

NO. 66657-6-I

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

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STATE OF WASHINGTON,

Respondent,

v.

ADAM STEVENS,

Appellant.

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

The Honorable David A. Kurtz, Judge

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OPENING BRIEF OF APPELLANT

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DAVID B. KOCH  
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC  
1908 E Madison Street  
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STATE OF WASHINGTON  
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A. ASSIGNMENT OF ERROR

The trial court erred in ordering restitution for a crime not charged and for which appellant did not agree to pay.<sup>1</sup>

Issue Pertaining to Assignment of Error

Appellant was convicted of residential burglary. He and his accomplices were arrested shortly after the crime, and most – if not all – of the stolen items were recovered. Nonetheless, appellant was ordered to pay restitution for unrecovered items apparently taken during an earlier burglary at the same home. Was this authorized under the restitution statute?

B. STATEMENT OF THE CASE

The Snohomish County Prosecutor's Office charged Adam Stevens with residential burglary for entering Robert Williams' Lake Stevens home on March 12, 2010 with the intent to commit theft. CP 73.

According to the Affidavit of Probable Cause, a Lake Stevens Police Officer observed a pickup truck parked partially on the shoulder of State Route 9 and partially in the southbound lane of travel. Two males ran out from a wooded area and toward the

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<sup>1</sup> The restitution order is attached to this brief as an appendix.

pickup. CP 70. One was carrying a single backpack. The other had two backpacks. The male with the single backpack reached the truck, placed his backpack in the bed, and entered the passenger side. The other male was unable to cross SR 9 due to traffic. CP 70.

Because of residential burglaries in the area, the officer contacted the driver and passenger in the truck. He also requested that another officer look for the second male, who never made it to the truck. CP 70.

The driver of the truck was Nicole Goettler, whose residence was just a few blocks away. CP 70. Officers went to Goettler's residence, where they found Adam Stevens hiding in a camper on the property. They recovered the two backpacks, which contained – among other items – jewelry, electronics, and credit cards belonging to Robert and Pamela Williams. Police alerted the Williams that they had been burglarized. CP 71.

Stevens pled guilty to the charged burglary. CP 52-69; 1RP<sup>2</sup> 1-7. As part of the plea agreement, the State agreed not to file an additional charge of possession of stolen property based on his

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<sup>2</sup> This brief refers to the verbatim report of proceedings as follows: 1RP – May 26, 2010; 2RP – July 19, 2010; 3RP – January

possession of the victims' credit cards. CP 63. Stevens agreed to pay restitution for charged and uncharged crimes. CP 69.

The Honorable David Kurtz imposed a standard range 63-month sentence. CP 43-44. The proper amount of restitution was unclear. In his victim impact statement, Robert Williams claimed damages totaling \$66,956.00. Supp. CP \_\_\_\_ (sub no. 17, Victim Impact Statement, at 5-6). In explaining this extremely large sum, Williams indicated that he and his wife spent 6 months of the year in Mexico and that there had been more than one burglary at his Lake Stevens home:

They were caught the second time they robbed our home (that's why no jewelry was recovered – they took most of it the first robbery).

*Id.* at 4.

Judge Kurtz interpreted this to mean that most of the missing property had been taken during a prior burglary, which is why so little property was found when Stevens and his accomplices were arrested. 2RP 5-6. It appeared Mr. Williams had intermingled the two burglaries, and the vast majority of items were taken during a prior burglary not tied to Stevens. 2RP 7, 23.

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10, 2011; 4RP – January 25, 2011.

The deputy prosecutor agreed with this interpretation of Mr. Williams' statement. 2RP 6-7. Defense counsel also concurred, pointing out that given the small amount of time between the charged burglary and Stevens' arrest, it would have been impossible to take and dispose of all the property listed as missing from the Williams' home. 2RP 8. Determining the precise amount of restitution – which Judge Kurtz expected to be small – was left for another day. 2RP 30-31.

A restitution hearing was held January 10, 2011. A different deputy prosecutor appeared for the State and requested \$8,213.59 to State Farm Insurance for claims paid to the Williams family and \$26,395.91 to the Williams for additional uncovered losses. 3RP 2-3; CP 30-40.

Defense counsel objected, arguing that the victims were still aggregating their losses from different burglaries and Stevens pled guilty only to the residential burglary that occurred the afternoon of March 12, 2010. 3RP 3-5. Discovery in the case demonstrated approximately an hour between the burglary and police contact, leaving no time for the taking and disposal of the various items the

Williams were claiming as lost. Moreover, defense counsel questioned whether police were still holding some of the unrecovered items as evidence. 3RP 5-11, 21-23.

Judge Kurtz noted that in the plea agreement paperwork, Stevens had agreed to pay restitution for losses associated with Lake Stevens Police Department case number 10-00616, and the Williams had listed all of their losses under that number. 3RP 11-14; CP 69. Defense counsel argued that Stevens had only agreed to pay restitution for the charged burglary and an uncharged possession of stolen property associated with that case number. He did not agree to pay restitution for losses associated with a different burglary, and simply listing those losses under case 10-00616 did not obligate Stevens to pay. 3RP 14-16.

The deputy prosecutor argued that the restitution agreement was not limited to losses from one hour on March 12. Rather, Stevens was liable for restitution stemming from a residential burglary "on or about March 12, 2010." The prosecutor believed the hour window was simply "the last time that these folks were clearing out this place." 3RP 18. Because Stevens may have been at the home earlier that same day, and/or hidden some of the stolen items

in the woods, the prosecutor argued he was liable for all of the Williams' losses. 3RP 19-20, 24-25.

Judge Kurtz ordered the full amount requested by the State – \$34,609.50 – but left open the possibility of a modification. 3RP 25-26, 30; CP 18-29. He asked the State to determine what items had been recovered and to file the discovery in the case so that he could see what documents the parties had when fashioning the agreement on restitution. The matter was then set for another hearing. 3RP 26-27, 31-32.

The final hearing was January 25, 2011. Both parties filed memoranda, and defense counsel filed all discovery documents in the case. See Supp. CP \_\_\_\_ (sub no. 27, Defense Objection to Proposed Restitution); Supp. CP \_\_\_\_ (sub no. 29, State's Memorandum Re: Restitution). Although the Williams were present, the State did not call them as witnesses to testify regarding their losses. 4RP 2-3, 5.

The State reduced its request for State Farm by \$1,046.23, but increased its request for the Williams family by more than \$30,000.00. 4RP 7-8. Judge Kurtz declined to increase the amount

owed the victims, but did reduce the amount owed State Farm. 4RP 8-11,16. The revised total was \$33,563.27. 4RP 16; CP 16-17.

In rejecting defense counsel's argument that Stevens should not be held liable for property taken some time other than the afternoon of March 12, Judge Kurtz found Stevens liable for all of the Williams' losses because the discovery documents revealed those losses had been claimed under incident number 10-00616. 4RP 13.

Stevens timely filed his Notice of Appeal. CP 1-15.

C. ARGUMENT

THE SENTENCING COURT WAS NOT AUTHORIZED TO ORDER THAT STEVENS PAY RESTITUTION FOR ALL OF THE VICTIMS' 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). "A causal connection is not established simply because a victim or insurer submits proof of expenditures for replacing property stolen or damaged . . . ." State v. Dedonado, 99 Wn. App. 251, 257, 991 P.2d 1216 (2000).

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.

Judge Kurtz found Stevens liable for all of the Williams' losses because those losses were included in the Lake Stevens Police file in case number 10-00616. 4RP 13. But Stevens did not agree to pay restitution for any and all claimed losses that made their way into that file. Rather, he was liable to pay restitution for two crimes: (1) the residential burglary to which he pled guilty and (2) the only uncharged crime listed in the plea documents – possession of stolen property (credit cards). CP 63, 69; see also 3RP 17 (prosecutor concedes this is only uncharged crime). While appendix C to the plea agreement refers to case number 10-00616, this reference is only in the context of these two offenses. See CP 69.

The claimed losses clearly were not part of the uncharged possession of stolen property charge because the credit cards were recovered upon Stevens' arrest. CP 71. Nor were they part of the residential burglary to which Stevens pled. By agreement of the parties, the facts to be considered for restitution were those found in the Affidavit of Probable Cause. CP 69. And that document merely recites the events beginning at 1:20 p.m. on the afternoon of March 12 and ending a short time later with the arrest of all three involved and recovery of the stolen items found in the backpacks Stevens was carrying. CP 70-71.

It is the State's burden to establish restitution. State v. Dennis, 101 Wn. App. 223, 226, 6 P.3d 1173 (2000). It did not establish that Stevens or his accomplices had anything to do with items stolen from the Williams home prior to the afternoon of March 12. Nor did it establish, as the deputy prosecutor speculated, that these missing items might have been taken that afternoon but disposed of in the woods prior to contact with police.

Finally, to the extent there is any ambiguity as to what the parties intended with the reference to case number 10-00616 in appendix C to the plea agreement, Stevens 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).

Stevens' understanding of his restitution obligation was made clear by his attorney below. He agreed to make restitution for any established damages or losses suffered as a result of the afternoon burglary and uncharged possession of stolen property, both of which were investigated under case number 10-00616. He is not obligated to reimburse the victims or their insurer for any additional losses.

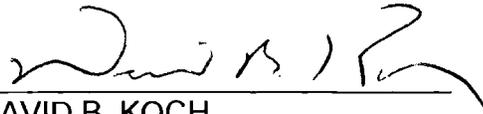
D. CONCLUSION

Stevens agreed to pay restitution for the one charged count of residential burglary and the one uncharged count of possession of stolen property. He is not liable for any additional losses. This Court should vacate the restitution order and remand for a proper accounting of what is owed.

DATED this 9<sup>th</sup> day of August, 2011.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



DAVID B. KOCH  
WSBA No. 23789  
Office ID No. 91051

Attorneys for Appellant

## **APPENDIX**



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SONYA KRASKI  
COUNTY CLERK  
SNOHOMISH CO. WASH

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF SNOHOMISH

THE STATE OF WASHINGTON vs  
STEVENS, ADAM RAY  
DOB: 01/15/1977  
DOL: STEVEAR236BN  
SID: WA17741296  
DOC: 777177

AMENDED  
RESTITUTION ORDER  
No: 10-1-00597-2  
PA#: 10F01120

NOTE:

Original Restitution Total: ~~\$26,395.91~~

Amended Restitution Total: \$33,563.27

Restitution shall be joint and several with:

The defendant in this cause having been ordered to make restitution pursuant to the Judgement and Sentence entered herein, and the amount of restitution having been determined based on

- the attached certifications of the Deputy Prosecuting Attorney and victim(s)
- restitution hearing conducted by the court.

Now, therefore, IT IS HEREBY ORDERED that the defendant shall pay the above stated amount. The defendant is to be given credit for any payments already received.

The defendant shall mail his/her payments according to the court shown at the top of this order as follows:

**SUPERIOR CRT:** Superior Court Clerk, 3000 Rockefeller MS605, Everett, WA 98201

**EVERETT DISTRICT CRT:** Mail your payments directly to the victim(s), NOT TO THE COURT.  
Pay by money order or cashier's check.

<u>VICTIM NAME &amp; ADDRESS</u>	<u>ORIG. REST. AMT.</u>	<u>AMND. REST. AMT.</u>
STATE FARM INSURANCE SUBROGATION SERVICES P.O. BOX 2375 BLOOMINGTON, IL 61702-2375	\$7,167.36	

NOTE: Insured: Pamela Williams  
Claim # 47M212311  
Policy # 47BGD8782

PAMELA L WILLIAMS  
731 94TH AVE SE  
LAKE STEVENS, WA 98258

#26,395.91  
~~\$26,395.91~~

NOTE: State Farm insurance filed @ 08/05/10  
47-M-212311

ORIGINAL

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No. 10-1-00597-2

NOTE TO VICTIMS: For payment schedule or further information you can call:

**Superior Court Cases:** The Snohomish County Clerk's Office is responsible for disbursing restitution funds as they become available. What this means to you as the victim is we will forward payments to you as soon as they are received by our office from the defendant. Please note: payments may be delayed if the defendant has been incarcerated for a length of time. Additionally, it is not uncommon for payments to be intermittent. The Clerk's Office monitors the cases regularly and will take appropriate action should the defendant not be in compliance with the payment schedule.

**Everett District Court Cases:** Non-payment, call Restitution Legal Assistant 4 months after this date at (425) 388-6434.

**Attention:** It is the victim's responsibility to notify the Clerk's Office if their address changes. Please send all requests in writing to the SNOHOMISH COUNTY CLERK'S OFFICE, Accounting Division, 3000 Rockefeller Ave, MS 605, Everett WA 98201. Be sure to include your full name, the case number, both old and new addresses, and a current daytime telephone number. If you have any questions, you may contact the clerk's Office Accounting Division at (425) 388-3466, ext. 2705.

Pursuant to RCW 36.18.190 all defendants will be assessed a \$100.00 Collection Costs Reimbursement Fee. Requests for waiver or reduction of this fee should be directed to the Snohomish County Clerk's Office Judicial Finance Division.

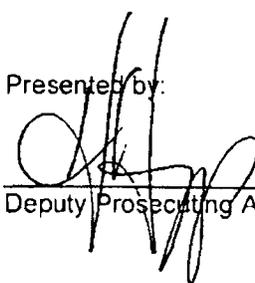
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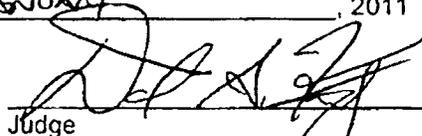
The defendant agrees that restitution should be set as ordered above. (strike if inapplicable).

This order is subject to amendment for future costs per RCW 9.94A.753.

DONE IN OPEN COURT this 25 day of January, 2011

Presented by:

  
23331  
Deputy Prosecuting Attorney

  
Judge

Approved for entry: disagreed

 #37104  
Attorney for Defendant

previously waived  
Defendant

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

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STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 66657-6-1
	)	
ADAM STEVENS,	)	
	)	
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 9<sup>TH</sup> DAY OF AUGUST 2011, I CAUSED A TRUE AND CORRECT COPY OF THE **OPENING BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- [X] SNOHOMISH COUNTY PROSECUTOR'S OFFICE  
3000 ROCKEFELLER AVENUE  
EVERETT, WA 98201
  
- [X] ADAM STEVENS  
DOC NO. 777177  
AIRWAY HEIGHTS CORRECTIONS CENTER  
P.O. BOX 2049  
AIRWAY HEIGHTS, WA 99001

**SIGNED** IN SEATTLE WASHINGTON, THIS 9<sup>TH</sup> DAY OF AUGUST 2011.

x *Patrick Mayovsky*

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STATE OF WASHINGTON  
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