

No. 70213-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

SAHAL AHMED SAHAL,

Appellant.

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

BRIEF OF APPELLANT

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SUPERIOR COURT OF WASHINGTON
KING COUNTY
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A. ASSIGNMENT OF ERROR

The trial court erred by ordering Sahal A. Sahal to pay restitution of \$12,973.42 to Kamal Shifow and Nima Ismail.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

The State must prove the amount of restitution by a preponderance of the evidence, and the evidence must be reliable and specific enough to allow the defendant to refute it. Mr. Sahal agreed to pay restitution for uncharged offenses, but did not agree to the amount of restitution. A burglary victim testified that jewelry was taken when his home was burglarized and provided the court with three receipts obtained by his wife for jewelry. Two of the receipts did not show the seller's name. Third was in a foreign language that was not translated, and the State did not establish that its conversion of the foreign currency was reliable. Did the State meet its burden of proving by a preponderance of the evidence that the jewelry was valued at \$12,973.42?

C. STATEMENT OF THE CASE

Sahal Ahmed Sahal was charged with residential burglary of the Diekhans' Seattle home on February 13, 2013. CP 1. Mr. Sahal and the King County Prosecutor's Office reached an agreement under

which the prosecutor reduced the charge to attempted residential burglary and Mr. Sahal agreed to plead guilty and to pay restitution for that case and for four uncharged offenses. CP 11-12, 23, 27-28; RP 12. Mr. Sahal pled guilty and was given an agreed standard range sentence. CP 9-26, 32; RP 5, 27-28, 38.

At a restitution hearing, the State asked the court to impose restitution of \$13,437.17 to the Shifow/Ismail family and \$1,204.50 to the Diekhans family based upon a “packet” of information.¹ RP 44. Mr. Sahal objected because the information for the Shifow/Ismail family did not include a signed victim loss statement. RP 45. Conceding that the provided documents were confusing, the prosecutor moved to continue the matter so she could locate the victim loss statement and determine what had been reported stolen to the police. RP 46.

Concerned about the statutory 180-day time deadline for entering restitution orders, the court ordered restitution of \$463.75 to the Ismail/Shifow household, apparently for replacing a broken door, and ordered all restitution requested by the Diekhans. CP 35-36; RP

¹ The packet was not introduced as evidence or filed in the court file.

46, 48. The court also continued the case for purposed of modifying the order. CP 35-36; RP 48-49.

When court reconvened, the State relied upon the testimony of Kamal Shifow and Exhibit 1 to support the remaining restitution request.² Mr. Shifow testified that jewelry was missing from his home after a burglary in February 2012. RP 54, 56. The court admitted copies of receipts Mr. Shifow's wife had obtained for jewelry purchased in the United States and Dubai, as well as a current conversion report from an internet site. RP 56, 58.

The receipts show that Nima Ismail purchased bangles and "balgalesa" for \$5,500 in 2009 and that she purchased a necklace and earring for \$5,000 in 2010.³ Ex. 1 at 1-2; RP 56. The names and locations of the companies where the items were purchased were blocked out as well as Ms. Ismail's address. *Id.* The exhibit also includes a 2011 receipt from Al Romaizan Jewellery [sic] in Dubai for 9,085 Dirhams. Ex. 1 at 3; RP 56. The receipt was not translated into English. Finally, the exhibit contains a copy of February 22, 2013, results from an online currency converter reporting that 9,085 United

² The second hearing was within the statutory deadline.

³ The receipt did not use dollar signs or other designation of the currency used.

Arab Emirates Dirhams are equal to 2,473.42 in United States Dollars.

Ex. 1 at 4.

Based upon this information, the court ordered Mr. Sahal to pay an additional \$12,973.42 to Mr. Shifow and Ms. Ismail. CP 37-38.

Mr. Sahal appealed from the order. CP 39-46.

D. ARGUMENT

The restitution award is not supported by substantial reliable evidence.

The superior court's power to order restitution is statutory. State v. Gray, 174 Wn.2d 920, 924, 280 P.3d 1110 (2012); State v. Griffith, 164 Wn.2d 960, 965, 195 P.3d 506 (2008). When the defendant is convicted of a felony, the court's authority to impose restitution is derived from the Sentencing Reform Act (SRA). The SRA requires the trial court to order restitution when the defendant is convicted of an offense that resulted in injury or loss of property or when the offender agrees to pay restitution for offenses that are not prosecuted as part of a plea agreement. RCW 9.94A.753(5); Griffith, 164 Wn.2d at 965-66.

Restitution must be based upon "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." RCW

9.94A.753(3). It also must be causally connected to the defendant's offense. Griffith, 164 Wn.2d at 966. Restitution is not a substitute for and does not deprive a victim of civil remedies. RCW 9.94A.753(8); State v. Martinez, 78 Wn. App. 870, 881, 899 P.2d 1302 (1995), rev. denied, 128 Wn.2d 1017 (1996).

When the defendant does not agree to the amount of restitution, the State must prove the victim's losses by a preponderance of the evidence. Griffith, 164 Wn.2d at 965; State v. Tobin, 161 Wn.2d 517, 524, 166 P.3d 1167 (2007). "While the claimed loss 'need not be established with specific accuracy,' it must be supported by 'substantial credible evidence.'" Griffith, 164 Wn.2d at 965 (quoting State v. Fleming, 75 Wn. App. 270, 274-75, 877 P.2d 243 (1994)). The State must produce evidence that "affords a reasonable basis for estimating loss and does not subject the trier of fact to mere speculation or conjecture." Id. (quoting State v. Hughes, 154 Wn.2d 118, 154, 110 P.3d 192 (2005) (in turn quoting Fleming, 75 Wn. App. at 274-75), overruled on other grounds, Washington v. Recuenco, 548 U.S. 212 (2006)). While the rules of evidence do not apply at a restitution hearing, the evidence presented must "meet due process requirements, such as providing the defendant an opportunity to refute the evidence

presented, and requiring the evidence be reliable.” State v. Pollard, 66 Wn. App. 779, 784-85, 834 P.2d 51 (1992).

In the present case, the State’s evidence in support of its restitution request did not provide the trial court with a reasonable basis for estimating the amount of the victims’ loss and did require the court to engage in speculation. The State’s request centered on three receipts for jewelry, but its witness, Mr. Shifow, did not purchase the jewelry and was not present when it was purchased. RP 55, 57-58.

The receipts also lacked specificity. In the first two receipts, the name and address of the seller is blacked out. While Mr. Shifow said the receipts were from Seattle jewelers, he was not present and the amounts do not even contain dollar signs, so there is no way to know what currency was used. Ex 1 at 1-2. The receipt from the Dubai jeweler was not translated into English. Ex. 1 at 3. Finally, the State produced no evidence that the on-line currency converter was reliable or that the conversion rate remained constant between the date of purchase, the date of the burglary, and the February 2013 date of the conversion results.⁴

⁴ A use of this website on October 18, 2013, resulted in a different exchange rate. www.xe.com/currencyconverter/convert/?Amount=9085&From=AED&To=WSD. Other internet sites produced slightly different results. www.usforex.com/currency-

In Pollard, this Court was confronted with a restitution order in a conviction for unlawful issuance of bank checks where the defendant agreed to pay restitution for charged and uncharged crimes. Pollard, 66 Wn. App. at 780-81. The only evidence to support the sum of restitution ordered, however, was a police report that recorded what bank personnel at various institutions stated the banks had lost, which was apparently based on the amount of the fraudulent checks the defendant deposited into his bank accounts. Id. at 781-82, 786. This Court concluded that the report was double hearsay and an insufficient basis upon which to base the restitution amount. Id. at 786.

In Mr. Sahal's case, the only evidence of the value of jewelry was inadequate. Two receipts did not include the name of the seller and do not have a dollar sign or other sign to show what currency was used. The third receipt is in a foreign language that was not translated into English. It was also in a foreign currency, but the State did not prove that its internet currency conversion was reliable. This evidence was not reliable and was not specific enough to give Mr. Sahal the opportunity to refute it.

converter (last viewed 10/18/13); www.onada.com/currency/converter (last viewed 10/18/13).

The State did not produce sufficient evidence that the jewelry for which it requested restitution was taken in the burglary and did not provide reliable evidence of the jewelry's value. The Order Modifying Restitution must be reversed and remanded to the superior court to be vacated.

E. CONCLUSION

The trial court ordered Mr. Sahal to pay restitution of \$12,973.42 in the absence of sufficient credible evidence of the value of the property or that the property was stolen during the crime for which Mr. Sahal agreed to pay restitution. He therefore asks this Court to reverse the restitution order.

DATED this 18th day of October 2013.

Respectfully submitted,



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Attorneys for Appellant

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DIVISION ONE**

STATE OF WASHINGTON,)	
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Respondent,)	
)	NO. 70213-1-I
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)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 18TH DAY OF OCTOBER, 2013, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

<input checked="" type="checkbox"/> KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(<input checked="" type="checkbox"/>) (<input type="checkbox"/>) (<input type="checkbox"/>)	U.S. MAIL HAND DELIVERY _____
<input checked="" type="checkbox"/> SAHAL SAHAL 3726 S 180 TH ST APT C203 SEATAC, WA 98188	(<input checked="" type="checkbox"/>) (<input type="checkbox"/>) (<input type="checkbox"/>)	U.S. MAIL HAND DELIVERY _____

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COURT OF APPEALS
DIVISION ONE
SEATTLE, WA

SIGNED IN SEATTLE, WASHINGTON THIS 18TH DAY OF OCTOBER, 2013.

X _____ 

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