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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON

BY: JW  
DEPUTY

NO. 37301-7-II

COURT OF APPEALS, DIVISION II

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STATE OF WASHINGTON,

Respondent,

vs.

LARRY P. GUIDRY JR.,

Appellant,

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APPEAL FROM THE SUPERIOR COURT  
FOR THURSTON COUNTY  
The Honorable Christine A. Pomeroy, Judge  
Cause No. 07-1-01538-1

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

01. The trial court erred in failing to dismiss counts III-X where Guidry was lawfully fishing under section 14.20.01 of the Nisqually tribal code.
02. The trial court erred in failing to dismiss counts III-X where there was no finding by a standard of beyond a reasonable doubt that on any of the days of the alleged offenses that Guidry was fishing outside the Nisqually Tribe's usual and accustomed area.
03. In finding Guidry guilty of counts III-X, the trial court erred in entering findings of fact 8, 9 and 11 as fully set forth herein at pages 6-7.
04. In finding Guidry guilty of counts III-X, the trial court erred in entering conclusions of law 1, 3-8(3-10), as fully set forth herein at pages 7-8
05. The trial court erred in failing to dismiss count I, engaging in fish dealing in the first degree, for insufficient evidence.
06. In finding Guidry guilty of engaging in fish dealing in the first degree, count I, the trial court erred in entering finding of fact 3 as fully set forth herein at page 5.
07. In finding Guidry guilty of engaging in fish dealing in the first degree, count I, the trial court erred in conclusions of law 8(1) as fully set forth herein at pages 7-8.

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08. The trial court erred in failing to dismiss count II, trafficking in fish in the first degree, for insufficient evidence.
09. In finding Guidry guilty of trafficking in fish in the first degree, count II, the trial court erred in entering finding of fact 3 as fully set forth herein at page 5.
10. In finding Guidry guilty of trafficking in fish in the first degree, count II, the trial court erred in entering conclusions of law 8(2) as fully set forth herein at pages 7-8.
11. The trial court erred in not dismissing Guidry's conviction for engaging in fish dealing in the first degree, count I, where the offense was the same in law and fact and incidental to his conviction for trafficking in fish in the first degree, count II.
12. The trial court erred in not dismissing Guidry's convictions for participating in Indian fishery for commercial purpose, counts III-VI, where the offenses were incidental to his convictions for commercial fishing without a license, counts VII-X.
13. The trial court erred in imposing restitution of \$10,000 where Guidry never expressly agreed to pay restitution beyond the crimes for which he was convicted and where there was insufficient proof that the amount ordered was causally connected to Guidry's convictions.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

01. Whether the trial court erred in failing to

dismiss counts III-X where Guidry was lawfully fishing under section 14.20.01 of the Nisqually tribal code and the qualification of his rights under this code inherent in RCW 77.15.570 is not reasonable and necessary for conservation of the resource and circumvented federal law with no consideration given to the satisfaction of the affected tribes, which precludes the State from carrying its burden to prove otherwise or from availing itself of a preemption argument relating only to State law? [Assignment of Error No. 1, 3 and 4]

02. Whether the trial court erred in failing to dismiss counts III-X where there was no finding by a standard of beyond a reasonable doubt that on any of the days of the alleged offenses that Guidry was fishing outside the Nisqually Tribe's usual and accustomed area? [Assignment of Error Nos. 2, 3 and 4].
03. Whether there was sufficient evidence to uphold Guidry's conviction for engaging in fish dealing in the first degree? [Assignments of Error Nos. 5-7].
04. Whether there was sufficient evidence to uphold Guidry's conviction for trafficking in fish in the first degree? [Assignments of Error Nos. 8-10].
05. Whether Guidry's convictions for engaging in fish dealing in the first degree, count I, and trafficking in fish in the first degree, count II, violate the constitutional prohibition

against double jeopardy?  
[Assignment of Error No. 11].

06. Whether Guidry's convictions for participating in Indian fishery for commercial purpose, counts III-VI, and his convictions for commercial fishing without a license, counts VII-X, violate the constitutional prohibition against double jeopardy? [Assignment of Error No. 12].
07. Whether the trial court erred in imposing restitution of \$10,000 where Guidry never expressly agreed to pay restitution beyond the crimes for which he was convicted and where there was insufficient proof that the amount ordered was causally connected to Guidry's convictions? [Assignment of Error No. 13].

C. STATEMENT OF THE CASE

01. Procedural Facts

Larry Patrick Guidry Jr. (Guidry) was charged by second amended information filed in Thurston County Superior Court on January 3, 2008, with engaging in unlicensed fish dealing activity in the first degree, count I, unlawful trafficking in fish, shellfish, or wildlife in the first degree, count II, four counts of participation of non-Indian in Indian fishery for commercial purpose, counts III-VI, four counts of fishing without a license in the first degree, counts VII-IX, and obstructing a law enforcement officer, count XI, contrary to RCWs 77.15.620(3),

77.15.260(2), 77.15.570(2), 77.15.500(2), and 9A.76.020(1), respectively.

[CP 33-37].

Following a bench trial, the court entered the following Findings of Fact and Conclusions:

#### I. FINDINGS OF FACT

1. The court has jurisdiction over the parties and subject matter.
2. The defendant testified that he is not a member of the Nisqually Indian Tribe.
3. On Count 1 and 2, which took place on January 11, 2005, Washington Department of Fish and Wildlife (WDFW) Officer Carl Klein testified, and the defendant acknowledged, that the defendant had a sign by the roadside that advertised "Chum salmon for sale." Officer Klein testified that the defendant was selling a commercial quantity of salmon. The defendant did not have a wholesale dealer's license or a direct retail endorsement required for selling the salmon.
4. On Counts 3-10, which occurred over December 18, 19, 20, and 21, 2005, there was testimony by Officer Klein, the NOAA special agents, and the defendant's witnesses that the defendant engaged in the Nisqually Tribal Fishery.
5. The defendant stipulated that on December 18 and 19, 2005, his wife, Lorena, who is a member of the Nisqually Indian Tribe, was not on the Nisqually Reservation.

6. Officer Klein testified that on December 20 and 21, 2005, Lorena Guidry did not assist the defendant in the landing or sorting of the chum salmon he caught, and she was not on the boat with him.
7. For Count 11, which occurred on December 21, 2005, WDFW Officers Klein and Haw ordered the defendant out of his vehicle, and he refused to comply. He obstructed the officers in their official duties. Officer Haw testified that he had to use force to remove the defendant from his (the defendant's) vehicle.
8. Exhibit #3, which was admitted into evidence, is composed of three tribal fish tickets that the defendant used to sell the chum salmon he caught on December 18, 19, and 20, 2005. It is clear from the information on these tickets that on December 18 and 19, 2005, the defendant was fishing off the Nisqually Indian Reservation but within the Nisqually Indian's usual and accustomed fishing area.
9. In response to a question about whether a non-tribal member can use the Nisqually tribal code to fish without his or her tribal spouse member, the court finds that the Riverbend Campground, where the defendant launched his boat, is not on the Nisqually Indian Reservation.
10. The defendant's landings of fish on December 18-21, 2005, were of a commercial quantity of fish each day.
11. In answer to the question of whether tribal code can supercede (sic) state statute, the court finds that the Nisqually Tribal Code

does not allow a non-Indian to fish in a tribal fishery unless the tribal spouse is on the boat, sorting fish, or tending the nets with the non-tribal spouse.

12. Having so found, the Court enters the following.

## II. CONCLUSION OF LAW

1. The Court has jurisdiction over the parties and the subject matter.
2. The defendant is not a member of the Nisqually Indian Tribe.
3. The Court finds that Nisqually Tribe's 1957 resolution, and the governor's proclamation, control.
4. On December 18 through 21, 2005, the defendant's wife needed to be assisting him, but she was not.
5. It is clear that the State's statute, RCW 77.15.570, goes to on- and off-reservation and usual-and-accustomed areas.
6. The defendant caught fish off the Nisqually Indian Reservation on December 19<sup>th</sup> through December 21, 2005. On all those days, he may have been fishing outside the Nisqually Tribe's usual and accustomed area.
7. Commercial fishing is defined as when the defendant deploys his net in the water and begins floating.
8. The defendant is Guilty beyond a reasonable doubt of the offenses of:

1. ENGAGING IN FISH DEALING ACTIVITY – UNLICENSED, FIRST DEGREE, RCW 778.15.620(3), committed on January 11, 2005.
2. UNLAWFUL TRAFFICKING IN FISH, SHELLFISH, OR WILDLIFE, FIRST DEGREE, RCW 77.15.260(2), committed on January 11, 2005.
- 3-6. PARTICIPATION OF NON-INDIAN IN INDIAN FISHERY FOR COMMERCIAL PURPOSE, X4, RCW 77.15.570(2), committed on December 18, through 21, 2005.
- 7-10. COMMERCIAL FISHING WITHOUT A LICENSE, FIRST DEGREE, X4, RCW 77.15.500(2), committed on December 18 through 21, 2005.
11. OBSTRUCTING A LAW ENFORCEMENT OFFICER (ON OR AFTER MAY 14, 2001), RCW 9A.76.020(1), committed on December 21, 2005.

[CP 101-04].

Guidry was sentenced within his standard range and timely notice of this appeal followed. [CP 90-99, 105].

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02. Substantive Facts: Bench Trial

At all times pertinent hereto, 2005, Guidry, a non-tribal member, lived on the Nisqually Indian Reservation (reservation) with his wife Lorena, who is a tribal member. [RP 170-71].<sup>1</sup>

02.1 Counts I-II: January 11, 2005

On January 11, 2005, Guidry and another person were observed approximately a quarter mile outside the reservation on the side of the road near several signs advertising fresh salmon for sale. [RP 52-53]. It was later determined that Guidry did not have the required wholesale or commercial licenses required by the State to sell salmon in this manner. [RP 55-57, 76].

02.2 Counts III-X: December 18-21, 2005

For each of the four days between December 18 and 21, 2005, Guidry was observed on the Nisqually River without his wife participating for commercial purposes in the Nisqually Treaty Indian Fishery for chum salmon [RP 60, 63-76, 88-93, 100-04, 173-75] without proper licenses. [RP 55-57]. On each occasion, he possessed fish with a value of \$250 or more. [RP 66-67, 70, 76, 122, 129-131, 178-181].

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<sup>1</sup> All references to the Report of Proceedings are to the transcript entitled BENCH TRIAL & SENTENCING held on January 7-10, 2008.

02.3 Count XI: December 21, 2005

When confronted by law enforcement officers on December 21, 2005, and ordered to exit his truck, Guidry resisted by grasping the steering wheel, thus requiring the officer to pull him from the truck before forcibly taking his arms behind his back in order to handcuff him. [RP 126-27].

D. ARGUMENT

01. GUIDRY'S CONVICTIONS UNDER COUNTS III THROUGH X SHOULD BE DISMISSED (1) WHERE HE WAS LAWFULLY FISHING UNDER SECTION 14.20.01 OF THE NISQUALLY TRIBAL CODE AND THE QUALIFICATION OF HIS RIGHTS UNDER THIS CODE INHERENT IN RCW 77.15.570 IS NOT REASONABLE AND NECESSARY FOR CONSERVATION OF THE RESOURCE AND CIRCUMVENTS FEDERAL LAW WITH NO CONSIDERATION GIVEN TO THE SATISFACTION OF THE AFFECTED TRIBES, WHICH PRECLUDES THE STATE FROM CARRYING ITS BURDEN TO PROVE OTHERWISE OR FROM AVAILING ITSELF OF A PREEMPTION ARGUMENT RELATING ONLY TO STATE LAW AND (2) WHERE THERE WAS NO FINDING BY A STANDARD OF BEYOND A REASONABLE DOUBT THAT ON ANY OF THE DAYS FROM DECEMBER 18 THROUGH 21, 2005, THAT HE WAS FISHING OUTSIDE THE NISQUALLY TRIBE'S USUAL AND ACCUSTOMED AREA.

01.1 State and Tribal Law Conflict

There is a conflict between RCW 77.15.570 and the Nisqually Tribal Code as to whether or not a non-tribal member (Guidry) who is married to a tribal member may fish in waters relevant to this case without the presence of his wife. The tribal code sanctions the conduct while the State statute does not.

Section 14.20 of the Nisqually Tribal Code provides, in relevant part:

**14.20.01 Who May Exercise the Tribal Right to Fish**

(a) The Nisqually Indian Tribe's right to fish in its usual and accustomed fishing places may be exercised by enrolled members or their authorized assistants....

(b) An enrolled member of the Nisqually Indian Tribe may be assisted in the exercise of Nisqually Tribal fishing rights by an "authorized assistant" as provided under the rulings of the Courts in United States v. Washington, 384 F. Supp 312 at 412 (W.D. Wash. 1974), affirmed 520 F.2d 676 (C.A. 9 1975) cert. denied 423 U.S. 1086 (1976).

....

(c) Within the boundaries of the Nisqually Indian Reservation enrolled members shall have the exclusive right to fish except as herein provided: [Emphasis added].

(i) An enrolled member may secure the assistance of his or her spouse. Such spouse may fish for the enrolled member without the enrolled member present on the boat. [Emphasis added].

....

(d) Within the Nisqually Tribe's off-reservation usual and accustomed fishing places, enrolled members of the Nisqually Tribe shall have the exclusive right to exercise Nisqually Tribal fishing rights, except as hereafter provided: [Emphasis added].

(i) An enrolled member may secure the assistance of his or her spouse.

(A) For fishing places in the Nisqually River and in McAllister Creek, such spouse may fish for the enrolled member without the enrolled member present on the boat. [Emphasis added].

[Nisqually Tribal Code; CP 74-75].

In contrast, RCW 77.15.570 provides, in relevant part:

(1) Except as provided in subsection (3) of this section, it is unlawful for a person who is not a treaty Indian fisherman to participate in the taking of fish or shellfish in a treaty Indian fishery, or to be on board a vessel, or associated equipment, operating in a treaty Indian fishery....

(2) A person who violates subsection (1) of this section with the intent of acting for commercial purposes, including any sale of catch, profit from catch, or payment for fishing assistance, is guilty of a class C felony....

(3)(a) The spouse ... of a treaty Indian fisherman may assist the fisherman in exercising treaty Indian fishing rights when the treaty Indian fisherman is present at the fishing site. [Emphasis added].

RCW 77.15.570.

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## 01.2 Overview Applicable Law

Indian fishing rights are guaranteed by treaty and protected by the Supremacy Clause of the U.S. Constitution.

Passenger Fishing Vessel v. Washington, 443 U.S. 658, 695, 99 S. Ct.

3055, 63 L. Ed. 2d 823 (1979). Federal law preempts state law.

Washington v. Confederated Tribes of the Colville Indian

Reservation, 447 U.S. 134, 156, 158, 100 S. Ct. 2069, 65 L. Ed. 2d 10

(1980). In U.S. v. Washington, 384 F. Supp. 312 (1974) (Boldt decision),

Judge Boldt underscored the point that treaty fishing rights are “reserved

by the Indians and cannot be qualified by the state.” Id. at 333.

All parties in this case agree that on reservation fishing is not subject to state regulation and no issue to the contrary is presented in this case. Indeed, any contention to the contrary would be diametrically opposed to the Indian self-government intent and philosophy of Congress.

Id. at 341.

Although the State has the right to regulate “off reservation fishing,” such authority is strictly limited to measures “reasonable and necessary for conservation” of the resource. Id. at 333. And the State

bears the burden of proof that a regulation it seeks to enforce is necessary for the actual conservation of fish. Id. at 342, 404.

For this purpose, conservation is defined to mean perpetuation of the fisheries species. Additionally, state regulation must not discriminate against the Indians, and must meet appropriate due process standards.

Id. at 333.

Also, any regulation of treaty fishing rights must be established “to the satisfaction of all affected tribes” or to the district court. Id., at 342.

### 01.3 Application of Law to Facts

#### 01.3.1 Premise

Guidry’s actions, vis-à-vis counts III-X, were authorized under section 14.20.01 of the Nisqually Tribal Code. This authority, however, appears incompatible with RCW 77.15.570.

In its simplest terms, the question is whether Guidry could or could not fish without the presence of his tribal-member wife. Thus, analysis of his efforts is replaced with a review of the requirement of his wife’s presence, which inescapably leads to consideration of whether the State carried its burden to demonstrate that RCW 14.20 can be employed to add a qualifying condition to Guidry’s right to fish under the tribal code. It did not.

### 01.3.2 Regulatory Burden

As previously indicated, even though the Boldt decision recognized the State's right to regulate "off reservation fishing," it further determined that implementation of this authority was predicated on its reasonableness and necessity for conservation of the resource. And no wonder, for the court was aware that various state laws and regulations aimed at fulfilling this purpose by "restrict(ing) the time, place, manner and volume" of such fishing by treaty tribes had been held unlawful. Washington, 384 F. Supp. at 333.

Of note, though Judge Boldt held that a tribal fisherman could be assisted by family members or relatives, Id. at 412, he did not, and for good reason, qualify this with the additional burden that the treaty Indian fisherman be present at the fishing site, which has nothing to do with the conservation of the resource, given that the fish will still be caught by the non-tribal spouse acting with the permission of the tribe irrespective of the presence or lack thereof of the treaty Indian fisherman.

It was the Washington State Legislature that qualified this right of assistance by limiting it to situations where "the treaty Indian fisherman is present at the fishing site." RCW 77.15.570(3)(a). This law has no relation to resource conservation and none has been advanced, for in the end it is nothing short of a limitation on the exercise of the treaty fishing

rights illuminated in the Boldt decision. It restricts the activity of non-Indians licensed by treaty tribes under the combined authority of the heretofore-cited federal law, including the Supremacy Clause, thus serving as an unlawful regulatory burden on treaty Indian fishing rights.

In arguing to the contrary, the State's dual reliance on State v. Price, 87 Wn. App. 424, 942 P.2d 377, review denied, 137 Wn.2d 186 (1999), and State v. Squally, 132 Wn.2d 333, 937 P.2d 1069 (1997), is misplaced. The former is easily distinguishable and thus not on point. There, in upholding a similar limitation requiring the Indian spouse's presence, Division I of this court relied, in part, on the rationale that its holding was consistent with "the regulations of the Yakama tribe." State v. Price, 87 Wn. App. at 432. In contrast to Guidry's situation, however, there is no indication that the tribal regulation in Price permitted the non-Indian spouse to fish without the presence of his tribal-member wife, as provided in section 14.20.01 of the Nisqually Tribal Code. In Price, the defendant was merely attempting to assert his wife's tribal fishing rights under the tribal code because his wife owned the boat. Price, 87 Wn. App. at 426. That is the key.

The Squally case also misses the mark. Neither of the two defendants in the consolidated case were claiming a defense concerning their respective fishing rights under the Nisqually Tribal Code, arguing

only that the trial court lacked criminal jurisdiction over their respective burglary, weapon and obstruction charges because the Nisqually Indian Tribe had not explicitly consented to the State's jurisdiction over the tribal land where the charged offenses allegedly took place. State v. Squally, 132 Wn.2d at 335-36. Little to do with this case.

### 01.3.3 Lenity

This court's goal in statutory interpretation is to identify and give effect to the Legislature's intent. State v. Spandel, 107 Wn. App. 352, 358, 27 P.3d 613 (citing State v. Bright, 129 Wn.2d 257, 265, 916 P.2d 922 (1996)), review denied, 145 Wn.2d 1013 (2001). Absent the existence of ambiguity, this court ascertains the meaning of a statute from its language alone. State v. Azpitarte, 140 Wn.2d 138, 141, 995 P.2d 31 (2000). Conversely, under the rule of lenity, any ambiguity is interpreted to favor the defendant. State v. Spandel, 107 Wn. App. at 358.

As previously set forth, RCW 77.15.570(3)(a) provides:

(3)(a) The spouse ... of a treaty Indian fisherman may assist the fisherman in exercising treaty Indian fishing rights when the treaty Indian fisherman is present at the fishing site.

In this context, and under the somewhat unique facts of this case, what does the verb "assist" mean? The statute tells us the person to be

assisted (treaty Indian fisherman) and the scope of the assistance (exercising treaty Indian fishing rights) but little else. It seems to imply, does it not, that it is the treaty Indian fisherman who is doing the fishing. But that doesn't make any sense because it goes on to require the treaty Indian fisherman's presence at the fishing site. If the treaty Indian fisherman is in fact the one doing the fishing, can't one assume his or her presence at the fishing site? Concomitantly, what is meant by the "fishing site?" Testimony in this case indicated that there are no roads on the Nisqually Reservation leading into where Guidry was fishing on the Nisqually River. [RP 198]. Thus to be on the site, as it were, Guidry's wife would have had to get on the boat in the dead of winter. Again, no sense.

If, on the other hand, the statute can be interpreted to mean that permission and spousal support satisfy the assistance requirement under the statute, then Guidry is in good shape. And why not? Consider this hypothetical: Dick and Jane get married (just like Mr. and Mrs. Guidry), Dick becomes a lawyer and goes to court and makes money while Jane, who never even sees the court house, stays home and does just as much taking care of the house and kids (just like Mr. and Mrs. Guidry), they get a divorce and the judge cuts the pie in half, 50-50, telling the parties that Jane more than assisted her husband without ever going to court with him.

That is what happened in this case and the verbiage of RCW 77.15.570 does not preclude such an interpretation.

01.4 Conclusion

As regards counts III-X, Guidry did nothing wrong under section 14.20.01 of the Nisqually Tribal Code, and the qualification of the exercise of his rights under this code inherent in RCW 77.15.570 is not reasonable and necessary for conservation of the resource and circumvents federal law with no consideration given to the satisfaction of the affected tribes, thus precluding the State from carrying its burden to prove otherwise or from availing itself of a preemption argument relating only to state law, especially where under the rule of lenity any ambiguity in the statute must be interpreted to favor Guidry, with the result that counts III-X must be dismissed.

And as there can be no serious debate in light of the Boldt decision that the State is without authority to qualify on-reservation fishing, including a tribe's designated usual and accustomed fishing places, and since the trial court made no finding by a standard of beyond a reasonable doubt that on any date from December 18 through the 21, 2005, that Guidry was fishing outside the Nisqually Tribe's usual and accustomed area or fishing places, counts III-X should also be dismissed for this reason.

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02. THERE WAS INSUFFICIENT EVIDENCE THAT GUIDRY COMMITTED THE OFFENSES OF ENGAGING IN FISH DEALING ACTIVITY IN THE FIRST DEGREE, COUNT I, AND TRAFFICKING IN FISH IN THE FIRST DEGREE, COUNT II.

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. Salinas, at 201; State v. Craven, 67 Wn. App. 921, 928, 841 P.2d 774 (1992). Circumstantial evidence is no less reliable than direct evidence, and criminal intent may be inferred from conduct where “plainly indicated as a matter of logical probability.” State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom. Salinas, at 201; Craven, at 928.

02.1 Count I: Engaging in Fish Dealing

Under RCW 77.15.620(3), to convict Guidry of the offense of engaging in fish dealing activity in the first degree, as charged in count I, the State, in part, had to prove beyond a reasonable doubt (1) that on the date in question Guidry engaged in “wholesale selling, buying, or brokering” the fish and (2) that the fish were worth \$250 or more. The State did not satisfy this burden. No evidence was presented that Guidry was wholesaling or buying or brokering the fish. And while Carl Klein was asked if he “wanted to purchase any salmon [RP 54],” this at best would constitute nothing more than an attempt to broker the fish, since no sale was consummated. What is more, no evidence was presented as to the worth of the fish. None.

02.2 Count II: Trafficking in Fish

Similarly, under RCW 77.15.260(2), to convict Guidry of trafficking in fish in the first degree, as charged in count II, the State, in part, had to once again prove beyond a reasonable doubt that the fish were worth \$250 or more. But this never happened.

03. GUIDRY’S CONVICTIONS FOR ENGAGING IN FISH DEALING IN THE FIRST DEGREE, COUNT I, AND TRAFFICKING IN FISH IN THE FIRST DEGREE, COUNT II, VIOLATE THE CONSTITUTIONAL PROHIBITION AGAINST DOUBLE JEOPARDY.

Article 1, section 9 of the Washington State Constitution and the Fifth Amendment to the United States Constitution provide that no person should twice be put in jeopardy for the same offense. Double jeopardy may be violated by multiple convictions even if the sentences are concurrent. State v. Calle, 125 Wn.2d 769, 775, 888 P.2d 155 (1995). A double jeopardy argument may be raised for the first time on appeal because it is a manifest error affecting a constitutional right. State v. Turner, 102 Wn. App. 202, 206, 6 P.3d 1226, reviewed denied, 143 Wn.2d 1009 (2001) (citing RAP 2.5(a) and State v. Adel, 136 Wn.2d 629, 631, 965 P.2d 1072 (1998)); See also State v. Frohs, 83 Wn. App. 803, 811, 924 P.2d 384 (1996). The issue is whether the Legislature intended to authorize multiple punishments for criminal conduct that violates more than one criminal statute. State v. Calle, 125 Wn.2d at 772.

A three-prong test is applied to determine legislative intent. First, multiple convictions constitute double jeopardy even if the offenses “clearly involve different legal elements, if there is clear evidence that the Legislature intended to impose only a single punishment.” In the Matter of Personal Restraint of Anthony C. Burchfield, 111 Wn. App. 892, 897, 46 P.3d 840 (2002) (citing State v. Calle, 125 Wn.2d at 780). Because the Legislature is free to define crimes and fix punishments as it will, “the role of the constitutional guarantee is limited to assuring that the court does not

exceed its legislative authorization by imposing multiple punishments for the same offense.” Brown v. Ohio, 432 U.S. 161, 165, 53 L. Ed. 2d 187, 97 S. Ct. 2221 (1977).

Here, neither the engaging in fish dealing nor the trafficking in fish statutes contain specific language authorizing separate punishments for the same conduct. RCW 77.15.620; RCW 77.15.260. The offenses are thus not automatically immune from double jeopardy analysis. Burchfield, 111 Wn. App. at 896.

Second, when, as here, the Legislature has not expressly authorized multiple punishments for the same act, this court applies the “same evidence test,” which asks “whether each offense has an element not contained in the other.” Id. Under the facts of this case, it cannot be claimed that the offenses here at issue do not violate the prohibition against double jeopardy under this prong. See State v. Zumwalt, 119 Wn. App. 126, 130, 82 P.3d 672 (2003). The question is whether each offense, as charged and proved, includes elements not included in the other. State v. Freeman, 153 Wn.2d 765, 777, 108 P.3d 753 (2005); State v. Calle, 125 Wn.2d at 777.

The State argued to the court that Guidry was guilty of each count because he had offered the fish for sale, which is the same allegation alleged in the second amended information. [RP 240-41; CP 33-34]. Thus, for purposes of this analysis, it can be assumed that Guidry was found guilty based on his offering the fish for sale, and, in consequence, his conviction for the two offenses derived from the same act and conduct.

When viewed in terms of what was charged and proved, the evidence required to prove each crime was sufficient to warrant a conviction for the other, with the inescapable result that the two crimes constitute one offense under Blockburger v. United States, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 2d 306 (1932); State v. Freeman, 153 Wn.2d at 777. The two convictions were the same in law and in fact, and because the legislature has not authorized separate punishment for the two crimes, double jeopardy bars Guidry's conviction for both offenses.

Of course, the "same evidence" test is not always dispositive. Burchfield, 111 Wn. App. at 897. This court may also determine whether there is evidence that the Legislature intended to treat conduct as a single offense for double jeopardy purposes. Id.; State v. Frohs, 83 Wn. App. 803, 811, 924 P.2d 384 (1996). This merger doctrine is simply another way, in addition to the "same evidence" test, by which this court may determine

whether the Legislature has authorized multiple punishments. “Thus, the merger doctrine is simply another means by which a court may determine whether the imposition of multiple punishments violates the Fifth Amendment guarantee against double jeopardy....” *Id.* The question is whether there is clear evidence that the legislature intended not to punish the conduct at issue with two separate convictions. *Calle*, 125 Wn.2d at 778. If a defendant is convicted of two crimes, his or her second conviction will stand if that conviction is based on “some injury to the person or property of the victim or others, which is separate and distinct from and not merely incidental to the crime of which it forms the element.” [Emphasis Added]. *State v. Johnson*, 92 Wn.2d 671, 680, 600 P.2d 1249 (1979).

Here, the crime of engaging in fish dealing occurred in furtherance of the crime of trafficking in fish: The commission of the former was required to prove the latter, with the result that it was incidental to the trafficking offense and therefore merges into the offense. *See State v. Freeman*, 153 Wn.2d 765, 778, 108 P.3d 753 (2005).

04. GUIDRY’S CONVICTIONS FOR PARTICIPATING IN INDIAN FISHERY FOR COMMERCIAL PURPOSE, COUNTS III-VI, AND HIS CONVICTIONS FOR COMMERCIAL FISHING WITHOUT A LICENSE, COUNTS VII-X, VIOLATE THE CONSTITUTIONAL PROHIBITION

AGAINST DOUBLE JEOPARDY.

As with the previous argument, neither the participating in Indian fishery for commercial purpose nor the commercial fishing without a license statutes contain specific language authorizing separate punishments for the same conduct. RCW 77.15.570; RCW 77.15.500. The offenses are thus not automatically immune from double jeopardy analysis. Burchfield, 111 Wn. App. at 896.

Unlike the previous argument, the statute under which Guidry was convicted of participating in Indian fishery for commercial purpose contains an element that the defendant is not a treaty Indian fisherman, which is not contained in the commercial fishing without a license statute. RCW 77.15.570 ; RCW 77.15.500. An essential element of commercial fishing without a license under RCW 77.15.500 is that the defendant not hold the appropriate fishing license, which is not required under the participating in Indian fishery for commercial purpose statute. The two offenses contain different elements and, therefore, are not established by the “same evidence test.” Thus the prohibition against double jeopardy is not violated here by applying the same evidence test. See State v. Zumwalt, 119 Wn. App. 126, 130, 82 P.3d 672 (2003).

That said, however, the four convictions of participating in Indian fishery for commercial purpose, counts III-VI, occurred at the same time and

place and for the same commercial purpose and in furtherance of the four convictions for commercial fishing without a license, counts VII-X: The commission of the former four offenses was required to prove the latter, with the result that four convictions for participating in Indian fishery for commercial purpose, counts III-VI, were incidental to the corresponding four convictions for commercial fishing without a license, counts VII-X, and therefore merge into those offenses. See State v. Freeman, 153 Wn.2d 765, 778, 108 P.3d 753 (2005).

05. THE TRIAL COURT ERRED IN IMPOSING RESTITUTION OF \$10,000 WHERE GUIDRY NEVER EXPRESSLY AGREED TO PAY RESTITUTION BEYOND THE CRIMES FOR WHICH HE WAS CONVICTED AND WHERE THERE WAS INSUFFICIENT PROOF THAT THE AMOUNT ORDERED WAS CAUSALLY CONNECTED TO GUIDRY'S CONVICTIONS.

05.1 Overview Applicable Law

The authority to impose restitution derives entirely from statute. State v. Hiett, 154 Wn.2d 560, 563, 103 P.3d 1247 (2005). In the absence of the defendant's "express agreement(,)" the court may not impose restitution beyond the crime charged. State v. Dauenhauer, 103 Wn. App. 373, 378, 891 P.2d 40, review denied, 143 Wn.2d 1011 (2001) (citing State v. Woods, 90 Wn. App. 904, 908, 953 P.2d 834 (1998)); See also RCW 9.94A.753(5).

In other words, restitution cannot be imposed based on a defendant's "general scheme" or acts "connected with" the crime charged, when those acts are not part of the charge. Woods, 90 Wn. App. at 907-08; Hartwell, 38 Wn. App. at 141. When the court fails to adhere to these principles, its restitution order is void. State v. Duback, 77 Wn. App. 330, 332-33, 891 P.2d 40 (1995). [Emphasis added].

State v. Dauenhauer, 103 Wn. App. at 378.

Additionally, a sentencing court must find that the victim's loss was causally connected to the precise crime for which the defendant was convicted before ordering restitution. State v. Enstone, 137 Wn.2d 675, 682, 974 P.2d 828 (1999). A sufficient causal connection exists when, but for the offense committed, the loss of damages would not have occurred. State v. Hahn, 100 Wn. App. 391, 399, 996 P.2d 1125 (2000). A causal connection is not established simply because a victim submits proof of expenditures. State v. Dedonado, 99 Wn. App. 251, 257, 991 P.2d 1216 (2000).

The prosecution bears the burden of proving, by a preponderance of the evidence, both the amount of restitution and the causal connection "between the crime ... and the injuries for which compensation is made." State v. Clapp, 67 Wn. App. 263, 276, 834 P.2d 1101 (1992), reviewed denied, 121 Wn.2d 1020 (1993). Where a court orders restitution for losses not causally related to the offense or fails to follow the statutory

requirements, the court “exceeds its statutory authority” and reversal is required.” State v. Vinyard, 50 Wn. App. 888, 891, 751 P.2d 339 (1988).

#### 05.2 Application of Law to Facts

With the exception of Guidry’s convictions for engaging in fish dealing in the first degree, count I, and trafficking in fish in the first degree, count II, both which occurred on January 11, 2005, and both of which are not relevant to this discussion, all of the offenses for which Guidry was convicted occurred during the period of December 18 through 21, 2005. [CP 90-91].

At the sentencing hearing, the prosecutor made the following specific request for restitution:

Your Honor, the state is also recommending, as part of the sentence, restitution in the amount of \$10,000 to the Washington Department of Fish and Wildlife Enforcement account. Your Honor, the defendant told his community corrections officer, and that officer testified on the stand that the defendant said he made between \$20- and \$30,00 a year fishing. And so if he began doing that in the early ‘90s, \$10,000 is a very small amount to ask in restitution, but we believe it’s fair.

[RP 272].

This claim was based on the trial testimony of correction officer Pat Austin, who related a conversation he had with Guidry “in March of 2005.” [RP 116].

CERTIFICATE

I certify that I mailed a copy of the above brief by depositing it in the United States Mail, first class postage pre-paid, to the following people at the addresses indicated:

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DATED this 6<sup>th</sup> day of November 2008.

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DIVISION II

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STATE OF WASHINGTON

BY \_\_\_\_\_  
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