

NO. 45646-0-II

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

STATE OF WASHINGTON,

Respondent,

v.

JOANNA KRYSTIN SPEAKS,

Appellant.

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

The Honorable Barbara Johnson, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The sentencing court erred by imposing restitution where the lack of specificity in the claimed personal items failed to satisfy the restitution statute or constitutional right to due process.

2. Ms. Speaks was denied her constitutional right to effective counsel by her counsel's failure to adequately object to the claimed value of personal property.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The restitution statute limits awards for "easily ascertainable damages for injury or loss to property." RCW 9.94A.753(3). The claim of restitution for personal property failed to provide information regarding the date of purchase, degree of use, or condition for the items claimed. In the absence of this rudimentary information, did the sentencing court err in finding there was sufficient specificity to support the award for personal items?

2. Was Ms. Speaks deprived of her constitutionally guaranteed right of effective counsel by defense counsel's failure to specifically challenge the personal property restitution award?

C. STATEMENT OF THE CASE

Joanna Speaks pleaded guilty to robbery in the first degree¹ and tampering with a witness.² The plea was in exchange for the prosecutor's offer dismissing four other charges to include a charge of first degree attempted murder. RP³ 1-8; CP 9.

Ms. Speaks was charged with having committed these crimes as an accomplice or as a principle. CP 7. Her co-defendant was Pedro Godinez. The robbery victim was Freddie Landstrom. RP 7.

Ms. Speaks entered a *Newton*⁴ plea agreeing there was sufficient evidence by which a reasonable jury could find her guilty. RP 1-8; CP 7.

The State's plea offer required Ms. Speaks's to agree to pay restitution. CP 10. The State's plea offer did not provide a specific amount of restitution. It also did not obligate Ms. Speaks to pay restitution for damages not causally related to her crimes. CP 10.

The State filed its Restitution Report. CP 29-34. The report noted \$17,780.94 owing in restitution broken, down as follows: \$15,735.95 due to the State's Crime Victims Compensation Program (CVCP) for medical costs; and \$2,044.99 due to Mr. Landstrom for "damaged clothing per

¹ RCW 9A.56.200

² RCW 9A.72.120

³ There is a single volume of verbatim report of proceedings ("RP").

⁴ *State v. Newton*, 87 Wn.2d 363, 552 P.2d 682 (1976)

phone conversation.” CP 30. The clothing list was broken down further as follows:

jacket \$490.00
shirt \$39.99
pants \$179.00
shoes \$217.00
socks \$15.00

The list also included costs for “stolen property” as follows:

cash \$650.00
phone \$349.00
wallet \$17.00
damaged car head-rest \$88.00

CP 30.

The court held a held a restitution hearing. RP 17-61. At the hearing, the State presented testimony from Mr. Landstrom. RP 17-35. Mr. Landstrom testified Ms. Speaks called him to her apartment. RP 24. Moments after he was inside, Mr. Godinez appeared and was holding a gun. RP 24, 28. Initially, Mr. Landstrom thought both he and Ms. Speaks were going to be robbery victims. RP 31. However, Ms. Speaks took personal property (i.e., cash, phone, wallet) while Mr. Godinez held the gun. RP 28.

Mr. Godinez and Mr. Landstrom left the apartment. RP 27. Mr. Godinez drove Mr. Landstrom around in Mr. Landstrom's car all the while with a gun to Mr. Landstrom's head. RP 27. They ended up at Vancouver Lake where Mr. Godinez told Mr. Landstrom, "Joanna, and him had planned this" and [T]hat he'd be an idiot not to follow through since I know what he looks like." RP 30. Mr. Godinez shot Mr. Landstrom six times. RP 19. He received medical treatment for his injuries and was still receiving medical treatment. RP 20-21. He made a claim through CVCP. RP 37.

Defense counsel made two arguments. First, Ms. Speaks should not have to pay restitution because it did not relate to any crime she committed. RP 49. The shooting was "a whole separate act" from the robbery. RP 50. Second, mere itemization of the stolen property was insufficient to support a restitution claim. RP 50.

The sentencing court disagreed. The court found that the shooting of Mr. Landstrom was an ongoing part of the robbery which included the taking of Mr. Landstrom's car. RP 54. The court did not address the itemization argument as to the stolen property. RP 53-56.

The court imposed the State's requested restitution of \$18,418.33. CP 35-36.

Ms. Speaks appeals the sentencing court's restitution determination.⁵ CP37-38.

D. ARGUMENT

1. THE SENTENCING COURT ERRED IN ORDERING RESTITUTION BASED ON UNSUPPORTED ESTIMATES FOR PERSONAL PROPERTY WHICH DID NOT ACCOUNT FOR THE AGE AND WEAR OF THE ITEMS.

a. Restitution may only be imposed for loss or injury caused by the crime in question.

Restitution is part of an offender's sentence and must be determined at sentencing or at later evidentiary hearing. RCW 9.94A.753(1); *State v. Hughes*, 154 Wn.2d 118, 155, 110 P.3d 192 (2005). The Sentencing Reform Act (SRA) requires the sentencing court to order restitution "whenever the offender is convicted of an offense which results in ... damage to or loss of property...." RCW 9.94A.753(5).

The statute further directs that "restitution ordered by a court ... shall be based on easily ascertainable damages or injury to or loss of property, actual expenses incurred for treatment for injury to persons, and lost wages resulting from injury." RCW 9.94A.753(3). Thus, restitution is limited to loss "causally connected to the crime charged." *State v.*

⁵ The court awarded total restitution in the amount of \$18,418.33. CP 38. The increase of the original requested amount was from ongoing medical expenses. CP 55-56.

Griffith, 164 Wn.2d 960, 965-66, 195 P.3d 506(2008) (quoting *State v. Tobin*, 161 Wn.2d 517, 524, 166 P.3d 1167 (2007)).⁶

When an offender disputes the factual basis of a restitution claim, the prosecution must prove the damages at an evidentiary hearing by a preponderance of the evidence. *State v. Kinneman*, 155 Wn.2d 272, 285, 119 P.3d 350 (2005). Although this may not require the victim's loss be established with complete accuracy, there must be substantial credible evidence providing a reasonable basis for estimating the loss and not mere speculation or conjecture. *Hughes*, 154 Wn.2d at 154; *Griffith*, 164 Wn.2d at 965.

- b. The restitution claim did not satisfy the statutory or constitutional requirements.

Ms. Speaks objected to the imposition of any restitution. RP 48-51.

Although the rules of evidence do not apply at a sentencing hearing or a restitution hearing, the hearing must comply with due process. *State v. Ford*, 137 Wn.2d 472, 484, 973 P.2d 452 (1999); *State v. Strauss*, 119 Wn.2d 401, 418, 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). Due process requires the defendant not be sentenced based upon information

⁶ A court can, in its discretion, order restitution up to double the amount of the victim's loss. RCW 9.94A.753(3). In this case, however, the court did not identify any reason to vary upward from the claimed damages.

that is false, lacks minimum indicia of reliability, or is not supported by the record. *Ford*, 137 Wn.2d at 481. The evidence supporting a restitution order is only sufficient then “if it affords a reasonable basis for estimating loss and does not subject the trier of fact to mere speculation or conjecture.” *Hughes*, 154 Wn.2d at 154, quoting *State v. Fleming*, 75 Wn. App. 270, 274, 877 P.2d 243 (1994); accord *Pollard*, 66 Wn. App. at 785.

The list of personal items Mr. Landstrom lost or had damaged, without any further supporting documentation to establish the actual value at the time of the robbery, fails to meet the statutory or constitutional standard for an order of restitution. This simple list of items leaves the court speculating as to the actual loss of personal property caused by the shooting. The record fails to establish the value of the various items at the time of the incident, by a preponderance of the evidence. Proof of anticipated expenditures for replacing stolen property is not sufficient. *State v. Dedonado*, 99 Wn. App. 251, 257, 991 P.2d 1216 (2000).

In *Dedonado* the court explained:

A causal connection is not established simply because a victim or insurer submits proof of expenditures for replacing property stolen or damaged by the person convicted. Such expenditures may be for items of substantially greater or lesser value than the actual loss. As pointed out by Dedonado at the hearing in the instant case, it is not possible to determine from the documentation provided by the State whether the HP generator was a proper replacement of the Adret generator. Similarly, it is not possible to determine from the documentation provided by the State whether

all of the repairs to the van were related to the damaged ignition switch. The State did not meet its burden of proving the restitution amounts here by a preponderance of the evidence because the documentation it provided did not establish a causal connection between Dedonado's actions and the damages.

Id.

While the claimed loss need not be established with specific accuracy, it must be supported by substantial credible evidence. *State v. Burns*, 159 Wn. App. 74, 78, 244 P.3d 988 (2010). In the absence of receipts, bills of sale, or other documentation establishing what the items had cost when purchased, how long Mr. Landstrom owned them, and what a current replacement would cost, the record failed to satisfy either the constitutional standards of due process of law or the statutory requirements for proof of “easily ascertainable for injury to or loss of property,” by preponderance of the evidence.

c. Reversal of the restitution order is required.

Because the State failed to meet its burden, the trial court abused its discretion when it ordered restitution. See *Dedonado*, 99 Wn. App. at 257. A trial court abuses its discretion if its decision is exercised on untenable grounds, is manifestly unreasonable, or is arbitrary. *State ex re. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971); *Harris v. Drake*, 152 Wn.2d 480, 493, 99 P.3d 872 (2004). The sentencing court’s decision here was exercised on untenable grounds because it exceeded the scope of

what is permitted by the relevant statutes. See RCW 9.92.060(2)(b); RCW 9.95.210(2)(b) (authorizing restitution only where there is “loss or damage”).

2. ALTERNATIVELY, DEFENSE COUNSEL’S FAILURE TO PROPERLY OBJECT TO THE RESTITUTION CLAIM FOR LOST AND DAMAGED PROPERTY DENIED MS. SPEAKS EFFECTIVE ASSISTANCE OF COUNSEL.

a. Ms. Speaks has a claim under ineffective assistance of counsel.

Arguably, defense counsel’s failure to make the proper objection to the imposition of restitution for Mr. Landstrom’s personal property waived Ms. Speaks right to challenge that portion of the restitution order. *State v. Ryan*, 78 Wn. App. 758, 762, 899 P.2d 825 (1995) (failure to object to restitution amount constitutes acknowledgment or agreement to the amount). If that is the case, based on the argument under Issue 1, Ms. Speaks should prevail on a claim of ineffective assistance of counsel.

b. Ms. Speaks was deprived of effective counsel at the restitution hearing.

To prevail on a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness based on consideration of all the circumstances and that the deficient performance prejudiced the specific court event. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d

674 (1984); *State v. Nichols*, 161 Wn.2d 1, 8, 162 P.3d 1122 (2007). Effective representation is presumed; the defendant must show the absence of legitimate strategic or tactical reasons for the challenged conduct. *State v. McFarland*, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995). To show prejudice, the defendant must prove that, but for the deficient performance, there is a reasonable probability that the outcome would have been different. *In re Pers. Restraint of Pirtle*, 136 Wn.2d 467, 487, 965 P.2d 593 (1998). Ineffective assistance of counsel claims are reviewed de novo. *In re Pers. Restraint of Brett*, 142 Wn.2d 868, 873, 16 P.3d 601 (2001).

As argued under Issue I, the State failed to present adequate proof of the value of personal items Mr. Landstrom claimed were damaged in the shooting. Whether the loss is causally connected to the crime is a question of law we review de novo. *State v. Acevedo*, 159 Wn. App. 221, 229–30, 248 P.3d 526 (2010).

Mr. Landstrom requested reimbursement for \$957.99 in clothing and a wallet that were lost or damaged. As Mr. Landstrom was wearing those clothes, the clothes were used clothes. There is very little value in used clothing.⁷ Mr. Landstrom significantly diminished the value of the clothing by wearing them and that should be reflected in the restitution

⁷ Or in a used wallet that apparently had little value to begin with (\$17). CP 30.

amount imposed. Had Mr. Landstrom been driving a 2004 Honda Accord destroyed in the shooting, the court would not order restitution in an amount equal to the value of a new 2014 Accord.

The same argument holds true for the \$349 Mr. Landstrom requested for his phone. Technology changes rapidly. A phone purchased for \$349, six months hence, is likely worth significantly less. Mr. Landstrom's possession, ownership, and use of the phone diminished the phone's value. This reduced value had nothing to do with the robbery. Mr. Landstrom should only be compensated for the true value of his property.

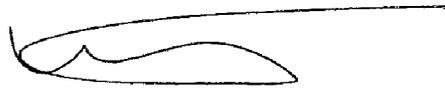
c. Reversal of the restitution order is required.

When reviewing restitution orders, this court must determine whether a causal connection exists between the losses and the criminal act. *Griffith*, 164 Wn.2d at 966. Losses are causally connected when the victim would not have sustained the losses but for the commission of the crime. *State v. Landrum*, 66 Wn. App. 791, 799, 832 P.2d 1539 (1992). Here, Mr. Landstrom had already sustained significant "losses" to the value of his clothing, his wallet, and his phone through everyday use. The restitution order should not compensate him for ordinary loss in value. Defense counsel was ineffective for failing to make this successful argument.

E. CONCLUSION

Ms. Speaks requests this court reverse the order of restitution and remand for further proceedings.

DATED this 17th day of June 2014.



LISA E. TABBUT/WSBA #21344
Attorney for Joanna Krystin Speaks

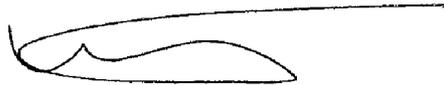
CERTIFICATE OF SERVICE

Lisa E. Tabbut declares as follows:

On today's date, I efiled Appellant's Brief to: (1) Anne Mowry Cruser, Clark County Prosecutor's Office, at prosecutor@clark.wa.gov; (2) the Court of Appeals, Division II; and (3) I mailed it to Joanna Krystin Speaks/DOC# 367475, Mission Creek Corrections Center for Women 3420 NE Sand Hill Rd., Belfair, WA 98528.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed June 17, 2014, in Mazama, Washington.



Lisa E. Tabbut, WSBA No. 21344
Attorney for Joanna Krystin Speaks

COWLITZ COUNTY ASSIGNED COUNSEL

June 17, 2014 - 5:11 PM

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