Supreme Court No. 90501-1
(COA No. 69932-6-I)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

GREGORY WATERS,

Petitioner.

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

PETITION FOR REVIEW

NANCY P. COLLINS
Attorney for Petitioner

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

Washington Court of Appeals Decisions

United States Supreme Court Decisions

United States Constitution

Washington Constitution

Statutes

Court Rules

A. IDENTITY OF PETITIONER

Gregory Waters, petitioner here and appellant below, asks this Court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition pursuant to RAP 13.3(a)(1) and RAP 13.4(b).

B. COURT OF APPEALS DECISION

Mr. Waters seeks review of the Court of Appeals decision dated April 28, 2014, for which reconsideration was denied on June 4, 2014. Copies are attached as Appendix A and B.

C. ISSUES PRESENTED FOR REVIEW

1. A party may receive an instruction on a lesser-degree offense only after meeting two related criteria: (1) some evidence affirmatively shows only the lesser offense was committed; and (2) this evidentiary showing is not based solely on disbelieving the State's case. Mr. Waters was charged with trafficking in stolen property. The affirmative evidence showed either he knowingly stole property or he permission to take the property. Did the Court of Appeals misconstrue controlling law when it found a factual basis to instruct the jury on an uncharged lesser-degree offense by surmising how the jury could have disregarded conflicting evidence?

2. Is there substantial public interest in reviewing the Court of Appeals decision based on the difficulty appellate courts have in applying the rule that they must examine evidence in the light most favorable to the party seeking a lesser-degree offense instruction but may not find a basis for a lesser offense instruction by disbelieving evidence?

3. This Court previously ruled that restitution is a punitive part of a criminal sentence but jury trial rights apply only when a fact increases the maximum sentence permitted by the jury's verdict, and restitution does not exceed a set maximum.[1] The United States Supreme Court recently overturned the precedent on which *Kinneman* relied and held that jury trial rights must be afforded any time an additional fact increases punishment, even if it does not increase the maximum punishment. Does the conflict in this Court's decision in *Kinneman* with the United States Supreme Court decision in *Allyene*[2] merit granting review to address whether unproven facts used to impose restitution violate an accused person's rights to trial by jury and due process of law?

---

[1] *State v. Kinneman*, 155 Wn.2d 272, 119 P.3d 350 (2005).

4. Restitution must be based on loss incurred by the charged crime and the value of property predicated on its fair market value. Here, the court valued lost property based on what it cost the owner to purchase decades earlier and guessed the number of items taken, even though the owner no longer used the property for any purpose and the only present-day value for the property was as scrap metal. Should this Court take review to address whether a court may value property based an assertion of its past worth and not testimony of its present value?

D. STATEMENT OF THE CASE

Zach Waters and Kerri Uitbenhowen rented a home in rural Skagit County. RP 34-36, 68.[3] The home was on a defunct dairy farm and there was large barn they used for storage. RP 37, 54. The barn was open, without doors, and contained "old run down stuff" left there by their landlords. RP 37.

Zach's[4] father Gregory Waters asked if he could take metal left in the barn and sell it for scrap, but Zach "said no" and told his father that the metal did not belong to him. RP 43. Zach's girlfriend Ms.

---

[2] *Allyene v. United States*, _ U.S. _, 133 S.Ct. 2151, 2158, 186 L.Ed.2d 314 (2013).

[3] The verbatim report of proceedings (RP) from the trial and sentencing are contained in a single volume.

Uitbenhowen also said she did not give Mr. Waters permission to take the metal pieces from the barn. RP 50-51.

One day Zach and his family found some of their own household items missing, such as sponges and garbage bags. RP 40, 50, 58. They also realized metal pieces were missing from the barn. RP 49, 57.

Zach and Ms. Uitbenhowen suspected Zach's father Gregory had taken the metal and intruded into their home. RP 58. When questioned by the police, Mr. Waters told Detective Dan Luvera that Ms. Uitbenhowen had asked him to take the metal, sell it as scrap, then share the proceeds with her. RP 122. Ms. Uitbenhown denied this.

Thomas Holtcamp and his mother Mildred owned the property. RP 69. The metal pieces piled on the floor of the barn were previsouly used as cattle guards for their dairy farm. RP 70, 77, 102. They closed their dairy farm business in 1990, rented the home near the barn to others, and gave tenants permission to use the barn. RP 70-71. They rarely went to the barn. RP 80.

Mr. Holtcamp said they bought most of the metal cattle guards in 1984, and some in the 1990s. RP 84. He bought the hoops then

---

[4] For purposes of clarity, Mr. Waters's son Zach is referred to by his first name. No disrespect is intended.

changed them so they would fit in their barn. RP 77. He did not know their current value but the last stalls he purchased in the 1990s were $30 a piece. RP 78.

The owner of a metal recycling and scrap yard, Brian Parberry, purchased a load of cattle guards from Mr. Waters on October 17, 2011. RP 102-105. Mr. Holtcamp estimated that the number of cattle guards in the truck "could be 50" but he could not tell. RP 84. Mr. Parberry recorded Mr. Waters's name, copied his driver's license, and took photographs of the items as part of his regular business practices. Mr. Parberry paid Mr. Waters $279.30 for the metal. RP 101, 112.

Mr. Parberry explained that when people bring items to his recycling center with potential resale value, he will keep and sell them. RP 116. He regularly received cattle guards due to the number of local dairy farms that had been shutting down. RP 108, 111. Cattle guards do not have potential resale value and he uses them only as scrap metal. RP 116.

The prosecution charged Mr. Waters with theft in the second degree; possession of stolen property in the second degree; residential burglary; burglary in the second degree; and trafficking in stolen

property in the first degree. CP 13-14. The jury acquitted Mr. Waters of every charged offense. CP 51-55.

Over defense objection, the court also instructed the jury on the lesser offense of trafficking in stolen property in the second degree. RP 150-51, 153. The jury convicted Mr. Waters of this offense. CP 56.

Based on an offender score of "0," Mr. Waters received a standard range sentence of 30 days with permission for work release or community service as alternatives to jail. CP 59-60. The court also imposed restitution of $1750, over Mr. Waters's objection. CP 69; RP 168-74. His sentence has been stayed pending appeal. CP 73.

E. ARGUMENT

1. **The Court of Appeals applied the wrong legal standard to determine whether the prosecution offered the type of evidence required for an instruction on a lesser included offense.**

a. *A judge may instruct the jury on a lesser-degree offense only when evidence affirmative shows that the lesser offense alone was committed, not based on disbelieving parts of the State's case.*

A person may be convicted only of crimes charged in the information. *State v. Tamalini*, 134 Wn.2d 725, 731, 953 P.2d 450 (1998); U.S. Const. amend. 14; Wash. Const. art. I, §§ 3, 22. This constitutional right is guarantees that the prosecution provides adequate

"notice to an accused of the nature and cause of the accusation against him." *State v. Kjorsvik*, 117 Wn.2d 93, 97, 812 P.2d 86 (1991).

In limited circumstances, the jury may consider a lesser-degree offense to a charged crime. *State v. Fernandez-Medina,* 141 Wn.2d 448, 453, 6 P.3d 1150 (2000). But in order for a judge to grant a party's request for a lesser offense instruction, "the evidence must raise an inference that *only* the lesser included/inferior degree offense was committed to the exclusion of the charged offense." *Id.* at 455 (emphasis in original). "[I]t is not enough that the jury might disbelieve the evidence pointing to guilt." *Id.* at 456.

The factual test for a party to receive a lesser offense instruction "[n]ecessarily" requires a "more particularized" factual showing "than that required for other jury instructions." *Fernandez-Medina,* 141 Wn.2d at 455.

The court's decision about whether to instruct on a lesser-degree offense is reviewed *de novo*. *Id.* at 454; *State v. Corey,* _Wn.App. _, 325 P.3d 250, 253 (2014).

b. *The Court of Appeals misapplied the legal standard for inferring whether an uncharged lesser offense was affirmatively proved.*

The prosecution charged Mr. Waters with first degree trafficking in stolen property, which required he knowingly stole property and knew it was stolen when selling it. CP 16; RCW 9A.82.050(1); CP 16; CP 43-45 (Instructions 21-23). A person acts "knowingly" when she is aware of or should be aware of facts and circumstances defining offense. RCW 9A.08.010(1)(b).

The lesser-degree offense of second degree trafficking in stolen property, offered to the jury over Mr. Waters's objection, required proof that Mr. Waters acted only recklessly. To show Mr. Waters was reckless, the State needed to prove he disregarded "a substantial risk" that he was selling stolen property and such disregard is a "gross deviation from conduct that a reasonable person would exercise in the same situation." RCW 9A.08.010 (1)(c).

But to get a lesser offense instruction, the State was required to produce evidence affirmatively showing Mr. Waters acted only reckelessly, and not knowingly. If the evidence showed he acted with knowledge that he was not permitted to take and sell the metal, then he would be guilty of the greater offense. *Fernandez-Medina,* 141 Wn.2d

at 455-56. There was no evidence affirmatively showing Mr. Waters was only reckless in the case at bar and the Court of Appeals misunderstood this necessary legal threshold.

Kerri Uitbenhowen and Zach both testified they unequivocally they told Mr. Waters that he could not take or sell the metal. RP 43, 50-51, 55. If this testimony is believed, Mr. Waters knew or should have known he could not take and sell the metal.

Mr. Waters told the police the opposite – that Ms. Uitenhowen told him to take the metal, sell it, and share the proceeds with her. RP 122. If believed, he thought he had permission to take the metal. There is no evidence of any shadings of gray: either Mr. Waters had permission from Ms. Uitenbehown or he knew he had no permission and stole the metal anyway. The jury rejected the latter, finding he did not intentionally or knowingly take and sell the metal. But the court was not free to offer an uncharged lesser-degree offense to the jury when the evidence did not affirmatively show he acted recklessly and when to any assessment on which recklessness could be found necessarily involved disbelieving the evidence presented.

The Court of Appeals did not apply the rule stated in *Fernandez-Medina* that a lesser-degree offense instruction may not be given only

where the jury would need to disbelieve the State's evidence. "[I]t is not enough that the jury might disbelieve the evidence pointing to guilt." 141 Wn.2d at 456. The faulty premise of the Court of Appeals ruling is that the jury would need to disbelieve both Mr. Waters and Ms. Uitbehowen in order to cull the evidence and find Mr. Waters acted recklessly without acting knowingly. *Id.* This reasoning is contrary to the established principle that a party may receive an instruction on an uncharged lesser-degree offense only when satisfying the necessary circumstances, including that the record affirmatively demonstrates only the lesser offense was committed.

Mr. Waters had no prior criminal history and was acquitted of all charged offenses. CP 59-60. The court's decision to offer the jury a compromise that was not factually available based on proper application of the controlling legal standard undermined the fairness of the proceedings and requires reversal of the lesser-degree offense conviction.

c. *Review should be granted because the Court of Appeals opinion shows its confusion over how to apply Fernandez-Medina.*

The Court of Appeals opinion correctly stated the governing legal principles but failed to apply them to the case, even after apprised

of its error in a motion to reconsider. Instead, the Court of Appeals assessed the evidence in the light most favorable to the prosecution, forgetting the "more particularized" showing required for instructing the jury on an uncharged crime. *Fernandez-Medina,* 141 Wn.2d at 455-56. The trial court committed the same error. Review should be granted to clarify how to apply this particularized standard.

2. **Recent opinions from the United States Supreme Court demonstrate that the judicial fact-finding used to impose restitution violates the Sixth Amendment, undermining this Court's ruling in *Kinneman***

a. *The court exceeded its fact-finding authority by imposing restitution based on conduct and value not found by the jury.*

In *State v. Kinneman*, 155 Wn.2d 272, 278-82, 119 P.3d 350 (2005), this Court addressed whether the sentencing court's authority to make factual determinations for a restitution award when those facts were not proven to a jury violated the Sixth and Fourteenth Amendment's constraints on a judge's authority.

The court agreed that restitution is punishment imposed as part of a person's sentence. *Id.* at 278. It affirmed that *Blakely*[5] and

[5] *Blakely v. Washington*, 542 U.S. 296, 300-01, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).

Apprendi[6] limit a judge's role as fact-finder when imposing both financial punishment and prison sentences. *Id.* at 279. It explained that restitution is punitive, even if it has a compensatory purpose. *Id.* at 281. It acknowledged that restitution is mandatory under the state sentencing scheme. *Id.* at 282. But the *Kinneman* Court held that judicial fact-finding does not violate the Sixth Amendment despite the punitive nature of restitution because *Blakely* and *Apprendi* apply only when the court's punishment exceeds a statutory maximum and there is no maximum for restitution. *Id.*

Recent decisions from the United States Supreme Court undermine the legal reasoning used in *Kinneman*. First, the Court ruled that a judge violates the Sixth Amendment by imposing a fine based on acts not expressly found by the jury. *Southern Union Co. v. United States*, _ U.S. _, 132 S.Ct. 2344, 2356, 183 L.Ed.2d 318 (2012). More significantly, it overturned its own precedent that had limited the Sixth Amendment rights explained in *Apprendi* to facts that increase the maximum punishment. *Allyene v. United States*, _ U.S. _, 133 S.Ct.

[6] *Apprendi v. New Jersey*, 530 U.S. 466, 476-77, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).

2151, 2158, 2160, 186 L.Ed.2d 314 (2013) (*overruling Harris v. United States*, 526 U.S. 545, 122 S.Ct. 2406, 153 L.Ed.2d 524 (2002)).

In *Allyene*, the Court held, "it is impossible to dispute that facts increasing the legally prescribed floor *aggravate* the punishment." *Id.* at 2161 (emphasis in original). Consequently, when judicial fact-finding increases the punishment, either as a minimum or maximum, that fact "produces a new penalty and constitutes an ingredient of the offense" that must be proved beyond a reasonable doubt. *Id.* at 2060.

This analysis applies to the punishment imposed on Mr. Waters as restitution, which was based on the court's determination of factually disputed issues never proved to the jury. The court decided how many cattle guards Mr. Waters took and how much they are worth. This fact-finding violates Mr. Waters's jury trial and due process rights. This Court should reconsider the breadth of the judge's fact-finding authority it imposing restitution and hold that a court lacks authority to assess the number of allegedly stolen items and their value beyond the precise amount offered and proven at trial.

b. *The prosecution's proof of value may not rest on speculation of unrealistic potential future uses of the stolen items.*

Determining the accurate sentence to impose, including restitution, may not be based on mere assertions or unproved allegations. *See State v. Hunley*, 175 Wn.2d 901, 910, 287 P.3d 584 (2012). Restitution is part of the "quantum of punishment" and the same due process rights attach as to other contested parts of punishment, including being proven to the degree required by law. *State v. Schultz*, 138 Wn.2d 638, 643-44, 980 P.2d 1265 (1999); *State v. Serio*, 97 Wn.App. 586, 987 P.2d 133 (1999).

The restitution statute provides, in pertinent part, that restitution:

> 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 due to mental anguish, pain and suffering, or other intangible losses, but may include the costs of counseling related to the offense.

RCW 9.94A.753(3).

Restitution is permitted only as actual compensation for loss caused by the offense of conviction, not upon speculative claims, general equity concerns, or intangible loss. *State v. Ewing*, 102 Wn.App. 349, 353-54, 7 P.3d 835 (2000); *State v. Johnson*, 69 Wn.App. 189, 191,

847 P.2d 960 (1993). There must be a direct, causal relationship between the conduct underlying the convicted offense and the amount of restitution to be awarded. See, e.g., *Paroline v. United States,* 572 U.S. ___, 134 S Ct 1710, 1720, 188 L.Ed.2d 714 (2014).

Mr. Waters was convicted of second degree trafficking in stolen property. CP 51-56. He is liable for restitution only for the value of property "proven to be causally related to [his] crime." *State v. Griffith*, 164 Wn. 2d 960, 967, 195 P.3d 506 (2008).

The trial court acknowledged that the only evidence underlying Mr. Waters's conviction was the sale of metal to Mr. Parberry's business on October 17, 2011. RP 170. It limited the restitution ordered to the metal sold at the recycling center on a single date, rejecting the State's claim that restitution should cover all metal missing from the barn. RP 163-64, 170. However, the court imposed $1750 in restitution based upon the price the owner paid for the metal cattle guards twenty or thirty years earlier, even though the trial evidence indicated that their value at the time of the incident was the scrap metal price paid to Mr. Waters. CP 69; RP 174.

The amount of restitution hinges on evidence establishing the value of the "loss" stemming from the crime of conviction, which is generally

related to fair market value at the time of the taking. *State v. Fleming*, 75 Wn.App. 270, 275, 877 P.2d 243 (1994).

> Fair market value is the amount of money which a well informed purchaser, willing but not obliged to buy the property would pay, and which a well informed seller, willing but not obliged to sell it would accept, taking into consideration all uses to which the property is adapted and might in reason be applied.

State v. Wilson, 6 Wn.App. 443, 447, 493 P.2d 1252 (1972).

In *Fleming*, the defendant was convicted of taking a gold necklace. 75 Wn.App. at 273. In the time between the taking and the restitution hearing, gold prices rose so the necklace was appraised at a higher value at the time of the restitution hearing than it would have been when taken. *Id.* The *Fleming* Court ruled that restitution may be based on the increased value of the gold necklace at the time of the restitution hearing rather than the time of the taking, because the necklace was made of a precious metal and its owner could have taken advantage of the increase in the metal's market value had it not been taken. *Id.* at 275.

Unlike the value of gold, the market value of metal cattle guards shaped for dairy farms only declined over time. Due to many dairies ceasing operation, there is no resale value to the metal cattle guards. RP 108, 111. On the contrary, there is a glut of unwanted cattle guards that

shuttered dairy farms have sold to the recycling center and its value is scrap metal. *Id.* Had there been potential resale value for the cattle guards, the recycling center would have kept them intact and tried to sell them for its own profit. RP 116. But because cattle guards lack resale value, recycling center owner Brian Parberry never kept any to sell. RP 116.

The market value of the metal cattle guards at the time of the taking was no more than the $279.30 Mr. Waters received when he sold them to the metal recycler. RP 112. As a professional seller of metal, the owner of the recycling center was best placed to judge the potential value of the metal and he found it lacked value other than scrap. RP 108, 116.

But the court imposed restitution based on what the owner had paid for the cattle guards years earlier, in the 1980s and 1990s. RP 173-74. When determining value, "a proper deduction must be made for depreciation. Depreciation is not limited to physical wear and tear but it includes economic and functional obsolescence." *Wilson*, 6 Wn.App. at 450. The trial court did not take depreciation of the guards at issue into account when ordering Mr. Waters to pay restitution at the prices paid for the property years earlier.

There was no evidence that the metal guards had another use. They were custom tailored to the particular needs of the dairy at the time they

were ordered, that dairy was no longer in existence, and the metal had been left for years in piles in a barn on property rented and used by strangers. RP 37, 83. The metal left in the barn was "old run down stuff." RP 37. The Holtcamps had no plan to sell the cattle guards at the price for which they were purchased years before or to reinstitute a dairy with those metal guards. There was no testimony about their value other than for the metal itself, sold as scrap.

The Court of Appeals simply deferred to the trial judge's guess about the amount of cattle guards sold and their value based on the purchase price years earlier, even though the metal did not retain that value. This speculative assessment of value, based on speculation and without connection to present day value, is an improper award of restitution in excess of the property's value based on the evidence before the court. This Court should grant review to both reevaluate the jury trial rights that attach to dispute restitution issues based on new case law and to explain the judge's authority to accord value to property based on its present-day worth.

F. CONCLUSION

Based on the foregoing, Petitioner Gregory Waters respectfully requests that review be granted pursuant to RAP 13.4(b).

DATED this 3rd day of July 2014.

Respectfully submitted,

NANCY P. COLLINS (WSBA 28806)
Washington Appellate Project (91052)
Attorneys for Petitioner

APPENDIX A

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

STATE OF WASHINGTON, Respondent, v. GREGORY WATERS, Appellant.	)	No. 69932-6-I UNPUBLISHED OPINION FILED: April 28, 2014

VERELLEN, A.C.J. — An instruction on a lesser included offense is properly given where there is affirmative evidence supporting an inference that only the lesser offense was committed to the exclusion of the charged offense. Here, the State presented affirmative evidence that Gregory Waters claimed he obtained permission to scrap property from a person he knew did not own that property. Viewed in the light most favorable to the State, this evidence supported an inference that Waters committed only second degree trafficking in stolen property, a lesser included offense of first degree trafficking in stolen property. Therefore, the trial court did not abuse its discretion in instructing the jury on the lesser included offense. Additionally, the trial court did not abuse its discretion in ordering Waters to pay restitution based upon the original cost of the stolen property. We affirm.

FACTS

Zach Waters and Kerri Uitbenhowen rented a home in Sedro-Woolley. The property included a barn where Zach[1] and Uitbenhowen were allowed to store things. The owners of the property, the Holtcamps, also stored approximately 300 cattle guards in the barn, left over from when they operated a dairy farm on the property.

Zach and Uitbenhowen went on vacation. When they returned, they believed someone had entered their home and they noticed that all of the cattle guards from the barn were missing. Uitbenhowen called the police.

An investigation led to Waters, Zach's father. He was charged by amended information with one count of theft in the second degree, one count of possessing stolen property in the second degree, one count of residential burglary, one count of burglary in the second degree, and one count of first degree trafficking in stolen property.

At trial, Brian Parberry, owner of Scrap-It Metal Recycling, testified that Waters scrapped a load of cattle guards on October 17, 2011, and that Parberry paid Waters $279.30. The trial court admitted photos of the load brought to Scrap-It by Waters on that date. Thomas Holtcamp, the owner of the cattle guards, testified that, based on the pictures, Waters scrapped approximately 50 of his cattle guards.

Zach testified that Waters had asked if he could scrap the cattle guards and that he said, "[N]o, it wasn't mine to give him permission."[2] Uitbenhowen testified that Waters never asked her if he could have the cattle guards and she never gave him permission to take them. Officer Dan Luvera testified that he talked to Waters during

---

[1] For ease of reference, we refer to Zach Waters by his first name and his father, appellant Gregory Waters, by his last name.

[2] Report of Proceedings (RP) (Oct. 24, 2012) at 43.

his investigation and that Waters indicated that Uitbenhowen had asked him to scrap the cattle guards and split the profit with her. Waters did not testify.

Over Waters' objection, the trial court instructed the jury on second degree trafficking in stolen property, the lesser included offense of first degree trafficking in stolen property. The jury returned a verdict of not guilty on every original count, but found Waters guilty of the lesser included offense, second degree trafficking in stolen property. As a result of a contested restitution hearing, the trial court ordered Waters to pay $1,750 in restitution for the stolen cattle guards.

Waters appeals.

DISCUSSION

Lesser Included Offense Instruction

Waters argues that the trial court erred when it instructed the jury on second degree trafficking in stolen property, the lesser included offense for first degree trafficking in stolen property. Specifically, he argues that the instruction was not proper because there was no affirmative evidence that he recklessly sold the stolen cattle guards. We disagree.

In Washington, the right to a lesser included offense instruction is statutory.[3] A party is entitled to an instruction of a lesser included offense if two conditions are met.[4] First, under the legal prong of the test, each element of the lesser offense must be a necessary element of the charged offense.[5] Second, under the factual prong, the

---

[3] RCW 10.61.006 ("In all other cases the defendant may be found guilty of an offense the commission of which is necessarily included within that with which he or she is charged in the indictment or information.").

[4] State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978).

[5] State v. Berlin, 133 Wn.2d 541, 545-46, 947 P.2d 700 (1997) (citing id.).

evidence presented in the case must support an inference that only the lesser offense was committed to the exclusion of the charged offense.[6]

Waters does not dispute that the legal prong of the test is satisfied in this case. The issue is whether the factual prong is satisfied.

We view the evidence that purports to support a requested instruction in the light most favorable to the party who requested the instruction at trial.[7] When deciding whether or not an instruction should be given, we must consider all of the evidence that is presented at trial.[8] It is not enough that the jury might simply disbelieve the State's evidence.[9]

Where a trial court's decision to give an instruction is based on the facts of the case, we review this factual determination for abuse of discretion.[10] A trial court abuses its discretion when its decision is manifestly unreasonable or based upon untenable grounds or reasons.[11]

In State v. Fernandez-Medina, our Supreme Court addressed whether the trial court properly refused to give an instruction on the lesser included offense of second degree assault.[12] In that case, Fernandez-Medina fired several shots into an apartment and pointed his gun at one victim's head.[13] Witnesses then heard a click, but no bullet

---

[6] State v. Fernandez-Medina, 141 Wn.2d 448, 455, 6 P.3d 1150 (2000).

[7] Id. at 455-56.

[8] Id. at 456.

[9] Id.

[10] State v. LaPlant, 157 Wn. App. 685, 687, 239 P.3d 366 (2010).

[11] State v. Neal, 144 Wn.2d 600, 609, 30 P.3d 1255 (2001).

[12] 141 Wn.2d 448, 449-50, 6 P.3d 1150 (2000).

[13] Id. at 451.

discharged. The defendant was charged with attempted murder or, in the alternative, assault in the first degree.[14] Based on evidence that a gun can make various sounds without pulling the trigger, Fernandez-Medina requested a jury instruction for second degree assault, the lesser included charge, which did not include intent to do serious bodily harm.[15] The Supreme Court held that he was entitled to the instruction because the testimony given by gun experts supported an inference that he had not pulled the trigger and, therefore, committed only the lesser included offense of second degree assault.[16]

Under RCW 9A.82.050(1), first degree trafficking in stolen property requires proof that the defendant "knowingly initiates, organizes, plans, finances, directs, manages, or supervises the theft of property for sale to others" or "knowingly traffics in stolen property." In contrast, under RCW 9A.82.055(1), second degree trafficking in stolen property requires proof that the defendant "recklessly" traffics in stolen property. Criminal recklessness requires that a person "knows of and disregards a substantial risk that a wrongful act may occur."[17] To resolve whether the factual prong is satisfied, we must determine whether there was evidence affirmatively establishing that Waters committed only the lesser offense, second degree trafficking in stolen property.[18]

Here, there was affirmative evidence that Waters acted recklessly in scrapping the cattle guards. Officer Luvera testified that during his investigation, he asked Waters

---

[14] Id.

[15] Id. at 452.

[16] Id. at 456-57.

[17] RCW 9A.08.010(1)(c).

[18] See Fernandez-Medina, 141 Wn.2d at 456.

to explain how he obtained the cattle guards and why he sold them to Scrap-It. Officer Luvera described Waters' response for the jury:

> He said that he got a call from [Uitbenhowen], and [Uitbenhowen] wanted him to scrap some material that was on the property that they were residing at. And that it's my understanding that the monies that [Waters] would get from scrapping the material would be split between he and [Uitbenhowen].[19]

Based upon this evidence, the jury could rationally find that Waters had permission from Uitbenhowen to scrap the cattle guards. Drawing all inferences in favor of the State, as we must, there was affirmative evidence that Waters knew Uitbenhowen was renting the property and the cattle guards did not belong to her. Waters argues that Officer Luvera's testimony only affirmatively shows that he had permission to scrap the cattle guards and, therefore, negates any inference that he recklessly sold stolen property. But the jury could have reasonably found that Waters acted recklessly by selling the cattle guards without obtaining permission from the true owners, the Holtcamps.

It is true that, in order to find Waters guilty of second degree trafficking in stolen property, the jury must necessarily have disbelieved Zach and Uitbenhowen's testimony that they did not give Waters permission to scrap the cattle guards. But that was not the only evidence presented by the State. The affirmative evidence provided by Officer Luvera supports an inference that Waters acted recklessly, as required for second degree trafficking in stolen property.

Restitution

Waters argues that the trial court abused its discretion by awarding restitution exceeding the scrap value of the cattle guards. We disagree.

---

[19] RP (Jan. 8, 2013) at 122.

"A court's authority to order restitution is derived solely from statute."[20] A judge must order restitution whenever a defendant is convicted of an offense that results in loss of property.[21] The amount of restitution awarded must be based "'on easily ascertainable damages.'"[22] While the claimed loss "'need not be established with specific accuracy,' it must be supported by 'substantial credible evidence.'"[23] "'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."'"[24] The State must prove the damages by a preponderance of the evidence.[25] A decision to impose restitution is generally within the discretion of the trial court, and the size of the award will not be disturbed on appeal absent an abuse of discretion.[26] "A court abuses its discretion only when its order is manifestly unreasonable or untenable."[27] It is not an abuse of discretion to utilize replacement value instead of fair market value.[28]

Here, the trial court observed that the owner could benefit from having cattle guards available for a sale of the barn for use as a dairy. The court calculated the total

---

[20] State v. Gonzalez, 168 Wn.2d 256, 261, 226 P.3d 131 (2010).

[21] RCW 9.94A.753(5).

[22] State v. Griffith, 164 Wn.2d 960, 965, 195 P.3d 506 (2008) (quoting RCW 9.94A.753(3)).

[23] Id. (quoting State v. Fleming, 75 Wn. App. 270, 274-75, 877 P.2d 243 (1994), overruled on other grounds by Washington v. Recuenco, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006)).

[24] Id. (quoting State v. Hughes, 154 Wn.2d 118, 154, 110 P.3d 192 (2005), abrogated on other grounds by Recuenco, 548 U.S. at 212).

[25] Id.

[26] State v. Gray, 174 Wn.2d 920, 924, 280 P.3d 1110 (2012).

[27] Id.

[28] See State v. Smith, 42 Wn. App. 399, 401, 711 P.2d 372 (1985) (restitution not limited to "only the fair market value, not the replacement cost, of the items stolen and later recovered and sold").

restitution due by multiplying the approximate number of cattle guards scrapped by the average original cost per cattle guard. Holtcamp testified that, based on the photograph of Waters' truck at Scrap-It, Waters scrapped approximately 50 of the Holtcamps' cattle guards. Additionally, Holtcamp completed a victim loss statement where he indicated that the original price of the cattle guards ranged from $30 to $42 each. Based upon this evidence, the trial court found that Waters scrapped 50 cattle guards with an average value of $35 each, resulting in total restitution due of $1,750.

Waters argues that this amount is an abuse of discretion because it does not reflect the fair market value of the cattle guards, which he argues equals the scrap value of $279.30. But Waters cites no authority requiring restitution to be based on fair market value.[29] Because the amount awarded was easily ascertainable, supported by the record, and consistent with the concept of replacement value, the trial court did not abuse its discretion.

Waters argues that the restitution amount must consider depreciation of the asset, citing State v. Wilson.[30] He also argues that a restitution award must be based on the proceeds of sale at the time of the loss, citing State v. A.N.W. Seed Corporation.[31] But neither of these cases involved an award of restitution in the context of a criminal trial. They are not persuasive.

---

[29] Waters cites Fleming, 75 Wn. App. at 275, for the premise that restitution is *generally related to* fair market value. But Fleming does not support an argument that restitution is limited to fair market value only.

[30] 6 Wn. App. 443, 493 P.2d 1252 (1972).

[31] 116 Wn.2d 39, 802 P.2d 1353 (1991).

Waters argues that there was not testimony about the value of the cattle guards other than their value as scrap metal. This is not true. Holtcamp testified that he paid approximately $30 each for the cattle guards in the mid-1990s.

Finally, Waters argues that the Sixth Amendment bars the trial court from imposing restitution based on a loss not found by the jury. But in State v. Kinneman, our Supreme Court held that there is no right to a jury trial to determine facts on which restitution is based.[32] Waters cites no authority that restitution awards require jury findings regarding the scope and amount of the victim's loss. His attempt to distinguish Kinneman on this point is not persuasive.

Affirmed.

WE CONCUR:

[32] 155 Wn.2d 272, 282, 119 P.3d 350 (2005).

APPENDIX B

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

STATE OF WASHINGTON, Respondent, v. GREGORY WATERS, Appellant.	)	No. 69932-6-I ORDER DENYING MOTION FOR RECONSIDERATION

Appellant has filed a motion for reconsideration of the court's opinion entered April 28, 2014. After consideration of the motion, the court has determined that it should be denied.

Now therefore, it is hereby

ORDERED that appellant's motion for reconsideration is denied.

Done this 4th day of June, 2014.

FOR THE PANEL:

Verellen, ACJ

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. 69932-6-I**, 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:

☒ respondent Rosemary Kaholokula, DPA
Skagit County Prosecutor's Office

☒ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: July 3, 2014