IN THE COURT OF APPEALS OF IOWA

No. 7-470 / 96-1805
No. 7-471 / 96-1846

000459

STATE OF IOWA,

Plaintiff-Appellee,

vs.

DENNIS VINCENT KREMER,

Defendant-Appellant.

FILED
SEP 24 1997
CLERK SUPREME COURT

STATE OF IOWA,

Plaintiff-Appellee,

vs.

SHERRI LYNN SCHUTTERS,

Defendant-Appellant.

Appeal from the Iowa District Court for Linn County, Thomas M. Horan, Judge.

Defendants appeal the district court's restitution order upon their conviction of second-degree theft in violation of Iowa Code sections 714.1(4) and 714.2(2) (1995). **AFFIRMED**

Linda Del Gallo, State Appellate Defender, and James G. Tomka, Assistant State Appellate Defender, for appellant Dennis Vincent Kremer.

Mark A. Newman, Forest City, for appellant Sherri Lynn Schutters.

Thomas J. Miller, Attorney General, Martha E. Boesen, Assistant Attorney General, Denver D. Dillard, County Attorney, and Jerry Vander Sanden, Assistant County Attorney, for appellee.

Considered by Sackett, P.J., and Streit and Mahan, JJ.

MAHAN, J.

Sherri Schutters and Dennis Kremer stole merchandise from their employer, David Judd, owner of Master Plumbing. After a trial on the minutes, the defendants were convicted of second-degree theft and sentenced to a term of imprisonment not to exceed five years; sentence suspended. At the restitution hearing, David Judd testified in regard to his losses. Among the items stolen were 3200 pounds of copper tubing that Judd alleged had a value between $6000 and $7000. Judd testified he lost 198 hours of labor when he sent his employees to recover the stolen items. Judd claims he should be reimbursed for the labor at a cost of $9702. This is based on the $49 per hour he normally bills for labor. He also asked for $1683.45 he paid a private investigator prior to filing charges; $114.48 for a Ryder truck he used to haul the stolen items; $85.50 in gas; and $223 the defendants owed on his charge account. The court ordered the defendants to pay restitution in the amount of $18,085.45. The defendants are jointly and severally liable for this amount. Both defendants challenge the award of restitution.

On appeal, both defendants allege that the amounts awarded for the copper tubing and the labor fees were improper. Schutters also alleges the court improperly awarded $500 in attorney fees Judd incurred in seeking to quash a subpoena and $223 owed to Judd for charges the defendants made on his charge account. We find the award of restitution and the amount were proper and affirm the decision of the district court.

000462

I. SCOPE OF REVIEW. Our review is for correction of errors at law. Iowa R. App. P. 4.

II. AWARD OF RESTITUTION. Restitution is authorized only by statute, is a mandatory part of sentencing in Iowa, and is defined in fairly broad terms. *State v. Tutor*, 538 N.W.2d 894, 896 (Iowa App. 1995); Iowa Code § 910.1(3) (1995). A defendant who seeks to overturn or modify a restitution order must show a failure by the trial court to exercise its discretion or an abuse of discretion. *Tutor*, 538 N.W.2d at 896. A trial court abuses its discretion and exceeds its statutory authority when it orders restitution for losses not causally related to the offense committed. *Id.* at 896-97.

In each instance, a causal connection must exist between the criminal act and the injury to the victim. *Id.* at 896. The relationship between damage caused by the criminal conduct and the restitutionary order must be shown by a preponderance of the evidence. *State v. Wagner*, 484 N.W.2d 212, 216 (Iowa App. 1992). This causal connection is essentially the tort element of proximate cause. *State v. Ihde*, 532 N.W.2d 827, 829 (Iowa App. 1995).

We believe the State proved by a preponderance of the evidence that the copper pipe belonged to Master Plumbing and was taken by the defendants without the permission of Judd. We also find the State proved by a preponderance of the

evidence that the theft caused pecuniary damage to the victim. Therefore, we affirm the district court's decision to award restitution.

The State presented substantial evidence against the defendants. The defendants both worked for the victim. Judd testified that a substantial portion of the items recovered were brand new and at least sixty percent of the items were labeled with a Master Plumbing job number or the name Master Plumbing. The defendants had access and ability to steal the items from Master Plumbing. These items were found at the defendants' residence. Further, Judd did not give the defendants permission to take these items.

The defendants contend there is insufficient evidence to show the copper tubing sold to B. & G. Salvage originally belonged to Master Plumbing. Given the defendants' unique position as employees of Master Plumbing and the fact such a large number of the items recovered were labeled with Master Plumbing's numbers or name, it is a clearly logical inference that the copper tubing the defendants sold to B. & G. Salvage for $3200 also belonged to Master Plumbing and was stolen by the defendants.

The loss of copper tubing, the temporary inability to use the numerous other items stolen by the defendants, the investigation conducted by Judd prior to filing charges, and the collection of the items found at the defendants' residence also caused pecuniary losses for Judd and Master Plumbing.

Once the causal connection is reached, the statute allows recovery of all damages the State can show by a preponderance of the evidence. *Id.* The amount that may be recovered as restitution includes:

> [A]ll damages to the extent not paid by an insurer, which a victim could recover against the offender in a civil action arising out of the same facts or event, except punitive damages and damages for pain, suffering, mental anguish, and loss of consortium.

Iowa Code § 910.1(3). In reviewing the amount of restitution fixed by a trial court, we must determine whether the trial court applied the correct law in fixing the damages and whether there is substantial evidence to support the damages award. *Ihde*, 532 N.W.2d at 829. A restitution order is not excessive if it bears a reasonable relationship to the damage caused. *State v. Mayberry*, 415 N.W.2d 644, 647 (Iowa 1987). The restitution amount must be in accord with the damages caused by the crime. *Ihde*, 532 N.W.2d at 830. We will deny recovery for lost profits only when the loss is speculative, contingent, conjectural, or uncertain. *Id.* The district court ordered the defendants to pay $18,085.45 to Master Plumbing. The defendants challenge the State's evidence as insufficient.

At the restitution hearing, Judd testified the private investigator he hired informed him that the copper tubing sold to B. & G. Salvage looked like it was new but it had been distressed in an attempt to make it look like scrap. Several suppliers told him the current price for 3200 pounds of new copper tubing was between $6000

and $7000. He also testified he spent $1683.45 to hire the private investigator to investigate the disappearance of inventory prior to filing charges.

Once the stolen items were discovered at the defendants' residence, Judd had to take his employees away from serving customers and utilize 198 man hours to return the items from Maquoketa to Cedar Rapids. If these employees had been completing service jobs, Master Plumbing would have billed out their time at a rate of $49 per hour; this amounts to $9702. Judd testified he did take his employees away from other jobs to collect, re-inventory, and restock the stolen items. When they finished, the employees returned to plumbing jobs they would have been doing during the time they were collecting the stolen items. We believe this amount is not speculative, contingent, conjectural, or uncertain. There were so many items involved that six of Master Plumbing's trucks were not sufficient to haul all of the items back to Cedar Rapids. Judd had to rent a Ryder truck. The cost of rental for the truck was $114.48. The cost of gas for the trip was $85.50.

At the restitution hearing, the defendants did not offer any contrary evidence other than the fact scrap copper was worth $1 per pound.

Schutters and Kremer both challenge the award for the price of the copper tubing and the lost man hours. We believe this amount is supported by substantial evidence.

Schutters also challenges the amount of restitution as including $223 for the tool account and $500 in attorney fees. We do not address these because there is no

evidence that these amounts were considered by the court in the total award. In fact, when the attorney fees were discussed at the restitution hearing, the defense objected that they were outside the scope of the restitution award. "Your honor, I'm going to object to this whole line of questioning. We're now beyond the amount the State sought in its restitution order." The district court sustained the objection.

For these reasons, we affirm the decision of the trial court.

AFFIRMED.