IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. KARLIE MARTIN, ARVIN ROY MARTIN, and JENNY LEE SHEA, and each of them as principal or accomplice, Appellants.	)	No. 65714-3-I (consolidated with 66275-9-I & 66339-9-I) DIVISION ONE UNPUBLISHED OPINION FILED: January 17, 2012

Becker, J. — While a court may order restitution for a criminal offense that has resulted in a loss of property, a court does not have authority to impose restitution to compensate a witness for time spent attending court. To the extent the restitution order in this case so compensates a witness, we reverse it. To the extent it compensates the victim for loss of property, we affirm.

Jenny Shea, Karlie Martin, and Arvin Martin stole numerous household items, including valuable antiques, from an unoccupied residence. The police were unable to recover all of the stolen items.

Shea pleaded guilty to residential burglary. K. Martin pleaded guilty to first degree possession of stolen property. A. Martin pleaded guilty to third

degree possession of stolen property. All the defendants agreed to pay restitution but contested the amount. Both Martins agreed in their plea agreements to pay restitution on uncharged counts or dismissed cause numbers. After Shea pleaded guilty, but before either of the Martins entered their guilty pleas, the court held a restitution hearing. The Martins participated in this hearing.

One of the homeowners, Carolyn Hansen-Faires, brought with her to the hearing a handwritten list of 59 items with claimed values ranging from $50 to $2,000. The list included antique furniture, antique dishware, paintings, a designer purse, and various household items.

Hansen-Faires testified about how she determined the listed values. She had an antique dealer license and had been an antique dealer. Her methodology for valuing the items varied from recalling how much she or her husband paid for an item to looking online, looking in shops, talking to other people, and setting prices based on her own knowledge or estimate of what she thought was a fair price. Hansen-Faires' husband, the other homeowner, testified to the price he paid for some of the items.

The owner of an antique store, Jeffrey Bassett, testified for the defendants. Bassett bought and sold antiques full time. Like Hansen-Faires, he regularly assessed items in his business. His general opinion was that the items on the list could possibly sell for the prices listed, but only in the best possible scenario. He thought the valuations were unlikely to be accurate. It was

impossible for him to assign specific values because he had not seen the items. He specifically questioned the values placed upon some of the items by Hansen-Faires. For example, based on his research, he thought a Limoges porcelain set she valued at $8,000 was probably not worth that much. He also questioned her estimates of $20,000 for a designer purse, $15,000 for antique wooden dolls, and $2,000 for four to five antique children's books. On cross-examination, Bassett agreed that anyone could do much of the valuation research online.

The prosecutor requested a total of $86,056.34. She said this number did not include $20,000 for missing clothing claimed by Hansen-Faires because it was not among the missing items reported to the police. The prosecutor said she also omitted one item as duplicative and did not count any of the items on the list that were marked recovered by Hansen-Faires.

The court ordered Shea to pay $86,600 in restitution. Six hundred dollars of this amount was to compensate Hansen-Faires for her time in attending court. After the Martins pleaded guilty, they were both held jointly and severally liable for the restitution order entered against Shea.

All three appellants challenge the restitution award, contending that it rests on unsupported and unreliable evidence and that the trial court applied the wrong burden of proof.

Except in extraordinary circumstances, a judge must order restitution whenever the offender is convicted of an offense which results in loss of property. RCW 9.94A.753(5). Restitution is both punitive and compensatory.

State v. Kinneman, 155 Wn.2d 272, 279, 119 P.3d 350 (2005). The trial court has discretion to determine the amount of restitution. State v. Pollard, 66 Wn. App. 779, 785, 834 P.2d 51, review denied, 120 Wn.2d 1015 (1992). We will find an abuse of that discretion only where its exercise is manifestly unreasonable, or exercised on untenable grounds or for untenable reasons. Pollard, 66 Wn. App. at 785.

The burden to establish the amount of restitution rests with the State and that burden is by a preponderance of the evidence. State v. Dennis, 101 Wn. App. 223, 226, 6 P.3d 1173 (2000).

BURDEN OF PROOF

The appellants argue the trial court improperly shifted the burden of proof to them and did not hold the State to its burden.

In closing argument, they suggested that the homeowners needed to do more to prove the value of the missing items. The court responded with the following oral comments:

> But I guess the thing the court has to deal with is who should be given the benefit, if you will, the difficulty in determining value. And it's a hard nut to crack for the court to be looking at these situations and say okay, am I going to give a criminal defendant who's been convicted of stealing somebody's property and say I'm going to give you the benefit of all the due process rights here and we want to put the burden on the person who's suffered a loss because of your criminal act and force them to go out and get appraisals with the same degree of certainty as in a civil case of a burden of proof as to what a loss is? Certainly that's required in cases of negligent loss of property. But here we have intentional acts being committed and then it's hard for the court in equity, if you will, to say we are going to put all the burden on the person that suffered the loss.

> . . . .
> . . . There is a burden and, of course the courts recognize and the law recognizes that it's not the same burden as in the case of a typical civil lawsuit. And it further has to be noted by the court that the court has the authority in the appropriate case to order twice the amount of the loss by way of punishment to a defendant for the actions that they've committed.
> . . . .
> You know, a defendant can go out and get appraisals just like the State can. I don't think the taxpayer should be undergoing the expense of going out and getting an appraisal at taxpayer expense to protect the due process rights of a felon. Just doesn't sit with my sense of justice. If a felon believes that they're being ripped off in return by a dishonest home owner, and as I say I'm not interested in, I'm not here to protect somebody who comes in as a victim and is dishonest with the court in anyway, [sic] but a defendant ought to have the burden if they think they're being accused of, or they're being subjected to paying more than what an item is worth, let the defendant go out and hire the appraiser. Take some of the goods that were returned, go down to Seattle or someplace and get a range of value from a certified appraiser that has no interest in the case. And then come in and say this is what it's worth. Then I've got something more than, I think, just the victim versus the defendant's expert.

Report of Proceedings at 131-32, 135-36.

Before ruling, the court acknowledged having read Shea's brief, which correctly stated the burden of proof. Given this fact and the context of the court's comments, we conclude the trial court did not shift the burden to the defendants. The comments were simply a response to the defendants' arguments.

RESTITUTION AMOUNT

Appellants challenge the amount of restitution awarded, contending there was insufficient evidence to support the award. If a defendant disputes the

restitution amount, the State must prove the damages. State v. Griffith, 164 Wn.2d 960, 965, 195 P.3d 506 (2008). The amount of restitution must be based on "easily ascertainable" damages. RCW 9.94A.753(3). Easily ascertainable damages are tangible damages supported by sufficient evidence. State v. Tobin, 132 Wn. App. 161, 173, 130 P.3d 426 (2006), aff'd, 161 Wn.2d 517, 166 P.3d 1167 (2007). While certainty of damages need not be proven with specific accuracy, the evidence must be sufficient to provide a reasonable basis for estimating loss. Pollard, 66 Wn. App. at 785. Evidence that subjects the trier of fact to speculation or conjecture is insufficient. Pollard, 66 Wn. App. at 785. The rules of evidence do not apply at restitution hearings. Pollard, 66 Wn. App. at 784. Nevertheless, the evidence admitted must meet due process requirements, such as providing the defendant an opportunity to refute the evidence presented and requiring that the evidence be reliable. Pollard, 66 Wn. App. at 784-85.

To support their argument that the evidence required the trial judge to speculate and that due process was violated, the defendants rely primarily on State v. Kisor, 68 Wn. App. 610, 844 P.2d 1038, review denied, 121 Wn.2d 1023 (1993), and Pollard, 66 Wn. App. at 779.

In Pollard, we reversed a restitution award based on a defendant's unlawful issuance of checks. The only evidence in the record supporting the restitution sum was a police report that recorded what bank personnel at the respective institutions stated the banks lost. This report, as it was double

hearsay, was insufficient to support the restitution order. Pollard, 66 Wn. App. at 786.

In Kisor, we also reversed a restitution award. There, the defendant had shot and killed a police dog. The court imposed $17,380 in restitution. The award was based on a conclusory hearsay affidavit providing a rough estimate of the costs associated with purchasing a new dog and training it. The affidavit referred to an advertisement, but the advertisement did not support the advanced figures. We concluded the affidavit was not substantial credible evidence supporting the restitution order and that due process was violated by the trial court's reliance on it. Kisor, 68 Wn. App. at 620.

Here, there is not the problem of hearsay like there was in Kisor or Pollard. The homeowners testified and were subject to cross-examination. The appellants had the opportunity to present rebutting testimony. That the homeowners based some of their testimony on information gained through other people did not violate due process.

It is true the defense witness was handicapped by the fact that he had never seen the items, but this was because the items were stolen—a problem created by the appellants, not by the homeowners.

Appellants complain that the State could have had evaluations done on recovered items that were part of a missing set, such as the $8,000 porcelain set which had at least two recovered tea cups, to provide some corroboration. Appellants also point out the homeowners did not provide photos, receipts, or

appraisal records for the missing items.

Washington courts follow the prevailing rule that the owner of a chattel may testify as to its market value without being qualified as an expert in this regard. State v. Hammond, 6 Wn. App. 459, 493 P.2d 1249 (1972). While other evidence would have been helpful, the testimony of the homeowners was sufficient by itself to sustain the restitution award. Hansen-Faires was familiar with antiques and with the items. Photos, receipts, or appraisal records are not necessary to establish a restitution amount, even for antiques. See People v. Ford, 77 A.D.3d 1176, 1177-78, 910 N.Y.S.2d 235 (2010), leave to appeal denied, 954 N.E.2d 96 (2011) (expert testimony not required to establish the value of victim's antiques; testimony from the victim, an antique collector, that she determined the value of missing items by comparing them to similar items and consulting antique dealers held sufficient).

We conclude there was sufficient evidence supporting the restitution award of $86,000 for lost items.

The $600 tacked onto the restitution award to compensate Hansen-Faires for her time in testifying, however, was not a proper part of the award. A court's authority to impose restitution is statutory. Griffth, 164 Wn.2d at 965. The State concedes that there is no statutory authority allowing a court to award time loss related to testimony. Finding no authority contrary to that provided by the parties, we accept the State's concession and order that $600 be subtracted from the award.

We remand to the trial court to subtract $600 from the restitution orders. Otherwise, we affirm.

Affirmed in part, reversed in part.

Becker, J.

WE CONCUR:

Dwyer, C.J.

Ellington, J.