

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

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|--------------------------|---|---------------------|
| THE STATE OF WASHINGTON, |) | No. 81400-1-I |
| |) | |
| Respondent, |) | |
| |) | |
| v. |) | UNPUBLISHED OPINION |
| |) | |
| RONALD J. BALLY, |) | |
| |) | |
| Appellant. |) | |

BOWMAN, J. — Ronald J. Bally appeals the trial court’s order requiring him to pay \$204,250 in restitution to his former employers following his convictions for burglary and theft. Because the trial court exceeded its statutory authority in ordering restitution for crimes for which the court did not convict Bally, we vacate the restitution order and remand for a new restitution hearing.

FACTS

The SpookShop sells costumes, masks, and accessories, mostly for Halloween. Since 1998, the business sold its inventory by opening “seasonal stores” and “popup stores” and in 1999, opened an online store. It had two 3,000- to 4,000-square-foot warehouses and several storage containers to hold its stock. But the company had ongoing inventory discrepancies that sometimes led to lost sales or canceled orders. In 2018, the owners had to shrink its inventory and vacate the two warehouses “because we just didn’t have enough money.”

The SpookShop employed Bally from 2004 until 2016. He became the shipping manager and was intimately familiar with “the main warehouse.” After he quit in the spring, the SpookShop owners became suspicious that he had been stealing from them. They learned that Bally had an online business selling costumes, masks, and various other products and accessories, most of them at or below wholesale prices. When reviewing Bally’s website, the SpookShop owners noticed that many of his items were identical to their missing inventory, including products they “uniquely” carried.

The owners installed security cameras around the main warehouse and its gated property. The cameras showed someone entering their warehouse “in the early morning hours” on November 19, 2017. The person appeared to use a key to enter the warehouse and go methodically through the aisles, removing items. He seemed to know where he was going and walked with a gait much like Bally’s. The intruder then walked out “carrying a large duffel bag” and what “appeared to be something else in his other arm.”

The owners called the police, who confronted Bally. Bally turned over a key to the SpookShop warehouse that he had kept and admitted that “in the two years since he’s left the employment” of the SpookShop, he “entered the business . . . with the key and took property from that business” three or four times. Bally also returned over 96 boxes that held several costumes each.

The State charged Bally with possession of stolen property in the first degree on February 1, 2018 and multiple counts of second degree burglary and trafficking of stolen property in the first degree between April 1, 2016 and

November 19, 2017.¹ After plea negotiations, Bally pleaded guilty to one count of second degree burglary and one count of first degree theft² arising out of the incident on November 19, 2017. The State agreed to dismiss the remaining charges.

The parties agreed to all aspects of Bally's sentence except for the amount of restitution. The plea agreement stated that "[r]estitution is To Be Determined and/or only partial restitution is listed." And at the plea hearing, the prosecutor told the court, "There is no restitution determined at this point. We anticipate special setting a contested restitution hearing and . . . it remains to be seen the amount of restitution that will be owing."

The court scheduled a restitution hearing several months later. In its brief, the State summarized the law on restitution and told the court:

In the present case, the State expects to present sufficient evidence to afford the Court a reasonable basis for estimating loss and determining restitution. At the conclusion of the forthcoming restitution hearing the State will ask the court to determine restitution by the preponderance of the evidence, and order the Defendant to pay restitution.

The State did not mention restitution for the dismissed crimes.

At the restitution hearing, defense counsel acknowledged the State's brief and "found it on point, with the exception that there needs to be a showing of a but for with regards to causation, and the State has to produce substantial evidence. So it's not just a matter of kind of a hope and a hunch."

¹ The trial court later determined that the probable cause affidavit did not support five of the trafficking charges.

² Theft in the first degree requires a property value exceeding \$5,000. RCW 9A.56.030(1)(a).

The lead detective, the SpookShop owners, and Bally testified at the hearing. The SpookShop owners created spreadsheets showing sales by Bally's online business between April 2016 and February 2018. They estimated that 75 percent of those sales involved their merchandise, which totaled \$71,856. Bally testified that he returned \$30,000 worth of merchandise to the owners from his basement boxes and that he owed "[n]o more than [\$]20,000" beyond that. He argued that "bad financial decisions" caused the other losses claimed by the SpookShop.

The trial court ordered Bally to pay \$204,250 in restitution. The court determined the total by calculating 75 percent of Bally's online sales from 2012 to 2017 and adjusting for shipping costs and \$15,000 of returned merchandise.

ANALYSIS

Bally appeals the amount of restitution. He asserts that the court can order restitution only for items stolen on November 19, 2017 and that the trial court had no authority to impose restitution for charges dismissed as part of his plea agreement.

Waiver

The State argues that "[p]ursuant to RAP 2.5, Bally is precluded from asserting for the first time on appeal that restitution damages are statutorily limited to the date of the offense." We disagree.³

³ We also reject the State's argument that Bally waived any challenge to restitution as part of an "indivisible" plea contract. See *State v. Ermels*, 156 Wn.2d 528, 541, 131 P.3d 299 (2006). Bally did not stipulate to pay restitution for dismissed charges in exchange for his plea agreement.

Under RAP 2.5(a)(1), a party may raise a claim that the trial court lacked jurisdiction for the first time on appeal. In State v. Fleming, 75 Wn. App. 270, 276 n.3, 877 P.2d 243 (1994), we applied RAP 2.5(a)(1) in the restitution context and held that a defendant can raise a challenge to a restitution order issued outside a court's statutory authority for the first time on appeal. See also State v. Moen, 129 Wn.2d 535, 547-48, 919 P.2d 69 (1996) (defendant not required to object in trial court when restitution hearing set beyond the former 60-day limit to hold a hearing). Here, Bally alleges that the trial court issued a restitution order outside its statutory authority because the damages are unrelated to the crimes for which the court convicted him. He may raise his challenge for the first time on appeal.⁴

Restitution Amount

Bally contends that "restitution can only be ordered for losses incurred as a result of the crime charged and pled to." The State claims the court acted within its authority in ordering restitution for the dismissed charges because Bally "agreed to a fact-finding hearing in which the judge would weigh the evidence and determine the scope of restitution." We review de novo whether a sentencing court has the statutory authority to order restitution. State v. Osborne, 140 Wn. App. 38, 41, 163 P.3d 799 (2007) (citing State v. Johnson, 96 Wn. App. 813, 815-16, 981 P.2d 25 (1999)).

⁴ We are not persuaded by the State's contention that Bally invited any error. Since he did not agree to the prosecutor's proposed restitution amount or expressly agree to pay for losses associated with dismissed charges, Bally did not "affirmatively assent[] to the error, materially contribute[] to it, or benefit[] from it." In re Pers. Restraint of Coggin, 182 Wn.2d 115, 119, 340 P.3d 810 (2014).

Under RCW 9.94A.753(5), “[r]estitution shall be ordered whenever the offender is convicted of an offense which results in injury to any person or damage to or loss of property.” See State v. Kinneman, 155 Wn.2d 272, 281, 119 P.3d 350 (2005). The statute affords the trial court broad discretion in determining restitution. Kinneman, 155 Wn.2d at 282. The State need not prove the specific amount of damages with certainty, and it need only prove damages by a preponderance of the evidence. State v. Tobin, 132 Wn. App. 161, 173-74, 130 P.3d 426 (2006), aff’d, 161 Wn.2d 517, 166 P.3d 1167 (2007).

But damages supporting restitution must be causally connected to the crime charged. Kinneman, 155 Wn.2d at 286. A court cannot impose restitution for uncharged crimes. Kinneman, 155 Wn.2d at 286. Nor may a court impose restitution “ ‘based on the defendant’s “general scheme” or acts “connected with” the crime charged, when those acts are not part of the charge.’ ” State v. Woods, 90 Wn. App. 904, 907-08, 953 P.2d 834 (1998) (quoting State v. Miszak, 69 Wn. App. 426, 428, 848 P.2d 1329 (1993)). Restitution for loss beyond the scope of the crime charged is properly awardable only when the defendant enters into an “express agreement” to pay such restitution as part of the plea bargain process. State v. Raleigh, 50 Wn. App. 248, 252, 748 P.2d 267 (1988).

Bally argues the trial court exceeded its authority by ordering restitution beyond the scope of his crime when he did not expressly agree to pay restitution for dismissed charges as part of his plea agreement. We agree.

The State charged Bally with multiple counts of burglary, possession of stolen property, and trafficking in stolen property between April 2016 and

February 2018. But Bally pleaded guilty to just one count of burglary in the second degree and one count of theft in the first degree, each arising from the incident on November 19, 2017. The State dismissed the remaining charges, including the five counts of trafficking that the court found probable cause did not support. Bally did not agree to pay restitution for the dismissed charges in his written plea form. He agreed only that “[r]estitution is To Be Determined and/or partial restitution is listed.” Still, the trial court imposed restitution for acts occurring between 2012 and 2017.⁵

Relying on Fleming, the State argues that even if Bally did not expressly agree to pay restitution for the dismissed charges in his plea form, his actions amount to an express agreement to pay for the losses. In Fleming, police suspected the defendant of two separate burglaries. Fleming, 75 Wn. App. at 271-72. In March 1989, he stole \$300 in cash. Fleming, 75 Wn. App. at 271. In April 1989, he stole \$50 and various jewelry items, including a gold necklace. Fleming, 75 Wn. App. at 272. The State first charged Fleming with second degree burglary. After plea negotiations, Fleming pleaded guilty to an amended charge of first degree trafficking in stolen property for acts “ ‘[d]uring March or April, 1989.’ ” Fleming, 75 Wn. App. at 272. In his plea form, Fleming agreed that “restitution will be ordered for property crimes or crimes resulting in injury.” Fleming, 75 Wn. App. at 272. Years later after Fleming’s release from prison, the court held a restitution hearing to determine the value of loss. Fleming admitted that he took the \$300 in the March burglary and did not object to the prosecutor’s

⁵ We note that the scope of the court’s restitution order also includes acts beyond the April 1, 2016 through November 19, 2017 time period alleged in the dismissed charges.

request that he pay restitution for that theft. Fleming, 75 Wn. App. at 273. He only contested the value of the jewelry from the April theft. Fleming, 75 Wn. App. at 273.

On appeal, Fleming argued the court exceeded its authority in ordering that he pay \$300 in restitution for the March burglary because it was a dismissed crime and he did not expressly agree to restitution for the theft. Fleming, 75 Wn. App. at 276. In affirming the court's restitution order, we concluded that Fleming's actions amounted to an agreement to pay restitution for the \$300 by

(1) affirmatively admitting while testifying at the restitution hearing to stealing the \$300; (2) telling the trial court that the only issue at the restitution hearing was the value of the necklace; and (3) failing to object to the prosecutor's recommendation at the time of the restitution hearing that restitution for the \$300 be ordered.

Fleming, 75 Wn. App. at 277.

Here, Bally did not admit to stealing 75 percent of the merchandise he sold on his website between 2012 and 2017. He admitted to police that he entered the SpookShop warehouse with a key and took merchandise "on three to four occasions" since he left their employment in 2016. Nor did Bally admit to stealing \$204,250 of SpookShop merchandise. Instead, he admitted to stealing \$50,000 worth of merchandise, \$30,000 of which he claims he returned. Unlike the defendant in Fleming, Bally also objected to imposing restitution unrelated to his convictions. He argued that "there needs to be a showing of a but for with regards to causation." In other words, Bally contested whether the amount of damages requested by the State was causally connected to the crimes for which the court convicted him.

We conclude that Bally did not expressly agree to pay restitution for crimes that the State dismissed. The trial court exceeded its authority by ordering him to pay restitution beyond that causally connected to the date of his crime or to which he agreed. We vacate the restitution order and remand for a new restitution hearing.⁶

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WE CONCUR:

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A handwritten signature in cursive script, appearing to read "Mann, C.J.", written above a horizontal line.

⁶ Since we reverse and remand to the trial court to recalculate restitution, we do not reach Bally's argument that the court based its restitution on speculation that the items Bally sold "must be items he took from SpookShop."