

64931-1

64931-1

NO. 64931-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v. .

MATTHEW VOGT,

Appellant.

2010 SEP 30 PM 1:23
COURT OF APPEALS
STATE OF WASHINGTON
FILED

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MICHAEL HAYDEN

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

PATRICK HALPERN HINDS
Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 296-9650

TABLE OF CONTENTS

	Page
A. <u>ISSUES PRESENTED</u>	1
B. <u>STATEMENT OF THE CASE</u>	1
1. PROCEDURAL FACTS	1
2. SUBSTANTIVE FACTS	2
C. <u>ARGUMENT</u>	4
1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ORDERING RESTITUTION	4
a. Additional Relevant Facts	4
b. Relevant Law	7
c. Vogt Has Failed To Establish That The Court Abused Its Discretion In Setting The Amount Of Restitution	10
D. <u>CONCLUSION</u>	15

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Washington v. Recuenco, 548 U.S. 212,
126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006)..... 9

Washington State:

State v. Bunner, 86 Wn. App. 158,
936 P.2d 419 (1997)..... 10

State v. Bush, 34 Wn. App. 121,
659 P.2d 1127 (1983)..... 9

State v. Davison, 116 Wn.2d 917,
809 P.2d 1374 (1991)..... 7, 9

State v. Demery, 144 Wn.2d 753,
30 P.3d 1278 (2001)..... 10, 14

State v. Enstone, 137 Wn.2d 675,
974 P.2d 828 (1999)..... 8, 9

State v. Fleming, 75 Wn. App. 270,
877 P.2d 243 (1994)..... 7, 8, 9

State v. Harrington, 56 Wn. App. 176,
782 P.2d 1101 (1989)..... 11

State v. Hennings, 129 Wn.2d 512,
919 P.2d 580 (1996)..... 8

State v. Hughes, 154 Wn.2d 118,
110 P.3d 192 (2005)..... 9

State v. Hunotte, 69 Wn. App. 670,
851 P.2d 694 (1993)..... 9

<u>State v. Israel</u> , 113 Wn. App. 243, 54 P.3d 1218 (2002).....	8
<u>State v. Mark</u> , 36 Wn. App. 428, 675 P.2d 1250 (1984).....	9, 14
<u>State v. Mead</u> , 67 Wn. App. 486, 836 P.2d 257 (1992).....	7
<u>State v. Tobin</u> , 132 Wn. App. 161, 130 P.3d 426 (2006).....	8
<u>State v. Warren</u> , 55 Wn. App. 645, 779 P.2d 1159 (1989).....	11

Statutes

Washington State:

RCW 9.94A.753	7, 9, 14
---------------------	----------

A. ISSUE PRESENTED

Trial courts have broad authority to order restitution. Here, the defendant caused damage to the property of the victims, who were the defendant's landlord. In an unlawful detainer action that took place before charges were filed, the defendant agreed to, *inter alia*, forfeit his \$4,500 security deposit. There was no indication that this forfeited money was intended to compensate the victims for any particular damage or expense. At a restitution hearing, the trial court found that the amount of damage was than \$10,859.14. The trial court was not asked to deduct the \$4,500 from the \$10,859.14 in calculating the amount of restitution to order. Restitution was ordered in the full amount of \$10,859.14. Did the trial court abuse its discretion in setting the amount of restitution?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

On January 29, 2009, the defendant, Matthew Vogt, pleaded guilty to five counts of Forgery.¹ CP 22-55, 67-78, 140-68. As part

¹ Vogt also pleaded guilty to one count of Unlawful Issuance of Bank Checks, two counts of Domestic Violence - misdemeanor Violation of a No Contact Order, and one count of Theft in the Third Degree. CP 67-78. Those convictions are not relevant to the issue on appeal.

of his plea, Vogt agreed to pay restitution in an amount to be determined. CP 52, 55. Restitution was ultimately ordered in the amount of \$10,859.14. CP 93-94; 4RP.² This timely appeal followed.

2. SUBSTANTIVE FACTS

On August 18, 2007, Vogt (and his wife/co-defendant, April Vogt) filled out and signed an application to rent the victims' home. CP 40.³ Accompanying the application were a number of documents that had been forged to make it appear that Vogt's assets and income were substantially greater than they actually were. CP 40-41. Based on these documents, the victims agreed to rent their home to Vogt and his family. CP 41.

The relationship between Vogt and the victims was rocky from the beginning. On September 27, 2007, the victims filed a complaint for unlawful detainer, under cause number 07-2-31479-2 SEA, seeking to evict Vogt for failing to pay rent or vacate. CP 202-03. On November 8, 2007, the victims filed a second

² The State adopts the Appellant's designation of the Verbatim Report of Proceedings. See Br. App. at 2, n.1.

³ As part of the plea agreement, Vogt stipulated to the facts contained in the certifications for determination of probable cause. CP 52.

complaint for unlawful detainer, under cause number 07-2-35862-5 SEA, again seeking to evict Vogt for failing to pay rent or vacate, as well as for breaching the lease by failing to allow access to the property for inspection and for having submitted fraudulent documents to induce the victims to sign the lease. CP 212-15.

Finally, on December 19, 2007, the victim filed a third complaint for unlawful detainer, under cause number 07-2-39869-4 SEA, again seeking to evict Vogt. Vogt had again failed to pay rent, again failed to allow access for inspection, and had violated the lease in numerous other ways, including causing extensive damage to the property. CP 223-41. Prior to any ruling on the merits of the case, Vogt and the victims agreed on a disposition in which the victims dismissed the suit in exchange for Vogt's agreement to terminate the lease, quit the property, and forfeit the security deposit. CP 341-43. A Stipulation and Order of Dismissal, giving legal force to the agreement of the parties, was entered on February 2, 2008. Id.

Criminal charges against the defendant were filed on June 16, 2008. CP 1-14. The Information was ultimately amended to include five counts of Forgery relating to specific, individual forged

documents submitted by Vogt as part of his rental application. CP 15-21.

C. ARGUMENT

1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ORDERING RESTITUTION.

a. Additional Relevant Facts.

The initial restitution hearing in this case was held on September 30, 2009. CP 67-78; 3RP. At that hearing, Vogt's sole argument was that the trial court was precluded from ordering restitution by the entry of the Stipulation and Order of Dismissal in the earlier unlawful detainer action. CP 224; 3RP 2-23. The court rejected that argument, but expressed a concern as to whether it could find the causal link between Vogt's crimes and the victim's damages necessary to impose restitution. 3RP 6-23. In explaining its rationale for rejecting Vogt's argument, the court explicitly noted that it considered the question of whether the State was precluded from seeking restitution to be wholly separate from the question of whether the victims had, in fact, already been compensated in whole or part. 3RP 6-7. The court stated:

[L]et me suggest, counsel...whether or not there's -- there is actual damages is a different issue. Whether or not all those damages have been now resolved is a different issue. If the plaintiff has been -- or the victim here has been made whole already is a different issue....

Id. The parties then agreed to set the matter over for the State to provide additional information and briefing regarding the causal nexus. 3RP 15-23. The trial court also indicated that the defense was free to bring any additional arguments, including challenges to the specific amount of damages and/or restitution. 3RP 20.

The restitution hearing was repeatedly continued over the next four months as Vogt obtained a new attorney so that he could move to withdraw his plea based on a claim of ineffective assistance of counsel. Supp. CP ____ (Sub No. 102, Hearing Continued); Supp. CP ____ (Sub No. 104, Motion Hearing); Supp. CP ____ (Sub No. 105, Hearing Continued); Supp. CP ____ (Sub No. 106, Order Authorizing Substitution of Counsel); Supp. CP ____ (Sub No. 109, Hearing Continued); Supp. CP ____ (Sub No. 110, Order of Continuance). This process was prolonged by the fact that Vogt repeatedly failed to appear for hearings, despite being ordered to do so. Supp. CP ____ (Sub No. 102, Hearing Continued); Supp. CP ____ (Sub No. 104, Motion Hearing).

Eventually, however, a final restitution hearing was held on January 27, 2010. 4RP 3-41.

Due to the substitution of counsel, the amount of time that had elapsed since prior briefs had been filed, and Vogt's constantly changing positions on a number of issues, at that hearing the State sought clarification as to exactly what issues needed to be addressed regarding restitution. 4RP 12. At the beginning of the hearing, counsel for the State made it clear that it was the State's understanding that Vogt's only remaining challenge was the claim that restitution simply could not be imposed because there was not a causal connection between the crimes and damages at issue. Id. Initially, Vogt did not dispute that this was the only remaining issue. Id. However, both Vogt and his attorney eventually asserted that the State had provided insufficient proof that there actually was any damage to the property at all or that Vogt had caused it. 4RP 20-23, 31-37. The trial court pointed out that this was the first time this claim had been raised, indicated that it did not believe the claim was being asserted in a timely manner, and ultimately concluded that the State *had* provided sufficient proof as to both the fact of damages and Vogt's responsibility for causing it. Id.

At the conclusion of the hearing -- based on the rental agent's sworn declaration, an itemized list of damages, and documentation of expenses, the court ordered Vogt to pay \$10,859.14 in restitution to the victims for physical damages done to their property. CP 93-94; 4RP 32-35. However, the court declined to impose an additional \$85,487.75 in restitution that had been sought by the State for other losses suffered by the victim. CP 93-94; 4RP 36-37.

b. Relevant Law:

Under RCW 9.94A.753(5), a sentencing 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." There are a number of identified purposes for restitution. The most commonly advanced are to punish defendants, to force them to face the consequences of their actions, and to compensate victims for their losses. See, e.g., State v. Davison, 116 Wn.2d 917, 920, 809 P.2d 1374 (1991); State v. Fleming, 75 Wn. App. 270, 275, 877 P.2d 243 (1994); State v. Mead, 67 Wn. App. 486, 490, 836 P.2d 257 (1992). Restitution attempts to achieve these purposes by requiring the defendant to pay -- as much as is possible -- to restore

the victim to the same position he or she was in before the crime was committed.

In this regard, the Legislature has expressed a strong desire that a criminal pay restitution to the victims of his crimes. State v. Tobin, 132 Wn. App. 161, 175, 130 P.3d 426 (2006). Therefore, while a trial court's authority to order restitution is purely statutory, the statute gives "the trial court broad powers of restitution." Fleming, 75 Wn. App. at 274. Thus, statutes authorizing restitution should not be given an overly technical construction that would permit a defendant to escape from just punishment. Id. Rather, the restitution statutes are to be interpreted broadly to carry out the Legislature's intent. State v. Israel, 113 Wn. App. 243, 299, 54 P.3d 1218 (2002); State v. Hennings, 129 Wn.2d 512, 519, 919 P.2d 580 (1996).

When exercising this broad authority, trial courts are to be guided by two principles. First, there must be a causal connection between the crime committed and the given loss. State v. Enstone, 137 Wn.2d 675, 974 P.2d 828 (1999). Second, the amount of the loss must be "easily ascertainable." Id.

Once the fact of damage and a causal connection is shown, the specific amount does not need to be proven with specific

accuracy or mathematical certainty: State v. Mark, 36 Wn. App. 428, 434, 675 P.2d 1250 (1984) (citing State v. Bush, 34 Wn. App. 121, 659 P.2d 1127 (1983)). Rather, the amount of loss is “easily ascertainable” if it “affords a reasonable basis for estimating loss and does not subject the trier of fact to mere speculation or conjecture. Mark, 36 Wn. App. at 434. Within these constraints the court has broad discretion to determine what is included in the “amount of loss.”⁴

As a result of the trial court's broad power to order restitution, this Court reviews a trial court's order only for abuse of discretion. State v. Hunotte, 69 Wn. App. 670, 674, 851 P.2d 694 (1993); Davison, 116 Wn.2d at 919 (imposition of restitution is generally within trial court's discretion and will not be disturbed on appeal absent abuse of discretion). Therefore, this Court reverses a restitution award only when it is manifestly unreasonable or based on untenable grounds or reasons. Enstone, 137 Wn.2d at 679. “Where reasonable persons could take differing views

⁴ This includes the authority to order restitution in an amount that actually exceeds the real dollar loss to the victim. RCW 9.94A.753(3). In addition, courts may consider changes in market value in determining the amount of loss. Fleming, 75 Wn. App. at 275. However, the trial court is not required to base the amount of restitution ordered on market value. State v. Hughes, 154 Wn.2d 118, 153-56, 110 P.3d 192 (2005) (overruled on other grounds by Washington v. Recuenco, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006)).

regarding the propriety of the trial court's actions, the trial court has not abused its discretion." State v. Demery, 144 Wn.2d 753, 758, 30 P.3d 1278 (2001). In this context, the burden of proving an abuse of discretion is born by the appellant. Id. In addition, like any decision of a lower court, a decision on restitution can be affirmed for any basis apparent in the record. State v. Bunner, 86 Wn. App. 158, 161, 936 P.2d 419 (1997).

c. Vogt Has Failed To Establish That The Court Abused Its Discretion In Setting The Amount of Restitution.

Vogt has not challenged the validity of the trial courts findings: 1) that he damaged the property in question; 2) that there was a sufficient causal connection between the damage and his crimes to impose restitution; and 3) that the amount of the damage for which restitution could be imposed was \$10,859.14. Rather, his only claim on appeal is that the trial court improperly "speculated" as to the amount of restitution to actually order because it did not reduce the \$10,859.14 in damages by part or all of the \$4,500 security deposit that Vogt forfeited. This argument must fail for three reasons.

First, Vogt failed to preserve this issue for appeal. While Vogt raised a number of arguments against restitution, at no point in any hearing or briefing did he ever raise the claim that the amount of restitution ultimately ordered should be *reduced* by the amount of the forfeited security deposit. CP 80-92, 223-43; 3RP 2-23; 4RP 3-41. Nor did he take any action to move the trial court to reconsider the restitution order on these grounds. His failure to raise this issue below precludes appellate review of the assigned error. State v. Warren, 55 Wn. App. 645, 649-50, 779 P.2d 1159 (1989); State v. Harrington, 56 Wn. App. 176, 180-81, 782 P.2d 1101 (1989).

Second, Vogt's entire argument depends on the premise that the trial court actually did fail to consider the effect of the earlier forfeiture. As the burden is on the appellant to establish that the trial court abused its discretion, the burden is also on the appellant to establish the correctness of any underlying premises. Here, Vogt has failed to meet that burden because the record affirmatively indicates that the court *did* consider the earlier forfeiture.

As noted above, at the initial restitution hearing, the court specifically indicated that it was aware that there was also a

potential argument that, in setting the amount of restitution actually ordered, it should take into account the extent to which the victims' losses had already been compensated in a separate proceeding. 3RP 5-7. While the trial court did not explicitly readdress this issue on the record at the subsequent hearing, there is no basis to conclude that this means that the court ignored or failed to consider the issue. And, as discussed below, there is a reasonable basis by which one could conclude that the amount of damage should not have been offset by the forfeited security deposit. Thus, as Vogt has failed to establish either that the trial court failed to consider this issue or that its decision on point was manifestly unreasonable, he has failed to meet his burden of demonstrating that the court's decision was an abuse of discretion.

Finally, Vogt has failed to establish that part or all of the forfeited \$4,500 security deposit actually should have been deducted from the restitution amount. Vogt notes that:

- the third unlawful detainer action filed by the victims referenced the fact that Vogt had damaged or altered the home in violation of the lease terms;

and

- the Stipulation and Order of Dismissal the action included an agreement that the victims would retain the \$4,500 security deposit. Br. App. at 2.

From these two facts, Vogt apparently concludes that the forfeiture of the \$4,500 was intended as, and limited to, compensation to the victims for physical damage done to the property (and, therefore, should have been deducted from the amount of restitution ordered).⁵ However, there is nothing in the Stipulation and Order of Dismissal that actually indicates that this was what the forfeited \$4,500 was for. CP 241-43.

Nor is there a basis to assume that this was what it was for. To the contrary, the unlawful detainer action listed multiple violations of the lease on Vogt's part. A number of these violations were of the sort that involved financial losses on the part of the victims, including, *inter alia*, failure to pay rent in December of 2007 (\$4,500), failure to pay the last month's rent (\$4,500), and damage to the property. CP 224-40. In this context, the victims' only request for a specific amount of money damages was for unpaid rent. CP 232.

⁵ This assumption is illustrated by Vogt's repeated reference to the \$4,500 as being a "damage deposit" as opposed to a "security deposit." See Br. App. at 3, 6.

Thus, despite Vogt's assumption to the contrary, there is no reasonable basis to conclude that the forfeiture of the \$4,500 security deposit was intended as, or limited to, direct compensation to the victims for damage done to the property. Indeed, one could just as reasonably conclude that the forfeited \$4,500 was payment of unpaid rent (also \$4,500) or was simply an undifferentiated payment towards all of the various losses suffered by the victims. In either of these two scenarios, the \$4,500 should not have been deducted from the court's restitution award.

Given that the latter two scenarios are as likely as the former, reasonable minds could differ as to the purpose or effect of the forfeiture of the security deposit.⁶ As noted above, where reasonable minds can differ, there is not an abuse of discretion. Demery, 144 Wn.2d at 758. As a result, the trial court did not abuse its discretion in declining to reduce the restitution ordered by part or all of the amount of the forfeited security deposit.

⁶ In this context, it does not matter that the former scenario *might* have been true. As noted above, the specific amount of restitution ordered need only be based on a reasonable estimation of loss; it need not be established with specific accuracy. Mark, 36 Wn. App. at 434. Indeed, the statute allows for a restitution order that actually exceeds the amount actually lost by the victim. RCW 9.94A.753(3).

D. CONCLUSION

For all the foregoing reasons, the State asks this Court to find that the trial court did not improperly speculate in setting the amount of restitution (or otherwise abuse its discretion) and to affirm the restitution order entered.

DATED this 30 day of September, 2010.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

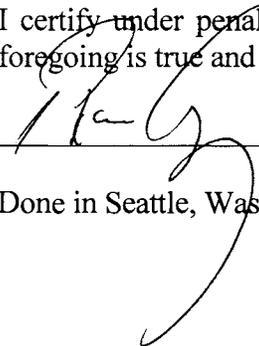
By: 

PATRICK HALPERN HINDS, WSBA #34049
Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

Certificate of Service

Today I deposited for delivery by United States Postal Service a properly addressed and stamped envelope directed to NIELSEN, BROMAN & KOCH, PLLC; 1908 East Madison; Seattle, WA 98122; ATTN: JENNIFER M. WINKLER, containing the Brief of Respondent in State v. Matthew Vogt, Court of Appeals Cause No. 64931-1-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.



Done in Seattle, Washington

09-30-10
Date