

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

**DIVISION II**

STATE OF WASHINGTON,

Respondent,

v.

ELIZABETH STALLINGS,

Appellant.

No. 38738-7-II  
(consolidated with No. 39478-2-II)

UNPUBLISHED OPINION

Quinn-Brintnall, J. — Following a bench trial, Elizabeth Stallings was found guilty of one count of second degree theft in violation of former RCW 9A.56.040 (1995),<sup>1</sup> and one count of second degree trafficking in stolen property in violation of RCW 9A.82.055(1), for stealing various stainless steel items from manufacturer FKC Co. Ltd. and selling the metal to a metal recycler in Tacoma, Washington. Stallings's appeal presents two issues: first, that the record is insufficient for the trial court to have found a valid jury trial waiver under the

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<sup>1</sup> The legislature amended former RCW 9A.56.040, effective July 26, 2009, raising the minimum value defining the offense from \$250 to \$750 and raising the maximum value defining the offense from \$1,500 to \$5,000. Former RCW 9A.56.040 applies here because it was the version of the statute in effect when Stallings committed her offense. *State v. Otis*, 151 Wn. App. 572, 579 n.7, 213 P.3d 613 (2009) (citing *State v. Schmidt*, 143 Wn.2d 658, 673-74, 23 P.3d 462 (2001)).

Washington State Constitution, and second, that sufficient evidence does not support the trial court's order requiring that she pay FKC \$3,305 in restitution. We affirm.

DISCUSSION

We resolved the first issue in *State v. Pierce*, 134 Wn. App. 763, 142 P.3d 610 (2006). The evidence appearing on the record before us is sufficient to demonstrate that Stallings knowingly and voluntarily waived her right to a jury trial. Stallings filed a written waiver of a jury trial with the trial court after having discussed the matter with her attorney and the court.

The waiver of trial by jury reads as follows,

Elizabeth Stallings, having been charged by the Prosecuting Attorney of Clallam County, State of Washington, with the crime of Theft 1°, Trafficking 1° having occurred on or about the 30th day of March, 2007, does hereby consent to the trial of said charge by the Court, without a jury, and hereby waives his [sic] constitutional rights to trial by jury.

DATED this 1st day of December, 2008.

/s/Elizabeth Stallings

Defendant

On this 1st day of Dec, 2008, the above-named defendant appeared before this Court and in open court, and with the approval of this Court signed the foregoing Waiver of Trial by Jury.

/s/George Wood

JUDGE

Clerk's Papers (CP) at 33.

Before the trial court accepted Stallings's jury trial waiver, her defense counsel informed the court of discussions he had had with his client:

[Defense Counsel]: Yes, Your Honor, Jonathan Feste on behalf of Ms. Stallings. I came to the courthouse this afternoon to talk to Mr. Greenspan, Ms. Stallings happened to be in the courthouse to deal with another small matter and she and I have spent approximately the past 30, 35 minutes visiting about her options. She knows of her constitutional right -- right to a jury trial is a significant constitutional right. After careful consideration and reviewing all of her options and strategy, she and I believe it would be best to carry this matter to a bench trial. And so she'd like to sign a waiver, that means we would know exactly where

we're standing with a jury and could notify them that they do not have to be present in the morning.

.....

THE COURT: All right.

Ms. Stallings, have you read the waiver of right to trial by jury?

[Stallings]: Yes, I did.

THE COURT: Have you reviewed it with [defense counsel]?

[Stallings]: Yes, I did.

THE COURT: Do you have any questions about the waiver?

[Stallings]: No, I do not.

THE COURT: Okay, let me go over it in detail with you just to make sure you understand.

You have the constitutional right to have a trial be tried by a jury of 12 people.

[Stallings]: Yes, I understand.

THE COURT: And it's a very valuable right. All the jury -- all 12 of the jurors must agree in order to find you guilty of the charges. If you waive that right then you're giving up -- you're saying the Court can decide which is only one person who will listen to the evidence. And that the judge finds that you are guilty beyond a reasonable doubt then that's only one person deciding rather than 12.

So, by signing this you're giving up a very valuable right that you have as a defendant. You still have the right to present your testimony and present your witnesses and to argue in front of the Court as to your side of the case. But again, there will be no jury if the Court approves this waiver.

So, do you have any questions about that at all?

[Stallings]: No, I do not.

THE COURT: Okay, are you signing this waiver and waiving your right to a jury freely and voluntarily?

[Stallings]: Yes, I am.

THE COURT: Okay. Do you feel you've had enough time to discuss it with your attorney?

[Stallings]: Yes, I do.

THE COURT: Okay, and has anybody made any threats or try to coerce you in any way to get you to sign the waiver?

[Stallings]: No.

THE COURT: Okay, I will go ahead and approve the waiver then, and find it was done voluntarily and without any coercion in any way or any threats, and she certainly understands her right to have a trial by jury and she chooses to waive that.

In *Pierce*, we characterized Pierce's claim as follows,

Pierce claims that his waiver of his jury trial right was invalid under Washington's state constitution. He claims that a valid waiver of the state constitutional right to a jury trial requires more than a valid waiver of the corresponding federal right. He argues that a waiver of the state constitutional right to a jury trial is valid only if the defendant is fully aware of the meaning of the state constitutional right. Without citing authority, Pierce claims that he needed to understand his right to participate in jury selection, his right to an impartial jury, his right to a 12-person jury, his right to be presumed innocent until proven guilty beyond a reasonable doubt, and his right to a unanimous verdict.

134 Wn. App. at 769.

Stallings raises the same claims. In fact, Stallings's appellate counsel also represented Pierce in his 2006 appeal. The State asserts in its brief that the argument is nearly identical to that which we considered and rejected in *Pierce* and that Stallings is essentially requesting that we reconsider our holding in *Pierce*. The State's characterization appears well taken. Having reviewed Stallings's briefing, including its analysis under *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986), we adhere to our analysis and holding in *Pierce*:

[N]o *Gunwall* analysis is necessary to decide this case. *Gunwall* addresses the extent of a right and not how the right in question may be waived. See *Gunwall*, 106 Wn.2d at 58. The issue here is waiver. Although Washington's constitutional right to a jury trial is more expansive than the federal right, it does not automatically follow that additional safeguards are required before a more expansive right may be waived. See [*State v.*] *Brand*, 55 Wn. App. [780,] 785, [780 P.2d 894 (1989)] (an accused's various constitutional rights are accorded different procedural safeguards), [*review denied*, 114 Wn.2d 1002 (1990)].

134 Wn. App. at 773.

Having reviewed the record and the briefing, it is clear that Stallings's jury waiver, which she executed in writing and signed in open court after consulting with her attorney and discussing the matter with the trial court on the record, was knowing and voluntarily entered and valid. The

trial court did not err in accepting Stallings's knowing and voluntary jury trial waiver.

We turn now to Stallings's challenge to the trial court's order that she pay FKC \$3,305 in restitution.

Stallings contends that the trial court based its \$3,305 restitution order on speculation. We disagree. Although the trial court was required to set the restitution amount from disputed evidence, its memorandum opinion re restitution rests on evidence appearing in the record. The memorandum opinion provides in pertinent part,

[Stallings] was found guilty of Theft in the Second Degree at a bench trial on December 3, 2008. The evidence showed beyond a reasonable doubt that she had stolen two stainless steel screens having a value of approximately \$300, and an assortment of high quality, expensive stainless steel pieces for which she received \$265 from a recycler in Tacoma. The aggregate \$565 value supported a determination of guilt of theft in the second degree, because it exceeded the \$250 threshold for that crime, but did not reach the \$1,500 threshold necessary for theft in the first degree.

. . . .  
. . . FKC was the victim in this matter, and although there are some discrepancies between the claims summary on the coversheet of Exhibit #1, the supporting attachments thereto, and the testimony of Mr. Campbell, the claim of FKC appears to be between \$60,000 and \$70,000, based upon the replacement cost of various items which Mr. Campbell testified all disappeared from their storage yard in March and April of 2007.

For purposes of restitution, [Stallings] acknowledges there is sufficient proof to establish a \$300 replacement cost for two stainless steel screens, together with the \$265 recycling proceeds, for a total of \$565. . . .

. . . .  
During the period in question, [Stallings] was seen on the premises twice, and on both occasions was engaged in theft of materials from FKC. On one occasion she was seen by the neighbors putting armloads of what turned out to be stainless steel screens in the backseat of her car, and she was seen to have made at least two trips from her car parked along the street, back through the woods to the FKC storage yard, and back again carrying these materials. . . .

The matter of who is guilty of the thefts of an estimated \$60,000 in stainless steel materials from FKC is further confused by the fact that other similar thefts had occurred involving materials from a different part of the FKC complex during the same period of time, which are apparently not connected to [Stallings], and the fact that the storage yard where the thefts in question occurred was very

poorly secured, and easily accessible from a busy city street. The remarkably lax security provided by the victim makes it probable that FKC suffered multiple thefts by more than one thief.

[T]o saddle her with the theft of \$60,000 worth of material claimed would require impermissible speculation, since proof by a preponderance of the evidence is simply not there. . . .

Therefore, it is the determination of the Court, based upon a preponderance of the evidence, that Ms. Stallings stole at least the \$265 worth of materials sold to a recycler in Tacoma, and at least two armloads of stainless steel screens which she was observed taking by the neighbors. The Court estimates that she would be able to carry at least ten such screens in an armload, and the replacement cost of those screens, according to the uncontroverted testimony of Mr. Campbell, is \$152 each. The theft of 20 screens at this replacement cost yields restitution of \$3,040, which when added to the \$265, yields total restitution of \$3,305, and that is the determination of the Court.

CP at 29-32.

A review of the trial court's memorandum opinion on restitution clearly reveals that the trial court refused to speculate and set the restitution amount by calculating the items actually sold, for which there was a receipt, or for items eye witnesses saw Stallings stealing. The trial court has a duty to exercise its discretion and set an appropriate restitution amount "based on easily ascertainable damages" and may not exceed double the amount of the defendant's gain or the victim's loss. RCW 9.94A.753(3). Evidence is sufficient to support a restitution order if it provides a reasonable basis for estimating loss and is not based on mere speculation or conjecture. *State v. Kinneman*, 155 Wn.2d 272, 285, 119 P.3d 350 (2005). Here, the trial court reviewed the evidence and determined that it would exercise its discretion and award only the losses supported by documentary or eye witness testimony. The trial court did not abuse its

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discretion when it ordered that Stallings pay \$3,305 in restitution to FKC for one count of second degree theft and one count of trafficking in stolen property. Accordingly, we affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

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QUINN-BRINTNALL, J.

We concur:

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ARMSTRONG, P.J.

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HUNT, J.