COURT OF APPEALS FOR THE STATE OF WASHINGTON

Division III

No. 31972-5-III

STATE OF WASHINGTON, Plaintiff/Respondent, vs. KEENAN W. ROSS, Defendant/Appellant.	)	MOTION ON THE MERITS

1. IDENTITY OF MOVING PARTY

The moving party is the Respondent, the State of Washington.

2. STATEMENT OF RELIEF SOUGHT

The State asks that the court deny the requested review, dismiss the appeal, and enter an order affirming Appellant's restitution order in Yakima County Superior Court case 12-1-01715-3. This court should grant the motion on the merits based on the fact that the issues on review are

1) clearly controlled by settled law, and 2) factual and supported by the evidence. RAP 18.14(e)(1).

3. STATEMENT OF FACTS

In Yakima County Superior Court case 12-1-01715-3, the appellant, Ross, pled guilty to the crime of first degree trafficking in stolen property. As part of a plea agreement, Ross agreed to pay restitution for crimes charged under 12-1-00295-4. As part of the deal, two charges in 12-1-00295-4 were dismissed. On May 3, 2013, at a triage hearing, the prosecutor set forth the details of the plea agreement on the record:

> PROSECUTOR: Okay. The other, the other thing that's important is as, as they say Mr. Bruns's case is gonna be dismissed.
> THE COURT: Right.
> PROSECUTOR: But he's gonna agree to make restitution in that case. If they want to contest the amount and have a restitution hearing whatever that's fine but **he is gonna agree to make restitution to that uncharged crime in return for the dismissal**.
> …
> THE COURT: Mr. Ross you understand that?
> MR. ROSS: Yes.

(5/3/2013 RP 19-20) (emphasis added).

On May 29, Ross filed a Statement of Defendant on Plea of Guilty that memorialized the agreement to pay restitution on the dismissed case.

On that same date, the judge went over the plea agreement with the defendant and the defendant confirmed he was agreeing to pay restitution. (5/29/13 RP 28). At sentencing, on July 9, 2013, the agreement was put on the record again. (7/9/13 RP 59).

A restitution hearing was held on August 20, 2013. The hearing was regarding the amount of restitution to be ordered for two counts charged under cause number 12-1-00295-4. Those two counts were 1) second degree burglary, and 2) attempted first degree theft. (CP 61). The burglary charge reads as follows:

> "On or about February 24, 2012, in the State of Washington, acting as a principal or an accomplice to another participant in the crime, you or another participant in the crime, with intent to commit a crime against a person or property therein, entered or remained unlawfully in a building located at 1580 Crusher Canyon Road, Selah, Washington, the property of Danny Joe Garner."

(CP 61). The attempted theft charge is as follows:

> "On or about February 24, 2012, in the State of Washington, acting as a principal or an accomplice to another participant in the crime, you or another participant in the crime with intent to commit the crime of First Degree Theft, took a substantial step toward wrongfully obtaining or exerting unauthorized control over an air conditioner

> unit and/or a pump compressor, property belonging to Danny Joe Garner, of a value exceeding $5,000.00, with intent to deprive Danny Joe Garner of that property."

(CP 61).

At the restitution hearing, the State called three witnesses: Dan Garner, Tina Brightwell, and Sgt. Guillermo Rodriguez. Mr. Ross did not call any witnesses. (8/20/13 RP 44). There were 7 photographs admitted. (8/20/13 RP 4). At issue in the hearing was the amount of the damage to be awarded. Ross argued that the warehouse was no longer functional and suggested that it had been previously vandalized. (8/20/13 RP 3).

Victim Dan Garner testified that he was the victim of a burglary on February 24, 2012 and described all the damage he saw in detail. When questioned about previous damage to his property, he testified as follows:

> Q: Was there any damage to that warehouse that you were unaware of before?
> A: None whatsoever.
> …..
> Q: Before this burglary happened when was the last time you or your wife were in that warehouse?
> A: Two days.
> Q: Two days?
> A: Yes.
> Q: And how much of this damage existed at that time?
> A: None of it.

(8/20/13 RP 9, 11). On cross-exam, Mr. Garner testified further about his knowledge of the condition of his property before the crime:

> Q: So you said you'd inspected the property a couple of days before the February 24, 2012 burglary, correct?
> A: That is correct.
> Q: Did you come out during the day time?
> A: Yes, I did.
> …
> Q: You went into the warehouse?
> A: Yes, I did.
> Q: And did you walk around the outside of the warehouse?
> A: I always walk around it. I mow around it.

(8/20/13 RP 21). He also testified that the cooling system was working. (8/20/13 RP 28-9). When questioned about the time frame that this crime took place within, the victim testified on cross-examination as follows:

> Q: Okay. Now, they m[u]st have removed it then between February 24th when the defendant was arrested and the occasion that you saw the property two days earlier isn't that a good logical assumption?
> A: Correct I'd say.

Mr. Harlan's daughter, Tina Brightwell, testified as well. She testified that she visited the warehouse 7 or 8 times a week, every week. (8/20/13 RP 34). She testified that the cooling system was running and working. (8/20/13 RP 35).

Sgt. Guillermo Rodriguez was the last witness to testify. He testified about first seeing the suspect vehicle, a small red pickup truck, in a location near the warehouse on February 23, 2012, the night before Ross was caught. The pickup was backed up into the weeds at the entrance to Dotty Drive, 75 yards from the warehouse, with no one around it on February 23. (8/20/13 RP 38, 40, 41). The next night when Sgt. Rodriguez saw it, on the 24th, it was in the exact same place at the exact same time. (8/20/13 RP 38, 40). When the sergeant went by the area a second time on the 24th, the truck was backed up to the victim's cold storage warehouse. (8/20/13 RP 38).

At that time, Ross and his codefendant were attempting to load a large compression unit into the back of the truck. (8/20/13 RP 39, CP 60). A small locked storage room of the warehouse was also accessed and bolts were removed so another large pump or compressor could be taken. (CP 60). Two padlocks had been cut from the storage unit and were located on the ground. *Id.* Two large bolt cutters were located in the truck. *Id.* Also located in the bed of the truck were brackets used to hold the pump/compressor in place. *Id.* On one of the suspects an officer located bolts for the fly wheel on a pump/compressor. *Id.*

Based on the testimony and documentation, the court ordered restitution in the amount of $54,580, broken down as follows:

1. Parts and labor for re-wiring motors/service: $16,500
2. Parts to repair compressors: $19,000
3. Labor to repair compressors: $19,000
4. Replacement of padlocks: $80

(9/18/13 62-69). The court declined to order restitution for the replacement value of the compressors, a horizontal condensing unit, spilled Freon, and assorted cast iron and brass fittings (9/18/13 RP 66-68). Findings of Fact and Conclusions of law were filed after the hearing.

This appeal followed.

4. ARGUMENT

Challenges to the amount of restitution are reviewed for an abuse of discretion. *State v. Griffith*, 164 Wn.2d 960, 965, 195 P.3d 506 (2008). "A trial court abuses its discretion when it bases its decision on untenable or unreasonable grounds." *State v. R.G.P.*, 175 Wn. App. 131, 136, 302 P.3d 885, *review denied*, 178 Wn.2d 1020 (2013). A decision is based on untenable grounds when the court bases its decision on an incorrect interpretation of the law. *R.G.P.*, 175 Wn. App. at 136.

RCW 9.94A.753(3) allows the trial court broad discretion in determining restitution. *State v. Kinneman*, 155 Wn.2d 272, 282, 119 P.3d 350 (2005). The State need not prove the specific amount of damages with certainty, and need only prove the damages by a preponderance of

the evidence. *State v. Tobin*, 132 Wn. App. 161, 173-74, 130 P.3d 426 (2006), *aff'd*, 161 Wn.2d 517, 166 P.3d 1167 (2007).

A causal connection must exist between the crime of conviction and the victim's damages. *State v. Taylor*, 86 Wn. App. 442, 445, 936 P.2d 1218 (1997). This is done by looking at the facts and circumstances underlying the defendant's crime, rather than simply looking at the name or elements of the crime. *State v. Griffith*, 164 Wn.2d 960, 966, 195 P.3d 506 (2008). *See e.g., State v. Smith*, 119 Wn.2d 365, 831 P.2d 1082 (1992) (burglary defendant ordered to pay restitution for service costs regarding surveillance system); State v. *Landrum* , 66 Wn. App. 791, 832 P.2d 1359 (1992) (defendant convicted of fourth degree assault required to pay for counseling costs for sexual assault); *State v. Harris*, 181 Wn. App. 969; 327 P.3d 1276 (2014) (DWLS defendant required to pay burial costs for pedestrian he hit); *State v. Thomas*, 138 Wn. App. 78, 155 P.3d 998 (2007) (DUI defendant required to pay restitution for accident damages); *State v. Steward*, 52 Wn. App. 413, 760 P.2d 939 (1988) (defendant charge with taking a motor vehicle without permission was liable for items taken from the car after she abandoned it); *State v. Harrington*, 56 Wn. App. 176, 782 P.2d 1101 (1989) (defendant charged with possessing stolen car liable for damage caused to the car).

There is no dispute as to the specific amounts of loss in this case. The sole issue is whether there is a causal connection between the two charges, second degree burglary and attempted first degree theft, and the victim's losses. Ross argues in his brief on appeal that items were taken prior to his burglary. Certainly, there could be other possibilities or other inferences that could be drawn as to when things might have been taken, but the uncontested evidence presented leads to the conclusion that more likely than not they were stolen as a product of the joint two-day venture that Ross was engaged in with his codefendant.

Here, two witnesses testified to the condition of the property before and after Ross was arrested. (8/20/13 RP 9,11, 34-35). This testimony was uncontroverted. There was no testimony about any prior damage whatsoever to the warehouse. Now, Ross wants the court to believe that part of the damage was not caused by him, but provided no testimony or evidence at the hearing in that regard.

State v. Acevedo, cited by Ross, is distinguishable from the case at hand. In *Acevedo*, a car was stolen December 5, 2008 and the date of the crime (possession of stolen motor vehicle) was over 6 months later, on June 11, 2009. 159 Wn. App. 221, 230, 248 P.3d 526 (2010). Mr. Acevedo told the police that the car was stripped **before** he bought it. *Id.*

This testimony was significant to the court's decision. But unlike *Acevedo*, here, there was no testimony from Ross or anyone else that the anything was taken before Ross and his accomplice burglarized the warehouse. There is no evidence or testimony at the trial level to support his claim of pre-existing damage. He could have testified at the restitution hearing or presented evidence of prior damage but did not do so. There was absolutely no evidence of any prior burglary or theft incidents at the warehouse.

In support of his argument, Ross also cites *State v. Woods*. In *State v. Woods*, the defendant was convicted of possession of a stolen vehicle on September 4, 1995. 90 Wn. App. 904, 906, 952 P.2d 834 (1998). At the restitution hearing, the State sought restitution for personal items that were in the car weeks prior, on August 17, 1995, when the car was first stolen. *Id.* The *Woods* court relied on *State v. Tetters*, 81 Wn.App. 478, 914 P.2d 784 (1996), in which the "loss [of personal items in the car] **undeniably** occurred before the criminal act for which the defendant was convicted." *Id.* at 910 (emphasis added).

The same cannot be said for Ross' case. Ross was charged with burglary and attempted theft. The uncontested testimony at the hearing was that the damage was not there prior to the burglary, and that Mr.

Garner had checked on his warehouse two days prior. (8/20/13 RP 21). The sole testimony was that the suspect vehicle was there over a two-day period. (RP 8/20/13 38-41) There was no evidence before the court that a prior burglary had ever occurred, been witnessed, been reported to police, or prosecuted. There was no evidence of any prior damage to the warehouse equipment. As such, the trial court's findings are supported by sufficient evidence and the trial court did not abuse its broad discretion in ordering restitution.

Ross also argues that "no evidence was presented showing that any copper wire or tubing was found at the scene when Mr. Ross was apprehended." However, we are talking about a burglary that occurred over a two-day time frame. It is a reasonable and logical inference that wire was being taken out of the warehouse over the two-day period that Ross and his accomplice were committing the burglary. The restitution order is not invalid simply because Ross or his accomplice removed the copper wire before being apprehended. The uncontroverted testimony that the wire went missing at the same time as the burglary is sufficient to award restitution for re-wiring costs.

Ross also argues, for the first time on appeal, that he was not charged with the theft of the copper wire or tubing. However, the courts

have made it clear that restitution is not confined to the definition of the crime. *State v. Selland*, 54 Wn. App. 122, 124, 722 P.2d 534 (1989). Restitution is not limited simply because a prosecutor could have filed other charges. *Id.* at 125. As indicated in *Selland*, "we do not see that the interest of restoring a victim's loss would be at all served by limiting the value of restitution to the crime charged. *Id.* This accords with the legislature's broad imposition on offenders of responsibility for restitution. *State v. Hiett*, 154 Wn.2d 560, 565, 115 P.3d 274 (2005).

Thus, even though Ross was not charged with the theft of copper wire or tubing, he was charged with burglary, which would encompass the damage he and his accomplices caused during their two-day venture. In sum, looking at the facts and circumstances underlying his crime, it is clear that a causal connection exists between the crimes he was convicted of and the victim's damages. As such, the order should be upheld.

5. CONCLUSION

The language of the restitution statue was meant to give the trial court broad powers of restitution. *Davison*, 116 Wn.2d at 920. The trial court's order of restitution in this case was not an abuse of discretion. As such, the State respectfully requests that this court grant the State's motion and affirm the conviction and sentence in this matter.

DATED: October 30, 2014.

_s/Tamara A. Hanlon_____
TAMARA A. HANLON
WSBA # 28345
Senior Deputy Prosecuting Attorney
Yakima County, Washington
Attorney for Respondent

DECLARATION OF SERVICE

I, Tamara A. Hanlon, state that on October 30, 2014, by agreement of the parties, I emailed a copy of the State's Motion on the Merits to Ms. Janet Gemberling at admin@gemberlaw.com.

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

DATED this 30th day of October, 2014 at Yakima, Washington.

__s/Tamara A. Hanlon_____
TAMARA A. HANLON, WSBA #28345
Senior Deputy Prosecuting Attorney
Yakima County, Washington
128 N. Second Street, Room 329
Yakima, WA 98901
Telephone: (509) 574-1210
Fax: (509) 574-1211
tamara.hanlon@co.yakima.wa.us