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Division III
State of Washington
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COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

DAVID ROMISH, APPELLANT

APPEAL FROM THE SUPERIOR COURT
OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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I. ISSUE PRESENTED

Did the trial court manifestly abuse its discretion when it ordered the defendant to pay twice the amount of the actual loss incurred by N&N Excavation and Cincinnati Insurance, which is authorized under RCW 9.94A.753(3)?

II. STATEMENT OF THE CASE

This Court recited the factual basis for Romish's plea of guilty and conviction for possession of stolen property in its unpublished opinion on direct appeal. *See State v. Romish*, 7 Wn.App.2d 510, 434 P.3d 546 (2019).

On August 23, 2016, Mr. Romish was found in possession of a Bobcat front loader and other property that had been reported stolen a week earlier. Mr. Romish was charged with possession of stolen property and pleaded guilty. In his guilty plea statement, Mr. Romish admitted to knowingly possessing stolen property, but he denied altering the condition of any of the property in his possession. Mr. Romish also did not indicate when he came into possession of the stolen property.

At the July 13, 2017, plea and sentencing hearing, counsel for Mr. Romish agreed that restitution could be ordered if the State showed a causal connection between the damage to the Bobcat and Mr. Romish's possession of it, but expressed doubts that the State could establish such a connection. Defense counsel reiterated that Mr. Romish denied altering the condition of the Bobcat. Counsel also disputed the amount of claimed damages and requested a separate hearing on restitution.

A restitution hearing was held October 12, 2017, and the only witness to testify was the owner of the stolen property. The owner detailed the damage that had been sustained by the Bobcat as a result of the theft. He explained that the Bobcat had been repainted in a haphazard manner and that a taillight had been broken. Although

there did not appear to be any functional damage, the owner had the Bobcat serviced, just to make sure. Receipts showed the service, repair and repainting costs totaled \$4,897.42. In addition to having the Bobcat repaired and serviced, the owner testified he had to rent replacement equipment during the period that the Bobcat was unavailable for use in his excavation business. Rental fees were incurred not only for the period that the Bobcat was missing as stolen, but also for the time the Bobcat was out of commission for service and repairs. The total rental cost was \$4,928.46.

On cross-examination, the property owner denied knowing who stole the Bobcat or who had repainted it. The owner testified that the paint on the Bobcat was neither fresh nor wet when it was recovered. And the property owner denied seeing any paint at the location where the Bobcat was recovered.

Id. at 513-14. On direct appeal, Romish challenged the trial court's imposition of \$9,825.88 in restitution. *Id.* at 514.

Ultimately, this Court reversed the restitution amount ordered by the court because the State did not establish a link between Romish's criminal conduct and some of the claimed damages to the Bobcat front loader that had been stolen from a job site and later possessed by Romish. This Court found:

No evidence was presented that might lead one to believe the Bobcat would not have been repainted or the taillight broken "but for" Mr. Romish's possession. In like manner, there is no reason to think Mr. Romish's possession of the Bobcat was the "but for" cause of the victim's rental fee expenses prior to the offense conduct date of August 23, 2016. Given these circumstances, the order of restitution must be reversed.

Id. at 516. (internal citations omitted).

However, the Court did find there was a sufficient casual connection between Romish's possession of the stolen Bobcat and some of the victim's damages. *Id.* Specifically, the Court held:

Most obviously, Mr. Romish can be held responsible for rental fees incurred on the date of his offense conduct, August 23, 2016. In addition, the record indicates the victim would have had the Bobcat serviced, regardless of how long it had been missing. Thus, there is a "but for" connection linking the service costs and related rental fees to Mr. Romish's conduct.

... On remand, the trial court has discretion to calculate the amount of restitution causally connected to Mr. Romish's August 23, 2016, offense conduct date. This would include service costs, rental fees for the day the Bobcat was discovered in Mr. Romish's possession, and rental fees for the period that the Bobcat was out of use for servicing. But pursuant to the terms of this opinion, restitution cannot include the costs of repainting the Bobcat or replacing the taillight. Also excluded are rental fees incurred prior to August 23 or for the period that the Bobcat was out of use solely for repainting and repair of the tail light.

Id. at 516-17.

On April 4, 2019, a new restitution hearing was held before a different superior court judge. After argument, the court ruled:

So on the evidence I have, what I'm going to order is two days of rental. One day for August 23rd, when Mr. Romish had the Bobcat in his possession, one day for the reasonable repair work that would have had to be done, at least one day, but I have no evidence it's more than one day. So that's \$104.86 per day, based on the estimates that I was given from the State and their request in their motion indicating that the total cost divided by 47 days was \$104.86 per day.

I will order the requested amount for the repair that took out the taillight and the painting, that was \$994.45. I will also order repayment to the victim of \$500 that he had to pay for his deductible. That's a total of \$1,704.17. The State has requested that I exercise discretion to make the victim whole. The statute does allow for up to double of that amount. I will grant that. That means the total amount of restitution will be \$3,408.34.¹

Peck RP 9-10.

Since there were two victims, the court clarified and ordered \$1,000 (\$500 insurance deductible doubled) to be paid to N&N Excavation (owner of the Bobcat) and \$2,408.34 (remainder of losses paid by N&N's insurer doubled) payable to Cincinnati Insurance. RP 11. *See* CP 165, 167-71.

III. ARGUMENT

THE TRIAL COURT DID NOT MANIFESTLY ABUSE ITS DISCRETION WHEN IT DOUBLED THE AMOUNT OF THE ACTUAL LOSS INCURRED BY EACH VICTIM FOR RESTITUTION.

Romish does not contest that the evidence presented at the second restitution hearing supports the actual loss of each victim; rather, he contends the superior court abused its discretion when it ordered him to pay twice the amount of the actual loss owed to each victim. This claim has no merit.

¹ The court denied the State's request that restitution include a 46-day rental fee for the time the Bobcat was repaired and serviced because there was no evidence suggesting the whole 46 days was necessary for servicing the Bobcat. RP 9.

Standard of review.

An appellate court will not disturb the trial court's entry of a restitution order on appeal absent an abuse of discretion. *State v. Tobin*, 161 Wn.2d 517, 523, 166 P.3d 1167 (2007). Discretion is abused only when exercised in a manifestly unreasonable manner or on untenable grounds or reasons. In that context, our high court has stated, "[t]he legislature intended to grant broad powers of restitution to the trial court." *Id.* at 524.

Accordingly, a trial court has discretion to determine the amount, terms, and conditions of the restitution. *State v. Bennett*, 63 Wn. App. 530, 532, 821 P.2d 499 (1991); *State v. Mark*, 36 Wn. App. 428, 433, 675 P.2d 1250 (1984) (a trial court has discretion to determine the amount of restitution); *State v. Mead*, 67 Wn. App. 486, 490, 836 P.2d 257 (1992) (the size of a restitution award is within the trial court's discretion, not to be disturbed absent a showing of abuse).

The purposes of the restitution statute are set forth in RCW 9.94A.010:

The purpose of this chapter is to make the criminal justice system accountable to the public by developing a system for the sentencing of felony offenders which structures, but does not eliminate, discretionary decisions affecting sentences, and to:

- (1) Ensure that the punishment for a criminal offense is proportionate to the seriousness of the offense and the offender's criminal history;

- (2) Promote respect for the law by providing punishment which is just;
- (3) Be commensurate with the punishment imposed on others committing similar offenses;
- (4) Protect the public;
- (5) Offer the offender an opportunity to improve himself or herself;
- (6) Make frugal use of the state's and local governments' resources; and
- (7) Reduce the risk of reoffending by offenders in the community.²

The restitution statute, RCW 9.94A.753(3), states in pertinent part:

Except as provided in subsection (6)³ of this section, restitution 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.*⁴

Restitution is both punitive and compensatory. *State v. Kinneman*, 155 Wn.2d 272, 279-80, 119 P.3d 350 (2005). One aim of restitution is “to require the defendant to face the consequences of his or her criminal conduct.” *Tobin*, 161 Wn.2d at 524. Stated otherwise, “[r]estitution

² Restitution is also designed to prevent future crimes by compensating victims. *Mead*, 67 Wn. App. at 490.

³ RCW 9.94A.753(6) deals with sexual offenders.

⁴ Emphasis added.

provides reparation to victims⁵ and helps to prevent future offenses.” *Mead*, 67 Wn. App. at 490. Because the restitution statute is interpreted to carry out statutory intent, an appellate court does “not engage in overly technical construction that would permit the defendant to escape from just punishment.” *Tobin*, 161 Wn.2d at 524. The legislature intended “to grant broad powers of restitution” to the trial court. *Id.* at 524.

Once damages have been established, the amount need not be shown with mathematical certainty. *Mark*, 36 Wn. App. at 434. Evidence supporting a restitution order is sufficient if it provides a reasonable basis for estimating loss. *State v. Dedonado*, 99 Wn. App. 251, 256, 991 P.2d 1216 (2000). “The plain language of the restitution statute allows the trial judge to order restitution ranging from zero in extraordinary circumstances, up to double the offender’s gain or the victim’s loss.” *Tobin*, 161 Wn.2d at 524. Increasing the amount of restitution must involve “a consciously exercised choice by the court, utilized to further the purposes of the restitution statute.” *State v. Fleming*, 75 Wn. App. 270, 276, 877 P.2d 243 (1994). Regarding legislative amendments to the restitution

⁵ For purposes of this statute, “victim” is defined as “any person who has sustained emotional, psychological, physical, or financial injury to person or property as a direct result of the crime charged.” RCW 9.94A.030(54).

statute, the Supreme Court has recognized that the legislature “has consistently sought to ensure that victims of crimes are made whole after suffering losses caused by offenders and to increase offender accountability.” *State v. Gonzalez*, 168 Wn.2d 256, 265, 226 P.3d 131 (2010).

In the instant case, the Honorable Rachelle Anderson consciously exercised her discretion when ordering restitution above the actual damages established at the new restitution hearing. By its plain terms, RCW 9.94A.142 does not require that the trial court articulate its reasons for exercising its discretion to award compensation under the doubling provision. Judge Anderson ordered a doubling of the restitution of each victim’s actual loss to make N&N Excavation and Cincinnati Insurance whole for the economic loss each sustained because of Romish’s criminal conduct. N&N Excavation’s actual loss was \$500 and Cincinnati Insurance’s actual loss was \$1,207.14, for a total of amount of \$1,704.17.

In effect, the court ordered an additional \$500, *above the actual loss* be paid to N&N Excavation (\$1,000 total), and an additional \$1,207.14, *above the actual loss* be paid to Cincinnati Insurance (\$2,408.34 total),⁶

⁶ The total amount ordered by the court to be paid to Cincinnati Insurance is less than the actual amount of damages of \$1,207.14, when doubled. If the actual damages were doubled, the sum total would have been \$2,414.28.

resulting in a judgment of \$3,408.34. Cincinnati Insurance was a victim because it paid direct benefits to N&N Excavation for its loss. *See State v. Ewing*, 102 Wn. App. 349, 356, 7 P.3d 835 (2000) (insurance companies may be victims for purposes of imposing restitution); *State v. Barnett*, 36 Wn. App. 560, 562, 675 P.2d 626 (1984) (same).

Romish provides no authority that the trial court erred when it doubled the amount for the actual loss for both victims. Certainly, the restitution statute authorizes a trial court, within its discretion, to order a defendant to pay *double the amount of a victim's actual loss*. Here, the court was well within its discretion to do so. The defendant's claim is without merit.

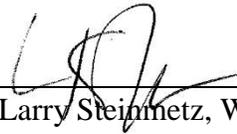
IV. CONCLUSION

The actual damages were supported by the evidence. Since restitution is both punitive and compensatory, Romish fails to demonstrate that the superior court manifestly abused its discretion when it doubled the amount of restitution owed for each victim's actual loss. The court had a tenable basis for ordering the restitution amount to make the victims whole and presumably to hold Romish accountable for his criminal conduct. The

State requests this Court affirm the restitution amount ordered by the superior court.

Respectfully submitted this 17 day of September, 2019.

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A handwritten signature in black ink, appearing to read 'L. Steinmetz', is written over a horizontal line.

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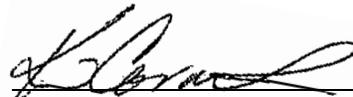
CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on September 17, 2019, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

Jennifer Stutzer
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9/17/2019
(Date)

Spokane, WA
(Place)



(Signature)

SPOKANE COUNTY PROSECUTOR

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