

July 15, 2015

No. 73051-7-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER PLETENIK,

Appellant.

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

The Honorable Regina S. Cahan

BRIEF OF APPELLANT

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STATUTES

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A. ASSIGNMENTS OF ERROR

1. The court erred in imposing restitution.
2. The State failed to prove the amount of restitution in light a specific objection by Mr. Pletenik.
3. The court's award of restitution was based upon conjecture and speculation.

B. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

The State bears the burden of proving the amount of restitution. The replacement cost is the proper method of valuing lost or damaged property. Here, Mr. Pletenik objected to the victim's requested amount of restitution and the State failed to prove the replacement value. The court awarded restitution based upon its own perception of the replacement value rather than anything in the record. Is Mr. Pletenik entitled to reversal and vacation of the restitution award where the State failed to carry its burden of proof, and the court's award is based solely on speculation?

C. STATEMENT OF THE CASE

Christopher Pletenik pleaded guilty to one count of second degree burglary for breaking into the Barneys¹ store in Seattle, taking several items, and damaging many more items during his brief stay inside the store. CP 21. Mr. Pletenik also pleaded guilty to one count of second degree identity theft for taking a Barneys employee's financial information and using it to buy cigarettes. CP 21. As part of the plea agreement, Mr. Pletenik agreed to pay restitution. CP 12-13, 32, 36.

At the subsequent restitution hearing, Barneys claimed Mr. Pletenik either took or damaged \$4,490 in merchandise. CP 27. Barneys itemized and listed the retail value for each item. CP 27. Mr. Pletenik did not object to repaying Barneys for the lost or damaged merchandise. RP 13-14.² But, Mr. Pletenik did object to the amount requested by Barneys, noting the difference between what Barneys paid for the item, i.e. replacement cost, and the retail price, which Barneys was requiring Mr. Pletenik to repay. RP 13-14.

The trial court agreed to a point:

¹ "Barneys" is officially named "Barneys New York" "a luxury specialty retailer renowned for having the most discerning edit from the world's top designers, including women's and men's ready-to-wear, accessories, shoes, jewelry, cosmetics, fragrances, and gifts for the home." <http://www.barneys.com/aboutbarneys>.

² Mr. Pletenik will only be citing the transcript from the January 12, 2015, restitution hearing.

THE COURT: It seems to me it is replacement at the company cost. It's not how much you could sell it for. And I just – I don't know what that would be, but I think it would be reasonable – there's – we all know there's a lot of markup in retail, so I would say 25 percent of these costs. I would just – whatever these costs are, I would give 25 percent of those costs. And, frankly, it might even be less because these costs are market [sic] up more than their usual, but perhaps that's more than your usual quality so . . .

MR. LEWICKI (prosecutor): Yeah, I understand the Court's point. I just don't know how we get to the number 25 percent.

THE COURT: Well, it's the -- if you want me to say that I'm speculating, I won't give any amount. I'm – I'm giving up the most reasonable – I think a hundred percent, I think that – I think it's unreasonable to give the store what they would have sold it at. The question is how can they replace it? They replace it by their costs. You haven't given me their costs. I know retail has a large markup, so I'm saying 25 percent of these costs would be reasonable. I think that's a reasonable reasoning, and that's what I'm giving.

RP 25-26. Mr. Pletenik objected to the court's calculation as speculative given the arbitrary figure the court used in calculating the store's cost and the fact had failed to prove it. RP 26.

D. ARGUMENT

The restitution award for the lost and damaged Barneys clothing was based upon speculation in light of the State’s failure to carry its burden of proof, requiring reversal of the restitution order.

1. *The State bears the burden of proving the amount of restitution following a specific objection by the defendant.*

A court’s authority to impose restitution is derived solely from statute. *State v. Martinez*, 78 Wn.App. 870, 881, 899 P.2d 1302 (1995), review denied, 128 Wn.2d 1017 (1996). RCW 9.94A.753(5) provides that “[r]estitution 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.”

“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 proved with specific accuracy, the evidence must be sufficient to provide a reasonable basis for estimating loss. *State v. Pollard*, 66 Wn.App. 779, 785, 834 P.2d 51 (1992). Evidence that subjects the trier of fact to speculation or conjecture is insufficient. *Pollard*, 66 Wn.App. at 785.

“[C]ompensation is not the primary purpose of restitution, and the criminal process should not be used as a means to enforce civil claims.” *Martinez*, 78 Wn.App. at 881.

2. *The amount of restitution may not be based on conjecture or speculation.*

Restitution must be based upon easily ascertainable damages, in other words, the court finds there is a causal connection between the crime proved and the injuries suffered. RCW 9.94A.753 (3); *State v. Fleming*, 75 Wn.App. 270, 274, 877 P.2d 243 (1994); *State v. Johnson*, 69 Wn.App. 189, 190, 847 P.2d 960 (1993) (*per curiam*). “While damages need not be proved with certainty, the evidence of damages must be sufficient to afford a reasonable basis for estimating the loss and must not subject the trier of fact to mere speculation or conjecture.” *State v. Awawdeh*, 72 Wn.App. 373, 379, 864 P.2d 965 (1993), *review denied*, 124 Wn.2d 1004, *cert. denied*, 513 U.S. 970 (1994). A causal connection exists if “but for” the offense, the loss or damages to the victim would not have occurred. *State v. Tobin*, 161 Wn.2d 517, 519, 524-25, 166 P.3d 1167 (2007). The State must prove this causal connection between the expenses and the offense by a preponderance of the evidence. *State v. Kinneman*, 122 Wn.App. 850, 860, 95 P.3d 1277 (2004) *aff’d*, 155 Wn.2d 272, 119 P.3d 350 (2005).

Replacement cost is a proper measure of restitution. *State v. Kisor*, 82 Wn.App. 175, 181, 916 P.2d 978 (1996).

Here, Mr. Pletenik lodged a specific objection to Barneys request for restitution, noting the replacement value was not the offered retail price of the items. The court agreed that the retail price was not the proper amount, but in the absence of any proof from the State, postulated that 25 percent of the requested amount was the proper award. RP 26. The 25 percent number was the court's own figure, neither suggested by the State nor Mr. Pletenik and was based solely on the court's own perception of retail practice.

The amount was wholly speculative and not based upon proof in the record. The court's award for the loss of clothing was not supported by the record and was erroneous.

3. *Where the State fails to prove the amount of restitution after a specific objection, the remedy is to strike the amount of restitution.*

The remedy for the State's failure to carry its burden of proving the amount of restitution where the defendant has posited a specific objection is to strike the restitution amount in question:

Moreover, if the State fails to establish a causal connection between defendant's actions and the damages, this court must vacate the restitution order. *Dedonado*, 991 P.2d at 1219. The reason for this rule is

that the State must not be given a further opportunity to carry its burden of proof after it fails to do so following a specific objection. *Cf. State v. McCorkle*, 137 Wn.2d 490, 496, 973 P.2d 461 (1999) (refusing to allow the State to introduce new evidence on remand to prove defendant's prior out-of-state convictions after the State failed to carry its burden of proof at sentencing).

State v. Dennis, 101 Wn.App. 223, 229-30, 6 P.3d 1173 (2000). *Cf.*

State v. Kinneman, 122 Wn.App. 850, 861-62, 95 P.3d 1277 (2004),

aff'd, 155 Wn.2d 272, 119P.3d 350 (2005) (usual remedy for the

State's failure to prove amount of restitution is vacation of the award of restitution).

Here, Mr. Pletenik lodged a specific objection to the amount requested by Barneys for the damaged or lost clothing items. Since the trial court ruled the retail amount was not the proper amount, the State failed to prove the proper replacement value. In light of the State's failure of proof, Mr. Pletenik asks this Court to vacate the award.

E. CONCLUSION

For the reasons stated, Mr. Pletenik asks this Court to strike the court's award of restitution for the clothing items from Barneys for the State's failure to carry its burden of proof.

DATED this 15th day of July 2015.

Respectfully submitted,

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DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 15TH DAY OF JULY, 2015, 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:

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[X] CHRISTOPHER PLETENIK (NO VALID ADDRESS) C/O COUNSEL FOR APPELLANT WASHINGTON APPELLATE PROJECT	() () (X)	U.S. MAIL HAND DELIVERY RETAINED FOR MAILING ONCE ADDRESS OBTAINED

SIGNED IN SEATTLE, WASHINGTON THIS 15TH DAY OF JULY, 2015.

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