

NO. 45375-4-II

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

STATE OF WASHINGTON, RESPONDENT

v.

MARYANN REHAUME, APPELLANT

Appeal from the Superior Court of Cowlitz County
The Honorable Stephen Warning

No. 11-1-01298-8

Brief of Respondent

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

1. Whether Defendant failed to show that the trial court abused its discretion in ordering her to pay the cost of prosecution of Defendant as restitution where the County would not have incurred that cost but for Defendant's offenses and had to pay that cost to recover the money stolen through those offenses.
2. Whether the issue of the trial court's inclusion of the loss from the stale cashier's checks in its restitution order is not ripe for review where further factual development is required to properly assess that issue.
3. Whether, assuming the issue is ripe for review, the trial court properly included the loss from stale cashier's checks in its restitution order where Defendant's offense of misappropriation of accounts by a public officer, which entailed removing those checks from the County's possession, prevented those checks from being negotiated in a timely manner.

B. STATEMENT OF THE CASE.

1. Procedure

On December 14, 2011, the State filed an information charging Maryann Rehaume, hereinafter referred to as "defendant," with eight counts of second degree theft in counts I through VIII, one count of third degree theft in count IX, and one count of misappropriation of accounts by a public officer in count X. CP 1-7. This information alleged that the

charges of second degree theft and misappropriation of accounts constituted major economic offenses. CP 1-7.

On January 15, 2013, the State filed an amended information, which omitted surplus language. CP 16-21. *See* RP 1, 9.

The case was called for trial before the Honorable Stephen Warning the same day. RP 1.

The State moved to have Sherry Ard, a state auditor who did most of the investigation of the case, sit with its special deputy prosecutor at counsel table during the trial. RP 10-11. The defendant had no objection to this, and the court allowed it. RP 11.

The parties selected a jury. RP 14-15.

The court then heard motions in limine. RP 15-25. *See* CP 8-15.

The parties gave their opening statements. RP 27.

The State called Christy Tenney, RP 31-38, Chad Williams, RP 40-58, Cowlitz County Sheriff's Detective Todd McDaniel, RP 59-65, Cowlitz County Sheriff's Detective Kelly Lincoln, RP 65-86, 92-105, Robert Rehaume, RP 105-11, Ken Yankee, RP 112-42, 186-87, Kathleen Hanks, RP 145-85, Cim Cogburn, RP 188-214, 221-35, Mariah Perry, RP 235-65, Marin Fox Hight, RP 265-87, and Sherrie Ard, RP 289-310, 322-532.

The State then rested. RP 532.

The Defendant chose not to testify, RP 533, and the defense rested. RP 538.

The parties discussed the court's jury instructions, and neither party took exception to any of those instructions. RP 532-37. The court read the instructions to the jury. RP 539-65; 569. *See* CP 92-124.

The parties gave their closing arguments. RP 569-603 (State's closing argument); 605-27 (Defendant's closing argument); 627-32 (State's rebuttal argument).

On January 18, 2013, the jury returned verdicts of guilty as charged. RP 634-42; CP 125-43.

On February 22, 2013, the trial court sentenced defendant to exceptional, yet concurrent terms of 36 months on counts I through VIII and X, and to 364 days on count IX, which it then suspended, for a term of 36 months in total confinement. CP 154-62; RP 660-62.

The trial court conducted a restitution hearing on May 13, 2013, RP 667-711, at which the State called Crystal Iverson, RP 668-79, and Kris Swanson. RP 679-94. After considering the testimony and argument, the court ordered restitution that included (1) repayment of the \$9,006.28 stolen from Cowlitz County, (2) \$786.00 for subpoena service fees, (3) costs for securing Robert Rehaume's testimony that included \$885.50 in airfare, \$124.30 in mileage from and to SeaTac airport, \$177.42 for

lodging, and \$138 in per diem subsistence costs, (4) \$32,916.98 for the audit and the auditor's attendance and testimony at trial, and (5) \$15,111.55 for the cashier's checks which ultimately became stale for a total award of \$59,146.03. RP 707-11, 714; CP 163-65; Appendix A.

On September 13, 2013, the defendant filed a timely notice of appeal. CP 166-70. *See* RP 666; CP 171-72.

2. Facts

The defendant was the Cowlitz County Probation Department's non-department head secretary, and had duties that included supervision of two cashiers and the processing of financial collections. RP 43-44. Chad Williams was her direct supervisor. RP 41, 42, 243, 272.

The defendant's office collected probation supervision fees. RP 236-28. When a probationer came into the office to make a payment, the cashiers would take the money, and apply the probationer's payments to their accounts in a computer system called Probation Records Office Manager, or "PROM." RP 113-14, 236, 239-40. This would then generate a receipt, one copy of which was given to the probationer and the other paper-clipped to the money received from the probationer. RP 240. The money and receipt would then be placed in a "dropbox." RP 240. However, the PROM system allowed its users to make adjustments to the amounts posted to the accounts. RP 240-41.

At the end of each day, the cashiers took the payments out of the dropbox, placed them in numerical order by receipt number, and gave them to Defendant. RP 242. If Defendant was not present, they would place the deposits in a bank bag and put the bag in Defendant's office safe. RP 244.

The department also received payments for vending machine revenue and notary services, which could not be entered into the PROM system. RP 245.

It also received checks from NCO Financial Systems, which contracted with Cowlitz County probation to service its delinquent accounts, RP 32-34, 246. These checks went directly to the defendant. RP 246.

Marin Fox Hight, Director of Cowlitz County Corrections, testified that it was the defendant's responsibility to transmit the money received in the probation department directly to the Treasurer's Office for deposit in the County's general fund. RP 271.

Both Hight and Chad Williams testified that the defendant was to place the deposits in the safe in her county office until the courier arrived to transport them to the Treasurer's office. RP 46, 274. Both Hight and Williams testified that the defendant was not authorized to place county cash, checks, money orders, or other negotiable instruments anywhere but in the safe in Defendant's county office. RP 46, 274. Nor did Defendant ever seek permission to store money collected for deposit anywhere but in

her office safe. RP 46. In fact, Hight testified that had she been aware that money was kept elsewhere prior to pick up by the courier, she would have initiated an investigation into the defendant. RP 274.

The defendant did not have permission to delay deposits; she was required to send each day's collected funds to the Treasurer's Office the following day. RP 47. Cowlitz County Treasurer Kathleen Hanks testified that the County departments that take in money were required by law to transfer that money to the treasurer within 24 hours, and that this was the County's standard operating procedure. RP 153-54. Defendant was only granted permission to delay transfer of funds to the Treasurer's Office on one occasion. RP 47.

Nevertheless, Cim Cogburn, an office assistant who was supervised by Defendant, testified that it was fairly common for deposits to be seven days late. RP 224.

In fact, on January 5, 2011, Cogburn emailed Hight, and stated that there were no deposits made in probation from November 18, 2010 through the end of that year, and that, as a result, their "year-end numbers were going to be off." RP 275. *See* RP 50.

Hight asked Cogburn to confirm that the Treasurer's office had not processed the deposits and then asked Chad Williams to speak with the defendant and see if there were deposits in defendant's office safe. RP 275.

Williams contacted Defendant and asked her if she could explain. RP 50. The defendant said she couldn't. RP 50. Williams asked Defendant if there was any money in the safe in her office that hadn't been sent to the Treasurer's office and she said, no. RP 50-51.

Williams then had Defendant open the safe and he confirmed that there was no money or deposits in the safe. RP 51. The defendant told him that as soon as the deposits are ready, she gives them to the courier. RP 52. The defendant then told Williams that there was a medical problem and left for the day. RP 51, 276. The defendant was placed on leave the following morning. RP 53, 276.

Hight estimated at the time that roughly \$46,000.00 in deposits were missing. RP 276.

On January 5, 2011, Sherrie Ard, an accountant who works as an assistant fraud audit manager for the Washington State Auditor's Office, was contacted by Cowlitz County, and asked to perform an audit. RP 290-300.

On January 6, 2011, the defendant came to her father-in-law, Robert Rehaume, and told him that she was in trouble and needed his help. RP 106-07. She appeared nervous and upset. RP 107. He withdrew \$31,000.00 from his bank account and gave it to her. RP 108-09.

On January 10, 2011, an attorney representing the defendant delivered 28 individual deposits that had been in Defendant's possession,

each in a separate envelope that included cash and checks, to the Treasurer's Office. RP 157-58, 74. *See* Exhibits 21-48(c). The attorney also gave Cowlitz County Treasurer Kathleen Hanks a letter explaining that the deposits were from Defendant. RP 74,159. *See* CP 198 (letter from attorney). The deposits totaled \$50,333.80, RP 81, of which \$15,311.55 was composed of checks. RP 419. Hanks testified that these funds constituted 28-days worth of deposits from the Probation Department. RP 162.

Hanks told the county auditor about the deposits, and the auditor asked her to hold on to them until law enforcement arrived. RP 162-63. Hanks did so, later giving the deposits to Detective Lincoln. RP 163.

On January 5, 2011, Sherrie Ard began a lengthy audit of the probation department's financial records. RP 290-300; 680-81. That audit revealed the following relevant information, organized by count:

Count I:

A PROM system report prepared by defendant's department indicated that on August 13, 2007, the funds received by the probation department were \$1,815.00 in cash, plus \$1,292.50 in checks for a total of \$3,107.50. RP 299-302, 305, 323; Exhibit 1A.

However, a treasurer's office miscellaneous receipt, showed that on August 13, 2007, the income to the probation department was \$970.00 in cash, plus \$3,251.91 in checks for a total of \$4,221.97. RP 304-05, 327-

28; Exhibit 1C. Thus, the treasurer's office received (\$1,292.50 - \$970.00=) \$845 less in cash than the probation department reported taking in. RP 306-07, 328.

Auditor Sherrie Ard testified that this could happen if the defendant inserted a check into the deposit and took out the \$845.00 in cash. RP 306-07, 332-34.

Ard located a manual receipt which showed that the probation department received a check from NCO on August 13, 2007 in the amount of \$1,114.47. RP 302-03, 325; Exhibit 19.

Exhibit 56, a list of checks written by NCO, did not list any check issued by NCO to Cowlitz County in that amount. RP 303-04, 325-26. In fact, Christy Tenney, a vice president of NCO Financial Systems, testified that NCO had never written a check to Cowlitz County in the amount of \$1,114.47. RP 37-38.

There was, however, an NCO check issued to Cowlitz County probation on July 3, 2007 in the amount of \$1,959.47, which is \$845.00 less than the non-existent \$1,114.47 check entered into PROM. RP 308-09, 332, 334-35.

Count II:

A probation department PROM system report, indicated that on August 10, 2007, the probation department received \$1,186.00 in cash and \$1,470.00 in checks for a total of \$2,656.00. RP 335-36; Exhibit 2A.

A manual receipt bearing the defendant's initials shows that a check was received from NCO for an amount of \$822.29 the same day. RP 336-37. However, Tenney testified that NCO had never written a check to Cowlitz County in the amount of \$822.29. RP 37-38.

When this non-existent \$822.29-check is added to the existing checks, the total amount from checks is \$2,292.29, and the overall total of cash (\$1,186.00) and checks, (\$2,292.29) becomes \$3,478.29. RP 337.

However, while the treasurer's office reported receiving this \$3,478.29 total from the probation department, it wrote a receipt for only \$276.00 in cash and \$3,202.29 in checks. RP 338-39. In other words, the treasurer's office received \$910.00 less in cash than was taken in by the probation department. RP 338-39.

There was, however, a \$1,732.29 check from NCO that was deposited on September 6, 2007. RP 340. This check was obviously written for \$910.00 more than the non-existent \$822.29 check of which Defendant acknowledged receipt. RP 340-41.

Auditor Ard concluded that the person acting as cashier, who signed the defendant's initials to the receipt, took this \$910.00 in cash out of the deposit and replaced it with the putatively additional revenue from this check. RP 341-43.

Count III:

A probation department PROM system report, indicated that on September 10, 2007 the probation department received \$1,550.00 in cash plus \$1,285.00 in checks for a total of \$2,835.00. RP 345; Exhibit 3A.

However, someone entered two adjustments, one of -\$50.00 and one of +\$75.00, for a net +\$25.00 adjustment, which “did not correspond to an actual check payment.” RP 343, 346-47.

Although there was no receipt prepared, an NCO check was also deposited that day in the amount of \$999.69. RP 347-48. NCO never issued a check in that amount to the county. RP 349.

With this check, there would still have been cash in the amount of \$1,550.00, but the check total would have been \$2,259.69, for a total deposit of \$3,809.69.

According to exhibit 3C, the treasurer’s receipt, the treasurer received \$3,809.69, but it was composed of \$289.00 in cash and \$3,520.69 in checks. RP 351-53.

Hence, the treasurer received \$1,261 less in cash than was collected by the probation department. RP 353.

Looking into this, Auditor Ard found a check from NCO written in the amount of \$2,260.69, dated September 5, 2007 (Exhibit 3D), which is \$1,261.00 more than the nonexistent \$999.69 check that was actually

recorded. RP 350. Ard surmised that someone must have recorded the actual \$2,260.69 check as the fictitious \$999.69 check and taken out the \$1,261.00 difference in cash. RP 355.

Count IV:

A probation department PROM system report, indicated that on February 17, 2010 the probation department received \$1,750.00 in cash plus \$945.00 in checks. RP 360-61; Exhibit 4A. However, a \$100 adjustment was added to the check amount, such that there was only \$845 in actual checks and a total of \$2595.00 deposited according to probation department records. RP 360.

However, the receipt prepared by Defendant and sent with the funds to the treasurer indicated that the deposit consisted of \$900.00 in cash and \$1,695.00 in checks for a total of \$2595. RP 361-64. In other words, the treasurer received \$850.00 less in cash than the probation department took in. RP 365.

There was a check from NCO in the amount of \$833.77 included in the deposit, which is \$16.23 less than the cash shortfall. RP 366. However, there was also a money order in this exact \$16.23 amount, which the defendant stipulated she obtained and deposited along with this check. RP 83-84, 367-68.

Auditor Ard concluded that the person who received the PROM transactions that day withdrew \$850.00 in cash from the total deposit and inserted the \$833.77 NCO check and the \$16.23 money order in its stead. RP 368.

Count V:

A probation department PROM system report, indicated that on March 9, 2010, the probation department received \$1,930.00 in cash plus \$420.00 in checks. RP 371-72; Exhibit 5A. However, there was a \$40 adjustment added to checks, so there was actually \$380.00 from checks for a total actual deposit of \$2,310.00 according to probation department records. RP 372-73.

While the treasurer received \$2,310.00 total, it received \$830 in cash and \$1,480.00 in checks. RP 374. The defendant signed the courier's receipt noting these amounts. RP 374-75. Thus, the treasurer received \$1,100.00 less cash than was taken in by the probation department. RP 374.

There was a check from NCO in the amount of \$1,093.35 included in the deposit, which is \$6.65 less than the \$1,100.00 cash shortfall. RP 376. However, there was also a money order in this exact \$6.65 amount, which the defendant stipulated she obtained and deposited along with this check. RP 83-84, 376-77.

Auditor Ard concluded that the person who received the PROM transactions that day withdrew \$1,093.35.00 in cash from the total deposit and inserted the \$1,093.35 NCO check and the \$6.65 money order in its stead. RP 368.

Count VI:

The probation department PROM system report for May 17, 2010 indicates that the probation department received \$3,046.00 in cash plus \$675.00 in checks. RP 380-81. However, there was a \$270 adjustment added to checks, so there was actually \$405.00 from checks for a total actual deposit of \$3,451.00. RP 381-82.

While the treasurer received this \$3,451.00 total, it received \$1,446.00 in cash and \$2,005.00 in checks. RP 382. The defendant signed the courier's receipt noting these amounts. RP 382-83. Thus, the treasurer received \$1,600.00 less cash than was taken in by the probation department. RP 382-83.

Investigating this, Auditor Ard found a check from NCO in the amount of \$1,593.82 included in the deposit, which is \$6.18 less than the \$1,600.00 cash shortfall. RP 384-85. However, there was also a money order in this exact \$6.18 amount, which the defendant stipulated she obtained and deposited along with this check. RP 83-84, 385.

Auditor Ard concluded that someone withdrew \$1,600.00 in cash from the total deposit and inserted the \$1,593.82 NCO check and the \$6.18 money order in its stead. RP 385-86.

Count VII:

The probation department PROM system report for August 9, 2010 indicates that the probation department received \$2,344.00 in cash plus \$810.00 in checks. RP 387-88; Exhibit 7A. However, there was a \$30 adjustment added to checks, so there was actually \$780.00 from checks for a total actual deposit of \$3,124.00. RP 387-88.

The cash total included a \$5.00 notary fee to the probation department, so the cash total to the treasurer was actually \$2,349.00 for a grand total of \$3,129.00. RP 389-90.

While the treasurer received this \$3,129.00 total, it received \$1,289.00 in cash and \$1,840.00 in checks. RP 390-92. The defendant signed the courier's receipt noting these amounts. RP 391. Thus, the treasurer received \$1,060.00 less cash than was taken in by the probation department. RP 390-92.

Looking into this, Auditor Ard found a check from NCO in the amount of \$1,046.49 included in the deposit, which is \$13.51 less than the \$1,060.00 cash shortfall. RP 393. However, there was also a money order in this exact \$13.51 amount, which the defendant stipulated she obtained and deposited along with this check. RP 83-84, 393-94.

Auditor Ard concluded that someone withdrew \$1,060.00 in cash from the total deposit and inserted the \$1,046.49 NCO check and the \$13.51 money order in its stead. RP 394.

Count VIII:

The probation department PROM system report for November 22, 2010 indicates that the probation department received \$4,405.25 in cash plus \$2,590.00 in checks, for a total of \$6,995.25. RP 41; Exhibit 9A.

However, this deposit was not delivered to the treasurer's office until January 10, 2011, when the defendant's attorney brought the funds to that office, after the defendant was placed on leave. RP 411.

While the treasurer received this \$6,995.25 total, she received \$3,445.25 in cash and \$3,550.00 in checks. RP 413-14. Thus, the treasurer received \$960.00 less cash than was taken in by the probation department. RP 414-15. *See* RP 83-84.

Investigating further, Auditor Ard found a check from NCO in the amount of \$952.64 included in the deposit, which is \$7.36 less than the \$960.00 cash shortfall. RP 415-16. *See* RP 83-84. However, there was also a money order in this exact \$7.36 amount, which the defendant stipulated she obtained and deposited along with this check. RP 83-84, 736.

Auditor Ard concluded that someone withdrew \$960.00 in cash from the total deposit and inserted the \$952.64 NCO check and the \$7.36 money order in its stead. RP 394.

Count IX:

The probation department PROM system report for October 19, 2010 indicates that the probation department received \$1,290.00 in cash plus \$2,725.00 in checks that day. RP 395-97; Exhibit 8A.

However, the cash total did not include a \$5.00 notary fee; so, the cash total was actually \$1,295.00 for a grand total of \$4,020.00. RP 397.

While the treasurer received this \$4,020.00 total, it received \$3,215.00 in cash and \$805.00 in checks. RP 397-99.

Investigating this further, Auditor Ard found a receipt for a \$2,400 money order. RP 400. However, while the treasurer's listing did not include a check for this amount, the treasurer did receive cash in this amount, and Ard therefore reclassified this \$2,400 deposit as a cash deposit. RP 401-04. This meant that the probation department received \$3,695.00 in cash and \$325 in checks, and that the treasurer received \$480 less cash than the probation department took in. RP 403.

Auditor Ard found a check from NCO in the amount of \$470.21 included in the deposit, which is \$9.79 less than the \$480.00 cash shortfall. *See* RP 405-06. However, there was also a money order in this exact \$9.79 amount, which the defendant stipulated she obtained and deposited along with this check. RP 83-84, 406-07.

Auditor Ard concluded that someone withdrew \$480.00 in cash from the total deposit and inserted the \$470.21 NCO check and the \$9.79 money order in its stead. RP 407-08.

Count X:

Auditor Ard testified that she was originally called to Cowlitz County to investigate cash missing from the probation department. RP 417-18. One of her responsibilities was to determine how much was missing, and she found, after her audit that \$51,816.00 was missing. RP 418. Of that amount, \$35,022.25 was cash and \$16,793.75 was in checks. RP 418-19.

On January 10, 2011, Defendant's attorney returned \$50,333.80, of which \$35,022.25 was cash and \$15,311.55 was in checks. RP 419.

Restitution Hearing:

At the restitution hearing following the trial, Crystal Iverson, an administrative assistant for the Cowlitz County Prosecutor's Office, testified that Cowlitz County paid \$786 for subpoena service fees that would not have been incurred had defendant's case not been filed. RP 669-71.

She testified that the County incurred expenses for bringing Robert Rehaume from Arizona to Washington to testify that included \$177.42 for lodging, \$131.08 for reimbursement for mileage from and to SeaTac

airport, \$138 per diem for subsistence for Rehaume, and \$985.50 on airfare from and to Arizona. RP 671-74. \$100.00 of the airfare cost was for a change fee brought about when Rehaume refused to accept service of his subpoena in Seattle prior to boarding and had to be issued a subpoena in Arizona. RP 676-77. Iverson testified that but for this case, Cowlitz County would not have incurred any of these expenses. RP 675.

Cowlitz County Auditor Kris Swanson testified that State Auditor's office personnel began an on-site audit as a result of this case which lasted several months. RP 680-81. The County was billed \$26,730.58 for this audit, and \$6,186.40 for the attendance at trial and testimony of a state auditor, for a total of \$32,916.98. RP 682-84. The County paid this amount to the State "as a result of this case." RP 684-85. These amounts would not have been "expended by the county but for the criminal activity that gave rise to this case." RP 685. *See* RP 693.

C. ARGUMENT.

1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ORDERING DEFENDANT TO PAY THE COST OF HER PROSECUTION AS RESTITUTION BECAUSE THE COUNTY WOULD NOT HAVE INCURRED THAT COST BUT FOR DEFENDANT'S OFFENSES AND HAD TO PAY THAT COST TO RECOVER THE MONEY STOLEN THROUGH THOSE OFFENSES.

"Restitution" is

a specific sum of money ordered by the sentencing court to be paid by the offender to the court over a

specified period of time as payment of damages.
The sum may include both public and private costs.

RCW 9.94A.030(42) (emphasis added).

“The authority to impose restitution is not an inherent power of the court, but is derived from statutes.” *State v. McCarthy*, 178 Wn. App. 290, 313 P.3d 1247 (2013) (citing *State v. Gray*, 174 Wn.2d 920, 924, 280 P.3d 1110 (2012)); *State v. Cosgaya-Alvarez*, 172 Wn. App. 785, 291 P.3d 939 (2013) (citing *State v. Tobin*, 161 Wn.2d 517, 524, 166 P.3d 1167 (2007)).

The relevant statute 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 or as provided in subsection (6) of this section unless extraordinary circumstances exist which make restitution inappropriate in the court’s judgment and the court sets forth such circumstances in the record.

RCW 9.94A.753(5); Appendix B (text of RCW 9.94A.753).

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.

RCW 9.94A.753(3) (emphasis added)¹; Appendix B.

“The ‘language of the restitution statute[] indicates legislative intent to grant broad powers of restitution.” *State v. Cosgaya-Alvarez*, 172 Wn. App. 785, 291 P.3d 939 (2013) (quoting *State v. Davison*, 116 Wn.2d 917, 920, 809 P.2d 1374 (1991)).

While the restitution statute directs that restitution “shall” be ordered, it does not say that the restitution ordered must be equivalent to the injury, damage or loss, either as a minimum or a maximum, nor does it contain a set maximum that applies to restitution. Instead, RCW 9.94A.753 allows the judge considerable discretion in determining restitution, which ranges from none (in some extraordinary circumstances) up to double the offender's gain or the victim's loss.

State v. Kinneman, 155 Wn.2d 272, 119 P.3d 350 (2005). See *Tobin*, 161 Wn.2d at 524.

Restitution is both punitive and compensatory. *State v. Kinneman*, 155 Wn.2d 272, 279-80, 119 P.3d 250 (2005). The restitution statute requires the defendant “to face the consequences of his or her criminal conduct.” *Tobin*, 161 Wn.2d at 524, 166 P.3d 1167. Because the restitution statute is interpreted to carry out the statutory goals, the court “does not engage in overly technical construction that would permit the defendant to escape from just punishment.” *Tobin*, 161 Wn.2d at 524, 166 P.3d 1167.

¹ Moreover, “where criminal profiteering is involved, the attorney general or a county prosecutor may, on behalf of the State, file an action in superior court for the recovery of damages and costs, ‘including reasonable investigative and attorney’s fees.’” *State v. Tobin*, 161 Wn.2d 517, 523, 166 P.3d 1167 (2007) (quoting RCW 9A.82.100(1)). “The definition of criminal profiteering includes theft as defined in RCW 9A.56.030.” *Id.* (citing RCW 9A.82.010(4)(e)).

Cosgaya-Alvarez, 172 Wn. App. at 790-91. See *Tobin*, 161 Wn.2d at 524.

“Restitution is allowed only for losses that are ‘causally connected’ to the crimes charged,” but “foreseeability is not required.” *Tobin*, 161 Wn.2d at 524. Thus, the Supreme Court has approved the “application of a ‘but for’ inquiry to determine causation.” *Tobin*, 161 Wn.2d at 524.

“[F]unds expended by a victim as a direct result of the crime (whether or not the victim is an ‘immediate’ victim’ of the offense) can be a loss of property on which restitution is based.” *Tobin*, 161 Wn.2d at 524.

“Attorney fees and costs may constitute damages on which restitution may be based, depending on the circumstances.” *State v. Kinneman*, 155 Wn.2d 272, 288, 119 P.3d 350 (2005). Indeed, restitution for attorney’s fees is only improper where “the fees are not sufficiently causally connected to the offense.” *Kinneman*, 155 Wn.2d at 288-89 (citing *State v. Vinyard*, 50 Wn. App. 888, 894, 751 P.2d 339 (1988)).

“[E]xpenditure of funds for investigative costs can be loss of property” within the meaning of RCW 9.94A.753(3). *State v. Kinneman*, 155 Wn.2d.272, 287, 119 P.3d 250 (2005). Thus, courts have “allowed restitution to include investigative costs that are “‘reasonably and rationally related to the crime and consequential in the sense that but for the [crime], the victim would not have incurred them.’ ” *Tobin*, 161 Wn.2d at 525 (quoting *State v. Kinneman*, 155 Wn.2d.272, 287, 119 P.3d

250 (2005)(quoting *State v. Wilson*, 100 Wn. App. 44, 50, 995 P.2d 1260 (2000))). Thus, “[t]he costs of investigating embezzlement have... been deemed proper restitution.” *Id.*

“The decision to impose restitution and the amount thereof are within the trial court’s discretion.” *State v. Woods*, 90 Wn. App. 904, 906, 953 P.2d 834 (1998). This Court “review[s] a trial court’s restitution order for abuse of discretion,” *State v. Clapp*, 67 Wn. App. 263, 276, 834 P.2d 1101 (1992), and “will reverse such an order only if it is manifestly unreasonable or the sentencing court exercised its discretion on untenable grounds or for untenable reasons.” *Woods*, 90 Wn. App. at 906. *See State v. Tobin*, 161 Wn.2d 517, 523, 166 P.3d 1167 (2007).

In the present case, Defendant argues that the court erred in ordering her to pay the costs of her prosecution as restitution because, she contends this expense should have been classified as “costs” under RCW 10.01.160, rather than as restitution under RCW 9.94A.753. Brief of Appellant (BOA), p. 6-9. Defendant’s argument is premised on the notion that “[w]itness costs, investigator expenses, and sheriff service fees are examples of court costs which may be recouped under RCW 10.01.160.” BOA, p. 7. However, just because such costs *may* be ordered as court costs, does not mean they should *not* be ordered as restitution.

In fact, Defendant cites and the State has found no authority which requires such costs to be recouped as court costs under RCW 10.01.160 rather than restitution under RCW 9.94A.753. *See* BOA, p. 1-11. Rather, the statutory and decisional law demand the opposite.

Appellate courts have held that “[a]ttorney fees and costs may constitute damages on which restitution may be based.” *Kinneman*, 155 Wn.2d at 288-89.

For example, in *State v. Christensen*, the defendant was an attorney, who was “convicted of stealing from his clients.” 100 Wn. App. 534, 535, 997 P.2d 1010 (2000), Division 1 of this Court affirmed a restitution order awarding the victim “attorney fees from and costs in the civil suit in which she recovered part of her loss” because the victim “incurred the fees as a direct result of Christensen’s offense,” and “had to pay attorney fees to get any recovery at all.” *Christensen*, 100 Wn. App. at 537-38. *See Tobin*, 161 Wn.2d at 524-25 (citing *State v. Kinneman*, 155 Wn.2d.272, 288, 119 P.3d 250 (2005)).

In this case, the victim is not a private person, but the County of Cowlitz. However, the Washington State Supreme Court has specifically held that where a public entity is a victim, our restitution scheme allows it to recover costs that are causally connected to the defendant’s acts. *Tobin*, 161 Wn.2d at 531. Thus, a government entity, like a private person, may

be entitled to restitution. *See* RCW 9.94A.030(42) (restitution “sum may include both public and private costs.”).

Moreover, like the private victim in *Christensen*, the County here “had to pay attorney fees to get any recovery at all.” *Christensen*, 100 Wn. App. at 538. Those attorney fees were the cost of prosecution of the defendant, including the “the subpoena service fees, witness costs, and investigator expenses” which Defendant challenges. BOA, p. 8. Because the County here, like the victim in *Christensen*, “incurred the[se] fees as a direct result of [the defendant’s] offense,” the trial court did not abuse its discretion in ordering their repayment as restitution. *Christensen*, 100 Wn. App. at 537-38. Given that the County

had to pay attorney fees to get any recovery at all... [it] remained considerably out of pocket with respect to the funds [Defendant] stole from [it]. The trial court, rightly concerned with making [the victim] whole, ordered [Defendant] to make up the shortfall. This was not an abuse of discretion under the restitution statute. [The victim] incurred the fees as a direct result of [Defendant]'s offense. *See State v. Wilson*, 100 Wash.App. 44, 995 P.2d 1260 (2000) (distinguishing *Martinez*, [78 Wn.App. 870, 899 P.2d 1302 (1995),] and holding that a victim may recover attorney fees incurred as a direct result of the crime for which restitution is being ordered). As the trial court explained, [the victim] “would have received zero” without her attorney's efforts.

Christensen, 100 Wn. App. at 538.

The trial court here, like that in *Christensen*, did not abuse its discretion in its order of restitution. Therefore, that order should be affirmed.

2. THE ISSUE OF THE TRIAL COURT’S INCLUSION OF THE LOSS FROM THE STALE CASHIER’S CHECKS IN ITS RESTITUTION ORDER IS NOT RIPE FOR REVIEW BECAUSE FURTHER FACTUAL DEVELOPMENT IS REQUIRED TO PROPERLY ASSESS THAT ISSUE.

“[G]enerally challenges to orders establishing legal financial sentencing conditions that do not limit a defendant's liberty are not ripe for review until the State attempts to curtail a defendant's liberty by enforcing them.” *State v. Lundy*, 176 Wn. App. 96, 108, 308 P.3d 755 (2013). Such challenges are only “ripe for review when the issue raised is primarily legal, *further factual development is not required, and the challenged action is final.*” *State v. McWilliams*, 177 Wn. App. 139, 153, 311 P.3d 584 (2013) (emphasis added).

In this case, the trial court included the following relevant provision in its restitution order:

5. Outdated Cashier’s Checks Retained in Evidence:
\$15,111.55
 - a. PROVIDED, HOWEVER, that the County is hereby directed to withdraw these items from

evidence and replace them with copies, then submit them for payment, making a reasonable effort to have them honored. The Cowlitz County Clerk is directed to cooperate with this process. Any amount honored shall be deducted from the defendant's restitution obligation.

- b. PROVIDED FURTHER, that after the process described in (a), supra, has been undergone, the defense may request reconsideration herein.

CP 164.

Although Defendant challenges this provision, *see* BOA, p. 9-11, "further factual development," *McWilliams*, 177 Wn. App. at 153, is required to properly assess that challenge.

The restitution order requires the County to submit the stale cashier's checks for payment and that the amount due be reduced by any amounts actually honored. CP 164. Thus, it's at least possible that the County will be able to negotiate all of the cashier's checks and that the amount owed by Defendant will be zero. If so, the issue raised by Defendant will be moot.

Therefore, until there is a record of at least one of the stale checks being rejected, the issue is not ripe for review.

3. ASSUMING THE ISSUE IS RIPE FOR REVIEW, THE TRIAL COURT PROPERLY INCLUDED THE LOSS FROM THE STALE CASHIER'S CHECKS IN ITS RESTITUTION ORDER BECAUSE DEFENDANT'S OFFENSE OF MISAPPROPRIATION OF ACCOUNTS BY A PUBLIC OFFICER, WHICH ENTAILED REMOVING THOSE CHECKS FROM THE COUNTY'S POSSESSION, PREVENTED THOSE CHECKS FROM BEING NEGOTIATED IN A TIMELY MANNER.

“Restitution shall be ordered whenever [*inter alia*,] the offender is convicted of an offense which results in injury to any person or damage to or loss of property.” RCW 9.94A.753(5); Appendix B. Again, “[r]estitution is allowed only for losses that are ‘causally connected’ to the crimes charged,” though “foreseeability is not required.” *Tobin*, 161 Wn.2d at 524. Instead, the Supreme Court has approved the “application of a ‘but for’ inquiry to determine causation.” *Tobin*, 161 Wn.2d at 524.

While Defendant argues that “there is insufficient causal connection between the outdated cashier’s checks and the charged offenses to include that loss in the order of restitution,” BOA, p. 10, the record demands otherwise.

Defendant was charged with misappropriation of accounts by a public officer by, *inter alia*, appropriating to “her own use or the use of any person not entitled thereto, without authority of law, any money so received by... her as such officer.” RCW 42.20.070(1); CP 16-21.

According to the testimony of both Marin Fox Hight, Director of Cowlitz County Corrections, and Probation Services Director Chad Williams, the defendant was required to place the deposits in the safe in her county office until the courier arrived to transport them to the Treasurer's office. RP 46, 274. Both Hight and Williams testified that the defendant was not authorized to place county cash, checks, money orders, or other negotiable instruments anywhere but in the safe in Defendant's county office. RP 46, 274.

Thus, when Defendant removed money and checks from her county office and kept them in her own possession, she appropriated to her own use money received as a public officer and thereby committed the offense of misappropriation of funds by a public officer. *See* RCW 42.20.070(1); CP 16-21.

But for this offense, the cashier's checks later revealed to have been in her possession, would have been in her office when Williams searched for them, and could have been promptly negotiated.

It was only because she removed those checks from her office that they could not be negotiated promptly, and instead became a part of an investigation, which by virtue of the volume and complexity of Defendant's offenses, extended until those checks became stale. *See, e.g.* RP 709-10. Investigators retained the original checks rather than

attempting to negotiate them because of concern that they may have been in some way fraudulent. RP 709-10. They could not rule out this possibility until the entire audit was complete, that is, until after the checks had become stale. RP 709-10.

Hence, the \$15,111.55 loss from the stale checks that had been misappropriated by Defendant is “causally connected’ to the crimes charged,” *Tobin*, 161 Wn.2d at 524, and an award of restitution in that amount it therefore appropriate.

As a result, the trial court properly included the \$15,111.55 loss from stale cashier’s checks in its restitution order and cannot have abused its discretion in so doing.

Therefore, the trial court’s restitution order should be affirmed.

D. CONCLUSION.

The trial court did not abuse its discretion in ordering Defendant to pay the cost of prosecution as restitution because the County would not have incurred that cost but for Defendant’s offenses and had to pay that cost to recover the money stolen through those offenses.

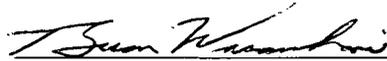
The issue of the trial court’s inclusion of the loss from the stale cashier’s checks in its restitution order is not ripe for review because further factual development is required to properly assess that issue.

Assuming the issue is ripe for review, the trial court properly included the loss from stale cashier's checks in its restitution order because Defendant's offense of misappropriation of accounts by a public officer, which included removing those checks from the County's possession, prevented those checks from being negotiated in a timely manner.

Therefore, the trial court's restitution order should be affirmed.

DATED: June 17, 2014.

SUSAN I. BAUR
Cowlitz County
Prosecuting Attorney



Brian Wasankari
Special Deputy Prosecuting Attorney
WSB # 28945

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.

6-17-14 
Date Signature

**APPENDIX A:
FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER
RE: LEGAL FINANCIAL OBLIGATIONS**

FILED
SUPERIOR COURT

2013 AUG 29 A 10:19

COWLITZ COUNTY
BEVERLY R. LITTLE, CLERK

BY AB

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF COWLITZ

STATE OF WASHINGTON,)
)
 Plaintiff,)
)
 vs.)
)
 MARYANN REHAUME,)
)
 Defendant.)

Cause No. 11-1-01298-8

FINDINGS OF FACT, CONCLUSIONS
OF LAW AND ORDER
RE: LEGAL FINANCIAL OBLIGATIONS

BASED on the file herein, the evidence adduced at trial, and the testimony of witnesses on Monday, May 13, 2013, the court hereby finds as follows:

I. FINDINGS AND CONCLUSIONS

The Declarations of Special Prosecuting Attorney Regarding Restitution filed herein are supported by the testimony of witnesses and the court finds them true and accurate by the standard of a preponderance of the evidence. The court finds that the County of Cowlitz expended money as described therein and that all money so spent would not have been expended but for the criminal activity of the defendant.

The court specifically finds that it is appropriate to award as restitution the costs of the State Auditor's Office's audit of the Cowlitz County Probation Department, and that such costs reasonably

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Page 1 of 3

13-9-00461-1

(83)

Daniel H. Bigelow
Prosecuting Attorney
P.O. Box 397
Cathlamet, Washington 98612
(360) 795-3652

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1 include the expense of State Auditor Sherrie Ard attending the trial at the prosecutor's side throughout
2 as investigating assistant.

3 **II. ORDER**

4 **IT IS HEREBY ORDERED** that legal financial obligations are awarded as follows:

- 5 1. For the amount stolen, as pled and proved at trial: \$9,006.28
- 6 2. For subpoena service fees: \$786
- 7 3. Travel for state's witness Robert Rehaume:
- 8 a. \$177.42 for lodging
- 9 b. \$138 per diem for subsistence. The court denies the State's request that Robert
10 Rehaume's daughter Cheryl Togashi's per diem be awarded. She accompanied the
11 witness, but in fairness, the defendant should not be required to bear that additional
12 cost.
- 13 c. Airfare to and from Phoenix, AZ, through SeaTac Airport: \$885.50. The court denies
14 the State's request to be awarded the cost of a change fee since that expense was
15 brought about in part through the State's failure to immediately go through the
16 interstate subpoena procedure.
- 17 d. Mileage from SeaTac to Kelso and back: \$124.30. The State's request for an additional
18 \$6.78 is denied. The court is aware of the cost of this trip and exercises its discretion in
19 setting the rate pursuant to its own awareness.
- 20 4. Cost of Audit: The court awards a total of \$32,916.98; comprised of \$6,186.40 for the time the
21 auditor spent at trial and the remainder, \$26,730.58, for the audit of the Cowlitz County Probation
22 Department.
- 23 5. Outdated Cashier's Checks Retained in Evidence: \$15,111.55
- 24 a. PROVIDED, HOWEVER, that the County is hereby directed to withdraw these items
25 from evidence and replace them with copies, then submit them for payment, making a
reasonable effort to have them honored. The Cowlitz County Clerk is directed to
cooperate with this process. Any amount honored shall be deducted from the
defendant's restitution obligation.
- b. PROVIDED FURTHER, that after the process described in (a), supra, has been
undergone, the defense may request reconsideration herein.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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6. Since all monies ordered herein are to be paid to Cowlitz County, the Court labels them all restitution for accounting convenience.

7. The awards made in the Judgment and Sentence herein are not superseded and remain in full force and effect.

8. **TOTAL AWARD:** \$59,146.03 in this order.

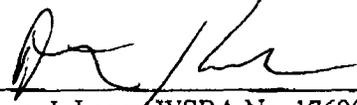
DATED this 29 day of August, 2013.



JUDGE

Presented by:


Daniel H. Bigelow, WSBA No. 21227
Special Deputy Prosecuting Attorney

Approved as to form: *Not approved*


Anthony J. Lowe, WSBA No. 17690
Attorney for Defendant

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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(360) 795-3652

**APPENDIX B:
TEXT OF RCW 9.94A.753**

9.94A.753. Restitution--Application dates

This section applies to offenses committed after July 1, 1985.

(1) When restitution is ordered, the court shall determine the amount of restitution due at the sentencing hearing or within one hundred eighty days except as provided in subsection (7) of this section. The court may continue the hearing beyond the one hundred eighty days for good cause. The court shall then set a minimum monthly payment that the offender is required to make towards the restitution that is ordered. The court should take into consideration the total amount of the restitution owed, the offender's present, past, and future ability to pay, as well as any assets that the offender may have.

(2) During the period of supervision, the community corrections officer may examine the offender to determine if there has been a change in circumstances that warrants an amendment of the monthly payment schedule. The community corrections officer may recommend a change to the schedule of payment and shall inform the court of the recommended change and the reasons for the change. The sentencing court may then reset the monthly minimum payments based on the report from the community corrections officer of the change in circumstances.

(3) 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.

(4) For the purposes of this section, for an offense committed prior to July 1, 2000, the offender shall remain under the court's jurisdiction for a term of ten years following the offender's release from total confinement or ten years subsequent to the entry of the judgment and sentence, whichever period ends later. Prior to the expiration of the initial ten-year period, the superior court may extend jurisdiction under the criminal judgment an additional ten years for payment of restitution. For an offense committed on or after July 1, 2000, the offender shall remain under the court's jurisdiction until the obligation is completely satisfied, regardless of the statutory maximum for the crime. The portion of the sentence concerning restitution may be modified as to amount, terms, and conditions during any period of time the offender remains under the court's jurisdiction, regardless of the expiration of the offender's term of community supervision and regardless of the statutory maximum sentence for the crime. The court may not reduce the total amount of

restitution ordered because the offender may lack the ability to pay the total amount. The offender's compliance with the restitution shall be supervised by the department only during any period which the department is authorized to supervise the offender in the community under RCW 9.94A.728, 9.94A.501, or in which the offender is in confinement in a state correctional institution or a correctional facility pursuant to a transfer agreement with the department, and the department shall supervise the offender's compliance during any such period. The department is responsible for supervision of the offender only during confinement and authorized supervision and not during any subsequent period in which the offender remains under the court's jurisdiction. The county clerk is authorized to collect unpaid restitution at any time the offender remains under the jurisdiction of the court for purposes of his or her legal financial obligations.

(5) Restitution 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 or as provided in subsection (6) of this section unless extraordinary circumstances exist which make restitution inappropriate in the court's judgment and the court sets forth such circumstances in the record. In addition, restitution shall be ordered to pay for an injury, loss, or damage if the offender pleads guilty to a lesser offense or fewer offenses and agrees with the prosecutor's recommendation that the offender be required to pay restitution to a victim of an offense or offenses which are not prosecuted pursuant to a plea agreement.

(6) Restitution for the crime of rape of a child in the first, second, or third degree, in which the victim becomes pregnant, shall include: (a) All of the victim's medical expenses that are associated with the rape and resulting pregnancy; and (b) child support for any child born as a result of the rape if child support is ordered pursuant to a civil superior court or administrative order for support for that child. The clerk must forward any restitution payments made on behalf of the victim's child to the Washington state child support registry under chapter 26.23 RCW. Identifying information about the victim and child shall not be included in the order. The offender shall receive a credit against any obligation owing under the administrative or superior court order for support of the victim's child. For the purposes of this subsection, the offender shall remain under the court's jurisdiction until the offender has satisfied support obligations under the superior court or administrative order for the period provided in RCW 4.16.020 or a maximum term of twenty-five years following the offender's release from total confinement or twenty-five years subsequent to the entry of the judgment and sentence, whichever period is longer. The court may not reduce the total amount of restitution ordered because the offender may lack the ability to pay the total amount. The department shall supervise the offender's compliance with the restitution ordered under this subsection.

(7) Regardless of the provisions of subsections (1) through (6) of this section, the court shall order restitution in all cases where the victim is entitled to benefits under the crime victims' compensation act, chapter 7.68 RCW. If the court does not order restitution and the victim of the crime has been determined to be entitled to benefits under the crime victims' compensation act, the department of labor and industries, as administrator of the crime victims' compensation program, may petition the court within one year of entry of

the judgment and sentence for entry of a restitution order. Upon receipt of a petition from the department of labor and industries, the court shall hold a restitution hearing and shall enter a restitution order.

(8) In addition to any sentence that may be imposed, an offender who has been found guilty of an offense involving fraud or other deceptive practice or an organization which has been found guilty of any such offense may be ordered by the sentencing court to give notice of the conviction to the class of persons or to the sector of the public affected by the conviction or financially interested in the subject matter of the offense by mail, by advertising in designated areas or through designated media, or by other appropriate means.

(9) This section does not limit civil remedies or defenses available to the victim, survivors of the victim, or offender including support enforcement remedies for support ordered under subsection (6) of this section for a child born as a result of a rape of a child victim. The court shall identify in the judgment and sentence the victim or victims entitled to restitution and what amount is due each victim. The state or victim may enforce the court-ordered restitution in the same manner as a judgment in a civil action. Restitution collected through civil enforcement must be paid through the registry of the court and must be distributed proportionately according to each victim's loss when there is more than one victim.

CREDIT(S)

[2003 c 379 § 16, eff. Oct. 1, 2003. Prior: 2000 c 226 § 3; 2000 c 28 § 33; prior: 1997 c 121 § 4; 1997 c 52 § 2; prior: 1995 c 231 § 2; 1995 c 33 § 4; 1994 c 271 § 602; 1989 c 252 § 6; 1987 c 281 § 4; 1985 c 443 § 10. Formerly RCW 9.94A.142.]

PIERCE COUNTY PROSECUTOR

June 17, 2014 - 1:40 PM

Transmittal Letter

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Case Name: STATE V. MARYANN REHAUME

Court of Appeals Case Number: 45375-4

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Statement of Arrangements

Motion: _____

Answer/Reply to Motion: _____

Brief: Respondent's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: _____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

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