

NO. 70213-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

SAHAL AHMED SAHAL,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JOHN ERLICK, JUDGE

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STATE OF WASHINGTON
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BRIEF OF RESPONDENT

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A. ISSUE PRESENTED

A restitution amount must be proven by the State by a preponderance of the evidence, based on substantial credible evidence. Here, the trial court modified the restitution amount that Sahal was ordered to pay to the Shifow/Ismail family based on the credible sworn testimony of a member of the family and documentary exhibits in the form of receipts and an internet foreign-currency conversion. Did the trial court abuse its discretion in ordering the additional restitution in the amount of \$12,973.42?

B. STATEMENT OF THE CASE

Defendant Sahal Ahmed Sahal pled guilty to attempted residential burglary and theft in the first degree (under two cause numbers – 12-1-01171-7 SEA and 12-1-04189-6 SEA) on August 27, 2012. CP 9-20. As part of the package plea agreement, Sahal agreed to pay restitution to several additional victims, and the State agreed not to file additional charges. CP 29. Specifically with respect to Nima Ismail, Sahal agreed to pay restitution up to a cap of \$30,000. Id.

The court held a hearing on March 6, 2013, to address restitution to the Diekhans family with respect to the attempted

residential burglary, and the Shifow/Ismail family with respect to an uncharged burglary. RP 44-51. The court ordered the requested restitution to the Diekhans family in full, and ordered partial restitution to the Shifow/Ismail family. Id.; CP 35-36.

The court continued the restitution hearing for good cause for an additional two days to allow the State to provide additional evidence in support of the remaining requested restitution for the Shifow/Ismail family. RP 46-48.

The court resumed the restitution hearing on March 8, 2013. RP 52-62. Mr. Kamal Shifow was present in court and gave sworn testimony regarding the losses to his family stemming from the burglary in February 2012. RP 52-59.

Mr. Shifow testified that the three receipts – provided to the court as Exhibit 1 – were for purchases of jewelry made by his wife, Nima Ismail, over many years. Id. Two of the receipts (with notations in English) were for purchases made in Seattle, with US Dollars; the third receipt (with notations in Arabic) was for a purchase made in Dubai, with United Arab Emirates Dirhams. RP 55, 56; Ex. 1. The jewelry from those purchases was stolen in the burglary. RP 55-56.

The court took judicial notice of the currency conversion from United Arab Emirates Dirhams to US Dollars, also included in Exhibit 1. RP 56-57, 60-61; Ex. 1. Sahal made a vague objection at the time the exhibit was entered, but it was not clear if it was intended as an objection to the judicial notice, or to the general foundation and admissibility of the exhibit. RP 56-57. The court did not rule on Sahal's objection because Sahal admitted there was no legal basis for an objection. Id.

The court found Mr. Shifow's testimony credible. RP 60. The court ordered additional restitution in the amount of \$12,973.42 to the Shifow/Ismail family for the jewelry stolen during the burglary, as documented in Exhibit 1. RP 60-61; CP 37-38.

C. ARGUMENT

**THE TRIAL COURT DID NOT ABUSE ITS DISCRETION
BY ORDERING ADDITIONAL RESTITUTION TO THE
SHIFOW/ISMAIL FAMILY.**

A trial court's restitution order will not be disturbed absent an abuse of discretion. State v. Griffith, 164 Wn.2d 960, 965, 195 P.3d 506 (2008). Such an abuse of discretion can only occur when the order is "manifestly unreasonable or exercised on untenable

grounds, or for untenable reasons.” State v. Bennett, 63 Wn. App. 530, 533, 821 P.2d 499 (1991).

A restitution order is supported by sufficient evidence if that evidence provides the trial court with a reasonable basis for estimating the loss. State v. Griffith, 164 Wn.2d 960, 965, 195 P.3d 506 (2008). Hearsay evidence is admissible at restitution hearings. State v. Pollard, 66 Wn. App. 779, 783-84, 834 P.2d 51 (1992); ER 1101.

Here, there is nothing in the record to demonstrate that the court abused its discretion in ordering the additional restitution for items stolen during a burglary. The court based its findings on credible, sworn testimony of Mr. Shifow. While he was not the family member who personally made the purchases of jewelry, he was competent to testify to the amounts his wife spent on the purchases.

Of the receipts Mr. Shifow provided and authenticated, two of them were clearly written on English forms.¹ It was a

¹ There was no evidence before the court that the redactions on those receipts were the name and address of the seller. It is more likely that the redactions were of personal contact information of the victims, which is regularly redacted in documents filed with the court for privacy reasons. The personal contact information of the victims was redacted in other places in the restitution documents provided to the court. Contact information for companies is not typically redacted, and was not redacted in other places in the restitution documents.

reasonable inference, corroborated by Mr. Shifow's testimony, that those purchases were made in US Dollars. The third receipt is replete with text in Arabic, both pre-printed and handwritten. Mr. Shifow confirmed that the location of those purchases was Dubai, part of the United Arab Emirates. Both the receipt itself and the testimony indicated that the currency of that purchase was Dirhams.

Appellant relies on Pollard, supra, to suggest that the evidence in this case did not protect Sahal's right to due process. However Pollard is distinguishable. There, the order of restitution was supported only by a police report that did not make clear what actual losses were suffered by any particular victim. Pollard, 66 Wn. App. at 786-87. The court was asked to rely upon preliminary estimates of what some of the victims could have lost, depending on who eventually paid on the fraudulent checks. Id. There is no such uncertainty in this case. The receipts and sworn testimony show clearly the value of this portion of the property that was actually stolen from the Shifow/Ismail family. The only uncertainty is how much greater the loss actually is, since much of the stolen jewelry was family heirlooms that could not be properly valued.

ER 201 requires the court to take judicial notice if a party requests such notice, and provides the court with the necessary information. ER 201(d). It is appropriate for a court to take judicial notice of a foreign currency exchange rate that is not subject to reasonable dispute because it can be accurately and readily determined by consulting a source of unquestionable accuracy. ER 201(b). Such sources include “encyclopedias, authoritative works upon the subject, reports of committees, scientific bodies and any source of information that is generally considered accurate and reliable.” State ex rel. Humiston v. Meyers, 61 Wn.2d 772, 779, 380 P.2d 735 (1963); see Tyler Pipe Industries, Inc. v. State, Dept. of Revenue, 96 Wn.2d 785, 795-96, 638 P.2d 1213 (1982) (judicial notice of prime interest rate is appropriate).

The rule regarding judicial notice also entitles an opposing party to directly challenge a request for the court to take judicial notice. ER 201(e). Here, no such challenge was made to the State’s request for mandatory judicial notice. At the time judicial notice was requested and the State’s exhibit was offered into evidence, Sahal made only a vague objection with no legal basis. The court made no decision with respect to that objection

due to the lack of grounds. Sahal's later objections were made with respect to the receipts contained in the exhibit and their foundation, but no objection was made to the court's notice of the applicable exchange rate. RP 60. Because Sahal did not object to the trial court's judicial notice, appellate review of this claim should be barred. State v. Davis, 141 Wn.2d 798, 849-50, 10 P.3d 977 (2000).

The trial court's authority to impose restitution derives solely from statute, which reflects the Legislature's efforts to ensure that victims are made whole and that defendants are held accountable for the losses they have caused. State v. Gonzalez, 168 Wn.2d 256, 265, 226 P.3d 131, cert. denied, 131 S. Ct. 318, 178 L. Ed. 2d 207 (2010); see also State v. Tetreault, 99 Wn. App. 435, 437, 998 P.2d 330, review denied, 141 Wn.2d 1015 (2000).

The need for foreign currency conversion in State criminal prosecutions is rare, for obvious reasons. However, currency conversions have been addressed in light of damages awarded in civil suits. The court has held that, since the goal is similarly to make the plaintiff whole, the exchange rate can be drawn either from the date of the loss, or the date of the award, whichever is

to the greater benefit of the plaintiff. Aker Verdal A/S v. Neil F. Lampson, Inc., 65 Wn. App. 177, 183-88, 828 P.2d 610 (1992).

Further, restitution can be properly based on the valuation of property at the time of the hearing, not just at the time of the crime. State v. Fleming, 75 Wn. App. 270, 273-76, 877 P.2d 243 (1994).

Although the trial court did not engage in a comparison between the currency conversion rate on the date of loss and the rate on the date of the restitution award, any error is harmless. If there is error to be found here, it could not have prejudiced Sahal's rights and did not materially affect the result of the case to his detriment. State v. Calegar, 133 Wn.2d 718, 727, 947 P.2d 235 (1997). Since it would have been proper for the court to choose the rate that gave the benefit to the Shifow/Ismail family, not to Sahal, any comparison could have only increased the amount Sahal was ordered to pay, not decreased it. Neither result would have been a prejudice to Sahal.

The State presented competent, credible, sworn testimony on which the court properly relied. The court examined the receipts provided and found them to be a reasonable estimate of the loss, necessitating no speculation as to the value

of these particular items of jewelry. The court properly took judicial notice of a reliable source of currency exchange rates. None of these actions were outside of the trial court's discretion on the issue of restitution.

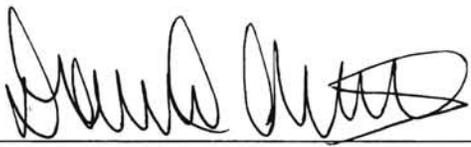
D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm the trial court's Order Modifying Restitution to be paid by Sahal.

DATED this 12th day of February, 2014.

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 Elaine Winters, 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. SAHAL AHMED SAHAL, Cause No. 70213-1-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.

Betty A. Huddleston
Name

Done in Seattle, Washington

2/12/14
Date