

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,)	No. 62403-2-1
)	
Respondent,)	
)	
v.)	
)	
CHRISTOPHER RUSSELL GREENE,)	UNPUBLISHED OPINION
aka ELIJA GREENE,)	
)	
Appellant.)	FILED: December 21, 2009
)	

Ellington, J. — Elija Greene stole money from his employer and was convicted of several counts of first degree theft. He appeals the resulting order of restitution, contending the evidence is insufficient to support it and that the court should have reduced his obligation because the victim took a tax deduction for the year in which the embezzlement was discovered. We disagree with the latter argument and find the evidence sufficient to support the restitution order except for two items. We remand for adjustment of the order and otherwise affirm.

BACKGROUND

In October 2001, David Huchthausen hired Elija Greene as a part-time bookkeeper. Greene handled accounts receivable and payable for Huchthausen's three business entities: Somerset Properties, Inc., Weiss-Huchthausen Properties, and

Huchthausen's personal business ventures involving sculpture, antiques, and real estate. Each entity had its own bank account. Greene's job included keeping ledgers for each account and for each property. Huchthausen traveled frequently, and left Greene with signed blank checks to pay the business expenses.

In October 2003, Huchthausen became dissatisfied with Greene's work and told him he would no longer be needed. Greene continued to work until a replacement was found in December. Huchthausen and the new bookkeeper soon discovered numerous inconsistencies in the books. An internal audit revealed that several thousand dollars was missing from the three accounts.

Huchthausen eventually reported the suspected thefts to police,¹ and Greene was charged with seven counts of first degree theft. The State alleged he stole over \$70,000 between April 2002 and January 2004. Eventually Greene pleaded guilty to four counts of first degree theft and one count of theft in the third degree, and agreed to pay restitution on "all charged and uncharged counts relating to information contained within the discovery."²

Greene contested the State's calculation of restitution. The court held a two day restitution hearing involving extensive testimony and several detailed exhibits. The State showed that many of the blank checks signed by Huchthausen were made payable by Greene either to himself or to "cash" and then deposited into Greene's personal bank account. Others were made payable to Greene's personal creditors or

¹ It appears that Huchthausen did not contact the police until after Greene made an unsatisfactory offer to repay part of the stolen money. See Clerk's Papers (CP) at 21.

² CP at 30, 54.

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to his friends. Greene also wrote unauthorized checks to Bank of America or “cash”
and

used them to purchase money orders payable to himself or his friends. His entries in the account check registers often listed incorrect payees or listed checks as “void.”

Some checks were never listed at all.

Huchthausen testified the checks in question were not authorized and the amounts Greene paid himself exceeded his salary. Huchthausen took personal and corporate tax deductions for embezzlement losses in 2003. There was no evidence indicating the amount of the resulting reduction in tax liability. Huchthausen testified that any amount recovered in restitution would be taxable as regular income.

Greene admitted “overbilling” Huchthausen for about \$14,500. He testified he sometimes recorded checks incorrectly but denied purposefully entering incorrect information.

Greene’s counsel argued the State failed to prove that all of the dozens of unauthorized checks and money orders were losses resulting from Greene’s crimes. Greene posited that other people could have accessed the signed blank checks or tampered with the unsecured computer bookkeeping files, and that Huchthausen was absent and could not know how many hours Greene actually worked. Greene also pointed out that the loss claimed by Huchthausen for tax purposes was far less than the \$73,000 the State sought in restitution.³

The court found the preponderance of the evidence established losses of \$16,633 from Huchthausen’s personal bank account and \$53,127.44 from the Somerset Properties bank account. The court found insufficient evidence of losses from the

³ The discrepancy is unexplained.

Weiss-Huchthausen account (amounting to \$1,520) or of alleged payroll overbilling (amounting to \$2,025), and denied restitution for those amounts. The court refused to offset the restitution award by the amount of Huchthausen's tax deductions. Ultimately the court entered a restitution order in the amount of \$69,761.36.

DISCUSSION

We review a court's award of restitution for abuse of discretion.⁴ A court abuses its discretion when its decision rests on an untenable basis.⁵ Factual findings in support of a restitution order are reviewed for substantial evidence.⁶

The court's authority to impose restitution as part of a criminal sentence is purely statutory.⁷ Under RCW 9.94A.753(3):

[R]estitution ordered by a court pursuant to a criminal conviction shall be based on easily ascertainable damages for injury to or loss of property, actual expenses incurred for treatment for injury to persons, and lost wages resulting from injury. Restitution shall not include reimbursement for damages for mental anguish, pain and suffering, or other intangible losses, but may include the costs of counseling reasonably related to the offense. 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.^[8]

"Easily ascertainable' damages are tangible damages supported by sufficient evidence.⁹ "The 'easily ascertainable' standard does not mean that restitution can be awarded only under simple calculations."¹⁰

⁴ State v. Israel, 113 Wn. App. 243, 299, 54 P.3d 1218 (2002).

⁵ Id.

⁶ State v. Griffith, 164 Wn.2d 960, 965, 195 P.3d 506 (2008).

⁷ State v. Smith, 119 Wn.2d 385, 389, 831 P.2d 1082 (1992).

⁸ RCW 9.94A.753(3).

⁹ State v. Tobin, 132 Wn. App. 161, 173, 130 P.3d 426 (2006), aff'd, 161 Wn.2d 517, 166 P.3d 1167 (2007).

When the defendant contests the amount of loss, the State must prove the damages by a preponderance of the evidence.¹¹ The statute precludes restitution for speculative and intangible losses, but the amount of loss need not be established with specific accuracy.¹² “Evidence supporting restitution is sufficient if it affords a reasonable basis for estimating loss and does not subject the trier of fact to mere speculation or conjecture.”¹³

Tax Deduction

Greene contends the court erred by failing to take into account that Huchthausen was “already compensated by a large tax deduction,”¹⁴ which he contends mitigated the loss. Because the amount of that benefit was not established at trial, he argues the amount of restitution was impermissibly speculative.

Greene’s argument is based on the faulty premise that a tax deduction constitutes “compensation.” A tax deduction merely reduces the gross income on which taxes are paid; unlike a tax credit, it does not directly reduce the amount of taxes owed. Further, Huchthausen will owe income tax on any restitution he receives.¹⁵ Thus, as the State pointed out at oral argument, the deduction is essentially a deferment of the tax obligation; it is not compensation.

¹⁰ State v. Kinneman, 155 Wn.2d 272, 285, 119 P.3d 350 (2005).

¹¹ Id.

¹² Id.

¹³ Id. (quoting State v. Fleming, 75 Wn. App. 270, 274, 877 P.2d 243 (1994)).

¹⁴ Appellant’s Brief at 9.

¹⁵ See Internal Revenue Code §1.165-1(d) (quoted in part in Respondent’s Brief at 10 n.7).

Greene's argument also incorrectly assumes that restitution may not exceed the loss. That is not so.¹⁶ RCW 9.94A.753 "allows the judge considerable discretion in determining restitution, which ranges from none (in some extraordinary circumstances) up to double the offender's gain or the victim's loss."¹⁷ Since the court could have ordered restitution for double the loss, it certainly had discretion to order restitution without regard for the victim's fleeting and incidental tax benefit.

Finally, Greene's argument is inconsistent with the punitive aspect of restitution.¹⁸ "Washington's restitution statutes . . . were intended to require the defendant to face the consequences of his or her criminal conduct."¹⁹ Requiring the court to reduce the amount of restitution by any tax deductions claimed by the victim would "permit the defendant to escape from just punishment"²⁰ and allow Greene to transfer his restitution burden to taxpayers. We decline to set this unfair precedent.

Sufficiency of the Evidence

Greene next contends the State failed to prove he took certain checks that were included in the restitution amount. With respect to two of the twelve challenged checks, we agree and remand for the appropriate reduction in restitution. The evidence is sufficient as to the other ten checks.

The State presented several detailed exhibits, including copies of dozens of

¹⁶ Kinneman, 155 Wn.2d at 282 (restitution statute "does not say that the restitution ordered must be equivalent to the injury, damage or loss, either as a minimum or a maximum, nor does it contain a set maximum that applies to restitution").

¹⁷ Id.

¹⁸ See id. at 281 ("Restitution is at least as punitive as compensatory").

¹⁹ State v. Tobin, 161 Wn.2d 517, 166 P.3d 1167 (2007).

²⁰ Id.

cancelled checks from the several bank accounts, which were correlated to information from the registers maintained by Greene. The evidence shows that most of these unauthorized checks are connected to Greene in multiple ways: they bear his handwriting; they were omitted from or incorrectly recorded in the registers he kept; they were made out to Greene, his friend, or an entity with which Huchthausen had no relationship; or they were immediately followed by a corresponding deposit to Greene's personal account. Most of the checks fall into several of these categories, providing substantial evidence that Greene used the checks for his own purposes.²¹

Greene argued that someone else might have taken the checks and falsified the register. He pointed out that the payee portions of certain checks were written in someone else's handwriting and the accounting software was easy to manipulate.

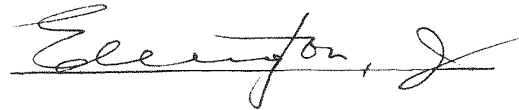
The court rejected this theory, finding that each of the checks fit Greene's practice, that there were no issues regarding access to the checks or computer files, and no issues about the handwriting. The court concluded the State had provided substantial evidence as to each of the checks. With two exceptions, we agree.

²¹ See Exhibits 9, 11, and 12. Check 3222 was made out to "cash" in Greene's handwriting, improperly omitted from the register, and the same amount was deposited in Greene's account the following day. Checks 3976, 5144, 5234, 4057, and 4397 (with corresponding money order) were all at least partially in Greene's handwriting, made out to "cash" or to persons or entities with which Huchthausen had no relationship, and all but check 5144 was either omitted or improperly recorded in the register. Checks 3981, 4027, and 4055 were at least partially in Greene's handwriting, incorrectly recorded as "void" or as payable to legitimate vendors, and actually made out to Bank of America. Though Huchthausen had an account with that bank, he had "no idea" why any of these checks would have been written. Finally, check 4500 was written to "cash" and used to purchase a money order, the exact amount of which was deposited in Greene's personal account the same day. It was incorrectly recorded as payable to a legitimate vendor.

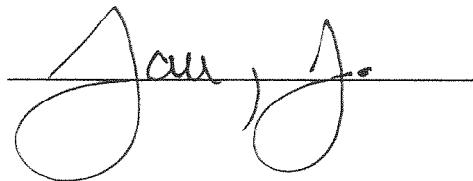
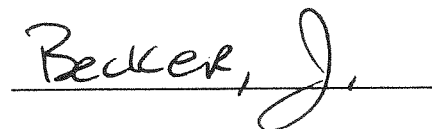
First, the State concedes it presented insufficient evidence to show Greene stole check 3587 for \$100. This check was made out to “cash” in Greene’s handwriting, but there is no other evidence connecting it to Greene. We accept the concession.

The evidence connecting Greene to check 3090 for \$729.69 is also insufficient. Check 3090 was made out to “cash,” not endorsed by Greene, and was accurately recorded in the register. While the check was written in Greene’s handwriting, this alone is insufficient, given his responsibilities. The only other evidence tying the check to Greene is that he made a deposit of the same amount plus \$80 four days after this check was written. Without evidence showing the disputed check was a constituent of the deposit, however, there is little beyond speculation connecting it to Greene.

The remaining checks were properly included in the restitution award. We remand with instructions to reduce the restitution amount by \$829.69. In all other respects, we affirm.

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WE CONCUR:

Handwritten signature of Sawyer, J. in cursive script, written over a horizontal line.Handwritten signature of Becker, J. in cursive script, written over a horizontal line.