

67626-1

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NO. 67626-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

JORGE VALENTE CUEVAS-SANCHEZ,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JOHN ERLICK

BRIEF OF RESPONDENT

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A. ISSUE PRESENTED.

The trial court found that the State had carried its burden of proving, by a preponderance of the evidence, the restitution amount, and found the information presented by the defendant insufficient to tarnish the credibility of the victim. Did the trial court abuse its discretion by ordering that the defendant pay \$284.94 in restitution?

B. STATEMENT OF THE CASE.

On March 30, 2011, the defendant pled guilty to one count of Vehicle Prowling in the Second Degree. CP 6-19; RP 3-12. In doing so, the defendant signed a "non-felony plea agreement." CP 18. In that agreement, the defendant stipulated that "the facts set forth in the certification(s) for determination of probable cause and prosecutor's summary are real and material facts for purposes of this sentencing," and that he "agrees to pay restitution for any damage or loss to the stolen vehicle or its contents." CP 18.

The certification for determination of probable cause established that on February 18, 2011, at approximately 7:50 PM, the defendant was seen popping the lock to a blue Honda Civic owned by Rafael Suarez-Serratos. CP 15. When confronted within

the vehicle by Southcenter Mall security officers, the defendant initially indicated that it was his friend's vehicle, but soon after fled from the security officers. CP 15. Rafael Suarez-Serratos was contacted, and stated that he did not know the defendant, and did not give the defendant permission to be in his vehicle. CP 15.

The defendant was sentenced on April 15, 2011. RP 13-22; CP 26-33. Among other conditions of a suspended sentence, the court ordered the defendant to pay restitution to the victim in an amount to be determined at a future hearing. RP 18-19; CP 31.

The restitution hearing was held on July 27, 2011. RP 23; CP 50-51. At that hearing, the State presented evidence in the form of a declaration from the victim, indicating that his 16 GB iPod Nano was missing after the crime, and that the brake lock pedal on his vehicle was loose and not functioning properly. CP __ (sub no. 36). Above the victim's signature, at the bottom of the page, it is typewritten:

I declare under penalty of perjury under the laws of the State of Washington, that the foregoing is a true and correct summary of the losses I incurred as a result of the crime investigated under the above cause number.

CP __ (sub no. 36). The cause number related to the instant case appears in the top-right corner of the page. CP __ (sub no. 36).

The defendant's attorney argued that there was no iPod Nano found on the defendant when he was apprehended by police, that there is no mention in police reports of the defendant sloughing anything, and that the Nano was not reported stolen by the victim at the time of the initial incident. RP 26-27.

In ordering restitution for the brake lock pedal, the trial court found that the State had shown by a preponderance of the evidence that the lock was tampered with. RP 29. The court additionally stated that it found the victim's statement credible as to what happened to the lock, and ordered the requested restitution as to the brake lock pedal. RP 29.

In considering the evidence regarding the iPod Nano, the court first asked if the defendant specifically denied taking the iPod, or was simply arguing the improbability of the victim's statement. RP 28. Once it confirmed that the latter was the case, the court gave its ruling:

On the Nano, it's—Nano is a pretty small item, and what we have here is a statement by a victim saying the Nano was taken. I'm not particularly surprised that he might not be aware at the time it was in his car. It's a very small, portable device, and I think like many of us, we lose our PDAs or iPhones all the time in terms of misplacement.

So I think that the defendant—I'm sorry—the victim, or the State in this case on behalf of the victim, carried the initial burden of proof and has carried that initial burden of proof, and it's not really directly controverted.

RP 29.

The court explained that a direct statement from the defendant saying that he had not taken anything from the vehicle would have created a different case; however, because the victim's statement that the Nano was taken remained uncontroverted, he ordered restitution in the amount requested by the State: \$284.94.

RP 30. It is this restitution order that is the subject of this appeal.

C. THE COURT SHOULD REJECT THE DEFENDANT'S CHALLENGE TO THE RESTITUTION AMOUNT.

Restitution in a criminal case is governed by RCW 9.94A.753(3), which provides, in relevant part, "restitution ordered by a court pursuant to a criminal conviction shall be based on easily ascertainable damages for injury to or loss of property." RCW 9.94A.753(3). When interpreting Washington's restitution statutes, courts recognize that they were intended to require the defendant to face the consequences of his or her criminal conduct. State v. Tobin,

161 Wn.2d 517, 524, 166 P.3d 1167 (2007); State v. Davison, 116 Wn.2d 917, 922, 809 P.2d 1374 (1991).

The State bears the burden of proving, by a preponderance of the evidence, both the amount of restitution and a nexus to the charged crime. Tobin, 161 Wn.2d at 524; State v. Kinneman, 122 Wn. App. 850, 860, 95 P.3d 1277 (2004). The restitution amount does not need to be proven with specific accuracy; as long as the evidence being provided has a reasonable basis for estimating loss, it is deemed sufficient. State v. Mark, 36 Wn. App. 428, 434, 675 P.2d 1250 (1984).

While a nexus to the charged crime is generally required, by express agreement as part of the plea bargaining process, the parties may exceed the scope of the specific crime. State v. Woods, 90 Wn. App. 904, 908, 953 P.2d 834 (1998). See State v. Miszak, 69 Wn. App. 426, 429, 848 P.2d 1329 (1993). Credibility determinations are left to the trier of fact, and are not to be disturbed on appeal. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 860 (1990); State v. Teshome, 122 Wn. App. 705, 715, 94 P.3d 1004 (2004).

The amount of restitution imposed is within the sound discretion of the sentencing court. Mark, 36 Wn. App. at 433. It will

not be disturbed by an appellate court, absent an abuse of that discretion. State v. Davison, 116 Wn.2d 917, 919, 809 P.2d 1374 (1991); State v. Piersen, 105 Wn. App. 160, 166-67, 18 P.3d 1154 (2001). An abuse of discretion occurs where the wrong legal principle is applied, where the decision is manifestly unreasonable, or the decision is based on untenable grounds or for untenable reasons. State v. Stenson, 132 Wn.2d 688, 701, 940 P.2d 1249 (1997); State v. Rundquist, 79 Wn. App. 786, 793, 905 P.2d 922 (1995).

In the instant case, the defendant agreed, in writing, to pay restitution to the victim for any loss or damage to the vehicle or its contents. The victim indicated, in a signed declaration, that, at the time of the incident, his brake lock pedal had been damaged, and his iPod Nano had been taken. This financial damage to the victim was covered by the agreement, so the required nexus was established if the Nano was taken from the vehicle, as the victim stated.

The defendant cites State v. Dedonado, 99 Wn. App. 251, 991 P.2d 1216 (2000), in support of the proposition that a court may not shift the burden to the defendant to disprove restitution. Brief of Appellant at 7-8. While the defendant is correct that the

burden is on the State, no such burden shifting took place in the instant case, and its facts are materially different from those of Dedonado.

In Dedonado, the trial court, while acknowledging that the defendant raised “valid questions” about the nexus between the charged crime and a generator that the victim claimed had been damaged, stated that “once [the defendant] get[s] [the restitution packet] from the state, I think the burden is on [the defendant] to notify the State that you are challenging it.” 99 Wn. App. at 254-55. The trial court went on to say that “if, in fact, there’s a necessity for an evidentiary hearing, the burden is on defense counsel to advise the state that that’s the case.” Id. at 254.

The trial court in Dedonado granted the State’s request for nearly \$11,000 in restitution to replace the generator, expressly because the defendant had not met his burden of informing the State and court in advance of his specific objection. Id. at 255.

In reversing the restitution order the Court of Appeals noted:

The sentencing court improperly imposed [a burden to notify the State of any objection] upon Dedonado and ordered restitution based upon evidence that did not establish a causal connection between Dedonado’s

actions and the damages. Entry of the order was thus an abuse of discretion.

Id. at 257.

In the instant case, the trial court was presented with a declaration from the victim that the Nano was taken in the course of the car prowl, and there had been an agreement by the defendant to pay restitution for any items so lost. The court was not called upon to weigh the credibility of conflicting testimony, but was called upon simply to determine if the victim's declaration was credible. While the court acknowledged that the defendant's arguments did make the victim's versions of events less probable, it indicated that the State had carried its burden (having previously indicated that the burden was preponderance) and the arguments of defense counsel alone were insufficient to swing the balance.

In contrast to Dedonado, the trial court in the instant case explicitly found that the State had "carried that initial burden" of proving the loss and the nexus by a preponderance of the evidence. The court did not impose a burden upon the defendant, but gave the defendant the opportunity to present additional information to contradict what the victim had said. The court told the defendant the type of information that it would have found

persuasive on the subject. When the defendant declined to present additional information, the court then ruled that the State had met its burden, and ordered restitution.

The trial court applied the appropriate standard in granting restitution to the victim. It imposed no burden upon the defendant. While acknowledging the validity of the defendant's arguments, the court found that the State had carried its burden in spite of them. It did not abuse its discretion, and the restitution order should be upheld.

D. CONCLUSION.

For the foregoing reasons, the State respectfully requests that this Court affirm the restitution order entered by the trial court.

DATED this 13th day of June, 2012.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to David B. Koch, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. JORGE VALENTE CUEVAS-SANCHEZ, Cause No. 67626-1-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Kimberley L. Reynolds
Done in Seattle, Washington

6/14/12
Date