

No. 65714-3-I
Consolidated with Nos. 66275-9-I
and 66339-9-I

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

FILED
COURT OF APPEALS DIVISION I
STATE OF WASHINGTON
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STATE OF WASHINGTON,

Respondent,

v.

ARVIN ROY MARTIN,

Appellant.

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

The Honorable Charles R. Snyder
The Honorable Steven J. Mura

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The trial court exceeded its statutory authority when it ordered restitution in an amount that was not supported by substantial evidence.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

The trial court has statutory authority to impose restitution where the evidence provides a reasonable basis for estimating losses and requires no speculation or conjecture. The amount of restitution may not be based on speculation or conjecture. Here, the victim provided a hand written list of items she claimed were taken but failed to provide any receipts, pictures of the items, appraisals, or other credible evidence to support her claim. Is Mr. Martin entitled to reversal of the order of restitution for a lack of substantial credible evidence?

C. STATEMENT OF THE CASE

Arvin Martin pleaded guilty to one count of possession of stolen property in the third degree. CP 15-19; 8/5/2010RP 5. While Mr. Martin did not agree to pay a particular amount of restitution, the State conditioned the plea on Mr. Martin agreeing to

pay restitution, the amount to be determined at a subsequent restitution hearing. CP 16; 8/5/2010RP 6.¹

At the restitution hearing, Carolyn Hansen-Faires testified about items she claimed were missing from her house which was the subject of the burglary. Ms. Faires provided a list of 58 items with her estimated value for each item, but was unable to provide pictures, appraisals, or receipts for any of the items. 5/4/2010RP 25-26, 105-07.² The list of items ranged from an antique coat rack estimated by Ms. Faires at \$1500 (“thought \$1500 was a fair price”), to a set of Limoges china estimated at \$2000 (“I talked to somebody who sells antiques online”), to a sewing machine for which she paid \$500 in the 1950’s but was still claiming a loss of \$500. 5/4/2010RP 18-19, 48-49, 56. Ms. Faires also claimed the loss of an antique lamp (“looked at lamp shops”), \$10,000 for a marble top for a table (“went on EBay”), and assorted dishware (“I just know how expensive they are”).

Mr. Martin objected to the evidence presented on the basis the amount was not easily ascertainable and based solely on

¹ The restitution hearing was conducted prior to Mr. Martin’s plea. The hearing was conducted following co-defendant Jenny Lee Shea’s guilty plea. 8/5/2010RP 6. Mr. Martin’s attorney was present during this hearing and cross examined the State’s witnesses on his behalf.

² The May 4, 2010, transcript also contains hearings conducted on June 2, 2010, and November 18, 2010, but will be cited collectively as “5/4/2010RP.”

speculation and conjecture. CP 46-51; 12/9/2010RP 4-8. The trial court discounted a portion of the claimed loss, but still imposed restitution in the amount of \$86,056.34, which included \$800 for Ms. Faires' "lost time." CP 7-8; 12/9/2010RP 5-6. Noting the lack of an appraisal for many of the antique items claimed, the court expounded:

You know, a defendant can go out and get appraisals just like the State can. *I don't think the taxpayer should be undergoing the expense of going out and getting an appraisal at taxpayer expense to protect the due process rights of a felon.* Just doesn't sit well with my sense of justice. If a felon believes that they're being ripped off in return by a dishonest home owner, and, as I say, I'm not interested in, I'm not here to protect somebody who comes in as a victim and is dishonest with the court in anyway, *but a defendant ought to have a burden if they think they're being accused of, or they're being subjected to paying more than what an item is worth, let the defendant go out and hire the appraiser.*

...

At the same time, because I don't have appraisals, it would be nice if I had those . . .

5/4/2010RP 28-30 (emphasis added).

Regarding Ms. Faires' "lost time," the court calculated the amount awarded thusly:

As far as the State's request that I compensate for the lost time, I don't have any evidence that there's any loss of income or anything. I think Ms. [Faires-] Hansen is retired. She's had some of her time

coming up here and that's worth something. *I don't have anything to judge that on or base it on.*

...

I don't have information on what her income loss has been because of having to come up here three times, which is a big, royal pain, I know, Miss Hansen.

...

As far as lost time, I will award additional \$600 for the time that Miss Hansen has had to come up here. I don't know, it's probably on the low side, but that's what I'm going to order.

5/4/2010RP 30-31 (emphasis added).

D. ARGUMENT

THE TRIAL COURT EXCEEDED ITS STATUTORY
AUTHORITY IN SETTING AN AMOUNT OF
RESTITUTION WHICH WAS NOT SUPPORTED BY
SUBSTANTIAL EVIDENCE

1. The trial court impermissibly shifted the burden of proving the amount of restitution to the defense. The trial court's authority to order restitution is purely statutory. *State v. Smith*, 119 Wn.2d 385, 389, 831 P.2d 1082 (1992). Whether a trial court exceeded its statutory authority is an issue of law reviewed *de novo*. *State v. Murray*, 118 Wn.App. 518, 521, 77 P.3d 1188 (2003).

Under RCW 9.94A.753(5), the trial court "shall" order restitution whenever an offender is convicted of an offense resulting in injury to another. RCW 9.94A.753(3) sets forth in relevant part that restitution by court order after a criminal conviction "shall be

based on easily ascertainable damages for ... actual expenses incurred for treatment for injury to persons.” In determining restitution the court may rely on information that is “admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing.” RCW 9.94A.530(2). The State must prove the restitution amount by a preponderance of the evidence. *State v. Dedonado*, 99 Wn.App. 251, 256, 991 P.2d 1216 (2000).

The State provided no documentation to support the requested amount other than the list provided by Ms. Faires. There were no pictures, receipts, or appraisals. Instead of placing the burden on the State as required, the court put the burden on Mr. Martin to prove Ms. Faires’ amount was wrong. The court’s troublesome comments about the “due process rights of a felon” and that the defendant had the burden to disprove the requested amount evidenced a misunderstanding of the burden of proof and impermissibly shifted it to Mr. Martin.

2. The State failed to establish the amount of restitution with sufficient credible evidence. In light of the lack of evidence presented at the hearing to support the requested amount of restitution, a fact repeatedly emphasized by the trial court in its

ruling, the amount of restitution ordered was not supported by the evidence and must be reversed.

When requesting a restitution order, the State must prove by a preponderance of the evidence that but for the defendant's crime, the loss would not have occurred. *State v. Kinneman*, 122 Wn.App. 850, 860, 95 P.3d 1277 (2004), *aff'd*, 155 Wn.2d 272 (2005). While the claimed loss need not be established with specific accuracy, it must be supported by substantial credible evidence. *State v. Griffith*, 164 Wn.2d 960, 965, 195 P.3d 506 (2008). Evidence of damages is sufficient if it provides the trial court with a reasonable basis for estimating losses and requires no speculation or conjecture. *State v. Fleming*, 75 Wn.App. 270, 877 P.2d 243 (1994); *State v. Pollard*, 66 Wn.App. 779, 834 P.2d 51, *review denied*, 120 Wn.2d 1015 (1992). The trial court may determine the amount of restitution "by either (1) the defendant's admission or acknowledgment or (2) a preponderance of the evidence." *State v. Ryan*, 78 Wn.App. 758, 761, 899 P.2d 825 (1995), *citing State v. Tindal*, 50 Wn.App. 401, 403, 748 P.2d 695 (1988).

The amount of restitution must be established by substantial *credible* evidence; the court cannot rely on speculation or conjecture. *State v. Kisor*, 68 Wn.App. 610, 620, 844 P.2d 1038

(1993). While the Rules of Evidence do not apply at restitution hearings, the evidence still must support more than mere speculation and conjecture as to the amount of restitution, and any hearsay statements must give the defense a sufficient basis for rebuttal. *Id.* “[T]he record must permit a reviewing court to determine exactly what figure is established by the evidence.” *State v. Pollard*, 66 Wn.App. 779, 785, 834 P.2d 51, *review denied*, 120 Wn.2d 1015 (1992).

Here, the court relied on speculation and conjecture in awarding restitution in light of the lack of any credible evidence in the form of pictures, receipts, or appraisals for any of the items Ms. Faires claimed were missing in order to establish their value.

In *Kisor*, the defendant was convicted of harming a police dog. In support of the amount of restitution for replacing the dog, the State submitted an affidavit from the county risk manager stating that she “checked with” the police department and canine training unit to determine the cost of the dog and attaching a canine college advertisement as proof that “12 weeks training is usual and customary for police dog handler training.” *Kisor*, 68 Wn.App. at 614 n. 2. On appeal, the court held the sentencing court abused its discretion and violated due process in ordering restitution based on

“nothing more than a rough estimate of the costs” of replacing a police dog. *Id.* Other than the statement of the Risk Manager that she “checked” with the Tacoma police and the Spokane Canine Training Unit, there was no indication of how she obtained the cost estimates. *Id.*

In *Pollard*, which involved the defrauding of banking institutions, the Court of Appeals ruled that a police report that recorded what bank personnel at the banking institutions stated the banks had lost, standing alone, did not amount to substantial credible evidence to establish the restitution amount. 66 Wn.App. at 786. Significant to that conclusion was not only that the police report was double hearsay, but also that the State could have substantiated the report with bank records or the testimony of bank personnel with “relative ease.” *Id.* See also *State v. Bunner*, 86 Wn.App. 158, 160, 936 P.2d 419 (1997) (reversing a restitution order as the only evidence was a summary report of medical expenditures from the Department of Social and Health Services).

This case is very similar to *Kisor* and *Pollard* in that the “evidence” presented was “nothing more than a rough estimate of the costs” of replacing the items claimed by Ms. Faires. *Kisor*, 68 Wn.App. at 614. As in *Pollard*, the claimed restitution could have

been substantiated by pictures, receipts, or appraisals, but none were provided. *Pollard*, 66 Wn.App. at 786. In addition, like *Kisor*, Ms. Faires' testimony amounted to "checking" with antique shops, internet sites, and other stores. As in *Kisor*, this is simply insufficient to establish the amount requested.

It may be argued that Ms. Faires provided the best estimate of the value of the items. The question is not whether Ms. Faires *estimated* the damages, it is whether she derived her estimates from a *reasonable basis* that did not require the trial judge to speculate or engage in conjecture as to the appropriate restitution. *State v. Tobin*, 132 Wn.App. 161, 174, 130 P.3d 426 (2006), *aff'd*, 161 Wn.2d 517 (2007). She did not: Ms. Faires provided estimates that were *not* derived from a reasonable basis, thus the court based its award of restitution on conjecture and speculation.

3. The trial court erred in awarding restitution for "lost time."

Regarding the request for "lost time" which was awarded by the court, there simply was no basis in the record to establish any amount. The bare request for fees, unsupported by any documentation or sufficient explanation, does not constitute sufficient credible evidence to establish the restitution amount. *Griffith*, 164 Wn.2d at 965. The trial court acknowledged there was

nothing in the record to establish an amount, so the court merely pulled a number (\$600) out of thin air and established that as the amount Ms. Faires should be compensated. This number was not supported by “any documentation or sufficient explanation” and should be reversed. *Id.*

4. This Court should vacate the order of restitution. The remedy for the State’s failure to prove the amount of restitution is to vacate the restitution order and remand to the sentencing court so that it can fix the proper amount of restitution. *Dedonado*, 99 Wn.App. at 257-58. The trial court is barred from considering any new evidence on remand because to do so would conflict with the requirement under the Sentencing Reform Act (SRA) that restitution must be set within 180 days of sentencing. RCW 9.94A.753(1); *Griffith*, 164 Wn.2d at 968 n.6.

The State failed to establish the amount of restitution with sufficient credible evidence and must be reversed.

E. CONCLUSION

For the reasons stated, Mr. Martin requests this Court vacate the award of restitution.

DATED this 27th day of July 2011.

Respectfully submitted,



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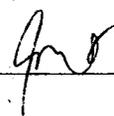
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