

NO. 47874-9-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

CJL,

Appellant.

BRIEF OF APPELLANT

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TABLE OF CONTENTS

	Page
A. TABLE OF AUTHORITIES	iii
B. ASSIGNMENT OF ERROR	
1. Assignment of Error	1
2. Issue Pertaining to Assignment of Error	1
C. STATEMENT OF THE CASE	
1. Factual History	2
2. Procedural History	5
D. ARGUMENT	
I. THE TRIAL COURT ERRED WHEN IT FOUND THE DEFENDANT GUILTY OF POSSESSION OF METHAMPHETAMINE BECAUSE SUBSTANTIAL EVIDENCE DOES NOT SUPPORT THIS CONVICTION	9
II. THE TRIAL COURT ERRED WHEN IT ORDERED THE DEFENDANT TO PAY RESTITUTION FOR THE THEFT OF AN ITEM FOR WHICH THE COURT ACQUITTED THE DEFENDANT	13
E. CONCLUSION	15
F. APPENDIX	
1. RCW 13.40.020(26)	16
2. RCW 13.40.090(1)	16
3. RCW 69.50.4013	17
G. AFFIRMATION OF SERVICE	18

TABLE OF AUTHORITIES

Page

Federal Cases

In re Winship,
397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) 10

Jackson v. Virginia,
443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) 11

State Cases

State v. Baeza, 100 Wn.2d 487, 670 P.2d 646 (1983) 10

State v. Colquitt, 133 Wn.App. 789, 137 P.3d 892 (2006) 12, 13

State v. Hernandez, 85 Wn.App. 672, 935 P.2d 623 (1997) 12

State v. Hunotte, 69 Wn.App. 670, 851 P.2d 694 (1993) 14

State v. Kindsvogel, 149 Wn.2d 477, 69 P.3d 870 (2003) 11

State v. Miszak, 69 Wn.App. 426, 848 P.2d 1329 (1993) 14

State v. Moore, 7 Wn.App. 1, 499 P.2d 16 (1972) 10

State v. Staley, 123 Wn.2d 794, 872 P.2d 502 (1994) 11

State v. Taplin, 9 Wn.App. 545, 513 P.2d 549 (1973) 11

Constitutional Provisions

Washington Constitution, Article 1, § 3 10

United States Constitution, Fourteenth Amendment 10

Statutes and Court Rules

RCW 13.40.020 15
RCW 13.40.190 15
RCW 69.50.4013 11

ASSIGNMENT OF ERROR

Assignment of Error

1. The trial court erred when it found the defendant guilty of possession of methamphetamine because the record does not include substantial evidence that the substance possessed was in fact methamphetamine.

2. The trial court erred when it ordered the defendant to pay restitution for the theft of an item for which the court acquitted the defendant.

Issues Pertaining to Assignment of Error

1. Does a trial court err if it finds a defendant guilty of possession of methamphetamine when (a) no expert testifies that the substance possessed was methamphetamine and no expert's report is admitted into evidence, (b) circumstantial evidence does not support the conclusion that the substance at issue was methamphetamine, and (c) the defendant did not stipulate that the substance was methamphetamine?

2. Does a trial court err in a juvenile case if it orders the defendant to pay restitution for the theft of an item for which the court acquitted the defendant?

STATEMENT OF THE CASE

Factual History

On February 7, 2015, Don Ericson was cleaning out the second bedroom in his upstairs apartment in Cathlamet when the 17-year-old Defendant CJL arrived to visit. RP 8-13. A little while after the defendant arrived Mr. Ericson took about a one hour nap while the defendant stayed in the apartment. RP 17-20. Mr. Ericson awoke from his nap around 11 am and the defendant left the apartment around noon or 12:30, going to the downstairs neighbor's apartment to use her phone to call for a ride. RP 17-20, 39-42. After the defendant left, Mr. Ericson went back into his second bedroom and found that three knives that he had seen hanging on the wall as decorations that morning were now gone. RP 8-12, 16-17. Upon seeing this, Mr Ericson went and checked his bedroom night stand and found that his .380 caliber Grendel pistol was also missing. *Id.* At this point Mr. Ericson called the Wahkiakum County Sheriff's office and reported what he believed were the defendant's theft of the items. *Id.*

During the late night hours of March 19, 2015, Janet Thomas was awoken to the sound of chicks in distress on the first floor of the barn in which she resides on Puget Island. RP 66-67, 75-76. Ms Thomas lives on the second floor of the barn as the caretaker for the building and the surrounding land and keeps some 300 chickens on the property. RP 70-71.

She raises some of the chickens for egg production and some for breeding. RP 87-88. Upon walking down to the first floor of the barn she encountered two burglars putting chickens into cages for transport. RP 75-79. One of the burglars was tall and thin and was wearing a “hoodie” sweatshirt. *Id.* The other was short and had a slight build. *Id.* In fact, she believed that person was a female. *Id.*

When Ms Thomas realized what was happening she yelled at the two burglars to leave her chickens alone as she grabbed the taller of the two intruders. RP 76-79. As she did the other intruder she believed was a female ran out of the barn and disappeared. *Id.* According to Ms Thomas the second intruder then kicked her in her injured leg, broke free from her grasp, and ran out the door after the first intruder. *Id.* Ms Thomas then called the Wahkiakum County Sheriff’s office to report the crime. *id.*

In fact, the defendant CJL lives on Puget Island not far from the barn where Ms Thomas lives and keeps her chickens. RP 160-161. A couple of days after the burglary, the defendant and his friend Mark Landreth had a third party transport them and a number of cages of chickens to a weekly livestock auction in Woodland, where the defendant sold the chickens. RP 202-206. In fact, Mr. Landreth later admitted that he was the taller of the two burglars who had entered the barn in conjunction with the defendant and that when Ms Thomas confronted them they were in the process of taking away

their third batch of chickens. RP 177-189. According to Mr. Landreth, the chickens he and the defendant took to the auction and which the defendant sold were the chickens they had taken from Ms Thomas. RP 202-206. Mr. Landreth also stated that on a prior occasion he had seen the defendant in possession of a .380 Grendel Pistol. RP 214-217. The defendant has a prior conviction for a non-violent felony. RP 131.

During this period of time the defendant's mother Elizabeth Lorenzo noticed that he had a laptop computer in his bedroom. RP 160-161. When she asked where it came from the defendant replied that he had purchased it from a friend. *Id.* However Ms Lorenzo did not believe her son so she called the Sheriff's Office and asked them to come and get it. *Id.* They did, and later discovered that it had been taken without permission from the Lutheran Church on Puget Island along with some sacrament cups. RP 50-56, 248-250.

On March 20, 2015, Wahkiakum County Sheriff's deputies received word that the defendant and Mr. Landreth were on a bus that runs between Wahkiakum and Cowlitz counties. RP 235-237. They then stopped the bus, arrested the defendant and Mr. Landreth, and then searched the defendant incident to arrest. *Id.* During that search one of the Deputies found a large baggie of marijuana in the defendant's front pocket. RP 281-284. The baggie also contained some small sacrament cups stolen from the Lutheran

Church. *Id.* The cups had some small rocks in them that the Deputy believed were methamphetamine and which later field tested positive for methamphetamine. *Id.* In addition, the deputies found a glass pipe in the defendant's pocket that they suspected contained methamphetamine residue. *Id.*

Procedural History

By information and amended information both filed in juvenile court on March 23, 2015, in cause number 15-8-00003-0, the Wahkiakum County Prosecutor charged the defendant CJL with first degree burglary, first degree trafficking in stolen property, theft of a firearm, second degree unlawful possession of a firearm, possession of methamphetamine, and third degree possession of stolen property. CP 9. The court arraigned the defendant on the next day and set a fact finding hearing within 30 days. *Id.* Two days after arraignment on March 26, 2015, the prosecutor filed a motion to dismiss all charges because "Respondent and case is currently being charged in adult Superior Court." CP 9-10. The juvenile court entered an order of dismissal pursuant to the motion on March 31, 2015. *Id.*

On March 25, 2015, the Wahkiakum County Prosecutor filed an information in Superior Court charging the defendant with the same six counts originally filed in juvenile court. CP 10. The Superior Court arraigned the defendant on April 6, 2015, and set a trial date for May 19,

2015. *Id.* The defendant later entered a speedy trial waiver in Superior Court, which reset trial from July 1, 2015. *Id.* However, on June 1, 2015, the prosecutor refiled the charges in juvenile court under cause number 15-8-0006-4 with one exception: the prosecutor amended the charge of first degree burglary to second degree burglary. *Id.* Four days later the Superior Court dismissed the adult charges upon the state's motion and on June 8, 2015, the juvenile court arraigned the defendant on the new information and set trial for June 24, 2015. *Id.* The defendant remained in custody during the entirety of these proceedings. CP 9-10.

Prior to trial the defense brought a motion to dismiss on the basis that the court had violated the defendant's right to speedy trial by holding him in custody from the date of his arrest on March 20th, to the date of his second arraignment in juvenile court on June 8th without bringing him to trial. CP 8-16. The trial court denied the motion upon its holding that under JuCR 7.8(e)(4), the time between the dismissal of the first juvenile information on March 31st to the defendant's arraignment on the second juvenile information on June 8th was excluded from the speedy trial calculation. CP 17-18. Thus, the court calculated that the defendant's trial date on June 24th was 27 days following his initial arraignment on the first juvenile information and within the time for trial for an in custody defendant under JuCR 7.8(b)(1). *Id.*

On June 24, 2015, the court called the case for trial, during which the

state called 16 witnesses, including Don Ericson, Janet Thomas, Mark Landreth and the officers who arrested the defendant, among others. CP 7-288. They testified to the facts from the preceding factual history. *See* Factual History. During trial the state had the clerk number some 58 exhibits, including a Washington State Crime Lab Report on the analysis of the suspected methamphetamine and methamphetamine pipe the deputy seized from the defendant. CP 29-30. Indeed, during the trial the defense stated that it would not object to the admission of the report. RP 284. This exchange went as follows during the direct examination of Deputy John Mason:

Q. And what about the communion cups that have white stuff in them?

A. That is 1 A, as I had labeled the entire package of marijuana and the cups as item 1.

Q. Okay. That is in the bag?

A. Yeah. We put it in the bag as well.

Q. Is that the pipe that you found on C. J. ?

A. Yes, it is.

Q. Where was that?

A. His front right pants pocket.

Q. Was it within the baggies that had the meth in it?

A. No. It was outside.

Q. Okay. So it's 1 A and 2; correct?

A. Yes.

MS. BAUR: So it's my understanding there's no objection to the stipulation that the lab report?

MS. BUSBY: Double-check the – yes. That's correct.

RP 283-284.

In spite of this statement, counsel for appellant has been unable to find any witness in the record who identified Exhibit 58, any point in the record where the state moved for the admission of Exhibit 58, or any ruling by the court admitting Exhibit 58 into evidence. RP 1-314.

Following the close of evidence and argument by counsel, the trial court found the defendant guilty on all charges except for Count II, which alleged the theft of Mr. Ericson's firearm. 308-314. The court later sentenced the defendant within the standard range, after which it ordered a restitution hearing. CP 45-52. At that restitution hearing, the court ordered that the defendant pay \$3,284.00 to Janet Thomas for her stolen chickens, \$1,000.00 to Janet Thomas for "lost income", \$21.50 to Our Saviour's Lutheran Church for stolen property, and \$225.00 to Don Ericson for his stolen pistol. CP 93-94. The defense objected to the imposition of restitution payable to Ms Thomas for anything other than the value of the chickens taken, which the defense believed was \$740.00 as well as the imposition of any restitution payable to Mr. Ericson for the stolen firearm related to the count

for which the defendant was acquitted. RP 398, 400. The defendant filed timely notice of appeal in this case. CP 59-61. The trial court later entered an amended restitution striking the \$1,000.00 restitution for “lost income.” CP 98-99.

ARGUMENT

I. THE TRIAL COURT ERRED WHEN IT FOUND THE DEFENDANT GUILTY OF POSSESSION OF METHAMPHETAMINE BECAUSE SUBSTANTIAL EVIDENCE DOES NOT SUPPORT THIS CONVICTION.

As a part of the due process rights guaranteed under both the Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment, the state must prove every element of a crime charged beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 488, 670 P.2d 646 (1983); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970). As the United States Supreme Court explained in *Winship*: “[The] use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law.” *In re Winship*, 397 U.S. at 364.

Mere possibility, suspicion, speculation, conjecture, or even a scintilla of evidence, is not substantial evidence, and does not meet the minimum requirements of due process. *State v. Moore*, 7 Wn.App. 1, 499 P.2d 16 (1972). As a result, any conviction not supported by substantial evidence may be attacked for the first time on appeal as a due process violation. *Id.* In addition, evidence that is equally consistent with innocence as it is with guilt is not sufficient to support a conviction; it is not substantial evidence. *State v. Aten*, 130 Wn.2d 640, 927 P.2d 210 (1996).

“Substantial evidence” in the context of a criminal case means evidence sufficient to persuade “an unprejudiced thinking mind of the truth of the fact to which the evidence is directed.” *State v. Taplin*, 9 Wn.App. 545, 513 P.2d 549 (1973) (quoting *State v. Collins*, 2 Wn.App. 757, 759, 470 P.2d 227, 228 (1970)). The test for determining the sufficiency of the evidence is whether “after viewing the evidence in the light most favorable to the prosecution any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 334, 99 S.Ct. 2781, 2797, 61 L.Ed.2d 560 (1979).

In the case at bar the state charged the defendant in Count V with possession of methamphetamine under RCW 69.50.4013(1). Subsection one of this statute states:

(1) It is unlawful for any person to possess a controlled substance unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of his or her professional practice, or except as otherwise authorized by this chapter.

RCW 69.50.401.

Under this statute the State has the burden of proving the nature of the controlled substance as an essential element of the crime of unlawful possession of a controlled substance. *State v. Kindsvogel*, 149 Wn.2d 477, 483, 69 P.3d 870 (2003) (citing *State v. Staley*, 123 Wn.2d 794, 798, 872 P.2d 502 (1994)). While the state does not necessarily have to present an

expert chemical analysis of the substance, if it does have to present circumstantial evidence sufficient to prove the identity of the drug. *State v. Hernandez*, 85 Wn.App. 672, 935 P.2d 623 (1997)

For example, in *State v. Colquitt*, 133 Wn.App. 789, 137 P.3d 892 (2006), a defendant convicted of possession of cocaine following a bench trial in which he stipulated to the admission but not sufficiency of the police reports appealed, arguing that those police reports did not prove the identity of the drugs he had possessed. In those reports the officer had stated that based upon his training and experience he believed the substance to be cocaine and that a field test he performed on it indicated that it was cocaine. The state argued on appeal that this evidence was sufficient to prove the identity of the drugs in questions.

In addressing these arguments the court reviewed a number of similar cases on the sufficiency of the identification of drugs absent the admission of expert testimony or a laboratory report. The court then noted that in each of those cases in which the court found the evidence sufficient, there was something in addition to the officer's opinion and the fact of a positive field test. Thus, the court found the evidence insufficient and reversed the conviction. Ultimately, the court held:

Finally, if an officer's opinion and field test, without more, is sufficient in this case to prove the identity of a controlled substance beyond a reasonable doubt, then an officer's opinion and field test,

without more, certainly will be sufficient in other trials. Such an evidentiary standard would eliminate the need for laboratory tests, laboratory reports, or forensic chemists.

Colquitt's conviction, with no laboratory results or other significant, sufficient corroborating evidence, must be reversed and the matter remanded to vacate the judgment.

State v. Colquitt, 133 Wn.App. at 802.

In the case at bar, as in *Colquitt*, the only evidence presented at trial as to the substance taken from the defendant was the opinion of the officer that it was methamphetamine and his testimony regarding a positive field test. Although the state had a laboratory report marked as an exhibit at trial, the state did not have a witness identify it, the state did not move it into evidence, and the court did not admit it into evidence. While the defense apparently was willing to agree to the admission of the report into evidence absent the testimony of the person who did the testing, the defense did not stipulate that the substance itself was methamphetamine. Thus, in this case, as in *Colquitt*, the evidence was insufficient to prove the identity of alleged methamphetamine. As a result, this court should vacate the defendant's conviction for possession of methamphetamine and remand with instructions to dismiss that count and then resentence the defendant on the remaining counts.

II. THE TRIAL COURT ERRED WHEN IT ORDERED THE DEFENDANT TO PAY RESTITUTION FOR THE THEFT OF AN ITEM FOR WHICH THE COURT ACQUITTED THE DEFENDANT.

The authority to impose restitution in a juvenile cases in Washington is purely statutory in nature. *State v. Hunotte*, 69 Wn.App. 670, 851 P.2d 694 (1993). The statute authorizing restitution awards is RCW 13.40.190(1), which states as follows:

(1)(a) In its dispositional order, the court shall require the respondent to make restitution to any persons who have suffered loss or damage as a result of the offense committed by the respondent. In addition, restitution may be ordered for loss or damage if the offender pleads guilty to a lesser offense or fewer offenses and agrees with the prosecutor's recommendation that the offender be required to pay restitution to a victim of an offense or offenses which, pursuant to a plea agreement, are not prosecuted.

RCW 13.40.190(1)

Under this statute the court may only order restitution for losses incurred as a result of the precise offense charged unless the defendant specifically agrees to pay restitution for uncharged, dismissed or reduced offenses. *State v. Miszak*, 69 Wn.App. 426, 848 P.2d 1329 (1993). Under RCW 13.40.020(26), the word "restitution" is a term of art for which the legislature has provided the following specific definition:

(26) "Restitution" means financial reimbursement by the offender to the victim, and shall be limited to easily ascertainable damages for injury to or loss of property, actual expenses incurred for medical treatment for physical injury to persons, lost wages resulting from physical injury, and costs of the victim's counseling reasonably related to the offense. Restitution shall not include reimbursement for

damages for mental anguish, pain and suffering, or other intangible losses. Nothing in this chapter shall limit or replace civil remedies or defenses available to the victim or offender;

RCW 13.40.020(26).

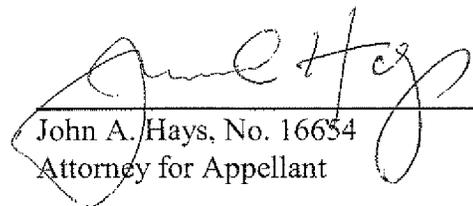
In the case at bar the trial court ordered the defendant to pay restitution for the firearm the state alleged the defendant stole from Mr. Ericson but on which charge the court acquitted the defendant. Under RCW 13.40.190(1), the trial court did not have authority to enter this order because these damages were not associated with an offence the defendant committed. Since the defendant did not agree to pay this amount, the trial court erred when it ordered this portion of restitution.

CONCLUSION

The trial court erred when it found the defendant guilty of possession of methamphetamine because substantial evidence does not support this charge. In addition, the trial court erred when it ordered the defendant to pay restitution on a charge for which he was acquitted.

DATED this 17th day of December, 2015.

Respectfully submitted,



John A. Hays, No. 16654
Attorney for Appellant

APPENDIX

RCW 13.40.020(26) Definitions

For the purposes of this chapter:

(26) "Restitution" means financial reimbursement by the offender to the victim, and shall be limited to easily ascertainable damages for injury to or loss of property, actual expenses incurred for medical treatment for physical injury to persons, lost wages resulting from physical injury, and costs of the victim's counseling reasonably related to the offense. Restitution shall not include reimbursement for damages for mental anguish, pain and suffering, or other intangible losses. Nothing in this chapter shall limit or replace civil remedies or defenses available to the victim or offender;

RCW 13.40.090(1) Disposition Order – Restitution for Loss or Damage – Modification of Restitution Order

(1)(a) In its dispositional order, the court shall require the respondent to make restitution to any persons who have suffered loss or damage as a result of the offense committed by the respondent. In addition, restitution may be ordered for loss or damage if the offender pleads guilty to a lesser offense or fewer offenses and agrees with the prosecutor's recommendation that the offender be required to pay restitution to a victim of an offense or offenses which, pursuant to a plea agreement, are not prosecuted.

RCW 69.50.4013

**Possession of Controlled Substance – Penalty – Possession
of Useable Marijuana, Marijuana Concentrates, or
Marijuana-infused Products**

(1) It is unlawful for any person to possess a controlled substance unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of his or her professional practice, or except as otherwise authorized by this chapter.

(2) Except as provided in RCW 69.50.4014, any person who violates this section is guilty of a class C felony punishable under chapter 9A.20 RCW.

(3)(a) The possession, by a person twenty-one years of age or older, of useable marijuana, marijuana concentrates, or marijuana-infused products in amounts that do not exceed those set forth in RCW 69.50.360(3) is not a violation of this section, this chapter, or any other provision of Washington state law.

(b) The possession of marijuana, useable marijuana, marijuana concentrates, and marijuana-infused products being physically transported or delivered within the state, in amounts not exceeding those that may be established under RCW 69.50.385(3), by a licensed employee of a common carrier when performing the duties authorized in accordance with RCW 69.50.382 and 69.50.385, is not a violation of this section, this chapter, or any other provision of Washington state law.

(4) No person under twenty-one years of age may possess, manufacture, sell, or distribute marijuana, marijuana-infused products, or marijuana concentrates, regardless of THC concentration. This does not include qualifying patients with a valid authorization.

(5) The possession by a qualifying patient or designated provider of marijuana concentrates, useable marijuana, marijuana-infused products, or plants in accordance with chapter 69.51A RCW is not a violation of this section, this chapter, or any other provision of Washington state law.

COURT OF APPEALS OF WASHINGTON, DIVISION II

STATE OF WASHINGTON,
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NO. 47874-9-II

vs.

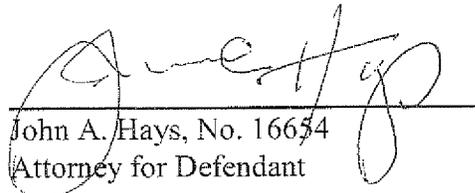
**AFFIRMATION
OF SERVICE**

CHRISTIAN J. LORENZO,
Appellant.

The under signed states the following under penalty of perjury under the laws of Washington State. On the date below, I personally e-filed and/or placed in the United States Mail the Brief of Appellant with this Affirmation of Service Attached with postage paid to the indicated parties:

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Dated this 17th day of December, 2015, at Longview, WA.



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