73759-7

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Court of Appeals
Division I
State of Washington

NO. 73759-7-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

VINOD CHANDRA RAM,

Appellant.

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE CAROL A. SCHAPIRA

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# BRIEF OF RESPONDENT

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## A. ISSUE PRESENTED

1. Where the evidence at trial established that the victim companies incurred financial liability as a result of the defendant's use of their stolen fuel account cards, in the amount that the defendant would have had to pay in order to legally obtain the fuel he stole, did the trial court properly exercise its discretion in ordering that restitution be paid in that amount and to the victim companies, with a provision allowing modification of the payee if any of the fuel card companies relieved the victim companies of their liability?

2. Where the restitution statute allows modification of the payee in a restitution order more than 180 days after sentencing, is remand to amend the order the proper remedy for any error in the trial court's choice of payees?

## B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

The defendant, Vinod Chandra Ram, was found guilty of one count of conspiracy to commit identity theft in the first degree and 16 counts of identity theft in the first degree, with a "major economic offense" aggravating factor found on all counts. CP 51-53, 58.

At a timely[1] post-sentencing restitution hearing, the trial court ordered Ram to pay restitution totaling $578,590.10 to 16 victims. CP 83-86; RP[2] 3. Ram timely appealed. CP 65.

2. SUBSTANTIVE FACTS.

a. The Underlying Crimes.

Between August 2010 and August 2011, Ram and his associates used stolen or cloned fuel account cards belonging to 16 different business entity victims to obtain fuel without paying for it. CP 38-50. Fuel account cards are issued by fuel companies that operate so-called "card-lock" fuel stations, which are used by commercial enterprises with fleets of vehicles. 6RP 53-54. Petrocard and Associated Petroleum Products (APP) are two companies that issue fuel cards in western Washington. 10RP 52-53; 11RP 116-18.

After a fuel card company issues cards to a customer business, such as a trucking company, the trucking company's

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[1] The restitution hearing was originally scheduled for 170 days after sentencing, but was postponed several times at Ram's request. CP 66; Supp. CP __ (subs 107, 109, 114, 119).

[2] The Brief of Appellant refers to the report of proceedings in Ram's appeal of his underlying convictions (72654-4-I), which has been linked with this appeal for consideration by the same panel, as 1RP through 14RP, and refers to the single-volume report of proceedings in this appeal as 15RP. However, because the record in 72654-4-I actually involves 16 volumes, this brief will refer to the record in 72654-4-I as 1RP through 16RP, and will refer to the single-volume report of proceedings in this appeal as "RP."

employee drivers can then each drive into a card-lock station, swipe his or her fuel card, enter a personal identification number (PIN) at a computerized kiosk to activate a fuel pump, and fuel his or her truck. 6RP 53; 7RP 48-50; 9RP 67. The trucking company would then receive a monthly or bi-monthly bill for all recent fuel transactions made using the company's fuel cards. 6RP 44-45; 10RP 52. The bills typically reflect the time, date, and location of each purchase, as well as the quantity and price of fuel purchased, the card number and PIN used. 6RP 45-49; 7RP 219-21.

The evidence at trial showed that either Ram or an accomplice would contact local owner-operator truck drivers and offer them steeply discounted fuel. 7RP 43-61. He would then meet them at a card-lock station, activate the fuel pump using a stolen or cloned fuel account card, pump the fuel at no cost to himself, and charge the truck driver a price below the retail price. 7RP 43-61. At trial, representatives of the companies whose cards Ram used without permission testified to the amounts of the fraudulent charges made on each of their accounts. 6RP 49, 82, 95; 7RP 31-39, 221, 231, 239; 8RP 182-84; 9RP 33, 140; 10RP 155; 11RP 37, 46, 74, 88, 109-10; 12RP 61.

b. The Restitution Hearing.

At the restitution hearing, the State requested restitution for all the fraudulently charged amounts established at trial. RP 3; Supp. CP __ (sub 145). The State presented no new evidence, instead resting entirely on the evidence presented at trial. RP 3-7. The restitution requested totaled $578,590.10, which was the aggregate amount the fuel companies billed the victim companies for the fuel fraudulently obtained by Ram. RP 3-5. For most counts, the proposed restitution order ordered the restitution to be paid directly to the victim trucking company; however, for two victims—Freres Lumber and Knight Transport—the restitution was instead directed to the relevant fuel card company. CP 83-85; Supp. CP __ (sub 145 at 2).

Ram presented a declaration by his investigator stating that he had contacted the relevant fuel card companies in an attempt to determine which victim companies actually paid the bill for the stolen fuel and which losses were instead absorbed by the card companies. CP 80-82. The declaration stated that the investigator had been able to confirm payment by only one victim company: Bartelson Transport. CP 82. The declaration stated that representatives of the relevant fuel companies had indicated that

seven of the other victims had not paid for the fraudulent charges, with the loss instead being written off by the fuel company and the inventory replaced, and that attempts to obtain information regarding another seven victims had been unsuccessful.[3] CP 81-82.

Ram argued that, with the exception of Bartelson Transport, it was inappropriate to order that restitution be paid to the victim companies rather than the fuel card companies, as there was insufficient evidence that the ultimate losses were born by the victim companies. RP 7-9. He also argued that because it was likely the fuel companies and not the victim companies who bore the losses, it was inappropriate to set restitution at the retail price the victims would have paid rather than the (unknown) wholesale price the fuel companies paid to replace the stolen inventory. RP 8-13.

The State argued that ordering restitution at the retail cost of the fuel was appropriate, because the restitution statute allows the court to order up to double the amount of the victims' losses. RP 4-5. The State also argued that ordering restitution to the victim

[3] The declaration reflected attempts to obtain information about 15 of the 16 victims—no mention was made of the victim in count six, Jackson Oil Company. CP 80-82.

companies was entirely proper, because the amount of the loss was known, and any uncertainty regarding whether the victim company or the fuel card company would end up bearing the final loss was no different than the possibility that a burglary victim would be reimbursed by his or her insurance company. RP 6-7, 16-19. In addition to questioning Ram's standing to contest who the proper payees were, the State pointed out that the proposed order stated that a copy of the order would be provided to the fuel card companies, and the order would be amended if the State learned that any of the victim companies had been reimbursed for their losses. RP 7, 19; CP 85.

The trial court stated that it agreed with the amount of restitution the State was requesting because it matched the evidence at trial, and that the payees could be modified if necessary in the future. RP 16, 23-24. Finding that the State had met its burden to prove restitution by a preponderance, the Court signed the State's proposed order. RP 23; CP 83-86.

## C. ARGUMENT

### 1. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN SETTING THE AMOUNT AND PAYEES OF RAM'S RESTITUTION OBLIGATION.

Ram contends that the restitution order must be vacated as to 15 of the 16 victims, without remand, because the trial court set restitution at the retail value of the stolen goods rather than the wholesale value and because the trial court designated the victims who incurred financial liability as a result of Ram's crimes as the initial payees, without requiring proof that they had not been relieved of their liability by the fuel card companies. This claim should be rejected. Washington's restitution statute permits restitution to be based on the retail price of stolen retail goods, and Ram lacks standing to assert the rights of the fuel card companies to be substituted for any victim companies whose financial liability was forgiven. Even if this Court determines that Ram has standing, the trial court properly exercised its discretion in listing as payees the companies who incurred the financial liability, with a provision allowing the substitution of any fuel card companies who indicate in the future that they in fact bore the ultimate loss.

RCW 9.94A.753 grants trial courts broad power to order and modify restitution. State v. Gray, 174 Wn.2d 920, 925, 280 P.3d

1110 (2012). It requires that the amount of restitution due be determined by the trial court within 180 days of sentencing unless there is good cause to continue the hearing. RCW 9.94A.753(1). The State bears the burden of proving the facts underlying restitution by a preponderance of the evidence. State v. Hughes, 154 Wn.2d 118, 154, 110 P.3d 192 (2005), abrogated in part on other grounds by Washington v. Recuenco, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006). The amount of restitution must be "based on easily ascertainable damages." RCW 9.94A.753(3). However, "the amount of harm or loss need not be established with specific accuracy." Hughes, 154 Wn.2d at 154. The evidence is sufficient to support a restitution order "if it affords a reasonable basis for estimating loss and does not subject the trier of fact to mere speculation or conjecture." Id.

Restitution is capped at "double the amount of the offender's gain or the victim's loss from the commission of the crime." RCW 9.94A.753(3). A trial court's decision regarding the imposition of restitution will not be disturbed on appeal absent an abuse of discretion, which occurs only when an order is manifestly unreasonable or untenable. Gray, 174 Wn.2d at 924.

a. The Trial Court Properly Exercised Its Discretion In Setting Restitution At The Retail Value Of The Stolen Fuel.

When a defendant obtains fuel from a gas station using a stolen fuel account card, the price he would have had to pay to purchase the same quantity of fuel as a law-abiding customer is easily ascertainable and affords a reasonable, non-speculative basis for estimating the victim's loss, regardless of whether the victim who bears the ultimate loss is the card owner who ends up having to pay the bill or the fuel company who replaces the stolen inventory and absorbs the loss. Moreover, the price at the pump reflects the value gained by the defendant in stealing the fuel rather than obtaining it as a law-abiding purchaser. The trial court therefore complied with RCW 9.94A.753 and properly exercised its discretion when it ordered Ram to pay restitution in an amount matching the price, as proved at trial, that he would have had to pay to purchase the fuel he stole.

Ram disregards the text of the statute when he argues that the trial court was required to set restitution at no more than the monetary cost incurred by the fuel companies to replace the stolen inventory at wholesale prices. This is the sort of "specific accuracy" that Washington's restitution statute does not require. Hughes, 154

Wn.2d at 154. The statute clearly contemplates that restitution can be based on either the victim's loss or the defendant's gain, and may in fact be up to double the amount of actual loss or gain. RCW 9.94A.753(3). Accordingly, restitution awards for more than the market value of stolen goods have routinely been upheld as a proper exercise of discretion. E.g., Hughes, 154 Wn.2d at 155 (restitution not limited to market value of stolen trees, but can also include cost of replacing them and other public costs); State v. Smith, 42 Wn. App. 399, 403, 711 P.2d 372 (1985) (trial court has discretion to order restitution in amount insurer paid to allow victim to replace stolen property, rather than merely market value of the property).

Tellingly, Ram provides no authority in Washington law for the holding he urges this Court to adopt. See DeHeer v. Seattle Post-Intelligencer, 60 Wn.2d 122, 126, 372 P.2d 193 (1962) ("Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none."). Because a Washington court's authority to impose restitution is based entirely on Washington statutes, the out-of-state cases cited by Ram, which interpret those states' restitution statutes, bear no relevance to the

question before this Court. See State v. Davison, 116 Wn.2d 917, 919-21, 809 P.2d 1374 (1991) (court's authority to impose restitution is statutory).

Because the retail price of stolen retail goods provides an easily ascertainable, reasonable, non-speculative basis for estimating the victim's loss and/or the defendant's gain, the trial court properly exercised its discretion in basing its restitution order on the retail price of the fuel Ram stole.

b. The Trial Court Properly Exercised Its Discretion In Listing The Victims Who Incurred Financial Liability As A Direct Result Of Ram's Crimes As The Payees In The Restitution Order.

Ram challenges the trial court's decision that restitution be paid to many of the identity theft victims, rather than solely to the fuel card companies; he argues that the State should have been required to prove that it was the identity theft victims who bore the ultimate loss from his crimes. Brief of Appellant at 6-9. This claim attempts to assert the rights of the fuel card companies to be substituted as payees, if indeed they did bear the ultimate losses with respect to some of the victims; Ram thus has no standing to

bring it. State v. Tobin, 132 Wn. App. 161, 180-81, 130 P.3d 426, 436 (2006), aff'd, 161 Wn.2d 517, 166 P.3d 1167 (2007).[4]

In Tobin, the amount of restitution that Tobin owed for illegally harvesting geoducks and crabs was determined by the trial court based on evidence regarding the quantities of geoducks and crab that Tobin sold, but what proportion of the stolen seafood had come from the various governmental and tribal lands involved was not clear. Id. at 165-66. The trial court decided to order restitution to all the governmental and tribal victims, with instructions that it be initially disbursed to one particular victim and then allocated among the victims per their internal negotiations. Id. at 166. When Tobin attempted to challenge the order to pay restitution to the State for geoducks that Tobin asserted belonged to one of the tribes, the court of appeals held that he had no standing, because he had not shown that he could assert the interest of the tribe. Id. at 180. Similarly, Ram has no standing to challenge the choice of payee because he has not shown that he may assert the interests of the fuel card companies.

Even if this Court were to determine that Ram has standing, the trial court did not abuse its discretion. The evidence at trial

[4] The supreme court did not review the court of appeals' holding on this particular issue.

established that Ram's use of fuel cards belonging to the victim companies cause the victim companies to be billed for the price of the fuel Ram stole. E.g. 6RP 45-46. Because the victim companies incurred a financial liability as a direct result of Ram's crimes, they were victims to whom restitution could properly be awarded. RCW 9.94A.030(54) ("'Victim' means any person who has sustained emotional, psychological, physical, or financial injury to person or property as a direct result of the crime charged.").

Furthermore, the propriety of the amount of restitution ordered did not depend on whether it was the victim companies or the fuel card companies who ultimately bore the loss. See section C.1.a. above. It was therefore a proper exercise of the trial court's discretion to order that restitution be paid to the victims that incurred the direct financial liability, without requiring proof that the liability had not been forgiven by the fuel card companies.[5] This is particularly true given that the order explicitly allowed later modifications of the payees if any victims or fuel card companies

[5] Although Ram presented hearsay evidence that some victims' liability had been forgiven, the trial court was not obligated to accept that hearsay at face value. CP 80-83; see In re Det. of Stout, 159 Wn.2d 357, 382, 150 P.3d 86 (2007) (determining credibility is part of fact finder's role).

notified the State, upon receiving a copy of the order, that the fuel card company had forgiven the victim's financial liability. CP 85.

If Ram's argument were correct, then a trial court could never order restitution for a burglary victim absent proof that they had not been reimbursed by their insurance company for the loss. However, Ram offers no authority for such a rule. State v. Martinez[6] is inapposite, first and foremost because the Martinez court's reasoning on the restitution issue was specifically rejected by our supreme court in State v. Kinneman, 155 Wn.2d 272, 287-88, 119 P.3d 350 (2005). Moreover, the Martinez court's reasoning in reversing the award of restitution to Martinez's insurance company was that the insurance company's losses were the result of Martinez's fraudulent insurance claim and subsequent lawsuit rather than a result of the arson itself. 78 Wn. App. at 882-85. Here, the financial liability incurred by the victim companies was indisputably the direct result of Ram's crimes.

The trial court therefore properly exercised its discretion in awarding restitution to the victim companies who incurred a financial liability as the direct result of Ram's crimes.

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[6] 78 Wn. App. 870, 899 P.2d 1302 (1995), abrogated by State v. Kinneman, 155 Wn.2d 272, 287-88, 119 P.3d 350 (2005).

c. Even If This Court Decides That The Trial Court Abused Its Discretion In Choosing The Payees, The Proper Remedy Is To Remand For The Trial Court To Modify The Payees Listed In The Restitution Order.

Where a restitution order is vacated on appeal, remand to correct the error is appropriate. State v. Griffith, 164 Wn.2d 960, 968, 195 P.3d 506 (2008); see also State v. Tobin, 161 Wn.2d 517, 524, 166 P.3d 1167 (2007) (restitution statute was intended to require the defendant to face the consequences of his criminal conduct). Where the evidence is insufficient to support the amount of restitution ordered, no new evidence on that issue may be admitted on remand due to the statutory requirement that the amount of restitution be set within 180 days of sentencing (assuming that deadline has passed). Griffith, 164 Wn.2d at 968. However, that statutory requirement pertains only to the amount of restitution. RCW 9.94A.753(1). Where the amount is upheld on appeal, nothing in the statute or caselaw prohibits the trial court from considering new evidence on remand to correct an error in the choice of payee. Cf. Tobin, 161 Wn.2d at 524 ("We do not engage in overly technical construction [of the restitution statute] that would permit the defendant to escape from just punishment.").

Altering the payee on a restitution order is the type of modification that can be made by a trial court more than 180 days after sentencing. State v. Edelman, 97 Wn. App. 161, 168, 984 P.2d 421 (1999); see also State v. Kerow, No. 72933-1-I, 2016 WL 783937 (Wash. Ct. App. Feb. 29, 2016) (where amount of restitution and causal connection to crime was clear prior to 180-day deadline, no error in entering restitution order after 180-day deadline where continuance was solely to obtain information clarifying the proper payee). If Ram had not appealed the order, the trial court could have modified it at any time to reallocate restitution to a fuel card company if new evidence indicated it had born the ultimate financial loss. It would be illogical and contrary to the purposes of the restitution statute to hold that the same thing cannot occur upon remand.

Finally, even if new evidence could not be admitted, remand would still be appropriate, because in this case any error in allocating restitution to the original victims could be corrected without admitting new evidence. The alleged error pertains to 13 payees, as the restitution order already lists the applicable fuel card company as payee instead of the victim company for two of the victims (Knight Transport and Freres Lumber), and Ram concedes

that a third victim, Bartelson Transport, was a proper payee. Supp. CP __ (sub 145 at 2); Brief of Appellant at 14. Because there are only two possible payees for the loss associated with Ram's use of each victim's fuel account, if this Court determines that the trial court erred in ordering restitution to certain victims rather than their fuel card companies, then it is clear, even without admitting additional evidence upon remand, who the new payee should be.

Furthermore, Ram appears to agree that under the court of appeals' opinion in Tobin, it would also be proper for the trial court to award restitution to both the victim company and the fuel card company, with instructions to disburse the restitution to the victim company and have it thereafter be allocated among the two per their agreement. Brief of Appellant at 8; Tobin, 132 Wn. App. at 166, 180-81. Such a modification upon remand would certainly not require the admission of any new evidence.

Because new evidence can be introduced to support a modification of the restitution payee more than 180 days after sentencing, and because new evidence is not actually necessary in this case, the proper remedy for any error that the trial court committed in choosing the payees in this case is to remand for modification of the restitution order.

## D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm the trial court's restitution order.

DATED this 14th day of March, 2016.

Respectfully submitted,

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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Jennifer Sweigert, the attorney for the appellant, at Sweigertj@nwattorney.net, containing a copy of the BRIEF OF RESPONDENT, in State v. Vinod Chandra Ram, Cause No. 73759-7, 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 14th day of March, 2016.

Name:
Done in Seattle, Washington