

**Court of Appeals No. 38646-1-II**

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

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**STATE OF WASHINGTON**

**Plaintiff/Respondent,**

**v.**

**KIMBERLY ANN PHILLIPS,**

**Defendant/Appellant.**

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FILED  
COURT OF APPEALS  
DIVISION II  
09 NOV 30 AM 9:38  
STATE OF WASHINGTON  
BY \_\_\_\_\_  
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**SUPPLEMENTAL OPENING BRIEF OF APPELLANT**

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**Appeal from the Superior Court of Pierce County,  
Cause No. 07-1-05353-2  
The Honorable James R. Orlando, Presiding Judge**

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**I. ASSIGNMENT OF ERROR**

The trial court abused its discretion in awarding the additional \$1,500 in restitution where the State presented insufficient evidence to establish the \$1,500 restitution was owed without resorting to speculation and conjecture.

**II. ISSUE PRESENTED**

Did the trial court abuse its discretion in awarding the additional \$1,500 in restitution where the State presented insufficient evidence to establish the \$1,500 restitution was owed without resorting to speculation and conjecture?

**III. STATEMENT OF THE CASE**

*A. Factual Background*

Ms. Phillips adopts and incorporates the factual background set forth in her previously filed Opening Brief.

*B. Procedural Background*

Ms. Phillips adopts and incorporates the procedural background set forth in her previously filed Opening Brief with the following additions.

On April 2, 2009, Ms. Phillips filed an Objection to Restitution Claim for Count V (Joy Ostrander). CP 377-387. Ms. Phillips objected to the trial court imposing \$1,500 in restitution on count V on the basis that the State failed to present a basis for the restitution which was not based on speculation or conjecture. CP 377-387.

On April 6, 2009, the State filed a Response to Defendant's objection to Restitution Claim re: Count V. CP 388-398. The State argued that the fact the jury found Ms. Phillips guilty of count V, a finding which required the jury to also find that Ms. Phillips had taken property which exceeded \$1,500 in value, was a sufficient basis to support the trial court imposing \$1,500 in

restitution for that charge. CP 388-398.

On May 1, 2009, a restitution hearing was held in this case. RP 1-13, 5-1-09.<sup>1</sup> Over Ms. Phillips' objection, the trial court imposed \$1,500 restitution on count V on the basis that the jury had found Ms. Phillips had taken in excess of \$1,500. CP 399-400; RP 10-11, 5-1-09.

#### IV. ARGUMENT

**The trial court abused its discretion in awarding the additional \$1,500 in restitution where the State presented insufficient evidence to establish the \$1,500 restitution was owed without resorting to speculation and conjecture.**

“The size of [a restitution] award is within the court's discretion and will not be disturbed on appeal absent a showing of abuse.” *State v. Mead*, 67 Wn.App. 486, 490, 836 P.2d 257 (1992) (citing *State v. Davison*, 116 Wn.2d 917, 919-20, 809 P.2d 1374 (1991)). A trial court abuses its discretion when its decision is “manifestly unreasonable or based on untenable grounds.” *Grandmaster Sheng-Yen Lu v. King County*, 110 Wn.App. 92, 99, 38 P.3d 1040 (2002). A court's decision is manifestly unreasonable

if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard.

*Grandmaster Sheng-Yen Lu*, 110 Wn.App. at 99, 38 P.3d 1040.

A court's authority to impose restitution is statutory. *Davison*, 116

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<sup>1</sup> The transcript of the restitution hearing is not numbered consecutively to the transcript for the trial. Reference will be made by giving the page number followed by the date of the hearing being referenced.

Wn.2d at 919, 809 P.2d 1374. A judge must order restitution whenever a defendant is convicted of an offense which results in loss of property. RCW 9.94A.753(5). The amount of restitution must be based “on easily ascertainable damages.” RCW 9.94A.753(3). While the claimed loss “need not be established with specific accuracy,” it must be supported by “substantial credible evidence.” *State v. Fleming*, 75 Wn.App. 270, 274-75, 877 P.2d 243 (1994). “Evidence supporting restitution ‘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. Griffith*, 164 Wn.2d 960, 965, 195 P.3d 506 (2008) (emphasis added), *citing State v. Hughes*, 154 Wn.2d 118, 154, 110 P.3d 192 (2005). If a defendant disputes the restitution amount, the State must prove the damages by a preponderance of the evidence. *State v. Kinneman*, 155 Wn.2d 272, 285, 119 P.3d 350 (2005).

Here, the court relied on three sources to find a factual basis to impose the additional \$1,500 restitution on county V: the jury verdict finding Ms. Phillips guilty of count V; the trial testimony of Mr. Ostrander and Ms. Karen Anderson; and the restitution declaration of Mr. Ostrander completed by Ms. Anderson. RP 1-13, 5-1-09.

- a. *Ms. Phillips’ conviction of count V and the testimony of Mr. Ostrander formed an insufficient basis to support the trial court’s order of the additional \$1,500 restitution on count V.*

As argued in Ms. Phillips’ Opening Brief, the trial court erred in finding Mr. Ostrander competent to testify and the State presented insufficient evidence to convict Ms. Phillips of count V since the State presented insufficient evidence to establish how much money was removed

from Mr. Ostrander's box. Ms. Phillips reasserts these same arguments in this supplemental brief as objections to the additional \$1,500 restitution ordered for Count V, but, rather than set the same arguments forth again, incorporates those arguments as set forth in her Opening Brief.

b. *The testimony of Ms. Anderson and the restitution declaration of Ms. Anderson are also an insufficient basis to support the trial court's order of the additional \$1,500 restitution on count V.*

As cited above, "Evidence supporting restitution '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. Griffith*, 164 Wn.2d 960, 965, 195 P.3d 506 (2008) (emphasis added).

At trial, Ms. Anderson testified that Ms. Ostrander kept cash in his house hidden in a black case between the studs in a basement closet. RP 520-521. Ms. Anderson testified that Ms. Ostrander used to keep between \$2,000 and \$4,000 in the basement. RP 520-521. In Mid-August, 2007, Mr. Ostrander showed Ms. Anderson the black case and the case had been rifled through and there was only \$300 in it. RP 524-527. However, Ms. Anderson also testified that Mr. Ostrander had been diagnosed with Alzheimer's in 2004 or 2005 and that she delayed calling the police about the money in the case because Mr. Ostrander had lost track of where he had hidden money in his house once or twice before. RP 528.

The restitution declaration completed by Ms. Anderson verifies that "The \$2,000-\$4,000 from [Mr. Ostrander's] home is an estimate based on the various times he has shown it to me." CP 388-398. Thus, the very evidence

the State used to as a reasonable basis to support the restitution establishes that that evidence is nothing more than speculation and conjecture.

The evidence presented by the State at both the trial and the restitution hearing was insufficient to establish either (a) whether or not any money was actually taken from Mr. Ostrander's money box or (b) if money was stolen, how much money was stolen. The determination by the trial court that Ms. Phillips took \$1,500 from Mr. Ostrander's home is pure speculation and conjecture. Mr. Ostrander was unable to give any evidence as to how much, if any cash was taken from his home and Ms. Anderson's testimony, by her own admission was nothing more than an estimate.

The trial court abused its discretion in ordering the \$1,500 in restitution since that ruling was based on untenable grounds--speculation and conjecture.

## **VI. CONCLUSION**

This court should vacate the restitution order insofar as it imposes the additional \$1,500 on count V for the money allegedly taken from Mr. Ostrander's home.

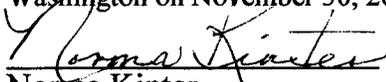
DATED this 30<sup>th</sup> day of November, 2009.

Respectfully submitted,

  
Sheri Arnold, WSBA No. 18760  
Attorney for Appellant

**CERTIFICATE OF SERVICE**

The undersigned certifies that on November 30, 2009, she delivered in person to: the Pierce County Prosecutor's Office, County-City Building, 930 Tacoma Ave. South, Tacoma, Washington 98402, and by United States mail to appellant, Kimberly A. Phillips, DOC # 930811, Washington Corrections Center for Women, 9601 Bujachich Road, Gig Harbor, Washington 98332-0017, true and correct copies of this Supplemental Brief. 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 November 30, 2009.

  
Norma Kinter

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