

NO. 70752-3-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

AMY LYSON,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JUDGE WILLIAM DOWNING

BRIEF OF RESPONDENT

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A. ISSUE PRESENTED

Lyson pled guilty to eight counts of Theft in the Second Degree for an embezzlement scheme in which she forged and cashed numerous checks belonging to the family-owned company for which she worked. Lyson agreed to pay restitution for all losses for all charged and uncharged counts. At a restitution hearing, the court considered a declaration from the victim and supporting materials in determining the loss amount. The court ordered Lyson to pay \$65,743 in restitution. Lyson now contends that the court abused its discretion in ordering Lyson to pay the restitution amount. Should this court agree that the trial court did not have sufficient evidence before it to determine the restitution figure by a preponderance of the evidence?

B. STATEMENT OF THE CASE

On May 21, 2012, the State charged AMY RENEE LYSON with eight counts of Theft in the Second Degree. CP 1 – 4. Lyson worked for a company called. the Versatile Company. CP 6. Her supervisor Mr. Eric Verzuh, discovered that Lyson had forged and cashed over 100 checks totaling over \$65,000. CP 6. This was the third time that Verzuh had caught Lyson stealing from Versatile. CP

6. The first two times he caught Lyson stealing they had not involved the police. Verzuh also discovered that Lyson used a company credit card to pay her personal bills. CP 6 – 7.

Verzuh confronted Lyson with his finding on the losses. Lyson admitted to the conduct. CP 7. Lyson was later interviewed by police and she gave a statement in which she admitted to forging the checks and to the unauthorized use of the company credit card. CP 8.

The total loss amount contained in the Certification for Determination of Probable Cause was \$68,565.70 in checks and 6,133.33 in fraudulent credit card transactions. CP 6.

On May 31, 2012, Mr. Verzuh completed a Victim Loss Statement indicating that the loss amount was \$65,743. CP 49. That Statement was under the penalty of perjury. CP 49.

On June 1, 2012, Mr. Verzuh sent the court a letter refining the loss amount to \$65,743.11. CP 48. He also detailed how that loss had impacted himself, the company, and the other employees of the company. CP 48.

On February 4, 2013, Lyson pleaded guilty as charged. CP 10 – 22. In her plea agreement, she agreed to pay restitution for all losses for all charged and uncharged counts. CP 31.

On March 7, 2013, the defendant was sentenced. 1RP 3.¹ Mr. Verzuh appeared on spoke on behalf of the company. He again talked about the magnitude of the loss and the impact it had on him and others. 1RP 3 – 9.

At the restitution hearing on July 17, 2013, the Court considered the information contained in the Certification. 2RP 4. The court also considered the declaration provided by Mr. Verzuh and its supporting materials. 2RP 4. The court also noted that he'd addressed the court at the sentencing was had been available for further questioning. 2RP 5. The court then found that based on a preponderance of the evidence the State had proven restitution in the amount contained in Verzuh's declaration, \$65,743.

C. ARGUMENT

THE TRIAL COURT HAD A SUFFICIENT FACTUAL BASIS ON WHICH TO DETERMINE RESTITUTION BASED ON A PERPONDERANCE OF THE EVIDENCE

The defendant contends that the trial court did not have a sufficient factual basis on which to base the restitution amount. This claim should be rejected. The court had before it the Certification

¹ The report of the sentencing hearing from March 7, 2013 will be referred to as 1RP. The report of the restitution hearing from July 17, 2013 will be referred to as 2RP.

for Determination of Probable Cause, a letter written by the victim, a declaration signed under the penalty of perjury, and had heard from the victim in court. The court had substantial evidence on which to base the restitution order.

a. The Standard of Review is Abuse of Discretion

In State v. Oakley, 158 Wn. App. 544, 551-52, 242 P.3d 886 (2010), the court discussed the standard of review for restitution issues. It stated that a trial court derives its authority to order restitution from statute rather than any inherent power. Id. A trial court's authority to order restitution under the statute is reviewed de novo. Id. But “[w]hen the particular type of restitution in question is authorized by statute, imposition of restitution is generally within the discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion.” Id. at 552 (citing State v. Davison, 116 Wn.2d 917, 919, 809 P.2d 1374 (1991)).

A trial court has discretion to determine the amount of restitution owed by a criminal defendant, and Court of Appeals will find an abuse of discretion only if the decision is manifestly

unreasonable, or exercised on untenable grounds, or for untenable reasons. State v. Tobin, 132 Wn. App. 161, 173, 130 P.3d 426, 432 (2006) aff'd, 161 Wn.2d 517, 166 P.3d 1167 (2007).

b. The Trial Court has Broad Power to Order Restitution

A trial court's authority to impose restitution is granted by statute. State v. Moen, 129 Wash.2d 535, 543, 919 P.2d 69 (1996). RCW 9.94A.753(5) requires the court to order restitution “whenever the offender is convicted of an offense which results in injury to any person or damage to or loss of property.” When enacting RCW 9.94A.753 (previously codified as RCW 9.94A.142), the legislature granted broad power to the trial court to order restitution. State v. Enstone, 137 Wash.2d 675, 679, 974 P.2d 828 (1999). Further, “. . . restitution ordered by a court pursuant to a criminal conviction shall be based on easily ascertainable damages for injury to or loss of property.” RCWA 9.94A.753

This statute has been interpreted to give a trial court great leeway in determining restitution. While restitution must be based on easily ascertainable damages, the amount of harm or loss need not be established with specific accuracy, State v. Kinneman, 155 Wn.2d 272, 119 P.3d 350 (2005). “[O]nce the fact of damage is

established, the precise amount need not be shown with mathematical certainty. State v. Tobin, 132 Wn. App. at 173.

Washington courts allow estimated damages in restitution cases. See, e.g., State v. Awawdeh, 72 Wash. App. 373, 379, 864 P.2d 965 (1994); State v. Bush, 34 Wn. App. 121, 123, 659 P.2d 1127 (1983); State v. Mark, 36 Wn. App. 428, 434, 675 P.2d 1250 (1984); State v. Pollard, 66 Wn. App. 779, 785, 834 P.2d 51 (1992). Specifically, “the evidence of damages must be sufficient to afford a *reasonable basis for estimating* the loss and must not subject the trier of fact to mere speculation or conjecture.” State v. Tobin, 132 Wn. App. at 174.

To determine the amount of restitution, the trial court can either rely on a defendant's acknowledgment or it can determine the amount by a preponderance of evidence. *Id.* The rules of evidence do not apply at restitution hearings. State v. Pollard, 66 Wn. App. at 784. The evidence supporting restitution must be reasonably reliable, and the defendant must have the opportunity to refute it. *Id.*

b. The Trial Court Properly Found There Was Sufficient Evidence on Which to Order Restitution.

The trial court here conducted a restitution hearing at which the state presented evidence. The court had before it three documents. The Certification for Determination of Probable Cause, signed under the penalty of perjury that established 107 forged checks and 20 instances of fraudulent credit card use. It also established that Lyson was confronted with the checks and that she admitted that she'd forged them. CP 8. She also admitted to the unauthorized credit card usage. CP 8.

The court also considered a letter written by the victim in which the victim detailed how the loss had impacted the company and all its employees. The letter set the restitution amount at \$65,743.11.

Finally, the court considered a declaration, signed under the penalty of perjury by the victim, that attested to the loss and also set the amount at \$65,743.

Lyson chose not to present any evidence on their behalf.

Clearly the evidence here has met the standard set by the court. Lyson has not satisfied her burden of showing that the

court's restitution order was manifestly unreasonable or based on untenable grounds. Her appeal should be denied.

Lyson cites to State v. Kisor, 68 Wn. App. 610, 619, 844 P.2d 1038 (1993) to support their claim that the trial court abused its discretion. Kisor, however, is distinguishable. In Kisor, the State requested restitution for a police dog and submitted an affidavit in support of their claim. The affidavit only claimed that the affiant “checked with” an unnamed person to obtain the restitution amount. The affidavit itself then was solely based on hearsay. The court found that did not constitute sufficient credible evidence.

Here however, the affidavit of Verzuh was not based on hearsay. Verzuh discovered the theft. CP 6. He counted the forged checks. CP6. He added up the loss amount. CP 6 – 7. And he confronted Lyson who admitted that she’d forged the checks. CP 7 – 8. His was not an affidavit based on conjecture and hearsay, it was an affidavit based on facts.

D. CONCLUSION

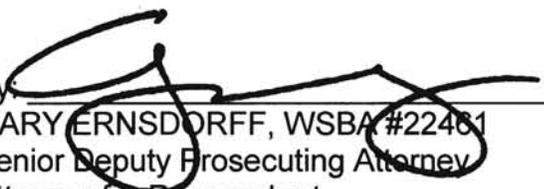
For the reasons set forth above, the respondent respectfully requests that this court uphold the restitution order of the trial court.

The trial court has a sufficient factual basis on which to determine the restitution amount.

DATED this 7th day of May, 2014.

Respectfully submitted,

DANIEL T. SATTERBERG
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By 
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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 Andrew Zinner, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the BRIEF OF RESPONDENT, in STATE V. AMY LYSON, Cause No. 70752-3 -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.

Dated this 7th day of May, 2014



Tara Longen
Done in Seattle, Washington

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