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65574-4

NO. 65574-4-I

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

REC'D
OCT 26 2010
King County Prosecutor
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

GREGORY RYAN,

Appellant.

2010 OCT 26 PM 3:54
CLERK OF COURT
COURT OF APPEALS
DIVISION ONE
STATE OF WASHINGTON

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Richard Eadie, Judge

OPENING BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The trial court erred in ordering restitution for a crime not charged.¹

Issue Pertaining to Assignment of Error

Appellant was convicted of Theft in the Second Degree for stealing silverware from a home. Nonetheless, the court ordered appellant to pay restitution for losses associated with burglary of the home despite the absence of an express agreement to pay these costs. Was this authorized under the restitution statute?

B. STATEMENT OF THE CASE

The King County Prosecutor's Office charged Gregory Ryan with one count of Residential Burglary for an offense allegedly committed on March 29, 2009 at the home of Rebecca Thatcher. CP 1. Attached to the information are two certifications for determination of probable cause. The first details the allegations of the March 29, 2009 offense. CP 2-3. The second details allegations concerning an earlier burglary occurring on February 2, 2009 at the home of Christine Gregory. CP 4-7. Restitution for the offense at the Gregory home is the only issue in this appeal.

¹ The restitution order is attached to this brief as an appendix.

According to the certification of probable cause, Christine Gregory left town, failing to set the alarm in her Shoreline home. On February 5, it was discovered that someone had smashed a sliding glass door, entered the home, and ransacked several rooms. CP 4. Electronics, jewelry, sterling silver tableware, and a Chihuly glass art bowl were among the items stolen from the home. CP 4-5. After police arrested an individual using a credit card taken from the home, they learned that three individuals had been involved, one of whom was Gregory Ryan. Ryan's DNA was found on a cigarette at the scene. CP 6-7.

As part of a plea deal, Ryan pled guilty to a reduced charge of Theft in the Second Degree for his conduct at the Gregory home (and one count of Malicious Mischief in the Second Degree for his conduct at the Thatcher home). CP 9-36; 1RP² 2-9. The amended information for the Gregory offense charges:

That the defendant GREGROY [sic] PATRICK RYAN in King County, Washington, on or about February 5, 2009, with intent to deprive another of property, to wit: silverware, did wrongfully obtain such property belonging to Christine Gregory, that the value of such property did exceed \$250;

² This brief refers to the verbatim report of proceedings as follows: 1RP – October 30, 2009; 2RP – November 20, 2009; 3RP – May 19, 2010.

CP 9. Ryan admitted that “[o]n or about February 5, 2009, in King County, Washington, I exerted unauthorized control over silverware belonging to Christine Gregory with intent to deprive her of that property, in an amount exceeding \$750.00 [sic].”³ CP 20.

The written plea agreement indicates that “[p]ursuant to RCW 9.94A.753, the defendant shall pay restitution in full to the victim(s) on charged counts” and that the court could consider the facts in the certification for determination of probable cause as the “real and material facts for purposes of this sentencing.” CP 32.

The King County Prosecutor’s Victim Assistance Unit submitted a request for \$47,839.96 in restitution to Christine Gregory and Gregory’s insurer. CP 48; Supp. CP ____ (sub no. 47, Restitution Packet, at 1).⁴ At a hearing on the request, Allison McGrath, a restitution investigator for the prosecutor’s office, testified that she had assembled the restitution packet after collecting information from Gregory and the insurance company to accurately represent all losses from the burglary of Gregory’s home. 3RP 3-6. McGrath

³ The \$750.00 threshold for this offense did not apply until after Ryan’s crime. See Laws 2009 c 431 § 8, eff. July 26, 2009.

⁴ The materials provided by the Victim Assistance Unit were clearly considered by the parties and the court, but were never filed

explained that cleaning costs were unusually high because police had used fingerprint dust throughout the home. 3RP 4-5. McGrath could not recall speaking to Gregory about the stolen silverware, but as to stolen jewelry, she recalled that Gregory's losses exceeded her maximum coverage. 3RP 5.

Defense counsel did not object to restitution for the value of missing silverware because Ryan had pled guilty to the theft of Gregory's silverware. Nor did counsel object to restitution for costs to clean Gregory's home, since they resulted from investigation of the theft. But since Ryan did not plead guilty to burglary, counsel argued he could not be held liable for any other losses inside the home. 3RP 6-11. The prosecutor countered that Ryan had "agreed to pay restitution for this entire incident," and therefore was responsible for all losses. 3RP 10. The court agreed. 3RP 11; CP 48-49.

Ryan timely filed a Notice of Appeal. CP 50-53.

below. To rectify that oversight, our office has filed them in the Superior Court.

C. ARGUMENT

THE SENTENCING COURT WAS NOT AUTHORIZED TO ORDER THAT RYAN PAY RESTITUTION FOR ALL OF THE VICTIM'S LOSSES.

Restitution is authorized "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). Under this provision, trial courts are authorized to order restitution only "for losses or damage resulting from the precise offense charged." State v. Fleming, 75 Wn. App. 270, 277, 877 P.2d 243 (1994), overruled on other grounds by Washington v. Recuenco, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006); State v. Miszak, 69 Wn. App. 426, 428, 848 P.2d 1329 (1993) (citing State v. Johnson, 69 Wn. App. 189, 191, 847 P.2d 960 (1993)).

There must be a causal relationship between the proved offense and the victim's losses, and trial courts are not authorized to order restitution for acts merely connected to a charged crime. State v. Teters, 81 Wn. App. 478, 480, 914 P.2d 784 (1996); State v. Tindal, 50 Wn. App. 401, 403, 748 P.2d 695 (1988). Short of a causal relationship, restitution may only be ordered where the defendant agrees to pay. RCW 9.94A.753 authorizes restitution:

if the offender pleads guilty to a lesser offense or fewer offenses [than charged] 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.

RCW 9.94A.753(5). Such an agreement must be express. State v. Woods, 90 Wn. App. 904, 908-09, 953 P.2d 834, review denied, 136 Wn.2d 1021 (1998); State v. Johnson, 69 Wn. App. at 192; State v. Raleigh, 50 Wn. App. 248, 252, 748 P.2d 267, review denied, 110 Wn.2d 1017 (1988).

The trial court's order of restitution is reviewed for an abuse of discretion. Fleming, 75 Wn. App. at 274. This Court will find an abuse of discretion where the trial court's decision is "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." State v. Pollard, 66 Wn. App. 779, 785, 834 P.2d 51, review denied, 120 Wn.2d 1015 (1992). The trial court abused its discretion here.

This Court's decisions in State v. Dauenhauer, 103 Wn. App. 373, 12 P.3d 661 (2000), review denied, 143 Wn.2d 1011 (2001), State v. Miszak, and State v. Mead, 67 Wn. App. 486, 836 P.2d 257 (1992), demonstrate why Ryan cannot be held responsible for all of the losses Gregory suffered from the burglary.

In Dauenhauer, the defendant was convicted of burglarizing three storage units. Before Dauenhauer and his accomplice could escape the scene, the property manager and a police officer confronted them. During the ensuing chase, Dauenhauer drove through two fences on the property and then collided with a truck. Dauenhauer, 103 Wn. App. at 375. Dauenhauer was ordered to pay restitution for damage to the facilities' fences and the truck. Id. at 377-379. This Court reversed, finding the absence of a causal relationship between the burglaries and these damages or an express agreement to pay for them. Moreover, that defense counsel had incorrectly conceded liability in the trial court was irrelevant. Id. at 379-380.

In Miszak, the defendant was initially charged with second-degree theft based on an allegation that he stole jewelry. But Miszak only pled guilty to one count of attempted theft. Miszak, 69 Wn. App. at 426-27. The State sought restitution for a number of jewelry items, but this Court refused to require restitution for any of them in the absence of proof that the victim's losses had resulted from the precise offense charged or that Miszak had expressly agreed to pay as part of his plea. Miszak, 69 Wn. App. at 428-430.

There was no such proof, since Miszak only pled to an *attempted* theft. Miszak *was* required to pay restitution for one item of jewelry based on his admission in his statement of plea of guilty that he had in fact stolen the item. Miszak, 69 Wn. App. 427, 430. But there is no similar admission on Ryan's part beyond theft of the silverware.

Finally, in Mead, the defendant worked as a dry-waller in his victims' homes. In one home, he took medical equipment, a coin collection, tools, jewelry, and electronics for which he was convicted of Possessing Stolen Property and required to pay restitution. Mead, 67 Wn. App. at 487-89, 491. Mead could not, however, be held responsible for replacing ransacked medical equipment that had been left behind in the victim's home because he was not convicted of actually burglarizing the home. Mead, 67 Wn. App. at 491-92 (citing State v. Hartwell, 38 Wn. App. 135, 140-141, 684 P.2d 778 (1984)). The same is true here. Under the amended information, Ryan was not charged with burglarizing Gregory's home. Therefore, he cannot be held liable for all damages resulting from that burglary.

At the restitution hearing, the deputy prosecutor argued that as part of the plea agreement, Ryan had “agreed to pay restitution for this entire incident.” 3RP 11. This is incorrect. Ryan merely agreed to pay “restitution in full to the victim(s) on charged counts” and agreed the court could consider the certification for probable cause to establish the facts. CP 32 (emphasis added). The only charged count pertaining to Gregory was the theft of her silverware.

While it is apparent from the plea agreement that Ryan did not agree to pay for all damages resulting from the burglary (expressly or even impliedly), to the extent there is any ambiguity, Ryan still prevails. A plea agreement is a contract and is interpreted as such. State v. Sledge, 133 Wn.2d 828, 838, 947 P.2d 1199 (1997). Moreover:

[p]lea agreements, by their nature, tend to be less formal and rely more on implicit understandings of the state and criminal defendants and their attorneys than do contracts in a commercial context. It may be for that reason that the terms of an agreement are generally defined by what the defendant understood them to be when he or she entered into the plea agreement.

State v. Oliva, 117 Wn. App. 773, 779, 73 P.3d 1016 (2003), review denied, 151 Wn.2d 1007 (2004) (citing State v. Cosner, 85 Wn.2d 45, 530 P.2d 317 (1975)) (emphasis added).

As counsel for Ryan acknowledged below, Ryan is properly liable for some of Gregory's losses. He owes her restitution for items of unrecovered silverware and costs associated with cleaning the home following the police investigation. Together, the cleaning expenses (Packet, at 8, 29-51) and missing jewelry (Packet, at 9, 55-57, 65-73) exceed \$10,000.00. But several other large expenses currently reflected in the restitution order are improper, including \$6,062.58 for damage to the home during the burglary (Packet, at 8, 12-19), \$2,549.02 for replacement of a lock and the shattered sliding glass door (Packet, at 8, 20-22), \$2,232.29 for stolen electronics and clothing (Packet, at 8, 23-27, 54, 62-64), thousands of dollars for jewelry, including \$8,784.46 for losses exceeding the policy limit (Packet, at 1, 9, 53, 55, 58-61, 64-65, 73-79), and \$3,080.00 for glass artwork (Packet, at 10, 81-82).⁵

⁵ Without additional explanation, the documents submitted in support of restitution make it impossible for undersigned appellate counsel to calculate some of these amounts with precision. That can only be accomplished in the trial court.

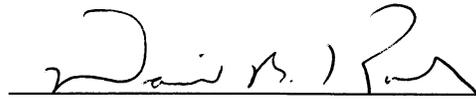
D. CONCLUSION

Ryan agreed to pay restitution for the one charged count pertaining to Gregory – theft of the silverware. He is liable for the missing silverware plus the costs of cleaning Gregory's home. This Court should vacate the restitution order and remand for a hearing where these costs, and only these costs, are calculated and imposed.

DATED this 26th day of October, 2010.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



DAVID B. KOCH
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Office ID No. 91051

Attorneys for Appellant

APPENDIX

FILED
2010 MAY 20 AM 9:34
KING COUNTY
SUPERIOR COURT CLERK
SEATTLE, WA

IN THE SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,)	
)	
)	Plaintiff,
)	No. 09-1-04834-3 SEA
vs.)	
)	ORDER SETTING RESTITUTION
GREGORY RYAN,)	
)	
)	Defendant,

The court ordered payment of restitution as a condition of sentencing. The Court has determined that the following persons are entitled to restitution in the following amounts;
IT IS ORDERED that defendant make payments through the registry of the clerk of the court as follows:

Christine Gregory C/O King County Clerk's Office 516 3 rd Ave. 6 th Floor Seattle, WA 98104	AMOUNT	\$ 12,864.46
Depositors Insurance Company 1000 Market Ave. N Canton, OH 44702 RE: Claim # 72 46 20 018347 02052009 01	AMOUNT	\$ 34,975.50

Please pay primary victim before insurance company. *PS*

DONE IN OPEN COURT this 19th ~~18~~ day of May ~~April~~, 2010.

Richard D Eadie

JUDGE RICHARD EADIE

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Presented by:

Andrew R. Hamilton #8312
ANDREW R. HAMILTON
Deputy Prosecuting Attorney

Copy received; Notice
Presentation waived:

Kenan Isitt 35317
Kenan Isitt
Attorney for Defendant

Order Setting Restitution
CCN# 1865861

REF# 2090406003

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 65574-4-1
)	
GREGORY RYAN,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 26TH DAY OF OCTOBER 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] GREGORY RYAN
6005 KENWOOD DRIVE
APT. B
EVERETT, WA 98203

SIGNED IN SEATTLE WASHINGTON, THIS 26TH DAY OF OCTOBER 2010.

x *Patrick Mayovsky*