

66339-9

66339-9

NO. 66339-9-I

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

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STATE OF WASHINGTON,

Respondent,

v.

KARLIE MARTIN,

Appellant.

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

The Honorable Steven J. Mura, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred by ordering Karlie K. Martin to pay \$86,600 in restitution.

2. Alternatively, the trial court erred by ordering Martin to pay \$600 in restitution as compensation for the complainant's time spent in court hearings.

3. The trial court erroneously shifted the burden to Martin to disprove the complainant's restitution estimates.

Issues Pertaining to Assignments of Error

1. Did the trial court abuse its discretion by ordering restitution in an amount that was supported primarily by hearsay evidence that was not reliable and did not afford the opportunity for rebuttal?

2. Did the trial court abuse its discretion by adding \$600 to the restitution amount as compensation for the complainant's time spent in court when the \$600 amount came out of thin air?

3. Must the restitution order be reversed because the trial court shifted the burden of proof to Martin and had the wrong standard of proof in mind when making its decision?

B. STATEMENT OF THE CASE

The Whatcom County prosecutor charged Karlie K. Martin with first degree possession of stolen property and residential burglary. CP 29-31. Martin pleaded guilty to first degree possession of stolen property and the state recommended dismissal of the burglary charge. CP 16-23. The agreement states, "This plea agreement is conditioned on the defendant agreeing to pay restitution on charged and uncharged counts or dismissed cause numbers (if applicable)[.]" CP 18. Martin did not agree to pay a particular amount of restitution.

The trial court imposed a standard range sentence and dismissed the burglary charge. CP 8-15. After a lengthy and contested restitution hearing, the trial court ordered Martin to pay \$86,600 restitution. CP 5-6. Martin appeals from the restitution order only. CP 2-4.

The state called two witnesses, Carolyn Hansen-Faires (Hansen), and her husband James Faires (Faires), to establish the amount of restitution. Hansen testified the missing property was taken in May 2009 from her home and farm property, which were not insured. RP 3-4, 20. She provided a handwritten list of missing items, some of which were expensive antiques, and her estimated values for each. RP 5-7; Ex. 1. Hansen testified she researched the antique items to determine their value.

RP 7. She said, "I'm licensed as an antique dealer with the state of Washington so I must know something about antiques." RP 43. She set the value for some of the items as the price she paid for them beginning with purchases in the 1950s. RP 55-58.

The listed items ranged from a set of Schoenhut wooden dolls valued at \$15,000, to an \$8,000 painting, to a \$2,300 brass garment rack to a \$550 antique chair to a \$50 CD player and many other things. RP 14-65. Hansen said she "low-balled everything." RP 43. Hansen had no information for many items, such as manufacturer, country of origin or time built. RP 68-70. Nor did she have sales receipts or appraisals for any items. RP 25-26, 105-07. Faires testified similarly. RP 72-75.

The defense called Jeffrey Bassett, the owner and operator of an area antiques store. RP 78-79. He had no special certifications, but testified he had been interested in antiques for most of his adult life and regularly assessed items brought into his store. RP 78-79.

Bassett reviewed Hansen's list of items. RP 85-86. He said it was difficult to give an opinion on many of Hansen's value estimates because of insufficient information, such as condition of the item, maker, and style. RP 82, 87, 89. He also testified the antiques market fluctuated and that

what the buyer paid for an item was not necessarily indicative of its value.  
RP 83.

Bassett did question some of the estimates. For example, he checked on the Internet and found that the best Schoenhut dolls in perfect condition were selling for \$1,200 to \$1,500 – ten times less than Hansen's estimate of \$15,000. RP 90-91. In Bassett's opinion, Hansen also significantly overvalued some antique children's books. RP 91, 93-94, 99.

Generally speaking, Bassett said, Hansen's assigned value estimates could have been accurate, but only if each of the items was the best in each of its categories. RP 92. He could not, however, accurately assess their value without seeing them. RP 92. He said most of Hansen's estimates "are not probable." RP 93.

After the testimony, the prosecutor requested Hansen be awarded restitution of \$86,056.34. RP 118. The prosecutor further requested Hansen be compensated for time lost in coming to court.<sup>1</sup> RP 117. Defense counsel, in contrast, asked the court to find it was not possible to determine a restitution amount based on the evidence presented. RP 129.

The trial court found there was no evidence showing Hansen was dishonest or misleading about her value estimates. RP 135-37. The court

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<sup>1</sup> The restitution hearing occurred on three different days.

also found "a defendant can go out and get appraisals just like the State can." RP 135. It continued, "[A] defendant ought to have the 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." RP 135. The Court ordered \$86,000 restitution and an additional \$600 for time lost, for a total award of \$86,600. CP 5-6; RP 138.

C. ARGUMENT

THE TRIAL COURT ERRED BY ORDERING MARTIN TO PAY RESTITUTION IN THE AMOUNT OF \$86,600.

In pleading guilty, Martin agreed to pay restitution on charged and uncharged counts or dismissed cause numbers. CP 18. She did not, however, agree to pay a specified amount of restitution. As a result, the state bore the burden of presenting substantial credible evidence of Hansen's loss. The evidence must be reliable and provide a defendant with a sufficient basis for rebuttal. The state did not meet its burden here. This Court should vacate the restitution order.

1. The state's evidence was not sufficient to sustain the restitution order and did not allow Martin an opportunity to refute Hansen's damage estimates.

"Restitution is an integral part of sentencing, and it is the State's obligation to establish the amount of restitution." State v. Dedonado, 99

Wn. App. 251, 257, 991 P.2d 1216 (2000). A restitution order must be based on "easily ascertainable damages." RCW 9.94A.753(3).<sup>2</sup> 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).

If the defendant disputes facts relevant to determining restitution, the State must prove the damages by a preponderance of the evidence. State v. Kinneman, 155 Wn.2d 272, 285, 119 P.3d 350 (2005); State v. Hunsicker, 129 Wn.2d 554, 559, 919 P.2d 79 (1996). "Preponderance of the evidence" means that accounting for all the evidence, the assertion must be more probably true than not true. State v. Otis, 151 Wn. App. 572, 578, 213 P.3d 613 (2009). This Court reviews a trial court's order of restitution for an abuse of discretion, which occurs upon application of an

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<sup>2</sup> RCW 9.94A.753(3) 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 reasonably related to the offense. The amount of restitution shall not exceed double the amount of the offender's gain or the victim's loss from the commission of the crime.

incorrect legal analysis or other error of law. State v. Tobin, 161 Wn.2d 517, 523, 166 P.3d 1167 (2007).

And while the rules of evidence do not apply at restitution hearings, the State's proof must meet due process requirements, such as providing the defendant with an opportunity to refute the evidence presented, and being reasonably reliable. State v. Strauss, 119 Wn.2d 401, 418-19, 832 P.2d 78 (1992); State v. Pollard, 66 Wn. App. 779, 784-85, 834 P.2d 51, review denied, 120 Wn.2d 1015 (1992). The record must permit a reviewing court to determine exactly what figure is established by the evidence. Pollard, 66 Wn. App. at 785.

Finally, when the State's evidence is comprised of hearsay statements, the State must provide corroborating evidence that gives the defendant a sufficient basis for rebuttal. State v. Kisor, 68 Wn. App. 610, 620, 844 P.2d 1038, review denied, 121 Wn.2d 1023 (1993).

To illustrate, in Kisor, the State sought restitution for the replacement of a police dog. Kisor, 68 Wn. App. at 614. In support of its claim, the State offered only an affidavit by the Clark County risk manager, stating that she had "checked with" the Tacoma Police Department and the Spokane Training Units, who informed her that the cost of replacing the dog would be \$3,500. Kisor, 68 Wn. App. at 614.

Additionally, the affidavit stated that the manager had relied on a Canine College advertisement in determining the cost to train the dog. Kisor, 68 Wn. App. at 614.

The appellate court found the trial court's reliance on the affidavit violated the defendant's due process rights because, other than offering hearsay statements, the state provided no corroborating evidence supporting the figures for replacing and training the dog. Kisor, 68 Wn. App. at 620.

Similarly, the proof offered by the State for the value of Hansen's stolen property violated Martin's due process rights. Hansen's handwritten list, admitted as Exhibit 1, was based on hearsay estimates made by Hansen's friends, such as "antique friend" Mia Bjooredud, Ms. Bjooredud's mother, Gloria, several Seattle antiques dealers, "somebody who sells antiques online, "art openings in New York," and comparing the prices of similar items for sale online and at stores, RP 15-16, 19-20, 49, 61-64, 70. Some of the estimates were based on what Hansen paid for the item at the time. RP 47-48, 54-56, 63-65.

As a result, defense witness Mr. Bassett could not rebut the state's proof. For example, he said the description of china as "a large set of Limoges china is a very vague statement and [I] can't really assess a value

on that." RP 87. With respect to furniture, in particular a brass garment rack from France, Bassett said, "Once again, it's hard to give you an opinion without actually seeing or knowing more about the item." RP 89. And regarding Hansen's \$2,000 antique children's books, Bassett testified he did not have enough information to opine on Hansen's value estimate. RP 91. He said he could not assess a fair market value for the items based solely on written descriptions. RP 92.

As in Kisor, this court should find the lack of corroboration of the state's evidence fatal to the restitution order. There was simply not enough information provided by the state to afford Martin an opportunity to refute Hansen's value estimates. See State v. Bunner, 86 Wn. App. 158, 161, 936 P.2d 419 (1997) ("Like an affidavit that provides only a rough estimate, the PSI [presentence investigation report] may not comply with due process."). Hansen's testimony and handwritten list did not amount to "substantial credible evidence" of her loss. This Court should therefore vacate the restitution order. See State v. Dennis, 101 Wn. App. 223, 229-30, 6 P.3d 1173 (2000) (remedy for state's failure to establish causal connection between defendant's actions and damages is vacation of restitution order because state "must not be given a further opportunity to

carry its burden of proof after it fails to do so following a specific objection.").

2. The court's \$600 award to Hansen for "lost time" was not supported by substantial credible evidence.

The prosecutor requested the court to include in the restitution order an amount of money that would cover Hansen's time lost from coming to court. The court acknowledged it had no "information on what her income loss has been of having to come up here three times . . . ." RP 137. The court nevertheless tacked on an additional \$600 to its \$86,000 restitution finding "for the time that Miss Hansen has had to come up here." RP 138.<sup>3</sup>

"Easily ascertainable' damages are those tangible damages which are proved by sufficient evidence to exist." State v. Bush, 34 Wn. App. 121, 123, 659 P.2d 1127, review denied, 99 Wn.2d 1017 (1983). In Martin's case, the trial judge admitted he had no evidence to support the \$600 amount. Hansen did not ask for these expenses and offered no supporting evidence. For example, Hansen did not state whether or not she missed work time at all to come to court, or what her wages were. The

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<sup>3</sup> Hansen testified her primary residence was in Port Orchard. The prosecutor submitted a cost bill to Whatcom County to cover Hansen's travel expenses for two trips to court. Supp. CP \_\_ (sub. no. 47, Cost Bill—Summary, filed July 9, 2010).

figure instead appears to come out of thin air. Therefore, even if this Court rejects the argument set forth above, it should strike the \$600 portion of the restitution order and remand for entry of a corrected order.

Furthermore, the state was primarily responsible for the need for multiple court appearances. It filed the information charging Martin with possession of stolen property on June 12, 2009. CP 34-35. Yet Hansen did not provide her list of items and estimated values until the morning of May 4, 2010, which was the date of the restitution hearing. RP 7-9. This forced Martin to request a second hearing to afford effect cross-examination of outstanding information. RP 9. The next hearing took place June 2, 2010. Martin called Bassett and the state recalled Hansen. RP 78, 101. The matter was then continued until June 15 for argument and the court's ruling. RP 110-138.

Under these circumstances, the additional \$600 restitution is unfair punishment. The restitution statute is intended to guarantee that defendants fulfill their obligation to compensate victims for losses resulting from their crimes. State v. Gonzalez, 168 Wn.2d 256, 265, 226 P.3d 131, cert. denied, 131 S. Ct. 318 (2010). The additional court appearances resulted from Martin's crime only in the broadest sense. Had

Hansen provided the information in a more timely fashion, multiple hearings would have been unnecessary.

Finally, counsel has found no cases in which courts have included payment for time lost due to court appearances. See 13B Seth A. Fine, Washington Practice: Criminal Law, § 3611 (2010-11) (collecting cases allowing restitution for indirect costs). Struggling to find an analogous circumstance, Martin cites this Court to State v. Halsen, 111 Wn.2d 121, 757 P.2d 531 (1988). The Court there interpreted the same operative language now contained in RCW 9.94A.753(3) (“treatment for injury”) as not permitting travel expenses to recover a child in a case involving custodial interference. 111 Wn.2d at 123. If such crime-specific costs do not fall within allowable statutory restitution damages, neither should the much more generic time lost for court appearances.

3. The trial court impermissibly shifted the burden to Martin.

RCW 9.94A.753 clearly places the burden on the State to prove restitution amounts. Dennis, 101 Wn. App. at 226. The trial court seemed to acknowledge that in Martin's case, but its comments warrant this Court's action. The troubling comments occurred during the court's explanation of its order:

[H]ere we have intentional acts being committed and then it's hard for the court in equity if you will, to say we are going to put all the

burden on the person that suffered the loss. . . . There is a burden and, of course, the courts recognize and *the law recognizes that it's not the same burden as in the case of a typical civil lawsuit*. And it further has to be noted by the court that the court has the authority in the appropriate case to order twice the amount of the loss by way of punishment to a defendant for the actions that they've committed.

RP 131-32 (emphasis added).

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 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, [*sic*] but a defendant ought to have the 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. Take some of the goods that were returned, go down to Seattle or someplace and get a range of value from a certified appraiser that has no interest in the case. And then come in and say this is what it's [*sic*] worth. Then I've got something more than, I think, just the victim versus the defendant's expert.

RP 135-36 (emphasis added).

The court's comments reveal it unfairly penalized Martin for not sufficiently rebutting the state's vague and insufficient proof by presenting certified appraisals. This improperly shifted the burden of disproving the restitution request to Martin. The comments also indicated the trial court was displeased that courts have consistently required the "person that suffered the loss" to present reliable evidence to establish the amount of

restitution and its connection to the crime. Regardless of its own apparent disagreement with the state of the law, the trial court was nonetheless bound by these higher court decisions. See Satterlee v. Snohomish County, 115 Wn. App. 229, 233, 62 P.3d 896 (2002), review denied, 150 Wn.2d 1008 (2003) (Supreme Court decision binding precedent on Court of Appeals).

In addition, the trial court erred by concluding the burden of proof to support a restitution order was different than the burden of proving civil damages. As was recognized long ago, "the appropriate standard of proof for the imposition of restitution [is] the civil burden required to prove damages in tort, specifically, evidence sufficient to afford a reasonable basis for estimating the loss." State v. Von Thiele, 47 Wn. App. 558, 564, 736 P.2d 297, review denied, 108 Wn.2d 1029 (1987). The trial court's implication that the burden of proving restitution was less than that for civil damages is thus incorrect.

For these reasons as well, this Court should reverse the trial court's order of restitution.

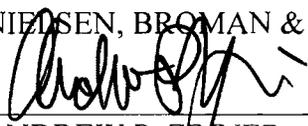
D. CONCLUSION

This Court should vacate the trial court's restitution order.

DATED this 26 day of May, 2011.

Respectfully submitted,

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

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 66339-9-1
	)	
KARLIE MARTIN,	)	
	)	
Appellant.	)	

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**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 26<sup>TH</sup> DAY OF MAY, 2011, 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] WHATCOM COUNTY PROSECUTOR'S OFFICE  
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- [X] KARLIE MARTIN  
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**SIGNED** IN SEATTLE WASHINGTON, THIS 26<sup>TH</sup> DAY OF MAY, 2011.

x *Patrick Mayovsky*