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STATE OF WASHINGTON

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No. 65714-3-I
(consolidated with
66339-9 and 66275-9)

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

STATE OF WASHINGTON, Respondent,

v.

KARLIE MARTIN and ARVIN MARTIN, Appellants.

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR.....1

**B. ISSUES PERTAINING TO APPELLANT’S
ASSIGNMENTS OF ERROR.....1**

C. SUMMARY.....1

D. FACTS3

E. ARGUMENT7

**1. The trial court did not abuse its discretion in ordering
 restitution at \$86,000 for the missing items because the
 victim’s testimony given her prior experience with
 antiques and her research regarding value was
 substantial credible evidence to establish the amount of
 loss.7**

**2. The trial court’s comments did not impermissibly shift
 the burden to the defendants to disprove the restitution
 amount, but acknowledged the State was not required to
 provide an expert or appraisals in order to meets its
 burden to prove restitution as asserted by defense and
 that the defense could obtain an expert if it believed it
 was necessary to rebut the State’s evidence.....13**

F. CONCLUSION18

TABLE OF AUTHORITIES

Washington State Court of Appeals

<u>State v. Dennis</u> , 101 Wn. App. 223, 6 P.3d 1173 (2000).....	8
<u>State v. Fleming</u> , 75 Wn. App. 270, 877 P.2d 243 (1994).....	10
<u>State v. Kisor</u> , 82 Wn. App. 175, 916 P.2d 978 (1996), <i>abrogated on other grounds by State v. Enstone</i> , 137 Wn. 2d 675, 974 P.2d 828 (1999).....	10
<u>State v. Pollard</u> , 66 Wn. App. 779, 834 P.2d 51 (1991), <i>rev. den.</i> , 120 Wn.2d 1015 (1992).....	8

Washington State Supreme Court

<u>State v. Camarillo</u> , 115 Wn.2d 60, 794 P.2d 850 (1990).....	8
<u>State v. Davison</u> , 116 Wn.2d 917, 809 P.2d 1374 (1991).....	7
<u>State v. Enstone</u> , 137 Wn.2d 675, 974 P.2d 828 (1999).....	9, 10
<u>State v. Hughes</u> , 154 Wn. 2d 118, 110 P.3d 192 (2005) <i>abrogated on other grounds by, Washington v. Recuenco</i> , 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006).....	8, 9
<u>State v. Kinneman</u> , 155 Wn.2d 272, 119 P.3d 350 (2005).....	9
<u>State v. Tobin</u> , 161 Wn. 2d 517, 166 P.3d 1167 (2007).....	9

Rules and Statutes

RCW 9.94A.030(41).....	9
RCW 9.94A.753(3).....	8, 17
RCW 9.94A.753(5).....	8

A. ASSIGNMENTS OF ERROR

None.

B. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. Whether the trial court abused its discretion in ordering restitution based on testimony of the owners of the stolen property regarding the original cost, the replacement cost and the value of the antiques where the owner who testified regarding the value of the antiques was a licensed antiques dealer, had owned an antiques store before and had researched the value of the antiques online and in an antiques reference book, and where the defense's antique's dealer testified he could not provide an opinion as to value because he had not seen the stolen items and that the amounts the owners had listed were possible if the items had been in the best condition.
2. Whether the court abused its discretion in awarding \$600 in time loss for the victim's attendance at three hearings to testify regarding restitution where the restitution statute does not provide authority for an award for time loss for testimony.
3. Whether the trial court impermissibly shifted the burden of proof to the defendant regarding the amount of restitution where the court commented that the State was not required to produce an expert in order to prove the amount of restitution and that experts were equally available to defense in order to rebut the evidence as to value and loss.

C. SUMMARY

Appellant Karlie and Arvin Martin (the "Martins") contend the trial court erred in setting restitution in the amount of \$86,600 for the

numerous antiques and valuable items that they and their co-defendant Jenny Shea took from the Faires' property in Whatcom County. Except for the \$600 for Ms. Hansen-Faires' time in attending the three court hearings regarding restitution, the Martins do not specifically contest that any individual item was incorrectly valued. Instead, the Martins assert that there was insufficient evidence to establish any value for the items taken and not recovered. On the contrary, Ms. Hansen-Faires testified as to her experience with antiques and her method in determining a value for each of the items taken. The court found her testimony more persuasive than the defense antiques dealer who admitted that many of the missing items could sell for the amount the Faires claimed if they were in fact in the best condition. The trial court found the testimony of the Faires credible and did not abuse its discretion in setting the amount of restitution at \$86,000 for the items taken.

The Martins also contest that the trial judge impermissibly shifted the burden of proof to them regarding establishing the amount of restitution based on some comments the judge made in deciding what the amount of loss was. The court did not impermissibly shift the burden to defense to disprove the claimed restitution amount by not requesting the State to produce an independent expert or appraisal in order to meet its

burden and by stating that defendants had the ability to call their own expert to rebut the State's evidence: it was responding to defense counsel's argument that the State could not meet its burden without producing an expert or professional appraisal. It simply was finding that the testimony of the owners was sufficient to prove the restitution amount and if defense felt that the amounts were incorrect, they also had the opportunity to produce an expert.

The court, however, did not have authority under the restitution statute to impose \$600 for Ms. Hansen-Faires' time in attending court to testify at the three restitution hearings. The restitution order should be remanded and reduced by the \$600 for this time loss, but otherwise should be affirmed.

D. FACTS

On May 20, 2010 as part of plea agreements Karlie Martin pleaded guilty to possession of stolen property in the first degree and Arvin Martin pleaded guilty to possession of stolen property in the third degree for the items taken from the Faires' dwelling in Whatcom County. KCP 16-23, 27-31; ACP 15-21; ARP 4, 6.¹ As part of the plea restitution was to be

¹ KRP refers to the verbatim report of proceedings for Karlie Martin, ARP for Arvin Martin and RP for those in co-defendant Jenny Shea's case. KCP refers to Karlie Martin's clerk's papers and ACP to Arvin's.

determined at a restitution hearing. KCP 18; ARP 6. At the restitution hearing, which had previously been held, after taking testimony from Ms. Hansen-Faires, Mr. Faires and a defense witness, an antiques dealer, the State requested the court set restitution at \$86,056.34, which did not include restitution for clothing items that Ms. Hansen-Faires testified had been taken but which had not been reported to the police. RP 117-18. The State also requested compensation for Ms. Hansen-Faires' time loss in having to testify, noting that the statute allows for up to double the amount of loss. RP 118.

In setting the amount of restitution at a total of \$86,600 the court explained that its objective was to make the victim whole, that it had weighed Ms. Hansen-Faires testimony as to value against the defense antiques dealer's testimony who stated he couldn't give an opinion as to what the value of the missing items was but that it was probably less than what Ms. Hansen-Faires had testified it was. The court stated it didn't believe that Ms. Hansen-Faires had been misleading in her testimony. RP 133-36. The court indicated it was not inclined to double the amount and ordered restitution of \$600 for Ms. Hansen-Faires' time to attend and testify at the three hearings, although it indicated it did not have any information as to Ms. Hansen-Faires' income.

During her testimony Ms. Hansen-Faires explained that she arrived at her values for each of the items listed on Ex. 1, her handwritten list of the missing items², based on either what she paid for them or what she believed their value to be. RP 7. In providing values for some of the antiques, she explained that she used to be a wholesaler in antiques, that she was licensed as an antiques dealer in Washington, and that she was going to be opening an antiques store on Airport Way. RP 15, 19, 43, 67. Regarding the antiques, she determined the value based on her research of the same or similar items on EBay, in an antiques reference book and in stores, or the price she had paid for it when she purchased it, or her general knowledge regarding the items. RP 7, 19, 27-28, 45, 47, 49, 51, 55, 59, 61-64, 102, 104.

Some of Ms. Hansen-Faires' values were based on what her husband told her the value was. RP 33, 40-41, 55-56, 61, 65. Mr. Faires testified regarding the values for the jackets, the engine for the wood splitter, the wagon wheels, one of the Limoges china sets and the beer tab rack. RP 72-75. His values were based on either what he paid for the item, its replacement cost, or somewhere in between those two figures. *Id.* An

² While the list did include some items that had been recovered the State did not request restitution for items that had been recovered, and the list itself did indicate in a couple places that the item(s) had been recovered. Ex. 1; RP 136-37.

estimate to replace the wood splitter engine ultimately was provided. Ex. 24.

The defense witness, an antiques dealer who had been in the antiques business for 10 years and had owned an antiques store for 8 years, testified that he assessed items for sale or consignment and sold them on the internet, including on EBay, and at his store. RP 78-79. He did not have any special certification or license regarding antiques. RP 79. He explained that the market value for an antique can fluctuate, but that the appraised value won't fluctuate based on the location where it's sold. RP 84. He also explained that a person who does not have a background in antiques can appraise some antiques if the person can determine that the item s/he is comparing it to, for example on EBay, is the same item. RP 85. He also testified that the research an antiques dealer does online could be done by anyone, that the value he places on an item is the market value, the best price he could sell the item for, and that a lot of the prices listed on EBay are closer to wholesale value as opposed to market retail value. RP 99-100.

The antiques dealer indicated he was familiar with some of the items on the list in general but not specifically. RP 86. He testified that it was possible to realize some or all of the prices listed but the items would

have to be in the best condition, and it was difficult for him to offer an opinion because he hadn't seen the items. RP 89, 94. When requested to give his general opinion about the values listed by Ms. Hansen-Faires, the dealer explained that in the best case scenario one could possibly sell the items for the prices listed, but it was impossible for him to assess their value without having seen them, and that he believed that some of the values were possible but most were not probable. RP 92-93.

E. ARGUMENT

- 1. The trial court did not abuse its discretion in ordering restitution at \$86,000 for the missing items because the victim's testimony given her prior experience with antiques and her research regarding value was substantial credible evidence to establish the amount of loss.**

The Martins allege that the trial court erred in ordering the amount of restitution because there wasn't substantial credible evidence regarding the value of the items taken and still missing. A court's authority to impose restitution is based on statute, not on the court's inherent authority.

State v. Davison, 116 Wn.2d 917, 919, 809 P.2d 1374 (1991). The restitution statute provides:

Restitution ordered by a court pursuant to a criminal conviction shall be based on easily ascertainable damages for injury to or loss of property, actual expenses incurred for treatment for injury to persons, and lost wages resulting from injury. Restitution shall not include reimbursement for

damages for mental anguish, pain and suffering, or other intangible losses, but may include the costs of counseling expenses reasonably related to the offense.

RCW 9.94A.753(3). It further provides:

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 or as provided in subsection (6) of this section unless extraordinary circumstances exist which make restitution inappropriate in the court's judgment and the court sets forth such circumstances in the record.

RCW 9.94A.753(5). The State's burden of proof at a restitution hearing is a preponderance of the evidence, and the standard on review is abuse of discretion. State v. Dennis, 101 Wn. App. 223, 226-27, 6 P.3d 1173 (2000). No abuse of discretion will be found where the amount of damages is established by "substantial credible evidence." State v. Pollard, 66 Wn. App. 779, 785, 834 P.2d 51 (1991), *rev. den.*, 120 Wn.2d 1015 (1992). The trial court's credibility determinations are not subject to appellate review. *See, State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) (trier of fact's credibility determinations are not subject to appellate review).

"The trial court has great power and discretion in issuing restitution." State v. Hughes, 154 Wn. 2d 118, 153, 110 P.3d 192 (2005) *abrogated on other grounds by, Washington v. Recuenco*, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006).

[T]he plain language of the restitution statute allows the trial judge to order restitution ranging from zero in extraordinary circumstances, up to double the offender's gain or the victim's loss The amount of restitution shall be based on "easily ascertainable damages." ... When interpreting Washington's restitution statutes, we recognize that they were intended to require the defendant to face the consequences of his or her criminal conduct. ... We do not engage in overly technical construction that would permit the defendant to escape from just punishment. ... The legislature intended "to grant broad powers of restitution" to the trial court.

State v. Tobin, 161 Wn. 2d 517, 524, 166 P.3d 1167 (2007) (internal citations omitted). In order to award restitution a trial court need only find that there is a causal connection between the defendant's crime and the resulting expenses. State v. Enstone, 137 Wn.2d 675, 682, 974 P.2d 828 (1999).

The amount of harm or loss does not need to be established with specific accuracy. State v. Kinneman, 155 Wn.2d 272, 285, 119 P.3d 350 (2005). "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." *Id.* (*quoting* State v. Hughes, 154 Wn.2d 118, 154, 110 P.3d 192 (2005)). Restitution is not restricted to market value: it is the amount ordered by the court "as payment of damages." Hughes, 154 Wn. 2d at 155; RCW 9.94A.030(41). Costs related to replacing lost property are compensable under the restitution statute. State

v. Kisor, 82 Wn. App. 175, 181, 916 P.2d 978 (1996), *abrogated on other grounds by* State v. Enstone, 137 Wn. 2d 675, 974 P.2d 828 (1999). The restitution amount may take into account and be based on the appreciation in value of the lost property since the time of the loss. State v. Fleming, 75 Wn. App. 270, 877 P.2d 243 (1994).

State v. Kisor, 68 Wn. App. 610, 844 P.2d 1038, *rev. den.*, 121 Wn.2d 1023 (1993), cited by the Martins, is distinguishable. In that case the defendant challenged the restitution figure because the amount was based solely on a conclusory affidavit, in violation of his due process. *Id.* at 619. The affidavit contained hearsay regarding “a rough estimate of the costs associated with purchasing a new animal and training it,” and did not include information to show how the declarant arrived at the amounts listed. *Id.* at 620. Although there was a reference to an advertisement from a canine college, the advertisement did not support the amounts requested. *Id.* The court reversed the restitution order because the affidavit did not constitute substantial credible evidence and because the defendant’s due process rights were violated because the affidavit did not provide him an opportunity to refute and rebut the evidence. *Id.*

The State’s evidence here was not based on the type of hearsay, a conclusory affidavit, that was at issue in Kisor, and the State did provide a

sufficient basis to rebut the evidence it relied upon, particularly given the unique nature of some of the items that had been stolen. The State presented testimony of the two owners of the property and the basis for their valuation of each item. They were subject to cross-examination so that the defense could rebut or refute the values to which they testified. Ms. Hansen-Faires had a background in antiques, and the values were based either on the cost the Faires paid for the items, the replacement cost or what Ms. Hansen-Faires had determined the value for the item was based on her research in reference books or online, a valuation process the defense antiques dealer admitted anyone could do as long as they knew the item and could determine that the item they were comparing it to was the same or similar. These were not mass produced items, but antiques and unique items like paintings created by specific artists. The dealer's inability to provide an opinion as to actual value of any of the items was due to the fact that he had not seen the items and could not given that they had been stolen. The State did provide documentation regarding some of the items and their values: it provided, a picture of a similar antique table, a teacup that was similar to the ones that had been taken, and a quotation for replacing the wood splitter engine; and Ms. Hansen-Faires even

brought in a matching chair from the French furniture set to demonstrate its authenticity. Ex. 1, 4, 24, RP 52-54, 67.

The court is required by statute to order restitution unless extraordinary circumstances exist which make restitution inappropriate in the court's judgment. The only ones who had seen the still missing items were the Faires, and their testimony regarding the amounts they paid for the items, the replacement cost and the valuation of the antiques based on Ms. Hansen-Faires research was substantial credible evidence to support the restitution figure of \$86,000 ordered by the court. All that was required for the court to impose restitution was a reasonable basis for estimating the loss. The owners' testimony, corroborated in part by the defense expert witness, provided that. The Faires incurred a substantial loss due to the Martins' crimes and the court's intent was to make the victim's whole. The court did not abuse its discretion in setting restitution at \$86,000 for the stolen items. The court, however, did not have authority under the restitution statute to impose \$600 for Ms. Hansen-Faires' time in attending court to testify at the three restitution hearings.

2. **The trial court's comments did not impermissibly shift the burden to the defendants to disprove the restitution amount, but acknowledged the State was not required to provide an expert or appraisals in order to meet its burden to prove restitution as asserted by defense and that the defense could obtain an expert if it believed it was necessary to rebut the State's evidence.**

The Martins assert that the trial judge impermissibly shifted the burden to them and Ms. Shea to disprove the restitution amount due to the trial court's comments they claim required them to prove the amount was wrong. Specifically Karlie Martin asserts that the court unfairly required them to obtain appraisals in order to rebut the Faires' claim. On the contrary the court was responding to defense counsel's claim that the State was required to obtain appraisals for the missing items in order to meet its burden, and merely stated that it wasn't necessary for the State to obtain appraisals for the missing items in order to meet its burden. As long as the State has met or meets its burden, the defense then has an opportunity to rebut that evidence, which could include obtaining appraisals, or, as Shea's counsel did, hiring an expert to rebut the evidence presented by the State. The court's comments acknowledging defense's opportunity to do so did not impermissibly shift the burden to the defendants to prove the restitution amount claimed was wrong. While the court's comment that the State's burden was less than that for a civil action was arguably

incorrect if it was referring to the burden of proof standard, the court still required the State to meet its burden by a preponderance, and therefore there was no impact from the incorrect comment.

At the restitution hearing the State argued it had met its burden to prove ascertainable damages based on the Faires' testimony regarding values, particularly given Ms. Hansen-Faires experience with antiques. RP 116-17. Defense counsel representing Ms. Shea, Mr. Fryer, then inquired of the court if it had read his memorandum, which the court indicated it had. RP 118. In the memorandum, Shea asserted that the State's burden of proof was by a preponderance of the evidence and faulted the State for not presenting an expert or other professional to testify regarding values. Shea CP at 7, 9. In argument, Mr. Fryer acknowledged the legal standard was not in dispute and the difficulty in proving an *exact amount* of restitution due to circumstances:

I think restitution is somewhat unique to the extent typically the item that is destroyed or stolen is no longer in existence and I think it places sort of a difficult burden on the victims to say, well, I want to go out and get my stuff appraised but I can't because the defendant that pled guilty or convicted has taken it. And I (sic) that's an unfair burden on the victim to say I want to value my stuff but I don't have any sort of mechanism to do that because it's gone, it's been destroyed or secreted, we don't have it anymore.

RP 119. Having acknowledged that nuance in trying to prove restitution generally and that the restitution statute doesn't require an exact amount, Fryer argued that it was different in this case because some items had been recovered and the State could go get an appraisal based on the recovered items. He also noted that generally insurance companies vet the victims' restitution claims³ and that he didn't think an insurance company would approve the victims' claim in this case. RP 119-21, 123. Fryer then reiterated that the State could have a qualified person review the victims' value estimates and confirm that their estimates were reasonable, arguing that the State should have an independent appraisal of the items done before restitution was awarded. RP 124-28. Mr. Fryer then argued that to rely upon the victims' testimony regarding value violated his client's right to due process and that no value could be assigned to the missing items. RP 129. He requested the court to find that it was impossible to determine value and to require the victims to file a civil lawsuit in order to recoup their losses. RP 129-30.

In response to Mr. Fryer's argument the court stated that restitution serves a different purpose than an insurance policy which is a business transaction. RP 130-31. The court then stated:

³ The Faires did not have the missing items insured.

... And it's a hard nut to crack for the court to be looking at these situations and saying okay, am I going to give you the benefit of all the due process rights here and we want to put the burden on the person who's suffered a loss because of your criminal act *and force them to go out and get appraisals with the same degree of certainty as in a civil case of a burden of proof as to what a loss is.* ...

RP 131 (emphasis added). After explaining the difficulty in determining value due to differences in price in the market based on location and other factors, and recognizing that it did not want to give the victim a windfall in the case, the court acknowledged that the victim might have been able to get the items for less, but that didn't mean that she didn't incur the loss.

RP 133-35. The court then commented that defendants are able to obtain appraisals just like the State is and that the State shouldn't have to go out and obtain appraisals to protect the due process rights of defendants. It then further explained:

In this case I don't have anything⁴ so I've got to say do I accept the defense argument and just simply say this looks like this might be overvalued here, or do I accept Miss Hansen's testimony? I don't think she was misleading the court at all. I really don't. She's angry, there's no doubt about that. But any victim is going to be angry. I didn't see anything in her testimony that convinced me that she was being dishonest thinking she was going to make a windfall off these defendants. And if she paid \$2000 for an item in New York City and could have got it here for \$150 or on

⁴ The court was referring to anything more the victims' testimony versus the defendant's expert. RP 135-36.

Ebay for \$80, ... but I don't think I can punish her by saying you should have bought them on Ebay.

At the same time, because I don't have appraisals, it would be nice if I had those, I don't have that and I'm not inclined in this case to order twice the amount of restitution. ...

RP 136. In setting the amount at \$86,000 the court reiterated that it found the victim's testimony credible.

The correct burden of proof was before the court and not disputed. The court's comments acknowledged that the restitution statute and caselaw does not require proof of an exact amount, as would be required in certain civil cases.⁵ Its other comments acknowledged that appraisals are not necessarily required in order to prove the restitution amount and are something that is equally available to both parties. The only question before the court was whether the Faires' testimony, along with the photos, was sufficient to prove by a preponderance the amount of loss and/or damage, *i.e.*, whether that evidence presented provided a reasonable basis for estimating their loss. It did.

Once the State had met its burden, then the burden properly shifted to the defense to rebut that evidence. The court's comments merely

⁵ If restitution were limited to an exact amount, then the statute wouldn't permit up to double the defendant's gain or the victims' loss in restitution, as it does. RCW 9.94A.753(3).

acknowledged that the State wasn't required to provide expert testimony regarding value to meet its burden, and that the defense could, if it chose to, present such testimony in order to rebut the State's evidence. The court held the State to its burden and did not impermissibly shift the burden of proof to the defendants.

F. CONCLUSION

For the reasons set forth above, the State respectfully requests that the restitution order be reduced by the \$600 for the time loss but otherwise upheld.

Respectfully submitted this 9th day of September, 2011.



Hilary A. Thomas, #22007
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CERTIFICATE OF SERVICE

I certify that on this date I placed in the United States mail with proper postage thereon, or otherwise caused to be delivered, a true and correct copy of the document to which this certificate is attached, to this Court, and appellant's counsel, addressed as follows:

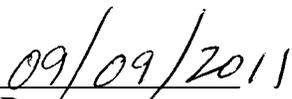
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