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NO. 63968-4-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

HONG PHAN,

Appellant.

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JUDGE MARIANNE SPEARMAN

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**BRIEF OF RESPONDENT**

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**A. ISSUE PRESENTED**

A trial court's award of restitution will not be disturbed absent an abuse of discretion. Where the evidence at the restitution hearing provided a causal connection between the defendant's crime and the damages sought by the State, did the trial court properly exercise its discretion in ordering restitution?

**B. STATEMENT OF THE CASE**

Darlene Jevne rented her home to Appellant Phan. 6/11/09 RP 9.<sup>1</sup> The home was in pristine condition at that time. 6/11/09 RP 10. Sometime at the expiration of the lease, Ms. Jevne went to the home and discovered extensive damage as a result of a marijuana grow that Phan had operated. CP 3; 6/11/09 RP 33. The Kent Police Department also responded to the home and found a dismantled marijuana grow operation with significant resultant damage to the home. CP 4.

Phan pled guilty in King County Superior Court to Attempted Manufacture of Marijuana. CP 13-25. As part of his plea agreement, he agreed to pay restitution for "any damage to house as a result of this incident." CP 25.

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<sup>1</sup> The State adopts Appellant's designation of the verbatim report of proceedings.

A restitution hearing was held on June 11, 2009 and July 30, 2009. The court heard testimony from Ms. Jevne and Appellant Phan, and reviewed exhibits admitted by the parties. 6/11/09 RP; 7/30/09 RP. After making adjustments to the amounts originally sought by Ms. Jevne and her insurance company, the court signed a restitution order totaling \$118,088.80, approximately \$36,000 of which was to go to Ms. Jevne, with the balance to her insurance company. CP 30-31. Phan appealed the restitution order. CP 32-34.

**C. ARGUMENT**

THE STATE PROVED A SUFFICIENT CAUSAL CONNECTION BETWEEN PHAN'S CRIME AND THE AMOUNT SOUGHT; THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN AWARDING RESTITUTION.

A trial court's determination of the amount of restitution is reviewed for abuse of discretion. State v. Tobin, 161 Wn.2d 517, 523, 166 P.3d 1167 (2007) citing State v. Enstone, 137 Wn.2d 675, 679, 974 P.2d 828 (1999). The order will be upheld unless the decision is "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." Enstone, 137 Wn.2d at 679-80 quoting State v. Cunningham, 96 Wn.2d 31, 34, 633 P.2d 886

(1981). If the amount of damages is shown by "substantial credible evidence," there is no abuse of discretion. State v. Pollard, 66 Wn. App. 779, 785, 834 P.2d 51 (1992).

A trial court's restitution award must be based on damages that are "easily ascertainable." RCW 9.94A.753(3). Easily ascertainable damages means tangible loss supported by sufficient evidence. State v. Bush, 34 Wn. App. 121, 123, 659 P.2d 1127 (1983). But those damages need not be proven with specific accuracy. Id. at 124; State v. Hahn, 100 Wn. App. 391, 398, 996 P.2d 1125 (2000). "Once the fact of damage is established, the precise amount need not be shown with mathematical certainty." Bush, 34 Wn. App. at 123.

A trial court has considerable discretion in determining the amount of restitution, which can range anywhere from none to double the victim's loss. State v. Kinneman, 155 Wn.2d 272, 282, 119 P.3d 350 (2005). The State need only prove damages by a preponderance of the evidence. Tobin, 161 Wn.2d at 524. The court should not "engage in an overly technical construction that would permit the defendant to escape from just punishment." Id. citing State v. Davison, 116 Wn.2d 917, 922, 809 P.2d 1374 (1991). The evidence produced by the State must afford "a reasonable

basis for estimating the loss and does not subject the trier of fact to mere speculation or conjecture." Bush, 34 Wn. App. at 124.

In deciding whether a restitution order is within the authority of the court, a "but for" factual test, evaluating the causal link between criminal acts and damages is appropriate. State v. Griffith, 164 Wn.2d 960, 965-66, 195 P.3d 506 (2008) citing Tobin, 161 Wn.2d at 524. In the instant case, because the damage to Ms. Jevne's house would not have occurred but for Phan's criminal marijuana growing operation, there was a sufficient causal connection between the crime Phan was convicted of and the damages awarded to Ms. Jevne. The restitution order should be upheld.

Ms. Jevne was the original owner of the home. She built it in 1964, along with her father. 6/11/09 RP 9, 32. Her home was in pristine condition at the time it was rented by Phan. The hardwood floors had all been redone. The entire house had been painted just prior to Phan moving in. There were no problems with the plumbing or electricity at that time. 6/11/09 RP 10, 32. In fact, Phan himself admitted that when he moved into the house, "There was no visible damage." 6/11/09 RP 58.

Sadly, that all changed when Phan rented Ms. Jevne's home. His marijuana growing operation completely ruined her house. 6/11/09 RP; Exhibits 1-20. In fact, following testimony on the issue of restitution, the trial court noted that the house was "completely a mess" and that it was "pretty much trashed and moldy." 6/11/09 RP 77; 7/30/09 RP 17.

During the hearing, Ms. Jevne testified regarding the specific damages to her home resulting from Phan's illegal operation. The floors were damaged by planting soil and water. The wooden living room flooring was rippled from where the water soaked through. The damage was so extensive that it went through into the subflooring, which rotted out. 6/11/09 RP 26-27; Exhibit 20. The carpet, which was only two years old, had to be replaced. There were holes in it and stains from the dirt and marijuana. 6/11/09 RP 49. In the upstairs master bedroom, Phan drilled through the hardwood flooring for ventilation purposes. 6/11/09 RP 16; Exhibit 16.

In the downstairs master bedroom, Phan jackhammered down through the flooring and into the concrete below to steal electricity, and he destroyed the wall in order to access electricity for his grow lights. 6/11/09 RP 16, 24, 48; Exhibit 17. In fact, the

electricity throughout the entire house needed to be completely rewired because Phan had damaged it in his attempt to divert it. He had drilled holes in the walls to get to the wiring. 6/11/09 RP 48-49; 6/11/09 RP 38-39. Ms. Jevne had to hire electricians to do full tracing for the home; when Phan tried to rewire the electricity he damaged the furnace and multiple electrical outlets, which would no longer work. The State inspector had to approve of Jevne's electrical fix, due to Phan "clamping down into the large cables coming into the home." 6/11/09 RP 38-39.

Due to the temperature and moisture requirements for growing marijuana, the house was so full of mold that Ms. Jevne had to hire a contractor to remove hazardous waste from her home. 6/11/09 RP 17. She described the mold as "[b]lackmold on the plasterboards, the corners of the rooms. Black mold in the ceiling of the living room, in the hallways." 6/11/09 RP 18. Because the mold was so extensive, she had to tear out many of her walls and ceilings to get rid of it. 6/11/09 RP 23. Due to the age of her home, it had asbestos ceilings, which meant that Ms. Jevne was required to hire special contractors to dispose of it. 6/11/09 RP 23-24.

Ms. Jevne was required to paint the entire home due to the damage caused by Appellant Phan. 6/11/09 RP 24-25. She had to

replace the windows due to the staining on them from the marijuana growing operation. 6/11/09 RP 25, 35-36. The windows were not in need of replacing prior to Phan's renting of the house. 6/11/09 RP 25. Additionally, the plumbing needed to be redone because Phan had rerouted it to provide water to his marijuana plants. The sinks were clogged, and the toilets, countertops and cabinets in the upstairs bathroom were stained from the chemicals he used. 6/11/09 RP 27-29, 34-35. The upstairs bathroom was full of mold and damage from the chemicals used in the marijuana grow operation. 6/11/09 RP 14; Exhibits 1-5, 8-9, 14.

Ms. Jevne also described dark brown staining that seeped out from around the windows onto the aluminum siding on the outside of her home. She was not able to remove the staining, even with pressure washing.<sup>2</sup> The brown staining also permeated

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<sup>2</sup> Despite Phan's claim that Ms. Jevne "asked the court to compensate her with new siding," Ms. Jevne specifically testified that she was *not* seeking the cost of new siding for the exterior of her home. 6/11/09 RP 22 ("I didn't put in here but there are spots all over my aluminum siding that we cannot get off even with pressure washing so I cannot replace it and that was something that was not put in this bill to replace a whole house outside aluminum siding"). Nowhere in Ms. Jevne's itemized list of claims did she ask the court to award restitution for the exterior aluminum siding to her home. Exhibit 23.

the drapes and blinds inside the home.<sup>3</sup> 6/11/09 RP 21-22.

Marijuana was found in the refrigerator, and the smell so permeated it, that it could not be properly cleaned out and was replaced. 6/11/09 RP 29-30.

Given the exhibits and the plethora of specific testimony by Ms. Jevne concerning the damages that Phan's marijuana grow had done to her home, the preponderance of the evidence clearly supported a causal connection between Phan's crime and the restitution sought by the State. The trial court did not abuse its discretion in entering the restitution order, and this court should uphold it.

Despite Phan's claim that Ms. Jevne was an opportunist who sought to perform elective home renovations,<sup>4</sup> the record demonstrates the contrary. The quality of the new flooring she installed was subpar to that which was in the home prior to the defendant occupying the house. 6/11/09 RP 39-40. Ms. Jevne testified that her father had put in the original flooring without using any nails. She stated that her house "is not as good today as when

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<sup>3</sup> Although Phan states that the trial court "awarded the complainant restitution for renovations such as these" the trial court specifically excluded the cost of draperies from the restitution order. 6/11/09 RP 73; 7/30/09 RP 20.

<sup>4</sup> Brief of Appellant at 6-7.

I rented it to [Phan] because I had the really good materials and things in there and you can't replace them." 6/11/09 RP 40. Some of the loss her home suffered was simply irreplaceable.

In fact, when questioned by Phan's attorney about the repairs to the upstairs bathroom, Ms. Jevne specifically testified, "I would never [have] torn my whole bathroom apart to do that. It didn't need remodeling." 6/11/09 RP 46. Ms. Jevne also testified that she would not have replaced the carpeting in the home had she not had to, as "[t]hat carpet was only about two years old." 6/11/09 RP 49-50.

In fact, some things in the home did not need to be, nor were they, replaced. Some floors were able to be refinished, versus completely replaced. The hardwood floors in the dining room did not need replacing, nor did the floor of the spare bedroom. 6/11/09 RP 39. One of the walls in the upstairs bathroom had shelving for linen. That was not damaged and was not replaced. 6/11/09 RP 28-9. The mirror in the upstairs bathroom was not replaced. 6/11/09 RP 35. Despite the Formica in the upstairs kitchen being broken, Ms. Jevne did not replace it. 6/11/09 RP 29. The door in the downstairs recreation room was not replaced. 6/11/09 RP 50. When questioned by Phan's attorney about whether the damage to

the kitchen range was caused by Phan's criminal activities or not, Ms. Jevne stated, "It was marked up and we couldn't clean it off from the oven inside to whatever was boiled on the stove, we couldn't clean it up. If you're having a hard time with that, I'm happy to split it with you. I'm not going to quarrel over the stove. I'm not here to take advantage of anyone." 6/11/09 RP 45.

Phan attempts to characterize the request for restitution as an attempt by Ms. Jevne to renovate her home at his expense. Specifically, he claims that she asked the trial court to reimburse her for expenses that her insurance company refused to pay. Brief of Appellant at 6-7. In fact, the only specific item Phan points to in support of this argument (the aluminum siding on the exterior of her home) was simply not covered by the replacement cost provisions of Ms. Jevne's policy. 6/11/09 RP 42. Furthermore, as noted above, Ms. Jevne did not even ask the court to award her restitution for exterior aluminum siding; she did not replace it. 6/11/09 RP 22; Exhibit 23. Moreover, Ms. Jevne specifically testified that the reason she did not receive more money from her insurance company was because of her policy limitations, not because they refused to reimburse her for damages she alleged, but was unable to prove, were caused by Phan. 6/11/09 RP 41-42.

Phan argues that Ms. Jevne performed an "array of home improvements" and "upgrades" including replacing Formica with granite and marble. Brief of Appellant at 6. But the record does not support the claim that Ms. Jevne renovated her home with marble bathrooms and granite countertops. In fact the trial court clearly disagreed with that same characterization by Phan's counsel at the hearing. 7/30/09 RP 15-17. The court appeared to completely disagree with the notion that Ms. Jevne "went into her house and simply tore out everything that didn't need to be torn out and replaced that." 7/30/09 RP 17.

Here, the trial court did not just sign a restitution award for the amount originally claimed by the State. In fact, the court carefully reviewed the evidence and subtracted certain amounts that it did not feel were appropriate. The court did not award restitution for the draperies that were replaced. 6/11/09 RP 73; 7/30/09 RP 20. Also, Ms. Jevne testified that the entire house took between eight and ten months to repair. It apparently remained unrented for approximately 16 months due to the wait to have it declared environmentally sound. 6/11/09 RP 30, 43-44. During that time, Ms. Jevne lost out on substantial rent. Ms. Jevne testified that she had never had problems renting her home.

6/11/09 RP 32, 44. However, the court did not award Ms. Jevne the entire sixteen months of lost rent, instead reducing the award by \$11,900. 7/11/09 RP 20.

Moreover, the State agreed to subtract certain amounts from its request for restitution, specifically, \$3,000 landscaping fees, \$6,473.81 attorney's fees, \$76.30 for nursery bark, \$456.69 for a new hot water tank, \$863.50 for the kitchen range, and \$14,885.54 for the draperies. 6/11/09 RP 71-72; Exhibit 23. The court's ultimate award of restitution was carefully limited to damages clearly linked to Phan's marijuana grow operation.

Despite Phan's generalized argument that the record does not support portions of the restitution order,<sup>5</sup> Ms. Jevne's testimony and the exhibits admitted at the restitution hearing clearly supported a causal connection between the damages sought by the State and the defendant's crime. Phan essentially ruined Ms. Jevne's home when he converted it into a marijuana growing operation. But for his criminal act, her home would not have needed the repairs she made.

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<sup>5</sup> On appeal, Phan apparently agrees with portions of the order but does not clearly articulate exactly what damages he agrees with and what portions of the order he takes issue with.

There is no requirement that the court enter written findings of fact to support a restitution order. The trial court's order of restitution properly held him financially accountable for his crime. The court clearly rejected the notion that Ms. Jevne was trying to upgrade her home at Phan's expense. The trial court properly based its award of restitution on the testimony provided by the victim, the exhibits admitted, and the receipts and invoices provided to the court. The court did not abuse its discretion and this Court should affirm the restitution order.

**D. CONCLUSION**

The State respectfully requests this Court to affirm the trial court's award of restitution in this matter.

DATED this 9 day of April, 2010.

Respectfully submitted,

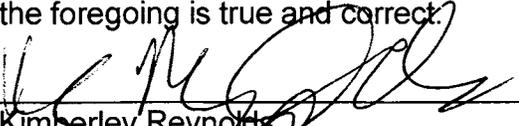
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Jan Trasen, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. HONG PHAN, Cause No. 63968-4-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

  
\_\_\_\_\_  
Kimberley Reynolds  
Done in Seattle, Washington

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