plain language of the statute thus does not support doubling the recalculated restitution amount. In fact, the purpose of the plain language at issue is to place a restriction on how a court orders restitution ("not to exceed double the victim's loss or offender's gain") as opposed to serving as clear statutory authority to double restitution. This is especially true in cases such as this one, where the State offered no evidence to support its assertion

that doubling the restitution was casually required to make the victim whole.

The plain language states that the amount of restitution is not to exceed double the victim's loss. The defense here argued that the actual amount of the victim's loss was \$500. The court should have been limited to not double any amount that would put the restitution over \$1000 (double N&N Excavation's loss). After the doubling, the restitution was \$3,408.34, exceeding the restriction that it not exceed double the victim's losses causally connected to the acts of the defendant.

Thus, the plain language of the statute as applied in this case does not support doubling the entire amount of the recalculated restitution. Based on the court's own analysis, the \$1,704.17 recalculated restitution amount was all that could be attributed to Romish. Contrary to the State's position, doubling of this amount was not required to make the victim whole.

E. CONCLUSION

For the reasons above, this Court should again vacate the order doubling restitution and remand for recalculation of the restitution amount.

DATED this 2nd day of July, 2019.

Respectfully submitted,



JENNIFER D. STUTZER (38894)
Attorney for Appellant

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DIVISION THREE**

STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
)	
v.)	NO. 36730-4-III
)	
DAVID MICHAEL ROMISH,)	
)	
APPELLANT.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, JENNIFER STUTZER, STATE THAT ON THE 2nd DAY OF JULY, 2019, I CAUSED THE ORIGINAL **APPELLANT'S OPENING BRIEF** TO BE FILED IN THE **COURT OF APPEALS - DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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<p>[X] DAVID ROMISH C/O JANE AND GEOFF GRAYDON 5960 WEAVER WAY DEER PARK, WA 99006-9477</p>	<p>(X) () ()</p>	<p>U.S. MAIL HAND DELIVERY EMAIL</p>

SIGNED IN SEATTLE, WASHINGTON THIS 2nd DAY OF JULY, 2019.

X  _____

STUTZER LAW PLLC

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