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NO. 63968-4-1

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

HONG PHAN,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR KING COUNTY

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APPELLANT'S REPLY BRIEF

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A. ARGUMENT.

THE RESTITUTION AWARD MUST BE VACATED  
BECAUSE THERE WAS INSUFFICIENT EVIDENCE OF  
CAUSATION.

1. The State failed to show that the extent of the complainant's damages were causally connected to Mr. Phan's actions. Losses are causally connected if, but for the charged crime, the victim would not have incurred the loss. State v. Griffith, 164 Wn.2d 960, 965-66, 195 P.3d 506 (2008), citing State v. Tobin, 161 Wn.2d 517, 524, 166 P.3d 1167 (2007) (internal citations omitted).

Here, the evidence was insufficient to show that but for Mr. Phan having used the home to cultivate marijuana, the victim's home would have needed a complete renovation, including full marble and tile bathrooms, new flooring, and all of the other improvements about which Ms. Jevne testified. 6/11/09 RP 25, 29, 31. Ms. Jevne also testified to her need for 16 months of rent money to compensate her for her losses. Id. at 42.

The State suggests that appellant's claim of opportunism is rebutted simply because the complainant chose not to request reimbursement for the aluminum siding from the court. Resp. Brief at 10. However, Ms. Jevne certainly attempted to recover the costs for replacing this siding from her insurance company. 6/1/09 RP 42.

The insurance company simply refused to compensate her. Id. It is disingenuous for the State to now argue that the complainant's decision not to ask the court to cover the same claim that the insurance company denied was anything but tactical.

Here, the evidence showed that Mr. Phan's conduct, while admittedly criminal, created an opportunity for Ms. Jevne to perform many elective renovations to her 45 year-old home. 6/11/09 RP 51; 7/30/09 RP 16-17. The trial court awarded the complainant restitution for her many renovations – compensation that the insurance company had refused to grant her. Although Ms. Jevne failed to provide any photographs showing damage caused by Mr. Phan to the windows or cabinetry of the house, she hired contractors to remove and replace every single window and cabinet in the house. 6/11/09 RP 25. The fact that the State argues that the complainant decided to retain one linen shelf and one door is hardly persuasive of the complainant's restraint in the renovation process. Resp. Brief at 9.

The complainant also testified that she had replaced all of her kitchen appliances following Mr. Phan's arrest, noting that he had

apparently kept “ethnic food in the refrigerator that wreaked [sic] in there and we scrubbed and scrubbed.” 6/11/09 RP 29.<sup>1</sup>

The State argues that it was the storage of marijuana in the refrigerator that resulted in the eventual replacement of the unit, at a cost to the complainant. Resp. Brief at 8. However, Ms. Jevne’s own testimony was clear about the true reason for the replacement of the refrigerator.

Q: The refrigerator sounds like there was spoiled food in it. Was there mold also?

A: There was mold, marijuana, and Vietnamese eggs with little chickens and things. That’s there [sic] ethnic food. We aired it out. We washed it with vinegar and water. I called everybody and then it wouldn’t cool anymore.”

Q: How old was the refrigerator?

A: About five years old.

6/11/09 RP 44-45.

Despite the State’s attempts to sanitize the ethnocentrism in the record, one thing is clear. The complainant’s efforts to sanitize her five year-old refrigerator with vinegar and water resulted in its demise – not the activities of Mr. Phan. This is one more example of the State’s failure to show causation between Mr. Phan’s illegal

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<sup>1</sup> The State later withdrew the request for restitution for the replacement of the complainant’s oven, due to Mr. Phan’s culinary activities, but maintained its request for the replacement cost of her new refrigerator. 6/11/09 RP 72.

activities and the damage to Ms. Jevne's property. The State failed to show that but for Mr. Phan's conduct, the complainant would not have incurred the loss. Griffith, 164 Wn.2d at 965-66.

2. The restitution order must be vacated. In the absence of sufficient evidence connecting Mr. Phan's criminal conduct to the extent of the damage to the complainant's home, the restitution order must be vacated. Griffith, 164 Wn.2d at 967-68. Unless a defendant agrees, restitution cannot be imposed based on a "general scheme" or acts "connected with" the crime charged, when those acts are not part of the charge. State v. Woods, 90 Wn. App. 904, 907-08, 953 P.2d 834 (1998).

Here, Mr. Phan agreed that he was responsible for a certain amount of the damage to Ms. Jevne's property; however, his offer of restitution did not include the items that her insurance company declined to cover, such as the aluminum siding. 7/30/09 RP 18-19; Ex. 24. Where the State has failed to show that that Mr. Phan's conduct caused the extent of the damages claimed by the complaining witness, the restitution award must be vacated. State v. Taylor, 86 Wn. App. 442, 446, 936 P.2d 1218 (1997) (reversing restitution award where State failed to demonstrate that

defendant's criminal acts caused amount of losses claimed by State).

B. CONCLUSION.

For the foregoing reasons, Mr. Phan respectfully requests this Court reverse the restitution order and remand the case for further proceedings.

DATED this 6<sup>th</sup> day of May, 2010.

Respectfully submitted,

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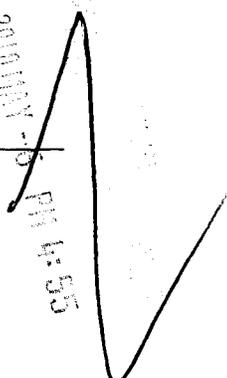
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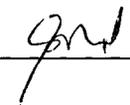
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KING COUNTY PROSECUTOR'S OFFICE  
APPELLATE UNIT  
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SEATTLE, WA 98104

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**SIGNED** IN SEATTLE, WASHINGTON THIS 6<sup>TH</sup> DAY OF MAY, 2010.

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