

NO. 62657-4-1

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

STATE OF WASHINGTON,

Respondent,

v.

JAMES P. CORBETT,

Appellant.

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COURT OF APPEALS
STATE OF WASHINGTON
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BRIEF OF RESPONDENT

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I. ISSUES

1. A defendant reported a new motorcycle stolen, and accepted total-loss payment from and transferred title to his insurer. Four years later he was found with the bike, damaged, still in his possession, and convicted of possessing stolen property. Was the act of possessing stolen property completed at the time of payment and transfer, or, consistent with the weight of authority elsewhere, was the crime ongoing as long as the true owner was deprived of the use of the property?

2. The “to convict” instruction specified that the defendant possessed stolen property on or about May 1, 2002 to on or about May 5, 2006. The jury was told that the entire time need not be proved. Was this error, when it was an accurate statement of the law and the instruction could be read consistent therewith?

3. Did the trial court abuse its discretion in ordering restitution, when but for defendant’s crime, the insurance carrier would not have sustained its loss?

II. STATEMENT OF THE CASE

The defendant, James Corbett, acquired a new 2002 Suzuki GSX-R1000 motorcycle on or about February 20, 2002. Ex. 5; 2

Trial RP 48-49.¹ On March 26, 2002, just a little over a month later, he reported his new motorcycle stolen. 1 Trial RP 42; 2 Trial RP 31-32, 39-40; Exs. 17A, 17B. He filed a claim with his insurer, Progressive Insurance. 1 Trial RP 42. He signed over title to the insurance company on May 2, 2002. 1 Trial RP 42-46; Exs. 5, 6. At the same time, Progressive in turn cut him a check for \$11,203.09, reflecting total loss of an unrecovered stolen vehicle. 1 Trial RP 42; Ex. 15. The check was negotiated and processed between May 2 and May 6, 2002. Ex. 15. This left Progressive as the registered owner, entitled to possession should the bike ever be recovered. Exs. 5, 6.

Six years later, on May 5, 2006, police got a call and were dispatched to a residence on 64th Drive SE in Snohomish, Washington. Once there the responding officer contacted Anna King.² 2 Trial RP 2-5. After contacting Ms. King the officer went into the garage, where he found a Suzuki motorcycle with no plates. He “ran” its VIN (“vehicle identification number”) and it

¹ The trial transcript is in three volumes and cited accordingly here. Appellant cites them as “3RP,” “4RP,” and “5RP,” respectively.

² After this investigation commenced, but before charges were filed, the defendant married Ms. King. 1 Trial RP 23-25, 27-28, 31, 33-34. She had given a statement to police but it could not be used, nor Ms. King called as a witness, because the defendant asserted marital privilege/spousal incompetency. *Id.*; 2 Trial RP 98-100.

came back as reported stolen, with the registered owner as Progressive Insurance. 2 Trial RP 6. The VIN matched the motorcycle reported stolen by the defendant. 1 Trial RP 48; 2 Trial RP 8-9.

Given a rough location where the motorcycle's former owner (the defendant) had an apartment, the responding officer drove through some apartment complexes in Everett and came upon a nearly identical motorcycle. He "ran" its plates and learned defendant Corbett was the registered owner. He then "ran" the defendant's driver's license and learned it bore the same address as the residence in Snohomish from where the call had originated. 2 Trial RP 7.

Sometime earlier that spring (of 2006), Anna King's sister Ngan Anh Le Pham and her boyfriend, Andrew Barton, had visited Ms. King and the defendant. Both recalled the defendant was actually living with Ms. King at the time, and kept his tools in the garage. 2 Trial RP 13, 14-15, 20, 26.³ While visiting, both saw two identical motorcycles in the garage. One didn't have plates. Thinking this odd, Barton commented on it. The defendant said he

³ The defendant's DOL address history showed him living at the 64th Drive SE address in Snohomish beginning in February 2006. Ex. 16.

didn't need plates because he only used the second one for parts.
2 Trial RP 15-16, 24-26.

Progressive Insurance recovered the bike. 1 Trial RP 46; 2
Trial RP 31-34. It was damaged on both sides; and a number of
items were broken. It looked like it had been "laid down and was
flipped." 2 Trial RP 47. The responding officer thought he had
seen some parts were missing. 2 Trial RP 9-10.

Progressive Insurance had a salvage company sell the
motorcycle. After deducting the salvage company's costs,
Progressive netted \$2,864.82. 1 Trial RP 49.

The defendant's father, testifying for his son, said his son's
first motorcycle was stolen after he'd only had it for 1½ to 2 months.
He said his son then bought a new, identical bike with the
insurance proceeds. 2 Trial RP 48-49. Thereafter, he asserted, his
son only had the new bike. 2 Trial RP 49-51, 55-56. He stated his
son never had two bikes at the same time. Id. The defendant did
not testify. 2 Trial RP 59.

The State charged the defendant with one count of second-
degree possession of stolen property. 1 CP 71-72. The jury
convicted and answered "yes" to a special interrogatory asking if
they found that the defendant had possessed the stolen property at

any time after January 12, 2005 (that is, at a time within the statute of limitations). 1 CP 31-32. The defendant was sentenced within the standard range. 1 CP 19-30. This appeal followed. 1 CP 6-18.

III. ARGUMENT

A. PROSECUTION WAS NOT BARRED BY THE STATUTE OF LIMITATIONS.

The defendant argues that the conviction must be overturned because it was committed more than three years prior to the filing of the information, and thus prosecution was barred by the statute of limitations. BOA 16-23.

Possession of stolen property, like most felonies in general, is subject to a three-year statute of limitations. RCW 9A.04.080(1)(h).⁴ The State charged the defendant with one count of second-degree possession of stolen property, from on or about May 1, 2002 to on or about May 5, 2006, by information filed January 14, 2008. 1 CP 71-72. The defendant argues, as he did below, that the crime was completed in early 2002. Thus, once he had reported the motorcycle stolen, and then once he had cashed the check for the bike's loss and title passed to Progressive in early May 2002, the crime by his theory was complete at that moment in

⁴ The statute references a number of different limitation terms for certain specific offenses, but both parties agree none are relevant here.

time, and had to be prosecuted within three years. Police did not receive the call at the Snohomish residence, and find the bike in the garage, until May 2006, four years later. 2 Trial RP 2-9, 13-16, 20, 24-26, 49. And the information was not filed until January 14, 2008. 1 CP 71-72.

The defendant argues prosecution is thus barred, despite the testimony from the sister-in-law and her boyfriend that he *continued to possess* the motorcycle, i.e., that he had it “for parts” in his garage, and an identical undamaged bike alongside it, in the late winter or early spring of 2006, less than three years from the filing of the information.

The parties briefed the issue below, 2 CP 90-100, and argued it at a pretrial hearing. 5/30/08 Hrg. RP 3-15.⁵ The trial court agreed with the State that the offense was continuing. 5/30/08 Hrg. RP 15-20. Appellant repeats his argument here.

Second-degree possession of stolen property is defined in relevant part as follows:

A person commits the crime of possessing stolen property in the second degree when he or she knowingly possesses stolen property that exceeds \$250 in value.

⁵ Defendant designates the transcript of this hearing as “2RP.”

Possessing stolen property means knowingly to receive, retain, possess, conceal, or dispose of stolen property knowing that it has been stolen and to withhold or appropriate the same to the use of any person other than the true owner or person entitled thereto.

WPIC 77.05, RCW 9A.56.160, RCW 9A.56.140 (text of both attached). "Receive," "retain," "possess," "conceal," or "dispose of" are alternate ways of committing the crime. WPIC 77.06. The trial court properly so found. 5/30/08 Hrg. RP 16, 19-20.

In Ladely our Supreme Court examined the old larceny statute at former RCW 9.54.010. State v. Ladely, 82 Wn.2d 172, 509 P.2d 658 (1973). That statute read as follows:

Larceny. Every person who, with intent to deprive or defraud the owner thereof-

(1) Shall take, lead or drive away the property of another; or

(2) Shall obtain from the owner or another the possession of or title to any property, real or personal, by color or aid of any order for the payment or delivery of property or money or any check or draft, knowing that the maker or drawer of such order, check or draft was not authorized or entitled to make or draw the same, or by color or aid of any fraudulent or false representation, personation or pretense or by any false token or writing or by any trick, device, bunco game or fortune-telling; or

(3) Having any property in his possession, custody or control, as bailee, factor, pledgee, servant, attorney, agent, employee, trustee, executor, administrator, guardian or officer of any person, estate, association

or corporation, or as a public officer, or a person authorized by agreement or by competent authority to take or hold such possession, custody or control, or as a finder thereof, shall secrete, withhold or appropriate the same to his own use or to the use of any person other than the true owner or person entitled thereto; or

(4) Having received any property by reason of a mistake, shall with knowledge of such mistake secrete, withhold or appropriate the same to his own use or to the use of any person other than the true owner or person entitled thereto; and

(5) Every person who, knowing the same to have been so appropriated, shall bring into this state, or buy, sell, receive or aid in concealing or withholding any property wrongfully appropriated, whether within or outside of this state, in such manner as to constitute larceny under the provisions of this chapter-

Steals such property and shall be guilty of larceny.

Former RCW 9.54.010, cited in Ladely, 82 Wn.2d at 174. Ladely examined only subsection (5), the “receiving stolen property” prong, concluded it was a separate crime from the four subsections, and that the statute of limitations ran from the receipt of the stolen property, not the original theft of it. Ladely at 176-77.

Defendant argues Ladely is dispositive. But Ladely examined *receiving* stolen property, not the *possession* thereof, and under different statutory language. Ladely at 176-77; compare former RCW 9.54.010(5) with RCW 9A.56.140 and -.160. As discussed above, one can violate RCW 9A.56.160 by receiving,

retaining, possessing, concealing, or disposing of stolen property. RCW 9A.56.140, -.160; WPIC 77.05, 77.06; 5/30/08 Hrg. RP 16. The trial court properly held, per Ladely, that prosecution under the “receiving” or “disposing of” prongs was foreclosed by the statute of limitations, but that prosecution under the “possessing” prong was not. 5/30/08 Hrg. RP 16.

Washington cases cited by the defense for the contrary proposition have discrete, one-time acts as their gravamen. In Klump, Division Three found that the statute of limitations for the crime of failure to appear began running on the date of failing to appear. State v. Klump, 61 Wn. App. 911, 912-15, 813 P.3d 131 (1991). In Green, the Supreme Court held that the misdemeanor of failing to transfer title within 15 days of the sale occurred on the 15th day, rather than being an ongoing offense. State v. Green, 150 Wn.2d 740, 742-44, 82 P.2d 239 (2004). None involved a possessory offense. For this reason, the trial court found they did not control the outcome here. 5/30/08 Hrg. RP 16.

The Green court also noted that

the doctrine of continuing offenses should be employed sparingly, and only when the legislature expressly states the offense is a continuing offense, or *when the nature of the offense leads to a*

reasonable conclusion that the legislature so intended.

Ladely at 742-43 (emphasis added); accord, Toussie v. United States, 397 U.S. 112, 115, 90 S. Ct. 858, 25 L. Ed. 2d 156 (1970) (articulating same standard for federal statutes, noting that “these considerations do not mean that a particular offense should never be construed as a continuing one”).

In Lawrence, a prosecution for possessing stolen property, a defendant argued, as here, that his crime was complete once he received the stolen property. The Supreme Court of Minnesota disagreed, holding that the addition of “possessing” to the statutory definition of the crime evinced legislative intent to denote a continuing offense. State v. Lawrence, 312 N.W.2d 251, 253 (Minn. 1981). One draws the same conclusion from our legislature having broken up the old larceny statute into theft and possessing stolen property in 1975, thereby *adding* “possess” to the list of criminal acts in RCW 9A.56.140. See LAWS 1975, 1st ex. sess., Ch. 260, §§9A.56.010 et seq.; Fine & Ende, 13B Washington Practice: Criminal Law, § 2606 at 129-30 (2d ed. 1998).

Not only our legislative history but the nature of the offense leads to the reasonable conclusion that the legislature intended the

offense as ongoing. “When mere possession of a prohibited article is a crime, the offense is a continuing one because the crime is committed each day the article remains in possession, as there is a continuing course of conduct.” Duncan v. State, 282 Md. 385, 384 A.2d 456, 458-59 (1979), citing Marron v. United States, 8 F.2d 251, 254 (9th Cir. 1925), aff’d, 275 U.S. 192, 48 S.Ct. 74, 72 L.Ed. 231 (1927).

In Fleetwood, a prosecution for concealing and retaining stolen savings bonds, the court found that since the “essence of the offense” was possession, the crime was ongoing and brought within the statute of limitations. United States v. Fleetwood, 489 F. Supp. 129, 131-32 (D.C. Or., 1980),⁶ citing Von Eichelberger v. United States, 252 F.2d 184, 185 (9th Cir. 1958) (same, re firearms); accord, United States v. Blizzard, 812 F. Supp. 79 (E.D. Va. 1993) (concealing and retaining stolen property a continuous offense) (citing Toussie); State v. Lodermeier, 481 N.W.2d 614, 619-21 (S.D., 1992) (“retain” stolen property means continuous); State v. Bailey, 767 P.2d 114, 115 (Or., 1989); State v. Knutson, 725 P.2d 407, 409 (Or. 1986); Williams v. Superior Court of Los Angeles

⁶ Disapproved on other grounds, United States v. Wyatt, 737 F.2d 1499 (9th Cir., 1984) (whether actual loss is the face value of bonds or the cost of their recovery).

Cty., 81 Cal. App. 3d 330, 343-44, 146 Cal. Rptr. 311, 319 (1978) (concealing stolen property); State v. Fernow, 354 N.W.2d 438, 439 (Minn.1984) (re retaining possession of stolen car, reaffirming Lawrence); State v. Davis, 275 S.E.2d 491, 494 (N.C. 1981) (receipt of stolen property a single act, while possession of stolen property a continuing offense); Commonwealth v. Farrar, 413 A.2d 1094, 1098 (Pa. 1980) (retaining stolen property a continuing offense, unlike receiving stolen property); State v. Reeves, 574 S.W.2d 647, 649, cert. denied, 441 U.S. 964, 99 S.Ct. 2412, 60 L.Ed.2d 1069 (Ark. 1979); Commonwealth v. Ciesla, 403 N.E.2d 381, 383 (Mass. 1980) (“[c]ontinuing, purposeful acts in aid of the concealment of stolen property transgress the basic legislative purpose to prevent the continued withholding or possession of the stolen property from its rightful owner”).

The defendant dismisses these cases as “poorly reasoned,” as ignoring admonitions to refer to legislative intent. BOA 22. This comment ignores the analysis in the cases themselves (e.g., in Lawrence, Lodermeier and Blizzard) as well as the effect of the 1975 amendments adding “possess” to the list of criminal acts in RCW 9A.56.140. See LAWS 1975, 1st ex. sess., Ch. 260,

§9A.56.140; compare former RCW 9.54.010, cited in Ladely, 82 Wn.2d at 174.

Lastly, construing the offense as continuous also accurately reflects the harm suffered by Progressive. The longer the defendant continued to hold the stolen motorcycle, the longer Progressive was deprived of it and its value, and the more the bike depreciated as well. This Court should affirm the trial court's careful reasoning finding that "possessing" stolen property is a continuing offense, while "receiving" and "disposing of" stolen property are not. See 5/30/08 Hrg. RP 16.

B. BECAUSE THE STATE WAS PROPERLY REQUIRED TO PROVE POSSESSION SOMETIME DURING THE TERM ALLEGED AND WITHIN THE STATUTE OF LIMITATIONS, THE CONVICTION WAS SUPPORTED BY SUFFICIENT EVIDENCE.

The defendant argues there was insufficient evidence to support his conviction. BOA 11-16.

Under the applicable standard of review, there will be sufficient evidence to affirm a criminal conviction if any rational trier of fact, viewing the evidence most favorably toward the State, could have found the essential elements of the charged crime were proved beyond a reasonable doubt. State v. Wentz, 149 Wn.2d 342, 347, 68 P.3d 282 (2003); State v. Salinas, 119 Wn.2d 192,

201, 829 P.2d 1068 (1992). A challenge to the sufficiency of the evidence admits the truth of the States' evidence. Salinas, 119 Wn.2d at 201; State v. Porter, 58 Wn. App. 57, 791 P.2d 905 (1990). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. Salinas, 119 Wn.2d at 201; State v. Soderholm, 68 Wn. App. 363, 373, 842 P.2d 1039 (1993).

In testing the sufficiency of the evidence, the reviewing court does not weigh the persuasiveness of the evidence. Rather, it defers to the trier of fact on issues involving conflicting testimony, credibility of witnesses, and the weight of the evidence. State v. Stewart, 141 Wn. App. 791, 795, 174 P.3d 111 (2007) (citing State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980)). State v. Hernandez, 85 Wn. App. 672, 675, 935 P.2d 623 (1997). Evidence favoring the defendant is not considered. State v. Randecker, 79 Wn.2d 512, 521, 487 P.2d 1295 (1971) (negative effect of defendant's explanation on State's case not considered), State v. Jackson, 62 Wn. App. 53, 58 n.2, 813 P.2d 156 (1991) (defense evidentiary inference cannot be used to attack sufficiency of evidence to convict).

The rules apply equally to a circumstantial evidence case, for circumstantial evidence is no less reliable than direct evidence. State v. Stewart, 141 Wn. App. at 795; State v. Delmarter, 94 Wn..2d at 638; State v. Zamora, 63 Wn. App. 220, 223, 817 P.2d 880 (1991); see WPIC 5.01. Circumstantial evidence is sufficient to prove any element of a crime. State v. Garcia, 20 Wn. App. 401, 405, 579 P.2d 1034 (1978) (citing State v. Lewis, 69 Wn.2d 120, 123-24, 417 P.2d 618 (1966)).

The State charged the defendant with one count of second-degree possession of stolen property, from on or about May 1, 2002 to on or about May 5, 2006. 1 CP 71-72. The “to-convict” instruction (2 CP 81) read in relevant part that the following elements must be proved beyond a reasonable doubt:

- (1) That on or about the 1st day of May, 2002, to on or about the 5th day of May, 2006, the defendant knowingly possessed stolen property;
- (2) That the defendant acted with knowledge that the property had been stolen;
- (3) That the defendant withheld or appropriated the property to the use of someone other than the true owner or person thereto;
- (4) That the stolen property was a motor vehicle;
- (5) That the acts occurred in the State of Washington.

2 CP 81.

In her closing argument at the end of trial, defense counsel argued that the State was required to prove the defendant possessed the stolen property for the entire period charged. 2 Trial RP 73. In rebuttal the prosecutor countered he was not so required. A defense objection, that this was an inaccurate statement of the law, was overruled. 2 Trial RP 80. The prosecutor added that one could also infer, from the evidence, that the defendant had in fact possessed the bike for the entire time. 2 Trial RP 82.

During deliberations the jury sent out a question asking if possession during the entire time must be proved. 1 CP 34-35. The defense argued the answer was “yes,” based on how the State had charged the case. 2 Trial RP 87-88, 92, 101. The State countered that “we’ve charged a crime saying on or around a particular time in 2002 through on or around a time in 2006. Some time in between those times, the defendant possessed the item,” and that was all that need be proved. 2 Trial RP 90.

The trial court agreed with the State and concluded the answer was “no.” 2 Trial RP 94, 102-04; 3 Trial RP 9-10. It noted the State’s initial theory of continuous ongoing possession was foreclosed in limine by the defendant’s assertion of the marital

privilege. 2 Trial RP 101; 3 Trial RP 8.⁷ The State's theory, on more limited evidence, was, then, that there was a continuous violation, but that it was sufficient if possession were only proved for May 2006. 3 Trial RP 9. The court added this was a correct statement of the law. Id. It noted that if the jury convicted, however, they would have to be given a special interrogatory to determine if they had found the defendant had possessed the stolen property at any time after January 12, 2005, that is, at a time within the statute of limitations. 2 Trial RP 94; 3 Trial RP 9-10.

The jury was instructed consistent with the court's ruling. 1 CP 35. They found the defendant guilty, 1 CP 32, and then answered "yes" to the special interrogatory. 1 CP 31.

On appeal, the defendant asserts insufficiency of the evidence. He does not argue that the other, more substantive elements – such as possession of the property, knowledge the property was stolen, and withholding or appropriating it to the use of someone other than the true owner – are not proved, as indeed,

⁷ Both parties agreed that Ms. King's statement to police in May 2006 would have supported a continuous-possession theory of the case. 2 Trial RP 98-100.

on this record, he cannot. Instead, he again argues that possession during the entire period from May 2002 to May 2006 must be proved, based on the charging language and the “to convict” instruction, and that this was not done.

In support he cites State v. Hickman, 135 Wn.2d 97, 954 P.2d 900 (1998). Hickman stands for the straightforward proposition that if a superfluous element is added to the jury’s instructions, then the State must prove it. In Hickman, the “to convict” instructions included the element “that the act occurred in Snohomish County, Washington.” That the crime charged had occurred in Washington had to be proved, but that it had occurred in Snohomish County, which was merely the venue, did not. Nonetheless, because it was in the instructions, venue had to be proved as an element, and our Supreme Court found insufficient evidence that it had been. Hickman, 135 Wn.2d at 100, 102, 104-05.

Hickman thus tells us what happens *when* a superfluous element is added. It does not tell us *if* a superfluous element has been added.

The trial court found that the “to convict” and charging language, reading “on or about” date X, to “on or about” date Y, did

not require the crime be proved for the entire time in between. 2
Trial RP 94, 101-04; 3 Trial RP 9-10. And defendant cites no case
that holds the trial court was wrong in so finding.

In Odell, the Supreme Court held that the precise time at
which a crime is committed is not a material element, provided it is
before the filing of the information and within the statute of
limitations. State v. Odell, 188 Wash. 310, 314-17, 62 P.2d 711
(1936), citing State v. Gorttfreedson, 24 Wash. 398, 64 P. 523
(1901) (month and day not filled in, only year; held sufficient as long
as any time within the statute of limitations). In State v. Hayes, this
Court held that the language “on or about” is sufficient to admit
proof of the act at any time within the statute of limitations, so long
as there is no defense of alibi. State v. Hayes, 81 Wn. App. 425,
432-33, 914 P.2d 788 (1996), citing State v. Osborne, 39 Wash.
548, 81 P. 1096 (1905); State v. Oberg, 187 Wash. 429, 432, 60
P.2d 66 (1936) (prosecution for sodomy where the State alleged
that the act occurred “on or about April 3,” but the victim testified
that the act occurred on June 20, over two months later); State v.
Thomas, 8 Wn.2d 573, 586, 113 P.2d 73 (1941); see also State v.
Kealoha, 22 P.2d 1012, 1026 (Haw. 2000); State v. Pitts, 62 Wn.2d
294, 382 P.2d 508 (1963).

Many of these cases examine charging language rather than instructions, but the same result should obtain. The trial court found that while the “to convict” instruction could be read to mean the State had to prove possession during the entire term, it could also be read to mean possession at any time during that term, and the latter was an accurate statement of the law. 2 Trial RP 95; 3 Trial RP 8. This was not a case, then, like Hickman, where the State unambiguously had bound itself to prove an additional, superfluous element. The defendant’s insufficiency argument fails.

Moreover, under the deferential standard of review, there was sufficient evidence, with reasonable inferences drawn therefrom, that the defendant indeed possessed the motorcycle the entire time, from May 2002 to May 2006. The defendant argues this is not so, if the father’s testimony were to be believed. But in reviewing sufficiency of the evidence, evidence and inferences favoring the defendant are not considered. State v. Randecker, 79 Wn.2d at 521; State v. Jackson, 62 Wn. App. at 58 n.2. Viewed in the light most favorable to the State, there was sufficient evidence to support this conviction.

C. RESTITUTION WAS PROPER.

After a post-sentence evidentiary hearing the trial court ordered the defendant pay \$8,338.27 in restitution, representing the difference between what Progressive Insurance paid out (\$11,203.09) and what it recovered net from salvage (\$2,864.82). 1 CP 2; 12/9/08 Restit. Hrg. RP 19-20.⁸

A trial court's authority to order restitution is derived from statute. State v. Tobin, 161 Wn.2d 517, 523, 166 P.3d 1167 (2007). RCW 9.94A.753 (formerly RCW 9.94A.142) authorizes restitution generally as part of a felony sentence. Pursuant thereto, restitution by adult offenders "shall be ordered whenever a defendant is convicted of an offense that results in injury to any person or damage to or loss of property." RCW 9.94A.753(5).

The purpose of restitution is to compensate the victim, protect society, deter recidivism, punish the offender, and impart to the offender a thorough understanding of the economic effects of his or her crime. State v. Davison, 116 Wn.2d 917, 809 P.2d 1374 (1991) (understanding economic impact); State v. Shannahan, 69 Wn. App. 512, 849 P.2d 1239 (1993) (punishment); State v. Eyre, 39 Wn. App. 141, 692 P.2d 853 (1984) (compensation); State v.

⁸ Appellant denotes this as "7RP."

Barnett, 36 Wn. App. 560, 675 P.2d 626 (1984) (protection of society and deterrence). While ordering restitution is generally mandatory, determining the amount lies within the discretion of the trial court. State v. Davison, 116 Wn.2d at 919. A restitution award of a type authorized by statute will not be disturbed on appeal absent an abuse of discretion. State v. Enstone, 137 Wn.2d 675, 679, 974 P.2d 828 (1999); State v. Davison, 116 Wn.2d 917, 919, 809 P.2d 1374 (1991); State v. Pollard, 66 Wn. App. 779, 785, 834 P.2d 51, review denied, 120 Wn.2d 1015 (1992).

A court must base a restitution award upon easily ascertainable damages. RCW 9.94A.753(3). However, the amount of loss need not be established with specific accuracy or mathematical certainty. State v. Wilson, 100 Wn. App. 44, 51-52, 995 P.2d 1260 (2000); State v. Flemming, 75 Wn. App. 270, 274, 877 P.2d 243 (1994).

The rules of evidence do not apply when establishing restitution. ER 1101; State v. Pollard, 66 Wn. App. 779, 784, 834 P.2d 51 (1992). The amount of restitution must be established with "substantial credible evidence which "does not subject the trier of fact to mere speculation or conjecture." State v. Fambrough, 66 Wn. App. 223, 225, 831 P.2d 789 (1992). Absent an admission by

the defendant, a trial court determines the amount by a preponderance of evidence. State v. Hunsicker, 129 Wn.2d 554, 559, 919 P.2d 79 (1996).

Damages must be causally related to the crime charged. State v. Kinneman, 155 Wn.2d 272, 286-88, 119 P.3d (2005); Enstone, 137 Wn.2d at 680, 682. They need not, however, be foreseeable. Enstone, 132 Wn.2d at 677, 680. Losses are causally connected to the crimes charged when the loss would not have occurred “but for” the crime. Kinneman, 155 Wn.2d at 287 (citing State v. Wilson, 100 Wn. App. 44, 50, 995 P.2d 1260 (2000)); accord, Enstone, 137 Wn.2d at 682-83. A defendant cannot be required to pay restitution beyond the crime charged or for other uncharged offenses. State v. Johnson, 69 Wn. App. 189, 191, 847 P.2d 960 (1993). But in determining whether a causal connection exists, the reviewing court looks “to the underlying facts of the charged offense, not the name of the crime to which the defendant entered a plea.” State v. Landrum, 66 Wn. App. 791, 799, 832 P.2d 1359 (1992).

The defendant had argued below against any restitution award, asserting that all that had been proved was possession of stolen property in 2006, while the loss had occurred back in 2002.

1 CP 3-5. He also argued that the statute of limitations had run, and that Progressive had made no effort to minimize damages. 12/9/08 Restit. Hrg. RP18-19. The State responded that the defendant had kept the bike the whole time, and had never paid the \$11,203.09 back. The jury's special interrogatory confirmed they found the defendant possessed the stolen motorcycle after January 2005, but it did not affirmatively state that he had not possessed the motorcycle before that time. 3 CP ___ (sub 61, State's restitution memo). But for the defendant's actions, the prosecution argued, Progressive would not have suffered its loss; thus, there was the requisite causal connection. Id.

As for allegedly not minimizing damages, Progressive's claims representative described the motorcycle's condition in detail:

[T]he vehicle had damage to both sides. The faring was scraped and broken on both sides, right hand brake lever broken, fiberglass panel behind the seat was scraped, both front turn signals were broken off, transmission shifter was damaged, the muffler was damaged, left hand mirror was damaged, battery was dead.

12/9/08 Restit. Hrg. RP 13. This damage was consistent with a collision. Id. The claims representative added repairs would not have been cost effective, and that Progressive was not in the business of repairing and reselling vehicles at retail. 12/9/08 Restit.

Hrg. RP 14-15. The trial court, in awarding damages, rejected the argument that the insurer had failed to minimize its loss, stating there was no evidence that greater efforts by Progressive would have yielded more. It added that the motorcycle would have lost value over the years anyway. 12/9/08 Restit. Hrg. RP 19-20.

On appeal the defendant argues something different: he asserts that the crime occurred and was complete on *March 26, 2002*, when the defendant reported the motorcycle stolen. BOA 24, citing 12/9/08 Restit. Hrg. RP 4; see Exs. 17A and 17B. Since this was outside the charging period commencing *May 1, 2002*, he argues, restitution cannot be awarded. BOA 24. He also argues that there is no evidence as to when the bike was damaged, and to the extent there was, the inference was that the damage occurred before the bike was reported stolen. BOA 24-25.

But the charged crime was possession of *stolen* property, and the motorcycle did not become “stolen property” until the defendant assigned title, accepted payment, and negotiated the check, all of which occurred between *May 1 and May 6, 2002*, *within* the charging period. 1 Trial RP 42-46; Exs. 5, 6, 15, 17A & 17B; 12/9/08 Restit. Hrg. RP 4-7; Restit. Hrg. Exs. 1, 2. The bike

did not become the property of another until title passed, and that was on or after May 1, 2002. Thus, this first argument fails.

As for not being responsible for any restitution attributable to *damage*, that argument presupposes the defendant is liable for *some* loss. Even if he were right, that would still leave *some* restitution payable, based on the amount paid off less the value (retail or trade-in) for an undamaged but depreciated Suzuki GSX-R1000 motorcycle. (As the trial court noted, a 2002 motorcycle would have depreciated over the years. 12/9/08 Restit. Hrg. RP 19-20.) While not of record, these figures are readily available online. Defendant's second argument thus does not support the conclusion that *no* restitution should be ordered.

In both Woods and Tetters defendants were convicted of possessing stolen vehicles sometime after the vehicles were initially stolen. Both the Woods and Tetters courts held that those defendants could not be required to pay restitution for the loss of owners' personal property that had been inside the cars at the time they were stolen, and that had disappeared. State v. Woods, 90 Wn. App. 904, 908-11, 953 P.2d 834 (1998); State v. Tetters, 81 Wn. App. 478, 480-81, 914 P.2d 784 (1996). It is something else again when the *stolen item itself* is damaged. In Tetters the

defendant did not contest having to pay for damages to the car itself. Tetters, 81 Wn. App. at 480. In State v. Harrington, a defendant was convicted of possession of stolen property (a car) and ordered to pay for damage to it. He argued that since he had only been convicted of possessing stolen property, and not, for example, malicious mischief, he could not be required to do so. State v. Harrington, 56 Wn. App. 176, 177-78, 180, 782 P.2d 1101 (1989). This Court rejected the argument, given undisputed evidence that he had been in possession of the vehicle the entire time it was stolen, and that the damage had occurred during that time. Harrington, 56 Wn. App. at 179-80.

The defendant seeks to distinguish Harrington by arguing no such evidence (of damage while in his possession) is present here. BOA 27-28. He is wrong. The evidence was that the defendant acquired title to a new Suzuki GSX-R1000 on February 20, 2002. Ex. 5; Restit. Hrg. Ex. 1; 12/9/08 Restit. Hrg. RP 8. He insured it on March 12, 2002, and reported it stolen two weeks later. 12/9/08 Restit. Hrg. RP 4; Ex. 17B. Four years later, in May 2006, it was found, damaged, in his possession. 1 Trial RP 48; 2 Trial RP 2-9. His explanation, to Ms. King's sister and boyfriend earlier that spring, was that he was using it "for parts." 2 Trial RP 15-16, 24-

26. The State burden was to prove restitution by a preponderance of the evidence. Hunsicker, 129 Wn.2d at 559; Pollard, 66 Wn. App. at 784; Fambrough, 66 Wn. App. at 225. A preponderance of the evidence establishes that the defendant was in possession of the motorcycle the entire time it was stolen, and that it was damaged while it was in his possession.

The defendant argues, however, that any inference is that the damage occurred *before* the bike was reported stolen. Yet this is contrary to the evidence he offered at trial. According to his father, the defendant only had the bike for 1½ to 2 months when it was “stolen.” 2 Trial RP 49. Defendant’s affidavit of theft said it had all of 400 miles on the odometer. 1 Trial RP 53. He declared its value as \$12,000 at the time it was stolen. Ex. 17B. This reflects the value of a new bike, not a damaged one.

Nonetheless, it may well be true that this crime occurred because the defendant had wrecked a brand new bike before he’d gotten it insured, or because insurance wouldn’t cover the damage – in either case before he reported it stolen, transferred title, and received payment. If this is the argument being made to avoid paying restitution, it seems a cynical one. There is no evidence whatsoever that anyone else damaged the Suzuki, with the

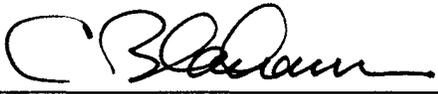
defendant somehow acquiring it later in his auto-repair work. A preponderance of the evidence established that the damage occurred while the bike was in his possession. "But for" his crime, Progressive would not have sustained the loss it did in recovering a damaged motorcycle. See Kinneman, 155 Wn.2d at 287 (articulating "but for" test); Enstone, 137 Wn.2d at 682-83 (same). And in determining whether a causal connection exists, the reviewing court looks "to the underlying facts of the charged offense, not the name of the crime[.]" State v. Landrum, 66 Wn. App. at 799. The trial court did not abuse its discretion in ordering restitution.

IV. CONCLUSION

The judgment and sentence should be *affirmed*.

Respectfully submitted on July 20, 2009.

JANICE E. ELLIS
Snohomish County Prosecutor

by: 
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Title 9A. Washington Criminal Code
Chapter 9A.56. Theft and Robbery

9A.56.140. Possessing stolen property--Definition--Presumption

(1) "Possessing stolen property" means knowingly to receive, retain, possess, conceal, or dispose of stolen property knowing that it has been stolen and to withhold or appropriate the same to the use of any person other than the true owner or person entitled thereto.

(2) The fact that the person who stole the property has not been convicted, apprehended, or identified is not a defense to a charge of possessing stolen property.

(3) When a person has in his or her possession, or under his or her control, stolen access devices issued in the names of two or more persons, or ten or more stolen merchandise pallets, or ten or more stolen beverage crates, or a combination of ten or more stolen merchandise pallets and beverage crates, as defined under RCW 9A.56.010, he or she is presumed to know that they are stolen.

(4) The presumption in subsection (3) of this section is rebuttable by evidence raising a reasonable inference that the possession of such stolen access devices, merchandise pallets, or beverage crates was without knowledge that they were stolen.

(5) In any prosecution for possessing stolen property, it is a sufficient defense that the property was merchandise pallets that were received by a pallet recycler or repairer in the ordinary course of its business.

[2004 c 122 § 2, eff. June 10, 2004; 1998 c 236 § 3; 1987 c 140 § 3; 1975 1st ex.s. c 260 § 9A.56.140.]

Title 9A. Washington Criminal Code
Chapter 9A.56. Theft and Robbery

9A.56.160. Possessing stolen property in the second degree (prior to 2007 amendments)

(1) A person is guilty of possessing stolen property in the second degree if:

(a) He or she possesses stolen property other than a firearm as defined in RCW 9A.41.010 which exceeds two hundred fifty dollars in value but does not exceed one thousand five hundred dollars in value; or

(b) He or she possesses a stolen public record, writing or instrument kept, filed, or deposited according to law; or

(c) He or she possesses a stolen access device; or

(d) He or she possesses a stolen motor vehicle of a value less than one thousand five hundred dollars.

(2) Possessing stolen property in the second degree is a class C felony.

[1995 c 129 § 15 (Initiative Measure No. 159); 1994 sp.s. c 7 § 434; 1987 c 140 § 4; 1975 1st ex.s. c 260 § 9A.56.160.]

[2007 c 199 § 7, eff. July 22, 2007 (after the date of this crime) in subsec. (1), in par. (a), inserted “or a motor vehicle,”; and deleted a former par. (d), which read: “(d) He or she possesses a stolen motor vehicle of a value less than one thousand five hundred dollars.”]