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STATE OF WASHINGTON
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NO. 63209-4-I

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

STATE OF WASHINGTON,

Respondent,

v.

DOUGLAS HUBER,

Appellant.

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

The Honorable George N. Bowden

APPELLANT'S REPLY BRIEF

Susan F. Wilk
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A. ARGUMENT IN REPLY

1. HUBER DID NOT AGREE TO PERMIT THE COURT TO CONSIDER THE CERTIFICATION OF DETERMINATION OF PROBABLE CAUSE FOR PURPOSES OF SENTENCING.

The State commits two errors in its response to Douglas Huber's arguments on appeal. First, the State mistakenly asserts that Huber agreed the court could consider the Certification for Determination of Probable Cause for purposes of sentencing. In actuality, Huber agreed to allow the court to consider the facts in the certification as true for purposes of the guilty plea only. CP 50. Huber entered a straight guilty plea in which he pleaded guilty only to attempting to assist another person in stealing an acetylene torch from Steven Rapp's shed. *Id.* And Huber did not agree to pay restitution for uncharged crimes. CP 53.

Under the "real facts" doctrine, a court may not consider unproven facts or facts probative of a more serious crime without the defendant's agreement. *State v. Quiros*, 78 Wn. App. 134, 138-39, 896 P.2d 91, rev. denied, 127 Wn.2d 1024 (1995); RCW 9.94A.530(2).¹ Because Huber did not agree to "real facts," that

¹ RCW 9.94A.530(2) provides in pertinent part:
In determining any sentence other than a sentence above the standard range, the trial court may rely on no more information than is admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of

Huber may have made certain admissions to arresting officers is immaterial for purposes of the instant appeal. The only admission the court was entitled to consider at the restitution hearing was Huber's statement on plea of guilty.²

The State relies heavily on facts contained in the Certification of Determination for Probable Cause and police reports in arguing what items were proven to have been taken during the August 31, 2008, burglary. Br. Resp. at 17-22. But because Huber did not consent to allow the court to consider the Certification for Determination of Probable Cause or the police reports for purposes of sentencing, and did not agree to pay restitution for uncharged crimes, they may not be deemed proven for purposes of appeal. As the evidence was thin that items other than the acetylene torch were taken on August 31, 2008, this Court should reverse the restitution award with respect to other items.

sentencing, or proven pursuant to RCW 9.94A.537. . . Where the defendant disputes material facts, the court must either not consider the fact or grant an evidentiary hearing on the point.

² Perhaps for this reason, the court did not attempt to reconcile Huber's alleged statements to police with his statement on plea of guilty during the restitution proceedings.

2. THE STATE DID NOT SUPPLY SUFFICIENT EVIDENCE OF THE VALUE OF THE ACETYLENE TORCH.

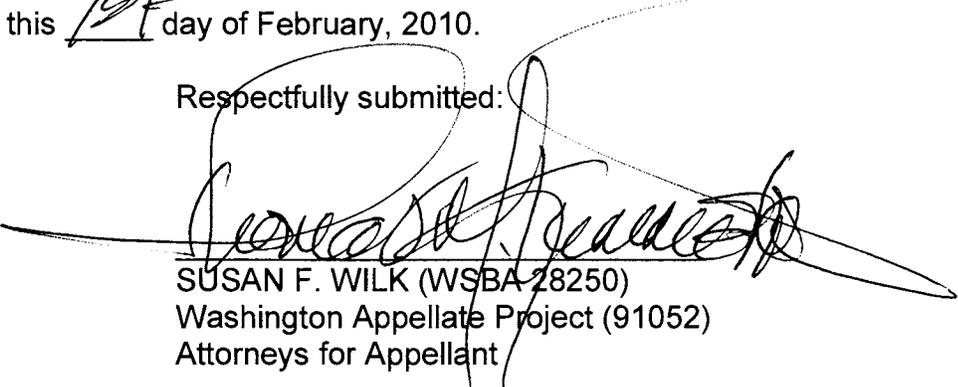
Second, the State apparently does not recognize the requirement the State prove value is tied to the court's duty to impose a restitution award that is based on easily ascertainable damages and does not subject the court to speculation or conjecture. See e.g. State v. Griffith, 164 Wn.2d 960, 965, 195 P.3d 506 (2008). The State asserts that an owner's rough estimation of an item's value, even where contested, and without any supporting documentation, will suffice to prove value. Br. Resp. at 25. But this is true only where the property owner's testimony affords a reasonable basis for estimating loss and does not require the court to guess at a restitution amount – i.e., engage in speculation or conjecture. State v. Mark, 36 Wn. App. 428, 434, 675 P.2d 1250 (1984). The loose figures provided by the Rapps did not meet this standard. The restitution award must be reversed.

B. CONCLUSION

For the foregoing reasons, and for the reasons argued in the Brief of Appellant, the restitution award in this matter should be reversed and dismissed.

DATED this 19th day of February, 2010.

Respectfully submitted:



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DIVISION ONE**

STATE OF WASHINGTON,)	
)	COA NO. 63209-4
Respondent,)	
)	
v.)	
)	
DOUGLAS HUBER,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, ANN JOYCE, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

1. THAT ON THE 1ST DAY OF FEBRUARY, 2010, A COPY OF *APPELLANT'S REPLY BRIEF* WAS SERVED ON THE PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL TO THE ADDRESSES LISTED.
 - SNOHOMISH COUNTY PROSECUTING ATTORNEY
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EVERETT, WA 98201

 - DOUGLAS HUBER
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191 CONSTANTINE WAY
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SIGNED IN SEATTLE, WASHINGTON THIS 1ST DAY OF FEBRUARY, 2010

x *Ann Joyce*