Supreme Court No. 94856-9

(Court of Appeals No. 74874-2-I)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DOUGLAS ROSS WHITE,

Petitioner.

PETITION FOR REVIEW

LILA J. SILVERSTEIN
Attorney for Petitioner

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711
lila@washapp.org

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

Washington Court of Appeals Decisions

United States Supreme Court Decisions

Constitutional Provisions

Statutes

Rules

A. IDENTITY OF PETITIONER AND DECISION BELOW

Douglas White, through his attorney, Lila J. Silverstein, asks this Court to review the opinion of the Court of Appeals in *State v. White*, No. 74874-2-I (Slip Op. filed July 31, 2017). A copy of the opinion is attached to this petition.

B. ISSUES PRESENTED FOR REVIEW

1. Do the Sixth and Fourteenth Amendments to the federal constitution and article I, section 21of the state constitution guarantee the right to have a jury find the amount of damages for purposes of imposing restitution? RAP 13.4(b)(3), (4).

2. Even assuming a judge may find the amount of loss by a preponderance of the evidence, did the sentencing court abuse its discretion in ordering Mr. White to refund appraisal fees to several customers and to pay over $16,000 to appraiser Tom Reed, where there was no evidence that Mr. White's appraisals were inaccurate, that the mortgages obtained were compromised, or that customers would have hired Tom Reed if they had not hired Mr. White?

C. STATEMENT OF THE CASE

Douglas White pleaded guilty to 28 counts of second-degree identity theft and 27 counts of mortgage fraud. CP 76-96, 160-83. Mr.

White's crimes consisted of using another person's electronic signature and license number when performing appraisals. CP 19-31.

Mr. White had worked for the other person, Tom Reed, from 2004-2008. CP 20. Mr. Reed's company was Washington Appraisal Reviews. CP 19.

Mr. White later performed appraisals as part of his own business, Washington Real Estate Services. CP 20. Several individuals and mortgage companies hired Mr. White to perform appraisals. These customers were referred directly to Mr. White, and had never hired or worked with Tom Reed. CP 20, 23, 27.

Mr. White performed the appraisals and used his company's letterhead, but because he did not have a license, he signed the appraisals with Tom Reed's electronic signature and license number. CP 20-31, 236-72. Although Mr. White falsely used Mr. Reed's signature and license numbers, the appraisals he performed were apparently accurate, and the customers successfully obtained mortgages. CP 19-31; RP (1/22/16 - CoA no. 74469-1-I)[1] 269, 288-89; RP (1/29/16) 166.

---

[1] This transcript is the restitution hearing for the co-defendant, Diana Merritt. Both Mr. White and the State referred to the facts and arguments adduced at Ms. Merritt's restitution hearing during Mr. White's restitution hearing. *See, e.g.,* RP (1/29/16) 149, 166.

Despite the fact that no customers lost money, Mr. White accepted responsibility for his fraud. He pleaded guilty, and was sentenced to 60 months in prison. CP 160, 163.

Mr. White did, however, contest the State's request for restitution. RP (1/29/16). The State asked that the court order Mr. White to return appraisal fees to 10 customers, and to pay Tom Reed restitution of over $16,000. CP 192-232. The latter request was the total of all appraisal fees paid, and was based on the theory that if the customers had not hired Douglas White, they may have hired Tom Reed. CP 236; RP (1/29/16) 169-74. The court ordered restitution over Mr. White's objections that the State failed to prove loss or damage. CP 233-35; RP (1/29/16) 166.

On appeal, Mr. White argued that the restitution order should be vacated because the State failed to prove any loss by a preponderance of the evidence – let alone loss of over $16,000. Mr. White also argued that he was deprived of his right to have a jury find the loss amount beyond a reasonable doubt. Such a right is guaranteed by the Sixth and Fourteenth Amendments, which require a jury finding beyond a reasonable doubt of any fact increasing the punishment, and article I, section 21, which provides an "inviolate right" to a jury trial on damages.

The Court of Appeals affirmed. It ruled the trial court properly award restitution to the customers on the basis that they did not receive certified appraisal reports, even though there was no evidence the appraisals were inaccurate and all customers received mortgages. Slip Op. at 4. The court held the trial court properly ordered Mr. White to pay $16,000 to Mr. Reed even though there was no evidence the customers would have hired Reed in White's absence. Slip Op. at 4. These customers were referred directly to Mr. White, and had never hired or worked with Tom Reed. CP 20, 23, 27. The Court of Appeals simply quoted the trial court's reasoning, which was that Mr. Reed was entitled to restitution because Mr. White used his signature and appraiser number. Slip Op. at 4.

The Court of Appeals also held there is no constitutional right to have a jury find the amount of restitution beyond a reasonable doubt. It ignored the state constitutional question, and held the federal question was foreclosed by a 2005 opinion of this court which predated significant U.S. Supreme Court opinions on the issue. It was unmoved by those subsequent opinions, and affirmed the restitution order. Slip Op. at 5-6.

D. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. This Court should grant review and hold that the federal and state constitutions guarantee the right to have a jury find damages beyond a reasonable doubt before restitution may be imposed.

a. Restitution is punishment, and the Sixth and Fourteenth Amendments guarantee the right to have the jury find beyond a reasonable doubt any fact essential to punishment.

The Sixth and Fourteenth Amendments guarantee the right to have a jury find, beyond a reasonable doubt, every fact essential to punishment. *Blakely v. Washington*, 542 U.S. 296, 313, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004); *Apprendi v. New Jersey,* 530 U.S. 466, 476, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); U.S. Const. amends. VI, XIV. Restitution constitutes punishment. *State v. Kinneman*, 155 Wn. 2d 272, 281, 119 P.3d 350 (2005). In this case, Mr. White did not admit facts essential to restitution nor did a jury find the facts essential to restitution.

In *Kinneman*, this Court rejected an argument that the rights to a jury trial and proof beyond a reasonable doubt apply to restitution. *Kinneman*, 155 Wn.2d at 282. But this was before the U.S. Supreme Court decided *Southern Union v. United States*, 567 U.S. 343, 132 S.Ct. 2344, 183 L.Ed.2d 318 (2012) and *Alleyne v. United States*, ___ U.S. ___ 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013). In *Southern Union*, the Court held that the rights to a jury trial and proof beyond a reasonable doubt apply to

the facts necessary to imposing fines, not just to facts necessary to imposing imprisonment. *Southern Union*, 132 S.Ct. at 2350-51. The court explained, "the amount of a fine ... is often calculated by reference to particular facts ... [like] the amount of the defendant's gain or the victim's loss, ..." *Id.* at 2350-51. "This is exactly what *Apprendi* guards against: judicial factfinding that enlarges the maximum punishment a defendant faces beyond what the jury's verdict or the defendant's admissions allow." *Id.* at 2352. In *Alleyne*, the Court extended *Apprendi* to the facts necessary to impose minimum punishment, not just maximum punishment. *Alleyne*, 133 S.Ct. at 2155.

The amount of restitution is calculated by reference to the amount of victim loss. RCW 9.94A.753 (3). Thus, consistent with the Constitution, the amount must be proved to a jury beyond a reasonable doubt. *Southern Union*, 132 S.Ct. at 2350-51.

The Court of Appeals held *Southern Union* is inapposite because "[n]o statute caps the dollar amount of restitution a Washington court can order...." Slip Op. at 6. Somewhat ironically, the Court then rejected *Alleyne* as irrelevant because "Washington's restitution statute does not require a minimum amount." Slip Op. at 6.

The Court of Appeals misunderstood the issue. The relevant question for constitutional purposes is what punishment may be imposed

in the absence of additional factual findings. Blakely v. Washington, 542 U.S. 296, 303, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004); *see also Alleyne*, 133 S.Ct. at 2155. In the context of restitution, the answer to that question is "zero". No restitution may be imposed unless a factfinder determines nexus and amount of loss. RCW 9.94A.753(3); *State v. Griffith*, 164 Wn.2d 960, 965, 195 P.3d 506 (2008). Thus, under the Sixth and Fourteenth Amendments these amounts must be agreed to by the defendant, or found by a jury beyond a reasonable doubt. *Southern Union,* 132 S.Ct. at 2352. This Court should grant review. RAP 13.4(b)(3), (4).

b. Article I, section 21 provides an "inviolate right" to a jury trial on damages.

The Court of Appeals did not address Mr. White's separate state constitutional argument. Slip Op. at 5-6.

Article I, section 21 provides:

> The right of trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts not of record, and for a verdict by nine or more jurors in civil cases in any court of record, and for waiving of the jury in civil cases where the consent of the parties interested is given thereto.

Const. art. I, § 21. This right to a jury trial applies to a determination of damages. *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 648, 771 P.2d 711, *as amended*, 780 P.2d 260 (1989).

In *Sofie*, this Court held the legislature could not remove from the jury its traditional function of determining damages by means of a statute that capped noneconomic damages. Similarly, nothing permits the removal of the damage-finding function from the jury simply by labeling such damages "restitution." Restitution is limited to damages causally connected to the offense. *State v. Cawyer*, 182 Wn. App. 610, 616-17, 330 P.3d 219 (2014). The damages at issue are no different than the damages at issue in *Sofie*, i.e., they are the value of loss suffered as a result of the acts of another. To preserve "inviolate" the right to a jury trial, article I, section 21 must afford a right to a jury determination of such damages. For this reason, too, this Court should grant review. RAP 13.4(b)(3), (4).

2. Even if a judge may find loss amount by a preponderance of the evidence, the State did not prove loss in this case.

a. Restitution may be ordered only for easily ascertainable damages caused by the crime.

A sentencing court's authority to order restitution is limited by statute. *Cawyer*, 182 Wn. App. at 616. The relevant statute provides for restitution "whenever the offender is convicted of an offense which results in injury to any person or damage to or loss of property." RCW 9.94A.753(5). "[R]estitution ordered by a court pursuant to a criminal conviction shall be based on easily ascertainable damages for injury to or

loss of property, actual expenses incurred for treatment for injury to persons, and lost wages resulting from injury." RCW 9.94A.753(3).

Restitution is appropriate only if a causal connection exists between the defendant's offense and the victim's injuries for which restitution is sought. *Cawyer*, 182 Wn. App. at 616-17. "Losses are causally connected if the victim would not have incurred the loss but for the crime." *State v. Acevedo*, 159 Wn. App. 221, 230, 248 P.3d 526 (2010).

The State bears the burden of proving loss amount by a preponderance of the evidence. *Griffith*, 164 Wn.2d at 965. "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." *Id.* (internal citations omitted).

The question of whether a loss is causally connected to a crime is a question of law this Court reviews de novo. *Acevedo*, 159 Wn. App. at 230. This Court reviews a trial court's factual findings for substantial evidence. *Griffith*, 164 Wn.2d at 965.

b. <u>The State failed to prove by a preponderance of the evidence that there was any loss or damage – let alone that there was over $16,000 lost</u>.

In this case, the State presented insufficient evidence to support the restitution order. The court ordered Mr. White to pay $400 or $450 each to

10 individuals, reasoning this was the amount each had paid him to perform appraisals. CP 233-35. But the State failed to prove that these people suffered any losses – let alone losses in these specific amounts. These individuals successfully obtained mortgages based on Mr. White's appraisals, and there was no evidence that the appraisals were inaccurate. RP (1/29/16) 166 (defense attorney notes this absence of proof at restitution hearing) CP 236-72 (State's documents in support of restitution simply show that appraisal fees were paid); CP 19-44 (certification for determination of probable cause, which formed factual basis for guilty plea, does not show these individuals lost money).

The Court of Appeals reasoned that the customers did not receive an appraisal performed by a properly certified appraiser, but the court does not explain how the customers lost $400 to $450 each. Slip Op. at 4. No one required the customers to pay for second appraisals after Mr. White's lack of certification was discovered; rather, all mortgages were approved.

The trial court also ordered Mr. White to pay $16,050.00 to Tom Reed. CP 233. The court apparently arrived at this amount by adding all of the appraisal fees paid to Mr. White. CP 236. The sentencing court reasoned that Mr. Reed "should be compensated for those appraisals that would have gone to him, if Mr. White had been doing what he said he was doing, which was working with Mr. Reed." RP (1/29/16) 177.

But there was no evidence showing that Mr. Reed *lost* these amounts. The State's theory seemed to be that but for Mr. White's crimes, all of Mr. White's customers would have hired Mr. Reed. RP (1/29/16) 169-74. However, there is no support in the record for this claim; in fact, the evidence is to the contrary.

Mr. Reed has owned his own appraisal company, Washington Appraisal Reviews, since 1995. CP 19. But all of the customers at issue in this case obtained appraisals through Mr. White's company, Washington Real Estate Services. CP 194-229; *see also* CP 20 (Tom Reed said he had never done an appraisal for Stay in Home Mortgage Company); CP 23 ("Reliance Mortgage sought to hire Washington Real Estate Services" (Doug White's company)); CP 27 (multiple borrowers state they were referred to Doug White's company). If these customers had wanted to hire Washington Appraisal Reviews, they could have done so. They did not. The fact that the person they did hire was fraudulently using Tom Reed's license does not mean Tom Reed lost the appraisal fee. To assume that the customers would have hired Tom Reed if Doug White were not wrongly performing appraisals is pure speculation, and is an impermissible basis for imposing restitution. *Griffith*, 164 Wn.2d at 965.

State v. Hahn, 100 Wn. App. 391, 996 P.2d 1125 (2000) is instructive. There, the defendant pleaded guilty to two counts of second

degree assault after severely injuring two victims. *Hahn*, 100 Wn. App. at 392, 394. The State sought restitution for both victims' medical treatment, and submitted hospital records identifying "numerous medical services rendered either on the date of the crime or shortly thereafter." *Id.* at 400. Even under these circumstances, the Court of Appeals reversed the restitution order because the evidence was "insufficient to allow the sentencing court to estimate losses by a preponderance of the evidence without speculation or conjecture." *Hahn*, 100 Wn. App. at 400. If the evidence supporting restitution was insufficient in *Hahn*, it is certainly insufficient here, where alleged damages are based purely on the speculation that Tom Reed would have performed (and been paid for) appraisals if Doug White had not.

It is also worth noting that following substantially similar arguments the trial judge declined to order co-defendant Diana Merritt to pay restitution. *See* Order Denying Restitution in King Co. 14-1-02955-8 SEA); RP (1/22/16 - CoA no. 74469-1-I) 259-317; RP (1/29/16) 149, 166 (Both sides refer to arguments made in Ms. Merritt's case). At Ms. Merritt's restitution hearing, the judge noted that the victims may have suffered a loss if the property value had been inflated, but he said "I don't have any evidence that the appraisals themselves were not relatively accurate." RP (1/22/16 - CoA no. 74469-1-I) 269. The court went on:

> So then the question becomes, are these other costs that they've incurred losses or injury? Well, it seems to me they got what they wanted in the long run. You're absolutely right, [prosecutor]; they bargained for an appraisal done by a licensed appraiser. But when push comes to shove, they actually got ultimately the services that they wanted and the loan refinance that they wanted.

RP (1/22/16 - CoA no. 74469-1-I) 288. The court concluded, "So when you get right down to it, I'm of the mind that there are no demonstrable, ascertainable damages to the individuals involved either, from the perspective of the cost of the appraisals themselves." *Id.* at 289.

The same reasoning applies to preclude restitution to the ten borrowers in Mr. White's case, yet at Mr. White's restitution hearing the court reversed course and said:

> [There] has to be a loss of property, or an injury to a person, and it has to be easily ascertainable. Well, how do we do that in this particular case? Well, the way I see it is every one of these appraisals involving a charged victim who wishes to be compensated for the amount of money they spent on the appraisal by a person who wasn't licensed to do the appraisal, I believe that that's compensable. And that's easily ascertainable. For some folks it was 400 bucks, for others it was 450. But every one of those individuals who's asked to be compensated for the cost of that essentially worthless appraisal, should get that compensation.

RP (1/29/16) 176.

The judge was wrong, because, as he had recognized only a week earlier at Ms. Merritt's hearing, the borrowers did not suffer any losses.

They did not have to get new appraisals by licensed professionals; they obtained mortgages based on Mr. White's appraisals and no one had required them to obtain new appraisals after Mr. White's fraud was discovered. Thus, the appraisal fees do not constitute losses and it was improper to order restitution in the amount of the appraisal fees. *See* RP (1/29/16) 166.

The court also declined to order Ms. Merritt to pay restitution to Mr. Reed, reasoning that Mr. White should be responsible for any losses to him. RP (1/22/16 - CoA no. 74469-1-I) 289. But again, the State never proved that Mr. Reed lost the appraisal fees that were paid to Mr. White. Customers hired Mr. White to perform appraisals; he performed the appraisals, and he was paid for these appraisals. Although he committed crimes by using Mr. Reed's electronic signature and license number, Mr. Reed had never been hired to perform these appraisals to begin with, so he cannot be said to have lost the fees. *See* RP (1/29/16) 169.

In sum, the restitution order should be vacated because the State failed to prove the victims lost the amounts ordered. That restitution was ordered in these circumstances demonstrates the importance of recognizing a constitutional right to have a jury make restitution findings beyond a reasonable doubt. This Court should grant review.

E. CONCLUSION

Douglas White respectfully requests that this Court grant review.

Respectfully submitted this 8th day of August, 2017.

/s Lila J. Silverstein
Lila J. Silverstein
WSBA #38394
Attorney for Petitioner

APPENDIX

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. DOUGLAS ROSS WHITE, Appellant.	No. 74874-2-I DIVISION ONE UNPUBLISHED OPINION FILED: July 31, 2017

LEACH, J. — Douglas White appeals the restitution the trial court ordered him to pay after he pleaded guilty to 28 counts of second degree identity theft and 27 counts of mortgage fraud. White challenges the sufficiency of the evidence to support the restitution order and claims that a jury should have decided the amount of restitution. He also contends that his convictions for mortgage fraud charged in counts 45 to 55 should be set aside because the State charged these crimes after the statute of limitations period for them had expired.

Because sufficient evidence supports the restitution order and White was not entitled to a jury trial on restitution, we affirm the restitution order. And because White fails to identify any evidence that the statute of limitations expired, we affirm the judgment and sentence.

Background

Washington State licensed Tom Reed to perform residential appraisals. Reed did business as Washington Appraisal Reviews Inc. and signed his appraisal reports by an electronic "signature." Reed hired White to perform appraisals as a trainee. White would accompany Reed on home appraisals and then put the appraisals together for Reed's

review. White took the appraiser licensing exam twice during his time at Washington Appraisal and failed each time. White worked closely with Reed for several years. He misused his trust as Reed's mentee to obtain Reed's electronic signature and certified residential appraiser license number. During the 2008 economic downturn, Reed laid off his employees.

White, doing business as Washington Real Estate Services Inc., performed appraisals. He used Reed's electronic signature and license number on the appraisal reports submitted to the client and companies. White's compensation for these appraisal reports ranged from $400 to $800.

White pleaded guilty to second degree identity theft and mortgage fraud as charged in the amended information. White entered a straight plea without a stipulation to real facts. In his statement on the plea of guilty, White admitted to using Reed's electronic signature and his appraiser's license number on appraisals he performed. White performed those appraisals on properties with the intent to mislead lenders and borrowers into thinking that Tom Reed completed the appraisals. His guilty plea recognized that he committed the crimes over a multiyear period between May 16, 2007, and August 30, 2012.

After sentencing, the court held a restitution hearing. The sentencing court ordered White to repay several individuals who had paid him for appraisals believing he was the licensed Tom Reed and to repay Reed the monies White received from the appraisals performed under Reed's name.

White timely appeals.

Analysis

White challenges the sufficiency of the evidence to support the restitution order and claims that a jury should have determined the amount of restitution. White also argues that several of his convictions should be vacated because they were barred by the statute of limitations. White also filed a statement of additional grounds for review, claiming ineffective assistance of trial counsel and an improper relationship between the prosecutor and the judge.

Restitution

Statutes provide a trial court's only authority to order restitution.[1] These statutes give courts broad discretion when determining the amount of restitution.[2] The trial court abuses its discretion if its restitution order is manifestly unreasonable or the court exercised its discretion on untenable grounds or for untenable reasons.[3]

A court must order restitution when "the offender is convicted of an offense which results in injury to any person or damage to or loss of property."[4] The court must base its order "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."[5]

A court can order restitution only for losses that are causally connected to the crimes charged unless the defendant expressly agrees to pay restitution for crimes for which he was not convicted.[6]

---

[1] State v. Smith, 119 Wn.2d 385, 389, 831 P.2d 1082 (1992).
[2] State v. Kinneman, 155 Wn.2d 272, 282,119 P.3d 350 (2005).
[3] State v. Enstone, 137 Wn.2d 675, 679-80, 974 P.2d 828 (1999).
[4] RCW 9.94A.753(5).
[5] RCW 9.94A.753(3).
[6] State v. Griffith, 164 Wn.2d. 960, 965-66, 195 P.3d 506 (2008).

The sentencing court ordered White to repay 10 of the victims who had paid for an appraisal that was essentially worthless because it was not performed by a licensed appraiser. Because these individuals each obtained refinancing or a mortgage for their property, White claims they suffered no loss. He notes the lack of any evidence that these appraisals were inaccurate. We find no merit to this argument. The individuals did not receive what they purchased, a certified appraisal report. Thus, their loss is causally related to White's crime.

The sentencing court also ordered White to pay Reed the monies he received for each of the appraisals White performed using Reed's license. White claims that the record contains no evidence that these customers would have hired Reed. In its oral ruling, the sentencing court explained the connection between the appraisals and Mr. Reed's entitlement to the payment from them:

> Every one of those appraisals purportedly was sent to Mr. Reed. On the face of them, they were appraisals that were going to be done by Mr. Reed's firm. To me, that sort of makes the nexus right there. An argument could be made, well, if Mr. White wasn't involved, would Mr. Reed have gotten the appraisals anyway? I don't know, but that's not what happened. What happened was those appraisals were going to be done by Mr. White, who was purportedly affiliated with Mr. Reed.

The sentencing court also considered whether this would be double dipping but noted that the restitution statute authorized the court to impose up to twice the victim's loss or the offender's gain.[7] Because White was enriched by the amount paid by each individual, paying that amount to Reed falls within the statutory

[7] RCW 9.94A.753(3); see Kinneman, 155 Wn.2d at 285 (evidence supporting restitution sufficient if it affords a reasonable basis for estimating loss and does not subject the trier of fact to mere speculation or conjecture).

parameters even though White might pay the same amount to some individuals who submitted claims.

Our courts have recognized that restitution statutes are "intended to require the defendant to face the consequences of his or her criminal conduct."[8] The trial court did not abuse its discretion in awarding restitution.

Jury Trial

White contends that the Sixth Amendment to the United States Constitution and article 1, section 21 of the Washington State Constitution each entitles a defendant to have a jury decide the amount of restitution. The Washington Supreme Court rejected this argument in State v. Kinneman.[9]

White argues that Southern Union Co. v. United States[10] and Alleyne v. United States[11] have eroded Kinneman's holding. Southern Union extended the holding in Apprendi v. New Jersey[12] to criminal fines, concluding that there was "no principled basis under Apprendi for treating criminal fines differently" than sentences of imprisonment or death.[13]

White's reliance on Southern Union is misplaced because the decision merely reemphasized Apprendi's holding that if a court uses a factual finding to elevate a sentence above the statutory maximum, due process requires proof of that fact beyond a

---

[8] State v. Tobin, 161 Wn.2d 517, 524, 166 P.3d 1167 (2007) (citing State v. Davison, 116 Wn.2d 917, 922, 809 P.2d 1374 (1991)).

[9] 155 Wn.2d 272, 282, 119 P.3d 350 (2005).

[10] 567 U.S. 343, 132 S. Ct. 2344, 183 L. Ed. 2d 318 (2012).

[11] ___ U.S. ___, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013).

[12] 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000).

[13] S. Union, 567 U.S. at 349.

reasonable doubt.[14] No statute caps the dollar amount of restitution a Washington court can order, subject to the requirement that the court base any restitution on the damages caused by a defendant's course of conduct. Apprendi remains inapplicable to Washington's restitution scheme.

Nor does Alleyne help White. There, the United States Supreme Court extended Apprendi to facts necessary to impose minimum punishment, not just maximum punishment.[15] Washington's restitution statute does not require a minimum amount. Kinneman remains controlling on this issue.

Statute of Limitations

White claims the court should vacate his convictions on counts 45-55. The State added these counts with an amended information filed February 20, 2015. The counts all involve mortgage fraud acts that occurred between June 12, 2008, and June 19, 2009. RCW 19.144.090(2) states that "[n]o information may be returned more than (a) five years after the violation, or (b) three years after the actual discovery of the violation, whichever date of limitation is later." The incidents all occurred more than five years before the State filed the amended information. But the statute allows the State to file an information within three years after actual discovery of the violation.

White claims that the State discovered the fraud charged in these counts when Tom Reed contacted the police in 2010 about White's use of Reed's electronic signature on an appraisal Reed did not perform. But that victim was not one of those listed in counts

[14] Apprendi, 530 U.S. at 490.
[15] Alleyne, 133 S. Ct. at 2155.

45-55. In July of 2010, Reed met with an investigator from the Department of Housing and Urban Development and provided her with a copy of a property appraisal performed for Stay in Home Mortgage. In 2012, Reed supplied the investigator with another incident of misuse of his credentials. An investigation over the course of the next several years revealed multiple additional incidents of fraud and the discovery of a codefendant who participated in the mortgage frauds. Nothing in the record shows that the State had actual knowledge of the additional incidents more than three years before it charged White with them. A complaint about one incident by a potential victim of a crime that an investigation later shows involved a continuing course of criminal conduct with many incidents does not provide the State with actual knowledge of each incident, only those reported. The State's actual discovery of an incident starts the statute of limitations for that incident.

Statement of Additional Grounds for Review

White filed a statement of additional grounds for review, alleging ineffective assistance of counsel and an improper relationship between the prosecutor and the trial judge.

White argues that his counsel was ineffective for not raising the issue of the statute of limitations for all of his counts. Because we have already determined that the statute of limitations did not bar the filing of the information, White's counsel was not ineffective for failing to raise the issue.[16]

[16] We note that the issue of the statute of limitations was raised by the codefendant. White's counsel was present during argument, and the court noted that should it decide that the statute of limitations barred the convictions for the codefendant, such a bar would also apply to White. The court later found the statute of limitations did not bar the actions.

White next claims that an improper relationship existed between the prosecutor and the judge because the prosecutor had allegedly worked for the judge in the past. The record before us contains no evidence of any improper relationship. White's conclusory allegations provide no basis for appellate review.[17]

Appellate Costs

Finally, White asks this court to deny the State appellate costs based on his indigency. We generally award appellate costs to the substantially prevailing party on review. However, when a trial court makes a finding of indigency, that finding continues throughout review "unless the commissioner or clerk determines by a preponderance of the evidence that the offender's financial circumstances have significantly improved since the last determination of indigency."[18] Here, the trial court found White indigent. If the State has evidence indicating significant improvement in White's financial circumstances since the trial court's finding, it may file a motion for costs with the commissioner.

Affirmed.

Leach, J.

WE CONCUR:

Cox, J.

[17] See RAP 10.10(c) (appellate court will not consider statement of additional grounds for review unless it informs the court of the nature and occurrence of alleged errors).

[18] RAP 14.2.

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. 74874-2-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 David Seaver, DPA
[PAOAppellateUnitMail@kingcounty.gov]
[david.seaver@kingcounty.gov]
King County Prosecutor's Office-Appellate Unit

☒ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: August 8, 2017

WASHINGTON APPELLATE PROJECT

August 08, 2017 - 4:10 PM

Transmittal Information

Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	74874-2
Appellate Court Case Title:	State of Washington, Respondent v. Douglas Ross White, Appellant
Superior Court Case Number:	14-1-02956-6

The following documents have been uploaded:

- 748742_Petition_for_Review_20170808160915D1359884_2082.pdf
  This File Contains:
  Petition for Review
  The Original File Name was washapp.org_20170808_155823.pdf

A copy of the uploaded files will be sent to:

- david.seaver@kingcounty.gov
- paoappellateunitmail@kingcounty.gov

Comments:

Sender Name: MARIA RILEY - Email: maria@washapp.org
Filing on Behalf of: Lila Jane Silverstein - Email: lila@washapp.org (Alternate Email: wapofficemail@washapp.org)

Address:
1511 3RD AVE STE 701
SEATTLE, WA, 98101
Phone: (206) 587-2711

Note: The Filing Id is 20170808160915D1359884