

08466-3

08466-3

NO. 68466-3-I

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

REC'D
OCT 19 2012
King County Prosecutor
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

LISA O'NEILL,

Appellant.

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

The Honorable Jay White, Judge

BRIEF OF APPELLANT

JENNIFER M. WINKLER
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

08466-3
OCT 19 2012
King County Prosecutor
Appellate Unit

TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENT OF ERROR</u>	1
<u>Issues Pertaining to Assignment of Error</u>	1
B. <u>STATEMENT OF THE CASE</u>	1
C. <u>ARGUMENT</u>	6
THE COURT ABUSED ITS DISCRETION IN SETTING THE RESTITUTION AMOUNT.....	6
D. <u>CONCLUSION</u>	9

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

State v. Edelman
97 Wn. App. 161, 984 P.2d 421 (1999)..... 8

State v. Enstone
137 Wn.2d 675, 974 P.2d 828 (1999)..... 6, 7

State v. Fleming
75 Wn. App. 270, 877 P.2d 243 (1994)..... 6

State v. Griffith
164 Wn.2d 960, 195 P.3d 506 (2008)..... 6, 7

State v. Kinneman
155 Wn.2d 272, 119 P.3d 350 (2005)..... 7

State v. Ring
134 Wn. App. 716, 141 P.3d 669 (2006)..... 7

State v. Tobin
161 Wn.2d 517, 166 P.3d 1167 (2007)..... 7

State v. Woods
90 Wn. App. 904, 953 P.2d 834 (1998)..... 7

RULES, STATUTES AND OTHER AUTHORITIES

RCW 9.94A.535 1

RCW 9.94A.537 1

RCW 9.94A.753 6, 7

Sentencing Reform Act..... 8

A. ASSIGNMENT OF ERROR

The court erred in ordering the appellant to pay a restitution amount that did not correspond to the crimes of conviction.

Issues Pertaining to Assignment of Error

1. Did the trial court abuse its discretion in setting the restitution amount without deducting the offsetting rent amounts owed to the appellant?
2. Should this Court reverse the trial court's restitution order and remand so that the amount may be reduced by at least \$10,000, the amount of rent the complainant agreed to pay the appellant?

B. STATEMENT OF THE CASE¹

The State charged Lisa O'Neill with 14 counts of first degree theft and one count of fourth degree assault. Each count also included a vulnerable victim aggravator. CP 1-22, 101-10; RCW 9.94A.535(3)(b); RCW 9.94A.537. The complainant as to all counts was Leonard Swenson, a widower in his mid-60s whom O'Neill befriended and who later moved into her house. 9RP 40, 47.

¹ This brief refers to the verbatim report of proceedings as follows: 1RP – 8/26/11; 2RP – 11/23/11; 3RP – 11/29/11; 4RP – 1/3/12; 5RP – 1/4/12; 6RP – 1/5/12; 7RP – 1/10/12; 8RP – 1/18/12; 9RP – 1/17/12; 10RP – 1/23/12; 11RP – 1/24/12; 12RP – 1/25/12; 13RP – 1/26/12; 14RP – 1/30/12; 15RP – 1/31/12; 16RP – 1/31/12 (closing arguments); 17RP – 2/1/12; and 18RP – 3/9/12.

Counts 1-13 were based on separate transactions occurring from October of 2006 through June of 2008. Count 1 was based on a \$23,910 cashier's check Swenson wrote to O'Neill in October of 2006. In counts 2-13, the State alleged O'Neill transferred various sums of money from the joint account she shared with Swenson to her personal account, each time shortly after a check payable to Swenson was deposited in the joint account. The total amount alleged to have been taken in these transactions was \$55,427.10. CP 101-10; Supp. CP ____ (sub no. 152, State's Trial Brief, page 5, 14). Count 14 included the amounts from counts 1-13 plus transactions totaling an additional \$28,500 for checks Swenson wrote to O'Neill in late 2006. Supp. CP ____ (sub no. 152, State's Trial Brief, page 15).

Swenson fixed cars for an auto body repair shop starting in 1970. He retired in August of 2007 after a stroke suffered seven months earlier made it difficult to work. 8RP 114; 9RP 36, 83.

Swenson was widowed in 2005 after his wife was killed by a drunk driver. 8RP 127; 9RP 37, 39-40. During the summer of 2006, Swenson met O'Neill at a bar he frequented. 9RP 45-46. They discussed O'Neill's dog, which was in poor health. 9RP 46. Swenson began staying in a spare bedroom at O'Neill's house shortly thereafter. 9RP 48-49. Except for a brief period after his stroke, Swenson lived at O'Neill's until July of 2008.

8RP 162-63, 170, 176-77; 9RP 80, 105-07. His rent at O'Neill's was \$500 per month. 8RP 34; 9RP 62, 133. Swenson did not recall paying O'Neill. 9RP 133.

Before she died, Swenson's wife handled most financial matters for the Swenson family. 7RP 78; 9RP 37; 10RP 98. After his wife died, Swenson received a settlement from a lawsuit against the drunk driver. 8RP 133-34; 9RP 43. He also received the proceeds of the sale of his house, which he sold for a small profit in late 2007 before it was foreclosed on. 9RP 42, 75, 85; 11RP 31-32, 61-62. Swenson cashed out various life insurance policies. 9RP 90. He also earned a regular paycheck and, after his retirement, unemployment compensation and Social Security benefits. 9RP 84.

Swenson said that O'Neill was nice to him initially and the two even discussed marriage, although O'Neill never wanted a physical relationship. 9RP 54-56. According to Swenson, O'Neill became increasingly impatient with him after his stroke because of a speech impediment. 9RP 56. She called him names, including "leprechaun," and occasionally threw things at him.² 9RP 56, 97-98.

² The fourth degree assault charge, of which O'Neill was acquitted, alleged that in April of 2008 O'Neill pushed Swenson down the stairs. 9RP 98-101; CP 110.

Nonetheless, O'Neill convinced Swenson to move his money from Banner Bank to Boeing Employees Credit Union (BECU), and later to a joint account with O'Neill at Bank of America. 7RP 78-82; 9RP 71-75. In October of 2006, O'Neill convinced Swenson to loan her \$23,910 to pay off an auto loan. 9RP 66. Swenson recalled writing other checks to O'Neill but did not recall the specifics.³ 9RP 66-69. O'Neill handled Swenson's financial transactions with BECU and Bank of America. 9RP 73-77. Swenson recalled signing paperwork at Bank of America but did not know there was a joint account and never transacted over the Internet or by ATM. 9RP 74-77.

The State's financial analyst, Rebecca Tyrrell, testified counts 2-13 were based on various deposits into the joint account, the near exact amounts of which were later transferred online to O'Neill's personal account. 12RP 51-74; Ex. 84. Tyrrell also summarized the additional transactions included in count 14, which also included amounts in counts 1-13. 12RP 74-89. Tyrrell noted that there were other, smaller deposits into the joint account that were immediately transferred to O'Neill's

³ An evaluating psychiatrist testified Swenson suffered from mild cognitive impairment. 8RP 47-50, 53.

account, as well as many cash withdrawals, that were not encompassed within any charge.⁴ 11RP 207-08; 12RP 89.

The jury found O'Neill guilty of counts 1-14 and the corresponding aggravator but it acquitted her of the assault charge. CP 189-217.

After trial and before sentencing, O'Neill moved to dismiss counts 1-13. She argued that because the transactions supporting counts 1-13 were included within count 14, the charges violated the prohibition against double jeopardy. CP 287-98; 18RP 3-8. The State argued any double jeopardy violation could be cured by dismissing count 14. 18RP 11-12. The trial court dismissed count 14. 18RP 19-21; CP 325; Supp. CP ___ (sub no. 226, Order Vacating Count XIV).

The court sentenced O'Neill to an exceptional sentence of 62 months on each count, to run concurrently. CP 325, 327. The court also denied O'Neill's request to offset the State's requested restitution amount by the amount of rent Swenson agreed to pay O'Neill.⁵ CP 284-86. The

⁴ According to Tyrrell, Swenson contributed the vast majority of the money spent by the O'Neill/Swenson household during the charging period. 11RP 205-07; 12RP 44-45.

⁵ O'Neill's calculation of the offsetting amount appears to contain an arithmetic error. CP 286. O'Neill asked for a \$21,995.66 offset, but the correct amount based on O'Neill's theory appears to be \$11,995.66, including \$10,000 for 20 months of rent.

court ordered restitution in the amount of \$55,427.10, finding by the preponderance of the evidence that the dollar amounts alleged in counts one through 13 had been proven. The court found "some math errors," but noted that "there is some restraint by the State here[.]" that there was evidence showing another \$34,000 was taken, and that there may have been other amounts as well. 18RP 53-54. The court called the sum sought by the State, which it ordered, "conservative." 18RP 53-54.

Ms. O'Neill now appeals.

C. ARGUMENT

THE COURT ABUSED ITS DISCRETION IN SETTING THE RESTITUTION AMOUNT.

A court may impose restitution only as authorized by statute. State v. Enstone, 137 Wn.2d 675, 679, 974 P.2d 828 (1999). RCW 9.94A.753(3) provides in pertinent part that restitution "shall be based on easily ascertainable damages for injury to or loss of property." 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) (quoting State v. Fleming, 75 Wn. App. 270, 274-75, 877 P.2d 243 (1994)). Evidence supporting restitution is sufficient if it provides a reasonable basis for estimating loss and does not require the court to base its award on speculation or conjecture. Griffith,

164 Wn.2d at 965. If a defendant disputes the restitution amount, the State must prove the amount by a preponderance of the evidence. State v. Kinneman, 155 Wn.2d 272, 285, 119 P.3d 350 (2005).

A trial court's order of restitution will not be disturbed on appeal absent an abuse of discretion. Enstone, 137 Wn.2d at 679. Application of an incorrect legal analysis or other error of law constitutes abuse of discretion. Kinneman, 155 Wn.2d at 289. The court also abuses its discretion when a restitution order is manifestly unreasonable, or the court exercises its discretion on untenable grounds or for untenable reasons. State v. Ring, 134 Wn. App. 716, 719, 141 P.3d 669 (2006) (citing Enstone, 137 Wn.2d at 679-80). This Court may not invoke the permissive doubling provision under RCW 9.94A.753(3) to uphold an otherwise erroneous restitution amount. Griffith, 164 Wn.2d at 966.

Absent a defendant's express agreement to pay more, restitution is allowed only for losses "causally connected" to the crimes charged. State v. Tobin, 161 Wn.2d 517, 524, 166 P.3d 1167 (2007) (quoting Kinneman, 155 Wn.2d at 286); State v. Woods, 90 Wn. App. 904, 908, 953 P.2d 834 (1998).

Here, the court abused its discretion by ordering the full amount of restitution the State requested. O'Neill objected, arguing the requested amount should be offset by expenses O'Neill incurred. It was undisputed,

for example, that Swenson agreed to pay O'Neill \$500 per month in rent and that he lived at O'Neill's residence for about 20 months. 8RP 34, 162-63, 170, 176-77; 9RP 62, 80, 105-07, 133.

In rejecting the defense request to reduce the restitution award, the court impermissibly considered losses unrelated to the crimes of conviction. The court reasoned:

if anything, it would appear that there is some restraint by the State here . . . [T]here certainly was evidence at trial that there was another \$34,000 or so taken, and there may have been other amounts. So it appears to be a conservative amount, so the court will order it.

18RP 54.

The court's reasoning is untenable. The amount the State requested was not "conservative" or the product of "restraint," it was the exact amount corresponding to the crimes of conviction. Moreover, as the court correctly recognized, count 14 was vacated. 18RP 54. Restitution is, under the Sentencing Reform Act, part of the offender's sentence. State v. Edelman, 97 Wn. App. 161, 166, 984 P.2d 421 (1999). A vacated conviction obviously vacates the corresponding punishment.

Absent agreement, restitution based on uncharged or vacated crimes is not permitted. Thus, when the court relied on the rationale that the State's restitution request was already "conservative" in rejecting O'Neill's proposed offsetting amounts, the court abused its discretion.

D. CONCLUSION

For the foregoing reasons, this Court should reverse the trial court's restitution order and remand for reduction of the amount by the amount of rent Swenson agreed to pay O'Neill.

DATED this 19th day of October, 2012.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



JENNIFER M. WINKLER
WSBA No. 35220
Office ID No. 91051

Attorneys for Appellant

