FILED
May 07, 2012
Court of Appeals
Division III
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 30280-6-III

STATE OF WASHINGTON, Respondent,

v.

JODY DANIELLE BORING, Appellant.

APPELLANT'S BRIEF

Andrea Burkhart, WSBA #38519
Burkhart & Burkhart, PLLC
6 ½ N. 2nd Avenue, Suite 200
PO Box 946
Walla Walla, WA 99362
Tel: (509) 529-0630
Fax: (509) 525-0630
Attorney for Appellant

TABLE OF CONTENTS

Authorities Cited.....ii

I. INTRODUCTION.....1

II. ASSIGNMENTS OF ERROR.....2

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.....3

IV. STATEMENT OF THE CASE.....3

V. ARGUMENT.....9

I. Jody Boring cannot be jointly and severally liable with Chris Boring because she was not convicted as an accomplice.....11

II. The trial court erred in finding a causal connection between Jody Boring's role in the crime and all of Hewes Craft's material losses when there was no evidence she was responsible for, or knew about, the theft of the material.....14

III. The trial court denied Jody Boring due process of law when it ordered restitution based on Hewes Craft's alleged losses after it denied her request for a continuance to investigate both allegations of other thefts from Hewes Craft and Hewes Craft's manner of calculating its restitution request.....16

VI. CONCLUSION.....19

CERTIFICATE OF SERVICE.....21

AUTHORITIES CITED

Cases

State v. Acevedo, 159 Wn. App. 221, 248 P.3d 526 (2011).....11, 15

State v. Cronin, 142 Wn.2d 568, 14 P.3d 752 (2000).....12

State v. Dauenhauer, 103 Wn. App. 373, 12 P.3d 661 (2000).....14

State v. Griffith, 164 Wn.2d 960, 195 P.3d 506 (2008).....10

State v. Hunotte, 69 Wn. App. 670, 851 P.2d 694 (1993).....15

State v. Israel, 113 Wn. App. 243, 54 P.3d 1218 (2002).....12, 13

State v. Kinneman, 155 Wn.2d 272, 119 P.3d 350 (2005).....10

State v. Kisor, 68 Wn. App. 610, 844 P.2d 1038 (1993).....17, 18

State v. Oakley, 158 Wn. App. 544, 242 P.3d 886 (2010).....14

State v. Pollard, 66 Wn. App. 779, 834 P.2d 51 (1992).....17

State v. Stein, 144 Wn.2d 236, 27 P.3d 184 (2001).....13

State v. Woods, 90 Wn. App. 904, 956 P.2d 834 (1998).....11, 14, 15

Statutes

RCW 9A.08.020(3).....11, 13

RCW 9A.82.050.....11

RCW 9A.82.055(1).....12

RCW 9.94A.753.....10

I. INTRODUCTION

Jody Boring was convicted of the lesser included offense of second degree trafficking in stolen property, arising from her involvement in transporting and selling stolen aluminum sheet and scrap metal to a recycler in Spokane at her husband's direction. The verdict reflected the jury's finding that she had acted recklessly rather than knowingly in perpetrating the crime. At a restitution hearing following her conviction, the trial court imposed restitution in the amount of $550,466 and ordered her jointly and severally liable with her husband, even though the amount of damages suffered by the victim was not causally connected to her role in the crime and even though the jury specifically found that she did not have knowledge of the criminal activity. The trial court further denied her request for a continuance to investigate reports of other thefts from the victim, as well as the victim's manner of calculating its restitution request, based on its assertion that it would calculate damages based solely on the amount of metal sold to the recycle company. But the trial court subsequently calculated its restitution award based entirely on the victim's calculation rather than the receipts documenting the amount of metal sold to the recycle company, a difference of over $300,000.

The trial court's restitution order was erroneous because Jody Boring was not liable for the total losses associated with the crime as she

was not an accomplice to the crime. Further, there was no evidence presented and nothing in the nature of the charges presented that indicated she was responsible for the theft of the material, or even had knowledge of the theft – her role was limited to unwittingly transporting and selling some truck loads of stolen metal. Lastly, by failing to grant a reasonable opportunity to investigate reports of other thefts and the victim's manner of calculating its losses, the trial court deprived her of due process of law when it subsequently calculated its restitution award based on the victim's claimed losses rather than the documented material sold. The restitution award should be vacated and the matter remanded for recalculation of the amount causally connected with Jody Boring's role in the crime.

II. ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR 1: The trial court erred as a matter of law in concluding that Jody Boring was jointly and severally liable for restitution to Hewes Craft with Chris Boring when she was not an accomplice.

ASSIGNMENT OF ERROR 2: The trial court erred as a matter of law in concluding that Jody Boring caused all of Hewes Craft's losses.

ASSIGNMENT OF ERROR 3: The trial court abused its discretion in imposing restitution against Jody Boring in the amount of $550,433.00.

ASSIGNMENT OF ERROR 4: The trial court violated Jody Boring's right to due process of law when it refused to grant her a continuance to investigate evidence of other thefts from Hewes Craft that contributed to its losses, as well as Hewes Craft's methodology in calculating its restitution request.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

ISSUE 1: When the jury implicitly found that Jody Boring did not have knowledge that the metal she sold to a recycler was stolen, by her husband, can she be jointly and severally liable for the value of all of the stolen metal with her husband? **NO.**

ISSUE 2: When Jody Boring was convicted of recklessly trafficking in stolen property and no evidence was presented that she was involved in the underlying thefts, is there a causal relationship between her conduct and the victim's losses that justifies entering a restitution order based upon the value of all of the victim's losses? **NO.**

ISSUE 3: When Jody Boring requested additional time to investigate a witness who had approached her about other thefts at Hewes Craft that contributed to its losses of material, and to examine Hewes Craft's records to analyze how it calculated its restitution request, did the trial court's

denial of her request violate due process by depriving her of a full and fair opportunity to refute the State's allegations? **YES.**

IV. STATEMENT OF THE CASE

Jody Boring was charged with first degree trafficking in stolen property consisting of metal unlawfully taken from Hewes Craft in Colville, Washington. CP 1-2; RP[1] (Trial) 116. Hewes Craft is a manufacturer of aluminum fishing boats. RP (Trial) 105. Boring's husband, Chris, began working for Hewes Craft[2] in 2005 and was promoted to a supervisory position within a few years. RP (Trial) 104-05, 160.

At some time in 2008, Hewes Craft began noticing a large discrepancy between its inventory reports and the amount of raw aluminum actually on hand. RP (Trial) 106. On further investigation, Hewes Craft also discovered that the scrap it ordinarily produced and sold as recycled material was missing. RP (Trial) 111, 113. Hewes Craft

---

[1] The verbatim reports consist of two consecutively paginated volumes reporting hearings held on July 22, 2011 through September 26, 2011, which volumes shall be referred to herein as "RP (Trial)"; and a single volume reporting hearings held on January 19, 2012 through January 31, 2012, which volume shall be referred to herein as "RP (Restitution)."

[2] "Hewes Craft" is occasionally referred to throughout the proceedings as "Hewes Marine Company." *See, e.g.*, RP (Trial) 103. For consistency, the name "Hewes Craft" shall be used herein.

determined that both aluminum sheet and scrap material were disappearing from its factory. RP (Trial) 114.

Beginning in about August 2007, a company named Bella Boats began selling scrap metals to Action Recycle in Spokane. RP (Trial) 55-57. In particular, Bella Boats sold to Action Recycle a large amount of aluminum 5052, a rare alloy. RP (Trial) 59, 64-65. Aluminum 5052 is a marine grade alloy that Hewes Craft used in making smaller boats. RP (Trial) 132.

Chris Boring and Jody Boring[3] signed invoices from Action Recycle on behalf of Bella Boats and were recognized by Action Recycle employees as representatives of Bella Boats. RP (Trial) 46, 48-49, 57-58. Jody would occasionally deliver materials to Action Recycle, usually consisting of several hundred pounds of metal on a pallet. RP (Trial) 58.

During the investigation, law enforcement officers recovered two pallets of material that had been sold to Action Recycling by Bella Boats. RP (Trial) 96. Hewes Craft employees inspected the material recovered and were able to identify it as coming from Hewes Craft based on the distinctiveness of the material and markings on it. RP (Trial) 133-34.

---

[3] Since Jody and Chris Boring share their last names, each will be referred to by first name, intending no disrespect.

During Jody's trial, Chris testified that he began asking her to deliver loads of scrap to Action Recycle while she was traveling to Spokane for her mother's cancer treatment. RP (Trial) 163-64. He began to lie to her to hide his gambling habit. RP (Trial) 164. Chris admitted that he began taking the metals from Hewes Craft and recycling them without permission, although he lied to Jody and told her he did. RP (Trial) 168. Chris testified that he was also recycling scrap from side jobs like building tree stands during this time period. RP (Trial) 161-62, 174-76. Jody admitted that she delivered truckloads of scrap metal to Action Recycle at Chris's request but denied that she knew anything was wrong. RP (Trial) 197-98.

The jury convicted Jody of the lesser included offense of second degree trafficking in stolen property, and further found that the crime was a major economic offense or series of offenses. CP 68-69. A separate restitution hearing was held. At the beginning of the hearing, the Borings sought a continuance to obtain additional documentation from Hewes Craft. RP (Restitution) 3. Additionally, Jody claimed to have a witness who would testify that other employees were stealing metal from Hewes Craft and sought additional information to show that Hewes Craft did not accurately calculate its losses. RP (Restitution) 5-6. The State objected to a continuance, contending that it would prove the amount of restitution

based on what it could prove the Borings sold to Action Recycle, not the amount of material that Hewes Craft reported as lost. RP (Restitution) 7-8. The trial court denied the Borings' discovery request on the grounds that if the restitution calculation were derived from the Action Recycle records, then confounding issues such as poor inventory controls and other thieves would not be relevant to the amount of restitution. RP (Restitution) 8, 11-12.

Subsequently, the State called Bill Hewes, a part owner of Hewes Craft, to testify. RP (Restitution) 28. Jody renewed her objection to Hewes' testimony without an opportunity to examine discrepancies in Hewes' financial accounting practices. RP (Restitution) 29. The trial court again overruled the objection, finding that the testimony was simply offered to show a correlation between the amount of scrap missing from Hewes Craft and the amount of material sold to Action Recycle, and that the State would prove the amount of restitution based on what was sold at Action Recycle. RP (Restitution) 31. Hewes then testified that the total amount paid out by Action Recycle to Chris and Jody was $213,758.52. RP (Restitution) 35.

However, over the objection of counsel, Hewes then presented additional evidence about the amount of Hewes Craft's losses based on its

inventory records of sheet and scrap. RP (Restitution) 39-40, 42-44. Trial counsel argued that the fact that Hewes Craft experienced shrinkage was insufficient to prove that the shrinkage was caused by Chris and Jody, and that it implicated the request to investigate a witness report that other individuals were stealing metal from Hewes Craft. RP (Restitution) 43.

Ultimately, Hewes presented evidence of hypothetical costs to Hewes Craft based on three different assumptions of the ratio between sheet metal and scrap metal in each of the pallets sold. RP (Restitution) 53-54. According to Hewes, if the percentage of raw material to scrap material were 55 percent, the cost to Hewes Craft would be $481,219; if the percentage were 70 percent, the cost would be $556,133; and if the percentage were 85 percent, the cost would be $631,048. RP 55-56. Hewes contended that based on the two pallets recovered, the 70 percent estimate would be conservative. RP (Restitution) 57.

At the conclusion of the hearing, contrary to its representation that it would prove damages based on the amount of scrap sold to Action Recycle, the State relied exclusively on Hewes's calculations of the cost to Hewes Craft and requested restitution of $556,133 based on an estimate that the amount of materials sold by Chris and Jody consisted of 70 percent raw aluminum. RP (Restitution) 79. Trial counsel questioned the

causal relationship between Hewes Craft's losses and the restitution requested by the State, and further argued that Jody should not be jointly and severally liable with Chris based on her lack of knowledge of Chris's thefts. RP (Restitution) 80-82.

The trial court entered a restitution order for $550,433, representing its estimate of Hewes Craft's losses less an allocation of $6,000 for aluminum obtained by Chris from other sources. RP (Restitution) 94. The trial court further found Jody jointly and severally liable with Chris based on its understanding that the jury found she was an accomplice. RP (Restitution) 96; CP 122. Jody timely appeals. CP 108.

V. ARGUMENT

The trial court abused its discretion in ordering Jody to be jointly and severally liable for $550,433 in restitution with her husband. First, the trial court incorrectly concluded that the jury had convicted Jody as an accomplice to Chris, when in fact the jury had concluded she did not have knowledge of the criminal activity when it convicted her of second degree trafficking in stolen property rather than first degree trafficking. Second, the trial court incorrectly calculated Jody's liability for restitution based on the amount of Hewes Craft's losses, when both the crime of conviction and the underlying facts did not establish that she was responsible for the

loss – to the contrary, the evidence established that the property was stolen before she ever became involved in transporting and selling it. Lastly, by failing to grant the continuance to investigate Hewes Craft's manner of calculating its losses as well as other thieves of Hewes Craft's material, the trial court deprived Jody of due process of law. Accordingly, the restitution order should be reversed and the cause remanded for recalculation.

A court's authority to impose restitution is derived from statute. *State v. Griffith*, 164 Wn.2d 960, 965, 195 P.3d 506 (2008). In the present case, the restitution award is governed by RCW 9.94A.753, which provides that 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." RCW 9.94A.753(5). The amount of restitution "shall be based on easily ascertainable damages for injury to or loss of property." RCW 9.94A.753(3). While restitution awards cannot be based upon speculative or intangible losses, the evidence supporting a restitution award is sufficient if it affords a reasonable basis for estimating loss and does not require the trier of fact to engage in speculation or conjecture. *State v. Kinneman*, 155 Wn.2d 272, 285, 119 P.3d 350 (2005).

Generally, a trial court's restitution order is reviewed for an abuse of discretion and, accordingly, fails if it is manifestly unreasonable or is based on untenable grounds or reasons. *State v. Woods*, 90 Wn. App. 904, 906, 956 P.2d 834, *review denied*, 136 Wn.2d 1021 (1998). However, whether the loss is causally connected to the crime of conviction is a question of law that is reviewed *de novo*. *State v. Acevedo*, 159 Wn. App. 221, 230, 248 P.3d 526 (2011).

I. Jody Boring cannot be jointly and severally liable with Chris Boring because she was not convicted as an accomplice.

In imposing joint and several liability, the trial court stated, "The jury found that there was uh an accomplice here and uh in cahoots with her husband for three years uh taking aluminum from his employer." RP (Restitution) 96. But the conclusion that Jody was an accomplice to Chris is erroneous and contrary to the jury's verdict.

The State originally charged Jody with first degree trafficking in stolen property, which requires proof that she knowingly engaged in trafficking. CP 1; RCW 9A.82.050. The State further charged Jody as an accomplice to Chris. CP 1. Accomplice liability similarly requires proof that the accomplice knows his or her conduct will promote or facilitate the commission of the crime. RCW 9A.08.020(3). Specifically, the

accomplice must have knowledge of the crime charged, not "a crime," to be liable as an accomplice. *State v. Cronin*, 142 Wn.2d 568, 579, 14 P.3d 752 (2000).

But the jury convicted Jody only of the lesser-included offense of second degree trafficking in stolen property. CP 67-68. Second degree trafficking in stolen property only requires proof that the perpetrator acted recklessly. RCW 9A.82.055(1). The verdict, accordingly, necessarily reflects the jury's conclusion that Jody did not have knowledge of her husband's thefts, but that she *should* have known. Indeed, the trial court itself acknowledged this interpretation of the jury's verdict. RP (Trial) 280 ("I think in the end what the jury found and I believe it's probably fairly accurate that and that you were willfully ignorant. That you should have raised some questions.").

The trial court's Findings of Fact and Conclusions of Law cite *State v. Israel*, 113 Wn. App. 243, 298-30, 54 P.3d 1218 (2002), in support of its imposition of joint and several liability. *Israel*, however, is distinctly different from the present case in that the defendant had been found to be part of a conspiracy. Once the conspiracy was proven, the co-conspirators could be held liable jointly and severally for the prior and unforeseeable acts of the co-conspirators in furtherance of the conspiracy.

Id. Here, by contrast, Jody was not found to be an accomplice or co-conspirator with her husband, and as a matter of law she could not be an accomplice or co-conspirator based on the jury's conclusion that she lacked knowledge of the criminal enterprise. *Id.* at 275 ("In Washington, accomplice liability requires knowledge of 'the crime' charged, not merely 'a crime.'" (*citing State v. Stein*, 144 Wn.2d 236, 245, 27 P.3d 184 (2001)).

If she was not an accomplice, Jody was not legally accountable for Chris's criminal activity. RCW 9A.08.020(2). Accordingly, the losses causally attributed to Chris's activity cannot be imputed to Jody. While she is certainly responsible for the damages resulting from her own conduct, under the facts of this case, she cannot be responsible for damages resulting from her husband's crimes when she was not an accomplice to those crimes. Consequently, the trial court erred in imposing joint and several liability between Jody and Chris.

II. The trial court erred in finding a causal connection between Jody Boring's role in the crime and all of Hewes Craft's material losses when there was no evidence she was responsible for, or knew about, the theft of the material.

Because Jody was not legally responsible for Chris's activity as an accomplice, her liability for restitution is limited to those losses that causally flowed from her own actions. In imposing joint and several liability for all of the losses suffered by Hewes Craft based on the collective actions of Jody and Chris, the trial court abused its discretion by ordering Jody to pay restitution for losses not caused by her actions.

A restitution order must be based upon a causal relationship between the crime charged, the evidence proven at trial, and the victim's damages. *State v. Dauenhauer*, 103 Wn. App. 373, 378, 12 P.3d 661 (2000); *Woods*, 90 Wn. App. at 909. "[R]estitution cannot be imposed based on a defendant's 'general scheme' or acts 'connected with' the crime charged, when those acts are not part of the charge." *Dauenhauer*, 103 Wn. App. at 378. A causal relationship exists when, but for the defendant's activities, the loss or damage would not have occurred. *State v. Oakley*, 158 Wn. App. 544, 552, 242 P.3d 886 (2010).

There is no causal connection if the victim's losses occurred before the acts constituting the defendant's crime. *Acevedo*, 159 Wn. App. at 230 (*citing Woods*, 90 Wn. App. at 909); *see also State v. Hunotte*, 69 Wn. App. 670, 676, 851 P.2d 694 (1993) ("In examining the causal relationship between the crime and the loss, it is clear that if the loss or damage occurs before the act constituting the crime, there is no causal connection between the two.").

In the present case, the evidence established that after Chris took aluminum materials from Hewes Craft without permission, he occasionally directed Jody to deliver the materials to Action Recycle to sell them. RP (Trial) 163-64, 168. There was no evidence whatsoever that Jody was associated with the theft of aluminum from Hewes Craft, or even that she had knowledge that the theft was occurring. Neither was Jody charged with any theft crime resulting from the taking of the materials from Hewes Craft. Her role was solely limited to occasionally delivering truck loads of materials to Action Recycle to sell them.

Hewes Craft's losses resulted from the theft of the materials. Chronologically, the theft of materials occurred prior to Jody's criminal acts in delivering and selling the materials to Action Recycle. Under *Acevedo* and *Hunotte*, Jody cannot be liable for those parts of the "general

scheme" that occurred before her own criminal activity. And because she was not an accomplice with Chris, she cannot be vicariously liable for his criminal activity.

Moreover, it cannot be said that "but for" Jody's actions in delivering the stolen aluminum to Action Recycle, Hewes Craft's losses would not have occurred. To the contrary, the evidence and the charges indicate that the theft of material would still have occurred.

In short, Jody did not cause Hewes Craft's loss of material. It was, accordingly, erroneous for the trial court to impose liability for all of Hewes Craft's losses on Jody.

III. The trial court denied Jody Boring due process of law when it ordered restitution based on Hewes Craft's alleged losses after it denied her request for a continuance to investigate both allegations of other thefts from Hewes Craft and Hewes Craft's manner of calculating its restitution request.

Even if the trial court did not err in calculating Jody's liability for restitution based on the total amount of Hewes Craft's losses when she could not be legally responsible for all of Hewes Craft's losses, it certainly erred when it calculated the restitution award based on Hewes Craft's

conclusory statements without providing a reasonable opportunity to investigate Hewes Craft's calculation. Should this court determine that the restitution award can be calculated from Hewes Craft's losses rather than Jody's sales of material to Action Recycle, it should nevertheless vacate the order to provide a reasonable opportunity to investigate whether other, uncharged individuals were responsible for some of Hewes Craft's claimed losses and how Hewes Craft calculated the damages claimed.

Although the rules of evidence do not apply at restitution hearings, the evidence presented at restitution hearings must meet due process requirements. *State v. Kisor*, 68 Wn. App. 610, 620, 844 P.2d 1038 (1993) (*citing State v. Pollard*, 66 Wn. App. 779, 784, 834 P.2d 51 (1992)). Among these due process requirements are the requirement that the evidence be reasonably reliable, and that the defendant have an opportunity to refute the evidence presented. *Kisor*, 68 Wn. App. at 620. Further, when the evidence consists of hearsay statements, a certain degree of corroboration is required so as to provide the defendant a sufficient basis to challenge or rebut the assertion. *Kisor*, 68 Wn. App. at 620 (*citing State v. S.S.*, 67 Wn. App. 800, 807-08, 840 P.2d 891).

In *Kisor*, the Court of Appeals vacated a restitution order that was entered after a hearing based solely on affidavits. 68 Wn. App. at 613,

620. The amount of loss claimed in *Kisor* was based on a witness's statement that she "checked" with the Tacoma police and the Spokane Canine Training Unit about the cost of purchasing and training a new police dog, without any further indication of where she obtained the figures. 68 Wn. App. at 620. The *Kisor* court observed that reliance upon the affidavit offended due process in remanding the matter for a new restitution hearing. *Id.*

Similarly here, there was little testimony about how Hewes Craft arrived at its figures other than that the numbers were produced by the accounting system. RP (Restitution) 36-37. Although Hewes admitted that Hewes Craft would expect a certain amount of waste in its ordinary course of business, no testimony was presented as to what the normal variance would be compared to the variances it claimed as its losses. RP (Restitution) 38-39. Prior to the hearing, the Borings had requested a continuance and production of information relating to scrap numbers, production numbers, scrap percentages, and similar information, for purposes of evaluating Hewes Craft's calculations. RP (Restitution) 5-6. Without providing the Borings an opportunity to evaluate the basis for Hewes Craft's claimed losses, the trial court's reliance on Hewes Craft's conclusory statements based on the authority of its accounting system was a deprivation of due process.

Further, Jody requested an opportunity to obtain testimony from a witness who approached her personally to state that other employees were taking material from Hewes Craft. RP (Restitution) 5. If other people were stealing material from Hewes Craft during the same time frame as Chris, it would be directly relevant to how much of Hewes Craft's total losses of aluminum were caused by Chris's theft, and how much was caused by other individuals. As discussed above, neither Chris nor Jody could be legally responsible for losses not caused by their own criminal actions. Thus, in the absence of an opportunity to investigate unrelated losses, Jody was deprived of the ability to adequately refute Hewes Craft's claim by distinguishing losses that were not caused by her criminal acts.

VI. CONCLUSION

The trial court's order imposing liability for over half a million dollars in restitution on Jody Boring was an abuse of discretion because it reflected losses not caused by her criminal acts, and because she was deprived of a reasonable opportunity to investigate and refute the amount of loss claimed by Hewes Craft. Consequently, the restitution order should be vacated and the cause remanded for entry of a restitution order limited to those losses caused by her own criminal acts.

RESPECTFULLY SUBMITTED this 7th day of May, 2012.

ANDREA BURKHART, WSBA #38519
Attorney for Appellant

DECLARATION OF SERVICE

I, the Undersigned, hereby declare that on this date, I caused to be served a true and correct copy of Appellant's Brief upon the following parties in interest by depositing them in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

Timothy Rasmussen
Prosecuting Attorney
Stevens County
215 S. Oak Street
Colville, WA 99114-2862

Jody Danielle Boring
PO Box 939
Kettle Falls, WA 99141

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed this 7th day of May, 2012 in Walla Walla, Washington.

Andrea Burkhart