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JAN 17 2014

King County Prosecutor  
Appellate Unit

NO. 70752-3-I

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

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STATE OF WASHINGTON,

Respondent,

v.

AMY LYSON,

Appellant.

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

The Honorable William L. Downing, Judge

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BRIEF OF APPELLANT

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ANDREW P. ZINNER  
Attorney for Appellant

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

*[Handwritten Signature]*  
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COURT OF APPEALS  
DIVISION ONE  
STATE OF WASHINGTON

**TABLE OF CONTENTS**

	Page
A. <u>ASSIGNMENT OF ERROR</u> .....	1
<u>Issue Pertaining to Assignment of Error</u> .....	1
B. <u>STATEMENT OF THE CASE</u> .....	1
C. <u>ARGUMENT</u> .....	2
THE TRIAL COURT ERRED BY ORDERING LYSON TO PAY RESTITUTION IN THE AMOUNT OF \$65,743.....	2
D. <u>CONCLUSION</u> .....	6

**TABLE OF AUTHORITIES**

	Page
 <u>WASHINGTON CASES</u>	
<u>State v. Bunner</u> 86 Wn. App. 158, 936 P.2d 419 (1997).....	5
<u>State v. Dedonado</u> 99 Wn. App. 251, 991 P.2d 1216 (2000).....	2
<u>State v. Dennis</u> 101 Wn. App. 223, 6 P.3d 1173 (2000).....	5
<u>State v. Griffith</u> 164 Wn.2d 960, 195 P.3d 506 (2008).....	3
<u>State v. Hunsicker</u> 129 Wn.2d 554, 919 P.2d 79 (1996).....	3
<u>State v. Kinneman</u> 155 Wn.2d 272, 119 P.3d 350 (2005).....	3
<u>State v. Kisor</u> 68 Wn. App. 610, 844 P.2d 1038 <u>review denied</u> , 121 Wn.2d 1023 (1993).....	4, 5
<u>State v. Otis</u> 151 Wn. App. 572, 213 P.3d 613 (2009).....	3
<u>State v. Pollard</u> 66 Wn. App. 779, 834 P.2d 51 <u>review denied</u> , 120 Wn.2d 1015 (1992).....	4
<u>State v. Strauss</u> 119 Wn.2d 401, 832 P.2d 78 (1992).....	3
<u>State v. Tobin</u> 161 Wn.2d 517, 166 P.3d 1167 (2007).....	3

**TABLE OF AUTHORITIES (CONT'D)**

Page

**RULES, STATUTES AND OTHER AUTHORITIES**

RCW 9.94A.753 ..... 2

A. ASSIGNMENT OF ERROR

The trial court erred by ordering Amy Lyson to pay \$65,743 in restitution.

Issue Pertaining to Assignment of Error

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

B. STATEMENT OF THE CASE

The State charged Lyson with eight counts of second degree theft after Lyson's employer discovered she had forged checks payable to herself totaling more than \$68,000. CP 1-9. Lyson pleaded guilty as charged. She admitting forging eight separate checks, each in an amount greater than \$750. CP 10-22. She stipulated to the facts set forth in the probable cause certificate for sentencing purposes. CP 31. The trial court imposed a prison-based Drug Offender Sentencing Alternative of 12 months confinement and 9.75 months of community custody. CP 35-45.

In a separate restitution hearing, the State presented a letter and affidavit from Lyson's employer and the probable cause certificate. CP 48-52. For the "total amount of damage or loss," Lyson's employer wrote, "\$65,743 in forged checks. Prosecutor has detailed records." CP 49.

Lyson contended the summary affidavit, which lacked itemization of the checks, was not sufficient to establish a restitution amount. RP 3. The trial court disagreed, ordering Lyson to pay restitution in the amount of \$65,743. CP 47; RP 5. Lyson appeals only the restitution order. CP 53.

C. ARGUMENT

THE TRIAL COURT ERRED BY ORDERING LYSON TO PAY RESTITUTION IN THE AMOUNT OF \$65,743.

In pleading guilty, Lyson agreed to pay restitution on charged and uncharged counts. CP 31. 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 her employer's loss. The State did not meet its burden here. This Court should vacate the restitution order.

"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>1</sup> While the

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<sup>1</sup> RCW 9.94A.753(3) provides:

[R]estitution 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

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

Although the rules of evidence do not apply at restitution hearings, the State's proof must meet due process requirements, such as being reasonably reliable and providing the defendant with an opportunity to refute the evidence. 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

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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.

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.

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, the State in Kisor 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 from 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. The manager also 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.

The proof offered by the State for Lyson's employer's loss similarly violated Lyson's due process rights. Although the employer declared the "prosecutor has detailed records" of his loss, no such records were presented during the restitution hearing. In the probable cause certificate, a Seattle police officer wrote Lyson's employer discovered that Lyson forged his signature on 107 checks payable to herself. CP 50. The officer referred to bank records for each check, but the records were not presented at the sentencing hearing.

As a result, defense counsel could not rebut the state's proof. As in Kisor, this court should find the lack of corroboration of the state's evidence fatal to the restitution order. 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."). The employer's hearsay statements did not amount to "substantial credible evidence" of his 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.").

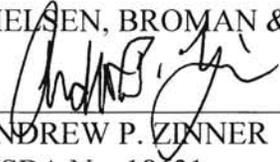
D. CONCLUSION

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

DATED this 17 day of January, 2014.

Respectfully submitted,

NIELSEN, BROMAN & KOCH

  
\_\_\_\_\_  
ANDREW P. ZINNER

WSBA No. 18631

Office ID No. 91051

Attorneys for Appellant

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DIVISION ONE

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STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 70752-3-1
	)	
AMY LYSON,	)	
	)	
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 17<sup>TH</sup> DAY OF JANUARY 2014, 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] AMY LYSON  
MISSION CREEK CORRECTIONS CENTER  
3420 NE SAND HILL ROAD  
BELFAIR, WA 98528

SIGNED IN SEATTLE WASHINGTON, THIS 17<sup>TH</sup> DAY OF JANUARY 2014.

x Patrick Mayovsky

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STATE OF WASHINGTON  
JAN 17 2014