

FILED
COURT OF APPEALS
DIVISION II

NO. 36842-1-II

08 JUL 11 PM 2:57

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

STATE OF WASHINGTON
BY  DEPUTY

STATE OF WASHINGTON,

Respondent,

vs.

JAYLENE F. MILLNER,

Appellant.

APPEAL FROM THE SUPERIOR COURT
FOR PACIFIC COUNTY
The Honorable Michael J. Sullivan, Judge
Cause No. 07-1-00059-1

BRIEF OF APPELLANT

ROBERT M. QUILLIAN
ATTORNEY FOR APPELLANT
WSBA NO. 6836

2633-A Parkmont Lane SW
Olympia, WA 98502
(360) 352-0166

TABLE OF CONTENTS

	<u>Page</u>
A. ASSIGNMENTS OF ERROR	1
B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR	1
C. STATEMENT OF THE CASE	1
D. ARGUMENT	2
The Order of Restitution awarded restitution for losses which were not related to the crime of Theft in the Third Degree occurring on January 4 and March 10, 2007.	2
E. CONCLUSION	10
APPENDIX - 2 PAGES	

TABLE OF AUTHORITIES

	<u>Page</u>
<u>Table of Cases</u>	
<u>State Cases</u>	
<i>State v. Ashley</i> , 40 Wn. App. 877, 700 P. 2d 1207 (1985)	8
<i>State v. Berman</i> , 50 Wn. App. 125, 747 P. 2d 492 (1987)	7, 8
<i>State v. Enstone</i> , 137 Wn. 2d 675, 974 P. 2d 828 (1999)	2
<i>State v. Hughes</i> , 154 Wn. 2d 118, 110 P. 2d 192 (2005)	2
<i>State v. Kinneman</i> , 155 Wn. 2d 272, 119 P. 3d 350 (2005)	2
<i>State v. Mark</i> , 36 Wn. App. 428, 675 P. 2d 1250 (1984)	7, 8
<i>State v. Mead</i> , 67 Wn. App. 486, 836 P. 2d 257 (1992)	5, 6
<i>State v. Rogers</i> , 30 Wn. App. 653, 638 P. 2d 89 (1981)	4, 5, 9
<i>State v. Selland</i> , 54 Wn. App. 122, 772 P. 2d 534 (1989)	6
<u>Table of Statutes and Court Rules</u>	
RCW 9.94A.753(3)	2
RCW 9.95.210	8

A. ASSIGNMENTS OF ERROR

1. The trial court erred in ordering restitution in the amount of \$8,787.00 following the Defendant's conviction for Theft in the Third Degree.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Was the restitution order entered in this case properly limited to the loss from the commission of the crime of Theft in the Third Degree, which occurred on January 4 and March 10, 2007, the crime for which the Defendant was convicted? (Assignment of Error No. 1).

C. STATEMENT OF THE CASE

By Second Amended Information, filed on June 6, 2007, the Defendant, JAYLENE F. MILLNER, was charged with one count of Theft in the First Degree with Aggravating Factors, alleged to have occurred in a series of transactions during her employment at Jack's Country Store during the period from March 15, 2005, to March 14, 2007. CP 5-6.

On June 6 and Jun 14, 2007, a non-jury Bench Trial was held on the charge in Pacific County Superior Court, the Honorable Michael J. Sullivan presiding. RP 6/6/07, pp. 2-272; RP 6/14/07, pp. 2-245. At the conclusion of the bench trial, Judge Sullivan found the Defendant guilty of the crime of Theft in the Third Degree. Judge Sullivan's ruling was set forth in a Memorandum Decision filed on June 28, 2007, and Agreed Findings of Fact and Conclusions of Law on Non-Jury Trial were entered on July 20, 2007. CP 7-15.

On August 31, 2007, a Memorandum on Restitution was entered and filed by Judge Sullivan, ordering restitution in an amount of \$8,787.00 to Jack's Country Store.

CP 19-20. An Order of Restitution was entered on September 14, 2007. CP 21-22.

Timely Notice of Appeal to the Court of Appeals, regarding the Order of Restitution, was filed on October 11, 2007. CP 23-26.

D. ARGUMENT

**The Order of Restitution awarded restitution
for losses which were not related to the
crime of Theft in the Third Degree occurring
on January 4 and March 10, 2007.**

RCW 9.94A.753(3) is the operative statute governing restitution in felony cases. It reads as follows:

Except as provided in subsection (6) of this section, restitution ordered by a court pursuant to a criminal conviction shall be based on 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. Restitution shall not include reimbursement for damages for mental anguish, pain and suffering, or other intangible losses, but may include the costs of counseling reasonably related to the offense. The amount of restitution shall not exceed double the amount of the offender's gain or the victim's loss **from the commission of the crime.** (Emphasis added).

It is conceded that a court's award of restitution will not be disturbed on appeal absent an abuse of discretion. *State v. Enstone*, 137 Wn. 2d 675, 679, 974 P. 2d 828 (1999). However, the application of an incorrect legal analysis or other error of law can constitute an abuse of discretion. *State v. Kinneman*, 155 Wn. 2d 272, 289, 119 P. 3d 350 (2005). Absent agreement from a defendant, the State must prove the claimed restitution

by a preponderance of the evidence. *State v. Hughes*, 154 Wn. 2d 118, 154, 110 P. 3d 192 (2005).

In the instant case, the Order of Restitution does not give any indication of what restitution components go to make up the award of \$8,787.00. However, the Court's Memorandum on Restitution gives **some** guidance in this regard.

The first paragraph of the Memorandum on Restitution cites cases holding that the amount of restitution is not limited to the amount necessary for conviction, and cites cases which hold that. The logical assumption from this discussion by the Court is that a component of the restitution amount is the sum of \$6,200, which was the amount the Defendant "admitted" to stealing in a statement made to an investigator and to the police.

In order to fully analyze this award of restitution, care must be taken to understand exactly what the Defendant was convicted of, and the evidence which supported that conviction. The allegations by the State were that the Defendant had, over a lengthy period of time, stolen goods from her employer, Jack's Country Store, by changing the prices on various products and buying the products at the reduced price. The evidence at trial, however, was such that only two incidents were proven by the State beyond a reasonable doubt. These incidents were on January 4, 2007, and March 10, 2007, and were supported by the admission of State's exhibits 6 and 4 respectively, which were the sales receipts from the Defendant's purchases on those two days, showing the purchase of items which had been price-altered by the Defendant. Exhibits 6 and 4 are attached to this Brief as appendices. The Court, in its Findings of Fact Nos. 3, 4, and 5, found that it had been proven beyond a reasonable doubt that the Defendant altered prices on merchandise on those two days, and that those actions by the Defendant on those two days resulted in

monetary loss to the store of less than \$250, thus giving rise to the Defendant's conviction for Theft in the Third Degree.

Significantly, the Court went on, in Finding of Fact No. 6, to conclude that there was "insufficient evidence to conclude beyond a reasonable doubt that Ms. Millner wrongfully obtained or exerted unauthorized control over property in an amount greater than \$1500, as alleged in Count I of the Information." The Court also found "insufficient evidence to conclude that Ms. Millner wrongfully obtained or exerted unauthorized control over property in an amount greater than \$250." CP 14.

In support of its apparent award of \$6,200 in restitution, the Court relied on several cases which stand for the proposition that an award of restitution is not necessarily limited to the amount necessary for conviction. While that proposition is certainly set forth in the case law, the cases relied upon by the Court are easily distinguishable from the facts of the instant case.

In *State v. Rogers*, 30 Wn. App. 653, 638 P. 2d 89 (1981), the Defendant was convicted of Possession of Stolen Property in the Second Degree for possession a stolen truck. There was no evidence presented at trial of the value of the truck. Thus, since no evidence of value is required in order to convict for the crime of possession of a stolen vehicle with a value less than \$1500, the conviction was upheld. Nonetheless, in setting restitution, the trial court apparently set restitution at the actual value of the stolen truck, which was never recovered. In upholding the general ability of the Court, under those facts, to set restitution in an amount above \$1,499, the court nonetheless remanded to the trial court, due to insufficiencies in the record as to how the restitution figure was arrived at, for further hearings to clarify the elements of the restitution amount and how it was

computed.

Aside from the fact of remand to clarify the restitution figure in the trial court, the critical distinction in the *Rogers* case (and, indeed, in all of the cases relied upon by the trial court) is that the true value of the truck was directly related to the **crime** for which the Defendant had been convicted, i.e. possession of the stolen truck, which was never recovered. Such is not the case in the case at bar. The loss to the victim from the Defendant's actions in committing the crime of Theft in the Third Degree are far less than \$250. No other thefts were proven at trial, and the Defendant should not be held responsible for alleged losses from any other alleged, yet unproven, thefts.

Similarly, in *State v. Mead*, 67 Wn. App. 486, 836 P. 2d 257 (1992), the Defendant was charged with Possession of Stolen Property in the First Degree, but was convicted by a jury of Possession of Stolen Property in the Second Degree. There was apparently disputed evidence at trial as to the value of the stolen items, which resulted in the conviction for second degree as opposed to first degree. In setting restitution, however, the Court set a figure for restitution in an amount exceeding \$1500, setting a higher figure as the value of the items which Mead had had in his possession. Interestingly, for purposes of the instant case, was the Court of Appeals' ruling as to a claim of restitution for medical supplies, which had been ransacked and damaged in the victim's home during the burglary where the other items (which were ultimately found in Mead's possession) were taken. The Court of Appeals reversed that portion of the restitution order, stating that "[a]lthough the damage could be linked to the offense of burglary, Mr. Mead was not, and could not be, charged or convicted of that crime in Washington as to the Swanbergs. His possession of stolen property occurred after a

burglary and the damage to the medical supplies cannot be attributed to his offense.” 67 Wn. App. At 491-92.

This analysis is directly attributable and consistent with the statutory requirement that restitution must be directly related to a loss “from the commission of **the** crime.” In *Mead*, **the** crime was Possession of Stolen Property, but Burglary. Thus, even though there may well have been suspicions about Mead’s activity or complicity in the burglary itself, his crime of conviction did not allow him to be charged, by way of restitution, with any losses sustained in the burglary itself.

Similarly, in the instant case, the \$6,200 award of restitution has nothing whatsoever to do with Ms. Millner’s crime of conviction, viz. Theft in the Third Degree occurring on January 4 and March 10, 2007. She was convicted of no other thefts other than from those two days, and by all accounts, the losses from those two incidents were far below the sum of \$250.

Finally, in *State v. Selland*, 54 Wn. App. 122, 772 P. 2d 534 (1989), the Defendant was convicted of Malicious Mischief in the Third Degree, but ordered to pay restitution in the amount of \$552.81, which was an amount over the \$250 statutory limit for the crime. The Court upheld the award, as being the appropriate restitution figure for the damage caused by the Defendant in the incident. Here again, the restitution ordered was for a loss “from the commission of **the** crime”, that crime being Malicious Mischief. For the same reasons set forth above, that case is factually distinguishable from the instant case.

Several cases support the Appellant’s position that restitution must be limited to losses sustained “from the commission of **the** crime”, i.e. the crime of Theft in the Third

Degree. For example, in *State v. Berman*, 50 Wn. App. 125, 747 P. 2d 492 (1987), the Defendant was convicted of Theft in the Second Degree. The facts indicated that the victim paid Berman the sums of \$1500 and \$710 for products which were never delivered. He was charged only for the \$710 transaction, and was duly convicted of that offense. The judge ordered restitution to include the \$1500, which the State had argued was part of the same scheme for which the Defendant had been convicted. The Court of Appeals disagreed and reversed the award of the \$1500, stating as follows:

If in fact the trial court did order Berman to pay \$1,500 in addition to the \$710 in restitution to Hansen, it was in error. RCW 9.95.210 reads in part that a trial court may impose restitution as a condition of probation 'to any person or persons who may have suffered loss or damage by reason of the commission of the crime in question...' **The scope of restitution is limited to the precise offense as charged.**

50 Wn. App. At 132 (Emphasis added).

It is of significance, as far as the instant case is concerned, that the Court of Appeals rejected the State's argument in *Berman* that the \$1,500 item was part of a common scheme or plan. Defendant Millner was charged with Theft in the First Degree, and there was the allegation that her actions constituted a common scheme or plan. CP 5-6. In finding the defendant not guilty of either Theft in the First Degree or Theft in the Second Degree, the trial court implicitly found that the State had not proven the existence of any sort of common scheme or plan by the Defendant Millner. The \$6,200 award of restitution cannot be upheld.

A case which is even closer, from a factual standpoint, to the instant case is *State v. Mark*, 36 Wn. App. 428, 675 P. 2d 1250 (1984), where a physician was convicted of

Grand Larceny for submitting false claims to DSHS for reimbursement for medicines neither dispensed nor prescribed. He was convicted for his activities during a thirteen month period from June 1, 1975, to June 30, 1976. At a restitution hearing held after the verdict, auditors testified that the Defendant's fraudulent activity had spanned a three year period, from January 1, 1974, to December 31, 1976, and put forth a restitution figure covering that three year period. Restitution was ordered by the trial judge for the entire three year period.

On appeal, the Court of Appeals reversed the restitution order, insofar as it awarded restitution for periods other than the 13-month period for which the Defendant had been convicted. In so holding, the court stated at page 431 as follows:

The issue presented is whether RCW 9.95.210 limits the scope of restitution to the precise offense as charged, or allows the trial court sufficient discretion to order restitution for the damages arising from the general criminal scheme for which the defendant was convicted. We agree with Mark's characterization of his conviction as being for 'grand larceny for 13 months.' Limiting restitution to the specific 13-month period charged may be technical, but it is required by the specific language of the statute.

It should be noted that the language of RCW 9.95.210 is essentially identical to the language of RCW 9.94A.753(3), in that they both speak of loss from the commission of **the** crime. To the same effect as *Berman* and *Mark* is the case of *State v. Ashley*, 40 Wn. App. 877, 700 P. 2d 1207 (1985).

The holdings of these cases clearly stand for the proposition that a restitution order can only award restitution resulting from the commission of **the** crime which, in Ms. Millner's case, is the crime of Theft in the Third Degree. The award in excess of the

losses attributable to her actions on January 4 and March 10, 2007, are in no way related to, or a result of her actions on those dates. The case law cited above is clear that such an award of restitution is not proper, and it must be stricken.

The other components of the court's Order of Restitution, at least as far as can be gleaned from the Memorandum on Restitution, involve investigation costs and reimbursement of Tom Downer, the owner of the store, for his time spent in "gathering evidence or cooperating with investigators...regarding the defendant's illegal actions."

There are two responses to this aspect of the restitution award. The first is essentially identical to the argument presented above regarding the \$6,200 award. The award of restitution must be confined to the loss related to the commission of the crimes on January 4 and March 10, 2007. The record is silent (or is certainly not clear) as to how, or even whether, the surveillance/investigation expenses were related at all to the dates in question or to the conviction of the Defendant for Theft in the Third Degree. For the same reasoning as set forth above, those awards should be stricken.

Alternatively, it is submitted that, in view of the scant record, this court should remand the matter to the trial court for further hearings and orders concerning these aspects of the restitution award. This was precisely what the Court of Appeals did in the *Rogers* case, which was discussed earlier in this brief, and which was a case relied upon by the trial court in the instant case. As the Court of Appeals stated in *Rogers, supra*, at pages 658-59:

Here, two widely disparate amounts of restitution were fixed. No findings, no verbatim report, and no affidavits or other evidence have been provided us pertinent to the determination of the amount of restitution. Where the amount of restitution so greatly exceeds the amount proven

for conviction of the crime, we cannot presume that the amount ordered is appropriate to make reparation to the

victim. Accordingly, remand to the trial judge for the entry of findings as to the amount of the loss suffered by the victims.

Only by such a remand, and clarification by the trial judge of the elements of basis for his award of these items of restitution, can the issue of restitution be fully and fairly evaluated by this Court.

E. CONCLUSION

For the reasons stated herein, this court should strike that portion of the restitution order which awards restitution over and above those losses from the commission of the crime of Theft in the Third Degree, occurring on January 4 and March 10, 2007, or, in the alternative, should remand this matter to the trial court for further hearings and order to clarify the trial court's restitution order.

DATED: July 10, 2008.

Respectfully submitted,



ROBERT M. QUILLIAN,
Attorney for Appellant
WSBA #6836

CERTIFICATE

I certify that I mailed a copy of the Brief of Appellant by depositing same in the United States Mail, first class postage prepaid, to the following people at the addresses indicated:

Mr. David Bustamante
Attorney at Law
1111 E. Madison St.
Suite 386
Seattle, WA 98122-4321

DATED this 11th day of July, 2008.



ROBERT M. QUILLIAN, WSBA #6836
Attorney for Appellant

FILED
COURT OF APPEALS
DIVISION II
08 JUL 11 PM 2:58
STATE OF WASHINGTON
BY  DEPUTY

APPENDIX

Jack's Country Store
 26006 Vernon Ave.
 Ocean Park, WA
 360-665-4989

DAIRY

FLAV PARMESAN SHRED \$2.19 F

DELI

DELI \$1.50 F

FARM, LAWN & GDN

CAN DOG FOOD \$1.00 T
 SALMON DINNR \$0.93 T
 SLC BF/GRVY \$0.93 T
 SLC CHKN/GRV \$0.93 T

GENERAL MDSE

32OZ SIMPLE GREEN \$7.49 T
 CHRMIN 12 ROLL BIG \$5.29 T
 WAXTEX 75' \$1.45 T

GROCERY NON TAX

VENDOR COUPON GROCER - \$0.35 F
 . 2 @ 0.35 0.70
 ANIMAL COOKIES \$3.49 F
 B C SCALLOPED POTATO
 2 @ \$1.39 \$2.78 F
 BRWNIE MIX \$2.57 F
 COCOA \$3.69 F
 PNKO BREADNG \$1.83 F
 PROPEL STRAWBERRY
 2 @ \$1.32 \$2.64 F

GROCERY TAXABLE

ROCKSTAR 24OZ OCARB. \$2.69 T F

HARDWARE

BALANCE DUE \$49.14
 VENDOR COUPON HARDWA -\$0.25

MEAT

JACKS PEPPER BACON \$0.68 F
 JACKS PEPPER BACON \$0.69 F
 OVN RST TRKY \$3.19 F

NEWSPAPERS

ASTORIAN DAILY \$0.50
 DAILY NEWS DAILY \$0.50

PRODUCE

BROCCOLI
 1.32 lb @ \$0.99/lb \$1.31 F
 GARDEN SALAD MIX \$1.39 F
 ONIONS RED
 0.57 lb @ \$0.69/lb \$0.39 F
 TOMATO ON THE VINE
 1.42 lb @ \$1.99/lb \$2.83 F

BALANCE DUE \$48.30

EMPLOYEE 10% DIS

Continued In Next Column....

\$51.88 10.000% - \$5.19
 EMPLOYEE 10% DIS

-\$0.95 @ 10.000% \$0.10
 IN-HOUSE CHARGE \$48.30
 [K] 4192
 CHANGE \$0.00

SUB TOTAL \$46.84
 TOTAL TAX \$1.46
 TOTAL \$48.30

P.O. SLIP #0000100050234

CASHIER NAME: JEN
 C0589 #0234 15:57:42 4JAN2007
 S00001 R005



COUNTRY STORE OCEAN PARK, WASHINGTON

Jack's Country Store, Inc
 26006 Vernon Ave./P.O. Box 710
 Ocean Park, WA 98640
 (360)665-4989

IN-HOUSE CHARGE

ACCOUNT: 4192
 Bay Machine Work

Amount: \$48.30

SIGNATURE

CASHIER NAME: JEN
 C0589 #0234 15:57:42 4JAN2007
 S00001 R005

Don't Forget!
 Sign up to receive our free e-mail ads
 www.jackscountrystore.com

Jack's Country Store
 26006 Vernon Ave.
 Ocean Park, WA
 360-665-4989

DAIRY

ALP BUTTERMILK QT \$0.99 F
 JUMBO EGGS DOZ \$1.55 F
 TILL SOUR CREAM 16OZ \$1.79 F

FARM, LAWN & GDN

MOIST N MTY CHS BURG \$5.78 T

GENERAL MDSE

CHRMIN 12 ROLL BIG
 2 @ \$5.99 \$11.98 T

GROCERY NON TAX

BALANCE DUE \$93.98
 GROCERY NON TAX \$0.25 F
 MLD THK SLSA \$3.09 F
 OLIVE OIL
 2 @ \$3.49 \$6.98 F
 RFRD BNS 16Z \$1.44 F
 SUNDAY NEWS \$1.50 F

GROCERY TAXABLE

GROCERY TAXABLE \$4.52 T F

MEAT

BEEF LIVER \$3.47 F
 BEEF TOP SIRLOIN STE \$10.51 F
 CRAB \$3.09 F
 MAPLE SAUSAGE LINKS \$3.49 F
 PLSKA KLBASA \$1.99 F
 PORK BLADE ROAST \$11.20 F
 REESERS 10CT \$1.59 F
 SHRIMP PREV FROZEN \$4.03 F
 SNOW CRAB CLUSTERS \$10.18 F

PRODUCE

AVOCADO MEXHASS
 3 @ \$0.79 \$2.37 F
 CILANTRO \$0.69 F
 FRSH EXPRS ANG HR SL \$1.59 F
 GUACAMOLE MIX 1 OZ \$0.89 F
 LIME JUICE \$0.94 F
 ONIONS GREEN
 2 @ \$0.49 \$0.98 F
 ONIONS RED
 0.87 lb @ \$0.89/lb \$0.77 F
 PEPPERS BELL \$0.59 F
 PEPPERS JALAPENO
 0.14 lb @ \$0.89/lb \$0.12 F
 PEPPES RED GRNHOUSE
 0.45 lb @ \$1.89/lb \$0.85 F
 TOMATO ON THE VINE
 1.70 lb @ \$2.19/lb \$3.72 F

BALANCE DUE \$94.20
 EMPLOYEE 10% DIS
 \$102.68 @ 10.000% -\$10.27
 EMPLOYEE 10% DIS

Continued In Next Column....

\$0.25 10.000% -\$0.03
 IN-HOUSE CHARGE \$94.20
 [K] 4192
 CHANGE \$0.00
 SUB TOTAL \$92.63
 TOTAL TAX \$1.57
 TOTAL \$94.20

P.O. SLIP #0000100050260
 CASHIER NAME: JOHN H.
 C0388 #0260 16:49:10 10MAR2007
 S00001 R005



COUNTRY STORE, OCEAN PARK, WASHINGTON

Jack's Country Store, Inc
 26006 Vernon Ave. / P.O. Box 710
 Ocean Park, WA 98640
 (360)665-4989

IN-HOUSE CHARGE

ACCOUNT: 4192
 Bay Machine Work

Amount: \$94.20

SIGNATURE

CASHIER NAME: JOHN H.
 C0388 #0260 16:49:10 10MAR2007
 S00001 R005

Don't Forget!
 Sign up to receive our free e-mail ads
 www.jackscountrystore.com