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Supreme Court No. 101879-7
(COA No. 38683-0-III)

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JASON J. GONZALES,

Petitioner.

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Jason Gonzales[1] asks this Court to accept review of the Court of Appeals decision under RAP 13.3 and RAP 13.4.

B. COURT OF APPEALS DECISION

Mr. Gonzales appealed his convictions and the imposition of restitution and the victim penalty assessment. The Court of Appeals affirmed. *State v. Jason Jessy Fontaine-Gonzales*, No. 38683-0-III, 2023 WL 2578578 (Wash. Ct. App. Mar. 21, 2023).

C. ISSUES PRESENTED FOR REVIEW

1. Due process requires the State to prove every element of the crime beyond a reasonable doubt. While reasonable inferences may be permissible, a conviction cannot be based on unreasonable inferences from equivocal evidence. In this case, Mr. Gonzales was briefly seen at the front door of Daniel Swain's house. But the State presented no evidence Mr.

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[1] The Petitioner's legal name is Jason J. Gonzales.

Gonzales went to the back of the house and damaged the back door. The State failed its burden to prove Mr. Gonzales committed or was an accomplice to residential burglary or malicious mischief. The Court of Appeals decision affirming these convictions conflicts with decisions by this Court and the Court of Appeals, implicates the due process rights of the accused, and warrants this Court's review. RAP 13.4(b).

2. Hearsay is inadmissible at trial unless it meets a narrowly-tailored exception. Under the present sense impression exception to the hearsay rule, immediacy is critical. This exception requires the declarant to have made the statement while observing the event or immediately after. A longer lapse of time is permitted only where there are other circumstances demonstrating reliability and lack of opportunity to reflect. Here, the trial court admitted a voicemail as a present sense impression even though the State did not prove its immediacy or any circumstances to prove it was sufficiently reliable to qualify as a present sense impression. The Court of

Appeals decision affirming the convictions conflicts with decisions by this Court and the Court of Appeals, undermines principles of fundamental fairness, and warrants this Court's review. RAP 13.4(b).

3. Article I, section 14 and the Eighth Amendment forbid courts from imposing "excessive fines." A court-ordered payment is a fine if it is at least partially punitive, and it is excessive if it is grossly disproportional to the offense. When weighing proportionality, courts are required to consider the person's ability to pay. Here, Mr. Gonzales cannot pay the $4,636.89 in restitution that accrues interest at 12 percent. He also cannot pay the $500 victim penalty assessment. The Court of Appeals decision affirming these payments conflicts with decisions by this Court, the Court of Appeals, and the United States Supreme Court, and it is an important constitutional issue that requires this Court's guidance.[2] RAP 13.4(b).

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[2] The constitutionality of the victim penalty assessment is currently pending in this Court. Petition for Review, *State v.*

D. STATEMENT OF THE CASE

Daniel Swain was away from his house when he received an alert that his security system was triggered. RP 191. When he got home a few minutes later, nobody was there, but the sliding door to the back porch was open and there was some damage to the doors that led from the porch into the house. RP 203-04. Nothing was missing from the house or the porch, and there was no evidence anyone entered the house. RP 218.

Mr. Swain had three security cameras on his house pointing at the driveway, the front door, and the backyard. RP 174, 213. A fourth camera was on his shop at the far end of his five-and-a-half-acre property. RP 213, 188; Ex. D-108.

Footage from the shop camera that day showed a car approach the shop and leave. RP 197. There was no evidence regarding what time the car was at the shop.

Rowley, No. 101718-9 (Wash. Feb. 14, 2023); Petition for Review, *State v. Griepsma*, COA No. 83720-6-I (Wash. Ct. App. April 7, 2023).

Some time later, footage from the driveway camera showed the same car. RP 197. There was no evidence how much time passed since the car was at the shop. A passenger got out of the car and walked up to the front door of the house. RP 198. The person in the video was Mr. Gonzales. RP 172.

While standing at the front door, Mr. Gonzales appeared to notice the camera pointed at the front door, reached up, and pointed the camera away from him. RP 202. Shortly after, he walked back to the car, got in, and left. RP 175. There was no evidence to show what time he got back in the car and left, or whether an alarm was sounding when he left.

Aside from the short clip at the front door, Mr. Gonzales did not appear in any other security footage. RP 223. Nobody else appeared in any of the footage. RP 200.

Around the same time, Joshua Terpstra and his friend were also on Mr. Swain's property. RP 178. Mr. Terpstra had built the shop a couple years prior, and he was familiar with the

property. RP 214. Mr. Terpstra and his friend did not appear in any of the security footage. RP 183, 200, 219.

That afternoon, Mr. Terpstra called Mr. Swain and left a voicemail:

> Don't forget to say Washington. Yeah, hey it's Josh Terpstra. Built your shop, you know. Hope you're doing good. I just wanted to touch base with you because – touch base, call you because I found a – I drove by your house with a buddy of mine. I was out in the area and I wanted – just wanted to show him the shop and I actually caught a guy, a couple guys snooping around on your place. So, I confronted them and got them out of there and whatnot and called their bullshit and I got their license plate number too just in case something comes up missing or you have an issue. But Washington plate B, Bravo, Charlie, Foxtrot, 5218. So, there you go. Give me a call if you have any questions. Yep. Hope you're doing good. Talk to you later. Bye.

RP (Ex. P-1) 3.

The State charged Mr. Gonzales with residential burglary and second degree malicious mischief. CP 11. The State's theory was that he was a principal or an accomplice to both offenses. RP 266.

Prior to trial, the State moved to admit a recording of Mr. Terpstra's voicemail. RP 4; CP 7-8. The State did not call Mr. Terpstra as a witness. Over Mr. Gonzales's objection, the court admitted the voicemail as a present sense impression.[3] RP 15. At trial, the State played Mr. Terpstra's voicemail for the jury. RP 195. During deliberation, the jury requested to listen to the voicemail again. CP 38; RP 284.

The jury found Mr. Gonzales guilty. RP 285. At sentencing, the court found Mr. Gonzales indigent. CP 60. Nonetheless, it ordered him to pay $4,636.89 in restitution to replace the damaged doors. CP 65. It also ordered him to pay a $500 victim penalty assessment. CP 64.

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[3] The State also argued it was an excited utterance, but the court declined admitting it as such. CP 7-8; RP 16.

E. ARGUMENT

1. The Court of Appeals decision improperly relieves the State of its burden to prove all elements of the offense beyond a reasonable doubt.

Due process requires the State to prove every element of the crime "beyond a reasonable doubt." *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). A conviction can stand only if, viewing the evidence in the light most favorable to the State, "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979).

While circumstantial and direct evidence are equally reliable, "inferences based on circumstantial evidence must be reasonable and cannot be based on speculation." *State v. Vasquez*, 178 Wn.2d 1, 16, 309 P.3d 318 (2013). A conviction cannot stand based on evidence that is "patently equivocal." *Id.* at 8 (citations omitted).

Even viewed in the light most favorable to the State, the evidence here does not support the convictions. All the evidence shows is that a car pulled into Mr. Swain's driveway, Mr. Gonzales got out, went to the front door, moved a security camera, went back to the car, and left. The Court of Appeals decision permitting the convictions to stand based solely on unreasonable inferences conflicts with decisions by this Court and the Court of Appeals. It is also an important issue that implicates the accused's right to due process. This Court should grant review. RAP 13.4(b).

a. The conviction for residential burglary violates due process because the State did not present any evidence of unlawful entry or criminal intent.

To convict a person of residential burglary, the State must prove beyond a reasonable doubt the person entered or remained unlawfully in a dwelling with the intent to commit a crime against a person or property therein. RCW 9A.52.025(1).

First, the State presented no evidence Mr. Gonzales unlawfully entered or remained in Mr. Swain's house. Though

he was briefly at the front door, he did not enter the house. There was no evidence Mr. Gonzales walked toward the back door after he was seen outside of the front door or that he returned to the car from the back door. There was no evidence at all that Mr. Gonzales was anywhere near the back door.

Second, the State presented no evidence Mr. Gonzales intended to commit a crime in the house. Certain facts and circumstances may be sufficient to prove intent, such as where the person broke a window,[4] broke a lock,[5] was in possession of burglary tools,[6] or if they fled.[7] Mr. Gonzales did none of these.

In *State v. Sandoval*, the Court of Appeals reversed a burglary conviction because, even though the defendant entered the residence unlawfully, the State did not prove he intended to

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[4] *State v. Bergeron*, 105 Wn.2d 1, 11, 19-20, 711 P.2d 1000 (1985).

[5] *State v. Bencivenga*, 137 Wn.2d 703, 711, 974 P.2d 832 (1999); *State v. Chacky*, 177 Wash. 694, 695-96, 33 P.2d 111 (1934).

[6] *Chacky*, 177 Wash. at 695-96.

[7] *Bergeron*, 105 Wn.2d at 11, 19-20; *Chacky*, 177 Wash. at 695-96.

commit a crime in the house. 123 Wn. App. 1, 5-6, 94 P.3d 323 (2004). The defendant did not try to sneak into the house, did not have burglary tools, was not wearing "burglary-like apparel," and did not try to flee. *Id.* at 5-6. Even though the defendant unlawfully entered the house when he kicked in the front door, went in, and shoved the owner, the Court of Appeals concluded, "there is no fact, alone or in conjunction with others, from which entering with intent to commit a crime more likely than not could flow." *Id.* at 5.

The Court of Appeals decision affirming Mr. Gonzales's conviction conflicts with its decision in *Sandoval*. Similar to in *Sandoval*, there was no evidence Mr. Gonzales had the requisite intent: he did not have any burglary tools or clothing, there was no evidence he tried to sneak in or break a window, and there was no evidence he fled—he simply returned to the car and left. Indeed, compared to *Sandoval*, there is even *less* evidence to support a conviction because there is no evidence Mr. Gonzales even entered the house. *See* 123 Wn. App. at 6.

Further, the Court of Appeals's conclusion that, because Mr. Gonzales moved a security camera at the front door, he must have gone to the back of the house, broke into the screened-in porch, damaged the doors into the house, and set off the alarm—without any other evidence—is an unreasonable inference. This conflicts with this Court's holding that inferences must be *reasonable* and based on *some* evidence. *Vasquez*, 178 Wn.2d 8, 16. This also conflicts with the Court of Appeals's holding that due process prohibits the State from relying on an inference as "the sole and sufficient proof" of an element. *Sandoval*, 123 Wn. App. at 4-5.

The State did not prove beyond a reasonable doubt Mr. Gonzales entered or remained unlawfully in Mr. Swain's home and that he intended to commit a crime in the home. The conviction violates due process.

b. The conviction for malicious mischief violates due process because the State did not present any evidence Mr. Gonzales knowingly or maliciously damaged Mr. Swain's property.

To prove a person guilty of malicious mischief in the second degree, the State must prove beyond a reasonable doubt the individual caused over $750 of physical damage to someone else's property, and the individual acted "knowingly and maliciously." RCW 9A.48.080(1)(a).

Mr. Swain's back door was damaged, but the State presented no evidence Mr. Gonzales caused it, much less that he did so knowingly and maliciously. Indeed, there was no evidence Mr. Gonzales was anywhere near the back door.

Rather, the evidence merely established Mr. Gonzales was briefly at the front door and left. There was no evidence the security alarm was sounding when he returned to the car and left or that he did anything to trigger it. The Court of Appeals decision affirming the conviction conflicts with decisions by this Court and the Court of Appeals requiring that an inference must be based on *some* evidence and cannot be the sole basis of

an element. *Vasquez*, 178 Wn.2d 8, 16; *Sandoval*, 123 Wn. App. at 4-5.

The State did not prove beyond a reasonable doubt Mr. Gonzales knowingly and maliciously damaged Mr. Swain's property. The conviction violates due process.

c. *The conviction as an accomplice violates due process because the State did not present any evidence Mr. Gonzales did anything to assist anyone else in committing a crime.*

There is no evidence Mr. Gonzales acted as a principal, and there is certainly no evidence he acted as an accomplice. To be found guilty as an accomplice, the State must prove the person knowingly promoted or facilitated the commission of the crime either by soliciting another person to commit it or by aiding or agreeing to aid the other person in planning or committing it. RCW 9A.08.020(3).

This Court has long held accomplice liability to require more than mere presence. *In re Welfare of Wilson*, 91 Wn.2d 487, 491, 588 P.2d 1161 (1979). Even if the person has

knowledge of the crime or is acquainted with active participants, presence is still not enough. *Id.*

Here, the evidence only shows Mr. Gonzales was briefly present at Mr. Swain's front door at some time that afternoon. There was no evidence he was there when the security system was triggered or that he had anything to do with triggering the alarm. There was no evidence he knew any crime was being committed, no evidence he was associated with anyone who damaged the back door, and no evidence he did anything to help anyone damage the back door.

The Court of Appeals decision affirming Mr. Gonzales's convictions conflicts with this Court's holdings that mere presence around the time a crime was committed cannot support a conviction as an accomplice, and inferences must be based on *some* evidence. *Wilson*, 91 Wn.2d at 492; *Vasquez*, 178 Wn.2d 8, 16. And guilt cannot be based on a pyramid of inferences—guilt must be based on strong underlying evidence,

reasonable inferences, and proof of each element beyond a reasonable doubt. *Bencivenga*, 137 Wn.2d at 711.

The State did not prove beyond a reasonable doubt Mr. Gonzales was an accomplice to any crime. The conviction violates due process.

2. The Court of Appeals decision affirming Mr. Gonzales's convictions undermines the principles of fairness underlying the prohibition against hearsay.

The Court of Appeals incorrectly analyzed the issue and affirmed Mr. Gonzales's convictions that rested on the erroneous admission of hearsay evidence. This Court should grant review and provide direction to lower courts on the application of the rules governing hearsay, clarify the prejudice standard, and uphold the strong prohibition against convictions based on inadmissible hearsay. RAP 13.4(b).

a. An out-of-court statement may be admissible as a present sense impression only where the State proved the declarant made the statement sufficiently close in time such that they had no opportunity to reflect.

The general prohibition against the admission of hearsay evidence is rooted in the accused's rights and principles of

fundamental fairness. *See State v. Neal*, 144 Wn.2d 600, 607-08, 30 P.3d 1255 (2001). The "present sense impression" exception to the hearsay rule permits admission of an out-of-court statement "describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." ER 803(a)(1). Like all hearsay exceptions, the present sense impression exception is narrowly tailored. *State v. Martinez*, 105 Wn. App. 775, 781, 20 P.3d 1062 (2001).

"The idea of immediacy lies at the heart of the [present sense impression] exception, thus, the time requirement underlying the exception is strict because it is *the* factor that assures trustworthiness." *United States v. Green*, 556 F.3d 151, 155 (3d Cir. 2009) (citations and quotations omitted, emphasis in original). There is no bright-line rule establishing when a lapse of time is too long, but the statement must be substantially contemporaneous. *State v. Hieb*, 39 Wn. App. 273, 277-78, 693 P.2d 145 (1984) (reversed on other grounds by *State v. Hieb*,

107 Wn.2d 97, 727 P.2d 239 (1986)). "[N]o more than a few seconds" may be permissible, but fifteen minutes is too long. *United States v. Portsmouth Paving Corp*., 694 F.2d 312, 323 (4th Cir. 1982); *Hilyer v. Howat Concrete Co., Inc.*, 578 F.2d 422, 426 n.7 (D.C. Cir. 1978).

The reasoning for the strict time requirement is "its contemporaneous nature precludes misrepresentation or conscious fabrication by the declarant." *Martinez*, 105 Wn. App. at 783. This Court has long held a present sense impression "must be a spontaneous or instinctive utterance of thought, dominated or evoked by the transaction or occurrence itself, and not the product of premeditation, reflection, or design." *Beck v. Dye*, 200 Wash. 1, 9-10, 92 P.2d 1113 (1939). The more immediate, the more reliable; "the greater the passage of time, the less trustworthy the statement is presumed to be, and the more the scales should tip toward inadmissibility." *Green*, 556 F.3d at 156.

In addition to the strict time requirement, the circumstances must demonstrate the declarant had no time to reflect before they made the statement. *Hieb*, 39 Wn. App. at 278. Where the length of time is longer or not clearly established, the need for corroborating evidence to demonstrate reliability becomes increasingly important. *See, e.g., United States. v. Blakey*, F.2d 779, 786 (7th Cir. 1979) (admissible because statement made within 23 minutes and there was substantial corroborating evidence); *State v. Odom*, 341 S.E.2d 332, 336 (N.C. 1986) (approximately ten minutes was not too remote based on other circumstances); *cf. Hilyer*, 578 F.2d at 426 n.7 (fifteen to forty-five minutes later too remote for present sense impression, but circumstances supported admission as an excited utterance).

b. The State did not prove the lapse of time or any other circumstances to demonstrate reliability.

Here, the Court of Appeals did not decide whether the trial court erred when it admitted Mr. Terpstra's voicemail as a present sense impression. *Fontaine-Gonzales*, 2023 WL

2578578 at *2-3 (discussing prejudice). It only concluded that its admission was not prejudicial. *Id.* This was error. Without any evidence to establish the lapse of time—which is "*the* factor"—the voicemail was inadmissible as a present sense impression. *Green*, 556 F.3d at 155 (citations and quotations omitted, emphasis in original).

The State did not present any evidence to determine the precise or even estimated interval of time between whatever it was that Mr. Terpstra said he observed and when he left the voicemail. He left the voicemail at 4:18 p.m. but did not say when he saw what he described. RP 193. The State did not prove the voicemail met the narrow exception, and the trial court erred in admitting it as a present sense impression.

Even if the State were able to prove an estimated time frame, the State did not present any evidence to demonstrate the statement was sufficiently reliable. There is no evidence to establish when Mr. Terpstra was on the property, where he was, or when he claimed to have seen someone. The voicemail was

clearly left some time after, but the court has no way to determine how long after or any other circumstances to indicate his statement was reliable.

Without any evidence to establish or even estimate the time difference, and without any other facts to support reliability, the voicemail was not admissible as a present sense impression. This Court should grant review and clarify the standards governing the admissibility of hearsay as a present sense impression.

c. The error was prejudicial.

Where the trial court erroneously admitted hearsay evidence, reversal is required if a reasonable probability exists that, "had the error not occurred, the outcome of the trial would have been materially affected." *In re Det. of Post*, 170 Wn.2d 302, 314, 241 P.3d 1234 (2010) (citations omitted). A reviewing court considers the impact of the erroneous evidence on the case: "where there is a risk of prejudice and no way to know what value the jury placed upon the improperly admitted

evidence, a new trial is necessary." *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 673, 230 P.3d 583 (2010) (citations omitted).

The trial court's error affected the outcome of this trial. All that the evidence shows was that Mr. Gonzales was at the front door at some point in the day and there was some damage to the back door. There was no evidence Mr. Gonzales went to the back door of the house or did anything to trigger the alarm. But in Mr. Terpstra's voicemail, he said he saw a car and "a couple guys snooping around." RP (Ex. P-1) 3.

The Court of Appeals wrongly concluded admission of the voicemail did not prejudice Mr. Gonzales because nothing in the voicemail clearly identified Mr. Gonzales. *Fontaine-Gonzales*, 2023 WL 2578578 at *2-3. But this reasoning demonstrates the dangers inherent in hearsay evidence. Mr. Terpstra's voicemail did not provide a time, location, or description of who or what he saw, but it invited the jury to presume it was Mr. Gonzales he saw snooping around. And while the license plate number he identified was never linked to

the car Mr. Gonzales was seen getting out of, it also invited the jury to presume it was the same car.

The Court of Appeals acknowledged the information in the voicemail was of "minimal value." *Fontaine-Gonzales*, 2023 WL 2578578 at *3. But unreliable hearsay evidence with little to no probative value invites the jury to speculate and is inherently prejudicial. *See* ER 403. As demonstrated in this case, the erroneous admission of the hearsay evidence allowed the jury to pile inference upon inference upon inference to find Mr. Gonzales guilty. *See* Section E.1; *Vasquez*, 178 Wn.2d 8, 16; *Bencivenga*, 137 Wn.2d at 711.

In addition, the Court of Appeals ignored the fact that the jury asked to listen to the voicemail while deliberating, demonstrating it relied on the erroneously admitted hearsay to find Mr. Gonzales guilty. Given the dearth of evidence and the State's reliance on a series of baseless inferences, the court's error in admitting the hearsay evidence certainly, and within reasonable probabilities, affected the outcome of trial. *Post*, 170

Wn.2d at 314. This Court should grant review and clarify the strict standards governing the admissibility of hearsay that are intended to prevent unfair convictions such as in this case.

3. **The Court of Appeals's refusal to consider a person's ability to pay in assessing the amount of restitution violates the constitutional prohibition against disproportional punishment.**

The Eighth Amendment and article I, section 14 forbid the government from imposing "excessive fines." U.S. Const. amend. VIII; Const. art. I, § 14. The purpose of the Excessive Fines Clause is to "limit the government's power to punish," and it limits the government's ability to require payments "as *punishment* for some offense." *Austin v. United States*, 509 U.S. 602, 609-10, 113 S. Ct. 2801, 125 L. Ed. 2d 488 (1993) (emphasis in original, citations omitted).

The analysis under the Excessive Fines Clause is a two-part test. First, the court must determine whether the payment is punishment. *United States v. Bajakajian*, 524 U.S. 321, 328-29, 118 S. Ct. 2028, 141 L. Ed. 2d 314 (1998). The constitutional protection applies to all payments that are "at least partially

punitive." *Timbs v. Indiana*, ___ U.S. ___, 139 S. Ct. 682, 689, 203 L. Ed. 2d 11 (2019); *City of Seattle v. Long*, 198 Wn.2d 136, 163, 493 P.3d 94 (2021).

Second, the court must evaluate whether the fine is grossly disproportional to the offense. *Bajakajian*, 524 U.S. at 334; *Long*, 198 Wn.2d at 163. The court must consider specific factors related to the offense: "(1) the nature and extent of the crime, (2) whether the violation was related to other illegal activities, (3) the other penalties that may be imposed for the violation, and (4) the extent of the harm caused." *Long*, 198 Wn.2d at 167 (citations omitted). The court must also consider a fifth factor related to the offender: ability to pay. *Id.* at 171.

Restitution and interest are partially punitive. But the Court of Appeals affirmed without considering Mr. Gonzales's ability to pay. This conflicts with decisions by the United States Supreme Court, this Court, and the Court of Appeals, erodes this important constitutional protection, and warrants this Court's review. RAP 13.4(b).

a. Restitution is punishment. Even where it is equal to demonstrated costs, the court is constitutionally required to consider the person's ability to pay.

The Court of Appeals acknowledged restitution is subject to the Excessive Fines Clause. *Fontaine-Gonzales*, 2023 WL 2578578 at *3 (citing *State v. Ramos*, 24 Wn. App. 2d 204, 226, 520 P.3d 65 (2022), *State v. Kinneman*, 155 Wn.2d 272, 279-80, 119 P.3d 350 (2005)). But it refused to weigh proportionality and concluded restitution is never grossly disproportional where it is based on demonstrated losses. *Id.* But the court must weigh proportionality wherever a payment is imposed as punishment, including consideration of a person's ability to pay. *Timbs*, 139 S. Ct. at 689; *Long*, 198 Wn.2d at 163, 171.

"'The touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality.'" *Long*, 198 Wn.2d at 166 (quoting *Bajakajian*, 524 U.S. at 334). "[E]xcessiveness concerns more than just an offense itself; it also includes consideration of an offender's circumstances." *Id.*

at 171. Whether a particular fine is excessive will vary from person to person: "what is ruin to one man's fortune, may be a matter of indifference to another's." *Id.* (citations omitted).

Considering a person's ability to pay is critical to the inquiry because it gives meaning to the constitutional prohibition against oppressive fines. In *Long*, this Court examined the "weight of history" and the present-day impact of fines on poor communities and communities of color to conclude proportionality "is directly related to an offender's circumstances." *Id.* at 171-72. The concept of proportionality itself encompasses ability to pay, and this can outweigh all other factors. *Jacobo Hernandez v. City of Kent*, 19 Wn. App. 2d 709, 723-24, 497 P.3d 871 (2021), *review denied*, 199 Wn.2d 1003, 504 P.3d 828 (2022).

In this case, the Court of Appeals refused to weigh proportionality as required under the Excessive Fines Clause. It relied on a Court of Appeals decision that concluded restitution is "inherently proportional" when it is equal to demonstrated

costs. *Fontaine-Gonzales*, 2023 WL 2578578 at *3 (citing *Ramos*, 24 Wn. App. 2d at 230). But that case based its reasoning on another case that was decided more than two decades before this Court held courts must consider ability to pay. *Ramos*, 24 Wn. App. 2d at 230 (citing *United States v. DuBose*, 146 F.3d 1141 (9th Cir. 1998)); *cf. Long*, 198 Wn.2d at 167, 171.

The United States Supreme Court's and this Court's holdings are clear: the Excessive Fines Clause requires courts to weigh proportionality in all contexts where a payment is at least partially punishment. *Timbs*, 139 S. Ct. at 690; *Long*, 198 Wn.2d at 162-63. The fact that restitution is *punishment* brings it under the purview of the Excessive Fines Clause. That the restitution amount equals the costs incurred does not exempt the court from weighing proportionality; indeed, many fines such as restitution are *always* based on documented costs. *See* RCW 9.94A.753(3) (requiring restitution to be "based on easily ascertainable damages"). Demonstrated costs may be relevant

to the fourth factor—extent of harm caused—but a fine may be grossly disproportional even if it is equal to demonstrated costs. *See Long*, 198 Wn.2d at 171.

The Court of Appeals refused to analyze proportionality and resolve the excessive nature of this punishment. But proper analysis of the five factors demonstrates the restitution amount is grossly disproportional. In this case, the nature and extent of the crime was some damage to a door. There is no evidence this was related to other illegal activities. No person was harmed.

Moreover, Mr. Gonzales cannot pay $4,636.89 in restitution and it is grossly disproportional. *See Jacobo Hernandez*, 19 Wn. App. 2d at 723 ("[A]n individual's ability to pay can outweigh all other factors."). This Court should grant review to address the unconstitutional nature of imposing restitution without regard to a person's ability to pay.

b. Restitution interest is also punishment, and the court must weigh proportionality, including ability to pay.

The Court of Appeals ignored Mr. Gonzales's challenge to restitution interest and summarily concluded the restitution

order was proportional. *Fontaine-Gonzales*, 2023 WL 2578578 at *3. But restitution principal is punishment, and restitution interest is also punishment. *See Kinneman*, 155 Wn.2d at 279; *Ramos*, 24 Wn. App. 2d at 242. Interest has no connection to the offense, and it is used as a tool to enforce timely payments. RCW 10.82.090(1), (2)(b); *see Ramos*, 24 Wn. App. 2d at 234 (Chung, J., concurring in part and dissenting in part).

The impact of restitution interest also demonstrates its punitive nature. It accumulates at the astonishing rate of 12 percent. RCW 10.82.090(1). It begins to accrue immediately after restitution is ordered, even while a person is incarcerated and unable to meaningfully work to pay off their debt. *State v. Claypool*, 111 Wn. App. 473, 467, 45 P.3d 609 (2002).

For people who are poor, interest on legal debt creates an increasingly insurmountable barrier to reentry. *State v. Blazina*, 182 Wn.2d 827, 836-37, 344 P.3d 680 (2015). It forces indigent defendants to pay more than wealthier defendants for no reasons related to the offense but simply because they are poor.

Restitution interest has no connection to the offense and traps people in poverty.

Interest accrual has no connection to the offense. Mr. Gonzales cannot pay, and it is grossly disproportional. This Court should grant review to address the unconstitutional nature of imposing restitution interest without regard to a person's ability to pay.

4. **The Court of Appeals's refusal to apply the Excessive Fines Clause to the victim penalty assessment violates the constitutional prohibition against disproportional punishment.**

The victim penalty assessment is also partially punitive and subject to the constraints of the Excessive Fines Clause. The Court of Appeals decision affirming this fine conflicts with decisions by the United States Supreme Court, this Court, and the Court of Appeals, erodes this important constitutional protection, and warrants this Court's review. RAP 13.4(b).

a. The victim penalty assessment is punishment.

The Excessive Fines Clause applies to all payments that are at least partially punitive. *Timbs*, 139 S. Ct. at 689; *Long*,

198 Wn.2d at 163. In Washington, all persons convicted of a crime must pay a victim penalty assessment. RCW 7.68.035(1)(a). The plain language of the statute makes clear these fines are punishment.

"If a statute's meaning is plain on its face, courts must follow that plain meaning." *Long*, 198 Wn.2d at 148 (citing *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002)). In *Long*, a person challenged the costs for the city's impoundment of his truck. *Id*. at 163. This Court examined the municipal code's plain language, which states: "Vehicles in violation of this section are subject to impound . . . in addition to *any other penalty* provided for by law." *Id.* at 164 (emphasis in original, quoting SMC 11.72.440(E)). The plain language indicated the costs were partially punitive and subject to the Excessive Fines Clause. *Id.*

The plain language of the victim penalty assessment statute also demonstrates it is partially punitive. When a person is found guilty of a crime, the statute provides: "there shall be

imposed by the court upon such convicted person a penalty assessment. The assessment shall be in addition to *any other penalty or fine* imposed by law." RCW 7.68.035(1)(a) (emphasis added). Like the municipal code in *Long*, the statute plainly characterizes the victim *penalty* assessment as a penalty, and it is subject to the Excessive Fines Clause. *See State v. Rowley*, No. 38281-8-III, 2023 WL 312890 at *8-9 (Wash. Ct. App. Jan. 19, 2023) (unpublished)[8] (Fearing, J., dissenting) (citing *Bajakajian* and *Long*); *see also State v. Rivera*, No. 38654-6-III, 2023 WL 2531748 at *3 (Wash. Ct. App. Mar. 16, 2023) (unpublished)[9] (Fearing, J., concurring in part and dissenting in part).

But the Court of Appeals refused to analyze the victim penalty assessment under the Excessive Fines Clause. *Fontaine-Gonzales*, 2023 WL 2578578 at *3 (citing *Ramos*, 24 Wn. App. 2d at 228; *State v. Tatum*, 23 Wn. App. 2d 123, 130,

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[8] Cited pursuant to GR 14.1(a).
[9] Cited pursuant to GR 14.1(a).

514 P.3d 763 (2022)). It relied on other Court of Appeals decisions that were decided based on *State v. Curry*, which did not involve an excessive fines challenge at all. 118 Wn.2d at 911, 917-18 n.3, 829 P.2d 166 (1992). Indeed, "*Curry*'s reasoning is vague." *Tatum*, 23 Wn. App. 2d at 130; *see Rowley*, 2023 WL 312890 at *5 (Fearing, J., dissenting); *Rivera*, 2023 WL 2531748 at *3 (Fearing, J., concurring in part and dissenting in part). In addition, *Curry* was decided before well the United States Supreme Court and this Court made clear the Excessive Fines Clause applies so long as the payment is "at least partially punitive." *Timbs*, 139 S. Ct. at 659; *Long*, 198 Wn.2d at 163.

The plain language of the statute makes clear the victim penalty assessment is at least partially punitive. The Court of Appeals decision conflicts with binding precedence on excessive fines jurisprudence.

b. The victim penalty assessment has no connection to the crime, and where a person cannot pay, it is unconstitutionally excessive.

The Court of Appeals concluded its analysis without weighing proportionality. But the Excessive Fines Clause requires the court to consider factors specific to the offense and the person's circumstances. *Long*, 198 Wn.2d at 167, 171.

Punishment must be proportional to the offense and serve legitimate goals. *See Timbs*, 139 S. Ct. at 688 (the Magna Carta required fines must "be proportioned to the wrong" (citations omitted)). Punishment "lacking any legitimate penological justification is by its nature disproportionate to the offense." *Graham v. Florida*, 560 U.S. 48, 71, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010).

The Excessive Fines Clause is particularly concerned with fines that are "employed 'in a measure out of accord with the penal goals of retribution and deterrence,' for 'fines are a source of revenue.'" *Timbs*, 139 S. Ct. at 689 (quoting *Harmelin v. Michigan*, 501 U.S. 957, 979 n.9, 111 S. Ct. 2680,

115 L. Ed. 2d 836 (1991)). When courts have a financial incentive to impose fines without a legitimate penological purpose, "it makes sense to scrutinize governmental action more closely." *Harmelin*, 501 U.S. at 979 n.9.

The victim penalty assessment is grossly disproportional because it has no connection to the offense—it is a blanket fine imposed on all persons found guilty of a crime, regardless of the offense or the extent of harm. RCW 7.68.035(1)(a); *see Rowley*, 2023 WL 312890 at *12. It is also government revenue and funds government programs. RCW 7.68.035(4).

Moreover, Mr. Gonzales cannot pay. The victim penalty assessment violates the constitutional prohibition against excessive fines. This Court should grant review the address the unconstitutional nature of imposing this mandatory fine without regard to a person's ability to pay.

F. CONCLUSION

Based on the preceding, Mr. Gonzales respectfully requests that review be granted pursuant to RAP 13.4(b).

I certify this brief contains 6,087 words and complies with RAP 18.17.

Respectfully submitted this 7th day of April 2023.

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APPENDIX

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Court of Appeals Opinion .... APP 1

FILED
MARCH 21, 2023
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON,	)	No. 38683-0-III
	)	
Respondent,	)	
	)	
v.	)	UNPUBLISHED OPINION
	)	
JASON JESSY FONTAINE-GONZALES,	)	
	)	
Appellant.	)	

PENNELL, J. —Jason Jessy Fontaine-Gonzales appeals his convictions for residential burglary and second degree malicious mischief. He also challenges the constitutionality of two legal financial obligations imposed at sentencing. We affirm.

FACTS

Daniel Swain left his home in rural Spokane County, Washington, at around 3:00 p.m. on October 2, 2022. At approximately 4:15 p.m., while he was away, he received a call from his alarm company, indicating a house alarm alert. A few minutes later, Mr. Swain received a voice mail from a man named Josh Terpstra, who had previously built a shop on Mr. Swain's property. The voicemail stated, in relevant part:

> Yeah, hey it's Josh Terpstra. Built your shop, you know. Hope you're doing good. I just wanted to touch base with you because—touch base, call you because I found a—I drove by your house with a buddy of mine. I was out in the area and I wanted—just wanted to show him the shop and I actually caught a guy, a couple guys snooping around on your place. So, I confronted them and got them out of there and whatnot and called their bullshit and I got their license plate number too just in case something comes up missing or you have an issue. But Washington plate B, Bravo,

> Charlie, Foxtrot, 5218. So, there you go. Give me a call if you have any questions. Yep. Hope you're doing good. Talk to you later. Bye.

Ex. P-1.

Mr. Swain returned home within the next 10 to 15 minutes. Mr. Swain discovered that at the back of his house a slider door was partially open. The slider led to an enclosed, screened-in porch. Inside the porch were French doors that led to the main part of the residence. Mr. Swain discovered the French doors had been pried open, with cracks around the door's deadlock. Mr. Swain did not discover anything missing from his home. The only property damage was to the French doors.

Mr. Swain reviewed videos from his home security system. A video showed that just before 4:00 p.m., a car pulled up to Mr. Swain's shop and then shortly after parked in front of his home. A man, later identified as Jason Fontaine-Gonzales, can be seen getting out of the passenger side of the car. The man walked up to Mr. Swain's front porch, looked through a window, and then adjusted the video camera upward so it could not capture images of the front porch. A few minutes later, the man returned into the frame of the garage camera, got in the front passenger seat of the car, and the car was driven off the property.

Mr. Swain contacted police and the State eventually charged Mr. Fontaine-Gonzales with residential burglary and second degree malicious mischief.

Before trial, the State filed a motion in limine seeking admission of Josh Terpstra's voicemail message. According to the State, the recorded voicemail qualified as either a present sense impression or an excited utterance. The trial court admitted the recording under the present sense impression exception to hearsay, explaining that the exception does not require a statement be made contemporaneously to the declarant's observations. In addition, the court found the "the chance of misrepresentation . . . minimal to none." Rep. of Proc. (Nov. 16, 2021) at 16.

At trial, the State presented testimony from law enforcement and Daniel Swain. Josh Terpstra did not testify. The State's evidence was consistent with the above summary. Mr. Swain also explained that he had spent roughly $4,600 to repair his French doors.

At sentencing, the court imposed a $500 crime victim penalty assessment, and assessed $4,636.89 in restitution to Mr. Swain. Mr. Fontaine-Gonzales did not object or otherwise challenge the constitutionality of restitution or the victim assessment fee.

Mr. Fontaine-Gonzales appeals his judgment and sentence.

ANALYSIS

Mr. Fontaine-Gonzales makes three claims on appeal: (1) the evidence was insufficient to support his convictions, (2) the trial court erroneously admitted

Mr. Terpstra's voicemail, and (3) imposition of the victim assessment and restitution violated Mr. Fontaine-Gonzales's constitutional right to be free from excessive fines.

Sufficiency of the evidence

The test for determining sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Homan*, 181 Wn.2d 102, 105, 330 P.3d 182 (2014). In a sufficiency challenge, the defendant admits the truth of the State's evidence and all reasonable inferences drawn therefrom. *Id.* at 106. Under this analysis, circumstantial evidence is deemed as reliable as direct evidence. *State v. Delmarter,* 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

Construed in the light most favorable to the State, the trial evidence showed Mr. Fontaine-Gonzales went to Mr. Swain's property and peered inside the main residence. He then manipulated a security camera so that it pointed upward. A reasonable inference from Mr. Fontaine-Gonzales's actions is that he attempted to conceal his activities because he intended to commit a crime. Shortly after Mr. Fontaine-Gonzales manipulated the security camera, the house alarm was triggered. A reasonable inference is that the cause of the alarm was the entry into the screened-in porch, where the French doors had been damaged. Although other people may have been at the residence at the

time the alarm was activated, a fair inference is that Mr. Fontaine-Gonzales was the cause of the alarm, given his apparent intent was to commit a crime at the residence.

From the foregoing facts, a fair-minded juror could conclude Mr. Fontaine-Gonzales had entered the screened-in porch with intent to commit a crime and that Mr. Fontaine-Gonzales was the individual responsible for damaging the French doors. These findings would be sufficient to justify convictions for residential burglary and second degree malicious mischief. *See* RCW 9A.52.025 (A person commits residential burglary "if, with intent to commit a crime against a person or property therein, the person enters or remains unlawfully in a dwelling."); RCW 9A.48.080(1)(a) (The elements of second degree malicious mischief are that the defendant (1) knowingly and maliciously (2) caused damage (3) to the property of another and (4) the damage exceeded $750.).

Hearsay

Mr. Fontaine-Gonzales argues that the trial court improperly admitted Josh Terpstra's voicemail message as a present sense impression because it was not sufficiently contemporaneous with Mr. Terpstra's observations to qualify for the exception to hearsay. We review a trial court's ruling on the applicability of a hearsay exception for abuse of discretion. *State v. Rodriquez*, 187 Wn. App. 922, 939, 352 P.3d 200 (2015). Even if the court abuses its discretion, we will not reverse a conviction based

on evidentiary error unless the defendant shows prejudice. *State v. Thomas,* 150 Wn.2d 821, 871, 83 P.3d 970, *abrogated on other grounds by Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

The record here does not show Mr. Terpstra's voicemail message was particularly prejudicial. The voicemail never identified Mr. Fontaine-Gonzales as the individual snooping around Mr. Swain's home. Although Mr. Terpstra mentioned a license plate number, there was no evidence offered linking the plate number to any particular vehicle. All Mr. Terpstra's voicemail did was corroborate the claim that *someone* had been at Daniel Swain's home under suspicious circumstances. Given the other evidence in the case, the information relayed by the voicemail was of minimal value.

If anything, Mr. Terpstra's voicemail helped the defense because it showed someone besides Mr. Fontaine-Gonzales had been at the residence. As suggested by defense counsel during summation, it is possible Mr. Terpstra was the one involved in the break-in and that he left Mr. Swain a voicemail to deflect suspicion in case he was caught on camera. Because Mr. Terpstra was never called as a witness, he was never confronted with the possibility of nefarious motives for his voicemail.

Regardless of whether the trial court erred by admitting Mr. Terpstra's voicemail, this evidence did not prejudice the outcome of trial.

Excessive fines

Mr. Fontaine-Gonzales claims the court's imposition of both restitution and the crime victim penalty assessment violate the excessive fines clause because Mr. Fontaine-Gonzales is unable to pay, and therefore, they are grossly disproportionate. We disagree.

Both the state and federal constitutions prohibit imposition of excessive fines. WASH. CONST. art. I, § 14; U.S. CONST. amend. VIII. To trigger an excessive fine protection, "a sanction must be a 'fine' and it must be 'excessive.'" *City of Seattle v. Long*, 198 Wn.2d 136, 162, 493 P.3d 94 (2021). Our review of an excessive fine claim is de novo. *Id*. at 163.

This court has previously held the crime victim penalty assessment does not implicate an excessive fines analysis. *State v. Ramos*, 24 Wn. App. 2d 204, 228, 520 P.3d 65 (2022*), review denied*, No. 101512-7 (Wash. Mar. 8, 2023); *State v. Tatum*, 23 Wn. App. 2d 123, 130, 514 P.3d 763, *review denied*, 200 Wn.2d 1021, 520 P.3d 977 (2022). We adhere to those rulings here.

Our case law has treated restitution differently from the crime victim penalty assessment based on our Supreme Court's holding that restitution is at least partially punitive. *See Ramos*, 24 Wn. App. 2d at 226; *State v. Kinneman*, 155 Wn.2d 272, 279-80, 119 P.3d 350 (2005). However, our courts have held "that when restitution is based on the

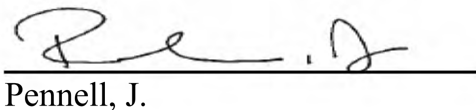
victim's actual losses, it is inherently proportional to the crime, even if the defendant lacks the ability to pay." *Ramos*, 24 Wn. App. 2d at 230.

Mr. Fontaine-Gonzales's restitution award was based solely on Mr. Swain's out-of-pocket losses. To the extent Mr. Fontaine-Gonzales disbelieved Mr. Swain's loss amount, his remedy was to challenge the amount at a restitution hearing. Mr. Fontaine-Gonzales cannot avoid paying for Mr. Swain's losses simply because Mr. Swain's property was expensive or because Mr. Fontaine-Gonzales lacks financial resources.

CONCLUSION

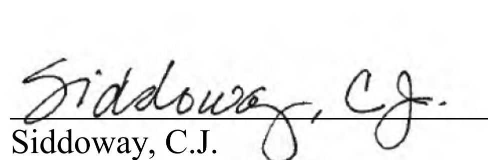
The judgment and sentence is affirmed.

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.

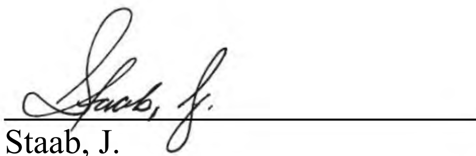


Pennell, J.

WE CONCUR:



Siddoway, C.J.



Staab, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 38683-0-III**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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Date: April 7, 2023

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