

73759-7

73759-7

FILED
April 18, 2016
Court of Appeals
Division I
State of Washington

NO. 73759-7-I

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

STATE OF WASHINGTON,

Respondent,

v.

VINOD RAM,

Appellant.

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

The Honorable Carol Schapira, Judge

REPLY BRIEF OF APPELLANT

JENNIFER J. SWEIGERT
Attorney for Appellant

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

TABLE OF CONTENTS

	Page
A. <u>ARGUMENT IN REPLY</u>	1
THE STATE FAILED TO MEET ITS BURDEN TO PROVE THE AMOUNT OF LOSS BY A PREPONDERANCE OF THE EVIDENCE.....	1
a. <u>The Invoices Presented by the State Fail to Establish Any Actual Loss by the Cardholders.</u>	2
b. <u>The Invoices Fail to Provide a Reasonable Basis for Estimating the Amount of Loss to the Fuel Companies.</u>	3
B. <u>CONCLUSION</u>	5

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

State v. Dennis
101 Wn. App. 223, 6 P.3d 1173 (2000)..... 1

State v. Deskins
180 Wn.2d 68, 322 P.3d 780 (2014)..... 2

State v. Fleming
75 Wn. App. 270, 877 P.2d 243 (1994)..... 4

State v. Griffith
164 Wn.2d 960, 195 P.3d 506 (2008)..... 5

State v. Hughes
154 Wn.2d 118, 110 P.3d 192 (2005)..... 3

State v. Mead
67 Wn. App. 486, 836 P.2d 257 (1992)..... 3

State v. Pollard
66 Wn. App. 779, 834 P.2d 51 (1992)..... 1

State v. Smith
42 Wn. App. 399, 711 P.2d 372 (1985)..... 3

RULES, STATUTES AND OTHER AUTHORITIES

ER 1101 2

RCW 9.94A.750 2

RCW 9.94A.753 1

A. ARGUMENT IN REPLY

THE STATE FAILED TO MEET ITS BURDEN TO PROVE THE AMOUNT OF LOSS BY A PREPONDERANCE OF THE EVIDENCE.

There is an old story about a fool looking for his keys under the lamppost, not because he lost them there, but because the light was better. The State in this case relies on the retail price of the fuel, not because it reflects the actual loss to any victim, but because it has evidence of that amount. The amount of restitution must be based on “easily ascertainable damages” that provide a “reasonable basis for estimating loss.” RCW 9.94A.753 (3); State v. Pollard, 66 Wn. App. 779, 785, 834 P.2d 51 (1992). But the one requirement does not automatically satisfy the other. The retail price of the fuel at issue in this case is, indeed, easily ascertainable based on the evidence presented at trial. But it does not reflect anyone’s actual loss.

It is not a novel proposition to assert that the State must establish that loss by the preponderance of the evidence at the restitution hearing. State v. Dennis, 101 Wn. App. 223, 227-28, 6 P.3d 1173 (2000). Ram does not seek standing to assert claims by the fuel companies or anyone else. He seeks merely to hold the State to its burden of proof.

a. The Invoices Presented by the State Fail to Establish Any Actual Loss by the Cardholders.

The retail invoices showing potential financial liability do not provide a reasonable basis for estimating the loss to the cardholders.¹ The potential financial liability of having one's account charged is not actual loss. Washington's restitution statute does not refer to liability. It refers to "loss of property." RCW 9.94A.750. In the absence of any other evidence whatsoever, the retail charges presented at trial might amount to some evidence that the cardholders actually paid, and therefore suffered losses, in that amount. But the evidence at the restitution hearing directly refuted that proposition.

The State argues the court was not obliged to accept Ram's evidence at face value. But there is no sign in the record that the Court found it somehow inaccurate or untrustworthy. Hearsay is permissible in restitution hearings. State v. Deskins, 180 Wn.2d 68, 83, 322 P.3d 780 (2014) ("Courts may rely on a broad range of evidence—including hearsay—because the rules of evidence do not apply to sentencing hearings.") (citing ER 1101(c)(3)).

This case is not akin to a burglary. In a burglary, there are actual items of property that were lost, regardless of whether the person is later able

¹ As in the opening brief, this argument refers to cardholders other than Bartelson. Ram concedes Bartelson's loss was established by sufficient evidence.

to be reimbursed by an insurance company. And, in fact, if items in a burglary are recovered and returned to the person in the same condition, such that the person suffers no loss, restitution is inappropriate. See State v. Mead, 67 Wn. App. 486, 490-91, 836 P.2d 257 (1992) (restitution correctly awarded for stolen medical equipment that was returned to the victims because the integrity of the equipment was comprised and it had to be either replaced or recalibrated).

The State cites State v. Hughes, 154 Wn.2d 118, 110 P.3d 192 (2005), and State v. Smith, 42 Wn. App. 399, 711 P.2d 372 (1985), for the proposition that courts may award more than retail value in restitution. BoR at 10. That is correct. It may award more than retail value when the increased amount is the replacement value of the lost property. It may award more than retail value when the increased amount better reflects the victim's actual loss. Here, the evidence shows seven of the cardholder companies suffered no loss whatsoever.

b. The Invoices Fail to Provide a Reasonable Basis for Estimating the Amount of Loss to the Fuel Companies.

The fuel companies suffered loss, but that the amount of that loss is unrelated to the retail amount they charge their customers. The State has provided no authority for its assertion that retail price is a reasonable basis for estimating a loss that is clearly in the amount of the wholesale cost. If

there were some commonly used amount of profit mark-up, this might be true. But the fact that mark-up amounts vary widely and the fuel companies' unwillingness to reveal any information about the amount of their profit margin leaves the Court with no reasonable basis for estimating their actual loss.

The doubling provision of the restitution statute does not save this restitution award from Ram's claim of insufficiency. "The ability to impose up to twice the amount of the victim's loss or offender's gain does not . . . preserve an otherwise erroneous restitution order. Any increase or doubling of restitution pursuant to the statute should be a consciously exercised choice by the court." State v. Fleming, 75 Wn. App. 270, 276, 877 P.2d 243 (1994). There was no indication the court opted to specifically increase any amount under this provision.

As discussed above, the fuel invoices do not provide a reasonable basis for estimating any victim's loss. Nor do they show the gain to Ram. Ram did not actually gain the retail value of the fuel. He charged the truck drivers much less than the actual retail value. Like the fuel companies' loss, his actual gain was far less than the retail amount they would have charged their customers. 7RP 43-61. No attempt was made at the restitution hearing to calculate the amount of Ram's gain.

In order to reasonably estimate the loss to the fuel companies, additional evidence would be required of their actual loss. Because new evidence to establish that amount is not permitted, no new restitution hearing is necessary on remand. State v. Griffith, 164 Wn.2d 960, 965, 195 P.3d 506 (2008).

B. CONCLUSION

For the foregoing reasons and the reasons stated in the opening Brief of Appellant, Ram requests this Court vacate the restitution order and remand so that the restitution amount can be reduced to the \$105,941.59 of loss demonstrated by Bartelson.

DATED this 18th day of April, 2016.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



JENNIFER J. SWEIGERT

WSBA No. 38068

Office ID No. 91051

Attorney for Appellant

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

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 73759-7-1
)	
VINOD RAM,)	
)	
Appellant.)	

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 18TH DAY OF APRIL 2016, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] VINOD RAM
DOC NO. 806105
MONROE CORRECTIONAL COMPLEX
P.O. BOX 777
MONROE, WA 98272

SIGNED IN SEATTLE WASHINGTON, THIS 18TH DAY OF APRIL 2016.

X *Patrick Mayovsky*

NIELSEN, BROMAN & KOCH, PLLC

April 18, 2016 - 3:41 PM

Transmittal Letter

Document Uploaded: 737597-Reply Brief.pdf

Case Name: Vinod Ram

Court of Appeals Case Number: 73759-7

Party Represented:

Is this a Personal Restraint Petition? Yes No

Trial Court County: ____ - Superior Court # ____

The document being Filed is:

- Designation of Clerk's Papers Supplemental Designation of Clerk's Papers
- Statement of Arrangements
- Motion: ____
- Answer/Reply to Motion: ____
- Brief: Reply
- Statement of Additional Authorities
- Affidavit of Attorney Fees
- Cost Bill
- Objection to Cost Bill
- Affidavit
- Letter
- Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____
- Personal Restraint Petition (PRP)
- Response to Personal Restraint Petition
- Reply to Response to Personal Restraint Petition
- Petition for Review (PRV)
- Other: _____

Comments:

No Comments were entered.

Sender Name: Patrick P Mayavsky - Email: mayovskyp@nwattorney.net

A copy of this document has been emailed to the following addresses:

paoappellateunitmail@kingcounty.gov
stephanie.guthrie@kingcounty.gov