

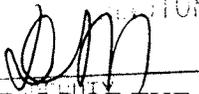
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COURT APPEALS

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NO. ~~34788-1-H~~

STATE OF WASHINGTON

BY 

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

STATE OF WASHINGTON,

Respondent,

v.

JEFFREY READ,

Appellant.

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

Commissioner Mark Gelman

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

Issues Presented on Appeal

1. The trial court abused its discretion by imposing \$170,037.31 in restitution to the Sumner Pioneer Cemetery who agreed that they were not responsible for repairing or replacing the broken cemetery markers.

2. For the purposes of restitution, the trial court abused its discretion in finding that that the Cemetery was a “victim” even though the evidence and testimony indisputably contradicted this finding.¹

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Jeffrey Read pleaded guilty to an amended information charging one count of malicious mischief in the first degree in violation of RCW 9A.48.070(1) and one count of unlawful removal of a grave marker at the Sumner Pioneer Cemetery in violation of RCW 68.60.040(1). CP 15-16. Following an evidentiary hearing, the trial court imposed restitution in the amount of \$170,037.31. CP 23-24. The restitution order delineated an award of \$158,237.31 to the Pioneer Cemetery, \$4,500 to Eleanor Riser and \$8,000 to Rod Schrengohst. CP 23. This timely appeal follows. CP 25.

2. SUBSTANTIVE FACTS

¹ There were no written findings filed.

Restitution Hearing

John Wells, the operations supervisor for the Pioneer Cemetery testified that the Cemetery is only responsible for maintaining the burial site. This includes the dirt and grass. The individual families are solely responsible for maintaining the grave markers. RP 26.2 The Cemetery has absolutely no legal or other responsibility to maintain and /or repair gravestone markers. RP 30. The cemetery undertook the repair and righting of the markers as a “community contributor”. RP 9

Mr. Wells testified that approximately 30 stones were broken and required glue to fix. RP 6-7. Approximately 275 others were tipped over but not broken. RP 7, 22. Although the Cemetery was not responsible for any repair to damage or tipped over stones, it took it upon itself to right and repair some of the gravestones. 31. Mr. Wells informed the court that he and two employees spent approximately 16 hours righting and repairing the stones during regular business hours and the same trio spent an additional five hours at overtime rates. RP 19-20. Additionally, Wells testified that Darlene, another employee spent 80 hours calculating the damage. RP 21. Mr. Wells wage plus his two employees and the office worker came to a total of \$6,437.31 plus one hundred dollars for epoxy. RP 13-14, 33-34. The

2 RP refers to the verbatim report of the restitution proceedings, volume Two. “RP” refers

Cemetery charged \$63,900 in resetting fees even though it did not reset any of the stones but just picked them up from the ground and put them in an upright position. RP 34. This fee represents a hypothetical figure for traveling to Tacoma Monument to pick up and set new stones for 300 gravestones, take them to an engraver and then take them to the cemetery to be placed on site. RP 34. The cost to reset a stone ranges from approximately \$200-\$500 depending on the size of the stone and is a charge the City would charge a customer even though none will be charged in the instant case and this amount is in addition to the labor charged and the \$63,900 the City wishes to charge for the hypothetical transporting of new stones. RP 35-37. These fees could theoretically be passed on to the families if they ordered new stones. RP 11-12, 38.

Only five families contacted the cemetery and expressed any interest in replacing their family stones and one of the families failed to follow through with their interest, so a total of four families actually expressed interest in replacing stones. RP 26-28, 34. The replacement costs for these families' grave markers was estimated to be \$32,800. The Cemetery obtained an estimate from Tacoma Monument for the replacement of 23 stones at a cost of \$100,300. No stones were ordered by any family and the City and the

to volume one of the verbatim report of the restitution proceedings.

cemetery do not own or have any right or responsibility to order new stones for a family. RP 25-26, 30. The City and the cemetery made no effort to contact any of the families. RP 31.

The City Council took it upon itself to authorize the expenditure of \$20,000 for the installation of lights at the cemetery. RP 17.

The trial court made an erroneous independent judgment that departed from the direct testimony presented at the restitution hearing to determine that the Cemetery was responsible for repairing damage to the broken and toppled grave markers. RP 45-46.

COMMISSIONER BOYLE: Well, the real issue is as I can see, it is whether the (inaudible) are responsible for a restitution to the City for this, things that the city is not legally responsible for, and I think that they are.

I think that there is preponderance of evidence and, in a case like this, the cemetery must make these repairs. Whether they can chase down the owners, whether they can be repaid for them, is something that we can only speculate on. As I hear the testimony this is an extremely difficult job.

But the city has this obligation for one reason, as I asked, if they are a going concern. If it is going to look like it looks in the pictures, nobody is going to show up there.

So the City has to make these repairs. They don't have a choice. They may get some money back from these people, but we are not going to go through hundreds of restitution hearings on each of these individuals and I can't say that they are responsible. If the money comes in and the City is to pay back. That is not going to happen.

We have to be realistic about this. And the realism here is that there was an incredible amount of damage. And I have to determine how much that is by a preponderance of the

evidence.

And I find from looking at all of this, I don't want to play games with one or two items, I think that the restitution request in its entirety is responsible and I am going to sign the order for the total restitution of the amount of \$170,037. 31.

1RP 45-46.

The actual out of pocket expenses incurred by the cemetery were \$6,437.31 in labor costs and \$100 in epoxy costs. RP 33-34. The actual cost to replace new grave stones for the families that expressed an interest was \$32,800, even though only two families were named in the restitution award for a total of \$12,500. CP 23; RP 26-27.

C. ARGUMENT

THE TRIAL COURT ABUSED ITS
DISCRETION BY IMPOSING
RESTITUTION TO A PARTY THAT WAS
NOT A VICTIM

1. The City and the Cemetery Were Not "Victims" For The Majority of The Restitution Awarded.

The cemetery was not a victim in the instant case. It is the land owner responsible for maintaining the grave sites. The Sumner City Cemetery has no right, authority or obligation to interfere with the replacement of any private families' grave stone marker. The cemetery, calling itself a

“community contributor” used three employees and spent two and one half days picking up toppled grave stone markers and applying epoxy to those that were broken. RP 9. For this service, they presented a bill in the amount of \$6,537.31. RP 13-34. The Sumner City Council voted to put lights in the cemetery at a cost of \$20,000. RP 17. At the request of the cemetery, which has no right to move, replace or interfere with a private family’s gravestone, Tacoma Monument provided an estimate for the repair of all of the damaged gravestones at a cost of \$100,300. RP 25-26, 30. The Commissioner without any evidence to support his oral findings stated that the picking up of the toppled stones was an “extremely difficult job”. RP 45-46. The Commissioner also ruled without support from the record that the cemetery had an obligation to fix the stones. *Id.* This is simply not correct.

The authority to order restitution is not an inherent power of the court but is derived from statutes. State v. Davison, 116 Wn.2d 917, 919, 809 P.2d 1374 (1991). Restitution provides for **victim** compensation and serves the purposes of rehabilitation and juvenile accountability. State v. Bennett, 63 Wn. App. 530, 533, 821 P.2d 499 (1991). Evidence admitted at a restitution hearing must meet due process requirements. State v. Strauss, 119 Wn.2d 401, 418-19, 832 P.2d 78 (1992). Evidence of damage is sufficient if it affords a reasonable basis for estimating loss and does not subject the trier of

fact to mere speculation or conjecture. State v. Pollard, 66 Wn. App. 779, 785, 834 P.2d 51 (1992).

Imposition of restitution is within the discretion of the court and will not be disturbed on appeal absent an abuse of discretion. State v. T.A.D., 122 Wn. App. 290, 95 P.3d 775 (2004), review denied, 154 Wn.2d 1006, 113 P.3d 482 (2005); Davison, 116 Wn.2d at 919. A trial court abuses its discretion when its decision is "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

RCW 13.40.190 provides in part:

(1) In its dispositional order, the court shall require the respondent to make restitution to any persons who have suffered loss or damage as a result of the offense committed by the respondent.

....

(4) For purposes of this section, "victim" means any person who has sustained emotional, psychological, physical, or financial injury to person or property as a direct result of the offense charged. "Victim" may also include a known parent or guardian of a victim who is a minor child or is not a minor child but is incapacitated, incompetent, disabled, or deceased.

Id. "[R]estitution" for purposes of the Juvenile Justice Act of 1977 is defined as 'reimbursement by the offender to the victim'." RCW 13.40.020(22).

Thus, to be entitled to restitution one must be both a ‘person’ and a ‘victim.’”
State v. A.M.R., 147 Wn.2d 91, 96, 51 P.3d 790 (2002).

“[T]he definition of ‘victim’ is interpreted broadly under the Juvenile Justice Act of 1977, and includes a person who is injured as the result of an occurrence”, and this definition does not limit restitution to injuries received as a direct result of the crime charged. State v. T.A.D., 122 Wn. App. at 294, quoting, A.M.R., 147 at 97-98.

In T.A.D., the Court awarded restitution to a juvenile’s father who paid a \$100 fee to the store from which his son stole a \$20 shirt. In A.M.R., the Court awarded restitution to the victim’s insurance company because it suffered a direct and actual loss by paying required mandatory claims. A.M.R., 147 at 97.

In the instant case, the cemetery had no authority, right or obligation to fix or “right” any grave markers. It did however undertake this task as a self-proclaimed “community contributor”. RP 9. A community contributor unlike an insurance company or a parent, has no obligation contractual or otherwise to make good for another’s destruction. The cemetery as a community contributor is not a victim within the statutory definition because the cemetery did not suffer any loss. RCW 13.40.190(4). Rather, the cemetery, without any

authority or obligation, voluntarily took it upon itself to repair and right a number of gravestones. Although the legislature intended a liberal interpretation of the meaning of “victim” that is not an invitation to read into the statute language and interpretation not intended. Davison, 116 Wn. 2d at 920.

In Davison, supra, the Supreme Court ruled that a City could be a victim as well as other third parties. In Davison, the City paid an employee, assault victim wages while he was unable to work. The Court recognized that lost wages is a valid claim that fell within the restitution statute’s scope. Davison, 116 Wn.2d at 921. Similarly in State v. Barr, 99 Wn.2d 75, 78, 658 P.2d 1247 (1983), restitution was allowed to a widow and children of the victim of negligent homicide. In State v. Barnett, 36 Wn. App. 560, 562, 675 P.2d 626, , review denied, 101 Wn.2d 1011 (1984), the Court allowed restitution to reimburse an insurance company which paid for losses sustained by the insured because of a burglary. In State v. Jeffries, 42 Wn. App. 142, 709 P.2d 819 (1985,), review denied, 105 Wn.2d 1013 (1986), reimbursement was properly authorized to the Department of Labor and Industries for payment of disability and medical expenses of assault victim. In State v. Forbes, 43 Wn. App. 793, 719 P.2d 941 (1986), a state agency was entitled to restitution for gambling losses incurred by an undercover detective.

These cases illustrate a wide variety of facts and circumstances allowing third party “victims” to recover losses through restitution. Each of these cases however share common facts not present in the instant case. First, each party that recovered through restitution was legally and financially responsible for the primary victim’s losses. Second, each party actually suffered a loss. The instant case is distinguishable on both grounds. First, the cemetery was not legally or financially responsible for the private families’ losses; and second, the cemetery did not suffer any loss other than its voluntary expenditure of its employee resources and one hundred dollars in epoxy.

. State v. Kinneman, 122 Wn. App. 850, 861, 95 P.3d 1277 (2004), affirmed in part and reversed on other grounds, Wn. App. 155 Wn.2d 272, 119 P.3d 350 (2005) is legally on point and factually analogous. Therein, the Court reversed an order of restitution to a party that was not a “victim”.

The trial court was limited to awarding restitution to Kinneman's victims. It did not err in denying an award to Union Planters Bank because Union Planters Bank was not a "victim" within the meaning of the statute. Regardless of how economical or efficient restitution directly to Union Planters Bank might have been, e.g., simultaneously placing both Option One and Brown in the position they would have been in prior to Kinneman's failure to pay off the prior lien holder on the Columbia Street property, a restitution [*867] award to a party who was not a victim is not within the scope of the

trial court's authority. The trial court did not abuse its discretion when it declined to award Union Planters Bank restitution.

State v. Kinneman, 122 Wn. App. at 866-67.

In the instant case, the commissioner wished to award recovery for losses to the damaged stones, however by awarding \$158,237.31 to Pioneer Cemetery, the Commissioner abused his discretion, because as in Kinneman, supra, Pioneer Cemetery like Union Planter's Bank was not a victim. Moreover, the Commissioner's stated desire to avoid multiple restitution hearings to address individual families concerns is also not grounds for awarding restitution to an entity that is neither a party nor a victim. RP 45-46. Restitution is limited to victims. State v. Kinneman, 122 Wn. App. at 866-67.

At most, then cemetery might be entitled to recover its actual labor and material costs: \$6,537.31. Mr. Read concedes that the families that came forward requesting repair or replacement of their grave markers are entitled to restitution. This amounts to \$12,500 for a total amount of restitution of \$19,437.31. The balance of the restitution \$151,300 was improperly awarded to Pioneer Cemetery and this portion of the restitution award should be vacated. Contrary to the Commissioner's ruling, the cemetery was not a victim and was neither required nor obligated to repair or order new stones.

The commissioner abused his discretion by imposing \$170,737.31 in

restitution. The decision was based on untenable grounds and for untenable reasons. The commissioner, rather than basing his decision on the unrefuted evidence presented, based his decision on his personal assessment of the situation. As in Kinneman, supra, this constitutes an abuse of discretion and is grounds for reversal. Specifically, the commission ruled that the cemetery had an obligation to repair the damaged grave stone markers. This is incorrect and directly contradicts the testimony of the cemetery which expressly stated that the grave stone markers are privately owned and the exclusive responsibility and property of the families. RP 25-26, 30.

2. There is an Inadequate Factual Basis for The \$151,300 Balance of the Restitution Award

The cemetery does not stand in for individual families and therefore has no authority or right to order preparation of new stones without express family authorization. The cemetery expressly testified through its operations manager that the grave markers were privately owned. RP 8. The unclaimed and unrequested repairs are also speculative and not easily ascertainable as there is no indication that the majority of families have any interest in replacing the damaged grave markers. Davidson, supra. Loss that is not easily ascertainable and is speculative is not recoverable as restitution. State v. Kinneman, 122 Wn. App. at 861.

In Kinneman, the trial court abused its discretion by awarding restitution to Brown in an amount equal to Kinneman's embezzlement without determining that this amount equaled Brown's loss. Id. In State v. Dedonado, 99 Wn. App. 251, 257-58, 991 P.2d 1216 (2000) the Court reversed an order of restitution where the state failed to establish a causal connection between the officer's injuries and the order of restitution. In State v. Dennis, the court reversed a portion of a restitution order because it found that the State had failed to present an adequate factual basis supporting that part of the award. State v. Dennis, 101 Wn. App. 223, 228, 6 P.3d 1173 (2000).

If the State fails to establish a causal connection between defendant's actions and the damages, this court must vacate the restitution order. *Dedonado*, 99 Wn. App. at 257-58. 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.

Dennis, 101 Wn. App. at 229.

In the instant case, like Dennis and Dedonado, Pioneer Cemetery did not suffer any loss by the damage to the stones. Pioneer's only loss was its voluntary expenditure of employee labor to pick up the toppled stones and the unauthorized application of epoxy for repairs. Without an easily ascertainable loss, Pioneer was not entitled to recover \$158,237.31 in restitution. Pioneer

Cemetery is not entitled to recover for the families that have neither requested nor authorized replacement of their grave stone markers. Pioneer Cemetery cannot make any assumptions regarding the wishes of the private property owners.

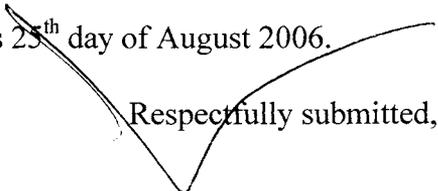
\$151,300 of the restitution award should be omitted from Mr. Read's restitution obligation as this amount is not easily ascertainable and the Cemetery is not an actual victim and no victim is claiming any losses for this amount.

D. CONCLUSION

Mr. Read respectfully requests this Court reverse his order of restitution and remand for modification of that order with directions to vacate the portion awarded to Pioneer Cemetery in the amount of \$158,237.31 because Pioneer Cemetery was not a victim entitled to recover the cost of replacement of stones it neither owned, nor had the right or responsibility to maintain. The restitution award should be limited to \$4500 to Eleanor Riser, \$8000 to Rod Schrengohst and perhaps \$6537.31 to Pioneer Cemetery for its volunteer work and epoxy costs.

DATED this 25th day of August 2006.

Respectfully submitted,



LISE ELLNER
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Attorney for Appellant

I, Lise Ellner, a person over the age of 18 years of age, served the Pierce County prosecutor's office 930 Tacoma Ave. S. Rm. 946, Tacoma, WA 98402 and Jeffrey Read 12013 108th Street Ct. E Puyallup, WA 98373" a true copy of the document to which this certificate is affixed, on August 26, 2006. Service was made by depositing in the mails of the United States of America, properly stamped and addressed.

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