

63219-1

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ORIGINAL

NO. 63219-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

VIVIAN WINSTON,

Appellant.

2009 DEC 16 PM 3:15
CLERK OF COURT
STATE OF WASHINGTON
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE REGINA CAHAN

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

	Page
A. ISSUE PRESENTED.....	1
B. STATEMENT OF THE CASE.....	1
1. PROCEDURAL FACTS.....	1
2. SUBSTANTIVE FACTS.....	2
C. ARGUMENT.....	3
D. CONCLUSION.....	7

TABLE OF AUTHORITIES

Page

Table of Cases

Washington State:

State ex. rel. Carroll v. Junker, 79 Wn.2d
12, 482 P.2d 775 (1971).....4

State v. Dauenhauer, 103 Wn. App. 373,
12 P.3d 661 (2000).....3

State v. Davidson, 116 Wn.2d 917,
809 P.2d 1374 (1991).....3, 4

State v. Enstone, 137 Wn.2d 675,
974 P.2d 828 (1999).....3, 5

State v. Harrington, 56 Wn. App. 176,
782 P.2d 1101 (1989).....4

State v. Hiett, 154 Wn.2d 560,
115 P.3d 274 (2005).....5-6

State v. Landrum, 66 Wn. App. 791,
832 P.2d 1359 (1992).....6

State v. Miszak, 69 Wn. App. 426,
848 P.2d 1329 (1993).....4

Statutes

Washington State:

RCW 9.94A.753.....4

A. ISSUE PRESENTED

A trial court may order restitution where a victim's loss is "causally connected" to a defendant's criminal conduct. A jury convicted Winston of theft in the second degree - access device, for stealing the victim's purse along with all of its contents, including several access devices. Did the trial court properly award restitution for the value of the purse and all of its contents?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The State charged Vivian Winston with Theft in the Second Degree - Access Device in violation of RCW 9A.56.040(1)(c) and RCW 9A.56.020(1)(a). CP 1. A jury found Winston guilty as charged and the court imposed a standard range sentence. CP 5. At sentencing, the trial court ordered that restitution be determined at a subsequent restitution hearing. CP 25. The State submitted a restitution packet to both the trial court and defense counsel including a Property Restitution Estimate form completed and signed under penalty of perjury by Morris, a letter and itemized list

of the stolen items from Morris's insurance company regarding the amount it paid and Morris's deductible, Internet screen shots with prices of several of the stolen items, a receipt for changing the locks at Morris's home as her keys were not recovered, and a proposed restitution order covering the loss. CP, Restitution Documents.¹ Winston objected to the award of any restitution but did not contest value. CP 41-4. The trial court ordered restitution in the amount of \$1,710.85. CP 51.

2. SUBSTANTIVE FACTS

On May 23, 2008, Amy Morris was shopping at Value Village in the Capitol Hill neighborhood of Seattle. RP 34-5. She entered a fitting room to try on some clothes and hung her purse on a hook inside. RP 36-7. Inside her purse, Morris had her wallet with credit cards, cash, various forms of identification, a PalmPilot, a PalmPilot keyboard, a set of keys, a cell phone, and a cellphone earpiece. RP 36. Morris estimated the purse and its contents weighed less than a couple pounds. RP 36-7. After trying on the clothes, Morris

¹ Due to this prosecutor's error, the documentation supporting restitution that was submitted to the trial court and defense counsel prior to the restitution hearing, was not also filed and made part of the electronic court record. The restitution documents have now been filed along with a declaration explaining the error. The State is filing a Supplemental Designation of the Record along with this brief pursuant to RAP 9.6(a) and will submit an amended Brief of Respondent with

left the fitting room and headed to the front counter to purchase several items. RP 37. As she stood in line to pay for her purchases, she realized that she had left her purse hanging in the fitting room. RP 38. She left the line and walked back to her fitting room. RP 38. As Morris approached, she saw Winston leaving the fitting room she had just been in. RP 38-9. A surveillance video showed the purse being removed from the wall while Winston, the only person in the fitting room after Morris, was alone in the fitting room. RP 48-9. Morris later identified Winston as the woman in the fitting room immediately after her. RP 56, 97. Police were unable to recover the purse or its contents. RP 95-96.

C. ARGUMENT

Winston contends that restitution is not appropriate for the items Winston stole from Ms. Morris along with her access devices because she was charged and convicted only with Theft in the Second Degree - Access Device.

Restitution statutes give the trial court broad discretion to order a defendant to pay restitution for his or her criminal acts and an award of restitution is reviewed for an abuse of discretion. State

appropriate page cites to the clerk's papers for the restitution documents when that information is available.

v. Dauenhauer, 103 Wn. App. 373, 377, 12 P.3d 661 (2000); State v. Enstone, 137 Wn.2d 675, 680, 974 P.2d 828 (1999); State v. Davidson, 116 Wn.2d 917, 920, 809 P.2d 1374 (1991). A court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. State ex. rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

"The authority to impose restitution is not an inherent power of the court, but is derived from statutes." Davidson, 116 Wn.2d at 919. Restitution "shall be ordered whenever the offender is convicted of an offense which results in injury to any person or damage to or loss of property". RCW 9.94A.753(5). Restitution

ordered by a court pursuant to a criminal conviction shall be based on easily ascertainable damages for injury to or loss of property, actual expenses incurred for treatment for injury to persons, and lost wages resulting from injury. Restitution shall not include reimbursement for damages for mental anguish, pain and suffering, and other intangible losses...The amount of restitution shall not exceed double the amount of the offender's gain or the victim's loss from the commission of the crime.

RCW 9.94A.753. Restitution cannot be imposed based on the defendant's "general scheme" or acts "connected with" the crime charged, when those acts are not part of the charge. State v. Miszak, 69 Wn. App. 426, 428; 848 P.2d 1329 (1993) (citing State

v. Harrington, 56 Wn. App. 176, 179, 782 P.2d 1101 (1989)).

However, a trial court may order restitution where a victim's loss is "causally connected" to a defendant's criminal conduct. Enstone, 137 Wn.2d at 682. This is consistent with one of the goals of the restitution statute, "to require the defendant to face the consequences of his criminal conduct." Id.

In State v. Hielt, 154 Wn.2d 560, 115 P.3d 274 (2005), David McNulty stole a car, drove around for some time, then picked up Hielt and two others. 154 Wn.2d at 562. They were soon followed by a marked patrol car. Id. After about two blocks, Hielt and one of the other passengers jumped from the moving car and fled. Id. The officer turned on his lights and sirens, which prompted McNulty to speed up and eventually spin out and collide with another vehicle as well as a storefront. Id. The State charged Hielt with taking a motor vehicle without permission. Id. at 563. Hielt accepted a deferred disposition and was found to be jointly and severally liable for missing property from the stolen car, damage to the stolen car, and damage to the car and storefront that it crashed into. Id. Even though Hielt was not in the car when it was taken or crashed, the Court of Appeals affirmed the

restitution order. The court did so because the trial court was authorized to look beyond the abstract elements of the crime:

Our legislature clearly intended to make restitution widely available to victims of crimes, at least when their injuries were a foreseeable consequence. To accomplish this legislative purpose, courts will look not only to the abstract elements of the crime but also to the defendant's actual conduct.

Id. at 564 (emphasis added); see also, State v. Landrum, 66 Wn. App. 791, 832 P.2d 1359 (1992) (Defendants ordered to pay restitution for counseling expenses after entering Alford pleas to assault in the fourth degree where conduct in question was child molestation in the first degree).

Here, the loss to Ms. Morris of her purse and all of its contents was a foreseeable consequence of Winston's conduct. Ms. Morris testified that along with several access devices, the contents of her purse included a palm pilot, a folding keyboard for the palm pilot, a cell phone, a Bluetooth headset, a wallet with some cash, several credit cards, and a set of keys. 2/10/09 RP 36. Documents showing the value of these items were before the trial court. CP, Restitution Documents. By finding Winston guilty of theft of an access device, the jury necessarily found that Winston

engaged in the conduct of stealing Ms. Morris's purse along with everything inside of it.

Winston contends that the "only possible damages that could have resulted from the crime of conviction would have been the costs of charges made on the stolen credit cards." Brief of Appellant at 5. But Winston committed the crime of conviction by taking Morris's purse, which caused Morris to lose everything in that purse. The loss to Ms. Morris of her purse and all of its contents is thus causally connected to Winston's criminal conduct. Thus, it was foreseeable that depriving Morris of her purse would cause her to lose the contents of her purse. The trial court was statutorily authorized to award the requested restitution.

D. CONCLUSION

DATED this 16th day of December, 2009.

RESPECTFULLY submitted,

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