IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. MATTHEW THAYER VOGT, Appellant.	No. 64931-1-I (Consolidated with No. 65131-5-I) DIVISION ONE UNPUBLISHED OPINION FILED: July 18, 2011

Leach, A.C.J. — Matthew Thayer Vogt appeals an order of restitution, claiming that the trial court should have reduced the total amount awarded by $4,500 to account for a security deposit he forfeited in an unlawful detainer action brought by the victims. Because Vogt failed to establish that forfeiture of the security deposit compensated the victims for the physical damage to their property, the trial court did not abuse its discretion in refusing to deduct it from the restitution award. Vogt also raises additional claims in a statement of additional grounds. None have merit. We, therefore, affirm.

Background

We take these substantive facts from the certification for determination of probable cause, which Vogt stipulated to when he pleaded guilty.

The victims worked for Microsoft. After being transferred to India, they

decided to rent their home. They hired MacPherson's Property Management Company to rent and manage their home while they were away. MacPherson's required that any potential tenant provide financial documentation showing that the tenant could afford the rent of $4,500 per month.

In August 2007, Vogt and his wife filled out and signed an application to rent the victims' home. Vogt attached to the application a number of forged documents that made it appear as though Vogt's assets and income were substantially greater than they were. Based on these documents, MacPherson's agreed to rent the home to Vogt and his family.

Disputes between Vogt and the property manager and the victims quickly arose. In September 2007, the victims filed a complaint for unlawful detainer, seeking to evict Vogt for failing to pay rent or vacate the premises. The victims filed a second unlawful detainer complaint in November, again seeking to evict Vogt for failing to pay rent or vacate. Each of these cases was resolved when Vogt agreed to pay rent and attorneys fees. In December 2007, the victims filed a third complaint for unlawful detainer based on Vogt's failure to pay rent and for fraudulent acts that induced the victims to lease the property to him.

Before a court ruled on the merits of the third complaint, the parties stipulated that in exchange for dismissing the case with prejudice, the lease would be terminated, Vogt would be barred from entering the rental property (except to remove his property at a specified time), his $4,500 security deposit would be forfeited, and the bond he posted in the case would be exonerated. A

stipulation and order of dismissal incorporating these terms was entered on February 2, 2008.

In June, the State filed criminal charges against Vogt. As later amended, the information charged six counts of forgery related to the documents attached to his rental application, first degree theft, identity theft in the first degree, unlawful issuance of a bank check, violation of the Uniform Controlled Substances Act, two counts of violating a no-contact order, and theft in the third degree.

On January 29, 2009, in exchange for dismissal of some of the charges, Vogt pleaded guilty to five counts of forgery, two no-contact order violations, and theft in the third degree. He also agreed to pay restitution. Vogt was sentenced on April 14, 2009.

The initial restitution hearing was held on September 30 of that year. At the hearing, Vogt argued that the stipulation and order of dismissal entered in the third unlawful detainer action precluded the trial court from ordering restitution. The court rejected Vogt's argument but expressed its concern that the State could not establish a causal nexus between the crimes Vogt pleaded to and the claimed physical damage to the property. The parties agreed to continue the matter to October 22. The matter was then repeatedly continued over the next four months, however, because Vogt did not appear and because he moved to obtain new counsel and withdraw his plea based on a claim of ineffective assistance of counsel.

When a restitution hearing was finally held on January 27, 2010, the court ordered Vogt to pay $10,859.14 in restitution for physical damage to the property.

In March 2010, the trial court ruled that because Vogt had failed to appear in court and had not been in contact with his attorney, he had abandoned his motion to withdraw his plea.

Vogt appeals the order of restitution.

Standard of Review

We review a trial court's restitution order under an abuse of discretion standard.[1] A court abuses its discretion when it orders restitution in excess of its statutory authority.[2] But "[w]hen the particular type of restitution in question is authorized by statute, imposition of restitution is generally within the discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion."[3] Discretion is abused when it is exercised in a manifestly unreasonable manner or on untenable grounds.[4] But "[w]here reasonable persons could take differing views regarding the propriety of the trial court's actions, the trial court has not abused its discretion."[5]

Analysis

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[1] State v. Davison, 116 Wn.2d 917, 919, 809 P.2d 1374 (1991).
[2] State v. Morse, 45 Wn. App. 197, 199. 723 P.2d 1209 (1986).
[3] Davison, 116 Wn.2d at 919.
[4] State v. Kinneman, 122 Wn. App. 850, 857, 95 P.3d 1277 (2004) (citing State v. Enstone, 137 Wn.2d 675, 679-80, 974 P.2d 828 (1999)).
[5] State v. Demery, 144 Wn.2d 753, 758, 30 P.3d 1278 (2001).

Restitution

The crux of Vogt's claim is that the trial court improperly "speculate[d]" as to the amount of restitution because it is not clear from the evidence presented whether the $4,500 security deposit that Vogt forfeited in the unlawful detainer action paid for damages to the home.

RCW 9.94A.753(5) provides that "[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." Restitution is proper if, but for the criminal act, no damage or injury would have resulted.[6] The amount of restitution ordered "shall be based on easily ascertainable damages for injury to or loss of property."[7] That is, "[o]nce the fact of damage is established[,] the amount need not be shown with mathematical certainty. Evidence of damage is sufficient if it affords a reasonable basis for estimating loss and does not subject the trier of fact to mere speculation or conjecture."[8]

Here Vogt makes a limited challenge. He does not challenge the trial court's findings that he caused damage to the property, that a sufficient causal connection exists to impose restitution for the damages caused, or that the amount of damage for which restitution could be imposed was $10,859.14. Instead, he only claims that the trial court should have reduced the total restitution ordered by the $4,500 security deposit because that amount might

[6] State v. Landrum, 66 Wn. App. 791, 799, 832 P.2d 1359 (1992).
[7] RCW 9.94A.753(3).
[8] State v. Mark, 36 Wn. App. 428, 434, 675 P.2d 1250 (1984).

have compensated the victims for property damage. Because Vogt has failed to demonstrate that the forfeited security deposit compensated the victims for the physical damage to their property, we disagree.

The third unlawful detainer complaint requested judgment for $4,500, plus per diem, in unpaid rent, attorney fees, and costs. It did not allege physical damage to property or request an award of damages for it. The stipulation and order of dismissal is silent as to the purpose for which the $4,500 deposit was forfeited.

Thus, the record before the trial court does not demonstrate that the forfeiture compensated the victims for physical damage to their property. But this record does contain sufficient evidence to support a finding that the forfeited security deposit compensated the victims for rent Vogt admitted he owed and the victims sought to recover in the lawsuit in which the $4,500 deposit was forfeited. Because Vogt has failed to demonstrate that the deposit forfeiture compensated the victims for the damage he caused to their property, the trial court did not abuse its discretion in refusing to deduct it from the restitution award.

Statement of Additional Grounds

Vogt raises a number of issues in a statement of additional grounds. None have merit.

Vogt claims the trial court erred by accepting his guilty plea on five counts of forgery because insufficient evidence supports his plea. Specifically, he claims his actions did not demonstrate intent to injure or defraud and that the

documents presented did not meet the statutory definition of "written instruments."

When reviewing a sufficiency challenge, this court "view[s] the evidence in the light most favorable to the State and determine[s] whether any rational trier of fact could have found the elements of the charged crime beyond a reasonable doubt."[9] "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom."[10]

CrR 4.2(d) provides that "[t]he court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea." In determining whether a factual basis exists, the court need not be convinced beyond a reasonable doubt that the defendant is guilty, only that there is sufficient evidence for a jury to conclude that the defendant is guilty.[11] When making this determination at a plea hearing, the court may consider any reliable source of information in the record, including the prosecutor's factual statement.[12]

Under RCW 9A.60.020, "A person is guilty of forgery if, with intent to injure or defraud[,] [h]e falsely makes, completes, or alters a written instrument or . . . [h]e possesses, utters, offers, disposes of, or puts off as true a written instrument which he knows to be forged." Here, the certification for

[9] State v. Brown, 162 Wn.2d 422, 428, 173 P.3d 245 (2007).
[10] State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).
[11] State v. Saas, 118 Wn.2d 37, 43, 820 P.2d 505 (1991).
[12] State v. Osborne, 102 Wn.2d 87, 95, 684 P.2d 683 (1984).

determination of probable cause fully set forth evidence of these elements for each forgery charged. It recites witness statements indicating that Vogt and his wife filled out and signed an application to rent the victims' residence and provided altered W-2 forms, counterfeit earnings statements, altered bank statements, and a counterfeit loan preapproval letter as proof of income. It also states that Vogt and his wife presented a counterfeit carbon copy of a receipt for a U.S. Bank cashier's check. Given the extensive information provided by the State to support Vogt's plea and the complete lack of merit to Vogt's claim that the forged documents are not written instruments, we conclude a rational jury could find beyond a reasonable doubt that Vogt intentionally committed the five counts of forgery.

Vogt also challenges his felony conviction for unlawful issuance of bank checks. Specifically, Vogt requests that the court reclassify his offense as a gross misdemeanor instead of a felony. He bases this argument on the fact that the information charged him under former RCW 9A.56.060(3) (1982). That statute allowed the prosecution to charge a series of transactions, each constituting the unlawful issuance of a bank check, as one count when each check was part of a common scheme or plan and to punish that offense as a class C felony when the related transactions totaled more than $250.[13] Vogt points out that in his statement on plea of guilty, he confessed to "present[ing]

[13] The statute was amended in 2009, raising the value for a class C felony offense to $750. Laws of 2009, ch. 431, § 10.

checks for payment knowing I did not have sufficient funds to meet such checks, of an amount less than $250." However, Vogt does not seek to withdraw his plea on this count. And because he cites no authority supporting the proposition that he is entitled to the relief requested without a plea withdrawal, we reject his argument.

Vogt claims his attorney provided ineffective assistance of counsel by failing to object to the restitution order because the amounts awarded were not causally related to offenses to which he pleaded guilty—forgery and unlawful issuance of bank checks.

We review ineffective assistance of counsel claims de novo.[14] To prevail, a defendant must show both deficient performance and resulting prejudice.[15] Counsel's performance is deficient if it fell below an objective standard of reasonableness.[16] To establish prejudice, a defendant must show a reasonable probability that the outcome of the trial would have been different absent counsel's deficient performance.[17] Failure on either prong of the test defeats a claim of ineffective assistance of counsel.[18]

When reviewing restitution orders, we determine whether a causal connection exists between the losses and the criminal act by looking to the facts

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[14] In re Pers. Restraint of Brett, 142 Wn.2d 868, 873, 16 P.3d 601 (2001).
[15] Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).
[16] State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997).
[17] State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987).
[18] Strickland, 466 U.S. at 697.

underlying the offense.[19] Losses are causally connected when the victim would not have sustained the losses but for the commission of the crime.[20] This determination rests on an examination of facts admitted by the plea agreement or admitted, acknowledged, or proved in a trial, at sentencing, or at a restitution hearing.[21] Whether the loss is causally connected to the crime is a question of law we review de novo.[22]

In this case, Vogt pleaded guilty to forging documents he used to procure a lease by deceit. Thus, but for the forgery, Vogt would not have occupied the house. And without Vogt's occupancy of the property, it would not have sustained physical damage. Accordingly, sufficient causal connection exists between Vogt's forgery and the physical damage to the house.

Vogt also challenges the factual basis for the amount of restitution ordered. He alleges that neither the charging information nor the record on appeal contains any evidence indicating how the alleged damage to the rental property occurred or that he occupied the house at the time the property was damaged. However, the appellant bears the burden of providing an adequate record for appellate review.[23] If an appellant fails to do so, the trial court's decision will not be disturbed on appeal.[24] The record establishes that the State

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[19] State v. Griffith, 164 Wn.2d 960, 966, 195 P.3d 506 (2008).
[20] Landrum, 66 Wn. App. at 799.
[21] State v. Dedonado, 99 Wn. App. 251, 256, 991 P.2d 1216 (2000).
[22] State v. Acevedo, 159 Wn. App. 221, 229-30, 248 P.3d 526 (2010).
[23] State v. Tracy, 128 Wn. App. 388, 394, 115 P.3d 381 (2005).
[24] Tracy, 128 Wn. App. at 394-95.

presented documentation describing the property damage and costs of repair at the restitution hearing. None of these documents are part of the record on appeal. Because Vogt failed to provide an adequate record to permit review of this issue, we decline to review it.

In sum, the trial court did not err in ordering restitution for physical damage to the victims' property. Thus, Vogt's counsel's failure to object to the restitution order does not constitute deficient performance. Because Vogt's counsel's performance was not deficient, Vogt's ineffective assistance of counsel claim fails.

Next, Vogt contends he received ineffective assistance because his counsel failed to object to the restitution order that was issued after the 180-day deadline.

"When restitution is ordered, the court shall determine the amount of restitution due at the sentencing hearing or within one hundred eighty days."[25] Here, Vogt was sentenced on April 14, 2009. The State scheduled a restitution hearing for September 30, 2009, well within 180 days. At that hearing, the parties agreed to continue the matter for one month. The court then repeatedly continued the hearing over the next four months because Vogt failed to appear and to allow Vogt time to obtain a new attorney and move to withdraw his plea. Because the first restitution hearing was held within 180 days and Vogt offers no proof that the State was unprepared to prove the amount of damages at that

[25] RCW 9.94A.753(1).

time, we find no error. Absent error, Vogt did not receive ineffective assistance.

Vogt alleges ineffective assistance when his counsel failed to dispute the fact that he damaged the rental property. Vogt claims he was entitled to an evidentiary hearing on this issue because he denied damaging the property, even if his attorney was silent on the issue, and he allegedly possessed photographs that proved he caused no damage.[26] But again, the record contains none of the documentation relied upon by the trial court in ordering restitution, nor does it contain the photographic evidence that Vogt claims he possessed. Because Vogt failed to provide an adequate record for review of this issue, we decline to consider it.

Vogt further contends that he received ineffective assistance when his counsel failed to object to the restitution order under RCW 9.94A.753(3), which states, "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." He claims that because he was not charged with or convicted of receiving financial benefit from his forgeries, the statute limits his restitution liability to $0. We review questions of statutory interpretation de novo.[27] Here, RCW 994A.753(3) specifically contemplates basing restitution upon the amount of "the victim's

[26] Vogt relies for authority on former RCW 9.94A.370(2) (1999), which provides, "Where the defendant disputes material facts, the court must either not consider the fact or grant an evidentiary hearing on the point. The facts shall be deemed proved at the hearing by a preponderance of the evidence." The statute has been recodified as RCW 9.94A.530 (Laws of 2001, ch. 10, § 6). The quoted language has not changed.

[27] State v. Bunker, 169 Wn.2d 571, 577-78, 238 P.3d 487 (2010).

loss." The amount of the victims' loss in this case was measured by the physical damage to their home. Because the amount of restitution did not exceed the amount of the victims' loss using this measure, Vogt's counsel was not ineffective.

Vogt further claims he received ineffective assistance because his counsel allegedly failed to investigate discrepancies in the search warrant resulting in a search of his computer. But because this complaint goes to the voluntariness of his plea and Vogt does not seek to withdraw his plea, he is not entitled to the relief. Moreover, to evaluate the prejudice prong of his argument requires an evaluation of information he failed to include in the record. For these reasons, we do not consider this issue.

Vogt contends the State violated the terms of his plea agreement by charging him with a felony violation of a no-contact order despite its promise not to charge him with additional no-contact order violations from the period of July 30, 2008, to January 29, 2009. But nothing in the appellate record shows that the State charged him with an additional no-contact order violation. Thus, we need not consider this claim further.

Vogt claims the trial court violated his constitutional protections against double jeopardy by allowing the State to charge him multiple times for the same offense. Specifically, he argues that he committed a single act of forgery because he faxed the various documents accompanying the rental application in a single batch. Again, Vogt does not seek to withdraw his plea, and for that

reason, he is not entitled to relief. But more importantly, RCW 9A.60.020 plainly and unambiguously defines the unit of prosecution as the "written instrument."[28] And here, the certification for determination of probable cause clearly indicates that Vogt forged multiple written instruments, including bank statements, earning statements, bank checks, and loan approval letters. Thus, each charge involved a different unit of prosecution, and none abridged Vogt's rights against double jeopardy.

Vogt argues his counsel was ineffective for failing to argue that the doctrines of collateral estoppel and res judicata barred his criminal prosecution because the forgery charges all flowed from the unlawful detainer action, which was dismissed with prejudice after the parties agreed to a disposition. It is well settled, however, that restitution is allowed even if the victim recovered part of her loss by settling a civil suit against the defendant so long as the restitution ordered does not constitute a double recovery for that loss.[29] Accordingly, Vogt's counsel was not deficient.

Finally, Vogt contends that the trial court should have allowed him to withdraw his pleas to the two no-contact order violations because the contact order was invalid on its face. But the record provided to this court does not include a complete copy of this order. Therefore, this court cannot review this

[28] State v. Williams, 118 Wn. App. 178, 183, 73 P.3d 376 (2003).

[29] See State v. Christensen, 100 Wn. App. 534, 538, 997 P.2d 1010 (2000) (holding that the "American Rule" did not bar the trial court from ordering restitution to cover victim's expenses for attorney fees in a civil suit where victim incurred those fees as a result of the defendant's offense).

issue.

For the foregoing reasons, we affirm the order of restitution.

Leach, A.C.J.

WE CONCUR:

Grosse, J