

NO. 34779-2

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

JEFFREY READ, APPELLANT
DEVON JAPHET, APPELLANT

RECEIVED
COURT OF APPEALS
DIVISION II
JUL 11 1992
TACOMA, WA
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Appeal from the Superior Court of Pierce County
The Honorable Paul M. Boyle, Judge

Nos. 05-8-01992-9, 05-8-01990-2
05-8-01993-7, 05-8-01991-9

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the lower court properly exercise its discretion in ordering restitution when the cemetery was a victim and the damages were easily ascertainable?

B. STATEMENT OF THE CASE.

1. Procedure

On September 29, 2005, the State charged defendants DEVON JAPHET (D.J.) and JEFFREY READ (J.R.) each with one count of first degree malicious mischief and ten counts of unlawful removal of a grave marker for the period between the 24th and 25th of September, 2005.

JCP1 27-33; RCP1 1-7.¹ The State also charged each defendant with one count of first degree malicious mischief and five counts of unlawful removal of a grave marker for the period between the 25th and 26th of September, 2005. JCP2 1-5; RCP2 1-5.

Pursuant to a plea agreement, both defendants pled guilty to one count of malicious mischief and one count of removal of a grave marker for the period between the 24th and 25th of September, 2005. JCP1 37-42; RCP1 8-13. Both defendants also pled guilty to one count of malicious mischief and one count of removal of a grave marker for the

¹ JCP1 refers to D.J.'s clerk papers for Cause No. 05-8-01993-7; JCP2 refers to D.J.'s clerk papers for Cause No. 05-8-01991-1; RCP1 refers to J.R.'s clerk papers for Cause No. 05-08-01992-9; and RCP2 refers to J.R.'s clerk papers for Cause No. 05-8-01990-2.

period between the 25th and 26th of September, 2005. JCP2 9-14; RCP2 9-14. Both defendants stipulated that one witness would testify to all damages at the restitution hearing. JCP1 43-49; RCP1 32-39 (Disposition Orders). After the restitution hearing, the court imposed \$170,737.31 in restitution, with joint and several liability between the defendants. JCP1 53-54; RCP1 22-23. Both defendants filed timely notices of appeal, contesting only the restitution order. JCP1 55-57; RCP1 26.

2. Restitution Hearing

On April 3, 2006, the defendants came before the Honorable Judge Pro Tempore Paul Boyle for the restitution hearing. RP 1.² The State called John Wells, the Sumner Pioneer Cemetery operation supervisor, who testified about how much damage the defendants caused. RP 5. The defendants damaged about 303 gravesites, including 26 which dated before 1889. RP 6. While the families own and are responsible for the stones, the cemetery is responsible for maintaining the site. RP 6-7. The cemetery's responsibilities include making sure the ground is level (e.g., the cemetery will repair a sunken grave). RP 7.

² RP refers to the Report of Proceedings prepared by R.V. Wilson of Wilson Transcription Services, which was used by defendant D.J.. RPII refers to the Report of Proceedings prepared by Rose Flygare-Kiser of Flygare & Associates, which was used by defendant J.R.. Respondent believes that the Report of Proceedings used by defendant J.R. listed an incorrect date (i.e., the "October 21, 2005" transcript should be "April, 3, 2006") and an incorrect name (i.e., "Kathleen Proctor" for the Respondent should be "Jeannette Lineberry").

In this case, the cemetery attempted to repair and upright all of the stones in order to contribute to the community. RPII 9. The cemetery was concerned about the number of damaged stones that dated before 1889. RP 29. The cemetery did not try to contact each one of the families because that would have taken some kind of genealogical search. RP 30. The cemetery was also concerned about the families that were no longer in the area or who did not know anything about the damage. RP 30. Five families had contacted the cemetery: (1) the Kincaid family whose stone cost \$8,200 (RP 24-25); (2) the Schrengohst family whose stone cost \$8,000 (RP 25-26); (3) the Riser family whose stone cost \$4,500 (RP 26); (4) the Canedy family whose stone cost \$4,500 (RP 27); and (5) the Dobbler family whose stone cost \$7,600 (RP 42). The Riser and Schrengohst families also directly contacted the prosecutor's office. RP 39.

The cemetery had substantial damage to over 30 grave stones that were broken into several pieces. RP 5. The cost of replacing the stones was high because a lot of the materials were no longer available, some of the materials were mined from Georgia, and a lot of the stones were handtooled. RP 23. The cemetery obtained an estimate from Tacoma Monument for replacing 23 stones the cemetery was unable to repair. RP 10, 20, 23. This estimate included the cost for repairing the stones for the families that had contacted the cemetery. The estimate came to \$100,300. RP 10.

The cemetery was able to glue back together some of the stones. RP 5. The cemetery paid three employees to repair the stones. RP 12. Repairing the stones was difficult to do because some of the stones were roughly eight feet tall and the cemetery could only glue one section at a time. RP 11. The cemetery also paid two employees to document and handle inquiries about the damage. RP 12. The total labor cost to the cemetery for this work came to \$6,537.31. RP 12.

Other grave stones had also been tipped over that did not break. RP 6. The cemetery was able to reset some of the stones by hand, others needed a standard monument lifting device and others needed a backhoe to pick them up and put them back on their foundations. RP 6. In order to get to the stones that needed the backhoe, other stones also had to be moved. RP 22. The cemetery glued about 30 stones back to their foundations, which required bracing the stones until the glue set. RP 22. If the foundation came over with a stone, the cemetery lifted the foundation out of the way, repaired the ground, and then reset the foundation. RP 22. The resetting fees cost \$63,900. RP 10.

After hearing testimony from the cemetery supervisor and argument from all of the parties, the court found that there was an “incredible amount of damage.” RP 44. The court signed the order for the total restitution in the amount of \$170,037.31. RP 44; CPJ1 53-54; RCP1 22-23. The court directed the funds to be disbursed in the following manner: (1) \$158,237.31 to Pioneer Cemetery; (2) \$4,500 to Eleanor

Riser; and (3) \$8,000 to Rod Schrengohst. CPJ1 53-54; RCP1 22-23. The court ordered that the amount must be paid at a rate of \$50.00 until paid in full or modified by the probation officer. CPJ1 53-54; RCP1 22-23. The court also deferred interest on the amount until the defendants reached the age of 18. RP 46.

C. ARGUMENT.

1. THE LOWER COURT PROPERLY EXERCISED ITS DISCRETION IN ORDERING RESTITUTION.

An appellate court's review of a lower court's restitution order is limited to whether the court abused its discretion. State v. Horner, 53 Wn. App. 806, 807, 770 P.2d 1056 (1989). An abuse of discretion occurs when the order is manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. State v. Smith, 33 Wn. App. 791, 798-99, 658 P.2d 1250, (quoting State v. Cunningham, 96 Wn.2d 31, 34, 633 P.2d 886 (1981)), review denied, 99 Wn.2d 1013 (1983).

A court's authority to order restitution is purely statutory. State v. Hennings, 129 Wn.2d 512, 519, 919 P.2d 580 (1996). Statutes authorizing restitution are to be broadly construed in order to carry out the Legislature's intent of providing restitution. Id. If, however, the language of a statute is plain and clear, the court must apply the language as written. Duke v. Boyd, 133 Wn.2d 80, 87, 942 P.2d 351 (1997).

The legislature passed the Juvenile Justice Act of 1977 with the intent to hold youth “accountable for their offenses and that communities, families, and the juvenile courts carry out their functions consistent with this intent.” RCW 13.40.010(2). To effectuate this policy, the legislature declared several important purposes, including providing “for restitution to victims of crime.” RCW 13.40.010(2)(h). RCW 13.40.020(22) defines “restitution” as financial reimbursement by the offender to the victim. Under RCW 13.40.190(1), the court is required to order “the respondent to make restitution to any persons who have suffered loss or damage as a result of the offense committed by the respondent.” In this case, the court did not abuse its discretion in ordering restitution when the cemetery was a victim and the damages were easily ascertainable.

a. The cemetery was a victim.

RCW 13.40.190(4) defines “victim” as any person who has sustained emotional, psychological, physical, or financial injury to person or property as a direct result of the offense charged. The Washington Supreme Court has interpreted this language as setting forth a broad definition. State v. Davison, 116 Wn.2d 917, 920, 809 P.2d 1374 (1991) (interpreting RCW 9.94A.030(28), which defines victim using identical language). Further, Washington courts have interpreted this and comparable statutes to carry out the wide scope of restitution, and have determined that the recipient of restitution may be one other than the

immediate victim of the crime. Id. at 921 (citing State v. Barr, 99 Wn.2d 75, 78, 658 P.2d 1247 (1983) (restitution to widow and children of victim of negligent homicide); State v. Barnett, 36 Wn. App. 560, 562, 675 P.2d 626 (reimbursement to insurance company which paid for losses sustained by insured because of burglary), review denied, 101 Wn.2d 1011 (1984); State v. Jeffries, 42 Wn. App. 142, 709 P.2d 819 (1985) (reimbursement to Department of Labor and Industries for payment of disability and medical expenses of assault victim), review denied, 105 Wn.2d 1013 (1986); State v. Forbes, 43 Wn. App. 793, 719 P.2d 941 (1986) (restitution to state agency for gambling losses of undercover detective)). The term “person” may be construed to include any public corporation. RCW 1.16.080.

The Washington Supreme Court has also determined that a person can be considered a victim if the person suffers financial injury by covering the costs of an immediate victim of the crime, even if the person did not have a legal obligation to do so. In State v. Davison, the offender had assaulted a City of Seattle fire fighter. Davison, 116 Wn.2d at 919. Because of his injuries, the victim was unable to work as a fire fighter for 4 months. Id. During that time, the City paid the victim his normal wage, even though it was not apparently legally obligated to make such payment. Id. Defendant argued that the City was not a victim because it was not legally obligated to pay such wages. Id. at 919-920. The court rejected defendant’s argument and determined that while the city was not an

immediate victim of the assault, it still fell within the broad statutory definition. Id. at 920-921. The court found that:

It would not serve the purpose or policy underlying the statute to permit the offender to escape responsibility for the consequences of his harmful assault by denying restitution simply because the City chose, from legal obligation *or otherwise*, to pay its employee rather than subject that victim to the hardship and uncertainty of awaiting possible restitution paid directly to the victim.

Id. at 921-922 (emphasis in original).

In this case, it was reasonable for the court to find the cemetery was a victim. Although the cemetery was not legally responsible for correcting all of the damage caused by defendants, it still fell within the broad statutory definition because it suffered a financial injury by expending its resources to fix the stones. The total labor cost to the cemetery for this work came to \$6,537.31. RP 12. The resetting fees cost \$63,900. RP 10. In sum, it was not an abuse of discretion to find the cemetery was a victim when it covered the costs of fixing the immediate victims' stones.

Further, there are several compelling policy reasons supporting the finding that the cemetery was a victim with regards to the stones which it had not yet fixed. Public policy supports cemeteries taking responsibility for replacing vandalized historic headstones when the headstones would not be replaced otherwise. The cemetery was concerned about the number of damaged stones that dated before 1889. RP 29. The early date of the

stones has historical significance (e.g., Washington became a state in 1889). The public has an interest in preserving stones of that date, especially when it is questionable whether family members still exist to shoulder the responsibility.

Based on the testimony, the court found that it would have been extremely difficult to find the existing family members who were responsible for the stones. RP 44. The cemetery was also concerned about the families that were no longer in the area or who did not know anything about the damage. RP 30. The cemetery did not try to contact each one of the families because that would have taken some kind of genealogical search. RP 30. Considering these circumstances it was reasonable to find the cemetery had suffered financial injury with regards to the stones which it had not yet fixed.

If the court would have found otherwise, it would have permitted defendants to escape responsibility for the consequences of their actions because they chose to vandalize stones of persons whose descendants could not be easily located. In sum, public policy reasons support the finding that the cemetery had sustained financial injury by taking the responsibility for fixing the stones. Accordingly it was not an abuse of discretion to find the cemetery was a victim and entitled to restitution.

Defendants rely on State v. Martinez and State v. Kinneman in alleging that the cemetery is not a victim. In Martinez, the court found an insurance company was not a victim because it had not suffered any injury

to person or property as a direct result of the crime charged. State v. Martinez, 78 Wn. App. 870, 882, 899 P.2d 1302 (1995). In Kinneman, the court found a bank was not a victim because it had not provided the immediate victims with money for their losses. State v. Kinneman, 122 Wn. App. 850, 866, 95 P.3d 1277 (2004). Unlike the alleged victim in Martinez, the cemetery in this case did suffer financial injury (i.e., the costs of repairing and resetting the stones), which was a direct result of defendants' crimes. Unlike the alleged victim in Kinneman, the cemetery here relieved the existing families of the financial burden of repairing and resetting the stones.

b. The damages were easily ascertainable.

Restitution for injury to or loss of property is limited to damages that are "easily ascertainable." RCW 13.40.020(22). "Easily ascertainable" damages are those tangible damages which are proved by sufficient evidence to exist; precise determination is not required. State v. Bush, 34 Wn. App. 121, 659 P.2d 1127, review denied, 99 Wn.2d 1017 (1983), overruled on other grounds, State v. Handley, 54 Wn. App. 377, 773 P.2d 879 (1989). To prove the extent of damages, the victim need only present evidence that "affords a reasonable basis for establishing the loss and does not subject the trier of fact to mere speculation or conjecture." Horner, 53 Wn. App. at 808. The loss need not be shown by

proof beyond a reasonable doubt or clear and convincing evidence. State v. Smith, 33 Wn. App. 791, 795-796, 658 P.2d 1250 (1983).

Further, a victim's actual out-of-pocket expenses are not determinative of the amount of the damage. In State v Horner, the victim replaced a window the defendant had damaged himself. Horner, 53 Wn. App at 807. The complainant's actual out-of-pocket expense was only \$40.02, but he requested \$90 for his labor based on an estimate of the cost of replacement by a professional. Id. At sentencing, the complainant was awarded restitution in the amount of \$ 130.02 on the basis of the repair facility's estimate. Id.

In this case, the damages were easily ascertainable because there was sufficient evidence, which provided a reasonable basis for the court's \$170,037.31 restitution order. The court heard testimony that: (1) based on an estimate from Tacoma Monument, replacing 23 stones would come to \$100,300 (RP 10); (2) based on the hours worked in repairing the stones, the total labor cost to the cemetery came to \$6,537.31 (RP 12); and (3) based on the amount of stones knocked over, the resetting fees cost \$63,900 (RP 10). This testimony provided sufficient evidence and a reasonable basis for the amount of restitution ordered. Accordingly the judge did not abuse its discretion in setting the amount at \$170,037.31.

Defendant D.J. alleges that the resetting fees were not easily ascertainable because the cemetery was reimbursed for those costs in the \$6,537.31 labor charge. Appellant D.J.'s Brief at 11. However, that

assertion ignores the testimony that the labor that went into the resetting fees was not incorporated into the labor charge. RP 35. On cross examination, the cemetery's operation supervisor was asked, "the labor that went into resetting that is incorporated in the \$6500; is that correct?" The cemetery's operation supervisor responded, "No." RP 35. The cemetery's operation supervisor also testified that the labor costs and resetting fees were not overlapping charges. RP 37. Based on this testimony, it was reasonable for the court to find that the cemetery's resetting fees were not reimbursed by the labor charge.

D. CONCLUSION.

For all the above reasons, this Court should affirm defendants' restitution.

DATED: March 5, 2007

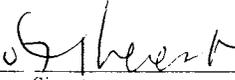
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Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

3.5.07 
Date Signature

