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AUG 29 2014

King County Prosecutor
Appellate Unit

NO. 71812-6-I

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

STATE OF WASHINGTON,

Respondent,

v.

JACOB HOLLAR,

Appellant.

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

The Honorable Julie Spector, Judge

BRIEF OF APPELLANT

DAVID B. KOCH
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2014 AUG 29 PM 4:06
COURT OF APPEALS DIV 1
STATE OF WASHINGTON

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A. ASSIGNMENT OF ERROR

The trial court erred, and violated appellant's due process rights, when it ordered \$487.57 in restitution based on uncorroborated hearsay.¹

Issue Pertaining to Assignment of Error

Appellant pled guilty to assaulting the victim and stealing the victim's purse. The victim submitted documentation establishing the cost of necessary medical treatment associated with the assault. The victim failed, however, to submit any documentation supporting the claimed losses associated with theft of the purse, relying instead on a hearsay estimate. Should this portion of the restitution order be stricken because it violates appellant's right to due process?

B. STATEMENT OF THE CASE

On the evening of June 20, 2013, three individuals with skateboards – one of whom was Jacob Hollar – approached Michael Johnson on the street. Using his skateboard, Hollar struck Johnson on the back of the head and one of the three took Johnson's purse. CP 39. Hollar pled guilty to Assault in the Second Degree and Theft in the Third Degree. CP 9-36. He also agreed to pay restitution for

¹ The court's Order Setting Restitution is attached to this brief as an appendix.

Johnson's losses. CP 18, 34.

Following sentencing, the State submitted documents supporting its restitution request. The documents established that the Crime Victim's Compensation Program had paid \$908.82 for Johnson's medical bills. CP 56-57. Hollar did not and does not contest this amount. RP 3.

In contrast, for the claimed losses associated with theft of the purse, the State submitted nothing beyond a Victim Loss Statement, signed by Johnson and containing hearsay regarding the estimated value of lost items. On the statement, Johnson listed the lost items and their estimated value as follows: a cell phone (\$100), ID card (\$16), Coach purse (\$250), and makeup (\$20). CP 58. Hollar objected to these amounts based on the absence of any supporting documentation establishing value. RP 3-4.

The Honorable Julie Spector overruled the objection. She indicated she could take judicial notice of what a Coach purse was worth because she owned one. RP 3. She also found the other requested amounts reasonable, although she observed it would have been nice to have more information on the cell phone regarding model and purchase price. RP 4-5. Judge Spector ordered Hollar to pay \$487.57 for these items, and Hollar timely filed his Notice of

Appeal. CP 53, 59-62.

C. ARGUMENT

THE COURT ERRED WHEN IT ORDERED RESTITUTION FOR JOHNSON'S CLAIMED PROPERTY LOSSES.

A trial court's authority to impose restitution is controlled by statute. State v. Hiett, 154 Wn.2d 560, 563, 115 P.3d 274 (2005). Restitution is authorized "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 orders are reviewed for an abuse of discretion. State v. Dauenhauer, 103 Wn. App. 373, 377, 12 P.3d 661 (2000), review denied, 143 Wn.2d 1011, 21 P.3d 291 (2001).

"If a defendant disputes the restitution amount, the State must prove the damages by a preponderance of the evidence." State v. Griffith, 164 Wn.2d 960, 965, 195 P.3d 506 (2008). While certainty of damages need not be shown with specific accuracy, due process requires an opportunity to refute the evidence presented and requires that the evidence be reliable. State v. Pollard, 66 Wn. App. 779, 784-785, 834 P.2d 51, review denied, 120 Wn.2d 1015, 844 P.2d 436 (1992). The court must not engage in mere speculation or conjecture, and the amount of

restitution must be supported by substantial credible evidence. *Id.* at 785. “Notwithstanding the forgiving abuse of discretion standard, the record must permit a reviewing court to determine exactly what figure is established by the evidence.” *Id.*

The documentation of Johnson’s property losses falls short of these standards. Johnson failed to submit any documentation supporting the value estimates. Thus, for example, the make and model of the cell phone are simply unknown, making it impossible to properly assess value. Similarly, although the purse is identified as a “Coach purse,” it is impossible to assess its value because nothing is known about the condition or model of the purse. Judge Spector’s conclusion that all requested amounts were reasonable is based merely on speculation and conjecture.

Judge Spector believed she could take judicial notice of the value of Johnson’s purse because she owns a Coach bag. RP 3. This was not proper. ER 201, which addresses judicial notice, provides:

(b) Kinds of Facts. A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

ER 201(b). The value of a Coach bag is not generally known in King County. Nor can it accurately be determined from available resources without knowing something about the age, condition, and model of the particular bag.

Hollar recognizes the rules of evidence do not apply at restitution hearings. See State v. Kisor, 68 Wn. App. 610, 620, 844 P.2d 1038, review denied, 121 Wn.2d 1023, 854 P.2d 1084 (1993). But, as noted above, due process requires that the defendant have an opportunity to refute the evidence presented and that the evidence be reasonably reliable. Pollard, 66 Wn. App. at 785. Moreover, where, as here, “the evidence is comprised of hearsay statements, the degree of corroboration required by due process is . . . proof which gives the defendant a sufficient basis for rebuttal.” Kisor, 68 Wn. App. at 620 (citing State v. S.S., 67 Wn. App. 800, 807-808, 840 P.2d 891 (1992)).

The Kisor Court found that a hearsay affidavit containing a rough estimate of losses was insufficient to satisfy due process. Id. Similarly, in this case, there was no way to rebut Johnson’s hearsay assertions in the Victim Loss Statement (or Judge Spector’s judicial notice) without additional proof regarding the claimed losses and bases for the estimates. By nonetheless

ordering restitution over Hollar's objection, Judge Spector erred and violated due process.

Where the defense objects to a particular restitution request, and the State fails to carry its burden on that request, the proper course is to vacate the restitution amount in question. The State does not get a second chance to prove the claim. Griffith, 164 Wn.2d at 967-968; State v. Dennis, 101 Wn. App. 223, 228-230, 6 P.3d 1173 (2000).

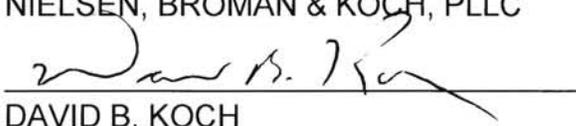
D. CONCLUSION

Hollar was denied due process. Johnson's claimed property losses, justified only by uncorroborated hearsay, led to speculation and conjecture concerning the value of those losses. They also failed to provide the defense with a basis for rebuttal. This Court should remand for entry of a new order limited to reimbursement for Johnson's medical care.

DATED this 29th day of August, 2014.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



DAVID B. KOCH
WSBA No. 23789
Office ID No. 91051
Attorneys for Appellant

APPENDIX

FILED
KING COUNTY WASHINGTON

MAR 12 2014

SUPERIOR COURT CLERK
BY Theresa Graham
DEPUTY

IN THE SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

JACOB NELSON HOLLAR,

Defendant,

No. 13-1-11520-1 SEA

ORDER SETTING RESTITUTION

The court ordered payment of restitution as a condition of sentencing. The Court has determined that the followings are entitled to restitution in the following amounts.

IT IS ORDERED that defendant make payments through the registry of the clerk of the court as follows:

Michael Caleb Johnson
C/o King County Superior Court Clerk's Office
516 3rd Avenue, 6th Floor
Seattle, WA 98104-2312

Amount: \$487.57

CVC
PO Box 44520
Olympia, WA 98504-4520
Re: Claim #VN43196

Amount: \$908.82

Pay Michael Johnson first.

Restitution is a joint and several obligation with juvenile co-defendant Camerean Rojas-Espino, Cause #: 13-8-07093-8, if convicted and ordered to pay under separate orders.

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DONE IN OPEN COURT this 12 day of MARCH, 2014.

J. Spector
JUDGE JULIE SPECTOR

Presented by:

McLong 29329
Deputy Prosecuting Attorney

Copy received; Notice

Kari Boyum / NDA
Attorney for Defendant

objection noted

Order Setting Restitution:

CCN# 1914212 REF# 033423289 CAUSE# 13-1-11520-1 SEA AVM

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COA NO. 71812-6-1

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 29TH DAY OF AUGUST 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL AND/OR VIA EMAIL.

[X] JACOB HOLLAR
2114 S. 6TH AVENUE
UNION GAP, WA 98901

SIGNED IN SEATTLE WASHINGTON, THIS 29TH DAY OF AUGUST 2014.

x Patrick Mayovsky