

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

DONALD JEFFREY STOUT,

Appellant.

No. 40616-1-II

UNPUBLISHED OPINION

Quinn-Brintnall, J. — Donald Stout appeals a restitution order entered by the Clark County Superior Court following his conviction of first degree malicious mischief. He contends that the trial court improperly based the amount on a charge of first degree theft not proven by the State. Because our review of the record establishes that the trial court reached the restitution award by doubling the loss based solely on the malicious damage Stout caused to Larry Wilson's house, we affirm.¹

FACTS

In 2006, Wilson loaned Stout \$338,500 to pay off an underlying mortgage and other debt, and complete a house that Stout was building in Ridgefield, Washington. After Stout failed to

¹ A commissioner of this court initially considered Stout's appeal as a motion on the merits under RAP 18.14 and then transferred it to a panel of judges.

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complete construction and stopped making interest payments on the loan, Wilson foreclosed on the property. He recorded the trustee's deed on February 2, 2009, and gave Stout 20 days notice to vacate the property.

On February 22, Stout's neighbor noticed a great deal of activity at the house next door. People were loading kitchen cabinets and various other fixtures into pickup trucks. There were approximately 10 people on the property, including Stout. The neighbor called Wilson, and he inspected the property the next day. He found garbage scattered everywhere, windows were broken, and someone had removed one of the doors on the exterior of the house and nailed plywood in its place. Inside the house, cabinetry was missing, and someone had removed almost all of the light fixtures and plumbing by sawing through the walls and ceilings. The furnace was sawn off at the ductwork. The electrical components for the heat pump were sawn off on the outside of the house. Window trim and baseboards were removed. Even some stair treads had been removed, leaving gaps in the stairs which made using the stairs difficult. The overall damage was extensive, and numerous fixtures were missing.

Wilson reported the matter to the Clark County Sheriff's Department, and the State charged Stout with first degree theft and first degree malicious mischief. The jury found Stout guilty of malicious mischief, but acquitted him of the theft charge.

At the restitution hearing, the State argued that the restitution amount should include missing property as well as damaged property because the lack of the missing items also damaged the house. Defense counsel argued that restitution could include only those damaged items that were still in the house because the jury had not found Stout guilty of theft and there was no evidence that Stout was responsible for removing items.

The court responded,

Well, first of all, with regard to whether there's evidence or not, there certainly was in the Court's mind evidence to state Mr. Stout had committed the crime of theft, or else I wouldn't have allowed that case to go to the jury. So it's inaccurate to state there was no evidence that Mr. Stout was involved in the theft. But in any event, the State—or the jury found that they could not find beyond a reasonable doubt that he was guilty of Theft in the 1st Degree of miscellaneous household items, including but not limited to sinks, heat pumps, furnaces, et cetera, having a value exceeding \$1,500.

So I have to keep in mind in setting the amount of restitution in this case that that was the jury's decision. That they found him not guilty of that crime, and found him guilty of Malicious Mischief in the 1st Degree for knowingly and maliciously damaging the house. . . .

. . . .
In general, I'm going to follow the approach outlined by the defense. I'm going to indicate that restitution will consist of—first of all, with regard to Mr. Wilson, I'm not going to guess as to what part of the \$1,000 he paid of the deductible is based on a theft and what's based on a malicious mischief. The restitution amount for Mr. Wilson is fixed at the \$1,000 deductible that he has. . . .

With regard to his insurance company, the damages which are associated with re—the loss which is associated with replacing damage to the wall, to the ceiling, to replacing the baseboard that was removed, and that may include either fixing the holes or it may include replacing them with other walls because that was—seemed to be the most cost-effective way to do it. Replacing wiring that had to be replaced because of damaging—damage. And with regard to light fixtures, I find that the removal of the light fixtures and the way they did it was a damage rather than a theft. Those things will be involved in the—in the restitution here.

However, to the extent that cabinetry, sinks, heat pumps, furnaces, things of that nature were removed, those items, tubs, things of that nature will not be involved in the restitution figure because they were removed rather than damaged. However, for example, if in a bathroom the walls were damaged in the process of removing a sink or a tub, then the cost of repairing the walls is included in damage. The actual fixture itself is not, because that was included in the theft charged. Similarly with the heat pumps, furnaces, et cetera, if there were damage to the walls or ceilings in order to replace—in the process of removal, then that will be charged to Mr. Stout. The actual items themselves will not be included. That, I think, is consistent with the jurors' decision in this case.

4 Report of Proceedings (RP) at 699-701. The court directed the parties to determine what restitution should cover and present their arguments to the court at a second hearing. It noted

that “[w]hatever the final amount is, I again exercise my discretion. Given the circumstances of what was done to the house, the amount of the victim’s loss will ultimately be doubled.” 4 RP at 702.

At the second hearing, the State requested restitution of \$66,465.74, which included \$32,232.87 to reimburse Wilson’s insurance company and \$1,000 for Wilson’s deductible, and to double the entire amount. Stout’s attorney contested a few items on the State’s list. The court removed one item from the State’s list and entered a restitution order for \$66,153.90.

ANALYSIS

A trial court can order restitution only for losses that are causally related to crimes charged and proven, and it cannot base its order on behavior that was not part of the charge upon which the defendant was convicted. *State v. Woods*, 90 Wn. App. 904, 907, 953 P.2d 834, *review denied*, 136 Wn.2d 1021 (1998); *State v. Johnson*, 69 Wn. App. 189, 191, 847 P.2d 960 (1993). However, the court may increase the amount awarded up to double the amount of the loss. RCW 9.94A.753(3). Imposition of restitution is generally within the discretion of the trial court, and the court’s decision will not be disturbed unless it is manifestly unreasonable or based on untenable grounds. *State v. Enstone*, 137 Wn.2d 675, 679-80, 974 P.2d 828 (1999).

Stout does not challenge the court’s determination of the base figure, but he argues that the court doubled that amount solely on the basis of the items removed from the house, thus awarding damages for the theft of which Stout was acquitted. The record does not support that argument.² The court rejected the State’s theory that part of the damage to the house was the

² Stout makes much of the court’s statement that there was evidence that he committed theft. The court was simply addressing the argument that there was no such evidence. The evidence notwithstanding, however, the court clearly agreed with the defense that the jury’s verdict precluded restitution for stolen items.

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removal of fixtures, and it refused to award damages for missing items. But it believed that the circumstances of the crime warranted a punitive award. That was entirely consistent with the purpose of RCW 9.94A.753(3). *See* David Boerner, *Sentencing in Washington*, § 4.8 (1985) (the provision for doubling furthers the legislative intent that the punishment should be commensurate with the crime). The trial court's restitution award was proper and 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.

QUINN-BRINTNALL, J.

We concur:

HUNT, P.J.

JOHANSON, J.