

FILED

MAY 28, 2015

Court of Appeals
Division III
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 32456-7-III

Consolidated with

No. 325601

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

SERINA FORD,

Defendant/Appellant

Respondent's Brief

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A. RESPONSE TO ASSIGNMENTS OF ERROR

- a. It was not an abuse of discretion for the trial court to refuse to give the lesser included jury instructions suggested by defense.
- b. Because Ms. Ford did not object to either the accomplice liability instruction or the to convict instruction regarding trafficking in stolen property in the first degree at trial, the issue is waived and may not be raised on appeal.
- c. The restitution ordered in the case is supported by substantial evidence and it was not an abuse of discretion for the court to order the amount.

B. ISSUES PRESENTED

- a. Did the trial court abuse its discretion in declining to give the lesser included offense instructions proposed by the defendant for the Theft charge and the Trafficking in Stolen Property charge?
- b. May a defendant raise the issue of sufficiency of a jury instruction for the first time on appeal?
- c. Does the record support an award of restitution covering all of the losses testified to by the victim when the jury found the defendant guilty of two of three counts charged?

C. STATEMENT OF THE CASE

On August 19, 2011 Ann Black reported her home had been burglarized. RP (4/9/14) at 9. She had left her home on August 18, 2011 at 8:30 a.m. and had returned the next date on August 19, 2011 at 1700 hours or 5:00 p.m. RP (4/9/14) at 9. She reported the Burglary when she returned that night. She found her front door unlocked, her back door wide open, with the dead bolt lying on the floor. RP (4/8/14) at 32. She reported numerous personal items had been taken from her house, namely jewelry. RP (4/8/14) at 33. The burglary was unique in that many valuables, electronics, and other commonly stolen items were in the house, but the person who went into Ms. Black's house appeared to have gone straight to her bedroom where she kept her safe and her jewelry. RP (4/8/15) at 61. Detective Ingraham with the Ellensburg police Department testified that in his experience, this type of behavior in a burglary indicates the person likely knows the victim or the contents of the home. RP (4/8/14) at 140-141.

The victim's son Chris Black reported that on August 18, Ms. Black came to Spokane. RP (4/8/14) at 73. Ms. Preston had been at Mr. Black's home in Spokane with the defendant, Serena Ford and her then boyfriend Nick Allemand. RP (4/8/14) at 72. Ms. Ford and

Mr. Allemand were gone from Chris' apartment in Spokane before Ann Black got there. RP (4/8/14) at 72.

Paul Parks lived with Ann Black at her residence prior to the burglary and was familiar with the residence. RP (4/8/14) at 89.

Ann Black testified at trial that there were two bathrooms in her house, including one off her bedroom and that Mr. Parks had full access to her house while he lived there. RP (4/8/14) at 28-29.

On August 19 at 1300 hours, during the timeframe Ms. Black was gone from her home, Sergeant Hocter with the Kittitas County Sheriff's Office stopped Ms. Ford driving her car less than one mile from the victim's home. RP (4/8/14) at 111-113. Paul Parks and Nick Allemand were in the car with Ms. Ford and refused to identify themselves. RP (4/8/15) at 116-118).

A charged co-defendant who plead guilty before trial, Paul Parks, testified in trial for the state. He testified that he lived with the defendant, Serena Ford in August, 2011 off and on. RP (4/8/14) at 94. He testified that between August 16 and 27, 2011 he went to pawn shops with Nick Allemand and Serena Ford to pawn different items. RP at 97. He testified that during this time frame, although he did not specifically remember pawning a watch, Ms. Ford and Mr. Allemand asked him to pawn items for them. RP (4/8/14) at 96-

97. He indicated his memory from this time frame was very hazy because of drug use. RP (4/8/14) at 101.

Paul Parks testified that when he would pawn the items he would give the money to Nick Allemand and Serena Ford. RP (4/8/14) at 98. On August 20, 2011 Paul Parks pawned a watch in Yakima. RP (4/8/14) at 95 -96. He identified his own signature on the pawn/sales slip from the pawn shop at trial. RP (4/8/14) at 95. Ann Black positively identified the pocket watch which Paul Parks pawned as her property. RP (4/8/14) at 46-48.

The watch was very unique. RP (4/8/14) at 47. Ann Black testified that it was one of several watches she kept in a leather case full of old dead watches in a dresser drawer in her closet. RP (4/8/14) at 47-48. She testified that the watch was “quite a treasure” to her. RP (4/8/14) at 47. It had belonged to her grandfather who had given it to her father. RP (4/8/14) at 47. When pressed on cross examination, she testified that she honestly did not know the market value of the watch, but that that it had sentimental value and that it was very old and from her family. RP (4/8/14) at 61. Francisco Duarte testified that he bought the watch from Paul Parks on August 22, 2011 for \$40.00 for parts and that it was a non-functional gold-filled watch. RP (4/8/14) at 130-132. He indicated he could have

paid more for the watch, but that because it was gold filled and not working, he bought it for parts. RP (4/8/14) at 131.

The defendant was charged as a principle or accomplice to Residential Burglary, Theft in the 2nd degree, and Trafficking in Stolen Property in the 1st degree. CP 1-3. The jury found her guilty of Theft in the 2nd Degree and Trafficking in Stolen Property in the 1st degree. RP (4/10/14) at 2, CP 79-81. The court ordered the defendant to pay \$6, 635.77 in restitution to Mutual of Enumclaw joint and several with defendants Nick Allemand and Paul Parks. CP 119. Ann Black testified at trial she submitted a claim for restitution for the items taken in the burglary and damage done to her back door to her insurance company, Mutual of Enumclaw. RP (48/14) at 36-37.

D. ARGUMENT

- a. The trial court did not abuse its discretion in refusing to give the lesser included offenses as requested by defense

The standard of review applicable to jury instructions depends on the trial court decision under review. State v. Walker, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998). If the decision was based on a factual determination, it is reviewed for abuse of discretion. Id. at 772. If it was based on a legal

conclusion, it is reviewed de novo. Id. In this case, the court concluded as a matter of fact that the evidence did not support an inference that Ford stole property valued at less than \$750 (to support the lesser included charge of Theft, 3rd) or that she acted recklessly regarding the trafficking charge (to support the lesser included charge of Trafficking in Stolen Property in the 2nd Degree).¹

The right to a lesser included offense instruction is statutory, codified at RCW 10.61.006. State v. Berlin, 133 Wn.2d 541, 545, 947 P.2d 700 (1997). In State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978), this court set forth a two-pronged test to determine whether a party is entitled to an instruction on a lesser included offense under RCW 10.61.006. Under the first prong of the test (the legal prong), the court asks whether the lesser included offense consists solely of elements that are necessary to conviction of the greater, charged offense. Id. Under the second (factual) prong, the court asks whether the evidence presented in the case supports an inference that *only* the lesser offense was committed, to the exclusion of the greater, charged offense. Id.

¹ Appellant argues incorrectly in their brief (AB p.7) that both lesser included charges (Theft in the 3rd degree and Trafficking in Stolen Property in the 2nd degree are misdemeanor offenses. Theft in the 3rd degree is a gross misdemeanor while Trafficking in Stolen Property in the 2nd degree is a class C felony. See RCW 9A.56.050 (Theft, 3rd) and 9A.82.055 (Trafficking, 2nd).

at 448. The requesting party is entitled to the lesser included offense instruction when the answer to both questions is yes.

Id.

In this case, it was not an abuse of discretion for the trial judge to find that the evidence in this case did not support an inference that *only* the lesser offense was committed. It is true that the defendants were found not guilty of the burglary, but the jury did find them guilty, as principle or accomplice of Theft in the 2nd Degree and Trafficking in Stolen Property in the 1st degree.

THEFT CHARGE:

The victim testified that when her home was burglarized, along with damage to her door, her actual losses sustained included the loss of personal property well over the limit of \$750 required for the Theft in the 2nd degree charge. It is true that the only property belonging to the victim that was ever recovered was one pocket watch; the watch pawned by Mr. Parks. There is a plethora of circumstantial evidence that supports a jury finding that although only one piece of property was recovered the defendants may have been involved in the theft and the trafficking of additional items belonging to the victim, even when the jury found the defendant not guilty of the burglary.

Although it is unclear from Mr. Parks or Ms. Ford's testimony somehow, Mr. Parks came into possession of at least a stolen watch belonging to Ms. Black two to three days after her home had been burglarized and the watch taken.

The victim testified that the recovered watch was one of several watches she kept in a dresser drawer in her bedroom and that Paul Parks was familiar with the items in her home and had lived in a trailer in her yard for some time the year before the burglary. She testified that the watch itself was "a great treasure" and even the antique dealer who purchased the watch from Mr. Parks admitted he could have paid more for the watch, but bought it only for the parts.

The law requires that to mandate a lesser included instruction be given, there be substantial evidence that only the lesser included crime was committed. The circumstantial evidence in this case supports the court's conclusion that the value of items stolen could have been more than \$750.00, thus evidence of the greater crime was committed was prevalent and it was not an abuse of discretion to deny the defense motion regarding the Theft, 3rd requested lesser included instruction.

TRAFFICKING IN STOLEN PROPERTY CHARGE:

Paul Parks testified that he got the watch he sold from Ms. Ford and Mr. Allemand and that after selling the watch; he gave the money back to Ms. Ford and Mr. Allemand. Ms. Ford testified differently. This is an issue of credibility that must be decided by the jury. If the jury believed Mr. Parks, Ms. Ford clearly was intentional in her trafficking of the stolen property. The only evidence supporting a reckless instruction is her own testimony that contradicted that of the other defendant; something the jury could have disregarded entirely. The law requires a court to give the lesser included offense when evidence supports a finding that only the lesser offense was committed. If the jury believed Mr. Parks' testimony (as appears to be the case), that it was Ms. Ford who initiated, planned, and financed the intentional trafficking, the evidence supported only the greater offense, to the exclusion of the lesser. The fact that there was evidence of the greater offense for the jury to consider supports the court's rejection of the lesser included offense instruction as requested by defense.

b. The defendant failed to object to either the accomplice instruction or the trafficking in stolen property instruction at trial and has waived any objection

Generally, issues raised for the first time on appeal will not be considered by an appellate court. RAP 2.5(a); State v.

McFarland, 127 Wn.2d 322, 332-33, 899 P.2d 1251 (1995). An exception exists, however, for manifest errors affecting a defendant's constitutional rights. RAP 2.5(a)(3); State v. Walsh, 143 Wn.2d 1, 7, 17 P.3d 591 (2001). There is a two-step analysis to determine whether to examine alleged constitutional errors for the first time on appeal. State v. Kronich, 160 Wn.2d 893, 899, 161 P.3d 982 (2007). First, the alleged error must involve a constitutional issue. State v. Lynn, 67 Wn. App. 339, 345, 835 P.2d 251 (1992). Second, the error must be manifest. Id. An error is manifest if it has “practical and identifiable consequences in the trial of the case.” State v. Stein, 144 Wn.2d 236, 240, 27 P.3d 184 (2001). Put another way, a “manifest error” is an error that is “unmistakable, evident or indisputable.” State v. Burke, 163 Wn.2d 204, 224, 181 P.3d 1 (2008) (quoting Lynn, 67 Wn. App. at 345). Purely formalistic errors are not manifest. Kronich, 160 Wn.2d at 899. An appellate court will consider error raised for the first time on appeal when the giving or failure to give an instruction invades a fundamental constitutional right of the accused, such as the right to a jury trial. Const. art. 1, § 21; State v. McHenry, 88 Wn.2d 211, 213, 558 P.2d 188 (1977); State v. Carothers, 84 Wn.2d 256, 262, 525 P.2d 731 (1974). See also

State v. McDonald, 74 Wn.2d 474, 480-81, 445 P.2d 345 (1968); State v. Peterson, 73 Wn.2d 303, 438 P.2d 183 (1968).

Defense says that because the state asked for an accomplice instruction, it was relieved from its duty to prove each element of the charged offense. Looking to the jury instructions, it is clear that even with the accomplice instruction, the jury was instructed that “to convict” on the trafficking charge, they must find what the statute requires. There was no relief from the burden of proving any element of the crime, even with the accomplice instruction.

In State v. Hayes, 164 Wn. App. 459, 262 P.3d 538 (2011), the problem was not only with the state asking for the accomplice instruction as was the case here, but that they asked for a modified “to convict” instruction as well, which is not the case here. There was no limitation put on the con

Defense cites Hayes, 164 Wn. App. 459, 262 P.3d 538 (2011) in support of the argument that there are some crimes where accomplice liability cannot lead to conviction because the language of the statute precludes that conclusion. In Hayes, the statute in question was RCW 9A.82.060 (1) (a), Leading Organized Crime. Both the title of the crime and the language of the statute, which includes the requirement for the state to prove the defendant intentionally “organiz[ed],

manag[ed], direct[ed], or financ[ed] any three or more persons...” (emphasis added). There is a requirement in the statute not only that the person be the leader, but that more than one person be involved in the activity, requiring a sort of de facto accomplice liability as the crime can only be accomplished by a group of people. In reading the Hayes case, it is clear that these types of joint ventures of group activities are the kinds that the state cannot prove also through the accomplice liability theories because the crimes require the participation of a certain number of people. 164 Wn. App at 469-70 (court discusses State v. Montejano, 147 Wn. App. 696, 699, 196 P.3d 1083 (2008) where the statute (RCW 9A.08.020(3) also requires acting with three or more people activity).

The trafficking in stolen property statute has no requirement that a group of three or more people be involved, like the statutes cited in the cases by defense. While it is true, the plain meaning of language like “supervise” “direct” or “finance” to imply that others be involved, this does not preclude accomplice liability.

In the leading organized crime statute in Hayes, the defendant had to be the leader. There is no such requirement for the trafficking crime and the facts of this case demonstrate

why. The logic is simple: if the crime is making it a crime to actually be the leader, you cannot be found guilty of the crime if you didn't lead, but instead only assisted. Here, giving someone a stolen watch and asking them to pawn it, doesn't necessarily mean you were the "leader" of the group, but were, in fact, an accomplice to the crime of trafficking.

Mr. Parks testified that he got the stolen watch from Serena Ford and Nick Allemand. Who was the leader? Who was the principle? The evidence does not point to a clear answer, but it is clear that acting together, Serena Ford and Nick Allemand instructed, directed, supervised, and/or financed Mr. Parks to sell the antique watch for cash and give the cash back to them. The accomplice instruction applies to both theories of liability under the statute: that they EITHER "knowingly initiated, organized, planned, financed, directed, managed, or supervised the theft of property for sale to others, " OR they "knowingly trafficked in stolen property." If the jury believed that Ms. Ford only planned the sale of the watch to the antique store, she still used an accomplice or was an accomplice to doing so because she asked Mr. Parks to actually sell the watch.

The state was not relieved of proving any element of the trafficking charge; therefore there is no Constitutional issue

and the sufficiency of the instruction may not be challenged for the first time on appeal.

c. The restitution claim was supported by substantial evidence at trial and the court did not abuse discretion in ordering the restitution amount requested by the victim.

“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's factual findings are reviewed for substantial evidence. Ingram v. Dep't of Licensing, 162 Wn.2d 514, 522, 173 P.3d 259 (2007). A court's authority to impose restitution is statutory. Davison, 116 Wn.2d at 919. A judge must order restitution whenever a defendant is convicted of an offense that 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. Hughes, 154 Wn.2d 118, 154, 110 P.3d 192 (2005) (internal quotation marks omitted) (quoting Fleming, 75 Wn. App. at 274-75), overruled on other grounds by Washington v. Recuenco, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006). “Restitution is allowed only for losses that are ‘causally connected’ to the crimes charged,” State v. Tobin, 161 Wn.2d 517, 524, 166 P.3d 1167 (2007) (quoting Kinneman, 155 Wn.2d at 286). Losses are causally connected if, but for the charged crime, the victim would not have incurred the loss. Tobin, 161 Wn.2d at 524. A court can, in its discretion, order restitution up to double the amount of the victim's loss. RCW 9.94A.753 (3).

When the State produces evidence of the amount of restitution, it is doing so not only in aid of punishing the defendant commensurate with the losses caused by the criminal act, but also in aid of compensating the victim for those losses. State v. Griffith, 164 Wn.2d 960, 969, 195 P.3d 506, 510 (2008). Restitution contains “a strong remedial component” because by statute it is connected to the victim's losses. State v. Shultz, 138 Wn.2d 638, 643-44, 980 P.2d 1265 (1999). Indeed, “restitution payments

are paid to the superior court clerk and disbursed directly to the victims, not to the State.” Id. at 644.

In this case, the victim testified that her losses sustained due to the burglary and the theft in this case was over \$6000 and submitted a claim to Mutual of Enumclaw for \$6,635.77. In supporting the remedial support to the victim, well within the court’s power, the court ordered the defendant to pay back the restitution requested by the victim and supported by her testimony, which was substantial evidence.

E. CONCLUSION

For the reasons stated, the sentence should be affirmed, including the relevant portions of the Judgment and Sentence pertaining to Restitution.

Respectfully submitted May 11, 2015,

/s/
/s/ Jodi M. Hammond
Attorney for Respondent
WSBA #043885

APPELLATE COURT OF THE STATE OF WASHINGTON

DIVISION III

State of Washington,)	
)	No. 32456-7-III
Respondent.)	
)	AFFIDAVIT OF SERVICE
SERINA FORD,)	
Appellant.)	
_____)	

STATE OF WASHINGTON)
) ss.
 County of Kittitas)

The undersigned being first duly sworn on oath, deposes and states:

That on the 28th day of May, 2015, affiant an electronic copy directed to:

Renee Townsley	Andrew Burkhart, WSBA #38519
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500 N. Cedar Street	
Spokane, WA 99210	

containing copies of the following documents:

- (1) Affidavit of Service
- (2) Respondent's Brief

Theresa Carren

SIGNED AND SWORN to (or affirmed) before me on this 28th day of May, 2015.

Robin A Raap
 NOTARY PUBLIC in and for the
 State of Washington.
 My Appointment Expires: 1/15/17