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

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| **STATE OF WASHINGTON,** | ) | **No. 28927-3-III** |
| **Respondent,** | ) | |
| | ) | **Division Three** |
| **v.** | ) | |
| | ) | |
| **JAMES ALLEN MOORE,** | ) | **UNPUBLISHED OPINION** |
| | ) | |
| **Appellant.** | ) | |
| | ) | |

Kulik, C.J. — After consuming four to five drinks, James A. Moore rolled his car, injuring his girl friend and damaging a house. Mr. Moore was convicted of vehicular assault. On appeal, Mr. Moore contends that the State did not present sufficient evidence to support both alternative means of vehicular assault and that the trial court erred by ordering restitution. We disagree and affirm the conviction and the restitution order.

FACTS

On March 26, 2008, Mr. Moore was out with his girl friend. Over the course of four to five hours, he estimated he had four to five drinks. As he drove his girl friend home, the two had an argument. Mr. Moore failed to negotiate a turn in the road, rolled

the car, and crashed into a nearby house. Mr. Moore's girl friend was taken to the hospital and treated for injuries.

A blood sample indicated that Mr. Moore's blood alcohol level at the time of the accident was .097 and .099. Mr. Moore was charged with vehicular assault. The charging document stated that Mr. Moore drove with a blood alcohol concentration of 0.08 or higher, and he drove a motor vehicle in a reckless manner, causing substantial bodily harm to his girl friend.

During trial, Yakima County Sheriff's Deputy Justin Mallonee testified that on the night of the accident, Mr. Moore admitted that he was upset about the argument and "hit the gas and missed the corner." Report of Proceedings (RP) (Dec. 30, 2009) at 138. Yakima County Reserve Deputy Jeff Nelson testified that Mr. Moore told Deputy Mallonee that he "accelerated, smashed the gas, lost control as he was coming up Crusher Canyon around the corner, which resulted in the collision." RP (Jan. 4, 2010) at 307.

Mr. Moore testified that his car was traveling approximately 40 miles per hour at the time of the collision and that the posted speed limit was 35 miles per hour. He also said that he always slowed down for that corner. However, he testified later that he did not clearly remember how fast he was driving and whether he braked or not.

Mr. Moore also stated that he was unable to remember the actual collision. Mr.

Moore agreed that given the damage to the house, the car was likely going "pretty fast." RP (Jan. 4, 2010) at 340. No skid marks were evident on the roadway.

The instruction given by the trial court provided two alternative means to convict Mr. Moore of vehicular assault. The pertinent part of the alternative means instruction stated:

> To convict the defendant of the crime of Vehicular Assault, each of the following elements of the crime must be proved beyond a reasonable doubt:
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> . . . .
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> (3) That at the time the defendant
>
> (a) operated or drove a motor vehicle in a reckless manner; or
>
> (b) was under the influence of intoxicating liquor.

Clerk's Papers at 167.

The jury found Mr. Moore guilty. The court denied Mr. Moore's motion for arrest of judgment.

During the sentencing hearing, the State presented evidence that the homeowner's insurance company paid $57,396.70 to repair the damages to the home caused by Mr. Moore's car. The insurance had estimated the damage to be $55,000 and included structural repairs, rebuilding walls, and replacing rafters and broken windows. Mr. Moore's car also severely damaged a retaining wall in the front of the house. Pictures were presented at trial that showed the visible damage to the home.

The State also presented evidence that the insurance company for the car paid $48,000 to the homeowner's insurance company to cover the damages. Additionally, the homeowners paid a $1,000 deductible. The homeowner provided the evidence relating to the insurance estimate and payments.

During the hearing, Mr. Moore said that he would not contest the deductible amount paid by the homeowners. However, Mr. Moore challenged the amount paid by the insurance company. He alleged that $57,000 was a "gagging" amount when compared to the visible damage to the house. RP (Feb. 12, 2010) at 77. He also implied that the homeowner's employment with the insurance company may have tainted the estimate.

As part of the judgment and sentence, the trial court ordered Mr. Moore to pay restitution in the amount of $10,396.70, subject to modification. The amount included $9,396.70 to Farmer's Insurance and $1,000.00 to Shannon and/or Edward Tyler, the homeowners.

Mr. Moore appeals, claiming that the State did not present sufficient evidence to support both alternative means of vehicular assault and that the trial court erred by ordering restitution.

## ANALYSIS

*Sufficient Evidence.* Sufficient evidence supports a conviction if "after viewing the evidence in a light most favorable to the State, any rational trier of fact could have found the essential elements of the charged crime beyond a reasonable doubt." *State v. Rempel*, 114 Wn.2d 77, 82, 785 P.2d 1134 (1990). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). An appellate court does not need to be convinced of guilt beyond a reasonable doubt, but must determine only whether substantial evidence supports the State's case. *State v. Galisia*, 63 Wn. App. 833, 838, 822 P.2d 303 (1992), *abrogated by State v. Trujillo*, 75 Wn. App. 913, 883 P.2d 329 (1994).

Under RCW 46.61.522(1), a person is guilty of vehicular assault if he or she operates or drives any vehicle:

> (a) In a reckless manner and causes substantial bodily harm to another; or
>
> (b) While under the influence of intoxicating liquor or any drug, as defined by RCW 46.61.502, and causes substantial bodily harm to another; or
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> (c) With disregard for the safety of others and causes substantial bodily harm to another.

When a single offense may be committed in more than one way, a jury must unanimously agree on guilt, but not the means by which the crime was committed as

long as there is sufficient evidence to support each alternative means. *State v. Ortega-Martinez*, 124 Wn.2d 702, 707-08, 881 P.2d 231 (1994). On appeal, we must determine whether any rational trier of fact could find each alternative means beyond a reasonable doubt. *Id*. at 708.

Mr. Moore maintains that the State failed to prove beyond a reasonable doubt the alternative means that he was driving in a reckless manner. Driving in a "reckless manner" is defined as a "'rash or heedless manner, indifferent to the consequences.'" *State v. Roggenkamp*, 153 Wn.2d 614, 631, 106 P.3d 196 (2005).

A rational juror could find that the argument between Mr. Moore and his girl friend resulted in Mr. Moore driving in a rash and heedless manner. Mr. Moore admits to being upset about the argument. Mr. Moore demonstrated his heedless manner when he "accelerated, smashed the gas, and lost control . . . which resulted in the collision." RP (Jan. 4, 2010) at 307. Although Mr. Moore could not remember the crash, he admits that he was traveling over the 35 mile per hour speed limit and that he was likely going pretty fast considering the damage to the house.

Additionally, a rational juror could find that Mr. Moore was indifferent to the consequences. First, Mr. Moore drove his car after consuming four to five alcoholic drinks. Also, Mr. Moore stated that although he could not remember if he slowed down

on the night of the collision, he always slowed down for the corner where the collision occurred. However, no skid marks were evident on the roadway. The jury could find that Mr. Moore was indifferent to the consequences based on the evidence that Mr. Moore drove after consuming alcohol and he failed to slow down at a corner where he knew a reduced speed was needed.

When considering the combination of evidence in a light most favorable to the State, there is substantial evidence to support the conclusion that Mr. Moore was driving in a rash or heedless manner, indifferent to the consequences. A juror could find beyond a reasonable doubt that Mr. Moore was driving in a reckless manner.

We conclude that sufficient evidence exists to support both alternative means of committing vehicular assault.

*Restitution.* A trial court's determination of restitution is reviewed for an abuse of discretion. *State v. King*, 113 Wn. App. 243, 299, 54 P.3d 1218 (2002).

Whenever an offender is convicted of an offense which results in injury to any person or damage to or loss of property, restitution shall be ordered. RCW 9.94A.753(5). The trial court can determine restitution by either relying on the defendant's stipulation to the amount or by determining an amount based on a preponderance of the evidence. *State v. Hughes*, 154 Wn.2d 118, 154, 110 P.3d 192 (2005), *abrogated on other grounds by*

*Washington v. Recuenco*, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006). If a defendant disputes the relevant facts needed to determine restitution, an "evidentiary hearing" is needed at which the State must prove the amount by a preponderance of the evidence. *Hughes*, 154 Wn.2d at 154.

The amount of restitution should be based on "'easily ascertainable damages'"; however, specific accuracy does not need to be established. *Hughes*, 154 Wn.2d at 154 (quoting RCW 9.94A.753(3)). Evidence is sufficient to determine restitution if it gives a reasonable estimate of loss and is not based on speculation or conjecture. *Id.* (quoting *State v. Fleming*, 75 Wn. App. 270, 274-75, 877 P.2d 243 (1994)).

In *State v. Lohr*, 130 Wn. App. 904, 911, 125 P.3d 977 (2005), the court determined that the statement from an insurance company regarding the amount it paid was nonspeculative, nonconjectural evidence that provided a reasonable basis for estimating the loss.

As a result of missing the curve in the road, Mr. Moore's vehicle collided with the side of a home. According to RCW 9.94A.753(5), because Mr. Moore was convicted of vehicular assault and caused damage to the home, he was required to pay restitution to the homeowners.

Although Mr. Moore challenged the amount of the restitution at the sentencing

hearing, the sentencing hearing constituted an evidentiary hearing on the validity of the amount. An evidentiary hearing occurs if evidence was presented at the hearing. *Hughes*, 154 Wn.2d at 154. Here, during the sentencing hearing, the State presented evidence that the homeowner's insurance company paid $57,396.70 to repair damages. The State also provided a copy of the estimated work. Pictures were presented at trial that showed the visible damage to the home. The trial court based its decision on this evidence.

The State also proved the amount of restitution by a preponderance of the evidence. The insurance estimated the damage from the collision to be $55,000. This estimate included structural repairs, rebuilding walls, replacing rafters, and replacing broken windows. Mr. Moore also severely damaged a retaining wall in the front of the house. The amount paid by the homeowner's insurance company is nonspeculative and should be considered a reasonable amount. *Lohr*, 130 Wn. App. at 911. Trial court testimony supports the extensive damage done to the home.

Additionally, Mr. Moore testified that he did not contest his responsibility to repay the homeowners the amount of the deductible. The amount of restitution based on the deductible cannot be disputed.

Substantial evidence exists to support the amount of restitution. The trial court did

not abuse its discretion by requiring Mr. Moore to pay restitution in the amount of $10,396.70.

We affirm the conviction and the restitution order.

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

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Kulik, C.J.

WE CONCUR:

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Sweeney, J. Brown, J.