

No. 80501-1-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

GENEVIEVE GABRIELA KORVIN,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SKAGIT COUNTY

APPELLANT'S OPENING BRIEF

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A. INTRODUCTION

Genevieve Korvin contested the restitution sought after she pled guilty to theft in the first degree. Almost a year and a half after sentencing, the court ordered her to pay \$68,870.51 in restitution. Because the court ordered restitution after the statutory 180-day deadline expired, the restitution order is void.

Alternatively, substantial evidence does not support the restitution amount. The State submitted evidence of checks payable to Ms. Korvin and credit card statements for a business card. Even though the CEO and board members signed all the checks and the board authorized Ms. Korvin to use the credit card, the State sought restitution for all “unsupported” checks and all credit card transactions. Only the casino withdrawals totaling approximately \$12,000 were easily ascertainable damages. This Court should remand to strike the amounts not proven to be causally connected to the crime charged.

B. ASSIGNMENTS OF ERROR

1. The trial court exceeded its authority when it ordered restitution after the 180-day deadline expired.
2. Substantial evidence does not support the trial court’s restitution order.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Under RCW 9.94A.753(1), the court must determine the amount of restitution “at the sentencing hearing or within one hundred eighty days.” The court “may continue the hearing beyond the one hundred eighty days for good cause.” The State has the burden to seek a continuance for good cause. When the court orders restitution after the 180-day deadline, without finding good cause and without express waiver, was the restitution order void?

2. The State has the burden to prove restitution and the amount “shall be based on easily ascertainable damages.” RCW 9.94A.753(3). The restitution amount must be supported by substantial evidence and must be causally connected to the crime charted. Here, the State sought restitution for checks payable to Ms. Korvin, business credit card transactions, and loan interest. However, all the checks were signed by the CEO and board members, and Ms. Korvin was authorized to use the credit card for business-related expenses. Further, the loan was not related to Ms. Korvin’s crime. Did the State fail to support the restitution amount with substantial evidence?

D. STATEMENT OF THE CASE

In 2013, Genevieve Korvin was a new intern at the Mount Vernon Chamber of Commerce Foundation (Foundation). RP 5/7/19 at 246. In August of 2013, she accepted the position of Experience Work Project (EWP) Coordinator for the Foundation. RP 5/7/19 at 247. In November of 2013, she applied to work for the Mount Vernon Chamber of Commerce (Chamber) when the then-acting Vice President of Operations suddenly resigned. RP 5/7/19 at 248. The Foundation operates under the Chamber. RP 12/5/18 at 13.

Kristen Keltz, the CEO of the Chamber and the Foundation, declared she would not fill Ms. Korvin's EWP Coordinator position at the Foundation, so Ms. Korvin was required to handle both positions. RP 1/30/19 at 56-57; RP 5/7/19 at 248-49. Ms. Korvin started as Vice President of Operations in January of 2014, and worked both positions until she left in November of 2014. RP 5/7/19 at 249.

Ms. Keltz agreed to pay Ms. Korvin for both positions. RP 5/7/19 at 258. The Chamber paid her \$3,500 each month for her work as Vice President of Operations. RP 5/7/19 at 289. Ms. Keltz informed Ms. Korvin she would be paid for her work for the Foundation under an alternative compensation scheme. RP 1/30/19 at 70. As the EWP

Coordinator for the Foundation, Ms. Korvin received a “pass through” payment of \$1,400 each month from the Foundation through the Chamber. RP 12/5/18 at 77.

Ms. Korvin also received additional compensation for grant writing for the Foundation. RP 5/7/19 at 256. Surplus grant funding was part of her compensation. RP 6/13/19 at 316. These payments were also processed as a “pass through” payment from the Foundation to the Chamber before being paid to Ms. Korvin. RP 6/13/19 at 331. Ms. Korvin prepared quarterly reports for grant funding to accompany her timesheets, which Ms. Keltz reviewed and approved. RP 6/13/19 at 320.

There was no formal written agreement regarding Ms. Korvin’s payment arrangement. RP 12/5/19 at 39. When Ms. Korvin asked for the payment agreement in writing, Ms. Keltz became upset. They had a heated argument about Ms. Korvin’s compensation. RP 5/7/19 at 258.

Shortly after she began working both positions, Ms. Korvin discovered a significant tax delinquency for both the Chamber and Foundation. RP 5/7/19 at 252. The total amount owed exceeded \$30,000 and spanned several years. CP 46-83. Her predecessor left a stack of IRS notices unaddressed. RP 5/7/19 at 252. Ms. Korvin

immediately alerted Ms. Keltz. RP 5/7/19 at 252. Despite Ms. Korvin's lack of training in tax compliance or employment tax, Ms. Keltz assigned the tax issue to her. RP 5/7/19 at 253. Ms. Korvin had only three months to resolve years of tax delinquency, including 27 quarterly taxes and three annual taxes. RP 5/7/19 at 253-55. She was under enormous pressure, as the IRS was threatening to shut down the Foundation and the Chamber. RP 12/5/18 at 77.

Ms. Korvin was now working as the EWP Coordinator for the Foundation, the Vice President of Operations for the Chamber, and the Foundation and Chamber's tax professional. Due to her many responsibilities, Ms. Korvin was working overtime. RP 5/7/19 at 291. She was stressed about the tax issues and worried about keeping EWP afloat. RP 5/7/19 at 257. With no one to help her, she was responsible for saving the Chamber, the Foundation, and everyone's jobs in EWP. RP 5/7/19 at 269.

In addition to the tax issue, one of Ms. Korvin's new responsibilities was to help Ms. Keltz maintain QuickBooks, which the Chamber and Foundation used for bookkeeping. RP 12/5/18 at 44. As CEO, Ms. Keltz was ultimately responsible for all accounting. RP 5/7/19 at 251. Ms. Keltz had full access to QuickBooks for the

Chamber and Foundation, and as part of her job would enter information and revise entries. RP 5/7/19 at 251, 290. Before starting as Vice President of Operations, Ms. Korvin received no training from the Chamber, Ms. Keltz, or the former employee. RP 5/7/19 at 249.

The prior Vice President of Operations handled bookkeeping for the Chamber and the Foundation and maintained them until she left in December of 2013. RP 5/7/19 at 251-51. After Ms. Korvin began working as the Vice President of Operations, it became clear the bookkeeping was in disarray. Ms. Korvin's predecessor did not properly maintain the books. RP 12/5/18 at 46. She did not complete monthly reconciliations. RP 12/5/18 at 47. She improperly set up the payroll system, which likely caused the tax delinquencies. RP 5/7/19 at 167. During her time as CEO, Ms. Keltz oversaw financial operations and accounting for both the Chamber and the Foundation. RP 1/30/19 at 7. Ms. Korvin had no bookkeeping access or responsibility before she began as the Vice President of Operations. RP 12/5/18 at 47.

Part of Ms. Korvin's bookkeeping responsibilities was to prepare checks. RP 5/7/19 at 270. The Chamber and the Foundation had specific procedures for checks. For amounts under \$500, the checks were approved and signed by Ms. Keltz. RP 12/5/18 at 17. All

checks over \$500 required two signatures—Ms. Keltz and a board member. 12/5/18 at 17. Ms. Korvin had no authority to sign or approve any checks. RP 5/7/19 at 270.

All checks required supporting documentation. For every check, Ms. Korvin attached supporting documents and provided them to Ms. Keltz for review and approval. RP 5/7/19 at 271. After signing, Ms. Keltz gave the supporting documents and checks to a member of the board of directors for a second signature. RP 5/7/19 at 271. Bob Lama, who served on the Chamber's board, testified he always reviewed supporting documentation before signing checks and never approved a check without this documentation. RP 12/5/18 at 71-72.

Because of her many responsibilities, Ms. Korvin incurred many expenses for the Foundation and Chamber. RP 6/13/19 at 322-23. She attended conventions, traveled for presentations, and participated in a legislative task force. RP 5/7/19 at 261. She submitted reimbursement requests for mileage, phone expenses, and conference expenses. RP 6/13/19 at 327. To request reimbursements, Ms. Korvin would submit all supporting documentation for approval and signature. RP 5/7/19 at 285. After approval, copies were retained in employee files for seven years. RP 5/7/19 at 286.

During her time as CEO, Ms. Keltz had a Chamber credit card. RP 1/30/19 at 67. She used the card to pay for luncheons, board meeting expenses, postage, monthly newsletters, and event expenses. RP 6/13/19 at 322-23; Exhibit 11.

In July 2014, Ms. Keltz left her position as CEO. RP 5/7/19 at 268. The board of directors did not find a replacement for several months. RP 5/7/19 at 170. In the meantime, Ms. Korvin took on even more responsibilities. RP 12/5/18 at 52.

Meanwhile, Ms. Korvin continued to work hard on the Chamber and Foundation tax issues. After months of hard work, on July 25, 2014, the Chamber and Foundation signed an installment agreement with the IRS to pay taxes owed. RP 5/7/19 at 267.

On August 27, 2014, the board of directors authorized Ms. Korvin to have a Chamber credit card. RP 5/7/19 at 279. Bob Lama and Steve Brown, both board members, signed the card agreement. RP 5/7/19 at 279. Similar to Ms. Keltz, Ms. Korvin used the card for Chamber and Foundation business, including luncheons and events. RP 5/7/19 at 280-81.

In October of 2014, Andy Mayer became the new CEO of the Chamber and Foundation. RP 5/7/19 at 170. In November of 2014, the

bank contacted Mr. Mayer to notify him of suspicious activity on the Chamber credit card. RP 5/7/19 at 172. In a lapse of judgment, Ms. Korvin used the Chamber credit card to withdraw approximately \$12,000 at casinos. Exhibit 5. Mr. Mayer met with Ms. Korvin and put her on leave. RP 5/7/19 at 174.

The Chamber and Foundation hired Patricia Anderson, a C.P.A., to review financial records from January 2014 through November 2014. RP 1/30/19 at 74. She reviewed QuickBooks, bank statements, check copies, and board meeting notes. RP 1/30/19 at 73-74. Many transactions were recorded correctly, and many discrepancies had nothing to do with Ms. Korvin. RP 5/7/19 at 156-57. Ms. Anderson did not complete a full audit, so she did not review records to reconcile “unsupported” entries. RP 5/7/19 at 121, 134. She testified she would have preferred a “full blown audit,” which “would have revealed quite a bit more information,” but the Chamber did not ask her to conduct one. RP 5/7/19 at 128.

Based on allegations Ms. Korvin took funds she was not entitled to, the State charged her with theft in the first degree. She pled guilty on February 14, 2018. CP 15. The court sentenced her on March 21,

2018. CP 15-25. The court reserved the issue of restitution, the amount of which was contested. CP 20.

The parties continued the matter many times before conducting the restitution hearing. CP 217-26. On August 21, 2019—nearly a year and a half after sentencing—the court ordered \$68,870.51 in restitution. CP 157-59.

Realizing the restitution order was entered outside of the 180-day statutory window, Ms. Korvin moved to vacate. CP 175-80. The court concluded Ms. Korvin waived the defense and denied the motion. CP 235-37.

E. ARGUMENT

1. The restitution order is void because the court entered it after the 180-day period expired without finding good cause and without a valid waiver.

A restitution order must be entered within 180 days of sentencing. RCW 9.94A.753(1). The court's authority to order restitution is derived solely from statute. *State v. Chipman*, 176 Wn. App. 615, 618, 309 P.3d 669 (2013). When a court does not enter a restitution order within the mandatory time limit, it has no authority to order restitution and the order is void. *State v. Johnson*, 96 Wn. App.

813, 815, 981 P.2d 25 (1999). Because the court failed to enter its restitution order within the 180-day period, the order is invalid.

a. The 180-day deadline is mandatory, and the order was invalid when entered.

The statute's use of the word "shall" creates a mandatory time limit. *State v. Krall*, 125 Wn.2d 146, 147-49, 881 P.2d 1040 (1994). The 180-day deadline is strictly enforced, and "the statutory time mandate prevails over victims' rights to restitution." *State v. Moen*, 129 Wn.2d 535, 542, 919 P.2d 69 (1996). The rule is simple—when a restitution order is entered after the deadline, it is invalid. *Id.*

Ms. Korvin was sentenced on March 21, 2018. CP 15-25. The 180-day deadline was September 17, 2018. However, the court did not enter the restitution order until August 21, 2019, nearly a year after the 180-day deadline expired. CP 157-59. Because the court did not enter the order before the 180-day deadline, the restitution order is invalid.

b. The court did not find good cause to continue the hearing before the 180-day period expired.

In order to extend the 180-day period, the State must move for an extension and the court must find good cause to extend the deadline. RCW 9.94A.753(1); *Chipman*, 176 Wn. App. at 619; *State v. Prado*, 144 Wn. App. 227, 249, 181 P.3d 901 (2008). Both the State's motion

and the court's finding of good cause must occur before the 180-day deadline. *Prado*, 144 Wn. App. at 249. The State bears the burden of complying with the 180-day deadline and must file a motion before the 180-day period expires. *Chipman*, 176 Wn. App. at 619. The defense has no burden to object. *State v. Grantham*, 174 Wn. App. 399, 404, 299 P.3d 21 (2013).

The State did not file a motion to extend the deadline before the 180-day period expired. The court did not find good cause for extending the 180-day deadline. Without the State's motion and the court's finding of good cause, the court's authority to enter the restitution order expired September 17, 2018. Therefore, the restitution order is invalid.

c. Ms. Korvin did not expressly waive the 180-day deadline.

The 180-day deadline is similar to a statute of limitations and is subject to waiver. *State v. Kerow*, 192 Wn. App. 843, 847, 368 P.3d 260 (2016). A statute of limitations establishes a clear window during which a court has authority to act, and a party does not waive the deadline simply by not objecting. *State v. Peltier*, 181 Wn.2d 290, 297, 332 P.3d 457 (2014). Rather, a defendant's waiver must be express and must be made before the deadline. *Id.* ("When a statute of limitations

has not run and the court still has authority . . . a defendant may waive the statute of limitations if he or she so chooses. This waiver must be express.”).

This Court will not presume the defendant waived the timeliness requirement simply because the defendant did not object to an order entered after the 180-day window—“it was invalid when entered.” *Moen*, 129 Wn.2d at 542. Whether a defendant protests or complies does not affect the strict deadline. *See id.* at 540 (“[The defendant’s] stated willingness to pay restitution did not make any difference” for the purposes of waiver.).

Ms. Korvin did not expressly waive the 180-day deadline. She was not required to object before the deadline. The fact that Ms. Korvin’s counsel complied with court orders, agreed to some of the continuances, and participated in hearings does not constitute a waiver. The State had ample time to file a motion and explain why it needed additional time, but it did not do so. The State is responsible for ensuring the timely resolution of criminal trials. *State v. Morris*, 126 Wn.2d 306, 314, 892 P.2d 734 (1995). Absent express waiver, the court’s violation of the 180-day deadline undermines the restitution order. Because the restitution order was untimely, it is invalid.

2. The State did not present substantial credible evidence to support the restitution amount.

The amount of restitution “shall be based on easily ascertainable damages.” RCW 9.94A.753(3). The State has the burden to establish the amount of restitution, and it must support the claimed loss with “substantial credible evidence.” *State v. Dedonado*, 99 Wn. App. 251, 257, 991 P.2d 1216 (2000); *State v. Deskins*, 180 Wn.2d 68, 82, 322 P.3d 780 (2014). While the amount does not need to be established with specific accuracy, the evidence must provide a “reasonable basis” for the claimed loss and must “not subject the trier of fact to mere speculation or conjecture.” *Deskins*, 180 Wn.2d at 82-83. The court’s decision must be based on “information bearing some minimal indicium of reliability beyond mere allegation.” *State v. Mendoza*, 165 Wn.2d 913, 920, 205 P.3d 113 (2009).

When disputed, the State must prove the amount by a preponderance of evidence. *Deskins*, 180 Wn.2d at 82. The State must also prove a causal connection between the defendant’s crime and the restitution requested. *State v. Enstone*, 137 Wn.2d 675, 679, 974 P.2d 828 (1999).

The sentencing court has the discretion to determine the restitution amount. *State v. Pollard*, 66 Wn. App. 779, 785, 834 P.2d 51

(1992). This Court reviews the restitution order for an abuse of discretion. *Deskins*, 180 Wn.2d at 82. The court abuses its discretion when the decision is “manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.” *Pollard*, 66 Wn. App. at 785 (quoting *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)). When the court orders restitution based on bare assertions or unproven allegations, it is an abuse of discretion. *See State v. Hunley*, 175 Wn.2d 901, 910, 287 P.3d 584 (2012).

The State sought restitution for checks issued by the Chamber in the amount of \$48,181.64. CP 26. This amount included \$17,787.91 for payroll, \$14,979.63 for check reimbursements, and \$15,414.10 for credit card charges. CP 26-27. The court awarded the Chamber this entire amount. CP 156. The court also awarded the Chamber \$3,000.00 for the cost of accounting and \$6,544.80 for interest on a loan. CP 156.

The State sought restitution for the Foundation in the amount of \$18,144.07. CP 27. This amount included \$1,500.00 for wages, \$12,550.00 for payroll, and \$4,094.07 for check reimbursements. CP 27. The court awarded the Foundation this amount, less \$7,000.00 for Ms. Korvin’s EWP salary for May through September of 2014. CP 156. Even though Ms. Korvin was the EWP Coordinator from January

through November of 2014, the court did not deduct Ms. Korvin's EWP salary for this entire period.

The cash withdrawals at the casino totaling approximately \$12,000 are the only amounts that are easily ascertainable and supported by substantial credible evidence. Other than the casino transactions, the State did not support the restitution amounts with substantial evidence. Therefore, the court abused its discretion. This Court should remand to strike the amounts that were not proven to be causally connected to the crime charged. *See State v. Griffith*, 164 Wn.2d 960, 968, 195 P.3d 506 (2008).

- a. The restitution amount for checks was not supported by substantial evidence because all checks were signed by the CEO and board members who always reviewed supporting documents before approving.*

All Chamber and Foundation checks must be approved and signed by the CEO and members of the board. Ms. Korvin did not have any authority to sign checks. RP 5/7/19 at 270. For amounts under \$500, Ms. Keltz signed the checks. RP 12/5/18 at 17. For amounts over \$500, Ms. Keltz and a board member signed the checks. RP 12/5/18 at 17. Ms. Korvin never signed any checks. RP 5/7/19 at 143.

Ms. Keltz and the board also required supporting documentation to accompany all check requests. RP 5/7/19 at 271. Bob Lama, a board

member who signed a significant number of checks to Ms. Korvin, never approved a check without reviewing the supporting documentation. RP 12/5/18 at 71-72.

Ms. Korvin was paid by check. Because of budgetary reasons and organizational mismanagement, Ms. Korvin was forced into an alternative compensation scheme. She received \$3,500 a month from the Chamber and \$1,400 a month from the Foundation. RP 5/7/19 at 289; RP 12/5/18 at 77. She also received additional compensation for grant writing. RP 5/7/19 at 256. To receive payment for grant writing, she prepared reports and timesheets to accompany each check request. RP 6/13/19 at 320. All payroll and wage checks were properly signed and approved. *See* Exhibits 16, 17.

Ms. Korvin was reimbursed by check. While handling her many responsibilities, Ms. Korvin incurred legitimate expenses, such as mileage, phone expenses, and conference costs. RP 6/13/19 at 327. She attended conventions, traveled for presentations, and participated in a legislative task force. RP 5/7/19 at 261. Ms. Korvin requested reimbursement checks by preparing the necessary documentation and submitting them to Ms. Keltz to review and sign, who then provided

the check and documentation to a board member to review and sign. RP 5/7/19 at 285.

For its restitution request, the State requested amounts for “unsupported” checks based on an accountant’s reports. Exhibits 6, 8. The Chamber did not hire the accountant to complete a full audit, so she did not review Chamber or Foundation files related to Ms. Korvin’s compensation or reimbursement requests. RP 5/7/19 at 121. Instead, she reviewed QuickBooks and other records to compile a list of “unsupported” checks. RP 5/7/19 at 134. The accountant reported: “we do not have any supporting documentation for these amounts and cannot verify if they were properly disbursed.” Exhibit 19, pg. 2. Had she been hired for a full audit, she would have reviewed Chamber and Foundation records, which “would have revealed quite a bit more information.” RP 5/7/19 at 128.

Even though all checks were approved and signed, the court ordered restitution for the total amount of purportedly “unsupported” checks related to Ms. Korvin’s compensation and reimbursements. This amount is not supported by substantial evidence. All the checks issued to Ms. Korvin were properly signed and approved. The board only signed checks after reviewing the supporting documentation. Indeed,

the board members said they would not sign a check without supporting documentation. RP 12/5/18 at 71-72; RP 6/13/19 at 333. Therefore, the court abused its discretion when it disregarded the evidence and ordered restitution for the checks based on unproven allegations. *See Hunley*, 175 Wn.2d at 910.

b. The restitution amount for credit card transactions was not supported by substantial evidence because Ms. Korvin was authorized to use the credit card for business-related expenses.

On August 27, 2014, Bob Lama and Steve Brown—both members of the Chamber board—authorized Ms. Korvin to have a Chamber credit card. RP 5/7/19 at 279. Similar to Ms. Keltz, Ms. Korvin used the card for Chamber and Foundation business such as luncheons and events. RP 5/7/19 at 280-81; *see* Exhibits 5, 11. She also used the credit card for board meetings, luncheons, travel, postage, auction items, and monthly newsletters. RP 6/13/19 at 322-23.

Aside from the casino transactions, there is no reasonable basis for concluding the other business expenses on the credit card were wrongfully spent. Ms. Korvin was authorized to have a credit card, and she used it mostly for Chamber and Foundation business. Therefore, the court abused its discretion in ordering restitution for all credit card transactions, when the disputed evidence showed Ms. Korvin made

many authorized expenses on the Chamber credit card she was properly using in the course of her employment. *See Hunley*, 175 Wn.2d at 910.

c. The restitution amount for interest on a loan is not supported by substantial evidence because the Chamber's need to obtain a loan was due to poor cash management, not due to Ms. Korvin's crime.

Restitution must be causally related to the defendant's crime. *Enstone*, 137 Wn.2d at 679. Before Ms. Korvin even started working for the Chamber and Foundation, the organizations had significant financial issues. The prior bookkeeper did not properly maintain the accounts. RP 12/5/18 at 46. QuickBooks was not set up correctly. RP 5/7/19 at 167. The Chamber and the Foundation were seriously delinquent in taxes and owed over \$30,000. CP 46-83. For most of Ms. Korvin's time with the Chamber and the Foundation, they were on the brink of closure. RP 12/5/18 at 77.

The Chamber's and Foundation's bookkeeping were commingled and disorganized well before Ms. Korvin's time. Their need to obtain a loan has no correlation to Ms. Korvin's crime. Therefore, there is no reasonable basis or connection for restitution for the interest on the loan, and the court abused its discretion in ordering restitution for interest on the loan.

F. CONCLUSION

The court exceeded its authority when it ordered restitution well beyond the 180-day deadline without finding good cause. The court also abused its discretion in ordering restitution for checks and credit card transactions when all checks were approved by the CEO and board members and Ms. Korvin was authorized to use the credit card for Chamber and Foundation business. Only the casino transactions were supported by substantial credible evidence. Hence, this court must vacate the restitution order or, in the alternative, remand to strike the amounts that were not proven to be causally connected to the crime charged.

DATED this 28th day of May 2020.

Respectfully submitted,

A handwritten signature in black ink that reads "Beverly Tsai". The signature is written in a cursive, flowing style.

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